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EDWARD THOMPSON COMPANY.

THE
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ENCYCLOPÆDIA
OF
LAW

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TABLES OF TITLES AND WORDS AND PHRASES.

I. TITLES.

Italics indicate cross-references.

- Special Partner or Partnership*, 1.
Special Property, 2.
Special Relief, 2.
Special Statutes, 2.
Special Tail, 2.
Special Term, 2.
Specific Legacy, 6.
 SPECIFIC PERFORMANCE, 7.
Speculative Damages, 136.
Spelling, 136.
 SPENDTHRIFTS AND SPENDTHRIFT TRUSTS, 137.
Spirit Gas, 151.
Spiritualism, 151.
Spoliation, 152.
Springing Use, 153.
Stake, 155.
Stale Claim, 155.
Stale Demand, 155.
Stall — Stallage, 155.
Stamp Tax, 155.
Standard of Time, 156.
Standing Aside, 156.
 STARE DECISIS, 158.
 STATE AND PUBLIC LANDS, 197.
State Attorney, 461.
State Courts, 461.
Stated Accounts, 461.
 STATES, 463.
State Universities, 493.
 STATIONS (RAILROAD), 495.
Statute Merchant, 519.
Statute Mile, 519.
Statute of Frauds, 519.
Statute of Feofails, 519.
Statute of Limitations, 519.
Statute of Uses, 519.
Statute of Wills, 519.
 STATUTES, 520.
Statutes of Descent and Distribution, 763.
Statute Staple, 763.
Statutory Allowances, 763.
 STATUTORY CRIMES, 764.
 STAY LAWS, 767.
Stay of Proceedings, 768.
 STENOGRAPHERS, 772.
Stepchildren, 784.
Stipulated Damages, 785.
Stipulations, 785.
Stipulations in Admiralty, 785.
Stirpes, 785.
 STOCK AND PRODUCE EXCHANGES, 788.
 STOCK AND STOCKHOLDERS, 808.
 STOCKBROKERS, 1053.
Stock Dividends, 1072.
Stockings, 1072.
Stock Law, 1073.
Stock Running at Large, 1073.
 STOCKYARDS, 1074.
Stole, 1076.
Stolen Goods, 1076.
 STOPPAGE IN TRANSITU, 1077.
Stopping Place, 1119.
Storage, 1119.
Store Fixtures, 1122.
 STORE ORDER ACTS, 1123.
Stove, 1126.
Stowage, 1126.
Stranding, 1127.

II. WORDS AND PHRASES.

BY THOMAS JOHNSON MICHIE.

- SPECIAL PLEA, 1.
SPECIAL POWER, 1.
SPECIAL PRIVILEGE, 1.
SPECIAL PROCEEDINGS, 1.
SPECIAL PROMISE, 2.
SPECIAL PURPOSE, 2.
SPECIAL REPLICATION, 2.
SPECIAL STOCK, 2.
SPECIAL TAXES, 2.
SPECIAL TRAVERSE, 2.
SPECIAL TRUST, 3.
SPECIALTY, 3.
SPECIAL VERDICT, 4.
SPECIAL WORD, 4.
SPECIE, 4.
SPECIES, 5.
SPECIFIC — SPECIFICALLY, 5.
SPECIFICATION, 6.
SPECIFIC GRAVITY, 6.
SPECIFIC LIEN, 6.
SPECIFIC QUESTION, 135.
SPECIFIC TAXES, 135.
SPECIFY, 136.
SPECIMEN, 136.
SPECULATE, 136.
SPEECH, 136.
SPEED — SPEEDILY, 136.
SPEEDWAY, 136.
SPEEDY TRIAL, 136.
SPENT BILLS OF LADING, 150.
SPILE, 150.
SPINNING PLANT, 150.
SPIRIT — SPIRITS, 151.
SPIRITUAL, 151.
SPIRITUALITY, 151.
SPITTING BLOOD, 151.
SPLINE KEY, 151.
SPOIL, 151.
SPORT — SPORTING, 152.
SPRAG, SPRAGGER, ETC., 152.
SPRAIN, 152.
SPRING, 152.
SPRING HOUSE, 153.
SPRING PLATE, 153.
SPURIOUS, 153.
SQUANDER — SQUANDERER, 153.
SQUARE, 153.
SQUATTER, 154.
SR., 154.
STAB, 154.
STABLE, 154.
STACK, 154.
STAGE, 154.
STAGECOACH, 155.
STAKED OFF, 155.
STAKEHOLDER, 155.
STAKE RACE, 155.
“STAL,” 155.
STALE LEVY, 155.
STALLION, 155.
STAND, STANDING, ETC., 155.
STANDARD, 156.
STANDARD GRADE, 156.
STAND COMMITTED, 156.
STANDING ARMY, 156.
STANDING BY, 156.
STANDING CROP, 156.
STANDING DETACHED, 157.
STANDING TREES — STANDING WOOD,
157.
STAND TO, 157.
START, 195.
STATE, STATEMENT, ETC., 195.
STATE AGENT, 196.
STATE BOND, 461.
STATE CHARITABLE INSTITUTION, 461.

TABLE OF WORDS AND PHRASES.

STATE CONSTABLE, 461.	STEER, 771.
STATED, 461.	STENCIL, 771.
STATED DAMAGES, 461.	STENOGRAPHY, 784.
STATE DEBT, 461.	STEFFATHER, 784.
STATED SUPPLY, 461.	STEP IN THE PROCEEDINGS, 784.
STATE ELECTION, 462.	STERLING MONEY, 784.
STATE JAIL — STATE PRISON, 462.	STEVEDORE, 784.
STATE LIBRARIES, 462.	STICKS, 784.
STATE OFFICER, 462.	STIFFENING ORDER, 784.
STATE OF NATURE, 462.	STIPEND, 785.
STATE PURPOSE, 462.	STIPULATED, 785.
STATE RELIGION, 462.	STOCK, STOCK IN TRADE, ETC., 785.
STATE ROAD, 462.	STOCK JOBBING, 1072.
STATE TAX, 493.	STOCK NOTE, 1073.
STATING PART OF BILL, 493.	STOCK PASS, 1073.
STATION, 493.	STONE, 1076.
STATION AGENT, 493.	STOP ORDER, 1076.
STATIONARY, 493.	STOPPAGE, 1076.
STATIONERY, 493.	STORAGE BATTERIES, 1120.
STATUARY, 519.	STORAGE RECEIPT, 1120.
STATUS, 519.	STORE, STORING, STOREHOUSE, ETC., 1120.
STATUTE FAIR, 519.	STOREKEEPER, 1122.
STATUTORY AWARD, 763.	STORM, 1126.
STATUTORY FORECLOSURE, 766.	STORM TIDE MARK, 1126.
STATUTORY LIENS, 766.	STORY, 1126.
STAY, 766.	STOWAWAY, 1126.
STEADY AND PERMANENT EMPLOYMENT, 768.	STRADDLE, 1126.
STEAL, 769.	STRAND, 1126.
STEAM, 770.	STRANGER, 1127.
STEAMSHIP, 770.	STRATAGEM — STRATEGY, 1127.
STEATITE, 771.	STRAW, 1127.
STEEL, 771.	STRAW BAIL, 1127.

THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW.

SPECIAL PARTNER OR PARTNERSHIP. — See the titles LIMITED PARTNERSHIP, vol. 19, p. 337; PARTNERSHIP, vol. 22, pp. 61, 64.

SPECIAL PLEA. (See also the title PLEAS AT LAW, 16 ENCYC. OF PL. AND PR. 539.) — A special plea is a plea other than the general issue.¹

SPECIAL POWER. — See note 2.

SPECIAL PRIVILEGE. — A special privilege is a right, power, franchise, immunity, or privilege granted to or vested in a person or class of persons to the exclusion of others and in derogation of common right.³

SPECIAL PROCEEDINGS. (See also the title ACTIONS, 1 ENCYC. OF PL. AND PR. 112.) — The term "special proceeding" is used in the codes of practice of many of the states in contradistinction to "action;" it may be said generally that any proceeding in a court which was not, under the common-law and equity practice, either an action at law or a suit in chancery is a special proceeding.⁴ "The phrase 'special proceedings,' within its proper definition, is a generic term for all civil remedies in courts of justice which are not ordinary actions."⁵

1. **Special Plea.** — "On the subject of general issues, it remains only to remark that other pleas are ordinarily distinguished from them by the appellation of *special pleas*; and when resort is had to the latter kind, the party is said to plead specially, in opposition to pleading the general issue." Stephen on Pleading (Tyler's ed.) 179.

Bouvier defines a *special plea* in bar as one that "universally advances new matter, upon which the defendant relies for his defense, which a special issue never does; it simply denies." Bouv. L. Dict.

Special Plea Amounting to General Issue. — In *Allen v. New Haven, etc., Co.*, 49 Conn. 245, quoting Gould's Pl., c. 6, p. 1, § 78, it was said: "A *special plea* amounting to the general issue is 'a plea alleging new matter which is in effect a denial of the truth of the declaration.'"

2. **General and Special Powers.** (See also the title POWERS, vol. 22, p. 1092.) — "A power is general when there is a general authority to convey in fee to any alienee. * * * *Special powers* are limited to persons designated and any alienation authorized of an estate or interest less than a fee." *Fellows v. Heermans*, 4 Lans. (N. Y.) 255, *per* Miller, J., *dissenting*. See also *Beecher v. Allen*, 5 Barb. (N. Y.) 175; *Farmers L. & T. Co. v. Carroll*, 5 Barb. (N. Y.) 652; *Hawley v. James*, 16 Wend. (N. Y.) 270.

Special Power to Dispose by Will. (See also the titles SEPARATE PROPERTY OF MARRIED WOMEN, vol. 25, p. 331; WILLS.) — A statute

provided that a married woman might dispose of an estate secured to her separate use or in the exercise of a *special power* to that effect. In construing this provision, the court said: "By the words *special power* is meant a power which is specifically expressed, or at least clearly and unequivocally manifested, of disposing by will of some particular estate." *Harris v. Harbeson*, 9 Bush (Ky.) 404.

3. **Special Privilege.** (See also PRIVILEGE, vol. 23, p. 46, note.) — *Guthrie Daily Leader v. Cameron*, 3 Okla. 689, *quoting* Black's L. Dict.

4. **Special Proceeding.** — *Matter of Central Irrigation Dist.*, 117 Cal. 387.

5. *Schuster v. Schuster*, 84 Minn. 407, *quoting* *In re Grundysen*, 53 Minn. 346.

In *Prince v. McCarty*, 61 Wis. 3, it was held that the term *special proceedings*, as used in Stat. Wis. (1898), § 3069, subdiv. 2, meant a *special proceeding* as defined in sections 2593-2596, and that a proceeding under chapter 43, to compel the delivery of books and papers of a public officer to his successor, being before a judge and not in a court, was not such a *special proceeding*.

Special Proceeding in Nature of Action — Costs. — *State v. Newell*, 13 Mont. 302.

Bastardy. — In *State v. Scott*, 7 S. Dak. 621, the court, in speaking of a bastardy proceeding, said: "These proceedings, therefore, in this state, come within the term 'quasi-criminal' or *special proceedings*; not special in the sense in which that term is used in the Code of Civil

SPECIAL PROMISE. — See note 1.

SPECIAL PROPERTY. — See the titles BAILMENTS, vol. 3, p. 761; PROPERTY, vol. 23, p. 260.

SPECIAL PURPOSE. — See note 2.

SPECIAL RELIEF. — See the title PRAYERS FOR RELIEF, 16 ENCYC. OF PL. AND PR. 774.

SPECIAL REPLICATION. (See also the title REPLICATIONS AND REPLIES, 18 ENCYC. OF PL. AND PR. 639.) — See note 3

SPECIAL STATUTES. — See the title STATUTES, *post*.

SPECIAL STOCK. (See also the title STOCK AND STOCKHOLDERS, *post*.) — See note 4.

SPECIAL TAIL. — See the title ESTATES, vol. 11, p. 371.

SPECIAL TAXES. (See also the title TAXATION.) — See note 5.

SPECIAL TERM. — See TERM.

SPECIAL TRAVERSE. (See also the title PLEAS AT LAW, 16 ENCYC. OF PL. AND PR. 547.) — "A special traverse is a mode of spreading upon the record and submitting to the judgment of the court a defense, consisting sometimes of new matter not appearing by the preceding pleading, which operates as an indirect denial of some fact or facts on which the case made by the preceding pleading depends; and although the matter pleaded by way of inducement does not directly answer the preceding pleading, for which purpose the *absque hoc* clause is necessary to form the perfect issue, yet it is a fundamental rule that the inducement should be such as in itself amounts to a sufficient answer in substance to the last pleading." 6

Procedure, but special as not being either criminal or civil in the strict sense of those terms."

Foreclosure of Mortgage. — The foreclosure of a mortgage under a power of sale has been held not to be a *special proceeding* within the meaning of Gen. Stat. Minn. (1878), c. 88, § 9 (Gen. Stat. Minn. 1894, § 6184). *In re Grundysen*, 53 Minn. 346.

Probate. — A proceeding to set aside probate under Code Civ. Pro. Cal., § 1327, has been held to be a *special proceeding*. *Matter of Joseph*, 118 Cal. 660.

Provisional Remedy. — See *Snavely v. Abbott Buggy Co.*, 36 Kan. 110.

1. **Special Promise** — Statute of Frauds. — See the title VERBAL AGREEMENTS (STATUTE OF FRAUDS), and see *Durham v. Manrow*, 2 N. Y. 538.

2. **Special Purpose.** — In *Roach v. Gunter*, 42 Ala. 241, it was said: "The judges of probate are authorized to hold special or adjourned terms 'for any *special purpose*.' We understand this *special purpose* to be for the transaction of some particular or specified business as contradistinguished from the business of the court generally." See also the title ADJOURNMENTS, 1 ENCYC. OF PL. AND PR. 238.

3. **Special Replication.** — In *Vanbibber v. Beirne*, 6 W. Va. 180, quoting Cooper on Equity Pleading 329, 330, it was said: "Formerly replications were either general or special, as they still are at law. A general replication, which alone is now used in equity, is a general denial of the truth of the defendant's plea or answer, and of the sufficiency of the matter alleged in it to bar the plaintiff's suit, and an assertion of the truth and sufficiency of the bill. A *special replication* was occasioned by the defendant's introducing new matter into his plea or answer, which made it necessary for the plaintiff to put in issue some additional

fact on his part, in avoidance of such new matter introduced by the defendant."

4. **Special Stock.** — In holding that an issue of *special stock* at a meeting called to authorize the issue of preferred stock was invalid, the court said: "The issue of *special stock* was invalid. This is a peculiar kind of stock, now distinctly provided for by statute, but unknown to the general laws of the commonwealth until 1855. Its characteristics are that it is limited in amount to two-fifths of the actual capital; it is subject to redemption by the corporation at par after a fixed time; to be expressed in the certificates; the corporation is bound to pay a fixed half-yearly sum or dividend upon it, as a debt; the holders of it are in no event liable for the debts of the corporation beyond their stock; and the issue of special stock makes all the general stockholders liable for all debts and contracts of the corporation until the special stock is fully redeemed. Stat. 1855, c. 290; 1870, c. 224, §§ 25, 39, cl. 4; Pub. Stat., c. 106, §§ 42, 61, cl. 3; *Williams v. Parker*, 136 Mass. 207. Preferred stock, as usually understood, is something quite different from this." *American Tube Works v. Boston Mach. Co.*, 139 Mass. 8.

5. **Special Taxes.** — The term *special taxes* has been held not to include special assessments. *Lamar Water, etc., Co. v. Lamar*, 128 Mo. 188. See also the title SPECIAL OR LOCAL ASSESSMENTS, vol. 25, p. 1168.

Special Road Taxes. — See *Kemmerer v. Foster Tp.*, 120 Pa. St. 158.

6. **Special Traverse.** — *Allen v. Stevens*, 29 N. J. L. 513. See also *Dike v. Ricks*, Cro. Car. 336. In *Chambers v. Hunt*, 18 N. J. L. 352, it was said: "Gould says, 'A *special traverse* is one preceded by introductory affirmative matter, called the inducement to the traverse.' Gould's Pl. 377, § 4. He says, 'The *special traverse*

SPECIAL TRUST. (See also the title TRUSTS AND TRUSTEES.)—See note 1.

SPECIALTY. (See also the titles CONTRACTS, vol. 7, p. 92; SEALS, vol. 25, p. 73.)—A "specialty" is an obligation or contract under seal; an instrument sealed and delivered.² In a narrower sense the term "specialty"

begins with the words *absque hoc*, or *et non*.¹ Id. 377, §§ 6, 8. The introductory affirmative matter, in the plea before us, is in these words: 'The defendant says that the sloop, at the time when, etc., was the property of him the defendant.' The *special traverse* following it is in these words: 'And not the property of the plaintiff.' The governing principle, never to be out of sight in such a plea, is laid down to be this: 'The traverse is but an inference from the inducement.' Gould's Pl. 410, § 55. It falls spontaneously from the inducement, as necessarily as a shadow from an object in the sun."

1. **Special Trust.**—In *Dodson v. Ball*, 60 Pa. St. 496, it was said: "Trusts are of two kinds, simple and special. *Vaux v. Parke*, 7 W. & S. (Pa.) 25. In the former the trustee is passive and performs no duty, and the trust is there purely technical. In the latter he is active, being an agent to execute the donor's will, and the trust is operative."

2. **Specialty.**—*Kerr v. Lydecker*, 51 Ohio St. 252.

A *specialty* is defined as "a writing or deed under the hand and seal of the parties." *Brainerd v. Stewart*, 33 Vt. 404, quoting *Tomlin's L. Dict.*

A *specialty* is "a writing sealed and delivered, containing some agreement." *Lane v. Morris*, 10 Ga. 167, quoting *Bouv. L. Dict.*

"A *specialty* is a contract executed with the solemnities of sealing and delivery, and is emphatically styled a deed." *Helm v. Eastland*, 2 Bibb (Ky.) 194.

Obligation and Specialty Synonymous.—*El-sasser v. Haines*, 52 N. J. 23.

Seal.—The term necessarily imports a sealed instrument. *Brainerd v. Stewart*, 33 Vt. 404.

In *Frazer v. Tunis*, 1 Binn. (Pa.) 261, it was said: "It is not denied by the plaintiff's counsel that these articles of agreement are *specialties*; because they are writings under seal, which is the true definition of a *specialty*."

Simple Contract and Specialty.—The terms "simple contract" and *specialty* comprise every kind of contractual obligation. *De Crano v. Moore*, 50 N. Y. App. Div. 366.

Mortgage a Specialty.—See *Kerr v. Lydecker*, 51 Ohio St. 252.

Statute of Limitations.—See the title LIMITATION OF ACTIONS, vol. 19, p. 289.

Same—Judgments, Liabilities Created by Statute.—In *Stockwell v. Coleman*, 10 Ohio St. 40, an action of debt was brought upon a transcript of a judgment of a justice of the peace of the state of Indiana. A plea of the statute of limitations of four years was entered. The court, *per* Sutliff, J., said: "It is certain that while the term *specialty*, in the strict and early use of the word, was regarded as only applicable to bonds, deeds, or other instruments under seal, it afterward came to be used in a much more comprehensive sense. The term *specialty* has long been used both in

England and America in this more comprehensive sense, as embracing debts upon recognizances, judgments, and decrees, and (in England certainly) debts upon statutes. And we have no doubt that the word *specialty*, as used in our statute of limitations, was intended and does in fact comprehend as well judgments as sealed instruments. * * * This court, however, rests its opinion in the case before us upon the conclusion arrived at, that a judgment of a court of another state is, in the legal and reasonably comprehensive sense of the term, to be regarded in this state as a debt upon a *specialty*; and such a judgment, when sued upon in this state, is not subject to a plea of the statute of limitations of four years, whether the judgment be that of a court of record or of a court not of record." See also *Bobo v. Norton*, 10 Ohio St. 514; *Bissell v. Jaudon*, 16 Ohio St. 498; *Randolph v. King*, 2 Bond (U. S.) 104. But in *Tyler v. Winslow*, 15 Ohio St. 366, *followed* in *Hawkins v. Lasley*, 40 Ohio St. 40, it was held that a domestic judgment was not a *specialty* within the statute. These decisions are absolutely irreconcilable upon principle.

In *Pease v. Howard*, 14 Johns. (N. Y.) 479, it was held that a judgment in a justice's court is not within the statute of limitations, like a foreign judgment; for it is, in an action founded upon it, conclusive evidence of a debt, and is, therefore, not a debt by simple contract, but by *specialty*.

In *Seymour v. Street*, 5 Neb. 85, it was said that *specialty* originally imported a writing actually under seal, though it has been extended to include judgments.

In *Indiana*, however, in *Kimball v. Whitney*, 15 Ind. 282, it was said: "The term *specialty*, employed in the statute, does not embrace a judgment. Says Blackstone: 'A debt of record is a sum of money which appears to be due by the evidence of a court of record.' 'Debts by *specialty*, or special contract, are such whereby a sum of money becomes or is acknowledged to be due, by deed or instrument under seal.'" 2 Black. Com. 465. And though the judgment sued upon in that case was a foreign one, it does not appear that the court intended to limit the doctrine enunciated to foreign judgments. See also *Niblack v. Goodman*, 67 Ind. 181. To the same effect see *Todd v. Crumb*, 5 McLean (U. S.) 172; *David v. Porter*, 51 Iowa 254.

These authorities well illustrate the confusion in which the subject is involved. Upon principle and authority it would seem that a judgment is not a *specialty*; but as it is not an agreement, contract, or promise in writing, it is not within the statute of limitations of 21 James I. nor the similar statutes of limitations in the United States. 7 Wait on Actions and Defenses 253. See also *Todd v. Crumb*, 5 McLean (U. S.) 172; *Reddington v. Julian*, 2 Ind. 224; *Dudley v. Lindsey*, 9 B. Mon. (Ky.) 486, 50 Am. Dec. 522; *Mahurin v. Bickford*, 8

imports an instrument under seal for the payment of money.¹

SPECIAL VERDICT. (See also the title VERDICT.)—A special verdict finds only the facts, and leaves to the court the duty of determining the law and of applying it to the facts.²

SPECIAL WORD.—See note 3.

SPECIE.—The meaning of the word "specie" is well understood to be metallic money issued by public authority, and it is generally used in contradistinction to paper money.⁴

N. H. 54; *Stewart v. Peterson*, 63 Pa. St. 230; *Mitchell v. Mitchell*, 8 Humph. (Tenn.) 359.

Except in *Ohio* (*Stockwell v. Coleman*, 10 Ohio St. 33, cited *supra*, this note), it has been generally held that a foreign judgment is not a *specialty*, even in those jurisdictions in which domestic judgments are so held. *Keith v. Estill*, 9 Port. (Ala.) 669; *Jordan v. Robinson*, 15 Me. 167; *Harness v. Green*, 20 Mo. 316; *Hubbell v. Coudrey*, 5 Johns. (N. Y.) 132; *Pease v. Howard*, 14 Johns. (N. Y.) 479; *Cameroon v. Wurtz*, 4 McCord L. (S. Car.) 278.

Same—Statute Liabilities, too, have been frequently termed *specialties* by the courts. *Jones v. Pope*, 1 Saund. 38; *Cork, etc., R. Co. v. Goode*, 13 C. B. 826, 76 E. C. L. 826; *Shepherd v. Hills*, 1 Exch. 55; *Bullard v. Bell*, 1 Mason (U. S.) 243; *Lane v. Morris*, 10 Ga. 162; *Ward v. Reeder*, 2 Harr. & M. (Md.) 145; *Van Hook v. Whitlock*, 3 Paige (N. Y.) 409; *Atwood v. Rhode Island Agricultural Bank*, 1 R. I. 376.

Specialty by Statute.—In *Ward v. Hudson*, 96 Mich. 435, it was said: "'Specialty by statute' means some right or cause of action given by statute which does not exist at common law. In such cases the nature or cause of action does not depend, in any degree, upon any contract relation. There is no original obligation whatever created by the act of the parties."

1. *Elsasser v. Haines*, 52 N. J. L. 23. See also *January v. Goodman*, 1 Dall. (Pa.) 208.

In *Marriott v. Thompson*, Willes 189, it was said: "Whenever a man by deed obliges himself to pay money to another it is a debt by *specialty*."

2. **Special Verdict.**—*Sturgis* First Nat. Bank v. *Peck*, 8 Kan. 666. See also *Cook v. Gerrard*, 1 Saund. 170; *Mumford v. Wardwell*, 6 Wall. (U. S.) 423; *Ward v. Cochran*, 150 U. S. 605; *Cummings v. Taylor*, 21 Minn. 368; *Austin v. Ahearne*, 61 N. Y. 13; *Shifflet v. Morelle*, 68 Tex. 386.

A *special verdict* is one by which the jury finds the facts only, leaving the judgment to the court. *People v. Ah Ye*, 31 Cal. 453; *McCormack v. Phillips*, 4 Dak. 534; *Toledo, etc., R. Co. v. Hammond*, 33 Ind. 380; *Sparrowhawk v. Sparrowhawk*, 11 Hun (N. Y.) 530; *People v. Board of Police*, 35 Barb. (N. Y.) 648; *Manning v. Monaghan*, 23 N. Y. 541; *Porter v. Western North Carolina R. Co.*, 97 N. Car. 71; *Dray v. Crich*, 3 Oregon 300; *Davis v. Chicago, etc., R. Co.*, 93 Wis. 470, 57 Am. St. Rep. 935.

"A *special verdict* is one by which all the facts of the case are put on the record and the law is submitted to the judges." *Carr v. Carr*, 52 N. Y. 256. See also *Imperial F. Ins. Co. v. Kiernan*, 83 Ky. 479.

Blackstone's Definition.—A *special verdict* is defined by Blackstone to be one whereby the jurors "state the naked facts as they find them

to be proved, and pray the advice of the court thereon, concluding conditionally that if upon the whole matter the court should be of the opinion that the plaintiff had cause of action, then they find for the plaintiff; if otherwise, then for the defendant. * * * Another method of finding a species of *special verdict* is when the jury find a verdict generally for the plaintiff, but subject, nevertheless, to the opinion of the judge of the court above on a special case stated by the counsel on both sides with regard to a matter of law." 3 Black. Com. 377, quoted in *Statler v. U. S.*, 157 U. S. 277.

Grounds on Which Based.—A general verdict is not rendered special by the fact that it designates the grounds on which it is based. *Shifflet v. Morelle*, 68 Tex. 386.

Special Verdict and Special Finding Distinguished. (See also SPECIAL FINDING, vol. 25, p. 1164.)—In *Toledo, etc., R. Co. v. Hammond*, 33 Ind. 380, it was said: "The only substantial difference between a *special verdict* and a 'special finding,' under the provisions of the code, is this: the *special verdict* must cover the issues, or some one or more of them; the 'special finding' may embrace only a particular question pertinent to but not covering any of the issues, although it may be controlling."

Special Verdict and Separate General Verdict.—"Separate general verdict" * * * is defined as a finding 'upon any of the issues in favor of the plaintiff or the defendant,' while a *special verdict* is defined as 'the finding of facts by a jury.' The distinctive characteristic between the two seems to be that in the one case the jury pass upon an issue made by the pleadings that may be constituted of many facts, and in the other they pass upon the existence of facts without reference to their relation to any issue." *Witty v. Chesapeake, etc., R. Co.*, 83 Ky. 29.

3. **Special Word—Trademarks.** (See also the title TRADEMARKS.)—In *In re Hopkinson*, (1892) 2 Ch. 121, *Kekewich, J.*, said: "What is the meaning of a *special word* used as a trademark? I think it must be intended to mean a word used as a trademark which separates the article to which it is applied from all others of the same class or character—something which points out the article as standing alone, which makes the man who sees or reads the word understand that the article has a special standing, a special existence, and is not one of the general class, for instance, of pianos, but belongs to a class of a particular character."

4. **Specie.** (See also MONEY, vol. 20, p. 837.)—*Walkup v. Houston*, 65 N. Car. 502. See also *Trebilcock v. Wilson*, 12 Wall. (U. S.) 687; *Webb v. Moore*, 4 T. B. Mon. (Ky.) 483.

"Hard Money or Specie is a coin of the precious metals, of a certain weight and fineness,

SPECIES. (See also GENUS, vol. 14, p. 1004.)—The word "species" means "a sort, a kind, a class subordinate to a genus."¹

SPECIFIC — SPECIFICALLY.—See note 2.

with the government stamp thereon, denoting its value as a medium of exchange or currency." *Henry v. Salina Bank*, 5 Hill (N. Y.) 536.

Note Payable in Specie.—In *Glover v. Robins*, 49 Ala. 219, 20 Am. Rep. 272, a promissory note for six thousand five hundred dollars was made in October, 1864, and was by its terms payable "in *specie*." It was held that a judgment for the sum stated and interest in gold or silver coin, "being the said plaintiff's damages as assessed by the jury aforesaid, or its equivalent in United States currency," was erroneous, and that the judgment could be recovered only for the amount of the note in United States currency. The court, *per Peters, J.*, said: "The note on which this suit is brought bears date on the 10th day of October, 1864, and it is made payable 'in *specie*.' There was no evidence offered to show what was meant by the word *specie*. But as there was no objection made to the verdict, which assessed the damages 'in gold or silver coin,' it is supposed that this interpretation was put upon this word by both the plaintiff and the defendant. Yet, as the debt was contracted long after the passage of the legal-tender acts of Congress, regulating the payment of such contracts, the judgment should have been for so many dollars only, leaving it to be discharged in any legal-tender currency or money of the United States. It is presumed that this is the result of the latest construction of the legal-tender acts of Congress by the Supreme Court of the United States; and the decisions of that high tribunal, until modified or overruled, constitute the governing rule, and are a part of the paramount law of the land. *Legal Tender Cases*, 12 Wall. (U. S.) 457; *Banks v. Supervisors*, 7 Wall. (U. S.) 26, 12 U. S. Stat. at L. 345, 532, 709." But see *Trebilcock v. Wilson*, 12 Wall. (U. S.) 687, stated under CURRENCY—CURRENT, vol. 8, p. 498. See also *Paup v. Drew*, 10 How. (U. S.) 218; *Pollard v. Pleasant Hill*, 3 Dill. (U. S.) 195; and the title PAYMENT, vol. 22, pp. 540, 541.

Specie Contract.—In *Frank v. Colhoun*, 59 Pa. St. 381, it was said: "A contract to pay simply in so much money, having no reference to its kind, is not what is meant by a '*specie* contract,' though it could have been made efficacious as such by a demand of gold or silver, then the only legal tender. But such a contract is solvable in whatever is legal money at the day of payment, and is therefore subject to any change in the money of the country by subsequent legislation; and by commercial usage was also payable in bank notes, recognized by consent as money when no other kind is demanded. But what we mean by a *specie* contract is one payable in *specie* by the express terms of the contract itself. It is an agreement in which the parties have taken away by consent the right of the debtor to pay except in the specified coin."

1. **Species.**—*Smythe v. State*, 17 Tex. App. 251.

2. **Specific — Specifically.**—The statute of 43 Eliz., c. 2, establishing poor rates in England,

imposed no liability on any mines except coal mines. The English Rating Act of 1874 (37 & 38 Vict., c. 54, § 3) made all mines assessable to the poor rate; but, by section 8, a lessee till then exempt from being rated became, during the continuance of his lease, entitled to deduct from his rent one-half of the rate, unless he had "*specifically* contracted to pay such rate in the event of the abolition of the said exemption." A lessee of an iron mine who became liable to the poor rate under the latter act, and who before its passing had contracted to pay his rent "free from all deductions whatsoever," and also to pay "all manner of taxes, rates, assessments, charges, and impositions whatsoever, parliamentary or parochial, which now are or which shall at any time or times hereafter" be payable in respect of the mine, was held not to have *specifically* contracted himself out of the benefit of section 8, Lord Hatherley saying that the meaning of the word *specific* is the reverse of "general," and that a covenant in a lease to pay all taxes, rents, assessments, charges, and impositions whatsoever, cannot be regarded as a *specific* covenant. *Chaloner v. Bolckow*, 3 App. Cas. 933. See also *Devonshire v. Barrow Haematite Steel Co.*, 2 Q. B. D. 286.

Particularly.—In *Roberts v. Cooke*, 16 Ves. Jr. 451, it was held that a general disposition of personal estate not thereinbefore *specifically* disposed of comprehended *specie* legacies lapsed, the word *specifically* being held to mean particularly. See also *Tindall v. Tindall*, 24 N. J. Eq. 515; *Molineaux v. Reynolds*, 55 N. J. Eq. 187.

Specific and General Contrasted.—See *Smith v. McCoolle*, 5 Kan. App. 715, stated under GENERAL, vol. 14, p. 948. See also *Chaloner v. Bolckow*, 3 App. Cas. 933.

Each, Every, Specifically.—In *Spaulding v. Harvey*, 7 Ind. 432, it was said: "There is great plausibility in the argument that the words 'each,' 'every,' *specifically*, as used in the statutes quoted, require a distinct and separate answer to each allegation. This is certainly the plain and usual sense of those words. 'Every allegation' means clearly 'each allegation,' *specifically* and separately considered."

Specific Appropriation.—In *State v. Wallichs*, 12 Neb. 409, it was said: "The term '*specific* appropriation' means a particular, a definite, a limited, a precise appropriation."

Specifically Bequeathed. (See also the title LEGACIES AND DEVICES, vol. 18, p. 714.)—In *Roberts v. Roberts*, 140 Ill. 349, it was said: "It was clearly the intention of the testator to dispose of all his estate, real and personal, by the fourteenth clause, which had not been bequeathed or devised by those which preceded it; and so the language, 'which has not been *specifically* bequeathed and devised,' would ordinarily be understood."

Specifically Devised.—A will contained the following clause: "Provided that in case any or either of my said sons shall depart this life leaving a widow, then I give the hereditaments and premises so *specifically* devised to such one or more of them so dying unto his widow

SPECIFICATION. (See also ENCYC. OF PL. AND PR., titles ASSIGNMENT OF ERRORS, vol. 2, p. 921; BILLS OF PARTICULARS, vol. 3, p. 517; NOTICE OR BRIEF STATEMENT OF DEFENSE, vol. 14, p. 1074.) — A specification is a statement of particulars; an account or narrative in detail.¹

SPECIFIC GRAVITY. — Specific gravity is defined to be the ratio of the weight of a body to the weight of an equal volume of some other body taken as the standard or unit. This standard is usually water for liquids and solids, and air for gases.²

SPECIFIC LEGACY. — See the title LEGACIES AND DEVISES, vol. 18, p. 714.

SPECIFIC LIEN. (See also the title LIENS, vol. 19, p. 3.) — A specific lien is a charge upon a particular piece of property by which it is held for the payment or discharge of a particular debt or duty, in priority to the general debts or duties of the owner.³

and her assigns, for and during the term of her natural life." In construing this provision Byles, J., said: "The word *specifically* is, indeed, an inartificial and inappropriate word as applied to realty, because it is said that all devises of land are specific. 2 Williams on Executors, 932. But its meaning in this context is, I conceive, the same as that in which it is often used, and, for example, in a passage cited in Richardson's Dictionary, from Warburton, *specifically*, that is, 'with its circumstances.' It is, I think, as here used, synonymous with specially, or particularly, or directly." Melsom v. Giles, L. R. 5 C. P. 621. See also Giles v. Melsom, L. R. 6 H. L. 29.

Specifically Described. — By an English statute it was provided that a bill of sale should not cover goods not *specifically* described. In construing this statute, Brett, M. R., said: "The learned judge at the trial thought that any description of species would be sufficient, that is, of species as distinguished from genus. That is not the true construction of the act. * * * I think that '*specific* description' means an inventory. The value of the goods may not be put down in an inventory, but it does not consist of merely one or two items. The statute requires that a proper inventory shall be prepared, and therefore all articles not described as in a proper inventory are not covered by the bill of sale. It seems to us that this point was not properly sifted at the trial. We think that the 'household furniture and effects' are not '*specifically* described' within the meaning of the statute." Roberts v. Roberts, 13 Q. B. D. 803. See also Davidson v. Carlton Bank, (1893) 1 Q. B. 86; Witt v. Banner, 19 Q. B. D. 276, 20 Q. B. D. 117. And see the titles BILLS OF SALE, vol. 4, p. 557; CHATTEL MORTGAGES, vol. 5, p. 959, note.

1. **Specification.** (See also the title WORKING CONTRACTS.) — "The word *specifications*, when applied to a building, means a specific and detailed statement of the materials to be used in the building and the manner of performing

the work." State v. Kendall, 15 Neb. 273, *per* Maxwell, J., *dissenting*. See also Jenney v. Des Moines, 103 Iowa 347.

Specification includes, in architecture, "not only the dimensions and mode of construction, but a description of every piece of material — its kind, length, breadth, thickness, and the manner of joining separate parts." And. L. Dict., *citing* Gilbert's Case, 1 Ct. of Cl. 34.

Letters. — By contract in writing a painter agreed with an owner to do all the painting on certain houses agreeably to *specifications* signed by the parties and annexed to the contract, and to provide good, proper, and sufficient materials for completing all the painting of the buildings mentioned in the *specification*. Annexed thereto on its execution was a letter signed by the painter showing the kind and quality of materials to be used, and how they were to be applied. It was held that such letter was a *specification*, within the meaning of the contract, and became part of the contract which was to be construed therewith. McGeragle v. Broemel, 53 N. J. L. 59.

Specification and Charge. (See also the title MILITARY LAW, vol. 20, p. 645.) — In Carter v. McClaughry, 183 U. S. 386, it was said: "According to military usage and practice, the charge is in effect divided into two parts, the first technically called the '*charge*,' and the second the *specification*. The charge proper designates the military offense of which the accused is alleged to be guilty. The *specification* sets forth the acts or omissions of the accused which form the legal constituents of the offense. The pleading need not possess the technical nicety of indictments as at common law."

Patent Law. — See the title PATENTS, vol. 22, p. 352.

2. **Specific Gravity.** — Louisville Public Warehouse Co. v. Collector of Customs, 6 U. S. App. 63.

3. **Specific Lien.** — Rohrbach v. Germania F. Ins. Co., 62 N. Y. 56.

SPECIFIC PERFORMANCE.

BY ARCHIBALD R. WATSON.

I. DEFINITION, 14.

II. NATURE, ORIGIN, AND ANTIQUITY OF REMEDY, 14.

1. *In General*, 14.
2. *Modern Extension of Doctrine*, 14.
3. *Matter of Equity Cognizance*, 14.
 - a. *General Rule*, 14.
 - b. *Retention of Jurisdiction When Once Acquired*, 15.
 - c. *Jurisdiction at Law*, 15.
4. *Injunction Against Breach*, 15.
 - a. *In General*, 15.
 - b. *When Injunction Granted*, 15.
 - (1) *In General*, 15.
 - (2) *Statute Limiting Right to Injunction*, 16.
 - (3) *Injunction in Aid of Specific Performance*, 16.
5. *Specific Performance as Compared with Rescission*, 16.
6. *Reformation and Specific Performance*, 16.

III. GROUNDS OF RELIEF, 17.

1. *Inadequacy of Legal Remedy*, 17.
 - a. *In General*, 17.
 - b. *Where Damages Sole Relief Sought*, 18.
 - c. *Completeness of Remedy at Law*, 19.
2. *Insolvency*, 19.
3. *Prevention of Fraud*, 20.
4. *Election Between Remedies*, 20.

IV. REQUISITES FOR EQUITABLE INTERPOSITION, 20.

1. *In General*, 20.
2. *Nature of Contract to Be Enforced*, 20.
 - a. *In General*, 20.
 - b. *Minds Must Have Met*, 21.
 - c. *Lawfulness*, 22.
 - (1) *General Rule*, 22.
 - (2) *Question as to Action at Law*, 23.
 - (3) *Ultra Vires Contracts*, 24.
 - (4) *Contract of Agent in Excess of Authority*, 24.
 - (a) *In General*, 24.
 - (b) *Agency of Tenant in Common*, 24.
 - (5) *Illegality or Invalidity as to Part*, 24.
 - (6) *Mere Fact of Lawfulness*, 24.
 - (7) *Statute of Limitations*, 25.
 - d. *Consideration*, 25.
 - (1) *General Rule*, 25.
 - (2) *Gratuitous Undertakings — Voluntary Agreements*, 26.
 - (a) *In General*, 26.
 - (b) *Executed Contracts*, 26.
 - (3) *Inadequacy of Consideration*, 26.
 - (a) *General Rule*, 26.
 - (b) *Inadequacy at Time When Contract Made*, 27.
 - (c) *Inadequacy Coupled with Fraud or Unfairness*, 27.
 - (d) *Rule by Statute*, 28.
 - (4) *Failure of Consideration*, 28.
 - (5) *Illegal Considerations*, 28.
 - (6) *Contracts under Seal*, 28.

- e. *Mutuality*, 28.
 - (1) *General Rule*, 28.
 - (2) *Contracts Performed on One Side*, 29.
 - (3) *Options*, 30.
 - (a) *General Rule*, 30.
 - (b) *Options in Leases to Renew or Purchase*, 30.
 - (c) *Option to Rescind*, 30.
 - (4) *Lesser Covenant Where Greater Enforceable*, 30.
 - (5) *Exception under Terms of Contract*, 31.
 - (6) *Unilateral Contracts*, 31.
 - (7) *Mutuality Subsequently Taken Away or Supplied*, 31.
 - (8) *Conflict of Cases*, 31.
- f. *Certainty*, 32.
 - (1) *General Rule*, 32.
 - (2) *Parties*, 36.
 - (3) *Description of Property Conveyed*, 36.
 - (4) *Time of Performance*, 37.
 - (5) *Price and Consideration*, 37.
 - (6) *Where Contract Capable of Being Made Certain*, 38.
 - (a) *General Rule*, 38.
 - (b) *Uncertainty Cured by Acts of Parties*, 38.
 - (7) *Specific Performance Refused Though Contract Not Void at Law*, 38.
 - (8) *Where Contract Not Disputed*, 38.
 - (9) *Contract Uncertain as to Part*, 38.
 - (10) *Assignees and Representatives*, 38.
- g. *Enforceability*, 38.
 - (1) *General Rule*, 38.
 - (2) *Property Not in Existence*, 39.
 - (3) *Where Party Might Nullify Decree*, 39.
 - (4) *Acts Beyond Defendant's Ability*, 39.
 - (a) *General Rule*, 39.
 - (b) *Where No Title in Defendant*, 40.
 - (c) *When Conveyance to Third Person Set Aside*, 40.
 - (5) *Approximate Relief*, 40.
 - (6) *Conditions to Be Performed by Complainant*, 40.
- 3. *Rule in Case of Conditional Contracts*, 40.
- 4. *Performance of Conditions Precedent*, 41.
 - a. *General Rule*, 41.
 - b. *Where Plaintiff's Failure Due to Defendant's Default*, 41.
 - c. *Waiver and Estoppel*, 42.
 - d. *Tender or Offer to Perform*, 42.
 - (1) *In General*, 42.
 - (2) *Where Contract Abandoned or Repudiated*, 43.
- e. *Dependent Covenants — Contemporaneous Performance*, 43.
- 5. *Party Seeking Performance Must Himself Do Equity*, 43.
- 6. *Demand*, 44.
- 7. *Effect of Plaintiff's Fraud, Misrepresentation, or Bad Faith*, 45.
 - a. *General Rule*, 45.
 - b. *Advantage Taken of Party's Ignorance*, 46.
 - c. *Undue Influence*, 46.
 - d. *Concealment of Material Facts*, 46.
 - e. *Intent to Defraud Creditors*, 46.
 - f. *Bad Faith Toward Third Persons*, 46.
 - g. *Purchase of Property with Knowledge of Sale to Another*, 47.
 - h. *Defendant's Fraud*, 47.
 - i. *Representations False but Not Fraudulent*, 47.
 - (1) *In General*, 47.
 - (2) *Test of Materiality*, 47.
- 8. *Mistake*, 47.

V. FORM AND CONSTRUCTION OF CONTRACT, 48.

1. *General Rule*, 48.
2. *Signature of Party*, 48.
3. *Construction*, 48.
 - a. *In General*, 48.
 - b. *Legal Effect Followed in Equity*, 48.
 - c. *When Question for Jury*, 48.
4. *Imperfect, Irregular, or Informal Deeds*, 48.

VI. REQUIREMENTS OF STATUTE OF FRAUDS, 49.

1. *General Rule*, 49.
2. *Doctrine of Part Performance*, 50.
 - a. *In General*, 50.
 - b. *Rule by Statute*, 52.
 - c. *Jurisdiction in Which Doctrine Denied*, 52.
 - d. *Rule in Maine and Massachusetts*, 52.
 - e. *Performance Must Have Been on Faith of Contract*, 53.
 - f. *Inadequacy of Damages*, 54.
 - g. *Payment of Purchase Money*, 54.
 - (1) *General Rule*, 54.
 - (2) *Rule in Alabama, Delaware, and Iowa*, 55.
 - (3) *Payment Accompanied by Other Acts*, 55.
 - h. *Change of Possession*, 56.
 - (1) *In General*, 56.
 - (2) *Possession and Improvements*, 57.
 - (3) *Possession of One of Several Parcels*, 58.
 - (4) *Continuance of Existing Possession*, 58.
 - (5) *Necessity for and Nature of Possession*, 58.
 - i. *Contract Must Be Certain and Definite, and Part Performance Clearly Shown*, 59.
 - j. *Acts Relied On Must Be Those of Plaintiff*, 60.
 - k. *Marriage as Part Performance*, 60.
 - l. *Mere Revocable Acts*, 60.
 - m. *Preliminary Acts*, 60.
 - n. *Contracts Not Performable Within a Year*, 60.
 - o. *Guaranties*, 61.
 - p. *Compensation in Lieu of Performance*, 61.
3. *Executed Contracts*, 61.
4. *Trusts*, 61.

VII. RULE OF JUDICIAL DISCRETION, 62.

1. *In General*, 62.
2. *Mere Fact of Legal Contract*, 65.
3. *Imposition of Conditions upon Plaintiff*, 65.
4. *Performance of Conditions Subsequent*, 65.
5. *Where Performance of No Benefit to Party Seeking Decree*, 66.
6. *Where Contract Already Substantially Performed*, 66.
7. *Enforcement of Forfeitures*, 66.
8. *Consideration of Public Interests*, 66.
9. *Contract Should Be Fair, Just, and Equitable*, 67.
 - a. *General Rule*, 67.
 - b. *Fact that Contract Enforceable at Law*, 68.
 - c. *Unconscionable Contracts*, 68.
 - d. *Rash and Improvident Contracts*, 69.
 - e. *Consideration of Time When Contract Made*, 69.
10. *Effect of Change of Value*, 70.

VIII. RULE WHERE PLAINTIFF IN DEFAULT, 70.

1. *In General*, 70.
2. *Extent and Limits of Rule*, 71.
3. *Fact that Plaintiff's Default Would Not Justify Rescission*, 71.
4. *Bond for Performance*, 72.

5. *Waiver of Default — Acquiescence*, 72.
6. *Performance Prevented by Plaintiff or Defendant*, 72.
7. *Provision in Contract for Forfeiture on Default*, 73.
8. *Time as Essence of Contract*, 73.
 - a. *General Rule*, 73.
 - b. *Where Time of Essence, No Enforcement by Party in Default*,
74.
 - c. *When Time Deemed of Essence and When Not*, 74.
 - (1) *In General*, 74.
 - (2) *Test — Question of Injury*, 76.
 - (3) *Fluctuating Values — Change of Value or Circumstances*,
76.
9. *Performance Within Reasonable Time*, 77.

IX. LACHES, 77.

1. *In General*, 77.
2. *Action Need Not Be Barred by Statute*, 79.
3. *Infancy*, 79.
4. *Laches of Assignor*, 79.
5. *Mere Delay*, 79.
6. *Delay Due to Promise of Performance or Negotiations for Settlement*,
81.
7. *Delay Due to Mistake*, 81.
8. *Plaintiff's Laches Due to or Induced by Defendant's Conduct*, 81.
9. *Acquiescence in Violation of Contract*, 81.
10. *Vendee in Possession*, 81.
11. *Delay and Change of Circumstances*, 81.
 - a. *In General*, 81.
 - b. *Uncertainty of Proof Due to Lapse of Time*, 81.
 - c. *Injury to Innocent Third Persons*, 82.
12. *Laches and Default*, 82.
13. *Delay in Demand for Performance*, 82.
14. *Period from Which Laches Computed*, 82.

X. PARTIAL PERFORMANCE, 82.

1. *In General*, 82.
2. *Separable Contracts*, 83.
3. *Acceptance in Full of Part Performance*, 83.
4. *Where Vendor's Title Defective*, 83.
5. *Contract of Tenant in Common*, 83.
6. *Partial Performance with Compensation for Residue*, 83.
 - a. *General Rule*, 83.
 - b. *When General Rule Does Not Apply*, 84.
 - c. *Contract Uncertain as to Part*, 84.
 - d. *Rule as to Vendee*, 85.

XI. DAMAGES IN LIEU OF OR IN ADDITION TO SPECIFIC PERFORMANCE, 85.

1. *Damages in Lieu of Performance*, 85.
 - a. *General Rule*, 85.
 - b. *Contract Void by Statute of Frauds*, 85.
 - c. *Voluntary Conveyance — Compensation for Improvements*, 86.
 - d. *Where Specific Performance Inequitable*, 86.
 - e. *Where Plaintiff Knew Performance Impossible*, 86.
 - f. *Performance Refused by Reason of Plaintiff's Fraud or Default*,
86.
 - g. *Case Made Must Call for Equitable Relief*, 86.
2. *Damages in Addition to Performance*, 86.

XII. CONTRACTS CLASSIFIED ACCORDING TO NATURE AND SUBJECT-MATTER, 87.

1. *In General*, 87.
2. *Adoption*, 87.
3. *Alternative Contracts*, 87.
 - a. *In General*, 87.

SPECIFIC PERFORMANCE.

- b. Alternative to Pay Money, 88.*
- c. Liquidated Damages, 88.*
- d. Forfeiture to Secure Performance, 88.*
- e. Forfeiture upon Nonperformance, 88.*
- f. Election Between Alternatives, 88.*
- 4. *Arbitration, 88.*
 - a. General Rule, 88.*
 - b. Exceptions to General Rule, 89.*
- 5. *Awards, 89.*
- 6. *Antenuptial Contracts, 90.*
- 7. *Bonds, 90.*
- 8. *Compromises, 91.*
- 9. *Contracts for Testamentary Provisions, 91.*
 - a. In General, 91.*
 - b. Where Contract Unfair or Inequitable, 92.*
 - c. Where Terms of Contract Uncertain, 92.*
 - d. Will Invalid or Revoked, 92.*
 - e. Ratification of Inconsistent Will, 92.*
 - f. Rescission—Acquiescence, 92.*
 - g. Parol Agreements, 93.*
 - h. Contracts to Make Will, 93.*
- 10. *Contracts to Construct, Erect, or Repair, 93.*
 - a. General Rule, 93.*
 - b. Exceptions, 94.*
- 11. *Contracts to Indemnify or Secure, 94.*
- 12. *Continuing Contracts—Successive Acts, 95.*
 - a. General Rule, 95.*
 - b. Exceptions, 95.*
 - c. Mere Execution of Contract, 96.*
- 13. *Delivery, Assignment, and Cancellation of Notes and Claims, 96.*
- 14. *Gifts, 96.*
 - a. General Rule, 96.*
 - b. Donee in Possession—Improvements, 97.*
 - c. Mere Change of Possession, 97.*
 - d. Undelivered Deeds, 98.*
 - e. Nature of Proof Required, 98.*
- 15. *Husband and Wife, 98.*
 - a. In General, 98.*
 - b. Husband's Contract to Procure Wife's Conveyance, 98.*
 - c. Refusal of Wife to Join in Husband's Deed, 98.*
 - d. Compensation or Indemnity for Dower Right, 98.*
 - e. Married Women, 99.*
 - (1) *In General, 99.*
 - (2) *Rule under Statutes, 99.*
 - (3) *Refusal of Husband to Join in Wife's Deed, 99.*
 - (4) *Sale of Homestead, 99.*
 - (5) *Instruments Defectively Executed or Acknowledged, 99.*
 - (6) *Suits by Married Women, 100.*
- 16. *Insurance, 100.*
- 17. *Options, 100.*
 - a. General Rule, 100.*
 - b. Refusal to Accept Purchase Money, 101.*
 - c. Option to Nullify Decree, 101.*
 - d. Contracts Terminable at Option of One Party, 101.*
- 18. *Partnership, 101.*
- 19. *Patents, 101.*
- 20. *Personal Services, 102.*
- 21. *Personal Property Contracts, 103.*
 - a. In General, 103.*
 - b. Property Having Market Value 103.*

- c. *Where Remedy at Law Inadequate*, 103.
 - (1) *General Rule*, 103.
 - (2) *Chattels Possessing Pretium Affectionis*, 104.
- d. *Parol Contract for Mortgage*, 104.
- e. *Payment of Consideration — Accounting*, 104.
- 22. *Real Property Contracts*, 104.
 - a. *In General*, 104.
 - b. *Contracts of Sale*, 106.
 - (1) *Suits by Vendor*, 106.
 - (a) *In General*, 106.
 - (b) *Title to Be Conveyed*, 106.
 - aa. *In General*, 106.
 - bb. *Record Title*, 107.
 - cc. *Title by Adverse Possession*, 107.
 - dd. *Statute of Limitations*, 107.
 - ee. *Defects Due to Vendee*, 107.
 - ff. *Defects Known to Vendee*, 107.
 - gg. *Reservations, Conditions, Restrictions*, 108.
 - hh. *Immaterial Defects — Technicalities*, 108.
 - ii. *Liens Dischargeable Out of Purchase Money*, 109.
 - (c) *"Marketable" Title*, 109.
 - aa. *General Rule*, 109.
 - bb. *Danger of Litigation*, 111.
 - cc. *Property Adversely Possessed*, 112.
 - dd. *Material Defects — Deficiency in Quantity*, 112.
 - (d) *Vendee Should State Objection*, 112.
 - (e) *Curing Defects — Parol Evidence*, 112.
 - (f) *Restitution of Possession*, 112.
 - (g) *Question for Court*, 113.
 - aa. *In General*, 113.
 - bb. *Rule of Judicial Discretion*, 113.
 - (h) *Tender of Title*, 113.
 - aa. *General Rule*, 113.
 - bb. *When Tender Unnecessary*, 114.
 - cc. *Conformity with Contract*, 114.
 - dd. *Contract for "Satisfactory" Title*, 114.
 - ee. *Acquisition of Title by Vendor*, 114.
 - (2) *Suits by Vendee*, 115.
 - (a) *In General*, 115.
 - (b) *Inability of Vendor to Perform*, 116.
 - (c) *Partial Performance — Compensation*, 116.
 - (d) *Payment or Tender*, 116.
 - aa. *General Rule*, 116.
 - bb. *When Tender Unnecessary*, 117.
 - (e) *Tender of Deed*, 118.
 - (f) *Vendee's Refusal to Accept Title*, 118.
 - (g) *Contracts to Reconvey*, 118.
- c. *Contracts to Mortgage*, 119.
 - (1) *In General*, 119.
 - (2) *Parol Contracts*, 119.
 - (3) *Agreements to Satisfy Mortgage*, 120.
 - (4) *Agreements Between Incumbrancers*, 120.
- d. *Easements*, 120.
- e. *Exchange*, 120.
- f. *Leases*, 120.
 - (1) *In General*, 120.
 - (2) *Covenants in Leases*, 121.
 - (3) *Breach of Covenants by Lessee*, 121.
 - (4) *Parol Leases*, 121.

- g. *Partition*, 122.
- 23. *Stock in Corporations*, 122.
 - a. *In General*, 122.
 - b. *When Contract Enforced*, 122.
 - (1) *In General*, 122.
 - (2) *Where Stock of Peculiar Value to Plaintiff*, 122.
 - c. *When Performance Denied*, 122.
 - (1) *In General*, 122.
 - (2) *Contract Induced by Fraud*, 123.
 - (3) *Contract Contrary to Public Policy*, 123.
 - (4) *Corporation to Be Organized in Futuro*, 123.
 - (5) *Where Defendant Not Owner of Stock*, 123.
 - (6) *Laches*, 123.
 - d. *Stock Subscriptions — Transfers*, 123.
- 24. *Support and Maintenance*, 123.
- 25. *Trusts*, 124.
 - a. *In General*, 124.
 - b. *Implied or Constructive Trusts — Statute of Frauds*, 124.
 - c. *Violation of Trusts*, 124.
- 26. *Miscellaneous*, 124.

XIII. RULE AS TO PRIVIES AND REPRESENTATIVES, 125.

- 1. *In General*, 125.
- 2. *Heirs and Devisees*, 125.
- 3. *Vendees and Assignees*, 126.
- 4. *Mere Personal Covenants*, 127.

XIV. EVIDENCE AND BURDEN OF PROOF, 127.

- 1. *Intent and Understanding of Parties*, 127.
- 2. *Surrounding Circumstances*, 127.
- 3. *Consideration*, 127.
- 4. *Fraud or Mistake*, 127.
- 5. *Rescission, Release, Discharge*, 128.
- 6. *Opinion Evidence — Question of Law*, 128.
- 7. *Presumptions*, 128.
- 8. *Parol Evidence*, 128.
 - a. *General Rule*, 128.
 - b. *To Identify Property Conveyed*, 129.
 - c. *Where Property Insufficiently Described*, 129.
 - d. *Patent Ambiguities*, 129.
 - e. *Latent Ambiguities*, 129.
 - f. *To Cure Uncertainty in Contract*, 129.
 - g. *To Explain Contract*, 130.
- 9. *Burden of Proof*, 130.
 - a. *General Rule*, 130.
 - b. *Must Establish Contract*, 130.
 - c. *Conditions Precedent*, 130.
 - d. *To Show Title*, 131.
 - e. *To Evade Statute of Frauds*, 131.
 - f. *Oral Contracts to Convey Land*, 131.
 - g. *Resulting Trusts*, 131.
 - h. *Affirmative Defenses*, 131.
 - i. *Cases Decided upon Particular Facts*, 131.

XV. OPERATION AND EFFECT OF DECREE, 132.

- 1. *How Decree Operates*, 132.
 - a. *General Rule*, 132.
 - b. *Situs of Subject-matter*, 133.
 - c. *Performance Compelled Through Agent*, 133.
- 2. *How Decree Enforced*, 134.
- 3. *Effect upon Title to Property*, 134.

XVI. WAIVER, FORFEITURE, AND ABANDONMENT, 134.

1. *Mutual Rescission*, 134.
2. *Forfeiture by Default*, 134.
3. *Abandonment*, 135.
4. *Action at Law*, 135.

CROSS-REFERENCES.

For matters of *PROCEDURE* see the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, vol. 20, p. 385.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *INJUNCTIONS*, vol. 16, p. 337; *LACHES*, vol. 18, p. 95; *RESCISSION, REFORMATION, AND CANCELLATION*, vol. 24, p. 374.

I. DEFINITION. — Specific performance is an equitable remedy which compels the performance of a contract in the precise terms agreed upon or such a substantial performance as will do justice between the parties, under the circumstances of the case.¹

II. NATURE, ORIGIN, AND ANTIQUITY OF REMEDY—1. **In General.**—The equitable remedy of specific performance is of very ancient date.² It has been said in this connection that "the ground on which equity first assumed the power of giving specific performance of contracts was to aid the defective remedy of the common law,"³ and, as will be seen more fully hereafter, the inadequacy of the remedy at law is still the controlling consideration.⁴

2. **Modern Extension of Doctrine.**—It has been observed with particular reference to specific performance that in the increasing complexities of modern business relations equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them.⁵ The jurisdiction of courts of equity is not now therefore confined within the narrow limits that once bound it. The constant tendency has been to broaden their powers, and especially has this been true in suits for specific performance.⁶

3. **Matter of Equity Cognizance**—*a. GENERAL RULE.*—Specific performance is, as a rule, strictly an equitable remedy, and as such has been said to be "one of the most extensive and most beneficial heads of equity jurisdiction,"⁷ the exercise of which "prevents the intolerable travesty of justice involved in permitting parties to refuse performance of their contracts at pleasure by electing to pay damages for the breach."⁸

1. For Definitions of Specific Performance see the following cases: *Willard v. Tayloe*, 8 Wall. (U. S.) 557; *Comer v. Bankhead*, 70 Ala. 493; *Riddle v. Cameron*, 50 Ala. 263; *Morgan v. Morgan*, 3 Stew. (Ala.) 383, 21 Am. Dec. 638; *Conaway v. Wright*, 5 Del. Ch. 472; *Dehart v. Dehart*, 15 Ind. 167; *Taggart v. Tevanny*, 1 Ind. App. 339; *Portland, etc., R. Co. v. Grand Trunk R. Co.*, 63 Me. 90; *Johnson v. Johnson*, 40 Md. 189; *Woodbury v. Luddy*, 14 Allen (Mass.) 1, 92 Am. Dec. 731.

"The Actual Accomplishment of a Contract by the party bound to fulfil it," or "performance of a contract in the precise terms agreed upon; strict performance." *Diamond State Iron Co. v. Todd*, 6 Del. Ch. 163.

2. *Hall v. Warren*, 9 Ves. Jr. 608; *Union Pac. R. Co. v. Chicago, etc., R. Co.*, 163 U. S. 600. See also *Chance v. Beall*, 20 Ga. 143; *Rogers v. Saunders*, 16 Me. 92, 33 Am. Dec. 635; *Hopper v. Hopper*, 16 N. J. Eq. 147; *Seymour v. Delancy*, 3 Cow. (N. Y.) 505, 15 Am. Dec. 270.

3. *Moore v. Fitz Randolph*, 6 Leigh (Va.) 175, 29 Am. Dec. 208.

4. See *infra*, this title, *Inadequacy of Legal Remedy*.

5. Mr. Chief Justice Fuller in *Union Pac. R. Co. v. Chicago, etc., R. Co.*, 163 U. S. 600.

6. *Tyson v. Watts*, 1 Md. Ch. 13.

But in *Louisiana*, even at the present time, the rather limited view seems to prevail that a party will never be compelled by a decree to sign a deed or note, because such judicial constraint is inconsistent with a proper respect for personal liberty. *Laroussini v. Werlein*, 48 La. Ann. 13. Nor, it has been held in the same jurisdiction, will specific performance be decreed when the contract requires, as it has been described, the doing of an act solely within the volition of the obligor, such as the signing of a lease, the appointment of an arbitrator, or the exercise of an option to purchase property. *Mirandona v. Burg*, 49 La. Ann. 656.

7. *Bryson v. Peak*, 8 Ired. Eq. (43 N. Car.) 310.

8. Mr. Chief Justice Fuller in *Union Pac. R. Co. v. Chicago, etc., R. Co.*, 163 U. S. 600.

The General Rule is that courts of equity will, as far as possible, put the parties in the condition in which they would have been if the contract had been duly performed according to its terms.¹

b. RETENTION OF JURISDICTION WHEN ONCE ACQUIRED. — When equity has once obtained jurisdiction, it will determine all questions material to the accomplishment of complete justice between the parties.²

c. JURISDICTION AT LAW. — Courts of law do not enforce specific performance unless authorized by statute, their sole remedy being in damages.³

4. Injunction Against Breach — *a. IN GENERAL.* — The specific performance of a contract is frequently enforced by an injunction against its violation.⁴ So where a person has agreed not to do a certain act, specific performance may be decreed in the form of an injunction.⁵ So also where the contract is for a license, or permits the performance of continuing acts, an injunction may restrain the defendant from interfering with the plaintiff in the exercise of his contract rights.⁶ Granting an injunction restraining the breach of a contract is, it has been held, a negative specific performance of the contract.⁷ It has been held that a mandatory injunction may enforce the affirmative terms of a contract indirectly in some cases in which a direct decree for specific performance would be ineffectual.⁸ So where a party agrees to do certain acts and not to do others, he may be enjoined from doing the latter acts, and specific performance of the contract will thus be enforced to that extent, although the court may have no power to decree specific performance of the acts which he agreed to do.⁹

b. WHEN INJUNCTION GRANTED — (1) *In General.* — Whether a court of equity will grant an injunction, the effect of which is to compel the specific performance of a contract, depends, of course, upon the same principles as govern a direct decree for specific performance.¹⁰ So, upon a bill for a

1. *Lynch v. Wright*, 94 Fed. Rep. 703.

2. **All Material Questions Determined.** — *Cathcart v. Robinson*, 5 Pet. (U. S.) 264; *Central Trust Co. v. Wabash, etc., R. Co.*, 29 Fed. Rep. 557; *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498, 3 Am. St. Rep. 758; *Anson v. Townsend*, 73 Cal. 415; *Ross v. Purse*, 17 Colo. 24; *Apperson v. Gogin*, 3 Ill. App. 48; *Renkin v. Hill*, 49 Iowa 270; *Simon v. Wildt*, 84 Ky. 157; *Baile v. St. Joseph F. & M. Ins. Co.*, 73 Mo. 371; *King v. Morford*, 1 N. J. Eq. 274; *Booten v. Scheffer*, 21 Gratt. (Va.) 474.

3. **Courts of Law — Damages.** — *Harnett v. Yeilding*, 2 Sch. & Lef. 548; *Tasker v. Small*, 3 Myl. & C. 63; *McLane v. Elmer*, 4 Ind. 239.

Under an Early Statute in Massachusetts, courts of law were given limited equitable jurisdiction, which included the power to decree specific performance, but the powers thus granted were strictly construed. See *Kidder v. Hunt*, 1 Pick. (Mass.) 328, 11 Am. Dec. 183; *Adams v. Townsend*, 1 Met. (Mass.) 483; *Jacobs v. Peterborough, etc., R. Co.*, 8 Cush. (Mass.) 223; *Buck v. Dowley*, 16 Gray (Mass.) 555.

4. **Injunction.** — *Lowell Mach. Shop v. Atlanta Cotton Factory Co.*, 60 Ga. 233; *Parker v. Garrison*, 61 Ill. 250; *Stovall v. McCutchen*, 107 Ky. 577; *Williams v. Montgomery*, 148 N. Y. 519.

5. *Barret v. Blgrave*, 5 Ves. Jr. 555; *Hapgood v. Rosenstock*, 23 Fed. Rep. 86.

6. See *Joy v. St. Louis*, 138 U. S. 1. And see *Dinham v. Bradford*, L. R. 5 Ch. 519; *Tillett v. Charing Cross Bridge Co.*, 26 Beav. 419; *Raphael v. Thames Valley R. Co.*, L. R. 2 Eq.

37; *Gregory v. Mighell*, 18 Ves. Jr. 328; *Tscheider v. Biddle*, 4 Dill. (U. S.) 55; *Hug v. Van Burkleo*, 58 Mo. 202; *Arnot v. Alexander*, 44 Mo. 27, 100 Am. Dec. 252; *Biddle v. Ramsey*, 52 Mo. 153.

7. *South Chicago City R. Co. v. Calumet Electric St. R. Co.*, 171 Ill. 391.

8. *Lane v. Newdigate*, 10 Ves. Jr. 192; *Rankin v. Huskisson*, 4 Sim. 13; *Manners v. Johnson*, 1 Ch. D. 673, 45 L. J. Ch. 404; *Storer v. Great Western R. Co.*, 2 Y. & C. Ch. 48; *Foster v. Birmingham, etc., R. Co.*, 2 W. R. 378; *Schwoerer v. Boylston Market Assoc.*, 99 Mass. 285.

9. *Lumley v. Wagner*, 1 DeG. M. & G. 604.

Case of Authors, Actors, etc. — Thus, where authors agree to write for one firm and not to write for any other, or actors agree to act at one theatre and not to act at any other, they may be restrained from writing for other firms or acting at other theatres, although they cannot be compelled to write or act for the firm or theatre agreed upon. *Morris v. Colman*, 18 Ves. Jr. 437; *McCaull v. Braham*, 16 Fed. Rep. 37; *Daly v. Smith*, (N. Y. Super. Ct. Spec. T.) 49 How. Pr. (N. Y.) 150; *Hayes v. Willio*, (C. Pl. Spec. T.) 11 Abb. Pr. N. S. (N. Y.) 167. Compare *Clarke v. Price*, 2 Wils. Ch. 157.

Contract for Business Dealings — Continuous Acts. — *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y. 60, 68 Am. St. Rep. 749.

10. See *Berliner Gramophone Co. v. Seaman*, (C. C. A.) 110 Fed. Rep. 30; *South Chicago City R. Co. v. Calumet Electric St. R. Co.*, 171 Ill. 391; *Standard Fashion Co. v. Siegel-Cooper Co.*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 624.

specific execution of an agreement and an injunction, it is clear that if, upon the plaintiff's case, as made out by his bill, he is not entitled to a specific execution of the agreement set up by him, he cannot be entitled to an injunction, which is only ancillary to the principal object of the suit.¹

(2) *Statute Limiting Right to Injunction.* — But it has been held in *New York* that specific performance may be decreed in a submitted controversy, though under the statute governing such proceedings the court has no power to grant a temporary injunction.²

(3) *Injunction in Aid of Specific Performance.* — An injunction may also be granted in proper cases in aid of a decree for specific performance, the more effectually to accomplish justice between the parties and the objects of the decree.³

5. *Specific Performance as Compared with Rescission.* — Specific performance has been declared to be the exact reverse of rescission, the defendant who resists the application for specific performance standing in much the same attitude as that of the plaintiff who seeks a rescission.⁴ It has been held in the same connection that as a rule when the specific performance of a written contract to convey land is denied, its rescission will be decreed.⁵ But it is well settled that chancery may refuse to decree specific performance of a contract, although it is such a contract as the court would not set aside if executed.⁶ And it is also the rule that the mere fact that rescission has been refused at the instance of the defendant is not conclusive of the affirmative right to specific performance.⁷

6. *Reformation and Specific Performance.* — Some of the older cases laid down the rule that a contract would not be reformed and then enforced as reformed in the same proceeding in equity.⁸ But the general rule at present is to the contrary.⁹ Equity will never, however, reform a contract to make an agree-

1. *Allen v. Burke*, 2 Md. Ch. 534.

2. *Associate Alumni v. General Theological Seminary*, 163 N. Y. 417.

3. *Davis v. Davis*, 89 Fed. Rep. 532; *Farrington v. Forman*, (N. J. 1893) 26 Atl. Rep. 532.

4. *Compared with Rescission.* — See *Johnston v. Mitchell*, 1 A. K. Marsh. (Ky.) 225, 10 Am. Dec. 727.

5. *Hendry v. Benlisa*, 37 Fla. 609, citing *Kirby v. Harrison*, 2 Ohio St. 328, 59 Am. Dec. 677.

6. *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 23, 7 Am. Dec. 513; *Barksdale v. Payne*, *Riley Eq. (S. Car.)* 174. See also *Willard Eq. Jur.* 264; *Jackson v. Ashton*, 11 Pet. (U. S.) 229; *Cathcart v. Robinson*, 5 Pet. (U. S.) 264; *Clark v. Maurer*, 77 Iowa 717; *Clitherall v. Ogilvie*, 1 Desaus. (S. Car.) 257; *Seymour v. Delancy*, 3 Cow. (N. Y.) 445, 15 Am. Dec. 270, 6 Johns. Ch. (N. Y.) 222.

7. *Moon v. Crowder*, 72 Ala. 79.

8. *Reformation.* — In *Atty.-Gen. v. Sitwell*, 1 Y. & C. Exch. 559, the court, by Baron Alderson, said: "I cannot help feeling that in the case of an executory agreement, first to reform and then to decree an execution of it, would be virtually to repeal the statute of frauds." And see *Grey v. Tubbs*, 43 Cal. 359; *Osborn v. Phelps*, 19 Conn. 63, 48 Am. Dec. 133; *Kemp v. Humphreys*, 13 Ill. 573; *Colt v. Beaumont*, 32 Mo. 118; *Norfleet v. Southall*, 3 Murph. (7 N. Car.) 189.

9. *England.* — *Olley v. Fisher*, 34 Ch. D. 367, 56 L. J. Ch. 208.

Alabama. — *Clopton v. Martin*, 11 Ala. 187.

California. — *Murphy v. Rooney*, 45 Cal. 78.

Illinois. — *Glos v. Wilson*, 198 Ill. 44.

Indiana. — *Vawter v. Bacon*, 89 Ind. 565.

Iowa. — *Winans v. Huyck*, 71 Iowa 459.

Kansas. — *Slicer v. Adams*, 10 Kan. App. 377.

Maryland. — *Popplein v. Foley*, 61 Md. 381;

Moale v. Buchanan, 11 Gill & J. (Md.) 314.

And see *Philpot v. Elliott*, 4 Md. Ch. 273.

Massachusetts. — *Glass v. Hulbert*, 102 Mass.

41.

Michigan. — See *White v. Port Huron*, etc., R. Co., 13 Mich. 356.

New Hampshire. — *Bellows v. Stone*, 14 N. H. 175.

New Jersey. — *McCormick v. Stephany*, 57 N. J. Eq. 257.

New York. — *Keisselbrack v. Livingston*, 4 Johns. Ch. (N. Y.) 144; *Gillespie v. Moon*, 2 Johns. Ch. (N. Y.) 585, 7 Am. Dec. 559. And see *Stoddard v. Hart*, 23 N. Y. 556.

Ohio. — *Columbus*, etc., R. Co. v. *Steinfeld*, 42 Ohio St. 449; *Harris v. Columbiana County Mut. Ins. Co.*, 18 Ohio 116, 51 Am. Dec. 448.

Pennsylvania. — *Gower v. Sterner*, 2 Whart. (Pa.) 75.

Tennessee. — *Williams v. Conrad*, 11 Humph. (Tenn.) 415; *Bailey v. Bailey*, 8 Humph. (Tenn.) 230; *Perry v. Pearson*, 1 Humph. (Tenn.) 438; *Davidson v. Greer*, 3 Sneed (Tenn.) 385; *Barnes v. Gregory*, 1 Head (Tenn.) 236; *Talley v. Courtney*, 1 Heisk. (Tenn.) 718.

Vermont. — *Beardsley v. Knight*, 10 Vt. 185, 33 Am. Dec. 193.

West Virginia. — *Fishack v. Ball*, 34 W. Va. 644.

Wisconsin. — *Fery v. Pfeiffer*, 18 Wis. 510; *Waterman v. Dutton*, 6 Wis. 265.

It was said in a *Kentucky* case: "The courts rarely ever reform and then specifically enforce

ment of a different effect from that which the parties intended, and enforce it as reformed.¹ It has been well said in this connection that the jurisdiction to enforce specific performance is to be cautiously exercised, and the court must clearly see that it is enforcing the contract the parties made, and not a contract which the court may make for them in the solution of vague, uncertain, doubtful, and conflicting testimony.²

III. GROUNDS OF RELIEF — 1. Inadequacy of Legal Remedy — a. IN GENERAL. — As the origin of the remedy of specific performance was due to the inadequacy of the common law, under the doctrines of which a judgment for damages was, as a rule, the only redress for civil wrongs, so the inadequacy of the legal remedy is still the controlling requisite for specific performance. Where, therefore, a party applying for the specific performance of a contract is shown to have an adequate remedy at law, equitable interposition of the nature under discussion will, as a rule, be denied.³ It has been held, accordingly,

a contract." *Stovall v. McCutchen*, 107 Ky. 577.

Fraudulent Omission from Deed. — *Winans v. Huyck*, 71 Iowa 459. And see *Buchanan v. Moore*, 13 S. & R. (Pa.) 304, 15 Am. Dec. 601.

Performance at Instance of Defendant. — *Bradford v. Union Bank*, 13 How. (U. S.) 57.

1. Making Different Contract. — *Rudd v. Lascelles*, (1900) 1 Ch. 815, 69 L. J. Ch. 396; *Hunt v. Rhodes*, 1 Pet. (U. S.) 14; *Cheney v. Libby*, 134 U. S. 68; *Farwell v. Meyer*, 35 Ill. 40; *Lombard v. Chicago Sinai Congregation*, 75 Ill. 271; *Wallingsford v. Wallingsford*, 6 Har. & J. (Md.) 485; *O'Brien v. Pentz*, 48 Md. 562; *Maughlin v. Perry*, 35 Md. 352; *Domestic Tel., etc., Co. v. Metropolitan Telephone, etc., Co.*, 39 N. J. Eq. 160; *Philadelphia, etc., R. Co. v. Lehigh Coal, etc., Co.*, 36 Pa. St. 204; *Stoddard v. Hart*, 23 N. Y. 559. And see *Riesz's Appeal*, 73 Pa. St. 485.

2. Court Should Proceed with Caution. — *Homan v. Stewart*, 103 Ala. 644, citing *Daniel v. Collins*, 57 Ala. 627; *Johnston v. Jones*, 85 Ala. 287; *Bogan v. Daughdrill*, 51 Ala. 314.

So Where a Mortgage Was Given as Security for a Sum Stated Therein, equity will not reform the mortgage and decree specific performance for security for a larger sum, on the ground of a parol understanding between the parties for additional advances when the mortgage was executed. *Stoddard v. Hart*, 23 N. Y. 556.

3. Adequacy of Legal Remedy — England. — *Flint v. Brandon*, 8 Ves. Jr. 163; *Sainter v. Ferguson*, 1 Macn. & G. 286; *New Brunswick, etc., R., etc., Co. v. Muggeridge*, 4 Drew. 686; *Harnett v. Yeilding*, 2 Sch. & Lef. 553; *Lennon v. Napier*, 2 Sch. & Lef. 682; *Wolverhampton Corp. v. Emmons*, (1901) 1 K. B. 515, 70 L. J. K. B. 429; *Scott v. Rayment*, L. R. 7 Eq. 112.

United States. — *Hyer v. Richmond Traction Co.*, 168 U. S. 471, modifying 42 U. S. App. 522; *Smith v. Washington Gas Light Co.*, 154 U. S. 559; *Union Pac. R. Co. v. Chicago, etc., R. Co.*, 163 U. S. 564; *Lacombe v. Forstall*, 123 U. S. 562; *Buzard v. Houston*, 119 U. S. 347; *Raton Water Works Co. v. Raton*, 174 U. S. 360; *Fallon v. Missouri, etc., R. Co.*, 1 Dill. (U. S.) 125; *Roundtree v. McLain*, *Hempst. (U. S.)* 245; *McNamara v. Home Land, etc., Co.*, 105 Fed. Rep. 202; *Willson v. Winchester, etc., R. Co.*, (C. C. A.) 99 Fed. Rep. 642; *Strang v. Richmond, etc., R. Co.*, 93 Fed. Rep. 71; *Oakford v. Hackley*, 92 Fed.

Rep. 368; *Thweatt v. Jones*, (C. C. A.) 87 Fed. Rep. 268; *American Box Mach. Co. v. Crosman*, 57 Fed. Rep. 1021; *Provisional Municipality v. Lehman*, (C. C. A.) 57 Fed. Rep. 324; *Rollins Invest. Co. v. George*, 48 Fed. Rep. 776; *Washburn, etc., Mfg. Co. v. Freeman Wire Co.*, 41 Fed. Rep. 410; *Summerlin v. Fronteriza Silver Min., etc., Co.*, 41 Fed. Rep. 249; *Brewster v. Tuthill Spring Co.*, 34 Fed. Rep. 769; *Memphis v. Brown*, 20 Wall. (U. S.) 289; *Rutland Marble Co. v. Ripley*, 10 Wall. (U. S.) 339.

Alabama. — *Electric Lighting Co. v. Mobile, etc., R. Co.*, 109 Ala. 190, 55 Am. St. Rep. 927; *Comer v. Bankhead*, 70 Ala. 496; *Bell v. Thompson*, 34 Ala. 633; *Andrews v. Andrews*, 28 Ala. 432; *Sims v. McEwen*, 27 Ala. 184.

California. — *Fleishman v. Woods*, 135 Cal. 256; *Senter v. Davis*, 38 Cal. 450; *Treasurer v. Commercial Coal Min. Co.*, 23 Cal. 390; *Duff v. Fisher*, 15 Cal. 375; *White v. Fratt*, 13 Cal. 521; *Johnson v. Rickett*, 5 Cal. 218.

Connecticut. — *Andrew v. Babcock*, 63 Conn. 109; *Hodges v. Kowing*, 58 Conn. 12; *Corbin v. Tracy*, 34 Conn. 325; *Cowles v. Whitman*, 10 Conn. 121, 25 Am. Dec. 60; *Bailey v. Strong*, 8 Conn. 278; *Sampson v. Hunt*, 1 Root (Conn.) 521.

Delaware. — *Satterthwait v. Marshall*, 4 Del. Ch. 337.

District of Columbia. — *Townsend v. Vanderwerker*, 20 D. C. 197.

Florida. — *Doggett v. Hart*, 5 Fla. 215, 58 Am. Dec. 464.

Georgia. — *Thompson v. Manly*, 16 Ga. 440; *Carolee v. Handelis*, 103 Ga. 299; *Orr v. Brown*, 5 Ga. 400.

Illinois. — *Canal Com'rs v. Sanitary Dist.*, 191 Ill. 326; *Anderson v. Olsen*, 188 Ill. 502; *Campbell v. Potter*, 147 Ill. 576; *Barton v. De Wolf*, 108 Ill. 195; *Rowell v. Covenant Mut. L. Assoc.*, 84 Ill. App. 304; *Potter v. Campbell*, 45 Ill. App. 174, affirmed 147 Ill. 576.

Indiana. — *Ikerd v. Beavers*, 106 Ind. 483; *Mather v. Simonton*, 73 Ind. 595; *Brown v. Shelby*, 4 Ind. App. 477; *Chamberlain v. Blue*, 6 Blackf. (Ind.) 491.

Iowa. — *Hull v. Hull*, 117 Iowa 63; *Burlington v. Burlington Water Co.*, 86 Iowa 266; *Richmond v. Dubuque, etc., R. Co.*, 33 Iowa 422.

Kansas. — See *Renz v. Drury*, 57 Kan. 84.

Kentucky. — *Smith v. Carney*, 1 Litt. (Ky.) 295.

that no action will lie for the specific performance of a contract to lend money on the debentures of a company, the proper remedy being an action for damages;¹ and where a deed is placed in escrow, the proper remedy of the vendee is not against the vendor for specific performance, but an action against the depository to obtain possession of the deed.² Nor will specific performance be decreed of a contract with a town where a levy is necessary to raise the requisite money, as the proper remedy is mandamus.³ In some cases, even where the contract in question relates to real estate, specific performance has been denied where an action for damages would be clearly adequate.⁴ But it has been held on the other hand that specific performance of contracts relating to lands will be enforced irrespective of the adequacy of the remedy at law.⁵

b. WHERE DAMAGES SOLE RELIEF SOUGHT. — So where damages are the sole relief sought, or the contract is merely to pay or advance money, specific

Louisiana. — *Caperton v. Forrey*, 49 La. Ann. 872; *Mirandona v. Burg*, 49 La. Ann. 656; *New Orleans v. New Orleans, etc.*, R. Co., 44 La. Ann. 64, *construing* Rev. Civ. Code, arts. 1926, 1927.

Maine. — *Goding v. Bangor, etc.*, R. Co., 94 Me. 542; *Bennett v. Dyer*, 89 Me. 17; *Gove v. Biddeford*, 85 Me. 393; *Porter v. Frenchman's Bay, etc., Land, etc.*, Co., 84 Me. 195.

Maryland. — *Equitable Gas Light Co. v. Baltimore Coal Tar, etc., Co.*, 63 Md. 285; *Cox v. Hill*, 6 Md. 274; *Wadsworth v. Manning*, 4 Md. 59; *Duval v. Myers*, 2 Md. Ch. 401; *Adair v. Winchester*, 7 Gill & J. (Md.) 114.

Massachusetts. — *New England Trust Co. v. Abbott*, 162 Mass. 148; *Worthington v. Waring*, 157 Mass. 425, 34 Am. St. Rep. 294; *Noyes v. Marsh*, 123 Mass. 286; *Somerby v. Buntin*, 118 Mass. 279, 19 Am. Rep. 459; *Jacobs v. Peterborough, etc.*, R. Co., 8 Cush. (Mass.) 223; *Gill v. Bicknell*, 2 Cush. (Mass.) 355; *Brooks v. Wheelock*, 11 Pick. (Mass.) 439; *Old Colony R. Corp. v. Evans*, 6 Gray (Mass.) 25, 66 Am. Dec. 394.

Michigan. — *Bonebright v. Pease*, 3 Mich. 318.

Minnesota. — *Northern Trust Co. v. Markell*, 61 Minn. 271; *Chicago, etc.*, R. Co. v. *Durant*, 44 Minn. 361; *Minneapolis Mill Co. v. Bassett*, 31 Minn. 390; *McClane v. White*, 5 Minn. 178.

Mississippi. — *Hoy v. Hansborough, Freem.* (Miss.) 533.

Missouri. — *Reed v. Reed*, 94 Mo. App. 590.

Nebraska. — *Gloe v. Chicago, etc.*, R. Co., (Neb. 1902) 91 N. W. Rep. 547.

New Hampshire. — *Eckstein v. Downing*, 64 N. H. 248, 10 Am. St. Rep. 404.

New Jersey. — *Armour v. Connolly*, (N. J. 1901) 49 Atl. Rep. 1117; *Madison Athletic Assoc. v. Brittin*, 60 N. J. Eq. 160; *Rothholz v. Schwartz*, 46 N. J. Eq. 477, 19 Am. St. Rep. 409; *Benwell v. Newark*, 55 N. J. Eq. 260; *Young Lock Nut Co. v. Brownley Mfg. Co.*, (N. J. 1896) 34 Atl. Rep. 947; *Church of Holy Communion v. Paterson Extension R. Co.*, 46 N. J. Eq. 372; *Blake v. Flatley*, 44 N. J. Eq. 228, 6 Am. St. Rep. 886; *Brown v. Brown*, 33 N. J. Eq. 650; *O'Connor v. Tyrrell*, 53 N. J. Eq. 15; *Isard v. Mays Landing Water-Power Co.*, 31 N. J. Eq. 511; *Bowne v. Ritter*, 26 N. J. Eq. 456; *Peeler v. Levy*, 26 N. J. Eq. 330; *Cutting v. Dana*, 25 N. J. Eq. 265; *Copper v. Wells*, 1 N. J. Eq. 10.

New York. — *Deen v. Milne*, 113 N. Y. 303; *Day v. Hunt*, 112 N. Y. 191; *Johnson v. Brooks*, 93 N. Y. 337; *Stilwell v. Swarthout*, 81 N. Y.

109; *Pennsylvania Coal Co. v. Delaware, etc., Canal Co.*, 31 N. Y. 91; *Clarke v. Rochester, etc.*, R. Co., 18 Barb. (N. Y.) 350; *Phillips v. Berger*, 8 Barb. (N. Y.) 527; *Enrich v. White*, (Supm. Ct. Spec. T.) 66 How. Pr. (N. Y.) 154; *Kempshall v. Stone*, 5 Johns. Ch. (N. Y.) 193; *Hatch v. Cobb*, 4 Johns. Ch. (N. Y.) 559; *Carter v. United Ins. Co.*, 1 Johns. Ch. (N. Y.) 463; *Phyfe v. Wardell*, 2 Edw. (N. Y.) 47; *Lochman v. Meehan*, 66 Hun (N. Y.) 633, 21 N. Y. Supp. 389; *Ludwig v. Bungart*, 48 N. Y. App. Div. 613, 26 Misc. (N. Y.) 247; *Morgenstern v. Burkhardt*, (Buffalo Super. Ct. Gen. T.) 9 Misc. (N. Y.) 417.

North Carolina. — *Paddock v. Davenport*, 107 N. Car. 710; *Barnes v. Barnes*, 65 N. Car. 261; *Murdoch v. Anderson*, 4 Jones Eq. (57 N. Car.) 77; *Lloyd v. Wheatly*, 2 Jones Eq. (55 N. Car.) 267; *Bryson v. Peak*, 8 Ired. Eq. (43 N. Car.) 310.

Ohio. — *Allison v. Luhrig Coal Co.*, 12 Ohio Cir. Dec. 504, 22 Ohio Cir. Ct. 489; *Glesenkamp v. Radel*, 10 Ohio Dec. 559, 8 Ohio N. P. 276; *Cooper v. Cooper*, 8 Ohio Dec. 35, 6 Ohio N. P. 99; *Mechanics', etc.*, Branch of State Bank v. *Debolt*, 1 Ohio St. 591.

Oregon. — *Johnson v. Wadsworth*, 24 Oregon 494.

Pennsylvania. — *Rigg v. Reading, etc.*, St. R. Co., 191 Pa. St. 298; *Smaltz's Appeal*, 99 Pa. St. 310; *Dech's Appeal*, 57 Pa. St. 467; *Nestel v. Knickerbocker L. Ins. Co.*, 12 Phila. (Pa.) 477, 34 Leg. Int. (Pa.) 240; *Dove v. Com. Title Ins., etc.*, Co., 6 Pa. Dist. 264; *Rommel v. Summit Branch Coal Co.*, 18 Pa. Super. Ct. 482.

South Carolina. — *Holley v. Anness*, 41 S. Car. 349; *McCarter v. Armstrong*, 32 S. Car. 203; *Rees v. Parish*, 1 McCord Eq. (S. Car.) 56.

Virginia. — *Langford v. Taylor*, 99 Va. 577; *Campbell v. Rust*, 85 Va. 653; *Moseley v. Boush*, 4 Rand. (Va.) 392.

Washington. — *Payne v. Still*, 10 Wash. 433. *West Virginia.* — *Hissam v. Parrish*, 41 W. Va. 686, 56 Am. St. Rep. 892.

1. *South African Territories v. Wallington*, (1898) A. C. 309, 67 L. J. Q. B. 470.

2. *Wolcott v. Johns*, 7 Colo. App. 360.

3. *Raton Waterworks Co. v. Raton*, 9 N. Mex. 70.

4. *Levy v. Hill*, 50 N. Y. App. Div. 294; *Meehan v. Owens*, 196 Pa. St. 69.

5. *Andrews v. Sullivan*, 7 Ill. 327, 43 Am. Dec. 53; *Hammond v. Foreman*, 48 S. Car. 175.

performance will not, as a rule, be decreed, as the remedy at law is adequate.¹ But a promise to make payment in some specified medium, as in gold or silver, has been held properly the subject of specific enforcement where the medium is of fluctuating value.²

Where an Action Is Brought to Obtain Legal Relief Only as the recovery of money, and the plaintiff upon the trial fails to establish a right to a recovery at law, the court cannot grant specific performance, although upon the evidence such an action might have been maintained.³

c. COMPLETENESS OF REMEDY AT LAW.—The remedy at law which defeats a suit in equity must, however, be full, adequate, and complete. If there is anything less than this equity has jurisdiction.⁴ If the legal remedy which the party may have will not put him in a situation as beneficial to him as if the agreement were specifically performed, relief will be afforded in equity.⁵

2. Insolvency.—In a few instances the right to specific performance has been maintained on the ground that a judgment at law would be inadequate by reason of the defendant's insolvency.⁶ In other cases, however, it has been held that the mere insolvency of a party standing alone is not sufficient to invoke the aid of a court of equity by means of specific performance.⁷ So, it has been held that equity, which will not, ordinarily, enforce a contract for the sale of personalty, will not depart from this rule merely on the ground of the insolvency of the defendant.⁸ Nor will a bill for specific performance lie on a creditor's claim for money alleged to be due on a contract against an insolvent, though the estate may have been brought within the jurisdiction of a court of equity.⁹ Other decisions seem to take a middle ground and hold that insolvency may be considered in connection with the other circumstances of the case.¹⁰

1. Where Damages Only Relief Asked—*England*.—See also *Crampton v. Varna R. Co.*, L. R. 7 Ch. 562; *Sichel v. Mosenthal*, 30 Beav. 371.

Connecticut.—*Story v. Norwich*, etc., R. Co., 24 Conn. 94; *Bailey v. Strong*, 8 Conn. 278; *Pitkin v. Pitkin*, 7 Conn. 307, 18 Am. Dec. 111.

Idaho.—*Hawkins v. Thurman*, 1 Idaho 598.

Illinois.—*Pierce v. Plumb*, 74 Ill. 326; *Doan v. Mauzey*, 33 Ill. 227.

Iowa.—*Richmond v. Dubuque*, etc., R. Co., 33 Iowa 422.

Massachusetts.—*Howe v. Nickerson*, 14 Allen (Mass.) 400; *Jones v. Boston Mill Corp.*, 4 Pick. (Mass.) 511, 16 Am. Dec. 358.

Mississippi.—*Taylor v. Reese*, 44 Miss. 93.

Missouri.—*Whittaker v. Summerville*, 83 Mo. App. 553.

New Jersey.—*Church of Holy Communion v. Patterson Extension R. Co.*, 46 N. J. Eq. 372.

New York.—*Bradford*, etc., R. Co. v. *New York*, etc., R. Co., 123 N. Y. 327; *Carter v. United Ins. Co.*, 1 Johns. Ch. (N. Y.) 463; *Phyfe v. Wardell*, 2 Edw. (N. Y.) 47, 5 Paige (N. Y.) 268.

South Carolina.—*Rees v. Parish*, 1 McCord Eq. (S. Car.) 56.

See also *Hicks v. Turck*, 72 Mich. 311.

2. Payment in Particular Medium.—*Hall v. Hiles*, 2 Bush (Ky.) 532; *Hord v. Miller*, 2 Duv. (Ky.) 103.

A Contrary Doctrine, however, seems to have been announced where the contract was merely for the payment of so many dollars in gold, the court observing that there was nothing to show that the parties regarded the contract as providing for the delivery of a commodity instead of the payment of money. *Howe v. Nickerson*, 14 Allen (Mass.) 400.

And it has also been held that a contract to pay a specified sum of money in gold and silver cannot be specifically enforced, because Congress has made the paper money of the government legal tender for all debts. *Wilson v. Morgan*, (N. Y. Super. Ct. Gen. T.) 1 Abb. Pr. N. S. (N. Y.) 174, 30 How. Pr. (N. Y.) 386. *Compare Carpenter v. Atherton*, (California Supm. Ct.) 28 How. Pr. (N. Y.) 303; *Luling v. Atlantic Mut. Ins. Co.*, (Supm. Ct. Spec. T.) 30 How. Pr. (N. Y.) 69.

3. Towle v. Jones, (N. Y. Super. Ct. Gen. T.) 19 Abb. Pr. (N. Y.) 449; *Cowenhoven v. Brooklyn*, 38 Barb. (N. Y.) 9.

4. Henderson v. Johns, 13 Colo. 280. And see *supra*, this section, *In General*.

5. Harnett v. Yeilding, 2 Sch. & Lef. 553; *Kelso v. Kelly*, 1 Daly (N. Y.) 419.

6. Insolvency of Defendant.—*McNamara v. Home Land*, etc., Co., 105 Fed. Rep. 202; *Clark v. Flint*, 22 Pick. (Mass.) 231, 33 Am. Dec. 733. And see *Doloret v. Rothschild*, 1 Sim. & St. 590; *Mechanics' Bank v. Seton*, 1 Pet. (U. S.) 305.

7. Strang v. Richmond, etc., R. Co., 93 Fed. Rep. 71; *Lasar v. Baldridge*, 32 Mo. App. 362; *Gillett v. Warren*, 10 N. Mex. 523.

8. McLaughlin v. Piatti, 27 Cal. 451. And see *Crawford v. Bradford*, 23 Fla. 404; *United New Jersey R., etc., Co. v. Haprock*, 28 N. J. Eq. 261; *Heilman v. Union Canal Co.*, 37 Pa. St. 100.

9. Columbia Casino Co. v. World's Columbian Exposition, 85 Ill. App. 369. And see *Pierce v. Plumb*, 74 Ill. 326; *Barton v. De Wolf*, 108 Ill. 195.

10. Lindsay v. Jackson, 2 Paige (N. Y.) 581; *Petrolia Mfg. Co. v. Jenkins*, 29 N. Y. App. Div. 403. And see *Chicago*, etc., R. Co. v. *Union*

3. Prevention of Fraud. — It has been held in general terms that the specific performance of a contract will always be decreed where a fraud would result if performance were denied.¹ It has been held that the vendor of property will be required to re-execute a deed where, without the purchaser's fault, the first deed has been accidentally lost or destroyed before it could be recorded,² or where he has obtained possession of it, after it has been once executed and delivered, and has destroyed it.³

4. Election Between Remedies. — Although an action for damages may not be adequate, the complaining party may, if he so elects, proceed at law for the breach instead of in equity for specific performance.⁴ Nor will the refusal to grant relief in equity preclude a recovery at law.⁵ And clearly the fact that one party to a contract might have recovered damages at law of the other for his nonperformance is no reason why the former should not have a decree for a specific performance.⁶

IV. REQUISITES FOR EQUITABLE INTERPOSITION — 1. In General. — The remedy of specific performance is based upon the existence of a contract between the parties to the suit or between those through whom they claim.⁷

2. Nature of Contract to Be Enforced — a. IN GENERAL. — In order that specific performance may be decreed there must, of course, be a contract between competent parties.⁸ Thus, specific performance of a contract to convey land will not be enforced, if satisfactory proof is made of the imbecility of the vendor.⁹ So also the specific performance of a contract executed by the party sought to be enforced while in such a state of intoxication as to be incapable of contracting will not be enforced,¹⁰ particularly where such state of

Pac. R. Co., 47 Fed. Rep. 15; *Parker v. Garrison*, 61 Ill. 250; *Clark v. Flint*, 22 Pick. (Mass.) 231, 33 Am. Dec. 733; *Avery v. Ryan*, 74 Wis. 591.

Vendee of Personalty Against Insolvent Vendor. — *Parker v. Garrison*, 61 Ill. 250.

1. To Prevent Fraud. — *Provisional Municipality v. Lehman*, (C. C. A.) 57 Fed. Rep. 324; *Studer v. Seyer*, 69 Ga. 125; *Cook v. Totten*, 49 W. Va. 177.

2. Lost Deeds. — *Cummings v. Coe*, 10 Cal. 529; *Conlin v. Ryan*, 47 Cal. 71; *Blight v. Banks*, 6 T. B. Mon. (Ky.) 192, 17 Am. Dec. 136; *Wade v. Greenwood*, 2 Rob. (Va.) 474, 40 Am. Dec. 759.

3. Tolar v. Tolar, 1 Dev. Eq. (16 N. Car.) 460, 18 Am. Dec. 598; *Tyson v. Harrington*, 6 Ired. Eq. (41 N. Car.) 329.

Where Delivery Doubtful. — A decree for the re-execution of a deed alleged to have been fraudulently destroyed was refused where the evidence did not show satisfactorily that the deed was ever delivered, or that the condition on which its delivery depended was ever performed. *Sterne v. Woods*, 11 Mo. 638.

An Innocent Purchaser of Land Having Paid the Full Price thereof, according to the terms of his purchase from one who claims full power and authority to make the sale, is entitled to a decree compelling a conveyance by the owner of the land, who was present at the sale, and did not then assert his claim to the land. *Stone v. Tyree*, 30 W. Va. 687. And see *Center v. Weed*, 138 N. Y. 532.

But a Purchaser to Whom the Identical Property Bargained for Was Delivered, though induced to purchase by means of fraudulent representations by the seller that the thing sold possessed qualities which it did not possess, cannot maintain an action for specific performance, and thus

compel the seller to deliver to him another article of like kind, owned by the latter, and in fact possessing the desired qualities, but which the plaintiff had never purchased. *Millirons v. Dillon*, 100 Ga. 656.

4. Election of Remedies. — *Amanda Gold Min., etc., Co. v. People's Min., etc., Co.*, 28 Colo. 251; *Hill v. Hobart*, 16 Me. 164; *Godfrey v. Dwinell*, 40 Me. 94; *Bryson v. Peak*, 8 Ired. Eq. (43 N. Car.) 310; *Rankin v. Hammond*, 25 Pa. Co. Ct. 45; *Long v. Colston*, 1 Hen. & M. (Va.) 111.

Election as Binding on Other Party. — It has been held erroneous to suppose, in the present connection, that after breach the vendee has an election to sue for damages at law or file a bill for specific performance, if the term "election" is used in the sense of the vendor's being bound by it. In other words, the vendor is not obliged to make compensation in damages, but may insist upon the vendee's receiving the very thing contracted for. *Bryson v. Peak*, 8 Ired. Eq. (43 N. Car.) 310.

5. Beck v. Allison, 56 N. Y. 366, 15 Am. Rep. 430; *Ballou v. Billings*, 136 Mass. 307.

6. Washburn v. Dewey, 17 Vt. 92.

7. Contract Requisite. — *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.*, 112 Ill. 384, 54 Am. Rep. 243.

8. Competent Parties. — *Gapen v. Gapen*, 41 W. Va. 422.

9. Reinicker v. Smith, 2 Har. & J. (Md.) 421.

10. Whitesides v. Greenlee, 2 Dev. Eq. (17 N. Car.) 152. And see *Brown v. Wheelock*, 75 Tex. 385; *Watson v. Doyle*, 130 Ill. 415; *Rodman v. Zillee*, 1 N. J. Eq. 320; *Byrne v. Long*, (Ky. 1891) 15 S. W. Rep. 778.

Specific performance of a contract of sale will not be refused on the ground that the purchaser was intoxicated at the time of the sale, unless it appear that such intoxication was pro-

intoxication was brought about by the other party with fraudulent intent.¹

6. MINDS MUST HAVE MET. — As it is elementary that there can be no contract unless the minds of the parties have met and mutually agreed, specific performance will be denied where this requisite is lacking.² Equity requires a clear mutual understanding and a positive assent on the part of each party.³ So where it appears from correspondence between the parties that the terms of sale were never in fact agreed upon, the remedy of specific performance will not be applied.⁴ An offer must be accepted in the terms and form submitted or there is no valid assent, such as will create a contract which may be specifically enforced,⁵ as where a particular proposition was made, but the one accepted differed as to the proportion of cash to be paid,⁶

Completeness. — Practically the same rule has found enunciation in other cases in the statement that in order that specific performance shall be decreed, there must be a complete contract, finally concluded and agreed upon.⁷

cured by the vendor, or that an undue advantage had been taken by him of the purchaser's condition. *Pittenger v. Pittenger*, 3 N. J. Eq. 156.

1. Whitesides v. Greenlee, 2 Dev. Eq. (17 N. Car.) 152.

Habitual Drunkenness — Sober Interval. — The mere fact that the contracting party was in the habit of getting drunk will not relieve him from a contract entered into when not intoxicated. *Watson v. Doyle*, 130 Ill. 415.

Subsequent Ratification. — And though entered into by one intoxicated, if it has been subsequently ratified by him, it is enforceable without regard to the amount of the consideration. *Mettert v. Hagan*, 18 Gratt. (Va.) 231.

2. Mutuality. — *Wenham v. Switzer*, (C. C. A.) 59 Fed. Rep. 942; *Clipson v. Villars*, 151 Ill. 165; *Krum v. Chamberlain*, 57 Neb. 220; *Brown v. Finney*, 53 Pa. St. 373.

When Equity Assists a Party in Obtaining His Right under a Contract it does so on the principle that the very contract, as assented to by the party alleged to be in default, is alone to be enforced. *Railey v. Bacon*, 26 Miss. 455.

3. Rushton v. Thompson, 35 Fed. Rep. 635; *Musgrove v. Hodges*, 46 Kan. 764; *Tedford v. Trimble*, 87 Mo. 226; *Rose v. Oliver*, 32 Oregon 447; *Cortelyou's Appeal*, 102 Pa. St. 576; *Spears v. Long*, 32 S. Car. 528. See *Varick v. Edwards*, Hoffm. (N. Y.) 382.

But One Who Signs a Contract Without Reading it may be bound by its terms. *Minneapolis, etc., R. Co. v. Cox*, 76 Iowa 306, 14 Am. St. Rep. 216.

Doubt as to Understanding of Contract. — Where there is a doubt as to whether both parties understood the agreement alike, specific performance will not be decreed in favor of either. *Coles v. Bowne*, 10 Paige (N. Y.) 526.

Preliminary Negotiations. — Arrangements and understandings between the parties which are no more than the preliminary negotiations for a contract will not be enforced. *Huddleston v. Eriscoe*, 11 Ves. Jr. 591; *Duff v. Hopkins*, 33 Fed. Rep. 599; *Carr v. Duval*, 14 Pet. (U. S.) 77; *Wristen v. Bowles*, 82 Cal. 84; *Los Angeles Immigration, etc., Assoc. v. Phillips*, 56 Cal. 539; *Pacific Rolling Mill Co. v. Riverside, etc., R. Co.*, 90 Cal. 627; *Canton Co. v. Northern Cent. R. Co.*, 21 Md. 383; *Wardell v. Williams*, 62 Mich. 50, 4 Am. St. Rep. 814; *Njms v. Vaughn*, 40 Mich. 356; *Domestic Tel., etc., Co. v. Metropolitan Telephone, etc., Co.*, 39 N. J. Eq. 160.

Assent of Parties Subsequently Acquiring Interests. — A contract between two parties who are about to form a corporation, in regard to the management of the business of the corporation, which is not assented to by other persons who subsequently acquire interests in such corporation, will not be specifically enforced. *Tascher, etc., Novelty Mfg. Co. v. Timerman*, 67 Ill. App. 568.

4. Clipson v. Villars, 151 Ill. 165.

A contract contained in a letter, written and signed by A, cannot be enforced against B without clear and convincing proof that, though signed in the name of A, it was in fact the letter of B, and proof that B consented that A might sign the letter for himself alone is not sufficient to bind B to the performance of its terms. *Bickett v. White*, 27 Ohio St. 405.

5. Bentz v. Eubanks, 41 Kan. 28; *Weaver v. Bun*, 71 W. Va. 736. See *Erickson v. Wallace*, 45 Kan. 430; *Schieds v. Horbach*, 30 Neb. 536.

An Acceptance After the Time Named in the offer is of no avail. *Childs v. Gillespie*, 147 Pa. St. 173. See also *Lasher v. Gardner*, 124 Ill. 441.

Unaccepted Propositions. — A naked proposition or expression of willingness to relinquish to a designated extent a claim to land, without an engagement coupled with an acceptance on the other side, cannot be considered as the subject of specific execution. *Parker v. Stephens*, 3 A. K. Marsh. (Ky.) 197. See *Barker v. Critzer*, 35 Kan. 459; *Dresel v. Jordan*, 104 Mass. 407.

6. Kennedy v. Parmelee, (Neb. 1902) 91 N. W. Rep. 490.

7. Complete Contract — United States. — *Hockley v. Oakford*, (C. C. A.) 98 Fed. Rep. 781.

Alabama. — *Carlisle v. Carlisle*, 77 Ala. 339; *Derrick v. Monette*, 73 Ala. 75.

California. — *Los Angeles Immigration, etc., Assoc. v. Phillips*, 56 Cal. 539.

Florida. — *Southern L. Ins. Co. v. Cole*, 4 Fla. 359.

Idaho. — *Bear Track Min. Co. v. Clark*, (Idaho 1898) 54 Pac. Rep. 1007.

Indiana. — *Ikerd v. Beavers*, 106 Ind. 483; *Johnson v. Pontious*, 118 Ind. 270.

Kentucky. — *Wilcox v. Gould*, (Ky. 1900) 56 S. W. Rep. 526; *Madox v. M'Queen*, 3 A. K. Marsh. (Ky.) 400.

Maryland. — *Dixon v. Dixon*, 92 Md. 432.

Michigan. — *Hall v. Loomis*, 63 Mich. 709;

Haste and Inadvertence. — A contract which, because of the haste in which it was signed, does not express the intent of the parties executing it, will not be specifically enforced.¹

Question for Court. — It has been held, in an action for specific performance, that whether the facts shown constitute an assent to the contract, is a question of law for the court.²

c. LAWFULNESS — (1) *General Rule.* — It is a general rule appertaining to the subject that the contract, the specific performance of which is sought in equity, must be a lawful contract or specific performance will be denied.³ Nor will specific performance be decreed of an illegal act or that which a party has not lawful power to perform.⁴ Equity will not enforce specific performance of a void contract.⁵ And where the informality of an instrument is such that it would be absolutely invalid and of no effect at law, equity will not reform or enforce it.⁶ Likewise, an undelivered deed will not support an action for specific performance, being ineffectual for any purpose.⁷ While equity will supply a remedy where the law affords none, it will not create a right of action where none exists at law.⁸

Contracts in Contravention of Statute. — Specific performance will never be decreed of contracts in contravention of express statute.⁹ A court of equity, it has been held, has no more jurisdiction than a court of law to recognize and give effect to instruments inoperative for want of compliance with a condition made by statute a prerequisite to their validity.¹⁰ But where particular acts

Gates *v.* Gamble, 53 Mich. 181. And see Munro *v.* Edwards, 86 Mich. 91.

Missouri. — Taylor *v.* Von Schraeder, 107 Mo. 206.

New Jersey. — Banks *v.* Weaver, (N. J. 1901) 48 Atl. Rep. 515; Lane *v.* Calvary Church, 59 N. J. Eq. 409; Potts *v.* Whitehead, 20 N. J. Eq. 55; McKibbin *v.* Brown, 14 N. J. Eq. 13.

New York. — Kayser *v.* Arnold, 124 N. Y. 674; Smith *v.* Bradhurst, 31 N. Y. App. Div. 98. *Ohio.* — State *v.* Baum, 6 Ohio 383.

Pennsylvania. — Holthouse's Appeal, (Pa. 1888) 12 Atl. Rep. 340; Wistar's Appeal, 80 Pa. St. 484; Hammer *v.* McEldowney, 46 Pa. St. 334.

See also Craig *v.* Craig, 1 Bailey Eq. (S. Car.) 102; Callanan *v.* Chapin, 158 Mass. 113.

Where Deed Not Delivered. — Equity will not enforce a contract to convey real estate proved solely by a deed, when there has never been a legal delivery of the deed. Overman *v.* Kerr, 17 Iowa 485. And see McIntire *v.* Bowden, 61 Me. 153.

For Contracts Held Not Sufficiently Complete for Specific Performance, see Wenham *v.* Switzer, (C. C. A.) 59 Fed. Rep. 942; Johnson *v.* Plotner, 15 S. Dak. 154.

For Particular Circumstances Held to Constitute a Concluded Agreement Enforceable in Equity, see Plant *v.* Bourne, (1897) 2 Ch. 281.

1. Morganthau *v.* White, 1 Sweeny (N. Y.) 395.

2. McPherson *v.* Fargo, 10 S. Dak. 611.

3. **Lawful Contract Essential.** — Hackley *v.* Oakford, (C. C. A.) 98 Fed. Rep. 781; Lewis *v.* Walker, 1 Mo. App. Rep. 459.

Champerous Agreement. — A champertous agreement will not be enforced. Bowman *v.* Cunningham, 78 Ill. 48. See also Miller *v.* Newell, 20 S. Car. 137, 47 Am. Rep. 833; Sayles *v.* Tibbitts, 5 R. I. 79.

Conveyance in Fraud of Creditors. — Taylor *v.* Von Schraeder, 107 Mo. 206; Ford *v.* Lewis, 10 B. Mon. (Ky.) 127.

Since no one alleging his own fraud can have relief in equity, it is no defense to a suit by a vendee for specific performance that the sale was made to prevent the vendor's creditors from collecting their debts. Gentry *v.* Gentry, 87 Va. 478.

Unlawful Preferences. — A contract for the sale of the land of a deceased member of an insolvent partnership which would operate to convert partnership assets into individual assets, and thereby interfere with the proper course of administration, will not be specifically enforced in equity. Bagwell *v.* Bagwell, 72 Ga. 92.

4. Simons *v.* Bedell, 122 Cal. 341, 68 Am. St. Rep. 35; Sprague *v.* Rooney, 104 Mo. 349, *overruling* 82 Mo. 493, 52 Am. Rep. 383.

5. **Void Contract.** — Bogan *v.* Camp, 30 Ala. 276; Moses *v.* McClain, 82 Ala. 370; Jenkins *v.* Atkins, 1 Humph. (Tenn.) 294, 34 Am. Dec. 648.

6. Butler *v.* Buckingham, 5 Day (Conn.) 492, 5 Am. Dec. 174. *Compare* Dundas *v.* Biddle, 2 Pa. St. 160.

7. Comer *v.* Baldwin, 16 Minn. 172.

8. **Creating Rights of Action.** — Hoy *v.* Hansborough, Freem. (Miss.) 533; Day *v.* Hunt, 112 N. Y. 191.

9. Buettgenbach *v.* Gerbig, (Neb. 1902) 90 N. W. Rep. 654; Rochevot *v.* Rochevot, 74 N. Y. App. Div. 585.

10. **Noncompliance with Statute** — *California.* — Leonis *v.* Lazzarovich, 55 Cal. 52; Barrett *v.* Tewksbury, 9 Cal. 13.

Connecticut. — Butler *v.* Buckingham, 5 Day (Conn.) 492, 5 Am. Dec. 174; Dickinson *v.* Glenney, 27 Conn. 104.

Maine. — Lane *v.* McKeen, 15 Me. 304.

Maryland. — Gebb *v.* Rose, 40 Md. 387.

Massachusetts. — Jewett *v.* Davis, 10 Allen (Mass.) 68; Townsley *v.* Chapin, 12 Allen (Mass.) 478.

North Carolina. — White *v.* Holly, 91 N. Car. 67.

Ohio. — Carr *v.* Williams, 10 Ohio 305, 36

are merely prohibited by statute, and the parties are not *in pari delicto*, the party upon whom no penalty is imposed may, upon nonperformance, enforce his contract against his co-contractor.¹

Duress. — Where the contract in question has been obtained by duress, it will not, of course, be specifically enforced.²

Public Policy. — Nor will specific performance be decreed of a contract violative of public policy.³

Restraint of Trade or Competition. — Courts of equity will not enforce contracts invalid at law as in restraint of trade or competition.⁴

(2) *Question as to Action at Law.* — It has been said that if an action at law will not lie to recover damages for the breach of a particular contract, neither will equity specifically enforce it.⁵ But it is believed that the maxim that equity will not decree the specific performance of a contract upon which an action at law for damages will not lie, only means that the contract must be such as the law would have recognized if sued on in proper time and under

Am. Dec. 87; *Purcell v. Goshorn*, 17 Ohio 105, 49 Am. Dec. 448.

Wisconsin. — See *Dreutzer v. Lawrence*, 58 Wis. 594.

See also *Drury v. Foster*, 2 Wall. (U. S.) 24.

Insufficient Acknowledgment. — *Martin v. Dwelly*, 6 Wend. (N. Y.) 18, 21 Am. Dec. 245.

Deed by Feme Covert. — And a deed by a *feme covert*, which the statute says shall be acknowledged in a particular manner, to be valid, is, if unacknowledged, void in equity as well as at law. *Cebb v. Rose*, 40 Md. 387; *Johns v. Reardon*, 11 Md. 465; *Byer v. Etnyre*, 2 Gill (Md.) 151, 41 Am. Dec. 410; *Steffey v. Steffey*, 19 Md. 5; *Roseburgh v. Sterling*, 27 Pa. St. 292.

So with her contract to sell. *Jackson v. Torrence*, 83 Cal. 521; *Butler v. Buckingham*, 5 Day (Conn.) 492, 5 Am. Dec. 174.

1. *Bateman v. Robinson*, 12 Neb. 511; *Carkins v. Anderson*, 21 Neb. 364. And see *Jaques v. Golightly*, 2 W. Bl. 1073; *Browning v. Morris*, 2 Cowp. 790; *Williams v. Hedley*, 8 East 378; *Lamb v. Davenport*, 18 Wall. (U. S.) 314; *Gaines v. Molen*, 30 Fed. Rep. 27; *Southerland v. Whittington*, 46 Ark. 285; *Worcester v. Eaton*, 11 Mass. 368; *White v. Bank*, 22 Pick. (Mass.) 181; *Lowell v. Boston, etc., R. Corp.*, 23 Pick. (Mass.) 24, 34 Am. Dec. 33; *Blanchard v. Jamison*, 14 Neb. 246; *Schermerhorn v. Talman*, 14 N. Y. 93.

2. **Duress.** — *Swint v. Carr*, 76 Ga. 322, 2 Am. St. Rep. 44; *Rau v. Von Zedlitz*, 132 Mass. 164.

3. **Contracts Against Public Policy.** — *United States.* — *Gaines v. Molen*, 30 Fed. Rep. 27.

Alabama. — *Smith v. Johnson*, 37 Ala. 633, 1 Ala. Sel. Cas. 562; *Evans v. Kittrell*, 33 Ala. 449; *Dial v. Hair*, 18 Ala. 798, 54 Am. Dec. 179; *Saltmarsh v. Beene*, 4 Port. (Ala.) 283, 30 Am. Dec. 525.

California. — *Kreamer v. Earl*, 91 Cal. 112. *Georgia.* — *Swint v. Carr*, 76 Ga. 322, 2 Am. St. Rep. 44.

Illinois. — *South Chicago City R. Co. v. Calumet Electric St. R. Co.*, 171 Ill. 391; *Bowman v. Cunningham*, 78 Ill. 48.

Indiana. — *Dumont v. Dufore*, 27 Ind. 263.

Kansas. — *Brake v. Ballou*, 19 Kan. 397.

Kentucky. — *McDermid v. McCastland*, Hard. (Ky.) 21.

Louisiana. — *Platt v. Maples*, 19 La. Ann. 459.

Michigan. — *Quirk v. Thomas*, 6 Mich. 76.

Missouri. — *Louthan v. Stillwell*, 73 Mo. 492.

New York. — *Pratt v. Adams*, 7 Paige (N. Y.) 615; *Fremont v. Stone*, 42 Barb. (N. Y.) 169.

Tennessee. — *Parks v. McKamy*, 3 Head (Tenn.) 297.

Washington. — *Reed v. Johnson*, 27 Wash. 42.

West Virginia. — *Ralphsnyder v. Shaw*, 45 W. Va. 680; *Dodson v. Swan*, 2 W. Va. 511, 98 Am. Dec. 787.

Wisconsin. — *Baum v. Baum*, 109 Wis. 47.

Contract to Secure Control of National Bank. — *Foll's Appeal*, 91 Pa. St. 434, 36 Am. Rep. 671.

Contracts Between Prospective Heirs or Devises. — *Mercier v. Mercier*, 50 Ga. 546, 15 Am. Rep. 694; *Brewer v. Church*, 4 Jones Eq. (57 N. Car.) 418.

So, as a *Cestui Que Trust* Cannot Dispose of His Interest in the Estate Devised in Trust for Him, a court of equity will not decree specific execution of an agreement of sale made by him. *Shankland's Appeal*, 47 Pa. St. 113.

Purchase by Trustee of Trust Property. — *Saltmarsh v. Beene*, 4 Port. (Ala.) 283, 30 Am. Dec. 525. And see *Millsaps v. Shotwell*, 76 Miss. 923.

Contract by Commissioner to Bid at His Sale. — *Wright v. Bruschke*, 62 Ill. App. 358. *Compare* *Pingree v. Coffin*, 12 Gray (Mass.) 288.

4. **Restraint of Trade.** — *Gray v. Oxnard Bros. Co.*, 59 Hun (N. Y.) 387; *Leonard v. Poole*, 55 N. Y. Super. Ct. 213; *Keeler v. Taylor*, 53 Pa. St. 467, 91 Am. Dec. 221; *Baggott v. Sawyer*, 25 S. Car. 405.

Stock Pooling Contracts. — *Moses v. Scott*, 84 Ala. 608.

5. *Kent v. Dean*, 128 Ala. 600. And see *Barry v. Coombe*, 1 Pet. (U. S.) 650; *Flint v. Brandon*, 8 Ves. Jr. 163; *Cannel v. Buckle*, 2 P. Wms. 243; *Hickman v. Grimes*, 1 A. K. Marsh. (Ky.) 86, 10 Am. Dec. 714; *Aston v. Robinson*, 49 Miss. 348.

No Right of Action at Law. — Equity will not enforce a purchase where the vendor cannot recover at law, except where the complainant shows a sufficient excuse for his failure, or that his forfeiture of his contract at law had been waived by the vendee. *Tevis v. Richardson*, 7 T. B. Mon. (Ky.) 654; *Allen v. Beal*, 3 A. K. Marsh. (Ky.) 554, 13 Am. Dec. 203.

proper circumstances,¹ and that, therefore, the mere fact that an action at law could not be maintained upon a contract is not a bar to specific performance, if free from objections which would generally prevent equitable relief.²

(3) *Ultra Vires Contracts*. — The general rule is that an executory contract of a corporation which is *ultra vires* will not be specifically enforced.³ And in an action against a municipal corporation, the specific performance of a contract will not be decreed unless the contract was one which the city was lawfully empowered to make.⁴

(4) *Contract of Agent in Excess of Authority* — (a) *In General*. — A contract entered into by an alleged agent, but in excess of his authority, will not, of course, be enforced against the principal.⁵ So where the husband of the owner of property assumes to contract with reference to it, without authority from his wife, and the contract is not subsequently ratified by the latter, it will not be specifically enforced.⁶

(b) *Agency of Tenant in Common*. — So also specific performance of a contract entered into without authority by a tenant in common, with reference to the joint property, will not be decreed as against his cotenants.⁷

(5) *Illegality or Invalidity as to Part*. — The fact that a contract is illegal in some of its provisions, as in restraint of trade, is no bar to the specific enforcement of such of its provisions as are not illegal.⁸ And though a contract to convey land may be void as to part, as the homestead of the grantor, specific performance of the residue may be required, where the homestead is separable from the other property involved.⁹ But a contract for the sale of land occupied as a homestead not executed by the wife is a nullity so far as the homestead is concerned, and the fact that the value of the property exceeds the statutory limit will not render the contract enforceable as to the residue, with compensation to the purchaser.¹⁰

(6) *Mere Fact of Lawfulness*. — But it does not of course follow that

1. *White v. Butcher*, 6 Jones Eq. (59 N. Car.) 231.

2. *Where Action at Law Not Maintainable*. — *England*. — *Lennon v. Napper*, 2 Sch. & Lef. 682. *Maine*. — *Getchell v. Jewett*, 4 Me. 350.

New York. — *Winne v. Winne*, 166 N. Y. 263; *Roberge v. Winne*, 144 N. Y. 709; *Sprague v. Cochran*, 144 N. Y. 104; *Smith v. Smith*, 125 N. Y. 224; *Perry v. Board of Missions*, 102 N. Y. 99; *Hale v. Omaha Nat. Bank*, 49 N. Y. 626; *Freeman v. Freeman*, 43 N. Y. 34; 3 Am. Rep. 657; *Husted v. Ingraham*, 75 N. Y. 251; *Chase v. Peck*, 21 N. Y. 581.

Illustrations. — This doctrine, it has been held, "is illustrated by cases of the transfer of possibility or expectancy of estates, assignments of things in action, contracts of married women, agreements invalid under the statute of frauds, agreements for the sale of land where the death of the vendor ensues before completion, agreements between a man and woman who afterwards marry, and verbal contracts which have been partially performed." *Martin, J.*, in *Winne v. Winne*, 166 N. Y. 271.

Contracts in Contemplation of Marriage. — Contracts made in contemplation of marriage may be enforced in equity, although incapable of enforcement at law, because of the doctrine of release or extinguishment by marriage. *Haymer v. Haymer*, 2 Vent. 343; *Holtham v. Ryland*, Nelson 205; *Acton v. Peirce*, 2 Vern. 480; *Cannel v. Buckle*, 2 P. Wms. 243; *Miller v. Goodwin*, 8 Gray (Mass.) 542.

3. See the title *ULTRA VIRES*.

4. *Logansport R. Co. v. Logansport*, 114 Fed.

Rep. 688. And see the titles *MUNICIPAL CORPORATIONS*, vol. 20, p. 1180; *ULTRA VIRES*.

A contract with a city which contemplated the unauthorized use of the power of eminent domain was also held unenforceable. *Driscoll v. New Haven*, 75 Conn. 92.

5. *Agency*. — *Jenkins v. Locke*, 3 App. Cas. (D. C.) 485; *Condon v. Osgood*, 97 Iowa 1; *Chappell v. Stewart*, 95 Md. 76; *Lawler v. Sloan*, 40 N. J. Eq. 489.

Where a Contract Was Made by an Agent in His Own Name, but in fact on behalf of an undisclosed principal, and there has been a performance on the part of such principal, accepted by the other contracting party, the principal will be entitled in equity to specific performance, notwithstanding the fact that the agent contracted in his own name. *St. John v. Griffith*, (Supm. Ct. Spec. T.) 2 Abb. Pr. (N. Y.) 198, 13 How. Pr. (N. Y.) 59.

6. *Hadfield v. Skelton*, 69 Wis. 460. And see *Carr v. Callaghan*, 3 Litt. (Ky.) 365.

7. *Smith v. Hogle*, 116 Iowa 645.

Where a Coparcener Signs His Cotenant's Name to a Contract to convey, and such cotenant repudiates the act, specific performance will be denied. *Jackson v. Torrence*, 83 Cal. 521; *Olson v. Lovell*, 91 Cal. 506.

8. *Partial Invalidity*. — *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 78 Am. St. Rep. 612. And see *Hawksley v. Outram*, (1892) 3 Ch. 359, 2 Reports 60.

9. *Engle v. White*, 104 Mich. 15.

10. *Hall v. Loomis*, 63 Mich. 709; *Phillips v. Stanch*, 20 Mich. 369.

because a contract is valid and enforceable at law specific performance will therefore be enforced,¹ or that performance will be decreed merely because there is no ground for rescission or cancellation.²

(7) *Statute of Limitations.* — In the absence of statutory exception,³ or some peculiar equity in the case,⁴ specific performance will not be decreed of a contract upon which the legal remedy is barred by the statute of limitations.⁵

d. CONSIDERATION — (1) *General Rule.* — It is well settled that equity will not decree the specific performance of a contract unless supported by a valuable consideration.⁶ Thus a promise to do a thing which the promisor is

1. *Semmes v. Worthington*, 38 Md. 325.

2. *Federal Oil Co. v. Western Oil Co.*, 112 Fed. Rep. 373.

3. Thus, the *Kentucky* statute declares that "the provision of this chapter [Gen. Stat., c. 71] shall not apply in the case of continuing and subsisting trusts, nor to an action by a vendee of real property in the possession thereof to obtain a conveyance." *Hampton v. Bailey*, (Ky. 1887) 5 S. W. Rep. 383.

4. *Wright v. Leclaire*, 3 Iowa 221; *Norman v. Bennett*, 32 W. Va. 614.

5. *Statute of Limitations.* — *Hovenden v. Annesley*, 2 Sch. & Lef. 617; *Beaubien v. Beaubien*, 23 How. (U. S.) 190; *Prater v. Sears*, 77 Ga. 28; *Horner v. McConnell*, 158 Ind. 280; *Johnson v. Hopkins*, 19 Iowa 49; *Smith v. Carney*, 1 Litt. (Ky.) 295; *Low v. Low*, 173 Mass. 580; *Peters v. Delaplaine*, 49 N. Y. 362.

6. *Question of Consideration* — *England.* — *Pulvertoft v. Pulvertoft*, 18 Ves. Jr. 84; *Ellison v. Ellison*, 6 Ves. Jr. 656; *Goring v. Nash*, 3 Atk. 186; *Knye v. Moore*, 1 Sim. & St. 61.

Alabama. — *Andrews v. Andrews*, 28 Ala. 432. *Arkansas.* — *Shields v. Trammell*, 19 Ark. 51.

Colorado. — *Winter v. Geobner*, 21 Colo. 279; *Ross v. Purse*, 17 Colo. 24.

Georgia. — *Wyche v. Greene*, 16 Ga. 49.

Idaho. — *Bear Track Min. Co. v. Clark*, (Idaho 1898) 54 Pac. Rep. 1007.

Illinois. — *Wyatt v. Mayfield*, 91 Ill. 577; *Fleming v. Carter*, 87 Ill. 565; *Stone v. Pratt*, 25 Ill. 25; *Webb v. Alton M. & F. Ins. Co.*, 10 Ill. 223.

Iowa. — *Holland v. Hensley*, 4 Iowa 222.

Kentucky. — *Northup v. Standifer*, (Ky. 1893) 23 S. W. Rep. 348; *Banks v. May*, 3 A. K. Marsh. (Ky.) 436; *Bright v. Bright*, 8 B. Mon. (Ky.) 194; *Mahan v. Mahan*, 7 B. Mon. (Ky.) 579; *M'Intire v. Hughes*, 4 Bibb (Ky.) 186; *Ormsby v. Hunton*, 3 Bibb (Ky.) 298; *Buford v. McKee*, 1 Dana (Ky.) 107.

Maryland. — *Coleman v. Applegarth*, 68 Md. 21, 6 Am. St. Rep. 417; *Snyder v. Jones*, 38 Md. 542; *Haines v. Haines*, 6 Md. 435; *Shepherd v. Bevin*, 9 Gill (Md.) 32; *Shepherd v. Shepherd*, 1 Md. Ch. 244; *Tiernan v. Poor*, 1 Gill & J. (Md.) 216, 19 Am. Dec. 225.

Massachusetts. — *Stone v. Hackett*, 12 Gray (Mass.) 227.

Mississippi. — *Vasser v. Vasser*, 23 Miss. 378; *Mercer v. Stark*, Walk. (Miss.) 451, 12 Am. Dec. 583.

Missouri. — *Shinkle v. Vickery*, 156 Mo. 1; *Taylor v. Von Schraeder*, 107 Mo. 206; *Bosley v. Bosley*, 85 Mo. App. 424.

Nevada. — *Schroeder v. Gemeinder*, 10 Nev. 355.

New York. — *Hermann v. Passmore*, 72 Hun (N. Y.) 526; *Burling v. King*, 66 Barb. (N. Y.)

633; *Minturn v. Seymour*, 4 Johns. Ch. (N. Y.) 497; *Acker v. Phoenix*, 4 Paige (N. Y.) 305; *Woodcock v. Bennett*, 1 Cow. (N. Y.) 733, 13 Am. Dec. 568. See *Stokes v. Stokes*, 148 N. Y. 708. And see *Spencer v. De Witt C. Hay Library Assoc.*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 608.

North Carolina. — See *Woodcock v. Merri- mon*, 122 N. Car. 731.

Pennsylvania. — *Heath's Appeal*, 100 Pa. St. 1; *Lennig's Estate*, 6 Pa. Dist. 249; *Dennison v. Goehring*, 7 Pa. St. 175, 47 Am. Dec. 505.

South Carolina. — *Cabeen v. Gordon*, 1 Hill Eq. (S. Car.) 51.

Tennessee. — *McCampbell v. Farnsworth*, 3 Coldw. (Tenn.) 317.

Texas. — *Williams v. Graves*, 7 Tex. Civ. App. 356.

Virginia. — *Graybill v. Brugh*, 89 Va. 895, 37 Am. St. Rep. 894; *Halsey v. Peters*, 79 Va. 60; *Darlington v. M'Coole*, 1 Leigh (Va.) 36.

Wisconsin. — *Hanson v. Michelson*, 19 Wis. 498.

A judgment debtor's land, having been sold under execution, was purchased by the judgment creditor for less than the amount of the judgment. Afterwards it was agreed between the debtor and the creditor that the debtor should pay the creditor a certain sum, which was less than the amount of the judgment, and that the creditor should reconvey the land purchased by him at the execution sale. It was held that this was such a contract as a court of equity would specifically enforce. *Farmer v. Sellers*, 127 Ala. 345.

Mortgage Where No Debt. — Specific performance of a defective mortgage will not be decreed where the evidence shows that the mortgage debt had been paid. *Roney v. Moss*, 74 Ala. 390.

Statement of Consideration in Contract. — In a contract, the specific performance of which is sought, the statement of the consideration is sufficient if a way be clearly pointed out for determining the same, even though the precise character or amount thereof be left unexpressed. *Ross v. Purse*, 17 Colo. 24.

Antecedent Debt of Husband. — Where a married woman attempts to convey and warrant land as to which she has a mere expectancy, her deed is no more than an executory contract which requires a valuable consideration to support it in equity, and a precedent debt of the husband does not constitute such consideration. *Bayler v. Com.*, 40 Pa. St. 37, 80 Am. Dec. 551.

Where Void Contract the Consideration. — *Butman v. Porter*, 100 Mass. 337; *Williams v. Graves*, 7 Tex. Civ. App. 356. And see *Tarbell v. Tarbell*, 10 Allen (Mass.) 278.

already legally bound to do is not a sufficient consideration for a decree of specific performance.¹

The Compromise of a Controversy will, in general, be held a sufficient consideration for specific performance, for law and equity alike favor compromises.²

Act Involving Trouble or Expense. — So also, the performing of some act involving trouble and expense may constitute a sufficient consideration upon which to base a claim for specific performance.³

Mere Fact of Valuable Consideration. — But the mere fact that a contract is supported by a valuable consideration is not sufficient to warrant a decree of specific performance if the contract is not fair and just in all its parts.⁴

Natural Love and Affection. — Mere natural love and affection will not support an executory contract so as to warrant a decree for specific performance.⁵

Marriage is a valuable consideration; and a contract to make a settlement of property to be acquired, made before marriage, in consideration of it, will be enforced in equity.⁶

When Payment of Consideration Denied. — When the payment of the consideration of a contract is denied, specific performance should not be decreed without proof of payment or an offer to pay.⁷

(2) *Gratuitous Undertakings — Voluntary Agreements* — (a) **In General.** — Equity will not specifically enforce gratuitous undertakings or voluntary agreements,⁸ unless a consideration has been supplied by the acts or conduct of the grantee or donee acting under and upon the faith of the contract, as where possession of land has been given under such agreement upon a meritorious consideration, and valuable improvements made on the faith thereof.⁹ So also where a party has accepted an option according to its terms, and acted upon it, he will, in general, be entitled to a decree of specific performance.¹⁰

(b) **Executed Contracts.** — It is a general rule that equity will not aid one volunteer against another, nor enforce a voluntary contract; but if a voluntary contract has been actually executed, then a court of equity will enforce all the rights growing out of the contract.¹¹ *Bona fide* execution of the consideration agreed upon entitles the one who has so fulfilled his part of the agreement to a decree against the other.¹²

(3) *Inadequacy of Consideration* — (a) **General Rule.** — It is well settled, in the

Agreement for Smaller Sum than Debt, Before Maturity. — *Chicora Fertilizer Co. v. Dunan*, 91 Md. 144.

1. *Dunckel v. Dunckel*, 56 Hun (N. Y.) 25; *Keffer v. Grayson*, 76 Va. 517, 44 Am. Rep. 171.

Payment of Subsisting Debt. — *Smith v. Phillips*, 77 Va. 548.

2. **Compromise.** — *Central Trust Co. v. Wabash, etc., R. Co.*, 29 Fed. Rep. 554; *Gaines v. Molen*, 30 Fed. Rep. 27; *Leach v. Fobes*, 11 Gray (Mass.) 506, 71 Am. Dec. 732; *Weed v. Terry, Walk.* (Mich.) 501, 2 Dougl. (Mich.) 344, 45 Am. Dec. 257.

3. **Trouble and Expense.** — *Law v. Henry*, 39 Ind. 414; *Lafollett v. Kyle*, 51 Ind. 446.

An Agreement to Pay Expenses of Litigation in an action to set aside a deed, upon the defendant's undertaking to convey certain land and pay a specific sum in money if the deed is set aside, entitles the plaintiff upon performance and happening of the conditions to a decree for specific performance. *Dewey v. Life*, 60 Iowa 361. And see *Weaver's Appeal*, 115 Pa. St. 59.

For Other Cases in which the circumstances were held to constitute a valuable and sufficient consideration for specific performance, see *Haydon v. Haydon*, (Ky. 1894) 27 S. W. Rep. 975; *Healy v. Healy*, 167 N. Y. 572; *Heath's Appeal*, 100 Pa. St. 1.

4. *Moon v. Crowder*, 72 Ala. 79.

5. **Natural Love and Affection.** — *Snyder v. Jones*, 38 Md. 542; *Dugan v. Gittings*, 3 Gill (Md.) 156, 43 Am. Dec. 306; *Pennington v. Gittings*, 2 Gill & J. (Md.) 217; *Keffer v. Grayson*, 76 Va. 517, 44 Am. Rep. 171.

6. **Marriage.** — *Gevers v. Wright*, 18 N. J. Eq. 330. And see generally the title *CONSIDERATION*, vol. 6, p. 724 *et seq.*

7. *Logan v. M'Chord*, 2 A. K. Marsh. (Ky.) 224.

8. **Undertaking for Payment of Husband's Debts.** — *White's Appeal*, 36 Pa. St. 134.

A Voluntary Agreement to Provide for a Relative will not be enforced by a court of equity. *Cotton v. Graham*, 84 Ky. 672.

9. *Studer v. Seyer*, 69 Ga. 125; *Hagar v. Hagar*, 71 Mo. 610. See also *Gunn v. McCauley*, 32 Ark. 97.

10. See *infra*, this subdivision, *Options*.

11. **Where Contract Executed.** — *Wyche v. Greene*, 16 Ga. 49; *Read v. Long*, 4 Yerg. (Tenn.) 68.

12. *Whitworth v. Harris*, 40 Miss. 483; *Lanning v. Cole*, 4 N. J. Eq. 229; *Hulmes v. Thorpe*, 5 N. J. Eq. 415; *Traphagen v. Traphagen*, 40 Barb. (N. Y.) 537; *Williston v. Williston*, 41 Barb. (N. Y.) 635.

absence of a statute to the contrary, that mere inadequacy of consideration, or a difference in value between the consideration paid and the thing contracted for, will not defeat a decree of specific performance.¹ But though inadequacy of consideration, standing alone, will not prevent the enforcement of a contract, it is a circumstance which, with others, will contribute to influence a court of equity to withhold its interposition.²

(b) **Inadequacy at Time When Contract Made.** — In passing upon the question of adequacy of consideration as affecting the right to specific performance, only the adequacy of the consideration at the time when the contract was entered into is to be regarded.³

(c) **Inadequacy Coupled with Fraud or Unfairness.** — While, as has been seen, inadequacy of consideration alone is not sufficient to defeat a decree for specific performance, if coupled with such inadequacy there is any element of fraud or unfairness, or if any undue advantage has been taken by one party of the other, a court of equity will invariably withhold its relief,⁴ and likewise where

1. Inadequacy of Consideration — England. — *Burrowes v. Lock*, 10 Ves. Jr. 470; *Adams v. Weare*, 1 Bro. C. C. 567; *Collier v. Brown*, 1 Cox Ch. 428; *Coles v. Trecothick*, 9 Ves. Jr. 246; *Emery v. Wase*, 8 Ves. Jr. 518.

United States. — *Union Pac. R. Co. v. Chicago, etc., R. Co.*, (C. C. A.) 51 Fed. Rep. 309; *Waterman v. Waterman*, 27 Fed. Rep. 827; *Erwin v. Parham*, 12 How. (U. S.) 197; *Cathcart v. Robinson*, 5 Pet. (U. S.) 264; *Garnett v. Macon*, 2 Brock. (U. S.) 185.

Alabama. — *Goodlett v. Hansell*, 66 Ala. 151; *Gentry v. Rogers*, 40 Ala. 442.

Illinois. — *Watson v. Doyle*, 130 Ill. 415; *Guyer v. Warren*, 175 Ill. 328.

Iowa. — *Townsend v. Blanchard*, 117 Iowa 36; *Ottumwa, etc., R. Co. v. McWilliams*, 71 Iowa 164; *Casady v. Scallen*, 15 Iowa 93.

Kentucky. — *January v. Martin*, 1 Bibb (Ky.) 586; *Beard v. Campbell*, 2 A. K. Marsh. (Ky.) 125, 12 Am. Dec. 362.

Maryland. — *Shepherd v. Bevin*, 9 Gill (Md.) 32.

Massachusetts. — *Lee v. Kirby*, 104 Mass. 420; *Leach v. Fobes*, 11 Gray (Mass.) 506, 71 Am. Dec. 732; *Park v. Johnson*, 4 Allen (Mass.) 259.

Michigan. — *Chambers v. Livermore*, 15 Mich. 381; *Hunt v. Thorn*, 2 Mich. 213; *Burtch v. Hogge*, Harr. (Mich.) 31.

Missouri. — *Bean v. Valle*, 2 Mo. 126; *Harrison v. Town*, 17 Mo. 237.

New Jersey. — *Madison Athletic Assoc. v. Brittin*, 60 N. J. Eq. 160; *Ketcham v. Owen*, 55 N. J. Eq. 344; *Shaddle v. Disborough*, 30 N. J. Eq. 370; *Ready v. Noakes*, 29 N. J. Eq. 497; *Chubb v. Peckham*, 13 N. J. Eq. 207; *Rodman v. Zilley*, 1 N. J. Eq. 320. And see *Goldstein v. Curtis*, 63 N. J. Eq. 454.

New York. — *Seymour v. Delancey*, 6 Johns. Ch. (N. Y.) 222, 3 Cow. (N. Y.) 445, 15 Am. Dec. 270; *Viele v. Troy, etc., R. Co.*, 21 Barb. (N. Y.) 381; *Northrup v. Gibbs*, (Supm. Ct. Gen. T.) 1 N. Y. Supp. 465.

North Carolina. — *White v. Thompson*, 1 Dev. & B. Eq. (21 N. Car.) 493.

South Carolina. — *Butler v. Haskell*, 4 Desaus. (S. Car.) 651; *Bunch v. Hurst*, 3 Desaus. (S. Car.) 273; *Fripp v. Frupp*, Rice Eq. (S. Car.) 84; *Sarter v. Gordon*, 2 Hill Eq. (S. Car.) 121; *Gasque v. Small*, 2 Strobb. Eq. (S. Car.) 72.

Tennessee. — *White v. Flora*, 2 Overt.

(Tenn.) 430; *Russell v. Stinson*, 3 Hayw. (Tenn.) 1.

Texas. — *Curlin v. Hendricks*, 35 Tex. 225.

Utah. — *Brinton v. Van Cott*, 8 Utah 480.

Wisconsin. — *Peterson v. Chase*, 115 Wis. 239.

As a general rule it has been said the parties themselves should be the sole judges of the value of the benefits to be derived under the contract. *South, etc., Alabama R. Co. v. Highland Ave., etc., R. Co.*, 98 Ala. 400, 39 Am. St. Rep. 74.

2. Cathcart v. Robinson, 5 Pet. (U. S.) 264; *Powers v. Hale*, 25 N. H. 145.

Proper for Consideration of Court. — *Cole v. Cole*, 106 Ill. 482.

3. Morrill v. Everson, 77 Cal. 114.

4. Inadequacy Together with Fraud — England. — *Peacock v. Evans*, 16 Ves. Jr. 512; *Gowland v. De Faria*, 17 Ves. Jr. 20; *Day v. Newman*, 2 Cox Ch. 77; *Kekewich v. Manning*, 1 DeG. M. & G. 188; *Hervey v. Audland*, 14 Sim. 531.

Illinois. — *Watson v. Doyle*, 130 Ill. 415; *Fish v. Leser*, 69 Ill. 394.

Indiana. — *Kirkman v. Kenyon*, 17 Ind. 607; *McCormick v. Malin*, 5 Blackf. (Ind.) 509.

Mississippi. — See *Clement v. Reid*, 9 Smed. & M. (Miss.) 535.

New Hampshire. — *Eaton v. Eaton*, 64 N. H. 493.

New York. — *Viele v. Troy, etc., R. Co.*, 21 Barb. (N. Y.) 381; *Seymour v. Delancey*, 6 Johns. Ch. (N. Y.) 222; *Woodcock v. Bennet*, 1 Cow. (N. Y.) 711, 13 Am. Dec. 568; *Varick v. Edwards*, Hoffm. (N. Y.) 382.

Pennsylvania. — *Graham v. Pancoast*, 30 Pa. St. 89; *Campbell v. Spencer*, 2 Binn. (Pa.) 129; *Henderson v. Hays*, 2 Watts (Pa.) 148.

South Carolina. — *Clitherall v. Ogilvie*, 1 Desaus. (S. Car.) 250; *Gasque v. Small*, 2 Strobb. Eq. (S. Car.) 72.

Texas. — *Brown v. Wheelock*, 75 Tex. 385; *Short v. Price*, 17 Tex. 403.

Virginia. — *Grizzle v. Sutherland*, 88 Va. 584; *Hale v. Wilkinson*, 21 Gratt. (Va.) 75.

Wisconsin. — *Smith v. Wood*, 12 Wis. 383.

The Court May Examine into the Consideration, its fairness and equity, and all the circumstances to be connected with it, and if anything inequitable appears it will not be enforced. *Rodman v. Zilley*, 1 N. J. Eq. 320.

the inadequacy itself is so gross as to create a presumption of fraud or unfairness, or to constitute an unconscionable contract.¹ And it should be observed in this connection that the court may refuse to enforce a contract on the ground of inadequacy of consideration and inequality, although sufficient ground for a rescission be not shown.²

(d) *Rule by Statute.* — By statute in *California* it is provided that specific performance of a contract shall not be decreed unless the party sought to be enforced has received an adequate consideration for the contract.³ But this has been held to mean only a consideration which is fair under all the circumstances, and not "the highest possible price."⁴

(4) *Failure of Consideration.* — Where there has been a failure of consideration specific performance of an executory contract will not, in general, be decreed.⁵

(5) *Illegal Considerations.* — A contract based upon an illegal consideration will not be specifically enforced.⁶

(6) *Contracts under Seal.* — It has been held that where the contract in question is under seal, it will be regarded as importing a sufficient consideration in an action for specific performance.⁷ But undoubtedly a court of equity will go behind the seal and inquire into the consideration,⁸ especially, it has been held, in a state where a statute provides that the presence or absence of a seal shall not in any manner affect the force, validity, character, or construction of a contract.⁹

e. *MUTUALITY* — (1) *General Rule.* — It has been said that a contract, in order to be specifically enforceable in equity, should be mutual and binding on both parties alike, both as to obligation and remedy.¹⁰ So it has been

Fraud as Waiver of Right to Set Up Inadequacy. — Where the vendor, under a contract for the sale of land, accepts the purchase price agreed to be paid therefor, and delivers a deed in which a portion of the land is fraudulently omitted, though supposed by the vendee to include the whole, he waives his right to object to a specific performance of the contract on the ground of the inadequacy of the consideration. *Nicholson v. Tarpey*, 70 Cal. 608.

1. **Gross Inadequacy** — *England.* — *Coles v. Trecothick*, 9 Ves. Jr. 246; *Abbott v. Swother*, 4 DeG. & Sm. 448; *Collier v. Brown*, 1 Cox Ch. 428; *Day v. Newman*, cited in *Mortlock v. Buller*, 10 Ves. Jr. 300.

California. — *Prince v. Lamb*, 128 Cal. 120. See *Newman v. Freitas*, 129 Cal. 283.

Indiana. — *Benton v. Shreeve*, 4 Ind. 66; *Brown v. Budd*, 2 Ind. 442; *Modisett v. Johnson*, 2 Blackf. (Ind.) 431.

Louisiana. — *Buford v. Collins*, 41 La. Ann. 642.

Massachusetts. — *Lee v. Kirby*, 104 Mass. 420.

Missouri. — *Harrison v. Town*, 17 Mo. 237.

New York. — *Margraf v. Muir*, 57 N. Y. 155; *Westervelt v. Matheson*, Hoffm. (N. Y.) 37.

Oklahoma. — *Ferguson v. Blackwell*, 8 Okla. 489.

South Carolina. — *Sarter v. Gordon*, 2 Hill Eq. (S. Car.) 121.

Virginia. — *White v. McGannon*, 29 Gratt. (Va.) 511.

West Virginia. — *Conaway v. Sweeney*, 24 W. Va. 643.

Wisconsin. — *Conrad v. Schwamb*, 53 Wis. 372.

Affirmance of Contract with Full Knowledge of Facts. — A court of equity will not refuse to

compel the execution of a contract on the ground of inadequacy of price, where the vendor, after making the contract, and with full knowledge of the facts, refused to rescind and retained a portion of the purchase money, *Galloway v. Barr*, 12 Ohio 354; or when the vendor has, after the contract, declared himself satisfied, *Woodruff v. Hargrave*, *Wright (Ohio)* 555.

2. *Rodman v. Zijley*, 1 N. J. Eq. 320; *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 1, 7 Am. Dec. 513. See *Mortlock v. Buller*, 10 Ves. Jr. 292.

3. **California Statute.** — *Stiles v. Cain*, 134 Cal. 170; *Prince v. Lamb*, 128 Cal. 120; *Windsor v. Miner*, 124 Cal. 492; *Ward v. Yorba*, 123 Cal. 447; *Morrill v. Everson*, 77 Cal. 117.

4. *Morrill v. Everson*, 77 Cal. 115.

5. **Failure of Consideration.** — *Deaver v. Parker*, 2 Ired. Eq. (37 N. Car.) 40. See *Davis v. Bowker*, 1 Nev. 487.

6. **Illegal Consideration.** — *Kennedy v. Hazleton*, 33 Fed. Rep. 293; *Paton v. Stewart*, 78 Ill. 481.

7. **Contract under Seal.** — *Guyer v. Warrep*, 175 Ill. 328; *Lyle v. Addicks*, 62 N. J. Eq. 123.

8. *Crandall v. Willig*, 166 Ill. 233; *Bosley v. Bosley*, 85 Mo. App. 424.

9. *Bosley v. Bosley*, 85 Mo. App. 424.

10. **Mutuality** — *England.* — *Lawrenson v. Butler*, 1 Sch. & Lef. 13; *Adderley v. Dixon*, 1 Sim. & St. 610.

United States. — *Rutland Marble Co. v. Ripley*, 10 Wall. (U. S.) 339; *Tufts v. Tufts*, 3 Woodb. & M. (U. S.) 472; *Bronson v. Cahill*, 4 McLean (U. S.) 21; *Strang v. Richmond*, etc., R. Co., 93 Fed. Rep. 71; *Norris v. Fox*, 45 Fed. Rep. 406; *Duff v. Hopkins*, 33 Fed. Rep. 599; *Pullman Palace Car Co. v. Texas*, etc., R. Co., 11 Fed. Rep. 625.

Alabama. — *Chadwick v. Chadwick*, 121 Ala.

intimated that a negative covenant in a contract of hiring will not be enforced where, if the court had the power, it would not enforce an affirmative covenant.¹ But a contract does not lack mutuality preventing its enforcement in equity where the same covenant which required one of the parties to purchase a certain commodity also impliedly required the other to furnish it.²

Waiver of Want of Mutuality. — In an action on a contract which is originally binding on the one and not on the other, it has been held that the latter may waive the want of mutuality.³

(2) *Contracts Performed on One Side.* — The better doctrine is that where the party seeking performance has fully performed on his side, a decree will

580; *Moses v. McClain*, 82 Ala. 370; *Wilks v. Georgia Pac. R. Co.*, 79 Ala. 180; *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498, 3 Am. St. Rep. 758.

California. — *Stanton v. Singleton*, 126 Cal. 657; *Calanchini v. Branstetter*, 84 Cal. 249; *Anson v. Townsend*, 73 Cal. 415; *Cooper v. Pena*, 21 Cal. 403.

District of Columbia. — *Lipscomb v. Watrous*, 3 App. Cas. (D. C.) 1.

Georgia. — *Black v. Maddox*, 104 Ga. 157; *Blalock v. Waggoner*, 82 Ga. 122; *Jacksens v. Nicolson*, 70 Ga. 198; *Peacock v. Deweese*, 73 Ga. 570; *Smith v. Smith*, 36 Ga. 184, 91 Am. Dec. 761.

Illinois. — *Lasher v. Gardner*, 124 Ill. 441; *Wright v. Brusckhe*, 62 Ill. App. 358; *Jackson v. Conlin*, 50 Ill. App. 538.

Indiana. — *Ikerd v. Beavers*, 106 Ind. 485.

Iowa. — *Olive v. Dougherty*, 3 Greene (Iowa) 371.

Kentucky. — *Stembridge v. Stembridge*, 87 Ky. 91; *Simon v. Wildt*, 84 Ky. 157; *Boucher v. Van Buskirk*, 2 A. K. Marsh. (Ky.) 345.

Maryland. — *Ryan v. McLane*, 91 Md. 175; *Hopkins v. Roberts*, 54 Md. 312; *O'Brien v. Pentz*, 48 Md. 562; *Reese v. Reese*, 41 Md. 554; *Gelston v. Sigmund*, 27 Md. 334; *Duval v. Myers*, 2 Md. Ch. 401; *Geiger v. Green*, 4 Gill (Md.) 472; *Tyson v. Watts*, 1 Md. Ch. 13.

Massachusetts. — *Butman v. Porter*, 100 Mass. 337; *Kansas, etc., R. Constr. Co. v. Topeka, etc., R. Co.*, 135 Mass. 34, 46 Am. Rep. 439; *Jones v. Newhall*, 115 Mass. 244, 15 Am. Rep. 97; *Old Colony R. Corp. v. Evans*, 6 Gray (Mass.) 25, 66 Am. Dec. 394.

Michigan. — *Chapman v. Morgan*, 55 Mich. 124; *Maynard v. Brown*, 41 Mich. 298; *Voorhies v. Frisbie*, 25 Mich. 476, 12 Am. Rep. 291; *Buck v. Smith*, 29 Mich. 166, 18 Am. Rep. 84; *Blanchard v. Detroit, etc., R. Co.*, 31 Mich. 43, 18 Am. Rep. 142; *Chambers v. Livermore*, 15 Mich. 381; *Hawley v. Sheldon*, Har. (Mich.) 420; *McMurtrie v. Bennette*, Har. (Mich.) 124.

Minnesota. — *Lowe v. Lowe*, 83 Minn. 206; *Alworth v. Seymour*, 42 Minn. 526.

Mississippi. — *Aston v. Robinson*, 49 Miss. 348.

Missouri. — *Glass v. Rowe*, 103 Mo. 513.

Montana. — *Ducie v. Ford*, 8 Mont. 233.

Nebraska. — *Hector Johnston Co. v. Billings*, (Neb. 1902) 91 N. W. Rep. 183.

Nevada. — *Schroeder v. Gemeinder*, 10 Nev. 355.

New Hampshire. — *Ewins v. Gordon*, 49 N. H. 444.

New Jersey. — *Woodruff v. Woodruff*, 44 N. J. Eq. 349; *Hopper v. Hopper*, 16 N. J. Eq. 147; *Smith v. McVeigh*, 11 N. J. Eq. 239; *Cooper v.*

Carlisle, 17 N. J. Eq. 525; *Ten Eyck v. Manning*, 52 N. J. Eq. 47.

New York. — *Rindge v. Baker*, 57 N. Y. 219, 15 Am. Rep. 483; *Justice v. Lang*, 42 N. Y. 493, 1 Am. Rep. 576; *Snyder v. Neefus*, 53 Barb. (N. Y.) 63; *Woodward v. Harris*, 2 Barb. (N. Y.) 442; *German v. Machin*, 6 Paige (N. Y.) 288; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. (N. Y.) 273; *Benedict v. Lynch*, 1 Johns. Ch. (N. Y.) 370, 7 Am. Dec. 484.

Pennsylvania. — *Ballou v. March*, 133 Pa. St. 64; *Meason v. Kaine*, 63 Pa. St. 335; *Tarr v. Scott*, 4 Brews. (Pa.) 49; *Pugh v. Good*, 3 W. & S. (Pa.) 56, 37 Am. Dec. 534; *Bodine v. Gladding*, 21 Pa. St. 50, 59 Am. Dec. 749; *Effinger v. Hain*, 18 Lanc. L. Rev. 3, 10 Pa. Dist. 107; *Porter v. Kinsey*, 14 Phila. (Pa.) 233, 37 Leg. Int. (Pa.) 424.

Tennessee. — *Bradford v. Foster*, 87 Tenn. 4. *Texas.* — *De Cordova v. Smith*, 9 Tex. 144, 58 Am. Dec. 139.

Virginia. — *Henley v. Hefferron*, (Va. 1896) 24 S. E. Rep. 235; *Graybill v. Brugh*, 89 Va. 895, 37 Am. St. Rep. 894; *Wood v. Dickey*, 90 Va. 160; *Ford v. Euker*, 86 Va. 75; *Shenandoah Valley R. Co. v. Dunlop*, 86 Va. 346; *Moore v. Fitz Randolph*, 6 Leigh (Va.) 175, 29 Am. Dec. 208; *Cox v. Cox*, 26 Gratt. (Va.) 311.

West Virginia. — *Hissam v. Parrish*, 41 W. Va. 686, 56 Am. St. Rep. 892.

"It is a Fundamental Rule in Equity that a contract, to be specifically enforced, must, in general, be mutual in its obligation and in its remedy, and it must be mutual *ab initio*." *Shenandoah Valley R. Co. v. Dunlop*, 86 Va. 346; *Tyson v. Watts*, 1 Md. Ch. 13.

Contract of Husband or Husband and Wife. — It has been said, accordingly, that a contract of the husband, or of the husband and wife, for the sale of the wife's lands, is not one of which specific performance will be decreed, because, as to the wife, the contract is void, and as to the husband it cannot be enforced, because to coerce him would operate morally as a constraint upon the wife; and since the contract is not enforceable against them, so neither can it be enforced by them. *Shenandoah Valley R. Co. v. Dunlop*, 86 Va. 346 [citing *Luse v. Deitz*, 46 Iowa 205; *Cheatham v. Cheatham*, 81 Va. 395; *Chilhowie Iron Co. v. Gardiner*, 79 Va. 305; *Clarke v. Reins*, 12 Gratt. (Va.) 98; *Watts v. Kinney*, 3 Leigh (Va.) 272, 23 Am. Dec. 266].

Mutual Obligations Need Not Be Co-ordinate in Time. — *Sterling v. Klepsattle*, 24 Ind. 94, 87 Am. Dec. 319.

1. See *Rice v. D'Arville*, 162 Mass. 559.
2. *Petrolia Mfg. Co. v. Jenkins*, 29 N. Y. App. Div. 403.

3. *South, etc., Alabama R. Co. v. Highland*

not be denied if the obligation of the other party is one the performance of which may be enforced in equity, though performance by the former could not, in the first instance, have been compelled.¹ The performance of a contract on the one side entitles the party who has performed to equitable assistance as against the other, though upon an application by the latter the court could not have compelled performance in his favor.²

(3) *Options* — (a) *General Rule*. — An option to sell or purchase property, founded on a valuable consideration, does not lack the requisite mutuality.³ So also a contract for the conveyance of land, by which the purchaser may pay in money or labor, at his election, can be enforced in equity, if he elects to pay the money and tenders the amount.⁴ But a contract which one party is at liberty to revoke at any time cannot be enforced against the other party,⁵ nor will specific performance of a contract which the other party, at his option, may refuse to carry out, be decreed.⁶ So it has been held that a party cannot obtain specific performance of a contract under which he may determine all his liabilities and obligations on giving the other party ten days' notice of his option and intention so to do,⁷ and likewise a contract which provided that the plaintiff might abandon it at any time on giving one year's notice was held unenforceable.⁸ But the general proposition that a court of equity will never specifically enforce a contract terminable at the option of the party seeking relief is certainly open to grave doubt, if, indeed, it is not manifestly unsound.⁹

(b) *Options in Leases to Renew or Purchase*. — An option contained in a lease giving the lessee the right to renew the lease or purchase the leased property is specifically enforceable, although no obligation is imposed upon the lessee to renew or purchase.¹⁰

(c) *Option to Rescind*. — A contract for the sale of land which gives an option to the vendors, in case of a failure of the vendees, to declare the contract at an end and retain the amount paid, is not so lacking in mutuality as to preclude the vendee from specific performance.¹¹

(4) *Lesser Covenant Where Greater Enforceable*. — A modification of the rule requiring mutuality of obligation and remedy has been said to be that where the obligation in question is not a distinct and separate contract, but a subordinate part of another, and the principal obligation of which it is a part is enforceable, the lesser covenant will be enforceable also.¹²

Ave., etc., R. Co., 98 Ala. 400, 39 Am. St. Rep. 74.

1. *Performance on One Side*. — *Whitney v. Hay*, 15 App. Cas. (D. C.) 164, affirmed 181 U. S. 77; *Thurber v. Meves*, 119 Cal. 35; *Seaton v. Tohill*, 11 Colo. App. 211; *Byers v. Denver Circle R. Co.*, 13 Colo. 552; *Sterling v. Klepsattle*, 24 Ind. 94, 87 Am. Dec. 319; *Topeka Water-Supply Co. v. Root*, 56 Kan. 187; *Bigler v. Baker*, 40 Neb. 325; *Grove v. Hodges*, 55 Pa. St. 504; *Freeman v. Stokes*, 12 Phila. (Pa.) 219, 34 Leg. Int. (Pa.) 248; *Boyd v. Brown*, 47 W. Va. 238. And see *Green v. Richards*, 23 N. J. Eq. 35.

So a contract to convey in consideration of personal services in the nature of support and maintenance for the grantor will be enforced where fully performed by the grantee. *Denlar v. Hile*, 123 Ind. 68; *Lindsay v. Glass*, 119 Ind. 301; *Ikerd v. Beavers*, 106 Ind. 483. Compare *Watson v. Mahan*, 20 Ind. 223.

2. *Cooper v. Pena*, 21 Cal. 403.

3. *Options*. — See the title *OPTIONS*, vol. 21, p. 928. See also *Frue v. Houghton*, 6 Colo. 318; *Miller v. Cameron*, 45 N. J. Eq. 95; *Johnston v. Wadsworth*, 24 Oregon 494; *House v. Jackson*, 24 Oregon 89; *Clark v. Gordon*, 35 W. Va. 735.

4. *Owen v. Frink*, 24 Cal. 171.

5. *Alworth v. Seymour*, 42 Minn. 526.

6. *Federal Oil Co. v. Western Oil Co.*, 112 Fed. Rep. 373.

7. *Brooklyn Baseball Club v. McGuire*, 116 Fed. Rep. 782.

8. *Rutland Marble Co. v. Ripley*, 10 Wall. (U. S.) 339. And see *Sturgis v. Galindo*, 59 Cal. 28, 43 Am. Rep. 239; *Rust v. Conard*, 47 Mich. 449, 41 Am. Rep. 720.

9. See observations of *Lowell, J.*, in *Singer Sewing Mach. Co. v. Union Button Hole, etc., Co.*, *Holmes (U. S.)* 253, 22 Fed. Cas. No. 12,904; also *Franklin Tel. Co. v. Harrison*, 145 U. S. 459.

10. *Option in Leases to Renew or Purchase*. — *Cooper v. Pena*, 21 Cal. 403; *Bacon v. Kentucky Cent. R. Co.*, 95 Ky. 373; *Waters v. Bew*, 52 N. J. Eq. 787; *Green v. Richards*, 23 N. J. Eq. 32; *Hawralty v. Warren*, 18 N. J. Eq. 124, 90 Am. Dev. 613; *Matter of Hunter*, 1 Edw. (N. Y.) 1. And see the title *LEASES*, vol. 18, p. 631 *et seq.*

11. *Jackson v. Conlin*, 50 Ill. App. 538.

12. *As Where a Lease or Deed Contains Covenants Binding the Grantor Alone*. — *Kerr v. Day*,

(5) *Exception under Terms of Contract.* — It has been held that the rule requiring mutuality of remedy has no application to cases where the contract, by its terms, gives to one party a right to performance which it does not give to the other.¹

(6) *Unilateral Contracts.* — Unilateral contracts for the performance of a particular act, founded on a valuable consideration, are not, of course, nonenforceable for lack of mutuality.²

(7) *Mutuality Subsequently Taken Away or Supplied.* — It has been held, however, that the rule that equity refuses to enforce the specific execution of contracts where the remedy is not mutual, applies to cases in which there is not such mutuality of remedy at the time the contract is made, not to cases in which the mutuality of remedy is taken away by a subsequent contingent event.³ So, also, the general rule that equity will not specifically enforce the performance of a contract where, from its terms, a right does not arise in favor of each party against the other, has been held subject to the modification that if the quality originally lacking be subsequently supplied, the enforcement of the contract may be decreed.⁴ On the other hand it has been held that if, from the personal incapacity of one of the parties or other cause, the contract, when concluded, is not enforceable against such party, no subsequent act or event can render it capable of enforcement against either party. It must be originally enforceable or not at all.⁵ So also where a contract when executed is not specifically enforceable against one of the parties, he cannot, by subsequent performance of those conditions that could not be specifically enforced, put himself in a position to demand specific performance against the other party.⁶

(8) *Conflict of Cases.* — The doctrine of mutuality of obligation and remedy has given rise to great confusion in the cases by reason of a failure clearly to apprehend the true principles involved. Where there is a completed contract, founded on an executed consideration, the doctrine of mutuality, it would seem, might well be ignored. So also where the consideration for the contract sought to be enforced is the contemporaneous contract or obligation of the party seeking enforcement, there can be, as a rule, no lack of mutuality of obligation.⁷ But where there is no consideration for the contract in suit,

14 Pa. St. 112, 53 Am. Dec. 526; *Corson v. Mulvany*, 49 Pa. St. 100, 88 Am. Dec. 485; *Shollenberger v. Brinton*, 52 Pa. St. 99.

1. *Green v. Richards*, 23 N. J. Eq. 32; *Van Doren v. Robinson*, 16 N. J. Eq. 259.

2. *Unilateral Contracts — England.* — *Fowle v. Freeman*, 9 Ves. Jr. 351; *Seton v. Slade*, 7 Ves. Jr. 265; *Flight v. Bolland*, 4 Russ. 298.

Indiana. — *Chamberlain v. Blue*, 6 Blackf. (Ind.) 491.

Iowa. — *Garretson v. Vanloon*, 3 Greene (Iowa) 128, 54 Am. Dec. 492.

Maine. — *Jones v. Robbins*, 29 Me. 351, 50 Am. Dec. 593; *Rogers v. Saunders*, 16 Me. 92, 33 Am. Dec. 635; *Getchell v. Jewett*, 4 Me. 350.

Massachusetts. — *Barnard v. Lee*, 97 Mass. 92. *New Hampshire.* — *Ewins v. Gordon*, 49 N. H. 444.

New Jersey. — *Miller v. Cameron*, 45 N. J. Eq. 95; *Hawralty v. Warren*, 18 N. J. Eq. 124, 90 Am. Dec. 613.

New York. — *Matter of Hunter*, 1 Edw. (N. Y.) 1.

Rhode Island. — *Ives v. Hazard*, 4 R. I. 14, 67 Am. Dec. 500.

3. *Moore v. Fitz Randolph*, 6 Leigh (Va.) 175, 29 Am. Dec. 208.

4. *French v. Boston Nat. Bank*, 179 Mass.

404; *Woodruff v. Woodruff*, 44 N. J. Eq. 349. And see *Richards v. Green*, 23 N. J. Eq. 536; *Carskaddon v. Kennedy*, 40 N. J. Eq. 259.

A Contract with an Infant has been held to be enforceable by him after he has become of age, notwithstanding the want of mutuality in the first instance, the same effect being given to the contract in equity as at law. *Cooper v. Pena*, 21 Cal. 403.

5. *Shenandoah Valley R. Co. v. Dunlop*, 86 Va. 346.

"The Rule Is Fundamental," it has been said, "that a contract will not be specifically enforced unless it is obligatory on both parties, nor unless both parties, at the time it is executed, have the right to resort to equity for its specific enforcement." *Thayer, J., in Norris v. Fox*, 45 Fed. Rep. 406, citing *Rutland Marble Co. v. Ripley*, 10 Wall. (U. S.) 340; *Duff v. Hopkins*, 33 Fed. Rep. 599; *Boucher v. Van Buskirk*, 2 A. K. Marsh. (Ky.) 345; *Duvall v. Myers*, 2 Md. Ch. 401; *German v. Machin*, 6 Paige (N. Y.) 288; *Bodine v. Glading*, 21 Pa. St. 50, 59 Am. Dec. 749.

6. *Norris v. Fox*, 45 Fed. Rep. 496. And see *Hope v. Hope*, 8 De G. M. & G. 731.

7. *South, etc., Alabama R. Co. v. Highland Ave., etc., R. Co.*, 98 Ala. 400, 39 Am. St. Rep. 74.

except the mere option of the complainant to do or not to do a particular thing, specific performance will not be decreed, not in strictness for want of mutuality of obligation, but because there is no consideration to support the contract.¹ The doctrine of mutuality should be considered only where the party seeking performance has not himself performed, and where the obligations imposed upon him by the contract are of such a nature that performance could not be compelled in equity.² Nor is the mere offer to perform or tender of performance of personal services the performance of which could not be compelled in equity, sufficient to relieve the situation of the lack of the requisite mutuality as to remedy.³ The principle that contracts must be mutual and binding upon both parties does not, it has been held, mean in every case that each party must have the same remedy for a breach by the other, but only that the contract is enforceable on both sides in some manner, not necessarily by specific performance in each instance.⁴

f. CERTAINTY — (1) *General Rule*. — To authorize a court of equity to exercise its jurisdiction compelling the specific performance of a contract, it must be reasonably certain as to its subject matter, its stipulations, its purposes, its parties, and the circumstances under which it was made.⁵

1. See *Winter v. Trainor*, 151 Ill. 191.

2. See, in this connection, the following cases: *England*. — *Bozon v. Farlow*, 1 Meriv. 459; *Coslake v. Till*, 1 Russ. 376; *Stocker v. Wedderburn*, 3 Kay & J. 393; *Hills v. Croll*, 2 Phila. 60. *United States*. — *Karrick v. Hannaman*, 168 U. S. 328; *Rutland Marble Co. v. Ripley*, 10 Wall. (U. S.) 339; *Leicester Piano Co. v. Front Royal, etc., Imp. Co.*, (C. C. A.) 55 Fed. Rep. 190.

California. — *Stanton v. Singleton*, 126 Cal. 657; *Cooper v. Pena*, 21 Cal. 403.

Illinois. — *Welty v. Jacobs*, 171 Ill. 624, affirmed 64 Ill. App. 285.

Michigan. — *Hall v. Loomis*, 63 Mich. 709.

Minnesota. — See *Alworth v. Seymour*, 42 Minn. 526.

New Hampshire. — *Hackett v. Hackett*, 67 N. H. 424.

Ohio. — *Port Clinton R. Co. v. Cleveland, etc., R. Co.*, 13 Ohio St. 544.

Where a Contract for Personal Services on the one part and for the conveyance of land as compensation therefor was unperformed as to the services, it was held that equity would not compel the conveyance of the land, because it could not enforce the performance of the services. *Cooper v. Pena*, 21 Cal. 403.

3. *Cooper v. Pena*, 21 Cal. 403.

4. *Northern Cent. R. Co. v. Walworth*, 193 Pa. St. 207, 74 Am. St. Rep. 683. See also *Eckstein v. Downing*, 64 N. H. 248, 10 Am. St. Rep. 404.

What is meant by mutuality of remedy is that the contract must be of such a nature that performance on both sides can be judicially secured. *Shields v. Trammell*, 19 Ark. 51.

5. *Contract Must Be Certain* — *England*. — *Lloyd v. Collett*, 4 Bro. C. C. 469; *Harnett v. Yeilding*, 2 Sch. & Lef. 549; *Paris Chocolate Co. v. Crystal Palace Co.*, 3 Smale & G. 119; *Tatham v. Platt*, 9 Hare 660; *Franks v. Martin*, 1 Eden 309; *South Wales R. Co. v. Wythes*, 5 DeG. M. & G. 880; *Taylor v. Portington*, 7 DeG. M. & G. 328; *Cooper v. Hood*, 26 Beav. 293; *Bromley v. Jefferies*, 2 Vern. 415; *Blagden v. Bradbear*, 12 Ves. Jr. 466.

United States. — *De Sollar v. Hanscome*, 158

U. S. 216; *Preston v. Preston*, 95 U. S. 200; *Colson v. Thompson*, 2 Wheat. (U. S.) 336; *Carr v. Duval*, 14 Pet. (U. S.) 77; *Kendall v. Almy*, 2 Sumn. (U. S.) 278; *Bowen v. Waters*, 2 Paine (U. S.) 1; *Strang v. Richmond, etc., R. Co.*, 93 Fed. Rep. 71; *Minnesota Tribune Co. v. Associated Press*, (C. C. A.) 83 Fed. Rep. 350; *Walcott v. Watson*, 53 Fed. Rep. 429; *Zeringue v. Texas, etc., R. Co.*, 34 Fed. Rep. 239; *Walton v. Coulson*, 1 McLean (U. S.) 120.

Alabama. — *Howison v. Jackson*, 124 Ala. 187; *Angel v. Simpson*, 85 Ala. 53; *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498, 3 Am. St. Rep. 758; *Carlisle v. Carlisle*, 77 Ala. 339; *Pike v. Pettus*, 71 Ala. 98; *Shelburne v. Letsinger*, 52 Ala. 96; *Williams v. Barnes*, 28 Ala. 613; *Aday v. Echols*, 18 Ala. 353, 52 Am. Dec. 225; *Goodwin v. Lyon*, 4 Port. (Ala.) 297. *Arkansas*. — *Sutton v. Myrick*, 39 Ark. 424; *Jordan v. Deaton*, 23 Ark. 704.

California. — *Foster v. Maginnis*, 89 Cal. 264; *Magee v. McManus*, 70 Cal. 553; *Forrester v. Flores*, 64 Cal. 24; *Los Angeles Immigration, etc., Assoc. v. Phillips*, 56 Cal. 539; *Agard v. Valencia*, 39 Cal. 292; *Minturn v. Baylis*, 33 Cal. 129; *Blum v. Robertson*, 24 Cal. 129; *Morrison v. Rossignol*, 5 Cal. 64.

Colorado. — *Ross v. Purse*, 17 Colo. 24.

Connecticut. — *Morris v. Peckham*, 51 Conn. 128; *Dodd v. Seymour*, 21 Conn. 476.

Dakota. — *Hollenbeck v. Prior*, 5 Dak. 298.

Delaware. — *Diamond State Iron Co. v. Todd*, 6 Del. Ch. 163; *Carlisle v. Flensing*, 1 Harr. (Del.) 421.

District of Columbia. — *Repetti v. Maisak*, 6 Mackey (D. C.) 366; *Armes v. Bigelow*, 3 MacArthur (D. C.) 442.

Georgia. — *Beall v. Clark*, 71 Ga. 818; *Shropshire v. Brown*, 45 Ga. 175; *Printup v. Mitchell*, 17 Ga. 558, 63 Am. Dec. 258; *Miller v. Cotten*, 5 Ga. 341.

Illinois. — *Shaw v. Schoonover*, 130 Ill. 448; *Clark v. Clark*, 122 Ill. 388; *Bowman v. Cunningham*, 78 Ill. 48; *Allen v. Webb*, 64 Ill. 342; *Fitzpatrick v. Beatty*, 6 Ill. 454; *Woods v. Evans*, 113 Ill. 186, 55 Am. Rep. 409; *Phoenix Ins. Co. v. Rink*, 110 Ill. 538; *Marshall v. Peck*, 91 Ill. 187; *Gosse v. Jones*, 73 Ill. 508.

Suggested Test as to Requisite Certainty. — The contract sought to be enforced must, at all events, be so certain that its meaning can be ascertained, as an indefinite contract cannot be enforced because the courts do not know to what the parties agreed.¹

Conjecture as to Meaning and Intent. — The meaning and intent of the parties should be placed beyond the bounds of mere conjecture by full and clear proof.²

Indiana. — *Cutsinger v. Ballard*, 115 Ind. 93; *Newman v. Perrill*, 73 Ind. 153; *Gigos v. Cochran*, 54 Ind. 593; *Miller v. Campbell*, 52 Ind. 125; *Baldwin v. Kerlin*, 46 Ind. 426; *Taggart v. Tevanny*, 1 Ind. App. 339. And see *Burke v. Mead*, 159 Ind. 252.

Iowa. — *Truman v. Truman*, 79 Iowa 506; *Corliss v. Conable*, 74 Iowa 58; *Recknagle v. Schmaltz*, 72 Iowa 63; *Thomas v. Griffith*, 68 Iowa 11; *Dunn v. McGovern*, 116 Iowa 663; *Day v. Griffith*, 15 Iowa 104; *Williamson v. Williamson*, 4 Iowa 279.

Kentucky. — *Waters v. Brown*, 7 J. J. Marsh. (Ky.) 123.

Louisiana. — *Burke v. His Creditors*, 9 La. Ann. 56.

Maine. — *Higgins v. Butler*, 78 Me. 520.

Maryland. — *Hopkins v. Roberts*, 54 Md. 312; *O'Brien v. Pentz*, 48 Md. 562; *Reese v. Reese*, 41 Md. 554; *Gelston v. Sigmund*, 27 Md. 334; *Smith v. Crandall*, 20 Md. 482; *Triebert v. Burgess*, 11 Md. 452; *Mundorff v. Kilbourn*, 4 Md. 459; *Beard v. Linthicum*, 1 Md. Ch. 347.

Massachusetts. — *Grace v. Denison*, 114 Mass. 16; *Boston, etc., R. Co. v. Babcock*, 3 Cush. (Mass.) 228; *Atwood v. Cobb*, 16 Pick. (Mass.) 227, 26 Am. Dec. 661.

Michigan. — *Bumpus v. Bumpus*, 53 Mich. 346; *Brown v. Brown*, 47 Mich. 378; *Kinyon v. Young*, 44 Mich. 339; *James v. Muir*, 33 Mich. 223; *Wright v. Wright*, 31 Mich. 380; *Blanchard v. Detroit, etc., R. Co.*, 31 Mich. 44, 18 Am. Rep. 142; *McClintock v. Laing*, 22 Mich. 212; *Munsell v. Loree*, 21 Mich. 491; *Wilson v. Wilson*, 6 Mich. 9; *McMurtrie v. Bennette*, Harr. (Mich.) 124; *Ramsdell v. Millerd*, Harr. (Mich.) 373.

Minnesota. — *Olson v. Erickson*, 42 Minn. 440; *Burke v. Ray*, 40 Minn. 34; *Nippolt v. Kammon*, 39 Minn. 372.

Mississippi. — *Fisher v. Kuhn*, 54 Miss. 480; *Aston v. Robinson*, 49 Miss. 348; *Montgomery v. Norris*, 1 How. (Miss.) 499.

Missouri. — *Strange v. Crowley*, 91 Mo. 287; *Berry v. Hartzell*, 91 Mo. 132; *Charpiot v. Sigerson*, 25 Mo. 63; *Bernhardt v. Walls*, 29 Mo. App. 206.

Nebraska. — *Clarke v. Koenig*, 36 Neb. 572.

Nevada. — *Schroeder v. Gemeinder*, 10 Nev. 355.

New Hampshire. — *Bunton v. Smith*, 40 N. H. 352.

New Jersey. — *Myers v. Metzger*, 63 N. J. Eq. 779; *Banks v. Weaver*, (N. J. 1901) 48 Atl. Rep. 515; *Worch v. Woodruff*, 61 N. J. Eq. 78; *Rutan v. Crawford*, 45 N. J. Eq. 99; *Brown v. Brown*, 33 N. J. Eq. 650; *Green v. Richards*, 23 N. J. Eq. 32; *Nichols v. Williams*, 22 N. J. Eq. 63; *Walker v. Hill*, 21 N. J. Eq. 191; *Potts v. Whitehead*, 20 N. J. Eq. 55; *Cooper v. Carlisle*, 17 N. J. Eq. 525; *McKibbin v. Brown*, 14 N. J. Eq. 13; *Lokerson v. Stillwell*, 13 N. J. Eq. 357; *Smith v. McVeigh*, 11 N. J. Eq. 239; *Wallace v.*

Brown, 10 N. J. Eq. 308; *Rockwell v. Lawrence*, 6 N. J. Eq. 190; *Robeson v. Hornbaker*, 3 N. J. Eq. 60; *Wharton v. Stoutenburgh*, 35 N. J. Eq. 274. See *Oakey v. Cook*, 41 N. J. Eq. 350.

New York. — *Winne v. Winne*, 166 N. Y. 263; *Stokes v. Stokes*, 148 N. Y. 716; *Cronkhite v. Cronkhite*, 94 N. Y. 323; *Stanton v. Miller*, 58 N. Y. 192; *Buckmaster v. Thompson*, 36 N. Y. 558; *McIneres v. Hogan*, (C. Pl. Eq. T.) 61 How. Pr. (N. Y.) 446; *Foot v. Webb*, 59 Barb. (N. Y.) 38; *Port Jervis, etc., R. Co. v. New York, etc., R. Co.*, 56 Hun (N. Y.) 647, 10 N. Y. Supp. 852; *Lawrence v. Saratoga Lake R. Co.*, 36 Hun (N. Y.) 472; *Greenleaf v. Blakeman*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 564; *Mehl v. Von Der Wulbeke*, 2 Lans. (N. Y.) 267; *Whitlock v. Duffield*, Hoffm. (N. Y.) 110; *Paget v. Melcher*, 42 N. Y. App. Div. 76. And see *Gouge v. Gouge*, 26 N. Y. App. Div. 154.

Ohio. — *Maud v. Maud*, 33 Ohio St. 147.

Oklahoma. — *Ferguson v. Blackwell*, 8 Okla. 489.

Oregon. — *Wagonblast v. Whitney*, 12 Oregon 83.

Pennsylvania. — *Ballou v. March*, 133 Pa. St. 64; *Delp's Appeal*, 109 Pa. St. 277; *Lord's Appeal*, 105 Pa. St. 451; *Hammer v. McEldowney*, 46 Pa. St. 334; *McCue v. Johnston*, 25 Pa. St. 306; *Charnley v. Hansbury*, 13 Pa. St. 16; *Woods v. Farmare*, 10 Watts (Pa.) 195.

South Carolina. — *Spears v. Long*, 32 S. Car. 528; *May v. Cavender*, 29 S. Car. 598; *Izard v. Middleton*, 1 Desaus. (S. Car.) 116.

Tennessee. — *Morrison v. Searight*, 4 Baxt. (Tenn.) 476.

Texas. — *Willis v. Matthews*, 46 Tex. 478; *Bracken v. Hambrick*, 25 Tex. 408; *Taylor v. Ashley*, 15 Tex. 50.

Utah. — *Reed v. Lowe*, 8 Utah 39.

Virginia. — *Griggsby v. Osborn*, 82 Va. 371; *Litterall v. Jackson*, 80 Va. 604; *Shenandoah Valley R. Co. v. Lewis*, 76 Va. 833; *Pierce v. Catron*, 23 Gratt. (Va.) 588; *Broughton v. Coffer*, 18 Gratt. (Va.) 184; *Pigg v. Corder*, 12 Leigh (Va.) 69.

West Virginia. — *McCully v. McLean*, 48 W. Va. 625; *Hissam v. Parrish*, 41 W. Va. 686, 56 Am. St. Rep. 892; *Campbell v. Fetterman*, 20 W. Va. 398; *Patrick v. Horton*, 3 W. Va. 23.

Wisconsin. — *Park v. Minneapolis, etc., R. Co.*, 114 Wis. 347; *Stout v. Weaver*, 72 Wis. 148; *Tiernan v. Gibney*, 24 Wis. 190; *Blanchard v. McDougal*, 6 Wis. 167, 70 Am. Dec. 458.

1. *Lawrence v. Saratoga Lake R. Co.*, 36 Hun (N. Y.) 472; *Buckmaster v. Thompson*, 36 N. Y. 558.

2. *Huntington, etc., Land Development Co. v. Thornburg*, 46 W. Va. 99.

Illustrations. — Thus, a stipulation for "collateral security of suitable character" is too uncertain and indefinite for specific enforcement,¹ as is also an engagement for security of "satisfactory character."² An agreement for a conveyance which fails to name the purchase price and terms of payment is not enforceable.³ Nor will specific performance be decreed of a stipulation in a contract for the sale of real estate, that the purchase money shall be paid "on such terms as may be agreed on between said parties."⁴ It is, however, as a rule, sufficient that the terms of the contract be made out in a manner satisfactory to the court, or in such manner that the court can understand what was intended.⁵ A reference to other cases in which the contracts have been held too uncertain for enforcement, or the reverse, will be found in the notes.⁶ These illustrative cases constitute, merely, specific applications of

Certainty in Four Respects. — In *Ross v. Purse*, 17 Colo. 24, the court, by Helm, J., said: "The four things that must appear in such contracts as essential prerequisites to suits for specific performance are, first, the names of the parties; second, the terms and conditions; third, the interest or property; and, fourth, the consideration." And see *Eppich v. Clifford*, 6 Colo. 493.

1. *Greenleaf v. Blakeman*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 564.

2. *Ladd v. Stevenson*, 43 Hun (N. Y.) 541, 112 N. Y. 325.

3. *Manning v. Ayers*, (C. C. A.) 77 Fed. Rep. 690; *Webster v. Brown*, 67 Mich. 328; *Woodruff v. Woodruff*, 44 N. J. Eq. 349; *Edichal Bullion Co. v. Columbia Gold Min. Co.*, 87 Va. 641.

4. *Huff v. Shepard*, 58 Mo. 242; *Mayer v. McCreery*, 119 N. Y. 434.

5. **Contract Inartificially Drawn.** — When the intention of the parties can be clearly ascertained from the language of the contract, it will be enforced, though inartificially expressed. *Bull v. Bell*, 4 Wis. 54.

Reasonable and Natural Construction of Terms. — *Roberge v. Winne*, 144 N. Y. 709.

6. **Contracts Too Uncertain for Enforcement** —

England. — *Taylor v. Gilbertson*, 2 Drew. 391.

United States. — *Bibber-White Co. v. White River Valley Electric R. Co.*, 110 Fed. Rep. 472; *Preston v. Preston*, 95 U. S. 200; *Horton v. McKee*, 68 Fed. Rep. 404; *Zeringue v. Texas*, etc., R. Co., 34 Fed. Rep. 239.

Alabama. — *Christian, etc., Grocery Co. v. Bienville Water Supply Co.*, 106 Ala. 124.

Arkansas. — *Johnson v. Craig*, 21 Ark. 533.

California. — *Stanton v. Singleton*, 126 Cal. 657; *Owens v. McNally*, 113 Cal. 444; *Berry v. Woodburn*, 107 Cal. 504; *Burnett v. Kullak*, 76 Cal. 535; *Ferris v. Irving*, 28 Cal. 645.

Colorado. — *Winter v. Geobner*, 21 Colo. 279. But compare *Ross v. Purse*, 17 Colo. 24.

Connecticut. — *Hodges v. Kowing*, 58 Conn. 12.

Delaware. — *Crockett v. Green*, 3 Del. Ch. 466.

District of Columbia. — *Repetti v. Maisak*, 6 Mackey (D. C.) 366; *Waters v. Ritchie*, 3 App. Cas. (D. C.) 379; *McCormick v. Hammersley*, 1 App. Cas. (D. C.) 313.

Florida. — *Edwards v. Rives*, 35 Fla. 89; *Patrick v. Sears*, 19 Fla. 856.

Illinois. — *Glos v. Wilson*, 198 Ill. 44; *Wright v. Raftree*, 181 Ill. 464; *Woodard v. Woodard*, 178 Ill. 295; *Carson v. Davis*, 171 Ill. 497; *Winter v. Trainor*, 151 Ill. 191; *Hamilton v.*

Harvey, 121 Ill. 469, 2 Am. St. Rep. 118; *Barnes v. Ludington*, 51 Ill. App. 90; *Wollensak v. Briggs*, 20 Ill. App. 50.

Indiana. — *Burke v. Mead*, 159 Ind. 252; *Bartlett v. Williams*, 27 Ind. App. 637; *Louisville, etc., R. Co. v. Bodenschatz, etc.*, *Stone Co.*, 141 Ind. 251; *Gas Light, etc., Co. v. New Albany*, 139 Ind. 660; *Miller v. Campbell*, 52 Ind. 125; *Baldwin v. Kerlin*, 46 Ind. 426.

Kansas. — *Ross v. Allen*, 45 Kan. 231; *Burkhalter v. Jones*, 32 Kan. 5.

Kentucky. — *Ecton v. Lexington, etc., R. Co.*, 59 S. W. Rep. 864, 22 Ky. L. Rep. 1133; *Caskey v. Williams*, (Ky. 1889) 11 S. W. Rep. 11; *Hall v. McLeod*, 2 Met. (Ky.) 98, 74 Am. Dec. 400. See *Ellis v. Deadman*, 4 Bibb (Ky.) 466.

Maine. — *Jordan v. Fay*, 40 Me. 130.

Maryland. — *Brehm v. Sperry*, 92 Md. 378; *Horner v. Woodland*, 88 Md. 511; *Gorter v. Gale*, 86 Md. 687; *Schwanebeck v. Smith*, 77 Md. 314.

Massachusetts. — *Doherty v. Hill*, 144 Mass. 467; *Lynes v. Hayden*, 119 Mass. 482; *Whelan v. Sullivan*, 102 Mass. 204. See also *Boston, etc., R. Co. v. Babcock*, 3 Cush. (Mass.) 228.

Michigan. — *Shipman v. Campbell*, 79 Mich. 82.

Minnesota. — *Lowe v. Lowe*, 83 Minn. 206; *Nippolt v. Kammon*, 39 Minn. 372.

Mississippi. — *Beaver v. Crump*, 76 Miss. 34; *Williams v. Stritz*, (Miss. 1895) 17 So. Rep. 227; *Bomer v. Canaday*, 79 Miss. 222; *Holmes v. Evans*, 48 Miss. 247, 12 Am. Rep. 372; *Fisher v. Kuhn*, 54 Miss. 480.

Missouri. — *Wendover v. Baker*, 121 Mo. 273.

Nebraska. — *Omaha L. & T. Co. v. Goodman*, 62 Neb. 197; *Krum v. Chamberlain*, 57 Neb. 220.

New Jersey. — *King v. Ruckman*, 20 N. J. Eq. 316; *Carr v. Passaic Land Imp., etc., Co.*, 19 N. J. Eq. 424; *Camden, etc., R. Co. v. Stewart*, 18 N. J. Eq. 489. See *Nichols v. Williams*, 22 N. J. Eq. 63.

New York. — *Lighthouse v. Buffalo Third Nat. Bank*, 162 N. Y. 336; *Milliman v. Huntington*, 68 Hun (N. Y.) 258; *Ripsom v. Hart*, 64 N. Y. App. Div. 593; *Smith v. Bradhurst*, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 546; *Heine v. Rohner*, 29 N. Y. App. Div. 239; *Kayser v. Arnold*, 124 N. Y. 674; *Maher v. Garry*, 3 N. Y. App. Div. 480. See *Stanton v. Miller*, 58 N. Y. 192. And see *Spencer v. De Witt C. Hay Library Assoc.*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 608.

North Carolina. — *Sherman v. Simpson*, 121 N. Car. 129; *Pitt v. Moore*, 99 N. Car. 85, 6

the general rules set forth and discussed in this subdivision, and contain no new principle whatever. The setting forth of all these cases according to

Am. St. Rep. 489; *Reed v. Reed*, 93 N. Car. 462; *Bread v. Munger*, 88 N. Car. 297; *Grier v. Rhyne*, 69 N. Car. 346; *Capps v. Holt*, 5 Jones Eq. (58 N. Car.) 153; *Murdock v. Anderson*, 4 Jones Eq. (57 N. Car.) 77. See *Allen v. Chambers*, 4 Ired. Eq. (39 N. Car.) 125. And see *Woodcock v. Merrimon*, 122 N. Car. 731.

Ohio.—*Bentley v. Miller*, 9 Ohio Cir. Dec. 851, 18 Ohio Cir. Ct. 881; *Ludlow v. Cincinnati Southern R. Co.*, 2 Ohio Dec. 477, 2 Ohio N. P. 314.

Pennsylvania.—*Purves's Estate*, 196 Pa. St. 438; *Northern Cent. R. Co. v. Walworth*, 193 Pa. St. 207, 74 Am. St. Rep. 683; *Reilly v. Gautschi*, 174 Pa. St. 80; *Weaver v. Shenk*, 154 Pa. St. 206; *Ballou v. March*, 133 Pa. St. 64; *Hammer v. McEldowney*, 46 Pa. St. 334; *Ogden v. Philadelphia, etc., Traction Co.*, 202 Pa. St. 480; *Holthouse's Appeal*, (Pa. 1888) 12 Atl. Rep. 340; *In re Doolittle*, 23 Pittsb. Leg. J. (Pa.) 394.

South Carolina.—*Hyde v. Cooper*, 13 Rich. Eq. (S. Car.) 250; *Church of The Advent v. Farrow*, 7 Rich. Eq. (S. Car.) 378.

Tennessee.—*Johnson v. Kellogg*, 7 Heisk. (Tenn.) 262; *Dobson v. Litton*, 5 Coldw. (Tenn.) 616.

Texas.—*Samuelson v. Bridges*, 6 Tex. Civ. App. 425; *Jones v. Carver*, 59 Tex. 293.

Utah.—*Whitehill v. Lowe*, 10 Utah 419; *Reed v. Lowe*, 8 Utah 39.

Virginia.—*Henley v. Hefferron*, (Va. 1896) 24 S. E. Rep. 235.

West Virginia.—*Hissam v. Parrish*, 41 W. Va. 686, 56 Am. St. Rep. 892; *Blenkenship v. Spencer*, 31 W. Va. 510; *Westfall v. Cottrills*, 24 W. Va. 763.

Wisconsin.—*Park v. Minneapolis, etc., R. Co.*, 114 Wis. 347; *Thoenke v. Fiedler*, 91 Wis. 386.

Contracts Sufficiently Certain for Enforcement—*England*.—*Owen v. Thomas*, 3 Myl. & K. 353; *Ogilvie v. Foljambe*, 3 Meriv. 53; *Hodges v. Horsfall*, 1 Russ. & M. 116. See *Marsh v. Mulligan*, 3 Jur. N. S. 979.

United States.—*Dewey v. Whitney*, 85 Fed. Rep. 325; *Harman v. Harman*, (C. C. A.) 70 Fed. Rep. 894.

Alabama.—*Andrews v. Andrews*, 28 Ala. 432; *Angel v. Simpson*, 85 Ala. 53; *Hooper v. Laney*, 39 Ala. 338.

California.—*Owens v. McNally*, 113 Cal. 444; *Mann v. Higgins*, 83 Cal. 66.

Dakota.—*Hollenbeck v. Prior*, 5 Dak. 298.

Delaware.—*McFarland v. Reeve*, 5 Del. Ch. 118.

Illinois.—*Guyer v. Warren*, 175 Ill. 328; *Hayes v. O'Brien*, 149 Ill. 403; *Whiton v. Whiton*, 179 Ill. 32; *Work v. Welsh*, 160 Ill. 68; *White v. Hermann*, 51 Ill. 243, 99 Am. Dec. 543; *Purinton v. Northern Illinois R. Co.*, 6 Ill. 297. See *Fleming v. Carter*, 87 Ill. 565.

Indiana.—*Horner v. Clark*, 27 Ind. App. 6; *Island Coal Co. v. Streitlemier*, 139 Ind. 83; *Starkey v. Starkey*, 136 Ind. 349.

Iowa.—*Minneapolis, etc., R. Co. v. Cox*, 76 Iowa 306, 14 Am. St. Rep. 216; *Puttman v.*

Haltey, 24 Iowa 425; *Ring v. Ashworth*, 3 Iowa 452.

Kansas.—*Bacon v. Leslie*, 50 Kan. 494, 34 Am. St. Rep. 134; *Hollis v. Burgess*, 37 Kan. 487; *Edwards v. Fry*, 9 Kan. 417.

Kentucky.—*Schmidt v. Louisville, etc., R. Co.*, 101 Ky. 441; *Winn v. Henry*, 84 Ky. 48; *Overstreet v. Rice*, 4 Bush (Ky.) 1, 96 Am. Dec. 279.

Maine.—*White v. Mooers*, 86 Me. 62.

Maryland.—*Maryland Constr. Co. v. Kuper*, 90 Md. 529.

Massachusetts.—*Ryder v. Loomis*, 161 Mass. 161; *Sanders v. Bryer*, 152 Mass. 141; *Hurley v. Brown*, 98 Mass. 545, 96 Am. Dec. 671; *Old Colony R. Corp. v. Evans*, 6 Gray (Mass.) 25, 66 Am. Dec. 394; *Baker v. Hathaway*, 5 Allen (Mass.) 103. See *Scanlan v. Geddes*, 112 Mass. 15.

Michigan.—*Thompson v. Tucker-Osborn*, 111 Mich. 470; *Goodenow v. Curtis*, 18 Mich. 298.

Minnesota.—*Strandberg v. Rossman*, 59 Minn. 509. See also *Brown v. Munger*, 42 Minn. 482.

Mississippi.—See *Wilbourn v. Bishop*, 62 Miss. 341.

Missouri.—*Scannell v. American Soda Fountain Co.*, 161 Mo. 606; *Smith v. Wilson*, 160 Mo. 657; *Eggert v. Chas. H. Heer Dry-Goods Co.*, 102 Mo. 512.

New Jersey.—*Woodridge v. Carlstadt*, 60 N. J. Eq. 1; *Brooks v. Wentz*, 61 N. J. Eq. 474; *Riley v. Hodgkins*, 57 N. J. Eq. 278; *Champion v. Genin*, 51 N. J. Eq. 38; *Blake v. Flatley*, 44 N. J. Eq. 228, 6 Am. St. Rep. 886; *Lewis v. Reichy*, 27 N. J. Eq. 240; *Robeson v. Hornbaker*, 3 N. J. Eq. 60.

New York.—*Muhlker v. Ruppert*, 124 N. Y. 627; *Healy v. Healy*, 167 N. Y. 572, 55 N. Y. App. Div. 315; *Brookman v. Kurzman*, 94 N. Y. 272; *Dieter v. Fallon*, 58 Hun (N. Y.) 605; *Waring v. Ayers*, 40 N. Y. 357; *Forsyth v. Leslie*, 74 N. Y. App. Div. 517; *King v. Bardeau*, 6 Johns. Ch. (N. Y.) 38, 10 Am. Dec. 312; *Wiswall v. McGowan, Hoffm.* (N. Y.) 126.

North Carolina.—*Falls of Neuse Mfg. Co. v. Hendricks*, 106 N. Car. 485; *Kitchen v. Herring*, 7 Ired. Eq. (42 N. Car.) 190; *Simmons v. Spruill*, 3 Jones Eq. (56 N. Car.) 9.

Pennsylvania.—*Northern Cent. R. Co. v. Walworth*, 12 York Leg. Rec. (Pa.) 121; *Lulay v. Barnes*, 172 Pa. St. 331; *Felty v. Calhoon*, 139 Pa. St. 378.

Rhode Island.—*Ives v. Hazard*, 4 R. I. 14, 67 Am. Dec. 500.

Tennessee.—*Smith v. Ruohs*, (Tenn. Ch. 1899) 54 S. W. Rep. 161; *Knuckolls v. Lea*, 10 Humph. (Tenn.) 577. See *Dobson v. Litton*, 5 Coldw. (Tenn.) 616.

Texas.—*Watson v. Baker*, 71 Tex. 739; *Newsom v. Davis*, 20 Tex. 419.

Utah.—*Easton v. Thatcher*, 7 Utah 99.

Vermont.—*Burton v. Landon*, 66 Vt. 361; *Olmstead v. Abbott*, 61 Vt. 281.

West Virginia.—*Crim v. England*, 46 W. Va. 480, 76 Am. St. Rep. 826.

Wisconsin.—*Combs v. Scott*, 76 Wis. 662; *Docter v. Hellberg*, 65 Wis. 415; *Whitney v. Robinson*, 53 Wis. 309.

their particular facts, incapable, in the nature of things, of precise reproduction in the future, is not deemed practicable or desirable in the present connection.

(2) *Parties*. — Specific performance cannot be decreed of a contract uncertain as to the parties who are to perform,¹ or where a like uncertainty exists as to the persons in whose favor performance is to be decreed.²

But a Latent Ambiguity as to the grantee in a contract to convey land may be cured by parol proof.³

(3) *Description of Property Conveyed*. — Specific performance of a contract to sell or convey property will not be decreed unless the parties have so described the property that it may be identified with reasonable certainty.⁴ If a decree for the specific performance of a contract relating to real estate is to possess any value, the contract should describe the land involved with such accuracy and clearness that it can be identified, its quantity known, and its boundaries determined beyond the possibility of future controversy.⁵ But the description of land by a contract for conveyance does not need to be set forth with the precision of metes and bounds and monuments.⁶ A contract to convey by township, section, and range, without naming the county, has been held to be sufficiently explicit, the court taking notice of the United States system of surveys.⁷ So also a practical location of the premises intended pursuant to the agreement is, in many cases, sufficient to give the requisite definiteness to a contract otherwise defective,⁸ and it will, as a rule, be held sufficient if the property intended to be conveyed can be identified by evidence properly admissible.⁹ And where a contract between the plain-

1. *Certainty of Parties*. — *Ross v. Purse*, 17 Colo. 24.

2. *Watkins v. Turner*, 34 Ark. 663; *Stanton v. Miller*, 58 N. Y. 192.

3. *Lee v. Cherry*, 85 Tenn. 707, 4 Am. St. Rep. 800. See also the title AMBIGUITY, vol. 2, p. 287.

4. *Description of Property* — *United States*. — *Preston v. Preston*, 95 U. S. 200.

Arkansas. — *Jordan v. Deaton*, 23 Ark. 704.

California. — *Ferris v. Irving*, 28 Cal. 645.

Colorado. — *Ross v. Purse*, 17 Colo. 24.

Illinois. — *Brix v. Ott*, 101 Ill. 70; *Borden v. Croak*, 131 Ill. 68, 19 Am. St. Rep. 23.

Indiana. — *Gigos v. Cochran*, 54 Ind. 593.

Michigan. — *McMurtrie v. Bennette*, Harr. (Mich.) 126; *Ramsdell v. Millerd*, Harr. (Mich.) 373.

Missouri. — *Shelton v. Church*, 10 Mo. 774.

New Jersey. — *Welsh v. Bayaud*, 21 N. J. Eq. 186; *Camden, etc., R. Co. v. Stewart*, 18 N. J. Eq. 489.

North Carolina. — *Prater v. Miller*, 3 Hawks. (10 N. Car.) 628; *Capps v. Holt*, 5 Jones Eq. (58 N. Car.) 153.

Ohio. — *Maud v. Maud*, 33 Ohio St. 147.

Texas. — *Taylor v. Ashley*, 15 Tex. 50.

Vermont. — *Olmstead v. Abbott*, 61 Vt. 281.

Virginia. — *Graham v. Hendren*, 5 Munf. (Va.) 185.

West Virginia. — *Patrick v. Horton*, 3 W. Va. 23.

5. *Arkansas*. — *Jordan v. Deaton*, 23 Ark. 704; *Johnson v. Craig*, 21 Ark. 533.

California. — *Ferris v. Irving*, 28 Cal. 645.

Iowa. — *Day v. Griffith*, 15 Iowa 104.

Kentucky. — *Hanly v. Blackford*, 1 Dana (Ky.) 1, 25 Am. Dec. 114.

Michigan. — *Wiegert v. Franck*, 56 Mich. 200; *Ramsdell v. Millerd*, Harr. (Mich.) 373.

Missouri. — *Shelton v. Church*, 10 Mo. 774.

New Jersey. — *Camden, etc., R. Co. v. Stewart*, 18 N. J. Eq. 489; *Carr v. Passaic Land Imp., etc., Co.*, 22 N. J. Eq. 85.

New York. — *Voorhees v. De Myer*, 3 Sandf. Ch. (N. Y.) 614.

North Carolina. — *Prater v. Miller*, 3 Hawks. (10 N. Car.) 628.

Oregon. — *Brown v. Lord*, 7 Oregon 302.

Pennsylvania. — *Ruff's Appeal*, 117 Pa. St. 310; *Cortelyou's Appeal*, 102 Pa. St. 576.

Texas. — *Bracken v. Hambrick*, 25 Tex. 408; *Taylor v. Ashley*, 15 Tex. 50.

Virginia. — *Graham v. Hendren*, 5 Munf. (Va.) 185.

Washington. — *Rochester v. Yesler*, 6 Wash. 114.

West Virginia. — *Mathews v. Jarrett*, 20 W. Va. 415; *Patrick v. Horton*, 3 W. Va. 23.

Thus, a promise to convey one hundred and sixty acres "in any one of the following counties," naming them, is incapable of enforcement. *Newman v. Perrill*, 73 Ind. 153. See *Reed v. Hornback*, 4 J. J. Marsh. (Ky.) 375; *Shelton v. Church*, 10 Mo. 774.

6. *Myers v. Metzger*, 61 N. J. Eq. 522.

7. *White v. Hermann*, 51 Ill. 243, 99 Am. Dec. 543; *Ottumwa, etc., R. Co. v. McWilliams*, 71 Iowa 164; *Richards v. Snider*, 11 Oregon 197.

8. *Dewey v. Spring Valley Land Co.*, 98 Wis. 83; *Lundgreen v. Stratton*, 73 Wis. 659.

9. *Bacon v. Leslie*, 50 Kan. 494, 34 Am. St. Rep. 134; *Kraft v. Egan*, 76 Md. 243.

Conveyance of So Much as Necessary. — A contract to convey so much of a designated tract as was necessary for the purpose named, has been held sufficiently certain to be enforced. *Rumble v. Heygate*, 18 W. R. 749; *Sanderson v. Cockermouth, etc., R. Co.*, 11 Beav. 497; *Stuart v. London, etc., R. Co.*, 1 DeG. M. & G.

tiff and defendant provided that on performance of certain conditions the defendant should be entitled to a conveyance of a certain number of acres, to be selected by the plaintiff, a court of equity has power specifically to enforce the contract and compel a selection to be made.¹

(4) *Time of Performance.* — If the time of performance of a contract is left uncertain, specific enforcement in equity cannot be had.² So when a contract of sale stated that credit was to be given for a certain part of the purchase money, but the length of the credit was not fixed, nor whether it was to be with interest, the agreement was held to lack the requisite certainty for specific performance.³ It has also been held that when one of the terms of a contract of sale is that part of the consideration is to be secured by mortgage payable at a time to be fixed and agreed upon by the parties, the contract is not sufficiently definite to entitle the purchaser to a decree for specific performance.⁴ And the fact that no time was fixed in a contract for the conveyance of land was held immaterial, because the legal implication would be that the conveyance was to be made within a reasonable time.⁵ A contract will not, as a rule, be specifically enforced where it cannot be determined how long it was to continue,⁶ particularly where it appears that the parties made a contemporaneous agreement that the contract should continue in force "only so long as both parties should desire," and that the defendant had terminated it.⁷

(5) *Price and Consideration.* — Where the price or consideration is not fixed or expressed in the contract and no mode of its determination is agreed on, the contract will not be specifically enforced.⁸ And where the contract provided for determining the price by arbitration, it was held that in the absence of an award the contract was too uncertain to be enforced,⁹ unless, indeed, the fixing of the price under the circumstances of the case was not essential.¹⁰

721; *Pearce v. Watts*, L. R. 20 Eq. 492; *Prater v. Miller*, 3 Hawks. (10 N. Car.) 628; *State v. Baum*, 6 Ohio 383.

1. *Fleishman v. Woods*, 135 Cal. 256.

2. *Time of Performance.* — *Oxford v. Crow*, (1893) 3 Ch. 535; *Roberts v. Campbell*, 59 Iowa 675; *Olive v. Dougherty*, 3 Greene (Iowa) 371; *Gates v. Gamble*, 53 Mich. 181; *Williams v. Stewart*, 25 Minn. 516; *Milliman v. Huntington*, 68 Hun (N. Y.) 258; *Berry v. Wortham*, 96 Va. 87; *Schmeling v. Kriesel*, 45 Wis. 325. And see *Easton v. Millington*, 105 Cal. 49. Compare *Lamb v. Hinman*, 46 Mich. 112.

Failure to Designate Time for Payment of Balance of Price. — *Potts v. Whitehead*, 20 N. J. Eq. 55.

Payable "in the Fall." — A contract for the sale of land which provides that the purchase money shall be paid "in the fall" of a year named is sufficiently certain in designating the period of payment, so that specific performance may be decreed. *Dark v. Bagley*, 3 Murph. (7 N. Car.) 33.

Transfer of Stock — Payment. — *Diamond State Iron Co. v. Todd*, 6 Del. Ch. 163.

3. *Potts v. Whitehead*, 20 N. J. Eq. 55.

4. *McKibbin v. Brown*, 14 N. J. Eq. 13.

But Where There Was No Agreement for Any Period of Credit, but merely that the purchaser should execute a mortgage, it was held that the agreement would be specifically enforced, the legal implication being that the debt secured by the mortgage was to be made payable on demand. *Green v. Richards*, 23 N. J. Eq. 34.

An Agreement that on a Certain Day in the future the defendant would pay a debt, or, in default thereof, would execute a mortgage on

certain premises, is not too uncertain and indefinite to be enforced. *Allender v. Evans-Smith Drug Co.*, 3 Indian Ter. 628.

Contract to Execute Mortgage. — Nor will the specific performance of a contract to execute a mortgage be refused merely because the contract did not specify when the payment of the money to be secured by the mortgage was to be made. *Triebert v. Burgess*, 11 Md. 463.

5. *Williamson v. Neeves*, 94 Wis. 656.

6. *Gardner v. Watson*, 13 Ill. 347.

7. *Real Estate Title Ins., etc., Co.'s Appeal*, 125 Pa. St. 549, 11 Am. St. Rep. 920.

But a contract to supply water for a stated period "or longer" at the option of the party to be supplied is not unenforceable for indefiniteness of duration, as the period of its continuance may be fixed by the lawful and regular exercise of the option. *Christian, etc., Grocery Co. v. Bienville Water-Supply Co.*, 106 Ala. 124.

8. *Olive v. Dougherty*, 3 Greene (Iowa) 371; *Pray v. Clark*, 113 Mass. 283; *Holliday v. Hubbard*, 45 Minn. 333.

Omission of Price and Terms of Sale. — *Soles v. Hickman*, 20 Pa. St. 180.

Erection of Undescribed Building. — *Mastin v. Halley*, 61 Mo. 196.

Improvements — No Value Fixed. — *Metcalf v. Hart*, 3 Wyo. 513, 31 Am. St. Rep. 122.

9. *Price to Be Determined by Arbitration.* — *Blundell v. Brettargh*, 17 Ves. Jr. 232; *Vickers v. Vickers*, L. R. 4 Eq. 529; *Baker v. Glass*, 6 Munf. (Va.) 212; *Graham v. Call*, 5 Munf. (Va.) 396; *Hopkins v. Gilman*, 22 Wis. 476.

10. *Dinham v. Bradford*, L. R. 5 Ch. 519; *Milnes v. Gery*, 14 Ves. Jr. 400.

Where a mode of ascertaining the price is specified in the contract, such mode must be pursued,¹ but where equity demands the enforcement of the contract the court will, if practicable, fix the value itself and decree specific performance.² So where the provision is merely that the price shall be fair, it may be determined by the court and the contract enforced.³

(6) *Where Contract Capable of Being Made Certain* — (a) *General Rule*. — The maxim *id certum est quod certum reddi potest* is applicable in actions for specific performance.⁴ So where the intention of the parties can be clearly ascertained from the language of the contract it will be enforced accordingly though it is inartificially expressed.⁵ And a written instrument that contains all the details of a contract, except such as may be legitimately proved by parol, is sufficiently certain to be enforced.⁶

(b) *Uncertainty Cured by Acts of Parties*. — The parties to a contract for the conveyance of real property may, by their own conduct under the contract in connection with the property conveyed, "render certain what might otherwise be deemed uncertain."⁷ So a defective description of land in a contract for conveyance may be remedied by putting the purchaser into possession.⁸ Nor is uncertainty as to the term and character of service necessarily such uncertainty as will defeat the enforcement of a contract of which such service is the consideration, where the contract has been fully performed by the rendition of the service.⁹

(7) *Specific Performance Refused Though Contract Not Void at Law*. — It has been held that a court of equity may refuse to decree specific performance, even though the contract be not so uncertain as to be void at law, and might even sustain an order of damages for its breach.¹⁰

(8) *Where Contract Not Disputed*. — Where the parties to a contract agree as to the meaning of its terms, specific performance will not, as a rule, be denied on the ground of uncertainty.¹¹

(9) *Contract Uncertain as to Part*. — If a substantial portion of the contract is sufficiently certain to enable a court of equity to enforce it, a decree will be granted compelling the performance of that part.¹²

(10) *Assignees and Representatives*. — The rule that a specific performance will be refused where the contract is vitiated by uncertainty, has been held applicable with greater strictness against assignees and representatives of the contracting parties, than against the original parties themselves.¹³

g. *ENFORCEABILITY* — (i) *General Rule*. — It is a well-settled principle in the present connection that equity will not decree specific performance of

1. *Woodruff v. Woodruff*, 44 N. J. Eq. 349.

2. *Arnot v. Alexander*, 44 Mo. 25, 100 Am. Dec. 252.

3. *Van Doren v. Robinson*, 16 N. J. Eq. 256; *Woodruff v. Woodruff*, 44 N. J. Eq. 349; *Myers v. Metzger*, 61 N. J. Eq. 522. See also *Dunnell v. Keteltas*, (Supm. Ct. Gen. T.) 16 Abb. Pr. (N. Y.) 211.

4. *Where Contract May Be Made Certain*. — *Homan v. Stewart*, 103 Ala. 644; *Ham v. Johnson*, 55 Minn. 115; *Kyle v. Rhodes*, 71 Miss. 487; *Repetto v. Baylor*, 61 N. J. Eq. 501; *Worch v. Woodruff*, 61 N. J. Eq. 78; *Waters v. Bew*, 52 N. J. Eq. 787; *Tyler Bldg., etc., Assoc. v. Forse*, (Tex. Civ. App. 1900) 59 S. W. Rep. 818.

Thus, a contract which gives the privilege of buying "at a fair market price," while in a sense uncertain, may yet be made certain by evidence as to what is a fair market price. *Myers v. Metzger*, 61 N. J. Eq. 522.

5. *Bull v. Bell*, 4 Wis. 54.

6. *Colerick v. Hooper*, 3 Ind. 316, 56 Am. Dec. 505.

7. *Engle v. White*, 104 Mich. 15.

8. *Brown v. Ward*, 110 Iowa 123; *Ottumwa, etc., R. Co. v. McWilliams*, 71 Iowa 164; *Lawrence v. Saratoga Lake R. Co.*, 36 Hun (N. Y.) 473.

Under the Mississippi Cases, which recognize no efficacy in part performance, the written contract must definitely distinguish the lands intended to be conveyed, even though the purchaser under it has entered on a specific tract. *Fisher v. Kuhn*, 54 Miss. 480. And see *McGuire v. Stevens*, 42 Miss. 724, 2 Am. Rep. 649; *Box v. Stanford*, 13 Smed. & M. (Miss.) 93, 51 Am. Dec. 142; *Beaman v. Buck*, 9 Smed. & M. (Miss.) 210.

Assignment of Undescribed Accounts — Selection by Assignee. — *Preston Nat. Bank v. George T. Smith Middlings Purifier Co.*, 84 Mich. 364.

9. *Lafollett v. Kyle*, 51 Ind. 446.

10. *Stanton v. Singleton*, 126 Cal. 657.

11. *Stovall v. McCutchen*, 107 Ky. 577.

12. *Sarter v. Gordon*, 2 Hill Eq. (S. Car.) 121.

13. *Odell v. Morin*, 5 Oregon 96.

a contract where, in the nature of things, it would be impossible or impracticable for the court to enforce its decree.¹ So equity will not entertain a bill for specific performance where it is manifest that before a decree could be rendered the contract would have expired.² But a contract, the execution of a part of which it would be difficult or impracticable to compel, may be enforced as to the residue if the difficult portion has already been actually executed.³ It has been said that a court of equity will not attempt to enforce a contract specifically unless it can be done mutually and completely, so as to secure substantially all that the parties contemplated.⁴ But this rule is subject to some exceptions, as where, it has been said, the consideration is entire but the performance separate.⁵ So, also, an agreement to execute a mortgage to pay money at a future day may be specifically enforced;⁶ and likewise the execution of a penal bond conditioned not to trade within designated limits.⁷

(2) *Property Not in Existence.* — A court of chancery will not decree specific performance of an agreement to convey property which has no existence.⁸

(3) *Where Party Might Nullify Decree.* — If the case is one in which either the provisions of the contract or the law would permit a party the option to nullify a decree for specific performance, should one be granted, the court will not do a vain thing by rendering such a decree.⁹

(4) *Acts Beyond Defendant's Ability* — (a) *General Rule.* — It may be stated as a general rule that a court of equity will not decree the specific enforcement of a contract beyond the ability of the defendant to perform.¹⁰ Nor

1. *Where Decree Not Enforceable.* — *Lacombe v. Forstall*, 123 U. S. 562; *Summerlin v. Fronticriza Silver Min., etc., Co.*, 41 Fed. Rep. 249; *Browning v. Kelly*, 124 Ala. 645; *Dunnell v. Keteltas*, (Supm. Ct. Gen. T.) 16 Abb. Pr. (N. Y.) 205; *Langford v. Taylor*, 99 Vt. 577.

That is to say, the situation of the parties and the nature of the contract must be such that the agreement may be executed, at least substantially, according to the original design. Equity will not undertake to do a vain thing. A substantial compliance must be practicable as well as possible. *Irwin v. Bailey*, 72 Ala. 467; *Ikerd v. Beavers*, 106 Ind. 485; *Shriver v. Seiss*, 49 Md. 384; *Bourget v. Monroe*, 58 Mich. 563; *Rust v. Conrad*, 47 Mich. 449, 41 Am. Rep. 720; *Blanchard v. Detroit, etc., R. Co.*, 31 Mich. 43, 18 Am. Rep. 142; *Buck v. Smith*, 29 Mich. 166, 18 Am. Rep. 84; *Angus v. Robinson*, 62 Vt. 60. See also *Marietta, etc., R. Co. v. Western Union Tel. Co.*, 38 Ohio St. 24.

A court of equity will not exercise its jurisdiction for specific performance, however inadequate the remedy of damages at law, when the contract is of such a nature that the decree for its specific performance cannot be enforced by the ordinary processes of the court. *Knott v. Shepherdstown Mfg. Co.*, 30 W. Va. 790.

In *Bozon v. Farlow*, 1 Meriv. 459, the chancellor refused to decree specific performance of a contract to assign an attorney's business on the ground that the court was not able to carry its decree into execution.

Compare, however, *Bryson v. Whitehead*, 1 Sim. & St. 74, in which specific performance was decreed of an agreement to sell the good will of a trade and the exclusive use of a secret in dyeing.

2. *Welty v. Jacobs*, 64 Ill. App. 285; *Hovnanian v. Bedessern*, 63 Ill. App. 353; *Werden*

v. Graham, 107 Ill. 169; *Brown v. Britton*, 41 N. Y. App. Div. 57.

3. See *Lattin v. Hazard*, 91 Cal. 87; *Welch v. Whelpley*, 62 Mich. 15, 4 Am. St. Rep. 810.

4. *Bourget v. Monroe*, 58 Mich. 563. And see *Bumpus v. Bumpus*, 53 Mich. 346; *Rust v. Conrad*, 47 Mich. 449, 41 Am. Rep. 720; *Roberts v. Kelsey*, 38 Mich. 602; *Wright v. Wright*, 31 Mich. 380; *Blanchard v. Detroit, etc., R. Co.*, 31 Mich. 52, 18 Am. Rep. 142; *Buck v. Smith*, 29 Mich. 166, 18 Am. Rep. 84; *Sterling v. Klepsattle*, 24 Ind. 94, 87 Am. Dec. 319.

5. *Granville v. Betts*, 19 L. J. Ch. 32; *Sterling v. Klepsattle*, 24 Ind. 94, 87 Am. Dec. 319.

6. *Ogden v. Ogden*, 4 Ohio St. 182.

7. *Avery v. Langford*, Kay 663.

8. *Property Not in Esse.* — *Kennedy v. Hazelton*, 128 U. S. 667. And see *Burton v. Shotwell*, 13 Bush (Ky.) 271, where the agreement was to transfer stock of a corporation which had not been organized.

9. *New Brunswick, etc., R. Co. v. Mugeridge*, 4 Drew. 686; *Rust v. Conrad*, 47 Mich. 449, 41 Am. Rep. 720. And see *Stamets v. Deniston*, 30 Pittsb. Leg. J. N. S. (Pa.) 48.

Where Power of Revocation Exists. — "A court of equity," it has been said, "never interferes where the power of revocation exists." *Southern Express Co. v. Western North Carolina R. Co.*, 99 U. S. 191. And see *Rutland Marble Co. v. Ripley*, 10 Wall. (U. S.) 339; *Rust v. Conrad*, 47 Mich. 455, 41 Am. Rep. 720.

Thus, a Mere Consent to Arbitrate, aside from other considerations, is not enforceable because either party may revoke it before actual submission. *Dunnell v. Keteltas*, (Supm. Ct.) 16 Abb. Pr. (N. Y.) 205.

10. *Inability of Defendant to Perform.* — *Lane v. Crossman*, 58 Ill. App. 386; *Caperton v. Forey*, 49 La. Ann. 872; *Rommel v. Summit Branch Coal Co.*, 18 Pa. Super. Ct. 482.

will specific performance of a contract be decreed where, in the nature of things, the only effect of a decree would be to imprison the defendant perpetually.¹

(b) *Where No Title in Defendant.* — Equity will not decree the conveyance of property to which the defendant has no title, or decree the conveyance of a different title from that which a party is able to convey.² Where, since a contract for the conveyance of property was executed, the party has conveyed the property to an innocent third person, the prospective vendee is left to his action for damages.³ But a vendor of land cannot, as an excuse for his refusal to perform, avail himself of his neglect to do that which was within his power, and which if done would have enabled him to perform his contract.⁴

(c) *When Conveyance to Third Person Set Aside.* — Where a conveyance is made in order to put it out of the power of the grantor to fulfil a contract previously entered into with the knowledge or concurrence of the grantee, the transaction will be declared null and void, and, if the proper parties are before the court, a decree will be rendered compelling a conveyance to the party rightfully entitled.⁵

(5) *Approximate Relief.* — Where specific performance of a contract is impracticable, the plaintiff may have approximate relief in some other form, which will secure to him the substantial advantages of his contract.⁶

(6) *Conditions to Be Performed by Complaint.* — Where certain conditions remain to be performed by the party seeking the aid of a court of equity, of such a nature that performance could not be enforced, a decree will, as a rule, be denied. This is under the rule that equity will not compel one party to a contract to fulfil his obligation unless it can render a like decree against the other.⁷

3. Rule in Case of Conditional Contracts. — Where the contract is subject to collateral conditions, as the contract of a third person interested, specific performance will not be decreed unless such condition has occurred or been performed;⁸ and likewise where the contract was contingent upon the subsequent consent or agreement of the parties thereto,⁹ or was dependent on a future event which might never happen.¹⁰ And *a fortiori* where a part of the considera-

1. *Love v. Cobb*, 63 N. Car. 324.

2. *Where No Title in Defendant* — *England.* — *Columbine v. Chichester*, 2 Phil. 27; *Ferguson v. Wilson*, L. R. 2 Ch. 77; *Post v. Marsh*, 16 Ch. D. 395.

United States. — *Kennedy v. Hazelton*, 128 U. S. 667; *Hildreth v. Thibodeau*, 117 Fed. Rep. 146.

Alabama. — *Fitzpatrick v. Featherstone*, 3 Ala. 40.

Arkansas. — *Shields v. Trammell*, 19 Ark. 51.

Kansas. — *Neuforth v. Hall*, 6 Kan. App. 902.

Kentucky. — *Gaither v. O'Doherty*, (Ky. 1889) 12 S. W. Rep. 306.

Maine. — *Snell v. Mitchell*, 65 Me. 48; *Smith v. Kelley*, 56 Me. 64.

Massachusetts. — *Milkman v. Ordway*, 106 Mass. 232.

Missouri. — *Brueggeman v. Jurgensen*, 24 Mo. 87.

New Jersey. — *Corby v. Drew*, 55 N. J. Eq. 387.

New York. — *Stevenson v. Buxton*, 37 Barb. (N. Y.) 13; *Woodward v. Harris*, 2 Barb. (N. Y.) 439; *Kempshall v. Stone*, 5 Johns. Ch. (N. Y.) 193; *Morss v. Elmendorf*, 11 Paige (N. Y.) 277; *Klaweiter v. Hubner*, 68 Hun (N. Y.) 338.

North Carolina. — *Swepson v. Johnston*, 84 N. Car. 449.

Pennsylvania. — *Maguire v. Heraty*, 163 Pa. St. 381, 43 Am. St. Rep. 800; *Northern Cent. R. Co. v. Walworth*, 12 York. Leg. Rec. (Pa.) 121.

Rhode Island. — *Flackhamer v. Himes*, (R. I. 1902) 53 Atl. Rep. 46.

South Carolina. — *Davenport v. Latimer*, 53 S. Car. 563.

West Virginia. — *Bates v. Swiger*, 40 W. Va. 420.

3. Innocent Third Parties. — *Fitzpatrick v. Featherstone*, 3 Ala. 40; *Shields v. Trammell*, 19 Ark. 51; *Ferrier v. Buzick*, 2 Iowa 136; *Hill v. Fiske*, 38 Me. 520; *Middlekauff v. Barrick*, 4 Gill (Md.) 290; *Peeler v. Levy*, 26 N. J. Eq. 330; *Stevenson v. Buxton*, (Supm. Ct. Gen. T.) 15 Abb. Pr. (N. Y.) 352; *Love v. Cobb*, 63 N. Car. 324; *Nicol v. Carr*, 35 Pa. St. 381.

4. *Thurman v. Pointer*, 67 Miss. 297; *Conant v. Bellows Falls Canal Co.*, 29 Vt. 263.

5. *Davies v. Collins*, 25 N. Y. App. Div. 272; *Northern Cent. R. Co. v. Walworth*, 193 Pa. St. 207, 74 Am. St. Rep. 683; *Bates v. Swiger*, 40 W. Va. 420; *Bull v. Bell*, 4 Wis. 54.

6. *Bennett v. Abrams*, 41 Barb. (N. Y.) 619.

7. *Wollensak v. Briggs*, 119 Ill. 453. And see *Irish's Estate*, 30 Pittsb. Leg. J. N. S. (Pa.) 293.

8. Conditional Contracts. — *Putnam v. Grace*, 161 Mass. 237; *Hector-Johnston Co. v. Billings*, (Neb. 1902) 91 N. W. Rep. 183; *Easton v. Lockhart*, 10 N. Dak. 181. See also *Johnson v. Johnson*, 16 Minn. 512.

9. *Glidden v. Korter*, 90 Me. 269.

10. *Bradley v. Morgan*, 2 A. K. Marsh. (Ky.) 369.

tion for the contract was a promise to marry, impossible of performance by reason of the death of one of the parties, it was held that specific performance of a dependent covenant would not be decreed.¹ But a contract or covenant which the happening of a condition or contingency may defeat will be enforced as long as it remains in force.²

4. Performance of Conditions Precedent — *a. GENERAL RULE.* — It is well settled as a general rule that a plaintiff will not be entitled to specific performance until the performance, or an offer to perform, on his own part, of all conditions precedent required by the terms of the contract.³ But a vendor in a contract of sale cannot, subsequent to the execution of the contract, impose unreasonable conditions upon the vendee and then refuse to convey unless the conditions are complied with.⁴

Substantial Performance. — A plaintiff, however, in an action for specific performance, is not in all instances bound to a literal compliance with his obligation, but may establish his position in a court of equity by a substantial performance of it.⁵

Undertaking Not Amounting to Condition. — Of course, if the undertaking on the plaintiff's part is not a condition precedent, his failure to perform it will not prevent a specific performance in his favor.⁶

Nugatory Act. — If the act required of the plaintiff be a merely nugatory one, his failure to perform will not impair his right to specific performance.⁷

b. WHERE PLAINTIFF'S FAILURE DUE TO DEFENDANT'S DEFAULT. — Where the plaintiff's failure to perform conditions precedent has been due solely to the defendant's misconduct or default, the latter will not be heard to object to the plaintiff's nonperformance, in an action for specific performance, and a decree will be rendered notwithstanding the failure to perform;⁸ and the rule is the same in the case of the nonperformance of condi-

1. *Bartley v. Greenleaf*, 112 Iowa 82.

2. *Parker's Estate*, 4 Pa. Dist. 221.

3. **Performance of Conditions Precedent** — *California.* — *Troy v. Clarke*, 30 Cal. 419.

Colorado. — *Boyes v. Green Mountain Falls Town, etc., Co.*, 3 Colo. App. 295.

Illinois. — *Cohn v. Mitchell*, 115 Ill. 125.

Indiana. — *Burke v. Mead*, 159 Ind. 252; *Thompson v. Allen*, 12 Ind. 539; *West v. Chase*, 3 Ind. 301.

Iowa. — *Minneapolis, etc., R. Co. v. Cox*, 76 Iowa 306, 14 Am. St. Rep. 216.

Kansas. — *Sanford v. Bartholomew*, 33 Kan. 38.

Maine. — *McIntire v. Bowden*, 61 Me. 153.

Massachusetts. — *Sullings v. Sullings*, 9 Allen (Mass.) 234.

Michigan. — *Johnston v. King*, 128 Mich. 216, 8 Detroit Leg. N. 614.

New York. — *Hatch v. Cobb*, 4 Johns. Ch. (N. Y.) 559.

Oregon. — *David v. Anderson*, 34 Oregon 439; *Manaudas v. Heilner*, 29 Oregon 222.

Vermont. — *Washburn v. Dewey*, 17 Vt. 92.

Virginia. — *Lightner v. Lightner*, (Va. 1895) 23 S. E. Rep. 301.

Washington. — *Page v. Carnine*, 29 Wash. 387.

West Virginia. — *McCully v. McLean*, 48 W. Va. 625.

See also *Daniel v. Hill*, 23 Tex. 571.

Offer to Perform. — It is not always necessary that the plaintiff shall have performed his part of the contract. It may suffice to show that he is ready and willing to perform. *Goman v. Salisbury*, 1 Vern. 240; *Colson v. Thompson*,

2 Wheat. (U. S.) 336; *Jenkins v. Harrison*, 66 Ala. 345; *Belle Greene Min. Co. v. Tuggle*, 65 Ga. 652; *Forsyth v. McCauley*, 48 Ga. 402; *Botsford v. Burr*, 2 Johns. Ch. (N. Y.) 416; *Baldwin v. Salter*, 8 Paige (N. Y.) 473; *Thompson v. Scott*, 1 McCord Eq. (S. Car.) 39.

4. *Mastin v. Grimes*, 88 Mo. 478.

5. **Substantial Performance.** — *Taylor v. Longworth*, 14 Pet. (U. S.) 172; *Southern Pine Fibre Co. v. North Augusta Land Co.*, 53 Fed. Rep. 318; *Rust v. Strickland*, 21 Colo. 177; *Oliver v. Crowell*, 42 Ill. 41; *Nilles v. Welsh*, 89 Iowa 491; *Burlington v. Burlington Water Co.*, 86 Iowa 266; *Fitzgerald v. Britt*, 43 Iowa 498; *Clark v. Sears*, 3 Iowa 104; *Show v. Livermore*, 2 Greene (Iowa) 338; *Johnston v. Mitchell*, 1 A. K. Marsh. (Ky.) 227, 10 Am. Dec. 727; *Church v. Steele*, 1 A. K. Marsh. (Ky.) 330; *Hart v. Brand*, 1 A. K. Marsh. (Ky.) 159, 10 Am. Dec. 715; *Maughlin v. Perry*, 35 Md. 352; *Adams v. Thompson*, 28 Neb. 53; *Zimmerman v. Brown*, (N. J. 1897) 36 Atl. Rep. 675; *Gira v. Harris*, 14 S. Dak. 537.

Where Variation from Literal Performance Subject of Pecuniary Compensation. — *Hulmes v. Thorpe*, 5 N. J. Eq. 415. See also *Hepburn v. Auld*, 5 Cranch (U. S.) 262; *Stevenson v. Polk*, 71 Iowa 278.

6. *Minneapolis, etc., R. Co. v. Cox*, 76 Iowa 306, 14 Am. St. Rep. 216; *Mitchell v. Long*, 5 Litt. (Ky.) 71; *Lloyd v. O'Rear*, 59 S. W. Rep. 483, 22 Ky. L. Rep. 1000.

7. *Coale v. Barney*, 1 Gill & J. (Md.) 324.

8. **Defendant's Misconduct.** — *Powell v. Higby*, 90 Ala. 103; *Dulin v. Prince*, 124 Ill. 76; *Church v. Steele*, 1 A. K. Marsh. (Ky.) 328; *Kellogg v.*

tions precedent by the plaintiff, where such conditions were subsequent to other unperformed conditions which it was the duty of the defendant to perform.¹

c. WAIVER AND ESTOPPEL. — Where, after default, a condition precedent to the performance of a contract is waived, a forfeiture cannot be subsequently insisted upon as the result of such nonperformance.² And where the plaintiff's performance of the contract has been approved and accepted without objection by the defendant, he will be estopped to set up objections thereto in a subsequent suit for specific performance.³ So also there may be a waiver of delay in the performance of conditions precedent, by a failure to object on account of delay until such conditions have been actually performed.⁴

Agreed Construction of Contract. — The defendant in a suit for specific performance who had theretofore acted on the contract as it was understood by the plaintiff is bound thereby, and cannot set up the defense that the contract was to be construed differently, and that the plaintiff had refused to carry it out according to such different construction.⁵

d. TENDER OR OFFER TO PERFORM — (1) *In General.* — Where certain conditions remain unperformed by the plaintiff which it would be his duty to perform contemporaneously with the defendant's compliance with the contract, there must be a tender or offer of performance by the plaintiff, or specific enforcement will not be decreed,⁶ in the absence of some excuse, sufficient in equity, for the plaintiff's default.⁷ While a technical tender at law or offer of performance in the precise terms of the contract will not in all instances be required,⁸ yet the plaintiff's offer of performance must be in substantial

Lavender, 9 Neb. 418; Bristol *v.* Bristol, etc., Water Works, 19 R. I. 413.

1. Pomeroy *v.* Fullerton, 113 Mo. 440. See also Monterey County *v.* Seegleken, (Cal. 1894) 36 Pac. Rep. 515.

2. Farley *v.* Vaughn, 11 Cal. 227; Izard *v.* Kimmel, 26 Neb. 51.

3. German Sav. Inst. *v.* De La Vergne Refrigerating Mach. Co., (C. C. A.) 70 Fed. Rep. 146; Dilts *v.* Sweet, 66 Hun (N. Y.) 629, 21 N. Y. Supp. 57.

4. Des Moines University *v.* Polk County Homestead, etc., Co., 87 Iowa 36.

5. Price *v.* Morgan, (N. J. 1887) 10 Atl. Rep. 663.

6. *Offer to Perform* — United States. — Horton *v.* McKee, 68 Fed. Rep. 404; Wescott *v.* Mulvane, (C. C. A.) 58 Fed. Rep. 305.

Arkansas. — Rudd *v.* Savelli, 44 Ark. 145; *Ex p.* Hodges, 24 Ark. 197.

Georgia. — Kerr *v.* Hammond, 97 Ga. 567.

Illinois. — Doyle *v.* Teas, 5 Ill. 202.

Indiana. — Burke *v.* Mead, 159 Ind. 252; Sowle *v.* Holdridge, 63 Ind. 216; Hunter *v.* Bales, 24 Ind. 299.

Maryland. — Chicora Fertilizer Co. *v.* Dunan, 91 Md. 144.

Massachusetts. — Thaxter *v.* Sprague, 159 Mass. 397.

Minnesota. — Lamprey *v.* St. Paul, etc., R. Co., 86 Minn. 509.

Nevada. — Schroeder *v.* Gemeinder, 10 Nev. 367.

New Jersey. — Miller *v.* Cameron, 45 N. J. Eq. 95.

New York. — Dyke *v.* Spargur, 143 N. Y. 651; Becker *v.* Boon, 61 N. Y. 317; Simpson *v.* French, (N. Y. Super. Ct. Spec. T.) 25 How. Pr. (N. Y.) 464; National Oleo Meter Co. *v.* Jackson, 56 N. Y. Super. Ct. 609, 3 N. Y. Supp.

826; Sheriden *v.* Smith, 2 Hill (N. Y.) 538; Brown *v.* Ferguson, 2 Den. (N. Y.) 196.

North Dakota. — Kulberg *v.* Georgia, 10 N. Dak. 461; Shelly *v.* Mikkelson, 5 N. Dak. 22.

Ohio. — Suydam *v.* Martin, Wright (Ohio) 384.

Oregon. — Clarno *v.* Grayson, 30 Oregon 111. Pennsylvania. — Freeman *v.* Stokes, 12 Phila. (Pa.) 219, 34 Leg. Int. (Pa.) 248.

Texas. — Polk *v.* Kyser, 21 Tex. Civ. App. 676.

Washington. — Page *v.* Carnine, 29 Wash. 387.

Wisconsin. — Dickey *v.* Pugh, 110 Wis. 400.

Ascertainment of Price. — The specific performance of a contract which involves the payment of a price will not be decreed until the price has been ascertained. Woodruff *v.* Woodruff, 44 N. J. Eq. 349.

7. *Excuse for Default.* — Cox *v.* Boyd, 38 Ala. 42; Jordan *v.* Deaton, 23 Ark. 704; Campbell *v.* Harrison, 3 Litt. (Ky.) 292; Moore *v.* Skidmore, Litt. Sel. Cas. (Ky.) 453, 12 Am. Dec. 333; Stevenson *v.* Dunlap, 7 T. B. Mon. (Ky.) 134; Babcock *v.* Emrich, (Supm. Ct. Gen. T.) 64 How. Pr. (N. Y.) 435; Ludlow *v.* Cooper, 13 Ohio 552.

8. *Nature of Offer* — England. — Clarke *v.* Elliott, 1 Madd. 606.

United States. — Johnson *v.* Sukeley, 2 McLean (U. S.) 562.

Iowa. — Totty *v.* Harris, 82 Iowa 645.

Massachusetts. — Irvin *v.* Gregory, 13 Gray (Mass.) 215.

Michigan. — McHugh *v.* Wells, 39 Mich. 175; Morris *v.* Hoyt, 11 Mich. 9.

Minnesota. — Poehler *v.* Reese, 78 Minn. 71; Minneapolis, etc., R. Co. *v.* Chisholm, 55 Minn. 374; St. Paul Land Co. *v.* Dayton, 39 Minn. 315.

compliance with the contract.¹

(2) *Where Contract Abandoned or Repudiated.* — Where the defendant has abandoned and repudiated the contract, a tender or offer to perform by the plaintiff before suit brought is unnecessary,² and likewise where the defendant has placed it out of his power to perform the contract obligation.³ In such cases a simple offer to perform in the pleadings will meet the requirements of equity.⁴

e. DEPENDENT COVENANTS — CONTEMPORANEOUS PERFORMANCE. — In the case of dependent covenants to be performed contemporaneously, neither party is required to perform until the other does. An offer to perform upon condition of performance by the other party is sufficient.⁵

5. Party Seeking Performance Must Himself Do Equity. — The maxim "he who seeks equity must do equity" is uniformly applicable in actions for specific performance.⁶ This rule, it has been said, requires of the plaintiff

New Jersey. — *Worch v. Woodruff*, 61 N. J. Eq. 78.

New York. — *Bennet v. Bennet*, 10 N. Y. App. Div. 550; *Klaweiter v. Hubner*, 68 Hun (N. Y.) 338; *Birdsall v. Waldron*, 2 Edw. (N. Y.) 315; *Stevenson v. Maxwell*, 2 Sandf. Ch. (N. Y.) 279.

Ohio. — See *Gibbs v. Champion*, 3 Ohio 337.

Wisconsin. — *Seeley v. Howard*, 13 Wis. 336.

"A Court of Chancery Is Not Bound by Any Fixed Rule in relation to the tender of money" in bills for specific performance. *Webster v. French*, 11 Ill. 254; *Anderson v. White*, 27 Ill. 57.

Refusal to Accept Tender Based on Claim of Forfeiture. — In a suit for specific performance the refusal to accept a tender of performance of the contract based solely on a claim of forfeiture makes it immaterial whether such tender strictly conformed to the contract. *Monson v. Bragdon*, 159 Ill. 61.

Tender of Less Amount than Due. — Where the plaintiff was merely to pay the expenses of obtaining a certain land patent, the tender of an amount believed in good faith to be adequate was held sufficient on a simple refusal to receive by the defendant without informing the plaintiff of the proper amount. *Dargin v. Cranston*, 12 Colo. App. 368.

1. *Ridley v. Ennis*, 70 Ala. 463; *Burkhalter v. Jones*, 32 Kan. 5. See also *Brewer v. Thorp*, 3 Ind. 262; *Counce v. Studley*, 81 Me. 431.

2. **Abandonment of Contract — England.** — *Hunter v. Daniel*, 4 Hare 420.

United States. — *Cheney v. Libby*, 134 U. S. 68; *Pollock v. Brainard*, 26 Fed. Rep. 732. And see *Hepburn v. Dunlop*, 1 Wheat. (U. S.) 179.

California. — *Stanton v. Singleton*, (Cal. 1898) 54 Pac. Rep. 587; *Sheplar v. Green*, 96 Cal. 218; *Dowd v. Clarke*, 54 Cal. 48; *Goodale v. West*, 5 Cal. 339.

Illinois. — *Scott v. Beach*, 172 Ill. 273; *Dulin v. Prince*, 124 Ill. 76; *Young v. Jordan*, 80 Ill. App. 559.

Indiana. — *Martin v. Merritt*, 57 Ind. 34, 26 Am. Rep. 45; *Turner v. Parry*, 27 Ind. 163; *Harshman v. Mitchell*, 117 Ind. 312.

Iowa. — *Veeder v. McMurray*, 70 Iowa 118; *Young v. Daniels*, 2 Iowa 126, 63 Am. Dec. 477.

Kentucky. — *Tyler v. Onzts*, 93 Ky. 331.

Massachusetts. — *Irvin v. Gregory*, 13 Gray (Mass.) 215.

Minnesota. — *Brown v. Eaton*, 21 Minn. 409; *Gill v. Newell*, 13 Minn. 462.

Mississippi. — *Wilbourn v. Bishop*, 62 Miss. 341.

Missouri. — *Deichmann v. Deichmann*, 49 Mo. 107.

New Jersey. — *McCormick v. Hickey*, 56 N. J. Eq. 848; *Oakey v. Cook*, 41 N. J. Eq. 350; *Huffman v. Hummer*, 17 N. J. Eq. 263.

New York. — *Baumann v. Pinckney*, 118 N. Y. 604; *Crary v. Smith*, 2 N. Y. 60; *North v. Pepper*, 21 Wend. (N. Y.) 636; *Birdsall v. Waldron*, 2 Edw. (N. Y.) 315. And see *Selleck v. Tallman*, 87 N. Y. 106; *Bruce v. Tilson*, 25 N. Y. 194; *Stevenson v. Maxwell*, 2 N. Y. 408.

Ohio. — *Brock v. Hidy*, 13 Ohio St. 306.

South Dakota. — *McPherson v. Fargo*, 10 S. Dak. 611, 66 Am. St. Rep. 723.

Tennessee. — *Bradford v. Foster*, 87 Tenn. 4.

Vermont. — *Welch v. Darling*, 59 Vt. 136.

Virginia. — *White v. Dobson*, 17 Gratt. (Va.) 262.

Wisconsin. — *Cunningham v. Brown*, 44 Wis. 72; *Wright v. Young*, 6 Wis. 127, 70 Am. Dec. 453.

3. *Luchetti v. Frost*, 133 Cal. xix., 65 Pac. Rep. 969; *Auxier v. Taylor*, 102 Iowa 673; *Kalklosh v. Haney*, 4 Tex. Civ. App. 118.

4. *Veeder v. McMurray*, 70 Iowa 118; *Deichmann v. Deichmann*, 49 Mo. 107.

5. **Dependent Covenants.** — *Shouse v. Doane*, 39 Fla. 95; *Irvin v. Gregory*, 13 Gray (Mass.) 215; *Mhoon v. Wilkerson*, 47 Miss. 633. See also *Kane v. Hood*, 13 Pick. (Mass.) 281.

In the case of *Oakey v. Cook*, 41 N. J. Eq. 350, the court said: "The reasonableness of this rule [the text statement] appears in almost every transaction of the business world. Farmers, merchants, bankers, and all other dealers act on the principle involved every day. Neither parts with his wares or money until he gets an equivalent according to the terms of the contract, whether the contract be made at the instant or days or months antecedently. *Stevenson v. Maxwell*, 2 N. Y. 408, 414; *Irvin v. Gregory*, 13 Gray (Mass.) 218; *Columbia Bank v. Hagner*, 1 Pet. (U. S.) 455."

6. *Barsht v. Tagg*, (1900) 1 Ch. 231, 69 L. J. Ch. 91; *Christian, etc., Grocery Co. v. Bienville Water-Supply Co.*, 106 Ala. 124; *Brown v. Brown*, 66 Conn. 493; *Pomeroy v. Fullerton*, 131 Mo. 581; *Gans v. Renshaw*, 2 Pa. St. 34, 44 Am. Dec. 152; *Bodwell v. Bodwell*, 66 Vt. 101.

that he do all that is in his power to fulfil his part of the contract which he is seeking to enforce, according to its terms. He must do his full duty or the court will not regard his prayer.¹

6. Demand. — Where no time of performance is named in a contract, a demand of performance should be made before suit is brought.² But a demand will not be required where it is clear that it would have been vain or unavailing,³ as where the defendant has been absent from the state,⁴ or has entirely repudiated the contract.⁵ But the strict rule at law requiring a

See also *Canajoharie, etc., Church v. Leiber*, 2 Paige (N. Y.) 43.

No Action After Refusal of Deed. — A plaintiff who has refused the deed tendered cannot maintain an action to compel a specific performance with compensation for defects in the title. *Emrich v. White*, 102 N. Y. 657. See *Gale v. Archer*, 42 Barb. (N. Y.) 320.

1. The Plaintiff's Duty — *United States*. — *Boone v. Missouri Iron Co.*, 17 How. (U. S.) 340; *Watts v. Waddle*, 6 Pet. (U. S.) 389; *Pratt v. Carroll*, 8 Cranch (U. S.) 471; *Colson v. Thompson*, 2 Wheat. (U. S.) 336; *Morgan v. Morgan*, 2 Wheat. (U. S.) 290; *Davis v. Read*, 37 Fed. Rep. 418; *New York Paper-Bag Mach. Co. v. Union Paper-Bag Mach. Co.*, 32 Fed. Rep. 783; *Ohio Steel Barb Fence Co. v. Washburn, etc., Mfg. Co.*, 26 Fed. Rep. 702; *Rushton v. Thompson*, 35 Fed. Rep. 635.

Alabama. — *Strange v. Watson*, 11 Ala. 324.

California. — *Nunez v. Morgan*, 77 Cal. 427; *Green v. Covillaud*, 10 Cal. 317, 70 Am. Dec. 725; *Hoen v. Simmons*, 1 Cal. 119, 52 Am. Dec. 291.

Connecticut. — *Sharps' Rifle Mfg. Co. v. Rowan*, 35 Conn. 127.

Delaware. — *McFarland v. Reeve*, 5 Del. Ch. 118.

Georgia. — *Askew v. Carr*, 81 Ga. 685.

Illinois. — *Harrison v. Polar Star Lodge No. 652*, 116 Ill. 279; *Cohn v. Mitchell*, 115 Ill. 124; *Weingaertner v. Pabst*, 115 Ill. 412; *Thayer v. Wilmington Star Min. Co.*, 105 Ill. 540; *Cassel v. Cassel*, 104 Ill. 361; *McCabe v. Crosier*, 69 Ill. 501; *Livingston County v. Henneberry*, 41 Ill. 180; *Bates v. Wheeler*, 2 Ill. 54.

Indiana. — *Vawter v. Bacon*, 89 Ind. 565; *Slaughter v. Harris*, 1 Ind. 238.

Iowa. — *Butler v. Archer*, 76 Iowa 551; *Wisconsin, etc., R. Co. v. Braham*, 71 Iowa 484; *Vennum v. Babcock*, 13 Iowa 194; *Jones v. Alley*, 4 Greene (Iowa) 181; *Garretson v. Vanloon*, 3 Greene (Iowa) 128, 54 Am. Dec. 492.

Kentucky. — *Enterprise Imp., etc., Co. v. Wilson*, (Ky. 1889) 11 S. W. Rep. 437; *Turner v. Clay*, 3 Bibb (Ky.) 52; *Greenup v. Strong*, 1 Bibb (Ky.) 590; *Bearden v. Wood*, 1 A. K. Marsh. (Ky.) 450; *Moore v. Skidmore*, Litt. Sel. Cas. (Ky.) 453, 12 Am. Dec. 333.

Louisiana. — *McClure v. King*, 15 La. Ann. 220; *Satterfield v. Keller*, 14 La. Ann. 615.

Maine. — *Furbish v. White*, 25 Me. 219; *Rogers v. Saunders*, 16 Me. 92, 33 Am. Dec. 635.

Maryland. — *Carswell v. Walsh*, 70 Md. 504; *Simmons v. Hill*, 4 Har. & M. (Md.) 252, 1 Am. Dec. 398.

Massachusetts. — *Wass v. Mugridge*, 128 Mass. 394; *Love v. Sortwell*, 124 Mass. 446; *Williams v. Hart*, 116 Mass. 513.

Minnesota. — *Minneapolis Industrial Exposition v. Brown*, 43 Minn. 77.

Mississippi. — *Mhoon v. Wilkerson*, 47 Miss. 633; *Stone v. Buckner*, 12 Smed. & M. (Miss.) 73; *Tyler v. McCardle*, 9 Smed. & M. (Miss.) 230; *Stewart v. Raymond R. Co.*, 7 Smed. & M. (Miss.) 568.

Missouri. — *Delassus v. Poston*, 19 Mo. 425.

Montana. — *Mayer v. Cruse*, 5 Mont. 485.

Nebraska. — *English v. Millgan*, 27 Neb. 326; *Hughes v. Reese*, 22 Neb. 78.

Nevada. — *Gibson v. Milne*, 1 Nev. 526.

New Jersey. — *Dowden v. Junker*, 48 N. J. Eq. 554; *Thorp v. Pettit*, 16 N. J. Eq. 488; *Earl v. Halsey*, 14 N. J. Eq. 332.

New York. — *Burling v. King*, 66 Barb. (N. Y.) 633; *Wright v. Delafield*, 23 Barb. (N. Y.) 498; *Babcock v. Enrich*, (Supm. Ct. Gen. T.) 64 How. Pr. (N. Y.) 435; *Jones v. Lynds*, 7 Paige (N. Y.) 301; *McIntosh v. St. Phillip's Church*, 54 N. Y. Super. Ct. 291; *Wheeler v. Wheeler*, (Supm. Ct. Gen. T.) 2 N. Y. Supp. 496.

Ohio. — *Hutcheson v. McNutt*, 1 Ohio 14; *Taft v. Leavitt*, *Wright* (Ohio) 389.

Oregon. — *Sanford v. Wheelan*, 12 Oregon 301.

South Carolina. — *Lake v. Shumate*, 20 S. Car. 33. But see *Ramsay v. Brailsford*, 2 Desaus. (S. Car.) 582, 2 Am. Dec. 698.

Texas. — *Haldeman v. Chambers*, 19 Tex. 1.

Vermont. — *Goodell v. Field*, 15 Vt. 448; *Cleveland v. Burton*, 11 Vt. 138; *White v. Yaw*, 7 Vt. 257; *Bodwell v. Bodwell*, 66 Vt. 101.

Virginia. — *Jones v. Roberts*, 6 Call (Va.) 187, 3 Am. Dec. 576; *Harvie v. Banks*, 1 Rand. (Va.) 408.

West Virginia. — *Frame v. Frame*, 32 W. Va. 463.

Wisconsin. — *Whiting v. Gould*, 2 Wis. 552.

2. Demand. — *Burns v. Fox*, 113 Ind. 205; *Harless v. Petty*, 84 Ind. 269; *Reed v. Hodges*, 80 Ind. 304; *Mather v. Scoles*, 35 Ind. 1; *Wright v. Leclaire*, 4 Greene (Iowa) 420. See also *Cornell v. Hayden*, 114 N. Y. 278.

Repetition of Demand. — Where a demand for performance has been once made and refused, it is not necessary to repeat the demand under similar circumstances before the institution of an action for specific performance. *Nims v. Vaughn*, 40 Mich. 356.

3. Where Demand Would Be Unavailing. — *Cutsinger v. Ballard*, 115 Ind. 93; *Burns v. Fox*, 113 Ind. 205; *Law v. Henry*, 39 Ind. 414; *Collins v. Vandever*, 1 Iowa 573; *Heard v. Lodge*, 20 Pick. (Mass.) 53, 32 Am. Dec. 197; *Ayer v. Ayer*, 16 Pick. (Mass.) 327; *Dye v. Forbes*, 34 Minn. 13.

4. *West v. Chase*, 3 Ind. 301; *Denlar v. Hile*, 123 Ind. 68.

5. *Burns v. Fox*, 113 Ind. 205; *Pawlak v. Granowski*, 54 Minn. 130.

demand as a prerequisite to suit in certain cases does not apply in an equitable action for specific performance, where the principal consideration is that the defendant shall have been afforded a fair opportunity to perform. And even if this has not been accorded, the circumstance will affect rather the costs of the suit than the result of the litigation.¹

Concurrent Acts. — Where the payment for the property and the delivery of the deed were to be concurrent, a defendant who has never tendered a deed or demanded performance by the plaintiff cannot set up the latter's failure to pay or demand a conveyance to defeat specific performance.²

7. Effect of Plaintiff's Fraud, Misrepresentation, or Bad Faith — *a.* **GENERAL RULE.** — Where the contract sought to be enforced is infected with fraud, misrepresentation, or bad faith, equity will not lend its aid to its enforcement,³ and this though the fraud or misrepresentation be not of a nature to justify a rescission of the contract at law.⁴ A plaintiff, as it has been frequently said,

1. *Jones v. Petaluma*, 36 Cal. 231; *Gray v. Dougherty*, 25 Cal. 266; *Bruce v. Tilson*, 25 N. Y. 194. See also *Vroom v. Ditmas*, 4 Paige (N. Y.) 535.

2. *Mudgett v. Clay*, 5 Wash. 103.

3. **Fraud** — *United States*. — *Mississippi*, etc., R. Co. v. *Cromwell*, 91 U. S. 643; *Burton v. Le Roy*, 5 Sawy. (U. S.) 510; *Hepburn v. Dunlop*, 1 Wheat. (U. S.) 206; *King v. Hamilton*, 4 Pet. (U. S.) 311; *Mechanics Bank v. Lynn*, 1 Pet. (U. S.) 376; *Thompson v. Tod*, Pet. (C. C.) 380; *Logansport R. Co. v. Logansport*, 114 Fed. Rep. 688; *Leicester Piano Co. v. Front Royal*, etc., Imp. Co., (C. C. A.) 55 Fed. Rep. 190.

Alabama. — *Andrews v. Andrews*, 28 Ala. 432; *Gould v. Womack*, 2 Ala. 83; *Ellis v. Burden*, 1 Ala. 458.

Arizona. — *Jacobs v. George*, (Ariz. 1889) 20 Pac. Rep. 183.

California. — *Kelly v. Central Pac. R. Co.*, 74 Cal. 557, 5 Am. St. Rep. 470; *Conrad v. Lindley*, 2 Cal. 173.

Georgia. — *Swint v. Carr*, 76 Ga. 322, 2 Am. St. Rep. 44.

Illinois. — *Maltby v. Thews*, 171 Ill. 264, affirmed 69 Ill. App. 30; *Grand Tower*, etc., R. Co. v. *Walton*, 150 Ill. 428; *Kelly v. Kendall*, 118 Ill. 650; *Tamm v. Lavalley*, 92 Ill. 263; *Fish v. Leser*, 69 Ill. 394; *Lear v. Choteau*, 23 Ill. 39; *Webb v. Alton Marine*, etc., Ins. Co., 10 Ill. 223; *Frisby v. Ballance*, 5 Ill. 287, 39 Am. Dec. 409. And see *Songer v. Partridge*, 107 Ill. 529.

Indiana. — *Louisville*, etc., R. Co. v. *Bodenschatz*, etc., *Stone Co.*, 141 Ind. 251; *Reed v. Rudman*, 5 Ind. 409.

Iowa. — *McDowell v. Caldwell*, 116 Iowa 475; *Brown v. Smith*, (Iowa 1902) 89 N. W. Rep. 1097; *Lucas v. Barrett*, 1 Greene (Iowa) 510.

Kansas. — *Bird v. Logan*, 35 Kan. 228; *Fry v. Platt*, 32 Kan. 62.

Kentucky. — *Warfield v. Erdman*, (Ky. 1897) 43 S. W. Rep. 708; *Fugate v. Robinson*, 18 B. Mon. (Ky.) 680; *Ford v. Lewis*, 10 B. Mon. (Ky.) 127; *Eastland v. Vanarsdel*, 3 Bibb (Ky.) 274; *Edwards v. Handley*, Hard. (Ky.) 611, 3 Am. Dec. 745.

Maine. — *Snell v. Mitchell*, 65 Me. 48; *Bradbury v. White*, 4 Me. 391.

Maryland. — *Smith v. Crandall*, 20 Md. 482; *Waters v. Howard*, 1 Md. Ch. 112; *Berry v. Cox*, 8 Gill (Md.) 466; *Griffith v. Frederick County Bank*, 6 Gill & J. (Md.) 424; *Carberry v. Tannehill*, 1 Har. & J. (Md.) 224.

Massachusetts. — *Lee v. Kirby*, 104 Mass. 420. *Michigan*. — *Rust v. Conrad*, 47 Mich. 449, 41 Am. Rep. 720; *Coryell v. Hotchkiss*, (Mich. 1902) 91 N. W. Rep. 162, 9 Detroit Leg. N. 324.

Mississippi. — *Daniel v. Frazer*, 40 Miss. 507; *Whitworth v. Harris*, 40 Miss. 483.

Missouri. — *McElroy v. Maxwell*, 101 Mo. 294.

Nebraska. — *Andrew v. Whitwer*, (Neb. 1902) 90 N. W. Rep. 924.

New Jersey. — *Plummer v. Keppler*, 26 N. J. Eq. 481; *Crane v. Decamp*, 21 N. J. Eq. 414; *Merritt v. Brown*, 21 N. J. Eq. 401; *Walker v. Hill*, 21 N. J. Eq. 191; *Stoutenburgh v. Tompkins*, 9 N. J. Eq. 332; *Miller v. Chetwood*, 2 N. J. Eq. 199; *Rodman v. Zillely*, 1 N. J. Eq. 320. And see *Hallinger v. Zimmerman*, 59 N. J. Eq. 644, 58 N. J. Eq. 217; *Corby v. Drew*, 55 N. J. Eq. 387.

New York. — *Margraf v. Muir*, 57 N. Y. 155; *Cuff v. Dorland*, 55 Barb. (N. Y.) 481; *Brown v. Haff*, 5 Paige (N. Y.) 235, 28 Am. Dec. 425; *Seymour v. Delancey*, 6 Johns. Ch. (N. Y.) 222; *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 1, 7 Am. Dec. 513; *McWhorter v. McMahan*, *Clarke* (N. Y.) 400; *Lennon v. Stiles*, 2 Silv. Sup. (N. Y.) 145.

North Carolina. — *Cannaday v. Shepard*, 2 Jones Eq. (55 N. Car.) 224; *Lloyd v. Wheatly*, 2 Jones Eq. (55 N. Car.) 267; *Leigh v. Crump*, 1 Ired. Eq. (36 N. Car.) 299.

Ohio. — *Wingart v. Fry*, *Wright* (Ohio) 105.

Pennsylvania. — *Friend v. Lamb*, 152 Pa. St. 529, 34 Am. St. Rep. 672; *Orne v. Kittanning Coal Co.*, 114 Pa. St. 172; *Wistar's Appeal*, 80 Pa. St. 484; *Hostetter v. Daly*, 42 Pittsb. Leg. J. N. S. (Pa.) 223; *Tarr v. Glading*, 1 Phila. (Pa.) 372, 9 Leg. Int. (Pa.) 110.

South Carolina. — *Holley v. Anness*, 41 S. Car. 349; *Cabeen v. Gordon*, 1 Hill Eq. (S. Car.) 51.

Tennessee. — *Mitchell v. Nicholson*, 8 Yerg. (Tenn.) 194; *McCarty v. Kyle*, 4 Coldw. (Tenn.) 348; *Rice v. Rawlings*, Meigs (Tenn.) 496; *Hall v. Ross*, 3 Hayw. (Tenn.) 200.

Virginia. — *Gish v. Jamison*, 96 Va. 312; *Ratliff v. Vandikes*, 89 Va. 307; *Booten v. Scheffer*, 21 Gratt. (Va.) 474.

West Virginia. — *Spencer v. Sandusky*, 46 W. Va. 582; *Core v. Wigner*, 32 W. Va. 277; *Horn v. Star Foundry Co.*, 23 W. Va. 522.

Wisconsin. — *Smith v. Wood*, 12 Wis. 382.

4. *Cathcart v. Robinson*, 5 Pet. (U. S.) 269; *Frisby v. Ballance*, 5 Ill. 287, 39 Am. Dec. 409.

in actions for specific performance "must come into equity with clean hands."¹ It has also been held that a contract will not be enforced, where entered into by the defendant with one whom he believed to be acting as his agent, when the latter was also the agent of the plaintiff in secret.² But there seems to be a distinction between cases where the alleged bad faith or misconduct of the complainant did not enter into and was not an inducement to the making of the contract sought to be enforced, and where the reverse is true. In the former instance the question presented is one of judicial discretion merely, and performance will be decreed or denied as may seem most conformable to fairness and equity, under all the circumstances of the case.³

b. ADVANTAGE TAKEN OF PARTY'S IGNORANCE. — Where one contracting party has taken an unfair advantage of the other's ignorance or inexperience, specific performance will, as a rule, be denied.⁴ But in the absence of fraud, one who signs a contract without reading it is bound by its terms.⁵ And where there is no misrepresentation, but both parties are ignorant of the fact that the premises sold are being put to an immoral use, performance may be decreed.⁶

c. UNDUE INFLUENCE. — Where the contract was obtained by the exercise of undue influence it will not be specifically enforced.⁷

d. CONCEALMENT OF MATERIAL FACTS. — The fraudulent concealment of a material fact by the party seeking enforcement of the contract has been held sufficient to defeat an application for specific performance.⁸

e. INTENT TO DEFRAUD CREDITORS. — Equity will not decree specific performance of a contract entered into with intent to defraud creditors,⁹ but a promise to pay purchase money under a new agreement after a prior transaction had been set aside as in fraud of creditors, is not within this rule.¹⁰

f. BAD FAITH TOWARD THIRD PERSONS. — It has been held that one who purchases stock in a corporation, whereby the vendor, with knowledge of the vendee, violates an agreement to give a third party a first opportunity to buy, cannot maintain an action for the specific enforcement of the contract.¹¹

1. Mississippi, etc., R. Co. v. Cromwell, 91 U. S. 643; Conrad v. Lindley, 2 Cal. 173; Kelly v. Kendall, 118 Ill. 650; Bohanan v. Bohanan, 96 Ill. 591; Home Mfg. Co. v. Gough, 2 Ill. App. 477; Kitchen v. Coffyn, 4 Ind. 504; Carskaddon v. Kennedy, 40 N. J. Eq. 259; Smith v. Sturges, (Supm. Ct. Gen. T.) 65 How. Pr. (N. Y.) 360; Reynolds v. Boland, 202 Pa. St. 642; Welfley v. Shenandoah Iron, etc., Co., 83 Va. 768.

Misrepresentation by Vendee as to Value of Property. — Kelley v. Sheldon, 8 Wis. 258.

Misrepresentation by Agent as to Means and Intent of Principal. — Carskaddon v. Kennedy, 40 N. J. Eq. 259.

Mortgage by Vendor After Contract of Sale. — Huber v. Burke, 11 S. & R. (Pa.) 238.

Bad Faith as to Rate of Interest. — McClellan v. Darrah, 50 Ill. 249.

2. Potter v. Hollister, 45 N. J. Eq. 508. See also Marsh v. Buchan, 46 N. J. Eq. 595; Goff v. Jones, 70 Tex. 572; Franco-Texan Land Co. v. Bousselet, 70 Tex. 422.

3. See *infra*, this title, *Rule of Judicial Discretion*.

4. Bird v. Logan, 35 Kan. 228; Musgraf v. Muir, 57 N. Y. 155. And see Osgood v. Franklin, 2 Johns. Ch. (N. Y.) 1, 7 Am. Dec. 513; Seymour v. Delaney, 6 Johns. Ch. (N. Y.) 222.

5. Minneapolis, etc., R. Co. v. Cox, 76 Iowa 306, 14 Am. St. Rep. 216. Compare Clark v. Maurer, 77 Iowa 717. See also Byars v. Stubbs,

85 Ala. 256; Wickham v. Winchester, 75 Iowa 327.

6. Hope v. Walter, (1899) 1 Ch. 879, 68 L. J. Ch. 359.

7. *Undue Influence.* — Miller v. Miller, 68 Pa. St. 486; Brady's Appeal, 66 Pa. St. 277. And see Christian v. Ransome, 46 Ga. 138.

8. *Concealment of Material Facts.* — Brewster v. Tuthill Spring Co., 34 Fed. Rep. 269; Byars v. Stubbs, 85 Ala. 256; Hetfield v. Willey, 105 Ill. 286; King v. Knapp, 59 N. Y. 462.

Suppressio Veri on Part of Agent. — Morgan v. Hardy, 16 Neb. 427.

9. Howell v. Donegan, 74 Hun (N. Y.) 410.

Where There Is a Conveyance of Land, Voluntary on Its Face, made by one who is defendant in a suit, just before the rendition of a judgment in a large sum against him, which but for this conveyance would be a lien on the land, and strong proof is not adduced that the conveyance was made in good faith and for value, the specific performance against the vendor of an agreement for the sale of the land will not be enforced. Tillotson v. Gesner, 33 N. J. Eq. 313.

10. Lynn v. Lyster, 113 Ill. 128.

11. Rigg v. Reading, etc., St. R. Co., 191 Pa. St. 298.

Specific Performance of Principal Contract Denied — Collateral Covenant. — Grigg v. Landis, 21 N. J. Eq. 494. And see Flood v. Finlay, 2 Ball & B. 9; Nelthorpe v. Holgate, 1 Coll. Ch. Cas. 204.

g. PURCHASE OF PROPERTY WITH KNOWLEDGE OF SALE TO ANOTHER. — Where a party enters into a contract of sale with an agent for property which, with knowledge of the vendee, the principal has withdrawn from sale or has sold to a third person, specific performance will be denied.¹

h. DEFENDANT'S FRAUD. — Manifestly a defendant in an action for specific performance cannot plead his own fraud in obtaining title to the property which he contracted to convey, as a bar to the action.²

i. REPRESENTATIONS FALSE BUT NOT FRAUDULENT — (1) *In General.* — Whether or not misrepresentations or misstatements which are not fraudulent will operate to defeat the specific performance of a contract depends upon their materiality. For material misstatements, specific performance will be denied,³ but otherwise where the misrepresentations were not material,⁴ or, as it has been held, were of a nature upon which the party seeking to defeat performance had no right to rely.⁵ In one instance it seems to have been intimated that a contract, induced by representations false but not fraudulent, might be specifically enforced upon the condition that the party seeking enforcement make good the representations according to their terms.⁶

(2) *Test of Materiality.* — A party to a contract cannot rescind or avoid the contract on the ground of a false representation made by the other party, unless he shows in addition to the false representation that he will be damaged by the performance of the contract.⁷ But if the misrepresentation was intentional and was made for the purpose of deceiving the vendor, and the vendor relied on it and was deceived by it, and would not have entered into the contract but for the fact that he was so deceived, then a court of equity will not enforce the contract, whether it be accompanied by damage or not.⁸

8. *Mistake.* — A contract entered into through mutual mistake as to a material fact will not be specifically enforced.⁹ But a mere misconception of

1. *Flynn v. Van Kleeck*, 91 Iowa 78; *Wickham v. Winchester*, 75 Iowa 327.

2. *Fackler v. Ford*, 24 How. (U. S.) 322. See also *Smith v. Ruohs*, (Tenn. Ch. 1899) 54 S. W. Rep. 161.

3. *Material Misstatements — United States.* — *Chandler v. Pomeroy*, 46 Fed. Rep. 533; *Davis v. Read*, 37 Fed. Rep. 418.

Illinois. — *Race v. Weston*, 86 Ill. 91.

Iowa. — *Mansfield v. Watson*, 2 Iowa 111.

Maryland. — *Crane v. Judik*, 86 Md. 63; *Kraft v. Egan*, 78 Md. 36.

Michigan. — *Hicks v. Turck*, 72 Mich. 311.

New Jersey. — *Wuesthoff v. Seymour*, 22 N. J. Eq. 66.

New York. — *Best v. Stow*, 2 Sandf. Ch. (N. Y.) 298.

Ohio. — *Jones v. Booth*, 38 Ohio St. 405; *Fuller v. Perkins*, 7 Ohio (pt. ii.) 196.

Wisconsin. — *Wells v. Millet*, 23 Wis. 64.

Misrepresentations as to Liens. — *Isaacs v. Skrainka*, 95 Mo. 517.

Misstatement as to Rental Value of Property. — *Boynton v. Hazelboom*, 14 Allen (Mass.) 107, 92 Am. Dec. 738.

Size of Buildings, etc. — *Fisher v. Worrall*, 5 W. & S. (Pa.) 478.

Quantity of Land — Written Contract — Parol Evidence. — *Miller v. Chetwood*, 2 N. J. Eq. 199.

Failure to Erect Near-by Improvements. — *Rogers v. Salmon*, 8 Paige (N. Y.) 559, 35 Am. Dec. 725.

4. *Wuesthoff v. Seymour*, 22 N. J. Eq. 66.

Vendor's Failure to Disclose Cost of Property. — That this is not sufficient to defeat performance

in equity, see *McManus v. Boston*, 171 Mass. 152.

5. See *Hallinger v. Zimmerman*, 59 N. J. Eq. 644, affirmed 58 N. J. Eq. 217.

6. See *Jasper County Electric R. Co. v. Curtis*, 154 Mo. 10.

7. *Morrison v. Lods*, 39 Cal. 381; *Scott v. Shiner*, 27 N. J. Eq. 185.

To Constitute Such a Misrepresentation as Will Prevent a Decree for specific performance, the statement in question must be so material to the contract founded thereupon that, if the statement be false, the contract becomes one which it would be unconscionable for the party who has made the statement to enforce, and the misrepresentation must be shown to have operated to the prejudice of the defendant. *Scott v. Shiner*, 27 N. J. Eq. 185.

8. *Kelly v. Central Pac. R. Co.*, 74 Cal. 557, 5 Am. St. Rep. 470.

9. *Mistake of Fact.* — *In re Hare*, 70 L. J. Ch. 45, (1901) 1 Ch. 93; *James v. State Bank*, 17 Ala. 69; *King v. Spaeth*, 50 N. J. Eq. 378; *Bowman v. McClenahan*, (Supm. Ct. Spec. T.) 19 Misc. (N. Y.) 438; *Kirker v. Kaufmann*, 31 Pittsb. L. J. N. S. (Pa.) 205.

And where the defendant has answered by way of cross bill in which he sets up a payment on the contract, and asks that it be ordered repaid to him, such an order will be made. *Hess v. Evans*, (N. J. 1888) 15 Atl. Rep. 310. See *Adams v. Valentine*, 33 Fed. Rep. 1.

Trifling Mistake. — For such mistake as to a minor detail as will not prevent a decree for specific performance, see *Dewey v. Whitney*, (C. C. A.) 93 Fed. Rep. 533.

the legal effect of an agreement will not prevent specific performance.¹ Nor will specific performance be denied where the mistake does not go to the foundation of the contract but is of a nature which may be corrected in the decree.²

V. FORM AND CONSTRUCTION OF CONTRACT — 1. General Rule. — In the absence of a statute changing the rule, the contract, the specific performance of which is sought, may be either in writing or verbal merely.³

2. Signature of Party. — Even though a statute may require a particular contract to be in writing, it is sufficient for specific performance that it be signed by the person sought to be enforced. The fact that the contract is not signed by the party seeking enforcement does not render it immaterial or deprive it of the requisite mutuality for enforcement.⁴

3. Construction — a. IN GENERAL. — On an application for the specific enforcement of a contract, equity looks rather to the spirit and intention of the parties than to the words in which the contract or agreement is expressed, and will give such construction to the contract as is consistent with that intent and the real equities of the case.⁵

b. LEGAL EFFECT FOLLOWED IN EQUITY. — But equity will not give to an executed agreement of the parties contemplating no further act by either, any different effect from that which the law attributes.⁶

c. WHEN QUESTION FOR JURY. — When the evidence is conflicting in an action for specific performance as to whether land was sold by the acre or by the tract, it is for the jury to determine the issue of fact.⁷

4. Imperfect, Irregular, or Informal Deeds. — It has been said that when any instrument of writing is designed to operate as a transfer of property, and proper and apt terms are used, whereby the meaning of the parties is clear, yet by the omission of some circumstances necessary to give it legal validity it is deprived of its intended specific operation, a court of equity will set it up as a contract, or as evidence of a contract, and, when founded on a valuable consideration, enforce it as a contract, when the rights of innocent third parties would not thereby be affected;⁸ or, in other words, an imperfect deed

1. Mistake of Law. — *Greenleaf v. Blakeman*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 564; *Pittsburgh, etc., R. Co. v. Glant*, 29 Pittsb. L. J. N. S. (Pa.) 113.

2. *North v. Percival*, (1898) 2 Ch. 128, 67 L. J. Ch. 321; *Keim v. Lindley*, (N. J. 1895) 30 Atl. Rep. 1063.

Omission of Portion of Contract. — Where a part of the agreement is omitted from the written instrument under a mistake, equity will not decree specific performance if such decree would be inequitable, or deny to a defendant the benefit which was the real consideration of the contract. *Jasper County Electric R. Co. v. Curtis*, 154 Mo. 10.

3. Form of Contract. — See *Goodwin v. Lyon*, 4 Port. (Ala.) 297; *Ridgway v. Ridgway*, 69 Md. 242; *Berry v. Hartzell*, 91 Mo. 132; *Van Dwyne v. Vreeland*, 12 N. J. Eq. 147; *Reno v. Moss*, 120 Pa. St. 49; *Poorman v. Kilgore*, 26 Pa. St. 365, 67 Am. Dec. 425; *Cox v. Cox*, 26 Pa. St. 375, 67 Am. Dec. 432; *Rowton v. Rowton*, 1 Hen. & M. (Va.) 92; *Griggsby v. Osborn*, 82 Va. 371; *Gallagher v. Gallagher*, 31 W. Va. 9.

In *Massachusetts* courts of equity have no power to enforce specifically any but written contracts. *Jacobs v. Peterborough, etc., R. Co.*, 8 Cush. (Mass.) 223.

4. Signature of Party. — *Black v. Maddox*, 104 Ga. 157; *Lindsay v. Warnock*, 93 Ga. 619; *Har-*

lan v. Logansport Natural Gas Co., 133 Ind. 323; *Peevey v. Haughton*, (Miss. 1895) 17 So. Rep. 378; *Smith v. Wilson*, 160 Mo. 657; *Ivory v. Murphy*, 36 Mo. 534; *Cramer v. Mooney*, 59 N. J. Eq. 164; *Gira v. Harris*, 14 S. Dak. 537; *McPherson v. Fargo*, 10 S. Dak. 611, 66 Am. St. Rep. 723; *Moore v. Powell*, 6 Tex. Civ. App. 43; *Central Land Co. v. Johnston*, 95 Va. 223.

Statute of Frauds. — A contract required to be in writing by the statute of frauds may be enforced against the party signing, although not signed by the other party. *Moses v. McClain*, 82 Ala. 370.

5. *James v. State Bank*, 17 Ala. 69; *Clowes v. Miller*, 74 Conn. 287; *Thornburgh v. Fish*, 11 Mont. 53.

6. *Stoddard v. Hart*, 23 N. Y. 556.

7. *Bird v. Bradburn*, 127 N. Car. 411.

8. Informal Deeds. — *Hollis v. Harris*, 96 Ala. 288; *Storey v. Weaver*, 66 Ga. 296; *Tiernan v. Poor*, 1 Gill & J. (Md.) 216, 19 Am. Dec. 225; *Browne v. Browne*, 1 Har. & J. (Md.) 430; *Coggsell, etc., Co. v. Coggsell*, (N. J. 1898) 40 Atl. Rep. 213; *Carr v. Williams*, 10 Ohio 305, 36 Am. Dec. 87; *South Portland Land Co. v. Munger*, 36 Oregon 457; *Reed v. Stouffer*, 14 Pa. Co. Ct. 505; *M'Farson's Appeal*, 11 Pa. St. 503; *Tyson v. Passmore*, 2 Pa. St. 122, 44 Am. Dec. 181; *Deutzer v. Lawrence*, 58 Wis. 594.

Will Improperly Witnessed. — Where a father agreed with his son, upon a valid consideration,

is in equity regarded as an agreement to convey, and, where it is acted on by the parties, conveys an equitable title which the courts may enforce.¹ So a deed defectively executed so as not to pass title, as where not sealed or acknowledged, may be treated in equity as an agreement to convey, and performance enforced accordingly.² It has been held, however, that a deed signed but not delivered to the grantee will not sustain an action for specific performance, as such an instrument is ineffectual for any purpose.³ So also a deed so informal as not to be legal under the requirements of an express statute has been held not to come within the rule.⁴

VI. REQUIREMENTS OF STATUTE OF FRAUDS — 1. General Rule. — It may be stated as a general rule, subject, however, to important qualifications hereinafter to be noted, that a court of equity will not specifically enforce a contract void under the statute of frauds.⁵ So also, where, pursuant to statute, the

to make a certain devise, and, upon his death, the will proved to be invalid for want of witnesses, the agreement was specifically enforced as against the testator's heirs at law. *Maddox v. Rowe*, 23 Ga. 431, 68 Am. Dec. 535. See *Jones v. Baird*, 4 Jones Eq. (57 N. Car.) 167.

Deed Lacking Seal. — A deed defective under the law in having no seal has been held effectual in equity, nevertheless, as a contract to sell. *Mastin v. Halley*, 61 Mo. 196; *Munds v. Casidey*, 98 N. Car. 558.

Conveyances to Confirm Title. — Where, by the reason of the loss of deeds or failure to record them, title to land is not clear, the owner may compel parties through whom he claims to execute the necessary conveyances to confirm the title. *Blight v. Banks*, 6 T. B. Mon. (Ky.) 192, 17 Am. Dec. 136.

1. *Roney v. Moss*, 74 Ala. 390; *Goodlett v. Hansell*, 66 Ala. 151; *Hill v. Cooper*, 6 Oregon 181.

2. *Hanson v. Michelson*, 19 Wis. 498.

3. *Comer v. Baldwin*, 16 Minn. 172. But see *Jones v. Jones*, 6 Conn. 111.

4. *Osborn v. Phelps*, 19 Conn. 63, 48 Am. Dec. 136; *White v. Holly*, 91 N. Car. 67; *Carr v. Williams*, 10 Ohio 305, 36 Am. Dec. 87.

5. **Statute of Frauds — United States.** — *Small v. Northern Pac. R. Co.*, 20 Fed. Rep. 753.

Arkansas. — *Ft. Smith v. Brogan*, 49 Ark. 306.

Colorado. — *Mackey v. Magnon*, 12 Colo. App. 137.

Georgia. — *Etheridge v. Woodard*, 106 Ga. 251.

Illinois. — *Strehl v. D'Evers*, 66 Ill. 77.

Kansas. — *Ross v. Allen*, 45 Kan. 231; *Hollis v. Burgess*, 37 Kan. 487.

Kentucky. — *Buchannon v. Little*, (Ky. 1893) 22 S. W. Rep. 559; *Hickman v. Grimes*, 1 A. K. Marsh. (Ky.) 86, 10 Am. Dec. 714.

Maine. — *Farnham v. Clements*, 51 Me. 426; *Wilton v. Harwood*, 23 Me. 131; *Stearns v. Hubbard*, 8 Me. 320.

Maryland. — See *Gough v. Crane*, 3 Md. Ch. 133; *Beard v. Linthicum*, 1 Md. Ch. 345.

Massachusetts. — *Gill v. Bicknell*, 2 Cush. (Mass.) 355.

Michigan. — *Moote v. Scriven*, 33 Mich. 500.

Missouri. — *Roth v. Goerger*, 118 Mo. 556; *Schulter v. Bockwinkle*, 19 Mo. 647. And see *Kelly v. Thuey*, (Mo. 1896) 37 S. W. Rep. 516.

New Jersey. — *Russell v. Russell*, 60 N. J. Eq. 282; *Walker v. Hill*, 21 N. J. Eq. 191.

26 C. of L.—4

New York. — *Ladd v. Stevenson*, 112 N. Y. 325, 8 Am. St. Rep. 748; *Stoddard v. Hart*, 23 N. Y. 556; *Phillips v. Thompson*, 1 Johns. Ch. (N. Y.) 131; *Ludwig v. Bungart*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 247; *Bullenkamp v. Bullenkamp*, 34 N. Y. App. Div. 193; *Van Epps v. Clock*, 3 Silv. Sup. (N. Y.) 500.

North Carolina. — *Davis v. Yelton*, 127 N. Car. 348; *Woodcock v. Merrimon*, 122 N. Car. 731; *North v. Bunn*, 122 N. Car. 766; *Barnes v. Teague*, 1 Jones Eq. (54 N. Car.) 277, 62 Am. Dec. 200.

Pennsylvania. — *Keebler's Estate*, 20 Pa. Co. Ct. 428, 6 Pa. Dist. 762.

South Carolina. — *Kennedy v. Gramling*, 33 S. Car. 367, 26 Am. St. Rep. 676; *Boozer v. Teague*, 27 S. Car. 348; *Givens v. Calder*, 2 Desaus. (S. Car.) 172, 2 Am. Dec. 686.

Tennessee. — *Otis v. Payne*, 86 Tenn. 663; *Lee v. Cherry*, 85 Tenn. 707, 4 Am. St. Rep. 800; *Blair v. Snodgrass*, 1 Sneed (Tenn.) 1.

Virginia. — *Buck v. Copland*, 2 Call (Va.) 218.

Wisconsin. — *Popp v. Swanke*, 68 Wis. 364; *Matteson v. Scofield*, 27 Wis. 671.

Consideration to Be Stated. — The *New York* statute of frauds requires the consideration to be expressed in the writing, and if this requirement is not complied with, specific performance cannot be decreed. *Wright v. Weeks*, 3 Bosw. (N. Y.) 372, affirmed 25 N. Y. 153.

But to the effect that the whole of the consideration need not be stated, see *Kelly v. Thuey*, (Mo. 1896) 37 S. W. Rep. 516.

Signatures of Parties. — It is not essential to the specific performance of a contract required to be in writing by the statute of frauds, that both parties should sign, but only the party sought to be charged or his agent.

Alabama. — *Davis v. Roberts*, 89 Ala. 402, 18 Am. St. Rep. 126.

Illinois. — *Farwell v. Lowther*, 18 Ill. 252.

Massachusetts. — *Slater v. Smith*, 117 Mass. 96; *Dresel v. Jordan*, 104 Mass. 407; *Old Colony R. Corp. v. Evans*, 6 Gray (Mass.) 25, 66 Am. Dec. 394. And see *Jacobs v. Peterborough*, etc., R. Co., 8 Cush. (Mass.) 223.

Mississippi. — *Atkinson v. Whitney*, 67 Miss. 655.

Missouri. — *Ivory v. Murphy*, 36 Mo. 534.

New Jersey. — *Dynan v. McCulloch*, 46 N. J. Eq. 11; *Miller v. Cameron*, 45 N. J. Eq. 95.

New York. — *Woodward v. Aspinwall*, 3 Sandf. (N. Y.) 272.

registration of a conveyance is essential to its validity, the court will not decree specific performance of an unregistered agreement or receive it in evidence for any purpose.¹ It has been held, however, that when a contract within the statute of frauds is proved by parol evidence without objection, the right to invoke the statute is waived,² and so where the parol agreement is admitted or proven without objection, and the statute is not set up, specific performance has been decreed.³ But it has been held that the defendant's admission of the contract will not estop him from relying on the statute of frauds as a defense,⁴ a court of equity, it has been said, having no power to enforce a contract to convey real estate not in writing, though a parol contract be confessed.⁵ The contrary, however, has also been decided.⁶

Preliminary Memoranda — Future Formal Agreement. — If there has been an agreement, the terms of which are evidenced by writing as required by the statute of frauds, it is sufficient for specific performance although it is expressly understood and agreed that a formal agreement is subsequently to be prepared and signed by the parties.⁷

2. Doctrine of Part Performance — a. IN GENERAL — Interests in Land. — Although a contract for the sale or transfer of an interest in real estate is in parol, when a writing is required by the statute of frauds, it may yet be enforced in equity where there has been partial performance of the nature hereinafter described, by the party seeking the aid of the court.⁸

Pennsylvania. — *Sylvester v. Born*, 132 Pa. St. 467; *Smith's Appeal*, 69 Pa. St. 474.

Rhode Island. — *Ives v. Hazard*, 4 R. I. 14, 67 Am. Dec. 500.

West Virginia. — *Creigh v. Boggs*, 19 W. Va. 240.

1. Unregistered Conveyance. — *White v. Holly*, 91 N. Car. 67.

2. Nunez v. Morgan, 77 Cal. 427.

3. Failure to Set Up Statute as Defense — England. — *Cooth v. Jackson*, 6 Ves. Jr. 39.

Alabama. — *Shakespeare v. Alba*, 76 Ala. 351.

Arkansas. — *Baker v. Hollibaugh*, 15 Ark. 322.

California. — *Osborne v. Endicott*, 6 Cal. 149, 65 Am. Dec. 498.

Georgia. — *Hollingshead v. McKenzie*, 8 Ga. 457; *Kirksey v. Kirksey*, 30 Ga. 156.

Illinois. — *Cloud v. Greasley*, 125 Ill. 313; *Hull v. Peer*, 27 Ill. 312; *Esmay v. Gorton*, 18 Ill. 483; *Dyer v. Martin*, 5 Ill. 146.

Indiana. — *Fall v. Hazelrigg*, 45 Ind. 581, 15 Am. Rep. 278.

Kentucky. — *Talbot v. Bowen*, 1 A. K. Marsh. (Ky.) 436, 10 Am. Dec. 747.

Maine. — *Douglass v. Snow*, 77 Me. 91.

Maryland. — *Artz v. Grove*, 21 Md. 456; *Albert v. Winn*, 5 Md. 66; *Winn v. Albert*, 2 Md. Ch. 169; *Small v. Owings*, 1 Md. Ch. 363; *Worley v. Walling*, 1 Har. & J. (Md.) 209.

New Hampshire. — *Tilton v. Tilton*, 9 N. H. 385; *Newton v. Swazey*, 8 N. H. 9.

New Jersey. — *Dodd v. Wakeman*, 26 N. J. Eq. 481; *Walker v. Hill*, 21 N. J. Eq. 191; *Dean v. Dean*, 9 N. J. Eq. 425.

New York. — *Harris v. Knickerbacker*, 5 Wend. (N. Y.) 638; *Cozine v. Graham*, 2 Paige (N. Y.) 177.

Ohio. — *Woods v. Dille*, 11 Ohio 455.

Pennsylvania. — *Houser v. Lamont*, 55 Pa. St. 311, 93 Am. Dec. 755.

South Carolina. — *Givens v. Calder*, 2 Desaus. (S. Car.) 172, 2 Am. Dec. 686.

Tennessee. — *Brakefield v. Anderson*, 87 Tenn. 206.

Vermont. — *Adams v. Patrick*, 30 Vt. 516; *Meach v. Stone*, 1 D. Chip. (Vt.) 182, 6 Am. Dec. 719.

West Virginia. — *Cunningham v. Cunningham*, 46 W. Va. 1.

4. Blagden v. Bradbear, 12 Ves. Jr. 468; *Moore v. Edwards*, 4 Ves. Jr. 23; *Thompson v. Tod, Pet.* (C. C.) 388; *Wynn v. Garland*, 19 Ark. 23, 68 Am. Dec. 190; *Stearns v. Hubbard*, 8 Me. 320; *Luckett v. Williamson*, 37 Mo. 388; *Barnes v. Teague*, 1 Jones Eq. (54 N. Car.) 277, 62 Am. Dec. 200.

5. Wilton v. Harwood, 23 Me. 131; *Stearns v. Hubbard*, 8 Me. 320.

6. In Child v. Godolphin, 1 Dick. 39, Lord Maclesfield said that if the defendant confessed the agreement the court would decree specific performance notwithstanding the statute, for such confession would not be looked upon as perjury or intended to be prevented by the statute. See *Wanley v. Sawbridge*, cited in *Whitbread v. Brockhurst*, 1 Bro. C. C. 415; *Whitchurch v. Bevis*, 2 Bro. C. C. 559, 2 Dick. 664; *Walters v. Morgan*, 2 Cox Ch. 369; *Auter v. Miller*, 18 Iowa 405.

7. Ridgway v. Wharton, 6 H. L. Cas. 264; *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266.

Preliminary Memorandum. — In the case of *Losee v. Morey*, 57 Barb. (N. Y.) 561, specific performance of a contract to convey lands was decreed in a case where the vendor claimed that the agreement to convey was intended as a mere memorandum upon which to base a future contract.

8. Part Performance — General Rule — England. — *Sharman v. Sharman*, 4 Reports 124, 67 L. T. N. S. 834; *Clinan v. Cooke*, 1 Sch. & Lef. 22; *Maddison v. Alderson*, 8 App. Cas. 467, 7 Q. B. D. 174; *Ex p. Whitehead*, 14 Q. B. D. 419; *Caton v. Caton*, L. R. 1 Ch. 137; *Morphett v. Jones*, 1 Swanst. 172; *Nunn v. Fabian*, L. R. 1 Ch. 35; *Mundy v. Jolliffe*, 5 Myl. & C. 167. See also *Buckmaster v. Harrop*, 7 Ves. Jr. 341.

United States. — *Townsend v. Vanderwerker*,

Theory of the Cases. — While the courts in their decisions of the doctrine of part performance as an exception to the general rule that a contract void by the statute of frauds will not be enforced, do not agree in the precise language used, nor even always in stating the incidental considerations justifying or explaining the subject, the general consensus of opinion seems to be that

160 U. S. 171; *Brown v. Sutton*, 129 U. S. 238; *Riggles v. Erney*, 154 U. S. 244; *Dunphy v. Ryan*, 116 U. S. 491; *Williams v. Morris*, 95 U. S. 444; *Whitney v. Hay*, 181 U. S. 77; *Neale v. Neale*, 9 Wall. (U. S.) 1; *Denver, etc., R. Co. v. Ristine*, (C. C. A.) 77 Fed. Rep. 58; *Small v. Northern Pac. R. Co.*, 20 Fed. Rep. 753.

Alabama. — *Parrish v. Steadham*, 102 Ala. 615; *Trammell v. Craddock*, 100 Ala. 266; *Pike v. Pettus*, 71 Ala. 98.

Arkansas. — *Moore v. Gordon*, 44 Ark. 334; *Wynn v. Garland*, 19 Ark. 23, 68 Am. Dec. 190.

California. — *Owens v. McNally*, 113 Cal. 444; *Hill v. Den*, 121 Cal. 42; *Eshleman v. Henrietta Vineyard Co.*, (Cal. 1894) 36 Pac. Rep. 775; *Moulton v. Harris*, 94 Cal. 420.

Connecticut. — *Andrew v. Babcock*, 63 Conn. 109.

Georgia. — *Oliver v. Powell*, 114 Ga. 592; *Bell v. Sappington*, 111 Ga. 391; *Todd v. Leach*, 100 Ga. 227; *Epps v. Story*, 109 Ga. 302; *Beall v. Clark*, 71 Ga. 818.

Idaho. — *Deeds v. Stephens*, (Idaho 1902) 69 Pac. Rep. 534; *Barton v. Dunlap*, (Idaho 1901) 66 Pac. Rep. 832; *Francis v. Green*, (Idaho 1901) 65 Pac. Rep. 362; *Male v. Leflang*, (Idaho 1900) 63 Pac. Rep. 108.

Illinois. — *Wilke v. Miller*, 171 Ill. 556; *Martin v. Martin*, 170 Ill. 639, 62 Am. St. Rep. 411; *Barrett v. Geisinger*, 148 Ill. 98; *Chicago, etc., R. Co. v. Boyd*, 118 Ill. 73; *Marshall v. Peck*, 91 Ill. 187; *Adkinson v. Tanner*, 68 Ill. 247.

Indiana. — *St. Joseph Hydraulic Co. v. Globe Tissue-Paper Co.*, 156 Ind. 665; *Swales v. Jackson*, 126 Ind. 282; *Green v. Groves*, 109 Ind. 519; *Wolke v. Fleming*, 103 Ind. 105, 53 Am. Rep. 495; *Coe v. Johnson*, 93 Ind. 418; *Boruff v. Hudson*, 138 Ind. 280; *Teague v. Fowler*, 56 Ind. 569; *Pearson v. East*, 36 Ind. 27; *Mather v. Scoles*, 35 Ind. 1; *Gwaltney v. Wheeler*, 26 Ind. 415; *Rupert v. Morton*, 19 Ind. 313; *Shepherd v. Fisher*, 17 Ind. 229; *Arnold v. Cord*, 16 Ind. 177.

Iowa. — *Lowery v. Lowery*, 117 Iowa 704; *Thomas v. Griffith*, 68 Iowa 11; *Rook v. Jimeson*, 67 Iowa 202; *Nelson v. Worrall*, 20 Iowa 469; *Fairbrother v. Shaw*, 4 Iowa 570; *Olive v. Dougherty*, 3 Greene (Iowa) 371.

Kansas. — *Janes v. Holmden*, 60 Kan. 855, 55 Pac. Rep. 1101; *Baldwin v. Squier*, 31 Kan. 283.

Kentucky. — *Beinlein v. Johns*, 102 Ky. 570; *Bennett v. Tiernay*, 78 Ky. 580.

Maine. — *Bigelow v. Bigelow*, 95 Me. 17; *Hunt v. Roberts*, 40 Me. 187.

Maryland. — *Goldman v. Brinton*, 90 Md. 259; *Hopkins v. Roberts*, 54 Md. 312; *Cole v. Cole*, 41 Md. 304; *Artz v. Grove*, 21 Md. 456; *Moale v. Buchanan*, 11 Gill & J. (Md.) 314; *Hamilton v. Jones*, 3 Gill & J. (Md.) 127; *Maryland Sav. Inst. v. Schroeder*, 8 Gill & J. (Md.) 93, 29 Am. Dec. 528.

Massachusetts. — *Perkins v. Perkins*, 181 Mass. 401; *Rose v. Fall River Five Cents Sav. Bank*, 165 Mass. 273; *Potter v. Jacobs*, 111

Mass. 32; *Gross v. Milligan*, 176 Mass. 566; *Jacobs v. Peterborough, etc., R. Co.*, 8 Cush. (Mass.) 223.

Michigan. — *Bushnell v. Rowland*, 118 Mich. 618; *Delavan v. Wright*, 110 Mich. 143; *Bartlett v. Bartlett*, 103 Mich. 293; *Lloyd v. Hollenback*, 98 Mich. 203; *Brown v. Brown*, 47 Mich. 378; *Farwell v. Johnston*, 34 Mich. 342; *Weed v. Terry*, 2 Dougl. (Mich.) 344, 45 Am. Dec. 257.

Minnesota. — *Bresnahan v. Bresnahan*, 71 Minn. 1; *Jorgenson v. Jorgenson*, 81 Minn. 428; *Svanburg v. Fosseen*, 75 Minn. 350, 74 Am. St. Rep. 490; *Slingerland v. Slingerland*, 39 Minn. 197; *Brown v. Hoag*, 35 Minn. 373; *Williams v. Stewart*, 25 Minn. 516; *Place v. Johnson*, 20 Minn. 219; *Atkins v. Little*, 17 Minn. 342. See *Evergreen Cemetery Assoc. v. Armstrong*, 37 Minn. 259.

Mississippi. — *Howell v. Gibson*, 30 Miss. 464.

Missouri. — *Green v. Ditsch*, 143 Mo. 1; *Berry v. Hartzell*, 91 Mo. 132; *Leahey v. Leahey*, 11 Mo. App. 413.

Nebraska. — *Lucas v. Lucas*, (Neb. 1902) 89 N. W. Rep. 769; *Gilmore v. Armstrong*, 48 Neb. 92.

New Hampshire. — *Shaw v. Abbott*, 61 N. H. 254; *Ham v. Goodrich*, 33 N. H. 32.

New Jersey. — *Neibert v. Baghurst*, (N. J. 1892) 25 Atl. Rep. 474; *Russell v. Russell*, 60 N. J. Eq. 282; *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266; *Dean v. Anderson*, 34 N. J. Eq. 496; *Cooper v. Carlisle*, 17 N. J. Eq. 525. And see *Repetto v. Baylor*, 61 N. J. Eq. 501.

New York. — *Hay v. Knauth*, 169 N. Y. 298; *Healy v. Healy*, 167 N. Y. 572; *Canda v. Totten*, 157 N. Y. 281; *Young v. Overbaugh*, 145 N. Y. 158; *Dunckel v. Dunckel*, 141 N. Y. 427; *Roberge v. Winne*, 144 N. Y. 709; *Wheeler v. Reynolds*, 66 N. Y. 231; *Ludwig v. Bungart*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 247; *Tannenbaum v. Armeny*, 81 Hun (N. Y.) 581; *Young v. Overbaugh*, 76 Hun (N. Y.) 151; *Kincaid v. Kincaid*, (N. Y. 1899) 53 N. W. Rep. 1126; *Murphy v. Whitney*, 69 Hun (N. Y.) 573; *Lawrence v. Saratoga Lake R. Co.*, 36 Hun (N. Y.) 467; *Brown v. Brown*, 29 Hun (N. Y.) 498; *Quinn v. Quinn*, 69 N. Y. App. Div. 598; *Healy v. Healy*, 55 N. Y. App. Div. 315. See also *Rathbun v. Rathbun*, 6 Barb. (N. Y.) 98.

Ohio. — *France v. McKenzie*, 11 Ohio Cir. Dec. 245, 20 Ohio Cir. Ct. 209; *Armstrong v. Kattenhorn*, 11 Ohio 265; *Cooper v. Cooper*, 8 Ohio Dec. 35, 6 Ohio N. P. 99.

Oregon. — *Barrett v. Schleich*, 37 Oregon 613; *Wagonblast v. Whitney*, 12 Oregon 83. And see *Reynolds v. Scriber*, 41 Oregon 407.

Pennsylvania. — *Hancock v. Melloy*, 187 Pa. St. 371; *Moyer's Appeal*, 105 Pa. St. 432; *Overmeyer v. Koerner*, 81 Pa. St. 517; *Lewis v. Smith*, 17 Montg. Co. Rep. (Pa.) 30; *Hancock v. Melloy*, 5 Pa. Dist. 461.

Rhode Island. — *Hodges v. Howard*, 5 R. I. 149.

South Carolina. — *Tillinghast v. Henderson*,

there must have been such part performance by the party asking for a decree as that the parties cannot be restored to their original relative positions; and further, the situation must be such that to permit the defendant to invoke the statute, intended to prevent fraud, would be, in effect, to make the statute itself an engine of fraud.¹

Cover for Fraud. — So when the statute of frauds has been used as a mere cover to a fraud, equity will relieve against the fraud notwithstanding the provisions of the statute, as where a conveyance of land was obtained upon a parol agreement to reconvey upon the happening of a named condition. In such circumstances a reconveyance may be decreed according to the terms of the parol understanding.²

Mere Refusal to Perform. — But it should be particularly observed, that a case for specific performance is not made out where the defendant's only fraud consists in a refusal to comply with his parol agreement.³

In England, it has been said that the doctrine of part performance is confined to cases arising in agreements relating to land.⁴

But in the United States, the tendency is to give it a wider scope,⁵ though it is, assuredly, most frequently invoked in connection with land contracts.

b. RULE BY STATUTE. — The doctrine of part performance as warranting a decree of specific performance notwithstanding the statute of frauds, has been embodied in the statutes of a number of the states, which should always be first consulted by the practitioner.⁶

c. JURISDICTIONS IN WHICH DOCTRINE DENIED. — In a few of the *United States* the doctrine of part performance of a contract as justifying enforcement in equity notwithstanding the statute of frauds, does not seem to be recognized.⁷

d. RULE IN MAINE AND MASSACHUSETTS. — In Maine and Massachusetts

59 S. Car. 388; *Alexander v. McDaniel*, 56 S. Car. 252; *Watts v. Witt*, 39 S. Car. 356; *Hutchinson v. Hutchinson*, 4 Desaus. (S. Car.) 77; *Smith v. Brailsford*, 1 Desaus. (S. Car.) 350.

Texas. — *Eason v. Eason*, 61 Tex. 225; *Johnson v. Portwood*, 89 Tex. 235; *Baker v. De Freese*, 2 Tex. Civ. App. 524.

Vermont. — *Meach v. Stone*, 1 D. Chip. (Vt.) 191, 6 Am. Dec. 719.

Virginia. — *Wright v. Pucket*, 22 Gratt. (Va.) 370.

West Virginia. — *Biern v. Ray*, 49 W. Va. 129; *Campbell v. Fetterman*, 20 W. Va. 398; *West Virginia Oil, etc., Co. v. Vinal*, 14 W. Va. 637. See also *Steenrod v. Wheeling, etc., R. Co.*, 27 W. Va. 1.

Wisconsin. — *Wall v. Minneapolis, etc., R. Co.*, 86 Wis. 48; *Seaman v. Aschermann*, 57 Wis. 547; *Seaman v. Aschermann*, 51 Wis. 678, 37 Am. Rep. 849.

1. See the cases in the preceding note.

2. **An Agreement by a Surety to Reconvey** will be specifically enforced, where a defaulting administrator and his wife, to secure such surety, conveyed to him certain real estate, in consideration of the verbal promise of the surety to pay a certain amount of such defalcation, and to reconvey one of the said tracts of land to the wife. Nor is such contract void by the statute of frauds. *Teague v. Fowler*, 56 Ind. 569. See also *Pearson v. East*, 36 Ind. 27; *Mather v. Scoles*, 35 Ind. 1; *Gwaltney v. Wheeler*, 26 Ind. 415; *Rupert v. Morton*, 19 Ind. 313; *Shepherd v. Fisher*, 17 Ind. 229; *Arnold v. Cord*, 16 Ind. 177.

3. **Mere Refusal by Defendant.** — *Dunphy v. Ryan*, 116 U. S. 491; *Purcell v. Miner*, 4 Wall.

(U. S.) 513; *Green v. Groves*, 109 Ind. 519; *Clifford v. Heald*, 141 Mass. 322.

4. See *Britain v. Rossiter*, 11 Q. B. D. 123; *Maddison v. Alderson*, 8 App. Cas. 467. But compare *McManus v. Cooke*, 35 Ch. D. 681, which implies that the doctrine of part performance applies wherever equity would decree specific performance had the contract been in writing.

5. *Brown v. Brown*, 33 N. J. Eq. 650. This is also illustrated by the case of *Birdsall v. Birdsall*, 52 Wis. 208, where equity disregarded the statute on the ground of part performance when a person had been induced by a promise of employment to give up his business and incur expense in traveling, etc., on the faith of a promise to employ.

6. See the statutes of the several states.

7. **Doctrine Denied — Mississippi.** — *Fisher v. Kuhn*, 54 Miss. 480; *McGuire v. Stevens*, 42 Miss. 724, 2 Am. Rep. 649; *Box v. Stanford*, 13 Smed. & M. (Miss.) 93, 51 Am. Dec. 142; *Beaman v. Buck*, 9 Smed. & M. (Miss.) 207. But see for a case in which compensation for acts of part performance was awarded, *Barnett v. Nichols*, 56 Miss. 622.

North Carolina. — See *Allen v. Chambers*, 4 Ired. Eq. (39 N. Car.) 125; *Dunn v. Moore*, 3 Ired. Eq. (38 N. Car.) 364; *Ellis v. Ellis*, 1 Dev. Eq. (16 N. Car.) 345; *Albea v. Griffin*, 2 Dev. & B. Eq. (22 N. Car.) 92; *Pitt v. Moore*, 99 N. Car. 85, 6 Am. St. Rep. 489; *Gulley v. Macy*, 84 N. Car. 434. Compare *North v. Bunn*, 122 N. Car. 766.

Tennessee. — See *Ridley v. McNairy*, 2 Humph. (Tenn.) 174; *Patton v. M'Clure, Mart. & Y. (Tenn.)* 333.

the doctrine of part performance in suits for specific performance was originally denied on the ground of the limited equity powers of the courts. But since full equity jurisdiction has, by statute, been conferred on the courts of these states, sufficient part performance will now entitle a party to specific enforcement.¹

c. PERFORMANCE MUST HAVE BEEN ON FAITH OF CONTRACT. — The acts of the plaintiff alleged to constitute part performance must have been performed in good faith, in reliance upon the parol contract sought to be enforced,² and must, it has been said, refer to, result from, or be made in pursuance of the agreement proved, and be of such a nature that but for the contract they would not have been performed.³ The acts relied on must furthermore be such as could be done with no other view or design than to perform the agreement, and not such as are merely introductory and ancillary to it.⁴

Whether All the Acts Done Called for by the Contract or Prove It. — But according to the better doctrine, not all the acts relied on need be required by the contract or a part of it, as where a vendee or lessee who has gone into possession erects valuable and permanent improvements on the property, independent of any stipulation in the contract.⁵ Nor need such acts, it has been held, be of such a nature as to prove the contract, it being sufficient that they are consistent with, and difficult of explanation in the absence of, the existence of a contract such as is sought to be established by parol proof.⁶ The language of some

1. *Where Equity Powers Limited* — *Maine.* — *Woodbury v. Gardner*, 77 Me. 68; *Green v. Jones*, 76 Me. 563; *Patterson v. Yeaton*, 47 Me. 308; *Wilton v. Harwood*, 23 Me. 131.

Massachusetts. — *Burns v. Daggett*, 141 Mass. 368; *Barnes v. Boston, etc.*, R. Co., 130 Mass. 388; *Potter v. Jacobs*, 111 Mass. 32; *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418; *Davenport v. Mason*, 15 Mass. 85; *Jacobs v. Peterborough, etc.*, R. Co., 8 Cush. (Mass.) 223; *Thompson v. Gould*, 20 Pick. (Mass.) 134; *Kidder v. Hunt*, 1 Pick. (Mass.) 328, 11 Am. Dec. 183; *Adams v. Townsend*, 1 Met. (Mass.) 483.

2. *Acts Done on Faith of Contract.* — *Senior v. Anderson*, 115 Cal. 496; *Cooley v. Lobdell*, 153 N. Y. 596.

3. *England.* — *In re Beetham*, 18 Q. B. D. 380; *Humphreys v. Green*, 10 Q. B. D. 148; *Lacon v. Mertins*, 3 Atk. 1; *Morphett v. Jones*, 1 Swanst. 172; *Frame v. Dawson*, 14 Ves. Jr. 386; *Cooth v. Jackson*, 6 Ves. Jr. 12; *Whittick v. Mozley*, 1 Cab. & El. 86. And see *Moddison v. Alderson*, 8 App. Cas. 467.

United States. — *Small v. Northern Pac. R. Co.*, 20 Fed. Rep. 753.

Arkansas. — *Haines v. McGlone*, 44 Ark. 79; *Moore v. Gordon*, 44 Ark. 334.

Connecticut. — *Osborn v. Phelps*, 19 Conn. 63, 48 Am. Dec. 133.

Georgia. — *Rawlins v. Shropshire*, 45 Ga. 182. *Illinois.* — *Gorham v. Dodge*, 122 Ill. 528; *Clark v. Clark*, 122 Ill. 388; *Kaufman v. Cook*, 114 Ill. 11; *Padfield v. Padfield*, 92 Ill. 198. And see *Warren v. Warren*, 105 Ill. 568.

Maryland. — *Shepherd v. Bevin*, 9 Gill (Md.) 32.

Missouri. — *Lydick v. Holland*, 83 Mo. 703.

Nebraska. — *Lewis v. North*, 62 Neb. 552.

New Jersey. — *Brown v. Brown*, 33 N. J. Eq. 650; *Larison v. Polhemus*, 36 N. J. Eq. 506; *Chamberlain v. Manning*, 41 N. J. Eq. 651.

New York. — *Rathbun v. Rathbun*, 6 Barb.

(N. Y.) 98; *Jervis v. Smith*, Hoffm. (N. Y.) 470; *Phillips v. Thompson*, 1 Johns. Ch. (N. Y.) 131.

Ohio. — *Armstrong v. Kattenhorn*, 11 Ohio 265.

Pennsylvania. — *Moore v. Small*, 19 Pa. St. 461.

South Carolina. — *Boozar v. Teague*, 27 S. Car. 348.

West Virginia. — *Campbell v. Fetterman*, 20 W. Va. 398.

See also *Wright v. Pucket*, 22 Gratt. (Va.) 370.

There Is Not Such Part Performance of an oral contract for the purchase of land as will take the contract out of the statute of frauds where no purchase money was paid and the acts relied upon as constituting the part performance were not done under the contract and in performance thereof, but under claim of title derived from another source. *Wright v. Rafferty*, 181 Ill. 464.

4. See *Weed v. Terry*, 2 Dougl. (Mich.) 351, 45 Am. Dec. 257.

5. *Sutherland v. Briggs*, 1 Hare 26. And see *Surcome v. Pinniger*, 3 De G. M. & G. 571; *Freeman v. Freeman*, 43 N. Y. 34, 3 Am. Rep. 657; *Ingles v. Patterson*, 36 Wis. 373.

6. *Acts as Proof of Contract* — *England.* — *Dale v. Hamilton*, 5 Hare 369; *Sutherland v. Briggs*, 1 Hare 26; *Frame v. Dawson*, 14 Ves. Jr. 386; *Nunn v. Fabian*, L. R. 1 Ch. 35; *Conner v. Fitzgerald*, 11 L. R. Ir. 106; *Lanyon v. Martin*, L. R. 13 Ir. 297.

Connecticut. — *Church v. Sterling*, 16 Conn. 388; *Grant v. Grant*, 63 Conn. 530, 38 Am. St. Rep. 379.

Illinois. — *Gorham v. Dodge*, 122 Ill. 528; *Irwin v. Dyke*, 114 Ill. 302; *Clark v. Clark*, 122 Ill. 388; *Smith v. Yocum*, 110 Ill. 142; *Bohanan v. Bohanan*, 96 Ill. 591; *Padfield v. Padfield*, 92 Ill. 198.

Indiana. — *Johns v. Johns*, 67 Ind. 440.

of the cases, however, seems to require that the act or acts relied on must be part and parcel of the contract,¹ and also of such a nature as to be evidence of the agreement.² But while all the acts relied on must, as already stated, be consistent with the agreement sought to be proved, it is believed that they need not be more than this, nor need they be performed pursuant to the agreement itself. For example, it can in general scarcely be said a part of a vendee's contract with his vendor that the former shall take possession of the property, and still less that he shall improve it, and yet it is well settled, as shown elsewhere, that the taking of possession of real property under a contract of sale and the erection of valuable improvements thereon entitles a vendee, as against his vendor, to specific performance.³

f. INADEQUACY OF DAMAGES. — In order that specific performance may be decreed on the ground of part performance, the acts done by the plaintiff and relied on to warrant a decree should be of such a nature that damages would be inadequate relief.⁴ Thus, where personal services were of a kind which could be estimated in money, and there was no peculiar relation between the parties upon which a pecuniary value could not be placed, the mere rendition of the services has been held not such part performance as would take the case out of the statute of frauds.⁵ But where the services were of such a nature that their value was unascertainable, and the plaintiff had also parted with certain of his property on the faith of the vendor's parol contract, it was held that specific performance would be decreed,⁶ and likewise where the statute of limitations had run against the claim for services.⁷

g. PAYMENT OF PURCHASE MONEY — (1) *General Rule.* — Payment of the Whole or a Part of the Purchase Money is not, as a rule, sufficient part performance to take the case out of the statute and warrant a decree for specific performance;⁸

Kansas. — *Bard v. Elston*, 31 Kan. 274.

Missouri. — *Hiatt v. Williams*, 72 Mo. 214, 37 Am. Rep. 438.

New Jersey. — *Larison v. Polhemus*, 36 N. J. Eq. 506.

Texas. — *Montgomery v. Carlton*, 56 Tex. 361.

"The Principle of the Cases Is," it has been said, "that the act must be of such a nature that, if stated, it would of itself infer the existence of some agreement; and then parol evidence is admitted to show what the agreement is." Sir William Grant in *Frame v. Dawson*, 14 Ves. Jr. 387.

1. *Graham v. Theis*, 47 Ga. 479.

The Doing by Either Party of Some Independent Act, not a part of the contract, does not become a part performance because the doer of the act was led so to act by his belief that the parol contract would be performed by the other party. *Graham v. Theis*, 47 Ga. 479.

In the Language of Lord Hardwicke, the act of part performance "must be such as could be done with no other view or design than to perform the agreement." *Gunter v. Halsey*, Ambl. 586.

2. *Hale v. Hale*, 90 Va. 728, citing 2 Min. Inst. (4th ed.) 853.

3. See *infra*, this section, *h.* (2) *Possession and Improvements.*

4. **Inadequacy of Relief by Damages** — *United States.* — *Williams v. Morris*, 95 U. S. 444.

Kansas. — *Baldwin v. Squier*, 31 Kan. 283.

Maine. — *Bennett v. Dyer*, 89 Me. 17.

Minnesota. — *Brown v. Hoag*, 35 Minn. 373.

New Jersey. — *Dean v. Anderson*, 34 N. J. Eq. 496.

New York. — *Ludwig v. Bungart*, (Supm. Ct.

Spec. T.) 26 Misc. (N. Y.) 247; *Ludwig v. Bungart*, 48 N. Y. App. Div. 613.

Ohio. — *Armstrong v. Kattenhorn*, 11 Ohio 265.

Pennsylvania. — *Moyer's Appeal*, 105 Pa. St. 432; *Lord's Appeal*, 105 Pa. St. 451; *Overmeyer v. Koerner*, 81* Pa. St. 517; *McKowen v. McDonald*, 43 Pa. St. 441, 82 Am. Dec. 576; *Donnelly's Estate*, 3 Pa. Dist. 381.

Texas. — *Eason v. Eason*, 61 Tex. 225.

Virginia. — *Wright v. Pucket*, 22 Gratt. (Va.) 370.

5. **Personal Services.** — *Weeks v. Lund*, 69 N. H. 78; *Peters v. Dickinson*, 67 N. H. 389; *Russell v. Briggs*, 165 N. Y. 500; *Ludwig v. Bungart*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 247, 48 N. Y. App. Div. 613; *Kling v. Bordner*, 65 Ohio St. 86; *Derr v. Ackerman*, 182 Pa. St. 591. And see *Wallace v. Long*, 105 Ind. 522, 55 Am. Rep. 222; *Richardson v. Orth*, 40 Oregon 252; *Rodman v. Rodman*, 112 Wis. 378; *Martin v. Martin*, 108 Wis. 284; *Ellis v. Cary*, 74 Wis. 176, 17 Am. St. Rep. 125.

6. *Svanburg v. Fosseen*, 75 Minn. 350, 74 Am. St. Rep. 490.

7. *Cooper v. Monroe*, 77 Hun (N. Y.) 1.

8. **Payment of Purchase Money** — *England.* — *Humphreys v. Green*, 10 Q. B. D. 148; *Clinan v. Cooke*, 1 Sch. & Lef. 22; *Pengall v. Ross*, 2 Eq. Cas. Abr. 46, par. 12.

California. — *Forrester v. Flores*, 64 Cal. 24. *District of Columbia.* — *Townsend v. Vanderwerker*, 20 D. C. 197.

Florida. — *Neal v. Gregory*, 19 Fla. 356.

Georgia. — See *Lyons v. Bass*, 108 Ga. 573.

Illinois. — *Fraser v. Gates*, 118 Ill. 99; *Temple v. Johnson*, 71 Ill. 13.

Indiana. — *Green v. Groves*, 109 Ind. 519;

and the rule is the same where the payment is made in services,¹ or goods.²

The Reason Is that the purchase money, in the first instance, or the value of the services or goods, is properly recoverable in an action at law for damages.³

(2) *Rule in Alabama, Delaware, and Iowa.* — In Delaware, payment of a substantial part of the purchase money, clearly made and accepted in execution of the agreement, will entitle the vendee to specific performance.⁴ In Iowa, by statute, "where the purchase money, or any portion thereof, has been received by the vendor," the case is taken out of the general rule.⁵ And under the Alabama statute, part payment and possession under the agreement will suffice.⁶

(3) *Payment Accompanied by Other Acts.* — If the payment or part payment of the purchase money is accompanied by other acts, such as the assumption of possession and the making of improvements, or by others which it is difficult to compensate in damages, it becomes sufficient for specific performance.⁷

Felton v. Smith, 84 Ind. 485; *Carlisle v. Brennan*, 67 Ind. 12; *Suman v. Springate*, 67 Ind. 115.

Kansas. — *Nay v. Mogram*, 24 Kan. 75.

Michigan. — *Kelly v. Kelly*, 54 Mich. 30; *Peckham v. Balch*, 49 Mich. 179.

Minnesota. — *Townsend v. Fenton*, 30 Minn. 528.

Nebraska. — *Baker v. Wiswell*, 17 Neb. 52.

New Hampshire. — *Brown v. Drew*, 67 N. H. 569.

New Jersey. — *Cochrane v. McEntee*, (N. J. 1896) 51 Atl. Rep. 279; *Bernheimer v. Verdon*, 63 N. J. Eq. 312; *Lippincott v. Bridgewater*, 55 N. J. Eq. 208; *Green v. Richards*, 23 N. J. Eq. 32.

New York. — *Cooley v. Lobdell*, 153 N. Y. 596; *Nasanowitz v. Hanf*, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 157; *Cooley v. Lobdell*, 82 Hun (N. Y.) 98. And see *Rosen v. Rose*, (N. Y. Super. Ct. Eq. T.) 13 Misc. (N. Y.) 565.

Oregon. — *Cooper v. Thomason*, 30 Oregon 161.

Pennsylvania. — *Jamison v. Dimock*, 95 Pa. St. 52; *Parker v. Wells*, 6 Whart. (Pa.) 153; *Gangwer v. Fry*, 17 Pa. St. 491, 55 Am. Dec. 578; *Donnelly's Estate*, 3 Pa. Dist. 381.

South Carolina. — *Mims v. Chandler*, 21 S. Car. 480.

Texas. — *Munk v. Weidner*, 9 Tex. Civ. App. 491; *Ann Berta Lodge, etc. v. Leverton*, 42 Tex. 18; *Wood v. Jones*, 35 Tex. 64.

Virginia. — *Brown v. Pollard*, 89 Va. 696.

West Virginia. — *Biern v. Ray*, 49 W. Va. 129; *Miller v. Lorentz*, 39 W. Va. 160; *Gallagher v. Gallagher*, 31 W. Va. 9.

Wisconsin. — *Harney v. Burhans*, 91 Wis. 348; *Jourdain v. Fox*, 90 Wis. 99.

The Fact that the Defendant Is Insolvent creates no greater equity for specific performance. *Townsend v. Fenton*, 32 Minn. 482; *Miller v. Lorentz*, 39 W. Va. 160.

1. *Crabill v. Marsh*, 38 Ohio St. 331.

2. *McPherson v. Wiswell*, 16 Neb. 625.

3. *Lippincott v. Bridgewater*, 55 N. J. Eq. 208.

4. *Townsend v. Houston*, 1 Harr. (Del.) 532, 27 Am. Dec. 732.

5. *Query v. Liston*, 92 Iowa 288; *Stem v. Nysonger*, 69 Iowa 512; *Franklin v. Tuckerman*, 68 Iowa 572; *Miller v. Nelson*, 64 Iowa 458; *Nau v. Jackman*, 58 Iowa 359.

6. *Robinson v. Driver*, 132 Ala. 169; *Jenkins v. Lovelace*, 72 Ala. 303; *Merrell v. Witherby*, 120 Ala. 418, 74 Am. St. Rep. 39; *Rovelsky v. Scheuer*, 114 Ala. 419; *A. G. Rhodes Furniture Co. v. Weedon*, 108 Ala. 252 (*modifying Garner v. Ullman*, 99 Ala. 218); *McLure v. Tenville*, 89 Ala. 572; *Shakespeare v. Alba*, 76 Ala. 351. And see the next section.

7. **Payment Together with Other Acts** — *England.* — *Lanyon v. Martin*, L. R. 13 Ir. 297.

United States. — *Bigelow v. Armes*, 108 U. S. 10; *People's Pure Ice Co. v. Trumbull*, (C. C. A.) 70 Fed. Rep. 166.

Alabama. — *Brewer v. Brewer*, 19 Ala. 481.

California. — *Day v. Cohn*, 65 Cal. 508.

Delaware. — *Pleasanton v. Raughley*, 3 Del. Ch. 124; *Cannon v. Collins*, 3 Del. Ch. 132.

District of Columbia. — *Armes v. Bigelow*, 3 MacArthur (D. C.) 442.

Illinois. — *McClure v. Otrich*, 118 Ill. 320; *Fitzsimmons v. Allen*, 39 Ill. 440; *Shirley v. Spencer*, 9 Ill. 583.

Indiana. — *Felton v. Smith*, 84 Ind. 485; *Watson v. Mahan*, 20 Ind. 223; *Tibbs v. Barker*, 1 Blackf. (Ind.) 58.

Kansas. — *Marsh v. Davis*, 33 Kan. 326.

Maine. — *Goodwin v. Smith*, 89 Me. 506; *Woodbury v. Gardner*, 77 Me. 68; *Green v. Jones*, 76 Me. 563.

Maryland. — *Bechtel v. Cone*, 52 Md. 698; *Dugan v. Gittings*, 3 Gill (Md.) 138.

Massachusetts. — *Low v. Low*, 173 Mass. 580.

Missouri. — *Rosenberger v. Jones*, 118 Mo. 559; *Anderson v. Shockley*, 82 Mo. 250; *Walker v. Owen*, 79 Mo. 563; *Gupton v. Gupton*, 47 Mo. 37.

New Jersey. — *Davison v. Davison*, 13 N. J. Eq. 246; *Ashmore v. Evans*, 11 N. J. Eq. 151.

New York. — *Canda v. Totten*, 157 N. Y. 281; *Malins v. Brown*, 4 N. Y. 403; *Davis v. Townsend*, 10 Barb. (N. Y.) 333; *Wendell v. Stone*, 39 Hun (N. Y.) 382; *Rhodes v. Rhodes*, 3 Sandf. Ch. (N. Y.) 279; *Agan v. Barry*, 66 N. Y. App. Div. 101.

Ohio. — *Kelley v. Stanbery*, 13 Ohio 408.

Pennsylvania. — *Jamison v. Dimock*, 95 Pa. St. 52.

South Carolina. — *Baker v. Hussey*, 63 S. Car. 551; *Mims v. Chandler*, 21 S. Car. 480.

Vermont. — *Griffith v. Abbott*, 56 Vt. 356.

Wisconsin. — *Bartz v. Paff*, 95 Wis. 95.

h. CHANGE OF POSSESSION — (1) *In General*. — While the mere taking of the possession of real property, in the absence of the making of improvements therefor, or the parting with a valuable consideration, may not, as a rule, be such part performance on the part of a donee or vendee as will entitle him to specific performance against the other party, yet where possession has been taken and the purchase price paid, or there has been a change of plans or sacrifice of business interests, specific performance has been decreed.¹ But the delivery of possession alone, by a vendor or lessor, has been held such part performance on his part as to entitle him to a decree.²

Tender of Money and Performance of Services. — See *Brophy v. Hagan*, 12 Pa. Co. Ct. 365.

Payment Small and Acts Unimportant. — To the effect that equity will refuse to interfere in such circumstances, see *Miller v. Zufall*, 113 Pa. St. 317.

In Texas the rule seems to be that payment of the purchase money, the erection of valuable improvements, and possession under the contract must all concur to warrant the specific performance of a parol contract for the sale of land. *Polk v. Kyser*, 21 Tex. Civ. App. 676; *Douglas v. Baker*, 79 Tex. 506; *Bradley v. Owsley*, 74 Tex. 71; *Robinson v. Davenport*, 40 Tex. 342; *Neatherly v. Ripley*, 21 Tex. 434; *Taylor v. Ashley*, 15 Tex. 52.

1. Change of Possession — *United States*. — *Neale v. Neale*, 9 Wall. (U. S.) 11.

Alabama. — *Heflin v. Milton*, 69 Ala. 354.

Arkansas. — *Guyann v. McCauley*, 32 Ark. 97.

California. — *Manly v. Howlett*, 55 Cal. 94.

Illinois. — *Simonton v. Godsey*, 174 Ill. 28; *Fouts v. Roof*, 171 Ill. 568; *Gorham v. Dodge*, 122 Ill. 528; *Clark v. Clark*, 122 Ill. 388; *Irwin v. Dyke*, 114 Ill. 302; *Smith v. Yocum*, 110 Ill. 142; *Warren v. Warren*, 105 Ill. 568; *McDowell v. Lucas*, 97 Ill. 489; *Bohanan v. Bohanan*, 96 Ill. 591; *Bright v. Bright*, 41 Ill. 97.

Indiana. — *Robinson v. Thrailkill*, 110 Ind. 117; *Railsback v. Walke*, 81 Ind. 409; *Johns v. Johns*, 67 Ind. 440.

Iowa. — *Mills v. McCaustland*, 105 Iowa 187; *Rink v. Sample*, 56 Iowa 100.

Michigan. — *Kinyon v. Young*, 44 Mich. 339.

Minnesota. — *Evergreen Cemetery Assoc. v. Armstrong*, 37 Minn. 259.

Missouri. — *Sharkey v. McDermott*, 91 Mo. 647, 60 Am. Rep. 270; *Walker v. Owen*, 79 Mo. 563; *Hiatt v. Williams*, 72 Mo. 214, 37 Am. Rep. 438.

Montana. — *Story v. Black*, 5 Mont. 26, 51 Am. Rep. 37.

Nebraska. — *Dawson v. McFaddin*, 22 Neb. 131; *Hartman v. Streitz*, 17 Neb. 557; *Haines v. Spanogle*, 17 Neb. 637; *Hanlon v. Wilson*, 10 Neb. 138.

New Jersey. — *Chamberlain v. Manning*, 41 N. J. Eq. 651; *Larison v. Polhemus*, 36 N. J. Eq. 506.

New York. — *Freeman v. Freeman*, 43 N. Y. 34, 3 Am. Rep. 657; *Dana v. Wright*, 23 Hun (N. Y.) 29.

Ohio. — *Hull v. Hull*, 9 Ohio Cir. Dec. 19.

Oregon. — *Brown v. Lord*, 7 Oregon 302.

Pennsylvania. — *Ballard v. Ward*, 89 Pa. St. 358; *Sower v. Weaver*, 84 Pa. St. 262; *Shellhammer v. Ashbaugh*, 83 Pa. St. 24; *Harris v. Richey*, 56 Pa. St. 395; *McLain v. School Directors*, 51 Pa. St. 196; *Poorman v. Kilgore*, 26 Pa. St. 365, 67 Am. Dec. 425; *Moore v. Small*,

19 Pa. St. 461; *Young v. Glendenning*, 6 Watts (Pa.) 509, 31 Am. Dec. 492; *Stewart v. Stewart*, 3 Watts (Pa.) 253; *Syler v. Eckhart*, 1 Binn. (Pa.) 378.

South Carolina. — *Martin v. Patterson*, 27 S. Car. 621. See also *Peay v. Seigler*, 48 S. Car. 496, 59 Am. St. Rep. 731.

Texas. — *Montgomery v. Carlton*, 56 Tex. 361.

Vermont. — *Griffith v. Abbott*, 56 Vt. 356.

Virginia. — *Bowman v. Wolford*, 80 Va. 213.

West Virginia. — *Steenrod v. Wheeling, etc.*, R. Co., 27 W. Va. 1; *Tracy v. Tracy*, 14 W. Va. 243.

Wisconsin. — *Littlefield v. Littlefield*, 51 Wis. 23. And see *Hege v. Thorsgaard*, 98 Wis. 11.

A Mere Entry upon Property by the Grantee and the cutting of wood thereon for fuel is insufficient as part performance. *Fulton v. Jansen*, 99 Cal. 587.

Exchange or Partition of Lands. — Where the exchange or partition of lands has been consummated by an exchange of actual possession or possession in severalty, the statute of frauds is no defense to an action for a formal conveyance. *Lacy v. Gard*, 60 Ill. App. 72; *Lewis v. Smith*, 17 Montg. Co. Rep. (Pa.) 30; *Whittemore v. Cope*, 11 Utah 344. And see *Anderson v. Canter*, 10 Kan. App. 167.

2. Right of Vendor or Lessor — *England*. — *Wills v. Stradling*, 3 Ves. Jr. 378; *Gregory v. Mighell*, 18 Ves. Jr. 328; *Boardman v. Mostyn*, 6 Ves. Jr. 467; *Ungley v. Ungley*, 4 Ch. D. 73; *Coles v. Pilkington, L. R.* 19 Eq. 174; *Butcher v. Stapely*, 1 Vern. 363.

Alabama. — *Arrington v. Porter*, 47 Ala. 714.

Arkansas. — *Pledger v. Garrison*, 42 Ark. 246.

California. — *Calanchini v. Branstetter*, 84 Cal. 249.

Connecticut. — *Eaton v. Whitaker*, 18 Conn. 222, 44 Am. Dec. 586.

Georgia. — *White v. Crew*, 16 Ga. 416.

Indiana. — *Savage v. Lee*, 101 Ind. 514.

Iowa. — *Anderson v. Simpson*, 21 Iowa 399.

Michigan. — *Weed v. Terry*, 2 Dougl. (Mich.) 344, 45 Am. Dec. 257.

Missouri. — *Walker v. Owen*, 79 Mo. 563; *Christopher v. National Brewery Co.*, 72 Mo. App. 121.

Montana. — *Southmayd v. Southmayd*, 4 Mont. 100.

New Jersey. — *Coggsell, etc., Co. v. Coggsell*, (N. J. 1898) 40 Atl. Rep. 213; *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266; *Green v. Richards*, 23 N. J. Eq. 32.

New York. — *Murray v. Jayne*, 8 Barb. (N. Y.) 612; *Harris v. Knickerbacker*, 5 Wend. (N. Y.) 638; *Lawrence v. Saratoga Lake R. Co.*, 36 Hun (N. Y.) 467.

Oregon. — *Cooper v. Thomason*, 30 Oregon 161.

Tender of Deed. — The mere execution or tender of a deed, unaccepted by the vendee, is not a sufficient part performance by the vendor.¹

(2) **Possession and Improvements.** — The making of valuable and lasting improvements upon the property upon the faith of the contract has always been a most persuasive circumstance in favor of equitable interposition.² It is not, of course, essential that the improvements be made pursuant to or be called for by the agreement,³ and it has been further held that the erection of valuable improvements on the property will warrant a decree, although no part of the purchase money has been paid.⁴ Nor is the mere fact that the use of the land during the time the plaintiff has been in possession will more than compensate him for the improvements placed thereon, be a bar to specific performance where, in addition to the improvements, the purchase price has been paid as well as the taxes on the property, for which the use of the land was no compensation.⁵

Pennsylvania. — Pugh v. Good, 3 W. & S. (Pa.) 56, 37 Am. Dec. 534.

Vermont. — Holmes v. Caden, 57 Vt. 111.

West Virginia. — Steenrod v. Wheeling, etc., R. Co., 27 W. Va. 1.

1. **Tender of Deed.** — Dunphy v. Ryan, 116 U. S. 491; Graham v. Theis, 47 Ga. 479; Sands v. Thompson, 43 Ind. 18; Clifford v. Heald, 141 Mass. 322; Enterprise Land Co. v. Betz, 3 Pa. Dist. 327, 34 W. N. C. (Pa.) 284; Wright v. Bearrow, 13 Tex. Civ. App. 146.

Instructions for Preparation of Deed. — A parol agreement for the sale of land will not be decreed specifically against the heir of the vendor, though he had given instructions in writing, stating the terms, to an attorney to draw the deeds of conveyance. Givens v. Calder, 2 Desaus. (S. Car.) 172, 2 Am. Dec. 686.

2. **Improvements** — England. — Whitbread v. Brockhurst, 1 Bro. C. C. 417.

United States. — Townsend v. Vanderwerker, 160 U. S. 171; Wheeling Bridge, etc., R. Co., v. Reymann Brewing Co., (C. C. A.) 90 Fed. Rep. 189.

Arizona. — Latimer v. Hamill, (Ariz. 1898) 52 Pac. Rep. 364.

Arkansas. — Mooney v. Rowland, 64 Ark. 19.

California. — Calanchini v. Branstetter, 84 Cal. 249; Manly v. Howlett, 55 Cal. 94.

Colorado. — Hunt v. Hayt, 10 Colo. 278.

District of Columbia. — McCormick v. Hammersley, 1 App. Cas. (D. C.) 313.

Idaho. — Barton v. Dunlap, (Idaho 1901) 66 Pac. Rep. 832.

Illinois. — Hall v. Peoria, etc., R. Co., 143 Ill. 163; Gaines v. Kendall, 176 Ill. 228; Dunn v. Berkshire, 175 Ill. 243; Fouts v. Roof, 171 Ill. 568; Irwin v. Dyke, 114 Ill. 302; Bohanan v. Bohanan, 96 Ill. 591; Kurtz v. Hibner, 55 Ill. 514, 8 Am. Rep. 665; Bright v. Bright, 41 Ill. 101.

Indiana. — Horner v. McConnell, 158 Ind. 280; Starkey v. Starkey, 136 Ind. 349; Robinson v. Thraikill, 110 Ind. 117; Drum v. Stevens, 94 Ind. 181.

Iowa. — Moore v. Pierson, 6 Iowa 279, 71 Am. Dec. 409.

Kansas. — Gilmore v. Asbury, 64 Kan. 383; Bard v. Elston, 31 Kan. 274.

Maryland. — Hamilton v. Jones, 3 Gill & J. (Md.) 127.

Massachusetts. — Potter v. Jacobs, 111 Mass. 32.

Minnesota. — Mournin v. Trainor, 63 Minn.

230; Evergreen Cemetery Assoc. v. Armstrong, 37 Minn. 259.

Missouri. — Johnson v. Hurley, 115 Mo. 513; Anderson v. Shockley, 82 Mo. 250.

Nebraska. — Ford v. Steele, 31 Neb. 521; Dawson v. McFaddin, 22 Neb. 131.

New Hampshire. — Stillings v. Stillings, 67 N. H. 584; Uncanoonuck Road Co. v. Orr, 67 N. H. 541.

New Jersey. — Fee v. Sharkey, 59 N. J. Eq. 284, affirmed 60 N. J. Eq. 446; Pennsylvania R. Co. v. U. S. Pipe-Line Co., (N. J. 1896) 33 Atl. Rep. 809.

New York. — Cooley v. Lobdell, 153 N. Y. 596; Luessen v. Morich, 72 N. Y. App. Div. 443; Gibbs v. J. M. Horton Ice-Cream Co., 61 N. Y. App. Div. 621; Dana v. Wright, 23 Hun (N. Y.) 29.

Ohio. — O'Hara v. O'Hara, 9 Ohio Cir. Dec. 293, 16 Ohio Cir. Ct. 367.

Oregon. — Cooper v. Thomason, 30 Oregon 161.

Pennsylvania. — Ballard v. Ward, 89 Pa. St. 358; Wack v. Sorber, 2 Whart. (Pa.) 387, 30 Am. Dec. 269.

Texas. — Anderson v. Anderson, 13 Tex. Civ. App. 527; Montgomery v. Carlton, 56 Tex. 361; Hibbert v. Aylott, 52 Tex. 530.

Virginia. — Halsey v. Peters, 79 Va. 60.

Washington. — Peck v. Stanfield, 12 Wash. 101; Mudgett v. Clay, 5 Wash. St. 103.

West Virginia. — Tracy v. Tracy, 14 W. Va. 243.

Wisconsin. — Littlefield v. Littlefield, 51 Wis. 23.

"The Ground upon Which This Equitable Jurisdiction Is Exercised although sometimes said to be part performance, really is to prevent a fraud being practiced upon the parol purchaser by the seller, by inducing him to expend his money upon improvements upon the faith of the contract, and then deprive him of the benefit of the expenditure and secure it to the seller by permitting the latter to avoid the performance of his contract." *Per* Grover, J., in *Freeman v. Freeman*, 43 N. Y. 34, 3 Am. Rep. 657.

3. *Surcome v. Pinniger*, 3 De G. M. & G. 571; *Freeman v. Freeman*, 43 N. Y. 34, 3 Am. Rep. 657; *Ingles v. Patterson*, 36 Wis. 373.

4. *Freeman v. Freeman*, 43 N. Y. 34, 3 Am. Rep. 657.

5. *Jorgenson v. Jorgenson*, 81 Minn. 428. And see *La Master v. Dickson*, 17 Tex. Civ. App. 473. Compare *Marr v. Shaw*, 51 Fed. Rep. 860.

(3) *Possession of One of Several Parcels.* — It has been held that where the agreement relates to several parcels of property, a possession of one is of the same effect as a possession of all;¹ but not where the several tracts or parcels of land are separate and distinct, and the purchase price is not a gross sum, and possession has been taken of only one or more of such distinct parcels.²

(4) *Continuance of Existing Possession — Rule Stated.* — Where one is already in possession of property, a continuance under the agreement is not sufficient.³

Continued Possession by a Tenant, to take the case out of the statute, must be shown to refer to and result from the particular contract and not the lease.⁴

Continuance of Possession, However, Coupled with Other Acts may warrant a decree,⁵ as where the court allowed specific performance of an agreement to convey at the expiration of a lease, on the faith of which the tenant had made extensive improvements, although the promisor died before the lease had expired.⁶ But the fact that a vendee who had been for several years in possession of the premises, under a parol lease, ceased to pay rent and made certain improvements has been held not to create such an equity in his favor as to entitle him to specific performance on equitable grounds.⁷

(5) *Necessity for and Nature of Possession — Possession Held Essential.* — According to the doctrine in some cases, unless possession has been taken by the vendee, no act of alleged part performance on his part will be sufficient.⁸

And if the Possession Is Abandoned, all claim to part performance will be lost.⁹

Temporary Suspension. — Though this result would not follow if the possession

1. *Several Parcels of Land.* — *Smith v. Underdunk*, 1 Sandf. Ch. (N. Y.) 579; *Bartz v. Paff*, 95 Wis. 95; *Jones v. Pease*, 21 Wis. 644.

2. *Small v. Northern Pac. R. Co.*, 20 Fed. Rep. 753. And see *Allen's Estate*, 1 W. & S. (Pa.) 383.

3. *Where Party Already in Possession — England.* — *Kine v. Balfre*, 2 Ball & B. 348; *Morphett v. Jones*, 1 Swanst. 122.

United States. — *Lake Erie, etc., R. Co. v. Michigan Cent. R. Co.*, 86 Fed. Rep. 840.

Alabama. — *Danforth v. Laney*, 28 Ala. 274. And see *McMahan v. Jacoway*, 105 Ala. 585.

Arkansas. — *Haines v. McGlone*, 44 Ark. 79. *Illinois.* — *Kaufman v. Cook*, 114 Ill. 11; *Creighton v. Sanders*, 89 Ill. 543.

Indiana. — *Green v. Groves*, 109 Ind. 519; *Johns v. Johns*, 67 Ind. 440; *Johnston v. Glancy*, 4 Blackf. (Ind.) 94, 28 Am. Dec. 45. And see *Savage v. Lee*, 101 Ind. 514.

Iowa. — *Hutton v. Dorse*, 116 Iowa 13; *Wilmer v. Farris*, 40 Iowa 309.

Maryland. — *Billingslea v. Ward*, 33 Md. 48.

Montana. — *Lamme v. Dodson*, 4 Mont. 560.

Nebraska. — *Lewis v. North*, 62 Neb. 552; *Bigler v. Baker*, 40 Neb. 325.

New Hampshire. — *Webster v. Blodgett*, 59 N. H. 120.

New Jersey. — *Cole v. Potts*, 10 N. J. Eq. 67.

Ohio. — *Armstrong v. Kattenhorn*, 11 Ohio 265.

Oregon. — *Brown v. Lord*, 7 Oregon 302.

Pennsylvania. — *Derr v. Ackerman*, 182 Pa. St. 591; *Birkbeck v. Kelly*, (Pa. 1887) 9 Atl. Rep. 313; *Greenlee v. Greenlee*, 22 Pa. St. 225; *Christy v. Barnhart*, 14 Pa. St. 260, 53 Am. Dec. 538; *Small v. Ehrgood*, 1 Lack. Leg. N. (Pa.) 167; *Galbreath v. Galbreath*, 5 Watts (Pa.) 146; *Brawdy v. Brawdy*, 7 Pa. St. 160; *Donnelly's Estate*, 3 Pa. Dist. 381.

Texas. — *Munk v. Weidner*, 9 Tex. Civ. App. 491.

Previous Constructive Possession. — In an action for specific performance of a parol agreement for the sale of real estate, where the plaintiff claims to have gone into possession under the agreement, but had been theretofore in constructive possession, it should appear that after the agreement acts were done with the privity of the owner of the fee which were inconsistent with the previous holding, and such as clearly to indicate a change in the relations of the parties. *Underwood v. Underwood*, 48 Mo. 527.

4. *Lewis v. North*, 62 Neb. 552; *Bigler v. Baker*, 40 Neb. 325.

5. *Other Acts in Addition to Continuance of Possession — England.* — *Lanyon v. Martin*, L. R. 13 Ir. 297; *Conner v. Fitzgerald*, L. R. 11 Ir. 106; *Nunn v. Fabian*, L. R. 1 Ch. 35; *Wills v. Stradling*, 3 Ves. Jr. 378; *Savage v. Carroll*, 1 Ball & B. 265; *Dowell v. Dew*, 1 Y. & C. Ch. 345; *Sutherland v. Briggs*, 1 Hare 26; *Brennan v. Bolton*, 2 Dr. & War. 349.

Indiana. — *Peck v. Williams*, 113 Ind. 256.

Kansas. — *Bard v. Elston*, 31 Kan. 274.

Maryland. — *Spear v. Orendorf*, 26 Md. 37.

Missouri. — *Spalding v. Conzelman*, 30 Mo. 177.

Pennsylvania. — *Williams v. Landman*, 8 W. & S. (Pa.) 55.

Texas. — *Eason v. Eason*, 61 Tex. 225.

Virginia. — *Wilde v. Fox*, 1 Rand. (Va.) 165.

6. *Hibbert v. Aylott*, 52 Tex. 530.

7. *Donnelly's Estate*, 3 Pa. Dist. 381.

8. *Possession Held Essential.* — *Ackerman v. Fisher*, 57 Pa. St. 457; *Moore v. Small*, 19 Pa. St. 461; *McKee v. Phillips*, 9 Watts (Pa.) 85; *Ward v. Stuart*, 62 Tex. 333; *Wooldridge v. Hancock*, 70 Tex. 18; *Goodwin v. Bartlett*, 43 W. Va. 332; *Woods v. Stevenson*, 43 W. Va. 149.

9. *Abandonment of Possession.* — *Chambliss v. Smith*, 30 Ala. 366; *Porter v. Citizens' Bank*, 73 Mo. App. 513.

were merely suspended temporarily without intent to abandon.¹

Nature of Possession Required. — The possession required must be notorious, exclusive, and taken under the contract, and solely referable to it,² though the knowledge of the vendor satisfies the requisite notoriety.³

Mere Constructive Possession is insufficient.⁴

When Possession to Be Taken. — Possession by the vendee must be taken in the lifetime of the vendor, with his knowledge, and retained against him.⁵

i. CONTRACT MUST BE CERTAIN AND DEFINITE, AND PART PERFORMANCE CLEARLY SHOWN. — It is well settled that in order to justify a decree for the performance of a parol agreement required by the statute of frauds to be in writing, the contract itself must be reasonably certain and definite, and the acts of part performance clearly established by the proof.⁶ So where a party seeks to enforce a parol agreement for the sale of land by a certain description, he must, in addition to the proof of part performance required to take the case out of the statute of frauds, show that the terms of the contract are clear and definite as to the locality and description of the land.⁷ And where proof of the contract is not clear, it will not take the case out of the statute though the complainant may show conclusively the full performance of the acts which he alleges were required of him by the contract.⁸ Nor, though the contract be established, will specific performance be decreed, where the

1. *Drum v. Stevens*, 94 Ind. 181.

2. **Kind of Possession Necessary** — *England*. — *In re Beetham*, 18 Q. B. D. 380; *Humphreys v. Green*, 10 Q. B. D. 148.

United States. — *Lake Erie, etc.*, R. Co. v. *Michigan Cent. R. Co.*, 86 Fed. Rep. 840.

Arizona. — *Latimer v. Hamill*, (Ariz. 1898) 52 Pac. Rep. 364.

Arkansas. — *Moore v. Gordon*, 44 Ark. 334.

Illinois. — *Gorham v. Dodge*, 122 Ill. 528; *Clark v. Clark*, 122 Ill. 388; *Irwin v. Dyke*, 114 Ill. 302; *Kaufman v. Cook*, 114 Ill. 11; *Padfield v. Padfield*, 92 Ill. 198. But see *Warren v. Warren*, 105 Ill. 568.

Indiana. — *Waymire v. Waymire*, 141 Ind. 164; *Johns v. Johns*, 67 Ind. 440. And see *Barnett v. Washington Glass Co.*, 12 Ind. App. 631.

Minnesota. — *Pawlak v. Granowski*, 54 Minn. 130.

Missouri. — *Charpiot v. Sigerson*, 25 Mo. 63. But see *Sharkey v. McDermott*, 91 Mo. 647, 60 Am. Rep. 270; *Hiatt v. Williams*, 72 Mo. 214, 37 Am. Rep. 438.

Montana. — *Story v. Black*, 5 Mont. 26, 51 Am. Rep. 37.

New Jersey. — *Larison v. Polhemus*, 36 N. J. Eq. 506; *Brown v. Brown*, 33 N. J. Eq. 650.

New York. — See *Dana v. Wright*, 23 Hun (N. Y.) 29.

Oregon. — *Brown v. Lord*, 7 Oregon 302.

Pennsylvania. — *Sample v. Horlacher*, 177 Pa. St. 247; *Dougan v. Blocher*, 24 Pa. St. 28; *Rankin v. Simpson*, 19 Pa. St. 471, 57 Am. Dec. 668; *Moore v. Small*, 19 Pa. St. 461; *Brawdy v. Brawdy*, 7 Pa. St. 157.

South Carolina. — *Boozar v. Teague*, 27 S. Car. 348.

West Virginia. — *Woods v. Stevenson*, 43 W. Va. 149; *Miller v. Lorentz*, 39 W. Va. 160.

Wisconsin. — *Rodman v. Rodman*, 112 Wis. 378; *Littlefield v. Littlefield*, 51 Wis. 23.

3. **Knowledge of Vendor.** — *Cole v. White*, cited in *Whitbread v. Brockhurst*, 1 Bro. C. C. 409; *Johnston v. Glancy*, 4 Blackf. (Ind.) 94, 28 Am. Dec. 45; *Carrolls v. Cox*, 15 Iowa 455;

Zimmerman v. Wengert, 31 Pa. St. 401; *Goucher v. Martin*, 9 Watts (Pa.) 106; *Thompson v. Scott*, 1 McCord Eq. (S. Car.) 32.

4. *Huntington, etc.*, Land Development Co. v. *Thornburg*, 46 W. Va. 99.

5. **Possession in Lifetime of Vendor.** — *Shirey v. Cumberhouse*, 41 Ark. 97; *Sage v. M'Guire*, 4 W. & S. (Pa.) 228; *Ryan v. Wilson*, 56 Tex. 36.

6. **Acts of Part Performance Must Be Clearly Shown.** — *Pike v. Pettus*, 71 Ala. 98; *Moore v. Gordon*, 44 Ark. 334; *Beall v. Clark*, 71 Ga. 818; *Marshall v. Peck*, 91 Ill. 187; *Thomas v. Griffith*, 68 Iowa 11; *Hopkins v. Roberts*, 54 Md. 312; *Brown v. Brown*, 47 Mich. 378; *Wood v. Terry*, 2 Dougl. (Mich.) 344, 45 Am. Dec. 257; *Berry v. Hartzell*, 91 Mo. 132; *Brown v. Brown*, 29 Hun (N. Y.) 498; *Shahan v. Swan*, 48 Ohio St. 25, 29 Am. St. Rep. 517; *Wagonblast v. Whitney*, 12 Oregon 83; *Sage v. M'Guire*, 4 W. & S. (Pa.) 228.

Contract Partly in Parol and Partly in Writing. — Where negotiations have been conducted by parol, or are partly evidenced by writings duly signed and partly rest in parol, and specific performance is sought on the ground of part performance, the terms of the contract should appear clearly, definitely, and unequivocally. *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266.

7. *Small v. Ehrgood*, 1 Lark. Leg. N. (Pa.) 167; *Taylor v. Ashley*, 15 Tex. 50.

Evidence as to Description. — Equity will not enforce a parol contract on the ground of part performance, where the description is so indefinite that the contract would not be enforced had the memorandum required by the statute of frauds been made. *Blankenship v. Spencer*, 31 W. Va. 510.

8. *Henry v. Pittsburgh Clay Mfg. Co.*, (C. C. A.) 80 Fed. Rep. 485; *Vose v. Strong*, 144 Ill. 108.

So Also, When It Was Settled by a Prior Action at Law that no such contract or promise was ever made, and that the acts done and claimed as in performance were under a mere parol

question of part performance remains in doubt.¹ But it is sufficient as to the terms of the contract if they are reasonably certain, and are made out in a manner satisfactory to the court.²

Controversy as to Details. — The fact that the details of the agreement are controverted by the parties will not deter the court from ascertaining what the terms of it really were and giving effect to the agreement, if the complainant shows himself entitled to a specific performance by a part performance.³

j. ACTS RELIED ON MUST BE THOSE OF PLAINTIFF. — One seeking to enforce a parol contract for the sale of lands on the ground of part performance must rely on his own acts in part performance, and not upon the acts of the defendant.⁴ So also partial performance by the grantor in no wise affecting the grantee will not take the case out of the statute for the benefit of the latter.⁵ It has been held, indeed, that the acts of the plaintiff's vendee, from whom the plaintiff subsequently repurchased, will not avail the latter.⁶

k. MARRIAGE AS PART PERFORMANCE. — It has been held that marriage, pursuant to an antenuptial parol contract to convey property, is not a sufficient part performance to sustain a decree where a statute requires a writing,⁷ though by further acts done, in addition to marriage, it may become sufficient.⁸

l. MERE REVOCABLE ACTS. — The mere making of a will, pursuant to an alleged agreement to make reciprocal wills, is not such part performance as will satisfy the statute of frauds.⁹

m. PRELIMINARY ACTS. — As a general rule acts which are merely preparatory to the performance of the contract in question are not sufficient as part performance,¹⁰ nor are mere preliminary acts, such as the incurrence of preliminary expenses.¹¹ But though specific performance may not be decreed on the faith of mere preparatory or preliminary acts, equity may, in proper circumstances, decree a party compensation therefor.¹²

n. CONTRACTS NOT PERFORMABLE WITHIN A YEAR. — It has been said that as a general rule the doctrine of part performance has no application to contracts that cannot be performed by either party within a year.¹³

license, no specific performance can be decreed. *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.*, 112 Ill. 384, 54 Am. Rep. 243.

1. *Van Epps v. Redfield*, 69 Conn. 104; *Geer v. Goudy*, 174 Ill. 514; *Hudson v. Max Meadows Land, etc., Co.*, 99 Va. 537. See *Bohannon v. Travis*, 94 Ky. 59.

Proof as to Performance. — In order to justify a decree of specific performance of a verbal agreement for the sale of real estate on the ground of part performance, the acts relied on to take the case out of the statute of frauds must be clearly, definitely, and satisfactorily shown. *Lewis v. North*, 62 Neb. 552. See also *Broughton v. Coffer*, 18 Gratt. (Va.) 184.

2. *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266.

3. *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266.

4. **Party Must Rely on His Own Acts.** — *Huntington, etc., Land Development Co. v. Thornburg*, 46 W. Va. 99. And see *Nelson v. Lawson*, 71 Miss. 819.

5. See *Bosley v. Bosley*, 85 Mo. App. 424. And see *Russell v. Russell*, 60 N. J. Eq. 282.

6. *Abbott v. Baldwin*, 61 N. H. 583.

7. **Marriage.** — *Montacute v. Maxwell*, 1 P. Wms. 618; *Caton v. Caton*, L. R. 1 Ch. 137; *Hunt v. Hunt*, 171 N. Y. 396, 55 N. Y. App. Div. 430; *Finch v. Finch*, 10 Ohio St. 501.

Compare *Moore v. Allen*, 26 Colo. 197, 77 Am. St. Rep. 255.

8. See *Ex p. Whitehead*, 14 Q. B. D. 419; *Ungley v. Ungley*, 4 Ch. D. 73; *Surcome v. Pinniger*, 3 De G. M. & G. 571; *Hammersly v. De Biel*, 12 Cl. & F. 45. And see *Moore v. Allen*, 26 Colo. 197, 77 Am. St. Rep. 255.

9. *Gould v. Mansfield*, 103 Mass. 408, 4 Am. Rep. 573; *Hale v. Hale*, 90 Va. 728.

10. **Preparatory Acts.** — *Pembroke v. Thorpe*, 3 Swanst. 437; *Cooth v. Jackson*, 6 Ves. Jr. 12; *Dunphy v. Ryan*, 116 U. S. 491; *Colgrove v. Solomon*, 34 Mich. 494; *Lydick v. Holland*, 83 Mo. 703; *Harris v. Rounsevel*, 61 N. H. 250.

Ordering Papers to Be Drawn Up is not enough. See *Glengal v. Barnard*, 1 Keen 769; *Clerk v. Wright*, 1 Atk. 12; *Thynne v. Glengall*, 2 H. L. Cas. 131; *Hawkins v. Holmes*, 1 P. Wms. 770; *Redding v. Wilkes*, 3 Bro. C. C. 400; *Gratz v. Gratz*, 4 Rawle (Pa.) 411; *Givens v. Calder*, 2 Desaus. (S. Car.) 171, 2 Am. Dec. 686.

11. *Clifford v. Heald*, 141 Mass. 322.
12. *Parker v. Niggeman*, 6 Mo. App. 546; *Sheldon v. Preva*, 57 Vt. 263; *Birdsall v. Birdsall*, 52 Wis. 208.

13. **Contracts Not Performable Within a Year.** — *Wolke v. Fleming*, 103 Ind. 105, 53 Am. Rep. 495. And see *Spota v. Hayes*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 532. Compare *In re Little River Lumber Co.*, 92 Fed. Rep. 585.

o. GUARANTIES. — It has been held that the doctrine of part performance does not apply to guaranties.¹

p. COMPENSATION IN LIEU OF PERFORMANCE. — Instead of granting specific performance of the agreement, equity will sometimes grant compensation for damages actually suffered by reason of the part performance of the contract.² So in *Kentucky* it seems that a verbal agreement for the sale of land will not be enforced in equity even though the purchaser has gone into possession, but the vendee will be entitled to a lien on the land for his purchase money.³

3. Executed Contracts. — Where the agreement is fair and unobjectionable and has been fully or substantially performed on one side, performance by the other party will generally be decreed, notwithstanding the statute of frauds, if a judgment for damages would be inadequate or would not make the performing party whole.⁴ So where possession has been given under a contract and there has been full performance on one side, such contract is not within the statute.⁵

4. Trusts. — Equity will not, as a rule, permit a party to invoke the statute of frauds to defeat the performance of a trust, where the result would be a fraud upon the other party.⁶ And where everything has been done on both sides, save the mere delivery of a deed, so that the holder of the legal title

1. Guaranties. — *Daniel v. Mercer*, 63 Ga. 442; *McGaughey v. Latham*, 63 Ga. 67.

Contract Held Not a Guaranty. — Where a person takes a bond for title by assignment, under a contract to pay the purchase money due to the original vendor, he may be compelled by a court of equity to perform his contract. It is not a parol promise to answer for the debt of another, nor is it a parol contract for the sale of land. *Ford v. Finney*, 35 Ga. 258.

2. Compensation. — *Pengall v. Ross*, 2 Eq. Cas. Abr. 46, par. 12; *Goodwin v. Lyon*, 4 Port. (Ala.) 297; *Deisher v. Stein*, 34 Kan. 39; *Barnett v. Nichols*, 56 Miss. 622; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. (N. Y.) 273; *Overmeyer v. Koerner*, 81* Pa. St. 517.

3. Asher v. Brock, 95 Ky. 270. And see *Duncan v. Duncan*, 93 Ky. 37, 40 Am. St. Rep. 159; *White v. O'Bannon*, 86 Ky. 93; *Newburger v. Adams*, 92 Ky. 27; *Usher v. Flood*, 83 Ky. 552.

4. Full Performance on One Side — California. — *Blankenship v. Whaley*, 124 Cal. 300.

Colorado. — *McLure v. Koen*, 25 Colo. 284.

Georgia. — *Morgan v. Battle*, 95 Ga. 663.

Illinois. — *Cleveland, etc., R. Co. v. Wood*, 189 Ill. 352; *Telford v. Chicago, etc., R. Co.*, 172 Ill. 559.

Iowa. — *Bird v. Jacobus*, 113 Iowa 194; *Mills v. McCaustland*, 105 Iowa 187; *Mitchell v. Colby*, 95 Iowa 202.

Maryland. — *Chappell v. Stewart*, 95 Md. 76.

Michigan. — *Gerber v. Upton*, 123 Mich. 605; *Sigler v. Sigler*, 108 Mich. 591; *Welch v. Whelpley*, 62 Mich. 15, 4 Am. St. Rep. 810.

Missouri. — *Hall v. Harris*, 145 Mo. 614.

Nebraska. — *Fremont Carriage Mfg. Co. v. Thomsen*, (Neb. 1902) 91 N. W. Rep. 376; *Lucas v. Lucas*, (Neb. 1902) 89 N. W. Rep. 769; *Te Poel v. Shutt*, 57 Neb. 592.

New York. — *Roberge v. Winne*, 71 Hun (N. Y.) 172; *Healy v. Healy*, (Supm. Ct. Eq. T.) 31 Misc. (N. Y.) 636, affirmed 55 N. Y. App. 315; *Brennan v. Brennan*, 66 Hun (N. Y.) 632, 21 N. Y. Supp. 195; *Noble v. McGurk*, (Supm.

Ct. Spec. T.) 16 Misc. (N. Y.) 461; *Korminsky v. Korminsky*, (N. Y. Super. Ct. Gen. T.) 2 Misc. (N. Y.) 138.

Ohio. — *O'Hara v. O'Hara*, 9 Ohio Cir. Dec. 293, 16 Ohio Cir. Ct. 367; *Cooper v. Cooper*, 8 Ohio Dec. 35, 6 Ohio N. P. 99.

South Carolina. — *Turnipseed v. Sirrine*, 57 S. Car. 559.

Utah. — *Walker v. Bamberger*, 17 Utah 239; *Brinton v. Van Cott*, 8 Utah 480.

Vermont. — *Smith v. Pierce*, 65 Vt. 200.

Washington. — *Horr v. Hollis*, 20 Wash. 424.

Wisconsin. — *Smith v. Putnam*, 107 Wis. 155; *Goldsmith v. Darling*, 92 Wis. 363.

A Debtor Who Conveys under an Oral Agreement that the land conveyed shall be held for and applied to the payment of certain debts due the grantee and others, may enforce his oral contract. *Shields v. Whitaker*, 82 N. Car. 516.

5. Wolke v. Fleming, 103 Ind. 105, 53 Am. Rep. 495.

6. Performance of Trusts. — *Hodges v. Verner*, 100 Ala. 612; *Rook v. Jameson*, 67 Iowa 202; *Bechtel v. Cone*, 52 Md. 698; *Jeremiah v. Pitcher*, 26 N. Y. App. Div. 402; *Bailey v. Harris*, 19 Tex. 108. And see *Millsaps v. Shotwell*, 76 Miss. 923. *Compare Lyons v. Bass*, 108 Ga. 573.

Legal Title as Security for Debt. — *Jackson v. Gray*, 9 Ga. 77.

If One Agrees by Parol to Take a Lease of Land for Another, but takes the lease in his own name, equity will enforce the agreement, and compel him to make title to the principal; and, in such a case, the statute requiring contracts for leasing or agreeing to lease lands to be in writing does not apply. *Hargrave v. King*, 5 Ired. Eq. (40 N. Car.) 430.

More Reliance upon Contract. — It has been said in this connection that "an agreement had under the statute cannot be made effectual either by way of contract or by way of trust merely by being relied upon." *Rose v. Fall River Five Cents Sav. Bank*, 165 Mass. 273. And see *Bourke v. Callanan*, 160 Mass. 195.

has become a bare trustee, equity will compel the delivery.¹ Where a debtor conveyed land to his creditor upon a parol agreement that the latter should sell the same, and, after satisfying the debt out of the proceeds, pay the residue to the debtor, and a sale was accordingly made, it was held that the agreement to pay could be enforced and was not within the statute of frauds.² But a bill for specific performance cannot be maintained on a parol agreement by which one party agreed to purchase real estate for the other, but took a deed in his own name and paid his own money for it. Such an agreement is within the statute of frauds, which requires a writing.³

VII. RULE OF JUDICIAL DISCRETION — 1. In General. — It is well settled that whether or not a contract will be specifically enforced is a matter of judicial discretion.⁴

1. *Rook v. Jameson*, 67 Iowa 202; *Bechtel v. Cone*, 52 Md. 698.

2. *Arnold v. Stephenson*, 79 Ind. 126.

3. *Wallace v. Brown*, 10 N. J. Eq. 308. And see *Levy v. Brush*, 45 N. Y. 589.

Purchase at Tax Sale. — Equity will not enforce a parol agreement made with the owner of real estate which was about to be sold for taxes, to bid the property in at the sale, and to reconvey to the owner on the repayment by him of the sum advanced. *Hain v. Robinson*, 72 Iowa 735.

4. General Rule as to Court's Discretion — England. — *Joynes v. Statham*, 3 Atk. 388; *Garrard v. Grinling*, 2 Swanst. 244; *Price v. Dyer*, 17 Ves. Jr. 357; *Clarke v. Grant*, 14 Ves. Jr. 519; *Mason v. Armitage*, 13 Ves. Jr. 25; *Mortlock v. Buller*, 10 Ves. Jr. 294; *White v. Damon*, 7 Ves. Jr. 35; *Townshend v. Stangroom*, 6 Ves. Jr. 328; *Pitcairn v. Ogbourne*, 2 Ves. 375; *Legal v. Miller*, 2 Ves. 299; *Winch v. Winchester*, 1 Ves. & B. 375; *Clowes v. Higginson*, 1 Ves. & B. 527; *Ramsbottom v. Gosden*, 1 Ves. & B. 165; *Flood v. Finlay*, 2 Ball & B. 15; *Hill v. Lane*, L. R. 11 Eq. 215; *Ramshire v. Bolton*, L. R. 8 Eq. 294; *Barry v. Croskey*, 2 Johns. & H. 1; *Cox v. Middleton*, 2 Drew. 209.

United States. — *McCabe v. Matthews*, 155 U. S. 550; *Cheney v. Libby*, 134 U. S. 68; *Hennessey v. Woolworth*, 128 U. S. 438; *Nickerson v. Nickerson*, 127 U. S. 668; *Mississippi, etc., R. Co. v. Cromwell*, 91 U. S. 643; *Willard v. Tayloe*, 8 Wall. (U. S.) 557; *Tobey v. Bristol County*, 3 Story (U. S.) 800; *King v. Hamilton*, 4 Pet. (U. S.) 328; *Roundtree v. McLain*, *Hempst. (U. S.)* 245; *Engelstad v. Dufresne*, (C. C. A.) 116 Fed. Rep. 582; *Slaughter v. La Compagnie Francaise, etc.*, 113 Fed. Rep. 21; *Newton v. Wooley*, 105 Fed. Rep. 541; *Leicester Piano Co. v. Front Royal, etc., Imp. Co.*, (C. C. A.) 55 Fed. Rep. 190; *Marr v. Shaw*, 51 Fed. Rep. 860.

Alabama. — *Homan v. Stewart*, 103 Ala. 644; *Carlisle v. Carlisle*, 77 Ala. 339; *Ellerbe v. Ellerbe*, 42 Ala. 643; *Gentry v. Rogers*, 40 Ala. 442; *Pulliam v. Owen*, 25 Ala. 492; *Blackwilder v. Loveless*, 21 Ala. 371; *Gould v. Womack*, 2 Ala. 83.

Arkansas. — *Watkins v. Turner*, 34 Ark. 663; *Morrison v. Peay*, 21 Ark. 110; *Wynn v. Garland*, 19 Ark. 23, 68 Am. Dec. 190; *Shields v. Trammell*, 19 Ark. 51; *Whiting v. Beebe*, 12 Ark. 421.

California. — *Kelly v. Central Pac. R. Co.*, 74 Cal. 557, 5 Am. St. Rep. 470; *Sturgis v. Galindo*, 59 Cal. 28, 43 Am. Rep. 239; *Bruck v. Tucker*,

42 Cal. 347; *Cooper v. Pena*, 21 Cal. 403; *Brown v. Covillaud*, 6 Cal. 566.

Connecticut. — *Quinn v. Roath*, 37 Conn. 16; *Patterson v. Bloomer*, 35 Conn. 57, 95 Am. Dec. 218; *Meeker v. Meeker*, 16 Conn. 403.

Delaware. — *Diamond State Iron Co. v. Todd*, 6 Del. Ch. 163; *Godwin v. Collins*, 4 Houst. (Del.) 28, 3 Del. Ch. 189; *Hudson v. Layton*, 5 Harr. (Del.) 74, 48 Am. Dec. 167.

Florida. — *Knox v. Spratt*, 23 Fla. 64; *Pensacola Gas Co. v. Provisional Municipality*, 33 Fla. 322.

Georgia. — *Kirkland v. Downing*, 106 Ga. 530.

Idaho. — *Vincent v. Larson*, 1 Idaho 241.

Illinois. — *Ebert v. Arends*, 190 Ill. 221; *Mack v. McIntosh*, 181 Ill. 633; *Maltby v. Thews*, 171 Ill. 264; *Leonard v. Crane*, 147 Ill. 52; *Cohn v. Mitchell*, 115 Ill. 124; *Chicago, etc., R. Co. v. Reno*, 113 Ill. 39; *Hetfield v. Willey*, 105 Ill. 286; *Beach v. Dyer*, 93 Ill. 295; *Ralls v. Ralls*, 82 Ill. 243; *Iglehart v. Vail*, 73 Ill. 63; *Fish v. Leser*, 69 Ill. 394; *Broadwell v. Broadwell*, 6 Ill. 599; *Frisby v. Ballance*, 5 Ill. 287, 39 Am. Dec. 409; *Bates Mach. Co. v. Bates*, 87 Ill. App. 225; *East St. Louis Connecting R. Co. v. East St. Louis*, 81 Ill. App. 109; *Short v. Kieffer*, 43 Ill. App. 515.

Indiana. — *Vawter v. Bacon*, 89 Ind. 565; *Mather v. Simonton*, 73 Ind. 595; *Kirkman v. Kenyon*, 17 Ind. 607; *Wabash, etc., Canal v. State*, 7 Ind. 180; *Ash v. Daggy*, 6 Ind. 259; *Dougherty v. Humpston*, 2 Blackf. (Ind.) 273.

Iowa. — *Minneapolis, etc., R. Co. v. Cox*, 76 Iowa 306, 14 Am. St. Rep. 216; *Briggs v. Jasper County*, 49 Iowa 481; *Parsons v. Gilbert*, 45 Iowa 33; *Sweeney v. O'Hara*, 43 Iowa 34; *Thurston v. Arnold*, 43 Iowa 43; *Grimes v. Hamilton County*, 37 Iowa 290; *Smith v. Shepherd*, 36 Iowa 253; *Auter v. Miller*, 18 Iowa 405; *Rudolph v. Covell*, 5 Iowa 525; *Armstrong v. Pierson*, 5 Iowa 317; *Young v. Daniels*, 2 Iowa 126, 63 Am. Dec. 477; *Shaw v. Livermore*, 2 Greene (Iowa) 338.

Kansas. — *Reid v. Mix*, 63 Kan. 745; *Fowler v. Marshall*, 29 Kan. 665.

Kentucky. — *Simon v. Wildt*, 84 Ky. 157; *Grundy v. Edwards*, 7 J. J. Marsh. (Ky.) 368, 23 Am. Dec. 409; *Turner v. Clay*, 3 Bibb (Ky.) 52.

Maine. — *Mansfield v. Sherman*, 81 Me. 365; *Snell v. Mitchell*, 65 Me. 48; *Rogers v. Saunders*, 16 Me. 92, 33 Am. Dec. 635.

Maryland. — *O'Brien v. Pentz*, 48 Md. 562; *Ellicott v. White*, 43 Md. 145; *Semmes v. Worthington*, 38 Md. 298; *Fardy v. Williams*, 38 Md. 494; *Brewer v. Herbert*, 30 Md. 310, 96 Am. Dec. 582; *Smoot v. Rea*, 19 Md. 398; *Crane*

This General Principle May Be Said to Be Qualified by the statement that this so-called judicial discretion in specific performance cases is never an arbitrary or capricious discretion, but to be exercised in conformity with established rules and usages, and specific performance decreed or denied accordingly.¹

v. Gough, 4 Md. 316; *Wadsworth v. Manning*, 4 Md. 59; *Philpot v. Elliott*, 4 Md. Ch. 273; *Duvall v. Myers*, 2 Md. Ch. 401; *Tyson v. Watts*, 1 Md. Ch. 13; *Waters v. Howard*, 8 Gill (Md.) 262; *Geiger v. Green*, 4 Gill (Md.) 473; *Griffith v. Frederick County Bank*, 6 Gill & J. (Md.) 424; *Shriver v. Seiss*, 49 Md. 384; *Perkins v. Wright*, 3 Har. & M. (Md.) 324.

Massachusetts.—*Graves v. Goldthwait*, 153 Mass. 268; *Boston, etc., R. Co. v. Bartlett*, 10 Gray (Mass.) 385; *Jones v. Newhall*, 115 Mass. 244, 15 Am. Rep. 97; *Western R. Corp. v. Babcock*, 6 Met. (Mass.) 346.

Michigan.—*Chapman v. Morgan*, 55 Mich. 124; *Rust v. Conrad*, 47 Mich. 449, 41 Am. Rep. 720; *Berry v. Whitney*, 40 Mich. 65; *Blanchard v. Detroit, etc., R. Co.*, 31 Mich. 43, 18 Am. Rep. 142; *Buck v. Smith*, 29 Mich. 166, 18 Am. Rep. 84; *Chambers v. Livermore*, 15 Mich. 381; *Smith v. Lawrence*, 15 Mich. 499; *Buys v. Eberhardt*, 3 Mich. 524; *Weed v. Terry*, 2 Doug. (Mich.) 344, 45 Am. Dec. 257; *McMurtrie v. Bennette*, Harr. (Mich.) 124.

Mississippi.—*Aston v. Robinson*, 49 Miss. 348; *Hester v. Hooker*, 7 Smed. & M. (Miss.) 768.

Missouri.—*Hollmann v. Conlon*, 143 Mo. 369; *Pomeroy v. Fullerton*, 131 Mo. 581; *In re Ferguson*, 124 Mo. 574; *Glass v. Rowe*, 103 Mo. 513; *Veth v. Gierth*, 92 Mo. 97; *Paris v. Haley*, 61 Mo. 453; *Taylor v. Williams*, 45 Mo. 80; *Fish v. Lightner*, 44 Mo. 268; *Ivory v. Murphy*, 36 Mo. 534.

Montana.—*Thornburgh v. Fish*, 11 Mont. 53.

Nebraska.—*Hector-Johnston Co. v. Billings*, (Neb. 1902) 91 N. W. Rep. 183; *Gregory v. Littlejohn*, 25 Neb. 368; *King v. Gsantner*, 23 Neb. 795.

Nevada.—*Schroeder v. Gemeinder*, 10 Nev. 355.

New Hampshire.—*Pickering v. Pickering*, 38 N. H. 400; *Eckstein v. Downing*, 64 N. H. 248, 10 Am. St. Rep. 404.

New Jersey.—*Brown v. Brown*, 33 N. J. Eq. 650; *Peeler v. Levy*, 26 N. J. Eq. 330; *Plummer v. Keppler*, 26 N. J. Eq. 481; *Locander v. Lounsbery*, 24 N. J. Eq. 417, 25 N. J. Eq. 554; *McDavid v. Pierrepont*, 23 N. J. Eq. 42; *Gariss v. Gariss*, 16 N. J. Eq. 79; *Johnson v. Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 773; *Smith v. McVeigh*, 11 N. J. Eq. 239; *Van Dyne v. Vreeland*, 11 N. J. Eq. 370; *Stoutenburgh v. Tompkins*, 9 N. J. Eq. 332; *Torrey v. Buck*, 2 N. J. Eq. 374; *Ely v. Perrine*, 2 N. J. Eq. 396; *King v. Morford*, 1 N. J. Eq. 274; *Pennie v. Sharp*, 23 N. J. Eq. 274.

New York.—*Winne v. Winne*, 166 N. Y. 263; *Mead v. Martens*, 162 N. Y. 626; *Stokes v. Stokes*, 155 N. Y. 590; *Heller v. Cohen*, 154 N. Y. 306; *Miles v. Dover Furnace Iron Co.*, 125 N. Y. 294; *Conger v. New York, etc., R. Co.*, 120 N. Y. 20; *Margraf v. Muir*, 57 N. Y. 155; *Warner v. Schweitzer*, 56 N. Y. App. Div. 623; *Peters v. Delaplaine*, 49 N. Y. 362; *Godard v. American Queen*, 44 N. Y. App. Div. 454; *Mead v. Martens*, 21 N. Y. App. Div. 134;

Gale v. Archer, 42 Barb. (N. Y.) 320; *Clarke v. Rochester, etc., R. Co.*, 18 Barb. (N. Y.) 350; *Bowen v. Irish Presb. Congregation*, 6 Bosw. (N. Y.) 245; *St. John v. Benedict*, 6 Johns. Ch. (N. Y.) 111; *Seymour v. Delancey*, 6 Johns. Ch. (N. Y.) 222, 3 Cow. (N. Y.) 445, 15 Am. Dec. 270; *McWhorter v. McMahan*, Clarke (N. Y.) 400; *Hoch v. Cocks*, 78 Hun (N. Y.) 253; *Platt v. Zimmermann*, (N. Y. Super. Ct. Gen. T.) 13 Misc. (N. Y.) 519; *Finkel v. Kohn*, 38 N. Y. App. Div. 199; *Hayes v. Nourse*, 114 N. Y. 595, 11 Am. St. Rep. 700; *Sherman v. Wright*, 49 N. Y. 227.

North Carolina.—*Whitted v. Fuquay*, 127 N. Car. 68; *Ramsay v. Gheen*, 99 N. Car. 215; *Love v. Welch*, 97 N. Car. 200; *Lloyd v. Wheatly*, 2 Jones Eq. (55 N. Car.) 269; *Prater v. Miller*, 3 Hawks (10 N. Car.) 629; *Lloyd v. Wheatly*, 2 Jones Eq. (55 N. Car.) 267; *Leigh v. Crump*, 1 Ired. Eq. (36 N. Car.) 299.

Ohio.—*Hughes v. Roth*, 7 Ohio Cir. Dec. 441.

Oregon.—*Snider v. Lehnher*, 5 Oregon 385.

Pennsylvania.—*Friend v. Lamb*, 152 Pa. St. 529, 34 Am. St. Rep. 672; *Foll's Appeal*, 91 Pa. St. 434, 36 Am. Rep. 671; *Walton's Appeal*, (Pa. 1887) 9 Atl. Rep. 922; *Kern's Estate*, 8 Pa. Dist. 709; *Cleland v. Aiken*, 23 Pa. Co. Ct. 1, 30 Pittsb. Leg. J. (Pa.) 172; *Mason v. Devenny*, 30 Pittsb. L. J. (Pa.) 216, 14 York Leg. Rec. (Pa.) 75; *Henderson v. Hays*, 2 Watts (Pa.) 148; *Datz v. Phillips*, 137 Pa. St. 203, 21 Am. St. Rep. 864.

South Carolina.—*Alexander v. McDaniel*, 56 S. Car. 252; *Davenport v. Latimer*, 53 S. Car. 563; *Clitherall v. Ogilvie*, 1 Desaus. (S. Car.) 250; *Barksdale v. Payne*, Riley Eq. (S. Car.) 174.

Tennessee.—*Baker v. Shy*, 9 Heisk. (Tenn.) 89; *Cocke v. Evans*, 9 Yerg. (Tenn.) 287; *Hudson v. King*, 2 Heisk. (Tenn.) 560; *Howard v. Moore*, 4 Sneed (Tenn.) 317; *Morrison v. Seairight*, 4 Baxt. (Tenn.) 478; *McCarty v. Kyle*, 4 Coldw. (Tenn.) 349; *Humbard v. Humbard*, 3 Head (Tenn.) 100; *Starnes v. Newsom*, 1 Tenn. Ch. 239.

Virginia.—*Gish v. Jamison*, 96 Va. 312; *Shenandoah Valley R. Co. v. Lewis*, 76 Va. 833, 12 Am. & Eng. R. Cas. 305; *Hale v. Wilkinson*, 21 Gratt. (Va.) 75; *McComas v. Easley*, 21 Gratt. (Va.) 23; *Pigg v. Corder*, 12 Leigh (Va.) 69; *Anthony v. Leftwich*, 3 Rand. (Va.) 238; *Barrett v. Forney*, 82 Va. 269.

Washington.—*Menger v. Schulz*, 28 Wash. 329.

West Virginia.—*Knott v. Shepherdson Mfg. Co.*, 30 W. Va. 790; *West Virginia Oil, etc., Co. v. Vinal*, 14 W. Va. 637; *Rader v. Neal*, 13 W. Va. 389; *Abbott v. L'Hommiedieu*, 10 W. Va. 677.

Wisconsin.—*Dewey v. Spring Valley Land Co.*, 98 Wis. 83; *Menasha v. Wisconsin Cent. R. Co.*, 65 Wis. 502; *Williams v. Williams*, 50 Wis. 311.

1. **Discretion Not Arbitrary**—*England*.—*Bennett v. Smith*, 16 Jur. 421.

United States.—*Rutland Marble Co. v. Ripley*, 10 Wall. (U. S.) 339.

Where a Valid Legal Contract Is Established, for the breach of which damages would be inadequate, and which possesses no objectionable features to prevent its specific execution, and no fraud appears as an inducement to the contract, the court will, almost as a matter of course, decree specific performance.¹

Inflexible Rules Impossible. — It is universally conceded, however, that inflexible rules by which it may be determined in any given case whether specific performance should or should not be decreed are impossible,² each case resting much upon its own particular facts and peculiar circumstances.³

The General Aim of the Court is to grant equitable relief of the nature under

Alabama. — *Bogan v. Daughdrill*, 51 Ala. 312.

California. — *McGarvey v. Hall*, 23 Cal. 140.

Illinois. — *Race v. Weston*, 86 Ill. 94; *Bowman v. Cunningham*, 78 Ill. 51; *Alexander v. Hoffman*, 70 Ill. 119; *Hough v. Coughlan*, 41 Ill. 134; *Scott v. Whitlow*, 20 Ill. 310.

Indiana. — *Atkinson v. Jackson*, 8 Ind. 31.

Iowa. — *Richmond v. Dubuque, etc.*, R. Co., 33 Iowa 422; *Armstrong v. Pierson*, 5 Iowa 317.

Massachusetts. — *Somerby v. Buntin*, 118 Mass. 279, 19 Am. Rep. 459.

New York. — *Rochester, etc., Land Co. v. Roe*, 8 N. Y. App. Div. 360.

Virginia. — *Bryan v. Lofftus*, 1 Rob. (Va.) 13, 39 Am. Dec. 242.

West Virginia. — *Lowry v. Buffington*, 6 W. Va. 249.

See also the cases in the preceding note.

Individual Liberty — Dictum of Louisiana Court.

— In this connection it has been observed that specific performance "should be guided by that respect for individual liberty which is an ennobling characteristic of our remedial system." *Levine v. Michel*, 35 La. Ann. 1121; *Laroussini v. Werlein*, 48 La. Ann. 13.

1. *Goddard v. American Queen*, 44 N. Y. App. Div. 459; *Whitted v. Fuquay*, 127 N. Car. 68; *Stamper v. Stamper*, 121 N. Car. 251; *Bryson v. Peak*, 8 Ired. Eq. (43 N. Car.) 310; *Kitchen v. Herring*, 7 Ired. Eq. (42 N. Car.) 190.

In such cases it would be the exercise of arbitrary power to refuse relief. *Cabeen v. Gordon*, 1 Hill Eq. (S. Car.) 51; *Hale v. Wilkinson*, 21 Gratt. (Va.) 80. See *Abbott v. L'Honniedieu*, 10 W. Va. 677.

2. **No Inflexible Rule.** — *Briggs v. Jasper County*, 49 Iowa 481; *Shaw v. Livermore*, 2 Greene (Iowa) 343; *Young v. Daniels*, 2 Iowa 126, 63 Am. Dec. 477; *Burke v. Seely*, 46 Mo. 334; *Taylor v. Williams*, 45 Mo. 80; *Fish v. Lightner*, 44 Mo. 268; *Ivory v. Murphy*, 36 Mo. 534; *Durrett v. Hook*, 8 Mo. 374.

3. *England.* — *Price v. Dyer*, 17 Ves. Jr. 357; *Clarke v. Grant*, 14 Ves. Jr. 519; *Mason v. Armitage*, 13 Ves. Jr. 25; *Radcliffe v. Warrington*, 12 Ves. Jr. 332; *White v. Damon*, 7 Ves. Jr. 35; *Townshend v. Stangroom*, 6 Ves. Jr. 328; *Pitcairn v. Ogbourne*, 2 Ves. 375; *Legal v. Miller*, 2 Ves. 299; *Winch v. Winchester*, 1 Ves. & B. 375; *Clowes v. Higginson*, 1 Ves. & B. 527; *Ramsbottom v. Gosden*, 1 Ves. & B. 165; *Flood v. Finlay*, 2 Ball & B. 15; *Joynes v. Statham*, 3 Atk. 388; *Garrard v. Grinling*, 2 Swanst. 244.

United States. — *McCabe v. Matthews*, 155 U. S. 550; *Cheney v. Libby*, 134 U. S. 68; *Mississippi, etc., R. Co. v. Cromwell*, 91 U. S. 643; *Roundtree v. McLain*, Hempst. (U. S.) 245; *Newton v. Wooley*, 105 Fed. Rep. 541.

Alabama. — *Carlisle v. Carlisle*, 77 Ala. 339.

Arkansas. — *Wynn v. Garland*, 19 Ark. 23, 68 Am. Dec. 190.

Connecticut. — *Patterson v. Bloomer*, 35 Conn. 57, 95 Am. Dec. 218.

Illinois. — *Cohn v. Mitchell*, 115 Ill. 124; *Hetfield v. Willey*, 105 Ill. 286; *Allen v. Woodruff*, 96 Ill. 11; *Beach v. Dyer*, 93 Ill. 295; *Ralls v. Ralls*, 82 Ill. 243; *Fish v. Leser*, 69 Ill. 394; *Andrews v. Sullivan*, 7 Ill. 327, 43 Am. Dec. 53.

Indiana. — *Kirkman v. Kenyon*, 17 Ind. 607; *Dougherty v. Humpston*, 2 Blackf. (Ind.) 273.

Iowa. — *Sweeney v. O'Hara*, 43 Iowa 34.

Kansas. — *Fowler v. Marshall*, 29 Kan. 665.

Kentucky. — *Simon v. Wildt*, 84 Ky. 157; *Grundy v. Edwards*, 7 J. J. Marsh. (Ky.) 368, 23 Am. Dec. 409.

Maine. — *Mansfield v. Sherman*, 81 Me. 365.

Maryland. — *Brewer v. Herbert*, 30 Md. 310, 96 Am. Dec. 582.

Massachusetts. — *Graves v. Goldthwait*, 153 Mass. 268; *Boston, etc., R. Co. v. Bartlett*, 10 Gray (Mass.) 385.

Michigan. — *Buck v. Smith*, 29 Mich. 166, 18 Am. Rep. 84; *Smith v. Lawrence*, 15 Mich. 499; *Weed v. Terry*, 2 Dougl. (Mich.) 344, 45 Am. Dec. 257.

Missouri. — *Fish v. Lightner*, 44 Mo. 268.

Montana. — *Thornburgh v. Fish*, 11 Mont. 53.

Nebraska. — *King v. Gsantner*, 23 Neb. 795.

New York. — *Heller v. Cohen*, 154 N. Y. 306; *Miles v. Dover Furnace Iron Co.*, 125 N. Y. 294; *Conger v. New York, etc., R. Co.*, 120 N. Y. 29; *Murtfeldt v. New York, etc., R. Co.*, 102 N. Y. 703, 2 N. Y. St. Rep. 444; *Columbia College v. Thacher*, 87 N. Y. 311, 41 Am. Rep. 365; *Jones v. Seligman*, 81 N. Y. 191; *Bruce v. Tilson*, 25 N. Y. 202; *Clarke v. Rochester, etc., R. Co.*, 18 Barb. (N. Y.) 350; *Hill v. Ressegieu*, 17 Barb. (N. Y.) 166; *St. John v. Benedict*, 6 Johns. Ch. (N. Y.) 111; *Gillespie v. Moon*, 2 Johns. Ch. (N. Y.) 598, 7 Am. Dec. 559; *Goddard v. American Queen*, 44 N. Y. App. Div. 459.

North Carolina. — *Lloyd v. Wheatly*, 2 Jones Eq. (55 N. Car.) 267.

Tennessee. — *Hudson v. King*, 2 Heisk. (Tenn.) 560.

West Virginia. — *West Virginia Oil, etc., Co. v. Vinal*, 14 W. Va. 637.

In each case, it has been said, the court will consider "whether in view of all the facts and those doctrines which are interwoven with the very texture of equity jurisprudence, and in view of the specific peculiarities presented, and the settled principles and maxims of the court, it is right and proper to entertain the case and administer relief." *Rust v. Conrad*, 47 Mich. 449, 41 Am. Rep. 720; *Buck v. Smith*, 29 Mich. 166, 18 Am. Rep. 84.

consideration, whenever such a decree would best accomplish the ends of justice.¹

2. Mere Fact of Legal Contract.—The fact alone that the party seeking specific performance is able to establish a contract valid at law is not sufficient to entitle him to a decree.² In addition to a legal contract there must be some equity invoking the interposition of a court of chancery in favor of the person seeking relief. Where the equities are equal, the legal title will prevail.³

3. Imposition of Conditions upon Plaintiff.—As it is within the discretion of a court of equity to withhold specific performance, so such relief may be refused and the complainant left to his remedies at law unless he will elect to submit to such terms and conditions in connection with the subject-matter of the contract as to the court may seem just and equitable.⁴

4. Performance of Conditions Subsequent.—Where conditions subsequent are to be performed by the party seeking the specific enforcement of a contract, the court in its decree will always provide for and require the performance thereof.⁵ The decree, it has been held, must bind all the parties, for a decree

1. See generally the following cases:

United States.—*May v. Le Claire*, 11 Wall. (U. S.) 217; *Willard v. Tayloe*, 8 Wall. (U. S.) 557; *Very v. Levy*, 13 How. (U. S.) 345; *Barr v. Lapsley*, 1 Wheat. (U. S.) 152.

Alabama.—*Bogan v. Daughdrill*, 51 Ala. 312; *Kirksey v. Fike*, 27 Ala. 383, 62 Am. Dec. 768.

California.—*McGarvey v. Hall*, 23 Cal. 140; *Duff v. Fisher*, 15 Cal. 381.

Illinois.—*McMullen v. Vanzant*, 73 Ill. 190.

Kentucky.—*Hall v. Hiles*, 2 Bush (Ky.) 532.

Maryland.—*Waters v. Howard*, 1 Md. Ch. 112; *Sullivan v. Tuck*, 1 Md. Ch. 59.

Massachusetts.—*Somerby v. Buntin*, 118 Mass. 279, 19 Am. Rep. 459.

New Jersey.—*Shimer v. Morris Canal, etc., Co.*, 27 N. J. Eq. 364; *Furman v. Clark*, 11 N. J. Eq. 306; *McKnight v. Robbins*, 5 N. J. Eq. 229.

New York.—*Carpenter v. Atherton*, (California Supm. Ct.) 28 How. Pr. (N. Y.) 307; *Steward v. Winters*, 4 Sandf. Ch. (N. Y.) 587; *Stuyvesant v. New York*, 11 Paige (N. Y.) 414.

North Carolina.—*Barnes v. Barnes*, 65 N. Car. 261; *Ashe v. Johnson*, 2 Jones Eq. (55 N. Car.) 149.

Oregon.—*Watson v. Smith*, 7 Oregon 448.

2. Mere Legal Contract Not Alone Sufficient.—*Kelly v. Central Pac. R. Co.*, 74 Cal. 557, 5 Am. St. Rep. 470; *Bruck v. Tucker*, 42 Cal. 347; *Chicago, etc., R. Co. v. Reno*, 113 Ill. 39; *Pinner v. Sharp*, 23 N. J. Eq. 274; *Friend v. Lamb*, 152 Pa. St. 529, 34 Am. St. Rep. 672; *Menasha v. Wisconsin Cent. R. Co.*, 65 Wis. 502. And see *Shields v. Trammell*, 19 Ark. 51.

3. Gallaher v. Hunter, 5 Mo. 507. And see *Bruck v. Tucker*, 42 Cal. 347.

4. May Impose Terms.—*United States.*—*Willard v. Tayloe*, 8 Wall. (U. S.) 559; *Westinghouse Air-Brake Co. v. Chicago Brake, etc., Co.*, 85 Fed. Rep. 786.

California.—*Giddings v. 76 Land, etc., Co.*, 109 Cal. 116; *Preble v. Abrahams*, 88 Cal. 245; *Ballard v. Carr*, 48 Cal. 74.

Colorado.—*Rust v. Strickland*, 1 Colo. App. 215; *Gilpin v. Watts*, 1 Colo. 479.

Connecticut.—*Annan v. Merritt*, 13 Conn. 478.

Georgia.—*Kirkland v. Downing*, 106 Ga. 530.

Illinois.—*Worden v. Crist*, 106 Ill. 326; *Thayer v. Wilmington Star Min. Co.*, 105 Ill. 540; *Price v. Blackmore*, 65 Ill. 386; *Hull v. Peer*, 27 Ill. 312.

Indiana.—*Martin v. Merritt*, 57 Ind. 34, 26 Am. Rep. 45; *Hill v. Kirby*, 7 Ind. 217.

Iowa.—*Troutman v. Gowing*, 16 Iowa 415; *Vennum v. Babcock*, 13 Iowa 194.

Kansas.—*Craft v. Bent*, 8 Kan. 328.

Kentucky.—*Brewer v. Peed*, 7 J. J. Marsh. (Ky.) 230.

Michigan.—*Fontaine v. Leveque*, 108 Mich. 614; *Crawford v. Schneider*, 106 Mich. 199; *Richards v. White*, 44 Mich. 622; *Moote v. Scriven*, 33 Mich. 500.

New Jersey.—*Keim v. Lindley*, (N. J. 1895) 30 Atl. Rep. 1063; *Harrigan v. Smith*, 57 N. J. Eq. 635; *McPherson v. Walton*, 42 N. J. Eq. 282; *Miller v. Miller*, 25 N. J. Eq. 355; *Van Scoten v. Albright*, 5 N. J. Eq. 467; *Hulmes v. Thorpe*, 5 N. J. Eq. 415.

New York.—*Standard Fashion Co. v. Siegel Cooper Co.*, 157 N. Y. 60, 68 Am. St. Rep. 749; *Duffy v. Donovan*, 52 N. Y. 634; *Bullenkamp v. Bullenkamp*, 34 N. Y. App. Div. 193; *Mead v. Martens*, 21 N. Y. App. Div. 134; *Clark v. Hall*, 7 Paige (N. Y.) 382; *Canajoharie, etc., Church v. Leiber*, 2 Paige (N. Y.) 43; *Helmke v. New Jersey, etc., R. Co.*, 66 Hun (N. Y.) 632, 21 N. Y. Supp. 345; *Dias v. Glover, Hoffm.* (N. Y.) 71.

North Carolina.—*Leigh v. Crump*, 1 Ired. Eq. (36 N. Car.) 299.

Ohio.—*Courcier v. Graham*, 2 Ohio 341.

South Carolina.—*Ramsay v. Brailsford*, 2 Desaus. (S. Car.) 582, 2 Am. Dec. 698.

Texas.—*Kerr County v. Kitchens*, (Tex. Civ. App. 1898) 45 S. W. Rep. 152.

Washington.—*Pratsch v. Aberdeen Packing Co.*, 7 Wash. 346.

Wisconsin.—*Matteson v. Scofield*, 27 Wis. 671; *Paine v. White*, 23 Wis. 91.

5. Conditions Subsequent.—*Lee v. Electric Typographic Co.*, 68 Fed. Rep. 519; *Pomeroy v. Fullerton*, 113 Mo. 440; *Mead v. Martens*, 21 N. Y. App. Div. 134, 162 N. Y. 626; *McCully v. McLean*, 48 W. Va. 625.

of specific performance against the defendant is erroneous unless it requires of the plaintiff the performance of his share of the obligations.¹ Indeed, inability on the part of the plaintiff to perform his part of an agreement is a good ground for refusing to enforce the agreement against the defendant in a bill in equity for specific performance.²

5. Where Performance of No Benefit to Party Seeking Decree — Subject-matter of No Value. — It has been said that a court of equity will not enforce a contract when it appears that the subject-matter possesses no value to the complainant, "or a value that rests only in the realms of fancy, speculation, and conjecture."³

Burdensome Expense. — Where a decree for the specific performance of a contract will impose upon one of the parties a large burden of expense, without any practical benefit to the other, the court will refuse to grant a decree, and leave the plaintiff to his action at law.⁴ Nor, it has been held, will specific performance be decreed where, though there has been a breach of the contract, no actual injury has been sustained by the plaintiff by reason of the defendant's failure to perform.⁵

6. Where Contract Already Substantially Performed. — Where the contract in question has already been substantially performed, equity will not interfere for the purpose of requiring strict and literal compliance with its terms.⁶

7. Enforcement of Forfeitures. — A court of equity is reluctant to enforce a provision of a contract in the nature of a forfeiture, and though a party by the strict terms of his agreement may be entitled to a forfeiture it will be withheld if there has been a substantial performance or the defendant is ready to fulfil his obligation.⁷ But it has been held that a forfeiture clause in a contract for the purchase and sale of real estate, whereby time in the payment of the deferred instalments is made of the essence of the contract, may be enforced in accordance with its terms, where such was the plain and evident intent of the parties when the contract was entered into.⁸

8. Consideration of Public Interests. — In deciding whether the specific per-

Insolvency of Vendee Not a Ground for Refusing Specific Performance. — *Sarter v. Gordon*, 2 Hill Eq. (S. Car.) 121.

Security for Deferred Payments. — *Van Scoten v. Albright*, 5 N. J. Eq. 467.

Removal of Defects in Title Before Payment of Purchase Money Is Required. — *Heavner v. Morgan*, 30 W. Va. 335, 8 Am. St. Rep. 55.

1. *Craft v. Bent*, 8 Kan. 328; *Baxter v. Brand*, 6 Dana (Ky.) 296; *Owens v. Hall*, 13 Ohio St. 571. And see *Clark v. Gordon*, 35 W. Va. 735.

Money Due from the Plaintiff must be paid before the court will grant a decree in his favor. *Sibert v. Kelly*, 6 T. B. Mon. (Ky.) 669. And see *Brewer v. Peed*, 7 J. J. Marsh. (Ky.) 230.

2. Plaintiff's Inability to Perform. — *Franklin v. Brownlow*, 14 Ves. Jr. 550; *Willingham v. Joyce*, 3 Ves. Jr. 168; *Price v. Assheton*, 1 Y. & C. Exch. 441; *McNally v. Gradwell*, 16 Ir. Ch. 512; *Brush Swan Electric Light Co. v. Brush Electric Co.*, (C. C. A.) 52 Fed. Rep. 37; *Rice v. D'Arville*, 162 Mass. 559; *Carter v. Phillips*, 144 Mass. 100; *Bird v. Bradburn*, 127 N. Car. 411. See also *Sims v. McEwen*, 27 Ala. 184.

3. Johnson v. Steffens, 54 Ill. App. 193.

Where the court can see that the plaintiff would not be benefited by specific performance, or that the defendant, by some act over which the court has no control, could render performance nugatory so far as benefit to the plaintiff is concerned, specific performance will not be

decreed. *Wilson v. Northampton, etc.*, R. Co., L. R. 9 Ch. 279.

4. *Royle v. Wynne*, Cr. & Ph. 252; *Chicago, etc., R. Co. v. Schoeneman*, 90 Ill. 258; *Herrington v. Hubbard*, 2 Ill. 569, 33 Am. Dec. 426; *Harsha v. Reid*, 45 N. Y. 415; *Heywood v. Covington*, 4 Leigh (Va.) 373; *Long v. Colston*, 1 Hen. & M. (Va.) 111.

Burden Without Benefit. — *Columbia College v. Thacher*, 87 N. Y. 311, 41 Am. Rep. 365; *Clarke v. Rochester, etc., R. Co.*, 18 Barb. (N. Y.) 350; *Conger v. New York, etc., R. Co.*, 45 Hun (N. Y.) 296.

5. No Injury. — *Brown v. Britton*, 41 N. Y. App. Div. 57.

6. Substantial Performance. — *Brehm v. Sperry*, 92 Md. 378; *Grigg v. Landis*, 21 N. J. Eq. 494.

7. Forfeitures. — *Sease v. Cleveland Co-operative Stove, etc., Foundry Co.*, 141 Mo. 488; *Lasar v. Baldrige*, 32 Mo. App. 362; *Knott v. Stephens*, 5 Oregon 235; *Hall v. Delaplaine*, 5 Wis. 206, 68 Am. Dec. 57. And see *Goodale v. Hill*, 42 Conn. 311.

Compensation Preferred to Forfeiture. — In *Knott v. Stephens*, 5 Oregon 235, the court said: "Compensation and not forfeiture is a favorite maxim with courts of equity; and where the vendor, by his contract to convey, has not affirmatively expressed his intention to make the time of payment material, courts of equity will infer that it was understood that interest on the deferred payments would be a sufficient compensation for the delay."

8. Whiteman v. Perkins, 56 Neb. 181.

formance of a contract will be decreed, the public interests will be considered,¹ and enforcement denied if such interests would be injuriously affected thereby.²

9. Contract Should Be Fair, Just, and Equitable—*a. GENERAL RULE.*—Before the discretion of a court of equity will be exercised in favor of the specific performance of a contract, it must appear that the contract is fair, just, and equitable in all its parts.³ If, therefore, a decree of specific perform-

1. Public Interests.—*Raphael v. Thames Valley R. Co.*, L. R. 2 Eq. 37; *South Chicago City R. Co. v. Calumet Electric St. R. Co.*, 171 Ill. 391; *St. Louis, etc., R. Co. v. Mathers*, 71 Ill. 592, 22 Am. Rep. 122; *Marsh v. Fairbury, etc., R. Co.*, 64 Ill. 414, 16 Am. Rep. 564. And see *Wolverhampton, etc., R. Co. v. London, etc., R. Co.*, L. R. 16 Eq. 433.

2. *Texas, etc., R. Co. v. Marshall*, 136 U. S. 393; *Hyer v. Richmond Traction Co.*, 168 U. S. 471; *East St. Louis Connecting R. Co. v. East St. Louis*, 81 Ill. App. 109; *Richmond v. Dubuque, etc., R. Co.*, 33 Iowa 422.

3. Contract Must Be Fair—*England.*—*In re Hare*, (1901) 1 Ch. 93, 70 L. J. Ch. 45.

United States.—*Texas, etc., R. Co. v. Marshall*, 136 U. S. 393; *Cheney v. Libby*, 134 U. S. 68; *Cathcart v. Robinson*, 5 Pet. (U. S.) 264; *King v. Hamilton*, 4 Pet. (U. S.) 328; *Logansport R. Co. v. Logansport*, 114 Fed. Rep. 688.

Alabama.—*South, etc., Alabama R. Co. v. Highland Ave., etc., R. Co.*, 119 Ala. 115; *Derrick v. Monette*, 73 Ala. 75; *Hurst v. Thompson*, 73 Ala. 158; *Moon v. Crowder*, 72 Ala. 89; *Daughdrill v. Edwards*, 59 Ala. 424; *Schuessler v. Hatchett*, 58 Ala. 181; *Ellett v. Wade*, 47 Ala. 456; *Andrews v. Andrews*, 28 Ala. 432; *Casey v. Holmes*, 10 Ala. 776.

California.—*Windsor v. Miner*, 124 Cal. 492; *Prince v. Lamb*, 128 Cal. 120; *Kelly v. Central Pac. R. Co.*, 74 Cal. 557, 5 Am. St. Rep. 470; *Cooper v. Pena*, 21 Cal. 403.

Connecticut.—*Canterbury Aqueduct Co. v. Ensworth*, 22 Conn. 608.

Delaware.—*Godwin v. Collins*, 3 Del. Ch. 189.

Georgia.—*Swint v. Carr*, 76 Ga. 322, 2 Am. St. Rep. 44; *Kirkland v. Downing*, 106 Ga. 530.

Idaho.—*Bear Track Min. Co. v. Clark*, (Idaho 1898) 54 Pac. Rep. 1007.

Illinois.—*Espert v. Wilson*, 190 Ill. 629; *Chicago, etc., R. Co. v. Reno*, 113 Ill. 39; *Chicago, etc., R. Co. v. Schoeneman*, 90 Ill. 258; *Taylor v. Merrill*, 55 Ill. 52; *Lear v. Chouteau*, 23 Ill. 39; *Webb v. Alton M. & F. Ins. Co.*, 10 Ill. 223.

Indiana.—*Thiebaud v. Union Furniture Co.*, 143 Ind. 340; *Ikerd v. Beavers*, 106 Ind. 483; *Kirkman v. Kenyon*, 17 Ind. 607; *Ash v. Daggy*, 6 Ind. 259; *Kitchen v. Coffyn*, 4 Ind. 504; *Modisett v. Johnson*, 2 Blackf. (Ind.) 431.

Iowa.—*Richmond v. Dubuque, etc., R. Co.*, 33 Iowa 422.

Kansas.—*Fowler v. Marshall*, 29 Kan. 665.

Kentucky.—*Duncan v. Central Pass. R. Co.*, 85 Ky. 525.

Maine.—*Goding v. Bangor, etc., R. Co.*, 94 Me. 542; *Mansfield v. Sherman*, 81 Me. 365; *Higgins v. Butler*, 78 Me. 520; *Low v. Treadwell*, 12 Me. 441.

Maryland.—*Hopkins v. Roberts*, 54 Md. 312; *Reese v. Reese*, 41 Md. 554; *Gough v. Crane*, 3

Md. Ch. 119. And see *Stull v. Hurtt*, 9 Gill. (Md.) 446.

Massachusetts.—*Wonson v. Fenno*, 129 Mass. 405; *Love v. Sortwell*, 124 Mass. 446.

Michigan.—*Rust v. Conrad*, 47 Mich. 449, 41 Am. Rep. 720; *Munch v. Shabel*, 37 Mich. 166; *Chambers v. Livermore*, 15 Mich. 381; *Weed v. Terry*, 2 Dougl. (Mich.) 344, 45 Am. Dec. 257.

Minnesota.—*Buckley v. Patterson*, 39 Minn. 250.

Mississippi.—*Millsaps v. Shotwell*, 76 Miss. 923.

Missouri.—*Hollmann v. Conlon*, 143 Mo. 369.

Nevada.—*Schroeder v. Gemeinder*, 10 Nev. 355.

New Jersey.—*New York L. Ins. Co. v. Gilhooly*, 61 N. J. Eq. 118; *Johnson v. Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 773.

New York.—*Seymour v. Delancey*, 6 Johns. Ch. (N. Y.) 223; *Winne v. Winne*, 166 N. Y. 263; *Stokes v. Stokes*, 155 N. Y. 581; *Gotthelf v. Stranahan*, 138 N. Y. 345; *Miles v. Dover Furnace Iron Co.*, 125 N. Y. 294; *Murtfeldt v. New York, etc., R. Co.*, 102 N. Y. 703, 2 N. Y. St. Rep. 444; *Stevens v. Comstock*, 109 N. Y. 655; *Margraf v. Muir*, 57 N. Y. 155; *Finkel v. Kohn*, 38 N. Y. App. Div. 199; *Sherman v. Wright*, 49 N. Y. 227; *Gale v. Archer*, 42 Barb. (N. Y.) 320; *Hoch v. Cocks*, 78 Hun (N. Y.) 253; *Carpenter v. Carpenter*, 56 Hun (N. Y.) 647, 10 N. Y. Supp. 486; *Hart v. Brown*, (Supm. Ct. Eq. T.) 6 Misc. (N. Y.) 238.

North Carolina.—*Whitted v. Fuquay*, 127 N. Car. 68; *Ramsay v. Gheen*, 99 N. Car. 215.

Ohio.—*Eleventh St. Church of Christ v. Pennington*, 10 Ohio Cir. Dec. 74, 18 Ohio Cir. Ct. 408; *Hughes v. Roth*, 7 Ohio Cir. Dec. 441; *Huntington v. Rogers*, 9 Ohio St. 511.

Oklahoma.—*Ferguson v. Blackwell*, 8 Okla. 489.

Pennsylvania.—*Meehan v. Owens*, 196 Pa. St. 69; *Friend v. Lamb*, 152 Pa. St. 529, 34 Am. St. Rep. 672; *Datz v. Phillips*, 137 Pa. St. 203, 21 Am. St. Rep. 864; *Backus's Appeal*, 58 Pa. St. 186; *Henderson v. Hays*, 2 Watts (Pa.) 148; *Rohrbacker's Estate*, 12 Pa. Co. Ct. 438.

South Carolina.—*Cabeen v. Gordon*, 1 Hill Eq. (S. Car.) 51.

Virginia.—*Bryan v. Lofftus*, 1 Rob. (Va.) 13, 39 Am. Dec. 242; *Garnett v. Macon*, 6 Call (Va.) 308.

Enforcement Conformable to Good Conscience and Natural Justice.—"Each case must be governed by its own facts and circumstances, and unless the proof discloses a situation where good conscience and natural justice require the enforcement of the agreement, this relief should not be awarded." *Martin, J.*, in *Winne v. Winne*, 166 N. Y. 263.

Rule by Statute in California.—See *Stiles v. Cain*, 134 Cal. 170.

ance would work hardship or injustice upon the defendant, or operate oppressively upon him, a court of equity will decline to interfere.¹ Nor will a court of equity enforce a contract according to its terms when to do so would be to violate the real object of the contract in the minds of the parties when the contract was made, and produce a result not contemplated at the time of the execution of the agreement,² and likewise where a decree would be inequitable as to innocent third persons whose interests have intervened since the making of the contract.³ But specific performance of a contract will not be denied on the ground of injury or injustice to a third party, where it is not made clearly to appear that such injustice would be done, and such third party, who was originally made a defendant to the action, asserted no rights therein, but procured the action to be dismissed as to him on his own application.⁴

b. FACT THAT CONTRACT ENFORCEABLE AT LAW. — It has been held that while a court of equity will not interfere to set aside a contract upon any ground short of incompetency or fraud, yet, when called upon to enforce a contract specifically, the court will go further and inquire whether the contract is an equitable one, such as a court of equity, seeking only to do equity, ought to enforce.⁵

c. UNCONSCIONABLE CONTRACTS. — It is well settled that a court of equity will refuse to enforce an unconscionable contract, or one whereby the party seeking a decree would obtain an unconscionable advantage over the other contracting party.⁶ But the mere fact that a party has made a bad trade or

1. *England.* — *Rudd v. Lascelles*, (1900) 1 Ch. 815, 69 L. J. Ch. 396; *Hope v. Walter*, (1900) 1 Ch. 257, 69 L. J. Ch. 166; *Mortlock v. Buller*, 10 Ves. Jr. 301; *Ramsden v. Hylton*, 2 Ves. 307.

United States. — *Leicester Piano Co. v. Front Royal, etc., Imp. Co.*, (C. C. A.) 55 Fed. Rep. 190; *Marr v. Shaw*, 51 Fed. Rep. 860; *Rushton v. Thompson*, 35 Fed. Rep. 635.

Alabama. — *Carlisle v. Carlisle*, 77 Ala. 339; *Irwin v. Bailey*, 72 Ala. 467; *Moon v. Crowder*, 72 Ala. 89; *Ellis v. Burden*, 1 Ala. 458.

Arkansas. — *Shields v. Trammell*, 19 Ark. 51.

Maryland. — *Perkins v. Wright*, 3 Har. & M. (Md.) 324.

Missouri. — *Veth v. Gierth*, 92 Mo. 97.

New Hampshire. — *Eaton v. Eaton*, 64 N. H. 493.

New Jersey. — *Tillotson v. Gesner*, 33 N. J. Eq. 313; *Chubb v. Peckham*, 13 N. J. Eq. 207; *Society, etc., v. Butler*, 12 N. J. Eq. 498.

New York. — *Conger v. New York, etc., R. Co.*, 120 N. Y. 29; *Day v. Hunt*, 112 N. Y. 191; *Cameron Coal Co. v. Emanuel*, 49 N. Y. Super. Ct. 77; *Darrow v. Bush*, 45 N. Y. App. Div. 262.

Tennessee. — *McCarty v. Kyle*, 4 Coldw. (Tenn.) 348.

And see the cases in the preceding note.

Illustrations — Injury to Adjoining Lands. — *Church of the Advent v. Farrow*, 7 Rich. Eq. (S. Car.) 378.

Consideration of Contract Confederate Money. — *Love v. Cobb*, 63 N. Car. 324.

Purchase of Invalid Bonds. — *Hempstead v. Seymour*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 92.

Purchase in Ignorance of Tenant's Rights. — *Beckenbaugh v. Nally*, 32 Hun (N. Y.) 160.

Rule Applied to Judicial Sales. — *Laight v. Pell*, 1 Edw. (N. Y.) 577.

2. *Finkel v. Kohn*, 38 N. Y. App. Div. 199.

And see *Quick v. Stuyvesant*, 2 Paige (N. Y.) 84.

Where Performance Would Render Liable to Criminal Prosecution. — The court will not grant specific performance against a purchaser of a contract to buy property, which, if he takes no steps to prevent it, will expose him as owner to criminal proceedings by reason of its use as a brothel at the time of sale, unless he knew or ought to have known of the state of the property at the time of the sale. *Hope v. Walter*, (1900) 1 Ch. 257, 69 L. J. Ch. 166.

3. Innocent Third Parties. — *Shields v. Trammell*, 19 Ark. 51; *Owens v. McNally*, 113 Cal. 444; *Saur v. Ferris*, 145 Ill. 115; *Ferrier v. Buzick*, 2 Iowa 136; *Cyrran v. Holyoke Water Power Co.*, 116 Mass. 90; *Brueggeman v. Jurgensen*, 24 Mo. 87; *Russell v. Moffitt*, 6 How. (Miss.) 303; *Society, etc., v. Low*, 17 N. J. Eq. 19; *Society, etc., v. Butler*, 12 N. J. Eq. 498.

Contract in Disregard of Prior Parol Sale — Knowledge of Complainant. — *Patterson v. Martz*, 8 Watts (Pa.) 374, 34 Am. Dec. 474.

4. Goddard v. American Queen, 44 N. Y. App. Div. 454.

5. Federal Oil Co. v. Western Oil Co., 112 Fed. Rep. 373; *Diamond State Iron Co. v. Todd*, 6 Del. Ch. 163; *Godwin v. Collins*, 4 Houst. (Del.) 28.

6. Unconscionable Contracts — England. — *Vaughan v. Thomas*, 1 Bro. C. C. 556.

United States. — *Federal Oil Co. v. Western Oil Co.*, 112 Fed. Rep. 373; *Newton v. Wooley*, 105 Fed. Rep. 541; *Nevada Nickel Syndicate v. National Nickel Co.*, 96 Fed. Rep. 133; *King v. Hamilton*, 4 Pet. (U. S.) 328.

California. — *Newman v. Freitas*, 129 Cal. 283.

Illinois. — *Bates Mach. Co. v. Bates*, 87 Ill. App. 225; *Beach Gravel, etc., Co. v. Simmons*, 62 Ill. App. 646; *Dreyer v. Goldy*, 62 Ill. App. 347.

unprofitable bargain, will not relieve him from specific performance,¹ and the comparative convenience or inconvenience of the parties to the contract, apart from any consideration of misconduct or hardship, is not by itself a sufficient ground for refusing specific performance of a contract.²

d. RASH AND IMPROVIDENT CONTRACTS. — So also where the contract of which specific enforcement is sought appears rash, improvident, and the consideration grossly inadequate, the party will, as a rule, be left to his legal remedy.³

e. CONSIDERATION OF TIME WHEN CONTRACT MADE. — It has been said that in considering the fairness or hardship of a contract, the time when the contract was made is to be considered, unless delay has been caused by the party seeking performance.⁴ But while this is probably the primary consideration, and while it may be said that equity will never decree the performance of a contract the very execution of which was infected with fraud or unfairness, it is undoubted that the court may, in the exercise of its discretion, refuse to decree enforcement on account of the occurrence of subsequent events, whereby performance would operate harshly and oppressively upon the performing party.⁵ In such circumstances the general rule is applied that where the circumstances of the parties have so changed as to render it inequitable that the extraordinary remedy of specific performance should be applied, it will not be decreed.⁶

Iowa. — Tucke v. Buchholz, 43 Iowa 415.

Kentucky. — Woollums v. Horsley, 93 Ky. 582.

Maine. — Goding v. Bangor, etc., R. Co., 94 Me. 542; Kelley v. York Cliffs Imp. Co., 94 Me. 374.

Michigan. — Rust v. Conrad, 47 Mich. 449, 41 Am. Rep. 720; Eames v. Eames, 16 Mich. 348; Chambers v. Livermore, 15 Mich. 381.

Missouri. — McElroy v. Maxwell, 101 Mo. 294.

New York. — Margraf v. Muir, 57 N. Y. 155.

Pennsylvania. — Weise's Appeal, 72 Pa. St. 351; Flanagan's Estate, 10 Kulp (Pa.) 179.

Rhode Island. — Harkness v. Remington, 7 R. I. 154.

Wisconsin. — Mulligan v. Albertz, 103 Wis. 140.

See also the title CATCHING BARGAIN, vol. 5, p. 764.

"Not that a Court of Equity Will Weigh Nicely the Relative Advantages or Disadvantages of a Bargain Fairly Made, but it will consider whether, either from gross inadequacy of consideration or inequality of terms, such as shocks the common sense of justice, or from anything in the relations of the parties, or in the circumstances of the contract, it is unconscientious for a party to exact his advantage." *Diamond State Iron Co. v. Todd*, 6 Del. Ch. 163; *Godwin v. Collins*, 4 Houst. (Del.) 28.

1. *Whitted v. Fuquay*, 127 N. Car. 68.

Where a Contract Is Fairly Made and Without Mistake, by competent parties, upon good consideration, and unattended with any circumstances which make its enforcement inequitable, a mere naked hardness of bargain is no valid objection to its enforcement in equity. *Morrison v. Peay*, 21 Ark. 110.

For Other Illustrative Cases, dependent on particular facts, in which the contracts were held not unconscionable so as to preclude specific enforcement, see *Schmidtz v. Louisville*, etc., R. Co., 101 Ky. 441; *Lyle v. Addicks*, 62 N. J.

Eq. 123; *Henry v. Pittsburg*, etc., R. Co., 5 Ohio Dec. 41, 2 Ohio N. P. 118.

2. *Hexter v. Pearce*, (1900) 1 Ch. 341, in which the contract related to an undivided moiety of mineral property.

3. *Godwin v. Collins*, 4 Houst. (Del.) 28; *Rust v. Conrad*, 47 Mich. 449, 41 Am. Rep. 720; *Friend v. Lamb*, 152 Pa. St. 529, 34 Am. St. Rep. 672; *Clitherrall v. Ogilvie*, 1 Desaus. (S. Car.) 250. Compare *Lee v. Kirby*, 104 Mass. 420.

4. *Prospect Park*, etc., R. Co. v. *Coney Island*, etc., R. Co., 144 N. Y. 152.

And in *Willard v. Tayloe*, 8 Wall. (U. S.) 557, the court, by Mr. Justice Field, said: "The question in such cases always is, was the contract at the time it was made a reasonable and fair one? If such was the fact, the parties are considered as having taken upon themselves the risk of subsequent fluctuations in the value of the property, and such fluctuations are not allowed to prevent its specific enforcement." And see *Hale v. Wilkinson*, 21 Gratt. (Va.) 75.

"It is by no means clear," said Mr. Justice Strong, in *Rutland Marble Co. v. Ripley*, 10 Wall. (U. S.) 339, "that a court of equity will refuse to decree the specific performance of a contract fair when it was made, but which has become a hard one by the force of subsequent circumstances or changing events."

5. **Restrictive Covenants as to Use of Land.** — *Page v. Murray*, 46 N. J. Eq. 325; *Waite v. O'Neil*, (C. C. A.) 76 Fed. Rep. 408.

6. *Prospect Park*, etc., R. Co. v. *Coney Island*, etc., R. Co., 66 Hun (N. Y.) 366; *Coe v. New Jersey Midland R. Co.*, 31 N. J. Eq. 105.

Inequity Either from Provisions of Contract or External Facts. — It is immaterial whether the fact that it is inequitable arises from the provisions of the contract, or from external facts or circumstances which affect the situation and relations of the parties. In either case it may constitute a sufficient ground for a court of

10. Effect of Change of Value — Rule Stated. — The mere fact that the value of the thing or property contracted for has increased or diminished since the contract was made will not, as a rule, warrant a refusal of specific performance in the absence of circumstances indicating fraud or bad faith,¹ the theory being that after the contract of sale the vendee becomes in equity the actual owner of the property, who must, therefore, sustain the loss if the estate be destroyed between the agreement and the conveyance, and will be entitled to any benefit which may accrue to it in the interim.²

Likewise, Where Time Is of the Essence of the Agreement, a party will not be heard to plead, in justification of his delay, that circumstances have changed and the property involved has increased or diminished in value.³

But in Some Instances Courts Have Refused to Enforce Contracts where there has been a material change of value in the subject-matter, on the ground that enforcement would be inequitable,⁴ or have permitted the enforcement of the contract at the suit of the vendee with an abatement of the price to compensate for the loss.⁵ So, also, where the contract was construed to be a mere executory agreement for the sale of a leasehold estate, the term of which was to commence and possession be given at a future day, it was held that the vendor could not compel specific performance where a considerable part of the property had, since the contract was made, been engulfed by the sea.⁶

Depreciation Through Negligence of Party. — A degree for specific performance against a vendor should make an abatement in the contract price to the amount that premises may have depreciated in value pending the suit, if the depreciation was the result of the vendor's negligence.⁷

VIII. RULE WHERE PLAINTIFF IN DEFAULT — 1. In General. — It has been laid down as a general rule that equity will not specifically enforce a contract at the instance of a party who is himself in default with respect to the contract sought to be enforced, or who has himself violated its terms and obligations.⁸

equity to withhold specific performance and leave the parties to their legal remedy. *Stokes v. Stokes*, 155 N. Y. 581.

1. Mere Change of Value. — *Low v. Treadwell*, 12 Me. 441; *Maryland Constr. Co. v. Kuper*, 90 Md. 529; *Brewer v. Herbert*, 30 Md. 301, 96 Am. Dec. 582; *Nims v. Vaughn*, 40 Mich. 356; *Hallett v. Parker*, 68 N. H. 598; *Keim v. Lindley*, (N. J. 1895) 30 Atl. Rep. 1063; *Falls v. Carpenter*, 1 Dev. & B. Eq. (21 N. Car.) 237, 28 Am. Dec. 613; *Young v. Wright*, 4 Wis. 144, 65 Am. Dec. 303.

2. Paine v. Meller, 6 Ves. Jr. 349; *Brewer v. Herbert*, 30 Md. 301, 96 Am. Dec. 582. *Compare dictum in Stent v. Bailis*, 2 P. Wms. 220.

Rents and Profits — Interest — Election. — *Lynch v. Wright*, 94 Fed. Rep. 703; *Worrall v. Munn*, 53 N. Y. 185.

3. Stow v. Russell, 36 Ill. 18.

4. Performance Held Inequitable. — *Fitzpatrick v. Dorland*, 27 Hun (N. Y.) 291.

5. Buildings Destroyed by Fire. — The rule stated in the text was applied in a *Georgia* case where, before conveyance by the vendor, the improvements on the property were destroyed by fire. *Phinizy v. Guernsey*, 111 Ga. 346, 78 Am. St. Rep. 207.

6. Huguenin v. Courtenay, 21 S. Car. 403, 53 Am. Rep. 688.

7. Lynch v. Wright, 94 Fed. Rep. 703. And see *Esdaile v. Stephenson*, 1 Sim. & St. 122; *Bostwick v. Beach*, 105 N. Y. 661; *Worrall v. Munn*, 53 N. Y. 185.

8. Where Plaintiff in Default — General Rule — United States. — *Home Land, etc., Co. v. Mc-*

Namara, (C. C. A.) 111 Fed. Rep. 642. And see *Brush Electric Co. v. Brush-Swan Electric Light Co.*, 1 U. S. App. 563.

Alabama. — *Florence Gas, etc., Co. v. Hanby*, 101 Ala. 15.

California. — *O'Donnell v. Jackson*, 69 Cal. 622.

District of Columbia. — *Lipscomb v. Watrous*, 3 App. Cas. (D. C.) 1.

Florida. — *Asia v. Hiser*, 38 Fla. 71; *Pensacola Gas Co. v. Provisional Municipality*, 33 Fla. 322.

Georgia. — *Dukes v. Baugh*, 91 Ga. 33.

Illinois. — *Work v. Welsh*, 160 Ill. 468.

Iowa. — *Foot v. Bush*, 100 Iowa 522.

Michigan. — *Russell v. Nester*, 46 Mich. 290.

Mississippi. — *Lewis v. Woods*, 4 How. (Miss.) 86, 34 Am. Dec. 110.

Missouri. — *Hollmann v. Conlon*, 143 Mo. 369; *Electric Secret Service Co. v. Gill-Alexander Electric Mfg. Co.*, 125 Mo. 140.

Nebraska. — *Clarke v. Koenig*, 36 Neb. 572.

New Jersey. — *Ocean City Assoc. v. Headley*, 62 N. J. Eq. 322; *Planer v. Equitable L. Assur. Soc.*, (N. J. 1897) 37 Atl. Rep. 668.

New York. — *Lennon v. Farrell*, 46 N. Y. App. Div. 621; *Steinhardt v. Baker*, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 470; *Jones v. Wittner*, 79 Hun (N. Y.) 283; *Martin v. Johnston*, (N. Y. Super. Ct. Gen. T.) 6 Misc. (N. Y.) 310.

Ohio. — *Brown v. Haines*, 12 Ohio 1; *Brewer v. Connecticut*, 9 Ohio 189; *Higby v. Whittaker*, 8 Ohio 198; *Rummington v. Kelley*, 7 Ohio (pt. ii.) 97; *Kirby v. Harrison*, 2 Ohio St. 326, 59 Am. Dec. 677.

Contract to Convey Land. — Where, in an action for the specific performance of a contract to convey land, it appeared that the vendee had been in possession for many years, but had never paid for the property, it was held that specific performance would not be decreed in his favor.¹

Surrender of Possession — Failure to Pay. — So also it has been held that one in possession of land under an agreement to pay for the same within a fixed time, who surrenders at the expiration of the time named without having paid anything, has no equity of redemption entitling him to enforce specific performance.²

Default in Executory Promises. — While executory promises may be a valid consideration for a contract, such contract will not be specifically enforced where the plaintiff has made default in such executory promises, the punctual performance of which was a part of the consideration of the contract sought to be enforced.³

2. Extent and Limits of Rule. — The rule that a party asking the specific performance of a contract must show that he has performed all on his part that he is bound to perform, is not to be applied to any case so as to work injustice, and, it has been said, has feebler application to the case of a purchaser who merely has money to pay, where delay of payment may be compensated in interest, than to the case of a vendor.⁴

3. Fact that Plaintiff's Default Would Not Justify Rescission. — Specific performance may be denied in the discretion of the court and the plaintiff remitted to his remedy at law, although the plaintiff's default would not justify a rescission of the contract.⁵

Oregon.—Maffett v. Thompson, 32 Oregon 546.

Pennsylvania.—Parker's Estate, 19 Pa. Co. Ct. 347, 6 Pa. Dist. 139.

South Carolina.—Davenport v. Latimer, 53 S. Car. 563.

Tennessee.—Rhoades v. Crozier, (Tenn. Ch. 1900) 59 S. W. Rep. 211.

Virginia.—Powell v. Berry, 91 Va. 568; Cox v. Cox, 26 Gratt. (Va.) 305; Vail v. Nelson, 4 Rand. (Va.) 478.

Statements of Rule.—"A complainant claiming a specific execution ought to show a performance or an offer of performance on his part, or strong reasons excusing his default, or that the strict compliance on his part has been waived by his adversary." Logan v. M'Chord, 2 A. K. Marsh. (Ky.) 224.

"The party seeking performance," it has been said, "must show that he has not been in fault, but has taken all proper steps toward a performance on his own part, and has been ready, desirous, and prompt to perform." Shepley, J., in Rogers v. Saunders, 16 Me. 92, 33 Am. Dec. 635. And see Milward v. Thanet, 5 Ves. Jr. 720, note; Durant v. Comegys, 2 Idaho 936; Hoyt v. Tuxbury, 70 Ill. 331; Vawter v. Bacon, 89 Ind. 565; Cook v. Bean, 17 Ind. 504; Rector v. Price, 1 Mo. 373; Ludlum v. Buckingham, 35 N. J. Eq. 71; Darling v. Cumming, 92 Va. 524; Powell v. Berry, 91 Va. 568; Dunsmore v. Lyle, 87 Va. 391; Ford v. Euker, 86 Va. 75; Gish v. Jamison, 96 Va. 312; Bowles v. Woodson, 6 Gratt. (Va.) 78.

Chancellor Kent's Statement.—"It may be laid down as an acknowledged rule in courts of equity that where the party who applies for a specific performance has omitted to execute his part of the contract by the time appointed for that purpose, without being able to assign any sufficient justification or excuse for his delay; and where there is nothing in the acts or con-

duct of the other party that amounts to an acquiescence in that delay, the court will not compel a specific performance." Kent, Chancellor, in Benedict v. Lynch, 1 Johns. Ch. (N. Y.) 378, 7 Am. Dec. 484.

Though Other Party Guilty of First Breach.—If the plaintiff has not performed the contract on his part, he is not entitled to specific performance, though the defendant committed the first breach of the contract. Ohio Steel Barb Fence Co. v. Washburn, etc., Mfg. Co., 26 Fed. Rep. 702.

A Tenant under a Lease containing a covenant to renew cannot enforce such covenant if he has violated other covenants in his lease, as by a prohibited use of the premises. Gannett v. Albree, 103 Mass. 372.

1. Showler v. Hambrick, (Va. 1896) 25 S. E. Rep. 102. And see Askew v. Carr, 81 Ga. 685; Dulin v. Prince, 124 Ill. 76; Mansfield v. Hodgdon, 147 Mass. 304; Willard v. Foster, 24 Neb. 205; Bradford v. Foster, 87 Tenn. 4.

Vendee's Default and Neglect to Seek Legal Redress.—Gentry v. Rogers, 40 Ala. 442.

2. Givens v. Cobb, 83 Mo. 189.

Default — Dispossession in Ejectment.—Tibbs v. Morris, 44 Barb. (N. Y.) 138.

Where the Vendor Has Failed to Give Title for a long time, during which interest has accumulated on the contract price, specific performance will not be decreed against the vendee. Williams v. Mattocks, 3 Vt. 189.

Default until Contract Appears Profitable.—M'Clure v. Purcel, 3 A. K. Marsh. (Ky.) 61. See also Diamond State Iron Co. v. Todd, 6 Del. Ch. 163.

3. Sullings v. Sullings, 9 Allen (Mass.) 234.

4. Prothro v. Smith, 6 Rich. Eq. (S. Car.) 224. And see Bennet v. Bennet, 10 N. Y. App. Div. 550.

5. See Pyatt v. Lyons, 51 N. J. Eq. 308.

4. Bond for Performance. — Where the plaintiff made default by reason of his inability to make the payments required by the contract, the fact that, at the hearing, he offers a bond to secure the stipulated sums, does not entitle him to a decree.¹

5. Waiver of Default — Acquiescence. — If, however, the defendant has waived the plaintiff's failure to perform according to the strict terms of his contract, or the defendant has acquiesced in the plaintiff's fault or delay, the defendant will not be permitted to set up the plaintiff's default as an objection to the specific enforcement of the contract.²

Notice by Vendor. — Where there has been a delay by the vendee of land in complying with the contract of purchase, a notice given by the vendor requiring the purchaser to pay for the land within a specific time and take a deed therefor, estops the vendor from taking advantage of the delay of the purchaser prior to such notice.³

Remaining in Possession — Improvements. — And where a vendee, after default on his part, is allowed to remain in possession and make valuable improvements, he may be entitled, subsequently, to specific performance.⁴

Mutual Failure to Perform. — Where both parties failed to perform their mutual covenants on the contract day, each impliedly waived strict performance as to time, and either could maintain a suit for specific performance.⁵

6. Performance Prevented by Plaintiff or Defendant. — Where the plaintiff's performance has been prevented by the defendant, the latter cannot set up such default in bar of an action for specific performance.⁶ But the one

1. *Rice v. D'Arville*, 162 Mass. 559.

2. **Waiver — England.** — *Pincke v. Curteis*, 4 Bro. C. C. 329.

United States. — *Brown v. Guarantee Trust, etc., Co.*, 128 U. S. 403; *Kentucky Distilleries, etc., Co. v. Warwick Co.*, (C. C. A.) 109 Fed. Rep. 363.

Alabama. — *Stewart v. Stokes*, 33 Ala. 494, 73 Am. Dec. 429; *Bass v. Gilliland*, 5 Ala. 761.

California. — *Barsolou v. Newton*, 63 Cal. 223.

Georgia. — *Moody v. Griffin*, 60 Ga. 459.

Iowa. — *Collins v. Vandever*, 1 Iowa 573. See also *Foot v. Bush*, 100 Iowa 522; *Armstrong v. Pierson*, 5 Iowa 317; *Brink v. Morton*, 2 Iowa 411.

Kentucky. — *Logan v. M'Chord*, 2 A. K. Marsh. (Ky.) 224. See also *Bellamy v. Ragsdale*, 14 B. Mon. (Ky.) 293; *Henry v. Graddy*, 5 B. Mon. (Ky.) 450.

Maine. — *Hull v. Sturdivant*, 46 Me. 34. See also *Snowman v. Harford*, 55 Me. 197.

New Jersey. — *Gannon v. Toole*, (N. J. 1895) 32 Atl. Rep. 702; *Schloetterer v. Wagner*, (N. J. 1891) 21 Atl. Rep. 863. See also *Keyport Brick, etc., Mfg. Co. v. Lorillard*, (N. J. 1890) 19 Atl. Rep. 381.

New York. — *Schroeppel v. Hopper*, 40 Barb. (N. Y.) 425.

Ohio. — *Hutcheson v. McNutt*, 1 Ohio 14.

Pennsylvania. — *Morgan v. Scott*, 26 Pa. St. 51. See also *Remington v. Irwin*, 14 Pa. St. 143.

Texas. — *Younger v. Welch*, 22 Tex. 417.

Wisconsin. — *Minert v. Emerick*, 6 Wis. 355; *Phillips v. Carver*, 99 Wis. 561.

See also *Kansas Lumber Co. v. Horrigan*, 36 Kan. 387; *Barnard v. Lee*, 97 Mass. 92; *Wallis v. Pidge*, 4 Mich. 570; *Ramsay v. Brailsford*, 2 Desaus. (S. Car.) 582, 2 Am. Dec. 698; *Chadwell v. Winston*, 3 Tenn. Ch. 110.

Acquiescence — No Injury to Defendant. — In a suit for specific performance, where the evidence shows continued acquiescence on the part of the defendant in the conduct of the plaintiff, and no serious harm is done by the delay to seek relief, the defense of laches is of no avail. *Welch v. Whelpley*, 62 Mich. 15, 4 Am. St. Rep. 810.

Delay of Two Days in Making Payment Held Not Fatal to Relief. — *Durand v. Sage*, 11 Wis. 151.

Acceptance of Part Performance. — Where the vendor has suffered the purchaser to remain in possession of the land for many years after the purchase money was due, and has during that time received several payments from the purchaser, he cannot resist specific performance on the ground that the contract had not been performed in time by the purchaser. *Voorhess v. De Meyer*, 2 Barb. (N. Y.) 37. And see *Murphy v. Lockwood*, 21 Ill. 611.

Acceptance of Part Payment is a waiver of defaults on the part of the purchaser. *Brassell v. McLeomore*, 50 Ala. 476; *Wilson v. Emig*, 44 Kan. 125; *Paulman v. Cheney*, 18 Neb. 392; *House v. Beatty*, 7 Ohio (pt. ii.) 84.

Where No Time Fixed Nor Penalty Imposed. — *Lake v. Lewis*, 16 Nev. 94.

Failure to Demand Deposit. — *Pincke v. Curteis*, 4 Bro. C. C. 329.

3. *Ingersoll v. Horton*, 7 Mich. 405.

4. **Where Time Not of Essence.** — *Murphy v. Lockwood*, 21 Ill. 611; *Edgerton v. Peckham*, 11 Paige (N. Y.) 352.

Waiver of Delay Though Provision that Time of Essence. — *Coles v. Shepard*, 30 Minn. 446; *Ballard v. Cheney*, 19 Neb. 58.

5. *Van Campen v. Knight*, 63 Barb. (N. Y.) 205.

6. *Bass v. Gilliland*, 5 Ala. 761; *Peters v. Canfield*, 74 Mich. 498; *Conover v. Wright*, 9 Pa. Dist. 688.

party's delay or default will not be deemed a defense in favor of another who fails to show that he has been ready at all times to perform all substantial conditions required of him.¹ So also where the plaintiff, by his own default, has prevented performance by the defendant, or where the defendant's default has been caused by the plaintiff's misconduct, specific enforcement will, as a rule, be denied.²

7. Provision in Contract for Forfeiture on Default. — Where the contract itself provides that on default by one of the parties thereto he shall forfeit all rights thereunder, equity will not, as a rule, grant specific performance,³ in the absence of a showing that the forfeiture has been waived by the other party to the contract.⁴ So, also, as the punctual performance of the conditions of a contract may be waived by the other contracting party, a provision in a contract that it should become void on the default of one of the parties thereto cannot be taken advantage of to put an end to the contract by the party committing the default.⁵

8. Time as Essence of Contract — *a. GENERAL RULE.* — It has been laid down as a general rule that time is not generally deemed in equity of the essence of the contract unless the parties have expressly so treated it, or it follows from the nature and circumstances of the contract.⁶ And where time is not of the essence of the contract, specific performance may, in the discretion of the court, be decreed, although the party seeking enforcement cannot show a punctual performance of his own obligations.⁷ In order to prevent

Tender of Defective Deed. — *Johnson v. Jones*, 85 Ala. 286.

Rule Held Inapplicable to Particular Facts. — See *Pratt v. Carroll*, 8 Cranch (U. S.) 471.

1. Readiness to Perform. — *Karns v. Olney*, 80 Cal. 90, 13 Am. St. Rep. 101; *Tate v. Pensacola*, etc., Development Co., 37 Fla. 439, 53 Am. St. Rep. 251; *Belt v. Brooklyn L. Ins. Co.*, 12 Mo. App. 100; *Kellogg v. Lavender*, 9 Neb. 418.

2. Kinney v. Redden, 2 Del. Ch. 46; *Young Lock Nut Co. v. Brownley Mfg. Co.*, (N. J. 1896) 34 Atl. Rep. 947.

3. Haggerty v. Elyton Land Co., 89 Ala. 428; *Foot v. Bush*, 100 Iowa 522; *O'Fallon v. Kennerly*, 45 Mo. 124; *Phelps v. Illinois Cent. R. Co.*, 63 Ill. 468.

4. Foot v. Bush, 100 Iowa 522; *Burroughs v. Jones*, 79 Miss. 214; *Pierce v. Morse*, 65 N. H. 196.

Forfeiture at Election of Vendor. — Where the contract provides for a forfeiture at the election of the vendor upon the vendee's default, the forfeiture must be declared by the vendor at the time specified or it will be deemed to have been waived. *Burroughs v. Jones*, 79 Miss. 214.

5. Dana v. St. Paul Invest. Co., 42 Minn. 194.

6. Time as Essence of Contract. — *United States*. — *Oliver v. Piatt*, 3 How. (U. S.) 333; *Mason v. Wallace*, 4 McLean (U. S.) 77; *Taylor v. Longworth*, 14 Pet. (U. S.) 172; *Secombe v. Steele*, 20 How. (U. S.) 94. See also *Brown v. Guarantee Trust, etc., Co.*, 128 U. S. 403.

Alabama. — *Louisville, etc., R. Co. v. Phil-yaw*, 94 Ala. 463.

Arkansas. — *Martin v. Skipwith*, 50 Ark. 141.

Connecticut. — *Pritchard v. Todd*, 38 Conn. 413; *Quinn v. Roath*, 37 Conn. 16.

Delaware. — *Burton v. Adkins*, 2 Del. Ch. 125.

Georgia. — *Russell v. Napier*, 80 Ga. 77.

Illinois. — *Bragg v. Olson*, 128 Ill. 540.

Indiana. — *Cutsinger v. Ballard*, 115 Ind. 93; *Cartmel v. Newton*, 79 Ind. 1; *Day v. Patterson*, 18 Ind. 114; *Keller v. Fisher*, 7 Ind. 718; *Ewing v. Crouse*, 6 Ind. 312; *Brumfield v. Palmer*, 7 Blackf. (Ind.) 227.

Iowa. — *Struble v. Allin*, 110 Iowa 101; *Armstrong v. Pierson*, 5 Iowa 317; *Brink v. Morton*, 2 Iowa 411.

Kentucky. — *Eubank v. Hampton*, 1 Dana (Ky.) 343.

Maryland. — *Somerville v. Trueman*, 4 Har. & M. (Md.) 43, 1 Am. Dec. 389.

Michigan. — *Ingersoll v. Horton*, 7 Mich. 405.

Nevada. — *Lake v. Lewis*, 16 Nev. 94.

New Jersey. — *Dynan v. McCulloch*, 46 N. J. Eq. 11; *New-Barbadoes Toll Bridge Co. v. Vreeland*, 4 N. J. Eq. 157.

New York. — *Havens v. Patterson*, 43 N. Y. 218; *Davies v. Collins*, 25 N. Y. App. Div. 272; *Waters v. Travis*, 9 Johns. (N. Y.) 450; *Decouche v. Savetier*, 3 Johns. Ch. (N. Y.) 190, 8 Am. Dec. 478; *Cordes v. Kenney*, 5 Silv. Sup. (N. Y.) 4; *Miller v. Bear*, 3 Paige (N. Y.) 466.

North Carolina. — *Scarlett v. Hunter*, 3 Jones Eq. (56 N. Car.) 84.

Tennessee. — *Chadwell v. Winston*, 3 Tenn. Ch. 110.

Virginia. — *Williams v. Lewis*, 5 Leigh (Va.) 686.

Washington. — *Janson v. Peterson*, 2 Wash. 447.

Wyoming. — *Metcalf v. Hart*, 4 Wyo. 513, 31 Am. St. Rep. 122.

And see *Russell v. Baughman*, 94 Pa. St. 400.

7. Arkansas. — *Martin v. Skipwith*, 50 Ark. 141.

Connecticut. — *Quinn v. Roath*, 37 Conn. 16.

Kentucky. — *Logan v. M'Chord*, 2 A. K. Marsh. (Ky.) 224.

Michigan. — *Moote v. Scriven*, 33 Mich. 500.

performance the provision broken by the party seeking equitable aid should be of such a character as to constitute a condition precedent to his right to enforce the contract, or be such as to invalidate the contract; or in some other manner to make it clearly inequitable, under circumstances indicating fraud, mistake, surprise, unreasonable delay, gross neglect, or bad faith, that the party should have a decree.¹

b. WHERE TIME OF ESSENCE, NO ENFORCEMENT BY PARTY IN DEFAULT. — Where time is of the essence of the contract and the party seeking equitable enforcement is shown to have made default in performance at the time fixed in the contract, a decree in his favor will not be rendered.² But the rule above stated is, of course, subject to the qualification that performance may be decreed notwithstanding default where time is of the essence, if such default has been waived by the other contracting party.³

Original Contract Changed by Consent. — Where changes were made in the original contract by consent of the parties thereto, and the contract, as modified, was completed by the promisee, the promisor will be deemed estopped to set up such changes as showing failure by the promisee to perform the original contract, in order to bar relief under the latter's bill for specific performance.⁴

c. WHEN TIME DEEMED OF ESSENCE AND WHEN NOT — (1) *In General.* — *No General Rule Can Be Stated* by which it can be determined, in each instance, whether or not time is of the essence of the contract.⁵ Time, it has been held, may be made of the essence of the contract, by express stipulation or necessary implication,⁶ or by the subsequent conduct of the parties in rela-

Nebraska. — *Langan v. Thummel*, 24 Neb. 265; *Willard v. Foster*, 24 Neb. 205.

New Jersey. — *Fred v. Fred*, (N. J. 1901) 50 Atl. Rep. 776; *Miller v. Miller*, 25 N. J. Eq. 354; *De Camp v. Crane*, 19 N. J. Eq. 166.

New York. — *Day v. Hunt*, 112 N. Y. 191; *Hubbell v. Von Schoening*, 49 N. Y. 326; *Hun v. Bourdon*, 57 N. Y. App. Div. 351.

North Dakota. — *Arnett v. Smith*, 11 N. Dak. 55.

Pennsylvania. — *Sylvester v. Born*, 132 Pa. St. 467.

Texas. — *Upton v. Maurice*, (Tex. Civ. App. 1896) 34 S. W. Rep. 642.

Failure to Pay on Contract Day Held Not to Defeat Specific Performance. — *Reed v. Jones*, 8 Wis. 392.

1. *Quinn v. Roath*, 37 Conn. 16.

2. *Where Plaintiff in Default* — *United States.* — *Kentucky Distilleries, etc., Co. v. Warwick Co.*, (C. C. A.) 109 Fed. Rep. 280.

Alabama. — *Goodwin v. Lyon*, 4 Port. (Ala.) 297.

California. — *Brown v. Covillaud*, 6 Cal. 566.

Illinois. — *Skeen v. Patterson*, 180 Ill. 289;

Heckard v. Sayre, 34 Ill. 142; *Lowery v. Niccolls*, 11 Ill. App. 450.

Kentucky. — *Stembridge v. Stembridge*, 87 Ky. 91; *Jones v. Noble*, 3 Bush (Ky.) 694.

Massachusetts. — *Carter v. Phillips*, 144 Mass. 100; *Richmond v. Gray*, 3 Allen (Mass.) 25.

Missouri. — *Russell v. Geyer*, 4 Mo. 384.

Nebraska. — *Brown v. Ulrich*, 48 Neb. 409;

Whiteman v. Perkins, 56 Neb. 181; *Canfield v. Tillotson*, 25 Neb. 857.

New York. — *Gale v. Archer*, 42 Barb. (N. Y.) 320; *Mitchell v. Wilson*, 4 Edw. (N. Y.) 697.

Pennsylvania. — *Reed v. Breeden*, 61 Pa. St. 460.

And see *Nageli v. Lenimer*, (N. J. 1888) 16 Atl. Rep. 205.

3. *Waiver.* — *Thayer v. Wilmington Star Min. Co.*, 105 Ill. 540; *Brown v. Ulrich*, 48 Neb. 409; *Pier v. Lee*, 14 S. Dak. 600.

4. *Barrett v. Geisinger*, 179 Ill. 240.

5. *Ancient and Modern Application of Rule.* — In *Barnard v. Lee*, 97 Mass. 92, the court by Gray, J., said: "This equitable doctrine" (that time will not be considered to be of the essence) "was formerly carried to an unreasonable extent, and the specific performance of contracts enforced after such a lapse of time and change of circumstances as to produce as much injustice as it avoided. In modern times the doctrine has been more guardedly applied, and it is now held that time, although not ordinarily of the essence of a contract in equity, yet may be made so by clear manifestation of the intent of the parties in the contract itself, by subsequent notice from one party to the other, by laches in the party seeking to enforce it, or by change in the value of the land or other circumstances which would make a decree for the specific performance inequitable."

Performance of Concurrent Acts. — *Byers v. Denver Circle R. Co.*, 13 Colo. 552.

Where a Vendee at an Auction Sale has been diligent and prompt in his efforts to complete it, and a third party has purchased the premises in question with notice of the rights of such vendee, no change of value or demand for immediate performance having occurred in the interval, time will not be held to be of the essence of the contract, and the conveyance to the third party will be set aside and specific performance decreed in favor of the purchaser at the auction sale. *Davies v. Collins*, 25 N. Y. App. Div. 272.

6. *Express Stipulation or Necessary Implication* — *England.* — *Hipwell v. Knight*, 1 Y. & C. Exch. 401.

United States. — *Cheney v. Libby*, 134 U. S. 68; *Brashier v. Gratz*, 6 Wheat. (U. S.) 528;

tion thereto,¹ as by a subsequent notice insisting that the contract be completed within a reasonable time specified in the notice.²

Nature of Contract Considered. — Where the contract is of such a nature that its performance cannot remain in doubt or uncertainty for any period of time without anxiety and detriment to one of the parties thereto, the other party will be held to performance on the day specified, or he will lose his right to specific enforcement.³ It has been held, on the other hand, that the rule that time is not of the essence of the contract governs where the agreement is for the conveyance of real estate and the parties have acted upon the faith of it so as to suffer a change of possession and the making of improvements.⁴

Mutual Failure to Perform at Contract Time. — Where neither of the parties performs or offers to perform on the day fixed in the agreement of sale, and the purchaser continues in possession of the property for several days thereafter, this shows that time is not regarded by the parties as of the essence of the contract, and such failure will not defeat specific performance.⁵

Hepburn v. Auld, 5 Cranch (U. S.) 262; *Garnett v. Macon*, 2 Brock. (U. S.) 185.

California. — *Bennett v. Hyde*, 92 Cal. 131; *Martin v. Morgan*, 87 Cal. 203, 22 Am. St. Rep. 240.

Connecticut. — *Potter v. Tuttle*, 22 Conn. 512. *Illinois.* — *Stow v. Russell*, 36 Ill. 18; *Steele v. Biggs*, 22 Ill. 643; *Smith v. Brown*, 10 Ill. 309.

Indiana. — *Keller v. Fisher*, 7 Ind. 718; *Ewing v. Crouse*, 6 Ind. 312; *Brumfield v. Palmer*, 7 Blackf. (Ind.) 227.

Iowa. — *Davis v. Stevens*, 3 Iowa 158; *Mathews v. Gilliss*, 1 Iowa 242; *Garretson v. Vanloon*, 3 Greene (Iowa) 128, 54 Am. Dec. 492; *Shuffleton v. Jenkins*, *Morr.* (Iowa) 427.

Kansas. — *Kansas Lumber Co. v. Horrigan*, 36 Kan. 387; *Missouri River, etc., R. Co. v. Brickley*, 21 Kan. 275.

Kentucky. — *Montgomery v. Phoenix Mut. L. Ins. Co.*, 14 Bush (Ky.) 51; *Kercheval v. Swope*, 6 T. B. Mon. (Ky.) 362; *Magoffin v. Holt*, 1 Duv. (Ky.) 95.

Maine. — *Jones v. Robbins*, 29 Me. 351, 50 Am. Dec. 593.

Massachusetts. — *Barnard v. Lee*, 97 Mass. 92.

Mississippi. — *Walton v. Wilson*, 30 Miss. 576.

Nebraska. — *Brown v. Ulrich*, 48 Neb. 409; *Izard v. Kimmel*, 26 Neb. 51.

Nevada. — *Lake v. Lewis*, 16 Nev. 94.

New Hampshire. — *Pennock v. Ela*, 41 N. H. 189.

New Jersey. — *Sharp v. Trimmer*, 24 N. J. Eq. 422; *Huffman v. Hummer*, 17 N. J. Eq. 263; *Baldwin v. Van Vorst*, 10 N. J. Eq. 577.

New York. — *Havens v. Patterson*, 43 N. Y. 218; *Benedict v. Lynch*, 1 Johns. Ch. (N. Y.) 370, 7 Am. Dec. 484; *Wells v. Smith*, 7 Paige (N. Y.) 22, 31 Am. Dec. 274; *Cordes v. Kenney*, 5 Silv. Sup. (N. Y.) 4.

North Carolina. — *Falls v. Carpenter*, 1 Dev. & B. Eq. (21 N. Car.) 237, 28 Am. Dec. 613.

Ohio. — *Scott v. Fields*, 7 Ohio (pt. ii.) 90.

Oregon. — *Knott v. Stephens*, 5 Oregon 235.

Texas. — *Farris v. Bennett*, 26 Tex. 568; *Younger v. Welch*, 22 Tex. 417; *Edwards v. Atkinson*, 14 Tex. 373.

Virginia. — *Jackson v. Ligon*, 3 Leigh (Va.) 161.

1. Subsequent Conduct. — *Kansas Lumber Co. v. Horrigan*, 36 Kan. 387; *Izard v. Kimmel*, 26

Neb. 51; *Sharp v. Trimmer*, 24 N. J. Eq. 422; *Havens v. Patterson*, 43 N. Y. 218; *Cordes v. Kenney*, 5 Silv. Sup. (N. Y.) 4; *Jackson v. Ligon*, 3 Leigh (Va.) 161.

Tender and Demand. — Though by the terms of the contract time is not made material, either party may enforce performance by executing or tendering the execution of the contract on his part, and demanding the same of the opposite party. *Knott v. Stephens*, 5 Oregon 235.

2. *Asia v. Hiser*, 38 Fla. 71; *Havens v. Patterson*, 43 N. Y. 218; *Ditto v. Harding*, 73 Ill. 117.

3. *Gale v. Archer*, 42 Barb. (N. Y.) 320.

4. Contracts in Regard to Realty — Change of Possession — Improvements — United States. — *Taylor v. Longworth*, 14 Pet. (U. S.) 172; *Mason v. Wallace*, 4 McLean (U. S.) 77; *Oliver v. Piatt*, 3 How. (U. S.) 333.

Alabama. — *Louisville, etc., R. Co. v. Phil-yaw*, 94 Ala. 463.

Arkansas. — *Martin v. Skipwith*, 50 Ark. 141.

Georgia. — *Russell v. Napier*, 80 Ga. 77.

Illinois. — *Bragg v. Olson*, 128 Ill. 540.

Indiana. — *Cutsinger v. Ballard*, 115 Ind. 93.

Iowa. — *Armstrong v. Pierson*, 5 Iowa 317;

Brink v. Morton, 2 Iowa 411.

Maryland. — *Somerville v. Trueman*, 4 Har.

& M. (Md.) 43, 1 Am. Dec. 389.

New York. — *Decouche v. Savetier*, 3 Johns.

Ch. (N. Y.) 190, 8 Am. Dec. 478; *Cordes v.*

Kenney, 5 Silv. Sup. (N. Y.) 4.

Tennessee. — *Chadwell v. Winston*, 3 Tenn.

Ch. 110.

Virginia. — *Williams v. Lewis*, 5 Leigh (Va.)

686.

Washington. — *Janson v. Peterson*, 2 Wash.

447.

Wyoming. — *Metcalf v. Hart*, 3 Wyo. 513, 31

Am. St. Rep. 122.

And see *Russell v. Baughman*, 94 Pa. St. 400.

Where the Vendee of Land Is Let into Possession, it is taken for granted that each party is satisfied, until one or the other moves towards the execution of the contract by demanding a specific performance, and neither party, under such circumstances, has a right to insist on lapse of time as a bar to specific performance. *Miller v. Bear*, 3 Paige (N. Y.) 466; *Scarlett v. Hunter*, 3 Jones Eq. (56 N. Car.) 84.

5. *Benson v. Tilton*, (Supm. Ct.) 24 How. Pr. (N. Y.) 494.

(2) *Test — Question of Injury.* — While, as has been stated, no general rule applicable in all cases can be laid down, probably the best test is whether or not the party's delay has been, or might have been, injurious to the other party to the contract, and whether, notwithstanding the delay, the parties may be placed *in statu quo*. If the complainant's delay has been productive of injury, or would be if the contract were enforced, or if the parties cannot by the decree be placed in relatively the same position as if there had been no default, a decree will, in general, be withheld.¹ If the contrary is the case, specific performance may be enforced.² And in determining whether the contract can under such circumstances be enforced without injury, the test is not that the one party may be able to profit by the failure of the other, but rather that he does not lose an advantage which he would have had, had no failure occurred.³

(3) *Fluctuating Values — Change of Value or Circumstances.* — If the thing contracted for is of fluctuating value, time will, in general, be deemed of the essence of the contract, and a strict compliance required in equity as at law.⁴ And where after default made by the party to a contract who is subsequently seeking performance, the value of the thing contracted for has substantially increased or diminished, so that, in case of specific enforcement, the party would in effect profit by his own wrong, equity will not, in general, enforce the contract, but will leave the party to his legal remedy.⁵ And where the vendor defaults and delays performance until the property has depreciated in value or the improvements therein have been destroyed, the vendee will not be required to perform.⁶ And it may be laid down as a general rule that equity will never enforce a contract at the instance of a party in default,

1. *Test.* — *Ingersoll v. Horton*, 7 Mich. 405. And see *Clay County Land, etc., Co. v. Skidmore*, 26 Tex. Civ. App. 472.

Timber Cut by Purchaser. — *Burton v. Adkins*, 2 Del. Ch. 125.

Sale to Third Person. — *Thompson v. Bruen*, 46 Ill. 125.

Delay until Object of Purchase Frustrated. — *Parsons v. Gilbert*, 45 Iowa 33.

2. *Camp Mfg. Co. v. Parker*, (C. C. A.) 91 Fed. Rep. 705; *Shouse v. Doane*, 39 Fla. 95; *Young v. Daniels*, 2 Iowa 126, 63 Am. Dec. 477; *Scannell v. American Soda Fountain Co.*, 161 Mo. 606; *Shipman v. Cummins*, 65 Hun (N. Y.) 620, 19 N. Y. Supp. 974; *Clay County Land, etc., Co. v. Skidmore*, 26 Tex. Civ. App. 472.

"If There Is No Damage Done to the Party an agreement may be enforced after the time named." *Pincke v. Curteis*, 4 Bro. C. C. 329.

Rationale of Rule. — See *Monihan v. Wakelin*, (Ariz. 1899) 56 Pac. Rep. 735.

3. *Monihan v. Wakelin*, (Ariz. 1899) 56 Pac. Rep. 735.

4. *Fluctuating Value.* — *Gale v. Archer*, 42 Barb. (N. Y.) 320.

5. *United States.* — *Holgate v. Eaton*, 116 U. S. 33; *Chicago, etc., R. Co. v. Stewart*, 19 Fed. Rep. 5.

Florida. — *Hendry v. Benlisa*, 37 Fla. 609.

Illinois. — *Iglehart v. Vail*, 73 Ill. 63; *Roby v. Cossitt*, 78 Ill. 638.

Kansas. — *Johnson v. Burdett Town Co.*, 7 Kan. App. 134.

Maine. — *Rogers v. Saunders*, 16 Me. 92, 33 Am. Dec. 635.

Maryland. — *Perkins v. Wright*, 3 Har. & M. (Md.) 324.

New Jersey. — *Reddish v. Miller*, 27 N. J. Eq. 514.

New York. — *Conger v. New York, etc., R. Co.*, 45 Hun (N. Y.) 296; *Jackson v. Edwards*, 22 Wend. (N. Y.) 498; *Peters v. Delaplaine*, 49 N. Y. 362.

Pennsylvania. — *Andrews v. Bell*, 56 Pa. St. 343; *Patterson v. Martz*, 8 Watts (Pa.) 374, 34 Am. Dec. 474.

South Carolina. — *Colcock v. Butler*, 1 Desaus. (S. Car.) 307.

Tennessee. — *Pillow v. Pillow*, 3 Humph. (Tenn.) 644; *Buchanan v. Brown, Cooke* (Tenn.) 185; *Hudson v. King*, 2 Heisk. (Tenn.) 560; *McCarty v. Kyle*, 4 Coldw. (Tenn.) 348.

Virginia. — *Clark v. Hutzler*, 96 Va. 73; *Rison v. Newberry*, 90 Va. 513; *Griffin v. Cunningham*, 19 Gratt. (Va.) 571; *Bryan v. Lofftus*, 1 Rob. (Va.) 12, 39 Am. Dec. 242; *Pigg v. Corder*, 12 Leigh (Va.) 69; *Garnett v. Macon*, 6 Call (Va.) 308.

When Rule Held Inapplicable. — An enhancement in the price of lands in the neighborhood subsequent to the date of the contract does not constitute such a change of circumstances as will warrant a denial of specific performance on the application of the vendee, when it appears that such increase in value has resulted rather from a number of purchases by the vendee than from a general demand for property, and no perceptible increase in value is shown to have occurred during the period of the vendee's delay. *Sylvester v. Born*, 132 Pa. St. 467.

6. *Property Destroyed by Fire Pending Vendor's Default.* — *Kinney v. Hickox*, 24 Neb. 167; *Smith v. Cansler*, 83 Ky. 367.

Debt Payable in Stock of Corporation. — *Demarest v. McKee*, 2 Grant Cas. (Pa.) 248.

where during the period of default the circumstances of the parties have materially changed with reference to the subject-matter of the contract.¹ So also a court of equity will refuse relief where the party seeking it is in default, and by delay has indicated an intent to perform the contract or to abandon it, as the property should rise or fall in value.²

9. Performance Within Reasonable Time.—Contracts which fix no day for the performance or of which time is not of the essence, must nevertheless be fulfilled within a reasonable time on the part of the one seeking specific performance, or the delay explained consistently with good faith.³ It has been held, however, that even where time is made material by express stipulation, the failure of one of the parties to perform a condition within the particular time limited will not in every case defeat his right to specific performance, if the condition be subsequently performed without unreasonable delay, and no circumstances have intervened that would render it unjust or inequitable to give such relief.⁴ What is a reasonable time for performance depends upon the particular circumstances of the case. Some illustrative decisions will be found in the notes.⁵

IX. LACHES—1. **In General.**—The doctrine is frequently declared that a contract will not be specifically enforced where the party seeking equitable relief has slept on his rights or been guilty of laches.⁶ But it is impossible to formulate in advance any general rule by which it may be determined whether

1. **Change of Circumstances or Relations of Parties.**—*Madox v. McQueen*, 3 A. K. Marsh. (Ky.) 400; *Ely v. McKay*, 12 Allen (Mass.) 323; *Young v. Rathbone*, 16 N. J. Eq. 224, 84 Am. Dec. 151; *Du Bois v. Baum*, 46 Pa. St. 537; *Miller v. Henlan*, 51 Pa. St. 265; *Tarr v. Scott*, 4 Brews. (Pa.) 49; *Callen v. Ferguson*, 29 Pa. St. 247; *Childress v. Holland*, 3 Hayw. (Tenn.) 274; *Clark v. Hutzler*, 96 Va. 73; *Darling v. Cumming*, 92 Va. 521.

2. *Gish v. Jamison*, 96 Va. 312. And see *Willard v. Tayloe*, 8 Wall. (U. S.) 557; *Booten v. Scheffer*, 21 Gratt. (Va.) 474; *Anthony v. Leftwich*, 3 Rand. (Va.) 238; *Pillow v. Pillow*, 3 Humph. (Tenn.) 644.

3. **Performance in Reasonable Time—England.**—*Wellesley v. Wellesley*, 4 Myl. & C. 579. *Florida.*—*Chabot v. Winter Park Co.*, 34 Fla. 258, 43 Am. St. Rep. 192.

Illinois.—*Crandall v. Willig*, 166 Ill. 233; *Cohn v. Mitchell*, 115 Ill. 124; *Roby v. Cossitt*, 78 Ill. 638; *Ditto v. Harding*, 73 Ill. 117; *Fitch v. Boyd*, 55 Ill. 307; *Taylor v. Merrill*, 55 Ill. 52.

Iowa.—*Butler v. Archer*, 76 Iowa 551; *Renwick v. Bancroft*, 59 Iowa 116.

Maryland.—*Johnson v. Johnson*, 40 Md. 189. *New York.*—*Benson v. Tilton*, (Supm. Ct.) 24 How. Pr. (N. Y.) 494.

South Carolina.—*Thompson v. Dulles*, 5 Rich. Eq. (S. Car.) 370.

Washington.—*Umfrid v. Brooks*, 14 Wash. 675.

West Virginia.—*Rader v. Neal*, 13 W. Va. 373.

Delay Pending Litigation over Title.—*Galloway v. Finley*, 12 Ohio 354; *Hoyt v. Tuxbury*, 70 Ill. 331.

Delay for Examination of Title.—*Hoyt v. Tuxbury*, 70 Ill. 331; *Willis v. Dawson*, 34 Hun (N. Y.) 492.

Contract Not to Be Kept Open Indefinitely.—But the vendee cannot keep the contract open indefinitely, so as to have the benefit of a rise in the value of the property, or relieve himself

in case of a depreciation. *Hoyt v. Tuxbury*, 70 Ill. 331.

A Purchaser at a Trustee's Sale, the terms of which are cash, must pay the money within a reasonable time. If he fails to do so, on a tender of the deed, a court of equity will not enforce a conveyance, on a subsequent tender of the amount of his bid. *Heuer v. Rutkowski*, 18 Mo. 216.

4. *Cheney v. Libby*, 134 U. S. 68; *Camp Mfg. Co. v. Parker*, (C. C. A.) 91 Fed. Rep. 705; *Shouse v. Doane*, 39 Fla. 95; *Shipman v. Cummins*, 65 Hun (N. Y.) 620, 19 N. Y. Supp. 974.

5. **Delay in Making Payment.**—*Walker v. Douglas*, 70 Ill. 445.

Delay in Completion of Contract for More than One Year.—*Simpson v. Atkinson*, 39 Minn. 238.

Seventeen Months.—*Bullock v. Adams*, 20 N. J. Eq. 367.

Two and a Half Years.—*Fowler v. Sutherland*, 68 Cal. 414.

Unreasonable Delay in Tendering Deed.—*Chicago, etc., R. Co. v. Wisconsin, etc., R. Co.*, 76 Iowa 615.

One Month Not Unreasonable.—*Butler v. Archer*, 76 Iowa 551.

Performance Held Within Reasonable Time.—*King v. Gsantner*, 23 Neb. 795.

Where Vendor and Vendee Live in Different States.—*Phillips v. Deck*, 76 Cal. 384.

6. **General Statement as to Laches—England.**—*Levy v. Stogdon*, (1898) 1 Ch. 478, 67 L. J. Ch. 313; *Cornwall v. Henson*, (1899) 2 Ch. 710, 68 L. J. Ch. 749; *Levy v. Stogdon*, (1899) 1 Ch. 5, 68 L. J. Ch. 19; *Alley v. Deschamps*, 13 Ves. Jr. 225; *Guest v. Homfray*, 5 Ves. Jr. 818; *Milward v. Thanet*, 5 Ves. Jr. 720, note.

United States.—*Davison v. Davis*, 125 U. S. 90; *Watts v. Waddle*, 6 Pet. (U. S.) 389; *Pratt v. Carroll*, 8 Cranch (U. S.) 471; *McCabe v. Mathews*, 40 Fed. Rep. 338; *New York Paper-Bag Mach. Co. v. Union Paper-Bag Mach. Co.*, 32 Fed. Rep. 783; *Fox v. Phelps*, 18 Fed. Rep. 120.

or not there has been such laches as will bar relief in equity, because, concededly, each case depends much upon its own particular facts and circumstances.¹ A number of cases in which the plaintiff's conduct has been held to constitute laches or the reverse will be found in the notes.² Such rules; of

Alabama.—Haggerty v. Elyton Land Co., 89 Ala. 428; Hayes v. Hall, 4 Port. (Ala.) 374, 30 Am. Dec. 530.

Arkansas.—Atkins v. Rison, 25 Ark. 141; Hemphill v. Miller, 16 Ark. 271.

California.—Seculovich v. Morton, 101 Cal. 673, 40 Am. St. Rep. 106; Molaskey v. Peery, 76 Cal. 84; Henderson v. Hicks, 58 Cal. 364; Green v. Covillaud, 10 Cal. 317, 70 Am. Dec. 725. See also Fowler v. Sutherland, 68 Cal. 417; Weber v. Marshall, 19 Cal. 459; Calanchini v. Branstetter, 84 Cal. 255.

Colorado.—Hagerman v. Bates, 5 Colo. App. 391.

Connecticut.—Hurd v. Hotchkiss, 72 Conn. 472.

District of Columbia.—Barbour v. Hickey, 2 App. Cas. (D. C.) 207.

Florida.—Knox v. Spratt, 23 Fla. 64.

Illinois.—Cohn v. Mitchell, 115 Ill. 124; Marshall v. Peck, 91 Ill. 187; Mix v. Balduc, 78 Ill. 215; Fitch v. Willard, 73 Ill. 92; Iglehart v. Vail, 73 Ill. 63; Hedenberg v. Jones, 73 Ill. 149; Alexander v. Hoffman, 70 Ill. 114; Peck v. Brighton Co., 69 Ill. 200.

Indiana.—Bennett v. Welch, 25 Ind. 140, 87 Am. Dec. 354.

Kansas.—Thornburgh v. Cole, 27 Kan. 490.

Kentucky.—Calvert v. Nichols, 8 B. Mon. (Ky.) 264; McMillin v. McMillin, 7 T. B. Mon. (Ky.) 560; Sprigg v. Albin, 6 J. J. Marsh. (Ky.) 158; Baird v. Baird, 5 J. J. Marsh. (Ky.) 580; Johnston v. Mitchell, 1 A. K. Marsh. (Ky.) 225, 10 Am. Dec. 727.

Massachusetts.—Williams v. Hart, 116 Mass. 513; Goldsmith v. Guild, 10 Allen (Mass.) 239; Fuller v. Hovey, 2 Allen (Mass.) 324, 79 Am. Dec. 782; Boston, etc., R. Co. v. Bartlett, 10 Gray (Mass.) 384.

Michigan.—Dragoo v. Dragoo, 50 Mich. 573; Russell v. Nester, 46 Mich. 290; Ritson v. Dodge, 33 Mich. 463.

Minnesota.—Oliver Min. Co. v. Clark, 65 Minn. 277; McDermid v. McGregor, 21 Minn. 111.

Missouri.—In re Ferguson, 124 Mo. 574; Bliss v. Prichard, 67 Mo. 186; Broaduss v. Ward, 8 Mo. 217.

Nebraska.—Morgan v. Bergen, 3 Neb. 209.

New Hampshire.—Pickering v. Pickering, 38 N. H. 400.

New Jersey.—Ocean City Assoc. v. Headley, 62 N. J. Eq. 322; Ketcham v. Owen, 55 N. J. Eq. 344; Young v. Young, 45 N. J. Eq. 27; Haughwout v. Murphy, 21 N. J. Eq. 118; Lawrence v. Lawrence, 21 N. J. Eq. 317; Merritt v. Brown, 21 N. J. Eq. 401; Ruckman v. King, 19 N. J. Eq. 360.

New York.—Delavan v. Duncan, 49 N. Y. 485; McWilliams v. Long, 32 Barb. (N. Y.) 194; Hatch v. Cobb, 4 Johns. Ch. (N. Y.) 561; Van Zandt v. New York, 8 Bosw. (N. Y.) 375.

North Carolina.—Love v. Welch, 97 N. Car. 200; Strickland v. Fowler, 1 Dev. & B. Eq. (21 N. Car.) 629.

Ohio.—Campbell v. Hicks, 19 Ohio St. 433.

Pennsylvania.—Alexander v. Wunderlich, 118 Pa. St. 610; Ruff's Appeal, 117 Pa. St. 310; Cadwalader's Appeal, 57 Pa. St. 158; Jones v. Jones, 11 Phila. (Pa.) 559, 32 Leg. Int. (Pa.) 199.

Rhode Island.—Ives v. Armstrong, 5 R. I. 567.

South Carolina.—Hodge v. Weeks, 31 S. Car. 276; Blackwell v. Ryan, 21 S. Car. 112; Osborne v. Bremer, 1 Desaus. (S. Car.) 486.

Tennessee.—Bracken v. Martin, 3 Yerg. (Tenn.) 55.

Texas.—McKin v. Williams, 48 Tex. 89; Howe v. Rogers, 32 Tex. 218; Eppinger v. McGreal, 31 Tex. 147; Glasscock v. Nelson, 26 Tex. 150; Smith v. Hampton, 13 Tex. 459.

Vermont.—Williams v. Mattocks, 3 Vt. 189.

Virginia.—Chilhowie Iron Co. v. Gardiner, 79 Va. 305; Booten v. Scheffer, 21 Gratt. (Va.) 474; Pigg v. Corder, 12 Leigh (Va.) 69; Richardson v. Baker, 5 Call (Va.) 514.

Washington.—Sayward v. Gardner, 5 Wash. 247.

Wisconsin.—Rogers v. Van Nortwick, 87 Wis. 414; Pratt v. Ayer, 3 Chand. (Wis.) 265.

1. "The Court Will Not Determine, as Matter of Law, what time will bar a plaintiff's action where the contract does not make time material. Each case must be determined upon its own peculiar circumstances." Brown v. Ward, 110 Iowa 123. And see Lavery v. Hall, 19 Iowa 526; McClure v. Fairfield, 153 Pa. St. 411.

2. Cases Where No Laches under Particular Circumstances.—United States.—Coulson v. Walton, 9 Pet. (U. S.) 62.

Arkansas.—Martin v. Skipwith, 50 Ark. 141.

Illinois.—Litsey v. Whittemore, 111 Ill. 267.

Iowa.—Fisher v. Carroll County Fair, etc., Assoc., 103 Iowa 745.

Maryland.—Haffner v. Dickson, 2 Har. & J. (Md.) 46.

New Jersey.—Thompson v. Keeler, (N. J. 1899) 42 Atl. Rep. 1043; Ashmore v. Evans, 11 N. J. Eq. 151.

New York.—Deen v. Milne, 113 N. Y. 303; Bennet v. Bennet, 10 N. Y. App. Div. 550.

Pennsylvania.—Porter v. Dougherty, 25 Pa. St. 405; McLaughlin v. Shields, 12 Pa. St. 283.

South Carolina.—Saverance v. Lockhart, 57 S. Car. 131.

Tennessee.—Louisville, etc., R. Co. v. Mississippi, etc., R. Co., 92 Tenn. 681.

Texas.—Campbell v. McFadin, 71 Tex. 28; Reed v. West, 47 Tex. 240. See McKin v. Williams, 48 Tex. 89.

Washington.—Wooding v. Crain, 10 Wash. 35.

Cases Where, under Particular Circumstances, Such Laches as Bars Relief.—England.—Levy v. Stogdon, (1899) 1 Ch. 5, 68 L. J. Ch. 19; Cornwall v. Henson, (1899) 2 Ch. 710, 68 L. J. Ch. 749.

Alabama.—Haggerty v. Elyton Land Co., 89 Ala. 428.

California.—Seculovich v. Morton, 101 Cal. 673, 40 Am. St. Rep. 106.

more or less general application, as are deducible from the cases are discussed in the succeeding portions of this subdivision.

2. Action Need Not Be Barred by Statute. — It is well settled that the specific performance of a contract may be denied by a court of equity although there has not been such delay as would bar an action at law for its breach.¹

3. Infancy. — The fact that the heirs of a deceased plaintiff in an action to compel the specific performance by the vendor of a contract for the sale of land are infants is not a legal excuse for a failure on their part to perform the contract of their ancestor, and the laches which would have barred the action had he survived will bar its prosecution by his infant heirs.² But the failure of an infant to file a bill for the specific enforcement of a parol contract for the conveyance of land to his father, who had fully performed his part in his lifetime, will not prevent his doing so after reaching majority.³

4. Laches of Assignor. — The laches of the assignor, or person under whom the contract rights sought to be enforced are claimed, will, as a rule, be imputed to the assignee or party seeking specific enforcement.⁴

5. Mere Delay. — It is believed that it may be safely stated that delay alone, in the absence of any change of circumstances or condition in the relation of the parties between themselves or with reference to the subject-matter, will not bar a suit for specific performance.⁵ So, also, it has been held generally that where there is sufficient excuse for the delay, mere lapse of time will not bar relief.⁶

Colorado. — *Hagerman v. Bates*, 5 Colo. App. 391.

Connecticut. — *Hurd v. Hotchkiss*, 72 Conn. 472.
District of Columbia. — *Barbour v. Hickey*, 2 App. Cas. (D. C.) 207.

Maryland. — *Myers v. Silljacks*, 58 Md. 319.
Michigan. — *Dragoo v. Dragoo*, 50 Mich. 573;
Cook v. Stafford, 86 Mich. 163.

Minnesota. — *Oliver Min. Co. v. Clark*, 65 Minn. 277; *Northrup v. Stevens*, 39 Minn. 105.

Missouri. — *In re Ferguson*, 124 Mo. 574;
Bliss v. Pritchard, 67 Mo. 186.

New Jersey. — *Ocean City Assoc. v. Headley*, 62 N. J. Eq. 322; *Ketcham v. Owen*, 55 N. J. Eq. 344.

Pennsylvania. — *Cadwalader's Appeal*, 57 Pa. St. 158.

South Carolina. — *Hodge v. Weeks*, 31 S. Car. 278.

Washington. — *Sayward v. Gardner*, 5 Wash. 247.

Wisconsin. — *Rogers v. Van Nortwick*, 87 Wis. 1414.

Plaintiff's Laches Rendering Performance Impossible. — Equity will not decree specific performance of a contract for the exchange of lands, against the party who at the time appointed for performance was ready and willing, and in favor of the other party who was not only in default but never offered to perform according to the terms of his contract, and whose laches rendered performance on his part impossible. *Alexander v. Wunderlich*, 118 Pa. St. 610.

1. Cocanougher v. Green, 93 Ky. 519; *Wolf v. Great Falls Water Power, etc., Co.*, 15 Mont. 49; *Peters v. Delaplaine*, 49 N. Y. 362; *Darrow v. Bush*, 45 N. Y. App. Div. 262. And see *Elmendorf v. Taylor*, 10 Wheat. (U. S.) 168.

2. Infant Heirs. — *Walker v. Douglas*, 70 Ill. 445; *Hayes v. Nourse*, 114 N. Y. 595, 11 Am. St. Rep. 700; *Havens v. Patterson*, 43 N. Y. 218; *Scott v. Barber*, 14 Ohio 547; *Henry v. Conn.*, 12 Ohio 193.

"In Executory Agreements an infant cannot take advantage of his infancy to excuse the nonassertion of [a right], where an immediate assertion of his right and performance of his part of the contract is essential to the interest of the other party." *Griffin v. Griffin*, 1 Sch. & Lef. 352. And see *Havens v. Patterson*, 43 N. Y. 223.

3. Putnam v. Tinkler, 83 Mich. 628.

4. Laches of Assignor. — *Frazier v. Broadnax*, 2 Litt. (Ky.) 249; *Hayes v. Nourse*, 114 N. Y. 595, 11 Am. St. Rep. 700; *Havens v. Patterson*, 43 N. Y. 218; *Aldrich v. Putney*, 11 Paige (N. Y.) 204. See *Kennedy v. Embry*, 72 Tex. 387.

5. Mere Delay — *Illinois.* — *Louisville, etc., R. Co. v. Illinois Cent. R. Co.*, 174 Ill. 448; *Hanna v. Ratekin*, 43 Ill. 462; *Glover v. Fisher*, 11 Ill. 66.

Kentucky. — *Spalding v. Alexander*, 6 Bush (Ky.) 160.

Maryland. — *Derrett v. Bowman*, 61 Md. 526; *Smoot v. Rea*, 19 Md. 398.

Michigan. — *Peters v. Canfield*, 74 Mich. 498; *Voltz v. Grummett*, 49 Mich. 453; *Bomier v. Caldwell*, 8 Mich. 463.

Minnesota. — *Austin v. Wacks*, 30 Minn. 335.

New Jersey. — *Harrigan v. Smith*, 57 N. J. Eq. 635; *New-Barbadoes Toll Bridge Co. v. Vreeland*, 4 N. J. Eq. 157.

New York. — *Williston v. Williston*, 41 Barb. (N. Y.) 635.

South Carolina. — *Osborne v. Bremar*, 1 Desaus. (S. Car.) 486.

Texas. — *Primm v. Barton*, 18 Tex. 206.

West Virginia. — *Ballard v. Ballard*, 25 W. Va. 470.

Wisconsin. — *Hall v. Delaplaine*, 5 Wis. 206, 68 Am. Dec. 57; *Crittenden v. Drury*, 4 Wis. 205.

And see *Randall v. Latham*, 36 Conn. 48.

6. Excuse for Delay. — *Craig v. Leiper*, 2 Yerg. (Tenn.) 193, 24 Am. Dec. 479.

The fact that the complainant believed that

6. Delay Due to Promise of Performance or Negotiations for Settlement. — Where the plaintiff has delayed his resort to equity by reason of the obligor's promises to perform the contract, or pending *bona fide* negotiations for a settlement or compromise of the differences between the parties, he will not be deemed to have lost or impaired his right to specific performance.¹ Nor is laches a bar to the specific performance of a contract not to engage in a specified business in a particular place, where the defendant concealed some of his breaches of the contract, and from time to time indicated an intention to commit no further breaches thereof.²

7. Delay Due to Mistake. — Where the violation of a contract was due to mutual mistake, undiscovered for five years, laches will not be imputed.³ But the mere fact that the violation of an alleged contract was not known to the plaintiff for several years after the breach will not excuse delay in the institution of suit in the absence of anything done by the defendant to prevent such discovery.⁴

8. Plaintiff's Laches Due to or Induced by Defendant's Conduct. — Where such delay in the institution of proceedings in equity as has occurred has been due to the conduct of the defendant himself, the defense of laches will not be entertained.⁵ Nor will a party be allowed to set up or take advantage of his own laches to defeat the enforcement of the contract.⁶

9. Acquiescence in Violation of Contract — Plaintiff's Acquiescence. — Where, however, after the defendant's violation or express repudiation of his contract the plaintiff delays to proceed for such a length of time as to constitute acquiescence in the defendant's breach, or a presumption of abandonment of his right to specific performance, relief in equity will be denied.⁷

Change of Conditions. — And this is particularly true where during such interval the condition of the parties⁸ or the value of the property⁹ has changed, or innocent third persons have acquired rights which would be prejudiced by a decree.¹⁰

for the want of a written promise or agreement, she could not enforce her right to the property, when in fact there had been such part performance as took the case out of the statute of frauds, is sufficient to excuse a delay in bringing suit for two or three years after the death of the person who agreed to make the conveyance. *Brown v. Sutton*, 129 U. S. 238.

1. Promises — Negotiations. — *Lancaster v. Roberts*, 144 Ill. 213; *Ryder v. Loomis*, 161 Mass. 161; *Eleventh St. Church of Christ v. Pennington*, 10 Ohio Cir. Dec.'74, 18 Ohio Cir. Ct. 408.

2. *Tilton v. Stein*, 87 Ill. 122.

3. Mutual Mistake. — *Max Meadows Land, etc., Co. v. Bridges*, 95 Va. 184.

4. *Eshleman v. Henrietta Vineyard Co.*, (Cal. 1894) 36 Pac. Rep. 775.

5. Conduct of Defendant. — *Cleaver v. Taylor*, (C. C. A.) 98 Fed. Rep. 900; *Karns v. Olney*, 80 Cal. 90, 13 Am. St. Rep. 101; *Brown v. Ward*, 110 Iowa 123; *Belt v. Brooklyn L. Ins. Co.*, 12 Mo. App. 100; *Kellogg v. Lavender*, 9 Neb. 418; *Keim v. Lindley*, (N. J. 1895) 30 Atl. Rep. 1063; *Eleventh St. Church of Christ v. Pennington*, 10 Ohio Cir. Dec. 74, 18 Ohio Cir. Ct. 408; *Burton v. Landon*, 66 Vt. 361.

6. *Dunn v. Yakish*, 10 Okla. 388.

7. Acquiescence — *United States*. — *McCabe v. Matthews*, 155 U. S. 550; *White v. Wansey*, (C. C. A.) 116 Fed. Rep. 345.

District of Columbia. — *Barbour v. Hickey*, 2 App. Cas. (D. C.) 207.

Michigan. — *Welch v. Whelpley*, 62 Mich. 15,

4 Am. St. Rep. 810; *Smith v. Lawrence*, 15 Mich. 499.

Minnesota. — *McDermid v. McGregor*, 21 Minn. 111.

Montana. — *Wolf v. Great Falls Water Power, etc., Co.*, 15 Mont. 49.

New Jersey. — *Harrigan v. Smith*, (N. J. 1898) 40 Atl. Rep. 13.

North Dakota. — *Mahon v. Leech*, 11 N. Dak. 181.

South Carolina. — *White v. Bennett*, 7 Rich. Eq. (S. Car.) 260.

Virginia. — *Gish v. Jamison*, 96 Va. 312.

Washington. — *Hogan v. Kyle*, 7 Wash. 595, 38 Am. St. Rep. 910.

Wisconsin. — *Thoenke v. Fiedler*, 91 Wis. 386.

Presumption of Waiver or Settlement. — In equity, lapse of time will create a presumption that the parties have waived or settled their rights, and stale claims when brought into a court of chancery are received without favor, and held entitled to but little consideration, unless attended with circumstances that will repel such presumption. *De Cordova v. Smith*, 9 Tex. 129, 58 Am. Dec. 139.

8. *White v. Wansey*, (C. C. A.) 116 Fed. Rep. 345.

9. *Barbour v. Hickey*, 2 App. Cas. (D. C.) 207; *Smith v. Lawrence*, 15 Mich. 499; *Harrigan v. Smith*, (N. J. 1898) 40 Atl. Rep. 13.

10. See *Porter v. Dougherty*, 25 Pa. St. 405. And see also *infra*, this section, *Delay and Change of Circumstances — Injury to Innocent Third Persons*,

So Also, if the Defendant Has Acquiesced in the Plaintiff's Delay or waived his right to insist upon a rescission as a result thereof, laches is not a defense.¹

Notice of Repudiation. — Where, indeed, one of the parties to a contract gives express notice to the other that he repudiates it and will not perform, a comparatively short period of inactivity on the part of the other contracting party may be held to bar specific performance.²

Acquiescence in Delay by Both Parties. — Where a person's rights under a contract did not arise until the performance of a condition, as much the duty of one of the contracting parties as the other, laches will not be imputed for delay in the performance of the condition, as the delay will be deemed to have been acquiesced in by both parties.³

Recognition of Contract. — It has been held that laches is no defense in an action for specific performance where the other contracting party has continuously recognized the obligation of the contract.⁴

10. Vendee in Possession. — Where a vendee in a contract of sale has been suffered to go into and remain in the actual possession of the property, delay to institute an action to compel a formal conveyance will not prejudice his rights.⁵

11. Delay and Change of Circumstances — *a.* IN GENERAL. — Where a party to a contract neglects to assert his rights by a bill for enforcement until there has been such change in conditions or values as would render the performance of the contract inequitable or a hardship upon the other contracting party, specific performance should be denied.⁶

b. UNCERTAINTY OF PROOF DUE TO LAPSE OF TIME. — Where a party delays an action for the specific performance of a contract until the evidence

1. *Karns v. Olney*, 80 Cal. 90, 13 Am. St. Rep. 101; *Belt v. Brooklyn L. Ins. Co.*, 12 Mo. App. 100; *Kellogg v. Lavender*, 9 Neb. 418.

2. **Express Notice of Repudiation.** — *Barbour v. Hickey*, 2 App. Cas. (D. C.) 207; *McDermid v. McGregor*, 21 Minn. 111; *Wolf v. Great Falls Water Power, etc., Co.*, 15 Mont. 49; *Ketcham v. Owen*, 55 N. J. Eq. 344; *Hogan v. Kyle*, 7 Wash. 595, 38 Am. St. Rep. 910.

Relief Barred by Delay of Two Years After Repudiation. — *White v. Bennett*, 7 Rich. Eq. (S. Car.) 260.

3. *Calanchini v. Branstetter*, 84 Cal. 255.

4. *Bennett v. Welch*, 25 Ind. 140, 87 Am. Dec. 354.

5. **Vendee in Possession.** — *Scadden Flat Gold Min. Co. v. Scadden*, 121 Cal. 33; *Tate v. Pensacola, etc., Development Co.*, 37 Fla. 439, 53 Am. St. Rep. 251; *Chicago, etc., R. Co. v. Hay*, 119 Ill. 507; *Hall v. Peoria, etc., R. Co.*, 143 Ill. 163; *Low v. Low*, 173 Mass. 580; *Minneapolis, etc., R. Co. v. Chisholm*, 55 Minn. 374; *New Barbadoes Toll Bridge Co. v. Vreeland*, 4 N. J. Eq. 157; *Waters v. Travis*, 9 Johns. (N. Y.) 450; *Sayward v. Gardner*, 5 Wash. 247; *Mudgett v. Clay*, 5 Wash. 103.

Title Bond — Action by Heirs of Vendee. — *Norman v. Bennett*, 32 W. Va. 614.

Action Against Vendor and Third Parties. — *White v. Patterson*, 139 Pa. St. 429.

Action by Vendee of Purchaser in Possession. — *See Peck v. Ashurst*, 108 Ala. 429.

Deed Absolute — Parol Trust for Security. — *Price v. Gaskins*, Phil. Eq. (62 N. Car.) 224.

Contract of Exchange — Possession and Improvements. — *Hunkins v. Hunkins*, 65 N. H. 95; *Stretch v. Schenck*, 23 Ind. 77.

6. **Delay Coupled with Change of Conditions** — *United States*. — *Holgate v. Eaton*, 116 U. S.

33; *Mundy v. Davis*, 20 Fed. Rep. 355; *Holt v. Rogers*, 8 Pet. (U. S.) 420; *Brashier v. Gratz*, 6 Wheat. (U. S.) 528; *McKay v. Carrington*, 1 McLean (U. S.) 50.

California. — *Requa v. Snow*, 76 Cal. 590; *Matthews v. Davis*, 102 Cal. 202; *Green v. Coillaud*, 10 Cal. 317, 70 Am. Dec. 725.

Colorado. — *Hagerman v. Bates*, 5 Colo. App. 391.

Illinois. — *Shortall v. Mitchell*, 57 Ill. 161.

Iowa. — *Young v. Daniels*, 2 Iowa 126, 63 Am. Dec. 477.

Kentucky. — *Smith v. Cansler*, 83 Ky. 367; *Williams v. Starke*, 2 B. Mon. (Ky.) 196; *Madox v. M'Quean*, 3 A. K. Marsh. (Ky.) 400.

Maine. — *Rogers v. Saunders*, 16 Me. 98, 33 Am. Dec. 640.

Massachusetts. — *Boston, etc., R. Co. v. Bartlett*, 10 Gray (Mass.) 384.

Minnesota. — *Anderson v. Luther Min. Co.*, 70 Minn. 23.

Missouri. — *Davis v. Petty*, 147 Mo. 374; *Pomeroy v. Fullerton*, 131 Mo. 581.

New Jersey. — *Penrose v. Leeds*, 46 N. J. Eq. 294; *Johns v. Norris*, 22 N. J. Eq. 102; *Merritt v. Brown*, 19 N. J. Eq. 286; *Young v. Rathbone*, 16 N. J. Eq. 224, 84 Am. Dec. 151.

New York. — *Huntington v. Titus*, 169 N. Y. 579; *Peters v. Delaplaine*, 49 N. Y. 362; *Hubbell v. Von Schoening*, 49 N. Y. 326; *Ringler v. Jetter*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 750; *Jackson v. Edwards*, 22 Wend. (N. Y.) 498.

North Carolina. — *Francis v. Love*, 3 Jones Eq. (56 N. Car.) 321.

Pennsylvania. — *Ruff's Appeal*, 117 Pa. St. 310; *Andrews v. Bell*, 56 Pa. St. 343; *Miller v. Henlan*, 51 Pa. St. 265; *Du Bois v. Baum*, 46 Pa. St. 537; *Callen v. Ferguson*, 29 Pa. St. 247;

of the contract is lost or its proof becomes uncertain by lapse of time, a court of equity will, in general, withhold its decree.¹

c. INJURY TO INNOCENT THIRD PERSONS. — If, while a vendee of land has been sleeping on his rights, the interests of third parties have intervened, specific performance as against such third parties will not be decreed.² So where a vendee has failed to assert his claims and has permitted innocent purchasers to come into possession and make improvements while he has stood by in silence, he will be deemed to have waived and lost his equitable rights.³

12. Laches and Default. — Where the plaintiff himself is in default in the performance of his part of the contract, and delays performance as well as the institution of a suit in equity until there has been a change of conditions or values, specific performance will, as a rule, be denied.⁴

13. Delay in Demand for Performance. — It is held that there may be such laches in demand for performance as will defeat the right to a specific enforcement of the contract in equity,⁵ particularly where there has been a material change of values meantime.⁶

14. Period from Which Laches Computed. — In the computation of the period, the lapse of which is relied upon as constituting laches, the court takes for its beginning the time when the contract was first broken and the action might have been brought.⁷

X. PARTIAL PERFORMANCE — 1. In General. — It has been laid down loosely that the court must be able to execute the whole contract, or it will not compel performance.⁸ It has also been said that the courts will not decree the

Demarest v. McKee, 2 Grant Cas. (Pa.) 248; *Norris v. Knox*, 1 Pittsb. (Pa.) 56.

Tennessee. — *Smith v. Christmas*, 7 Yerg. (Tenn.) 565; *Childress v. Holland*, 3 Hayw. (Tenn.) 274; *Pillow v. Pillow*, 3 Humph. (Tenn.) 644.

Texas. — *Edwards v. Atkinson*, 14 Tex. 373. *Virginia.* — *Newberry v. French*, 98 Va. 479; *Darling v. Cumming*, 92 Va. 521.

Wisconsin. — *Combs v. Scott*, 76 Wis. 662. And see *Ecclesiastical Com'rs v. Pinney*, (1900) 2 Ch. 736.

Laches and Voluntary Disablement to Perform. — *McGalliard v. Aikins*, 2 Ired. Eq. (37 N. Car.) 186.

Contract to Convey Reversionary Interests. — Where the specific performance of a contract to convey a reversionary interest in land was sought after the lapse of nearly ten years, and after the reversion of dower, as it existed at the date of the contract, had been converted, by the death of the widow, into a present estate in fee, and there was no satisfactory explanation of the delay, relief was refused, and the bill was dismissed. *Pickering v. Pickering*, 38 N. H. 400.

1. A Delay of Fifteen Years in calling for the specific performance of a parol contract for the conveyance of land, without any attempt to enforce it in the lifetime of the contractor, is a circumstance of great weight against the party seeking performance, and will render necessary more strict and full proof, and closer scrutiny of the evidence. *Eyre v. Eyre*, 19 N. J. Eq. 102.

Even if the rights of a third person had not intervened, a court of equity, if a suit to compel the donor to convey the legal title to the donee was not instituted for thirty-one years, would not grant relief, if there was any trouble about the terms of the agreement or the conditions on which the deed was to be made by the father to the son. *Frame v. Frame*, 32 W. Va. 463.

Contract Lost — Evidence Conflicting. — *Van Buren v. Stocking*, 86 Mich. 246.

2. Interests of Third Parties. — *Warder v. Cornell*, 105 Ill. 169; *Gray v. Crockett*, 35 Kan. 66; *Grummett v. Gingrass*, 77 Mich. 369; *Gariss v. Gariss*, 16 N. J. Eq. 79; *Van Doren v. Robinson*, 16 N. J. Eq. 256; *Porter v. Dougherty*, 25 Pa. St. 405; *Insurance Co. v. Union Canal Co.*, *Bright*. (Pa.) 48; *Frame v. Frame*, 32 W. Va. 463. And see *Stone v. Tyree*, 30 W. Va. 687.

Agreement to Give Mortgage. — An agreement to execute a mortgage will be treated in equity as a mortgage only when it can be done consistently with the rights and equities of others, and in a reasonable time after the promise was made. As against other creditors of the debtor it cannot be enforced after a delay of eleven years, and eight years after the debtor's death. *Nelson v. Hagerstown Bank*, 27 Md. 51.

3. Ewing v. Beauchamp, 6 B. Mon. (Ky.) 422. And see also cases cited in preceding note.

4. Mathews v. Davis, 102 Cal. 202; *Newberry v. French*, 98 Va. 479.

5. Seculovich v. Morton, 101 Cal. 673, 40 Am. St. Rep. 106; *Morse v. Seibold*, 147 Ill. 318; *Davis v. Petty*, 147 Mo. 374; *Brown v. Massey*, 138 Mo. 519; *Love v. Welch*, 97 N. Car. 200.

6. Brown v. Massey, 138 Mo. 519.

7. Gish v. Jamison, 96 Va. 312.

8. See Young Lock Nut Co. v. Brownley Mfg. Co., (N. J. 1896) 34 Atl. Rep. 947.

Entire Contract Partly Illegal. — A contract by which one party sold to the other a building, with a quantity of intoxicating liquors, and bar fixtures contained in the building, for a gross sum, without fixing a separate price for the real estate, or the intoxicating liquors, or the fixtures, and neither party had a permit to sell intoxicating liquors, and the liquors were not purchased for medical, scientific, or mechanical purposes, such contract being entire and indivisible, is

specific performance of particular stipulations, to be separated and dealt with apart from the rest of the contract, if they do not clearly appear by the contract to stand by themselves wholly unaffected by the other portions thereof.¹

2. Separable Contracts. — The rule that the whole contract must be enforced or no part of it will be, does not apply where the part which cannot be enforced is separable from the other.²

3. Acceptance in Full of Part Performance. — It is no defense to a bill for specific performance that the defendant can only partially perform, if the complainant, having fully performed on his part, is willing to accept such partial performance as the defendant is able to make in full performance of the contract.³

4. Where Vendor's Title Defective. — A vendee may also enforce a conveyance of land, although the vendor's title thereto be defective, as the vendor will not be permitted to take advantage of the weakness of his own title.⁴ The complainant is, in any event, entitled to such a deed as the defendant can give.⁵

5. Contract of Tenant in Common. — Where a tenant in common executes a contract for the sale of the property in his own name, and also, but without authority, in the name of his co-tenant, and the co-tenant repudiates the act, performance by the signing tenant may be specifically enforced as to his interest on payment of his share of the price.⁶ But the contrary, it seems, would be the rule in the absence of any bad faith on the part of the joint tenant, or misrepresentation as to the extent of his authority.⁷

6. Partial Performance with Compensation for Residue — *a. GENERAL RULE.* — Where a party has entered into a contract which he is only partially able to perform, he will not, as a rule, be permitted to plead his own incapacity in bar of all equitable relief, but performance of such portion as he is able to perform may be decreed, with pecuniary compensation for the residue, or an abatement of the purchase price as to that portion of the property which cannot be acquired.⁸ So where a husband has entered into a contract of sale,

void as in contravention of the prohibitory liquor law, and cannot be made the basis of a suit for specific performance. *Gerlach v. Skinner*, 34 Kan. 86, 55 Am. Rep. 240.

1. Baldwin v. Fletcher, 48 Mich. 604.

Articles of Separation — Husband and Wife. — A stipulation contained in articles of separation to pay an allowance to the wife may be enforced in equity, but the stipulation to live apart will not be decreed to be specifically performed. *Aspinwall v. Aspinwall*, 49 N. J. Eq. 302.

2. Separable Contracts. — *Lawrence v. Saratoga Lake R. Co.*, 36 Hun (N. Y.) 475. And see *Ogden v. Fossick*, 4 De G. F. & J. 426; *Powell v. Elliot*, L. R. 10 Ch. 424; *Wilkinson v. Clements*, L. R. 8 Ch. 96.

Affirmative and Negative Covenants. — So, though specific performance of the affirmative provisions of a contract may be impracticable through difficulty of enforcement, the court may in effect decree performance of negative covenants by means of injunctive relief. *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y. 60, 68 Am. St. Rep. 749.

3. Bull v. Bell, 4 Wis. 54. And see *Waters v. Travis*, 9 Johns. (N. Y.) 450.

4. Vendor's Title Defective No Defense. — *St. Louis, etc., R. Co. v. Beidler*, 45 Ark. 17; *Bragg v. Olson*, 128 Ill. 540; *Litsey v. Whittemore*, 111 Ill. 267; *Harding v. Parshall*, 56 Ill. 219; *Anderson v. Kennedy*, 51 Mich. 467; *Gartrell v. Stafford*, 12 Neb. 545, 41 Am. Rep. 767; *Peters v. Delaplaine*, 49 N. Y. 362; *Voorhees v. De Myer*, 3 Sandf. Ch. (N. Y.) 614;

Love v. Camp, 6 Ired. Eq. (41 N. Car.) 209, 51 Am. Dec. 419; *Corson v. Mulvany*, 49 Pa. St. 88, 88 Am. Dec. 485; *Dalzell v. Crawford*, 2 Pa. L. J. 16, 1 Pa. L. J. Rep. 155; *Roberts v. Lovejoy*, 60 Tex. 253.

Conveyance Subject to Support and Maintenance. — *Downer v. Church*, 44 N. Y. 647.

Use of Land as Highway. — *Canham v. Mooney*, 73 Mich. 184.

Pending Litigation as to Title. — *Bragg v. Olson*, 128 Ill. 540.

5. Brown v. Ward, 110 Iowa 123; *Graft v. Loucks*, 138 Pa. St. 453.

Conveyance Subject to Incumbrance. — *Jérôme v. Scudder*, 2 Robt. (N. Y.) 169.

6. Keator v. Brown, 57 N. J. Eq. 600.

7. Lumley v. Ravenscroft, (1895) 1 Q. B. 683; *Cochran v. Blout*, 161 U. S. 350.

Where a Husband and Wife Own Separate Undivided Interests in a house and lot where they live and carry on a hotel business, and have jointly agreed to sell the whole property together for a fixed sum, the husband cannot be held to have intended to sell his undivided interest apart from that of the wife, and if she fails or refuses to acknowledge the contract or to convey her interest in the property, equity will not compel a conveyance by the husband of his separate undivided interest in the property. *Jackson v. Torrence*, 83 Cal. 521.

8. Part Performance and Compensation — *United States*. — *May v. Le Claire*, 11 Wall. (U. S.) 217.

Alabama. — *Bogan v. Daughdrill*, 51 Ala.

and his wife refuses to join in the deed for the extinguishment of her dower right, it has been held that performance by the husband may be decreed with compensation or abatement for the wife's dower interest,¹ or indemnity may be required against loss by the wife's claim for dower.²

b. WHEN GENERAL RULE DOES NOT APPLY. — The rule that when a person makes a contract for the sale of real estate in which he has only a limited interest, he may be compelled in equity to convey as much of the property as lies in his power to convey, with a deduction from the agreed price for so much as he has no power to convey, does not apply where the purchaser at the time of the sale had notice of the defect in the vendor's title.³

c. CONTRACT UNCERTAIN AS TO PART. — It has been held that where a part of a written contract for the conveyance of lands is incapable of enforcement because of uncertainty, it will not be enforced as to the residue with compensation, when the residue and the compensation could be ascertained only by parol.⁴

312; *Bell v. Thompson*, 34 Ala. 633; *Bass v. Gilliland*, 5 Ala. 761; *Weatherford v. James*, 2 Ala. 170.

Arkansas. — *Bonner v. Little*, 38 Ark. 397; *Meek v. Walthall*, 20 Ark. 648.

California. — *Marshall v. Caldwell*, 41 Cal. 611.

Georgia. — *Seegar v. Smith*, 78 Ga. 616.

Indiana. — *Wilson v. Brumfield*, 8 Blackf. (Ind.) 146.

Kentucky. — *Jones v. Shackleford*, 2 Bibb (Ky.) 410; *Rankin v. Maxwell*, 2 A. K. Marsh. (Ky.) 488, 12 Am. Dec. 431.

Massachusetts. — *Woodbury v. Luddy*, 14 Allen (Mass.) 1, 92 Am. Dec. 731.

Michigan. — *Covell v. Cole*, 16 Mich. 223.

Mississippi. — *Mathews v. Patterson*, 2 How. (Miss.) 729.

Missouri. — *Luckett v. Williamson*, 31 Mo. 54.

New York. — *Bostwick v. Beach*, 103 N. Y. 422; *Lawrence v. Saratoga Lake R. Co.*, 36 Hun (N. Y.) 475; *Morss v. Elmendorf*, 11 Paige (N. Y.) 277. And see *Waters v. Travis*, 9 Johns. (N. Y.) 450.

North Carolina. — *Jacobs v. Locke*, 2 Ired. Eq. (37 N. Car.) 286; *Henry v. Liles*, 2 Ired. Eq. (37 N. Car.) 407.

Ohio. — *Ketchum v. Stout*, 20 Ohio 453.

Tennessee. — *Collins v. Smith*, 1 Head (Tenn.) 251.

Texas. — *Roberts v. Lovejoy*, 60 Tex. 253.

Virginia. — *Evans v. Kingsberry*, 2 Rand. (Va.) 120, 14 Am. Dec. 779; *White v. Dobson*, 17 Gratt. (Va.) 262.

West Virginia. — *Mongan v. Brast*, 34 W. Va. 332; *Stockton v. Union Oil, etc., Co.*, 4 W. Va. 273.

Wisconsin. — *Doctor v. Hellberg*, 65 Wis. 415; *Wright v. Young*, 6 Wis. 127, 70 Am. Dec. 453.

But compare *Rugge v. Ellis*, 1 Desaus. (S. Car.) 160.

1. *Illinois.* — *Hall v. Hall*, 125 Ill. 95; *Humphrey v. Clement*, 44 Ill. 299.

Indiana. — *Martin v. Merritt*, 57 Ind. 34, 26 Am. Rep. 45; *Hazelrig v. Hutson*, 18 Ind. 481; *Wingate v. Hamilton*, 7 Ind. 73; *Wilson v. Brumfield*, 8 Blackf. (Ind.) 146.

Iowa. — *Presser v. Hildenbrand*, 23 Iowa 483.

Massachusetts. — *Davis v. Parker*, 14 Allen

(Mass.) 94; *Woodbury v. Luddy*, 14 Allen (Mass.) 1, 92 Am. Dec. 731; *Park v. Johnson*, 4 Allen (Mass.) 259.

Minnesota. — *Sanborn v. Nockin*, 20 Minn. 178.

New York. — *Bostwick v. Beach*, 103 N. Y. 414; *Sternberger v. McGovern*, 56 N. Y. 19.

Wisconsin. — *Wright v. Young*, 6 Wis. 127, 70 Am. Dec. 453.

But where the owner of a tract of land and his wife signed a contract by which they jointly agreed to sell the land to another, and to convey it by deed of general warranty, but there was no provision for a release of dower by the wife, and at the time agreed on for performance the wife, without any advice or procurement on the part of her husband, refused to join in the execution of the deed, it was held that specific performance should not be decreed against the husband with an abatement in the value of the price of the dower right. *Lucas v. Scott*, 41 Ohio St. 636.

How Value of Dower Computed. — *Hazelrig v. Hutson*, 18 Ind. 481. See *Humphrey v. Clement*, 44 Ill. 299.

But in *Pennsylvania* the courts have held that where the vendor's wife refuses to join in his deed the vendee cannot compel a conveyance of the husband's sole interest unless he is willing to pay the full purchase price for both estates and accept the vendor's deed alone, and they relegate the vendee to the courts at law for relief. *Riesz's Appeal*, 73 Pa. St. 485. And see *Burk's Appeal*, 75 Pa. St. 141, 15 Am. Rep. 587; *Corson v. Mulvany*, 49 Pa. St. 88, 88 Am. Dec. 485; *Clark v. Seirer*, 7 Watts (Pa.) 107, 32 Am. Dec. 745; *Hanna v. Phillips*, 1 Grant Cas. (Pa.) 253; *Harrigan v. McAleese*, (Pa. 1888) 16 Atl. Rep. 31.

2. *Young v. Paul*, 10 N. J. Eq. 401, 64 Am. Dec. 456.

But a Decree of Indemnity Will Be Made Only where it appears that the wife's refusal to convey is not her voluntary act but is made in bad faith, by the device of the husband, to escape his just obligation. *Peeler v. Levy*, 26 N. J. Eq. 330. And see *Blake v. Flatley*, 44 N. J. Eq. 228, 6 Am. St. Rep. 886.

3. *Knox v. Spratt*, 23 Fla. 64.

4. *King v. Ruckman*, 20 N. J. Eq. 316, reversed on other grounds 21 N. J. Eq. 599. And see *Youell v. Allen*, 18 Mich. 108.

d. RULE AS TO VENDEE. — As a general rule, where a vendor is unable completely to perform his contract, the vendee will not be required to accept a part.¹ But if the vendee is willing to accept a part performance with a proportionate abatement of the price, a decree will be rendered accordingly.² Indeed, circumstances are conceivable in which a vendee might be required to accept a partial performance with compensation, as where the deficiency is slight and does not go to the consideration of the contract, and the vendor has acted in good faith.

XI. DAMAGES IN LIEU OF OR IN ADDITION TO SPECIFIC PERFORMANCE —

1. Damages in Lieu of Performance — *a. GENERAL RULE.* — Where performance of the contract sought to be enforced has become impracticable or impossible by reason of the destruction of the subject-matter or the conveyance thereof by the defendant to an innocent third person, a court of equity, while refusing to grant specific enforcement, may retain the cause for the assessment of such damages as the plaintiff may show himself to have sustained.³

b. CONTRACT VOID BY STATUTE OF FRAUDS. — Where the contract of which performance is sought is void by the statute of frauds, the vendee may, nevertheless, have a decree for any payments of purchase money, which will be declared a lien on the land.⁴

1. *Lawrence v. Saratoga Lake R. Co.*, 36 Hun (N. Y.) 475.

Where a contract to convey lands is void as to a part, the court, in an action for specific performance of the whole contract, cannot decree a conveyance of the part as to which the contract is valid, unless the plaintiff elects to take such partial conveyance. *Donner v. Redenbaugh*, 61 Iowa 269.

Where Vendor Retains Part of Land. — A vendor cannot enforce specific performance as to a part only of the land which he agreed to convey. *Hill v. Rich Hill Coal Min. Co.*, 119 Mo. 9.

2. *Leigh v. Crump*, 1 Ired. Eq. (36 N. Car.) 299.

3. Damages in Lieu of Performance — *United States.* — *Pratt v. Law*, 9 Cranch (U. S.) 456.

Alabama. — *Eastman v. Reid*, 101 Ala. 320; *Hooper v. Savannah, etc.*, R. Co., 69 Ala. 529; *Kelly v. Allen*, 34 Ala. 663; *Aday v. Echols*, 18 Ala. 353, 52 Am. Dec. 225; *Goodwin v. Lyon*, 4 Port. (Ala.) 314.

Connecticut. — *Thresher v. Stonington Sav. Bank*, 68 Conn. 201.

Illinois. — *Greer v. Sellers*, 64 Ill. App. 505.
Iowa. — *Cornell v. Rodabaugh*, 117 Iowa 287.

Kentucky. — *Fisher v. Kay*, 2 Bibb (Ky.) 434; *Slaughter v. Tindle*, 1 Litt. (Ky.) 358.

Massachusetts. — *Eastman v. Simpson*, 139 Mass. 348; *Wonson v. Fenno*, 129 Mass. 405; *Milkman v. Ordway*, 106 Mass. 232; *Andrews v. Brown*, 3 Cush. (Mass.) 130.

Missouri. — *Hamilton v. Hamilton*, 59 Mo. 232.

New York. — *Miles v. Dover Furnace Iron Co.*, 125 N. Y. 294, 53 Hun (N. Y.) 632; *Margraf v. Muir*, 57 N. Y. 159; *Colman v. Dixon*, 50 N. Y. 574; *Bradley v. Aldrich*, 40 N. Y. 509, 100 Am. Dec. 528; *Lewis v. Mott*, 36 N. Y. 399; *Barlow v. Scott*, 24 N. Y. 40; *Woodward v. Harris*, 2 Barb. (N. Y.) 442; *Donath v. Germania Land Co.*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 641; *Phillips v. Thompson*, 1 Johns. Ch. (N. Y.) 131; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. (N. Y.) 273; *Mowbray v. Dieck-*

man, 9 N. Y. App. Div. 120; *O'Beirne v. Bullis*, 2 N. Y. App. Div. 545.

Ohio. — *Columbus, etc.*, R. Co. *v. Steinfeld*, 42 Ohio St. 449; *Williams v. Champion*, 6 Ohio 169; *Chapman v. Mad River, etc.*, R. Co., 6 Ohio St. 119.

Pennsylvania. — *Huffman v. Bradshaw*, 30 Pittsb. Leg. J. N. S. (Pa.) 367; *Bartol v. Shaffer*, 7 North. Co. Rep. (Pa.) 217.

Washington. — *Cunningham v. Duncan*, 4 Wash. 506.

Wisconsin. — *James v. Cutler*, 54 Wis. 178; *Benson v. Cutler*, 53 Wis. 107.

See also *Ray v. Wilcoxon*, 107 N. Car. 514; *Deeds v. Stephens*, (Idaho 1902) 69 Pac. Rep. 534.

Money Decree for Proceeds of Land. — *Oliver v. Crosswell*, 42 Ill. 41.

Where There Has Been a Contract to Convey Shares in a Corporation Never Organized by reason of the fault of the obligor, while specific performance cannot be decreed, the payment of a sum of money as the equivalent of the stock may be required. *Burton v. Shotwell*, 13 Bush (Ky.) 271.

Recovery of Stipulated Sum. — When a vendor brings a suit for specific performance, the jurisdiction of the court attaches, and it may go on to do complete justice, though in its progress it may decree on a matter which was cognizable at law. Thus, where the contract provided that the vendee might relieve himself from it by paying a penalty, the court will decree payment of the penalty. *Cathcart v. Robinson*, 5 Pet. (U. S.) 264. *Compare Stevenson v. Buxton*, (Supm. Ct. Spec. T.) 8 Abb. Pr. (N. Y.) 414.

And Where the Wife of the Vendor Refuses to Join in the Contract, the court may award damages in lieu of performance, *Plum v. Mitchell*, (Ky. 1894) 26 S. W. Rep. 391; which may include, with the amount of purchase money paid, the cost of the proceedings in equity for the enforcement of the contract. *Huffman v. Bradshaw*, 17 Pa. Super. Ct. 205.

4. Statute of Frauds. — *Mialhi v. Lassabe*, 4 Ala. 712; *Johnston v. Glancy*, 4 Blackf. (Ind.) 94, 28 Am. Dec. 45; *Devore v. Devore*, 138 Mo.

c. VOLUNTARY CONVEYANCE — COMPENSATION FOR IMPROVEMENTS. — While specific performance may be denied of a voluntary contract for the conveyance of land, the donee who went into possession and erected improvements thereon may be awarded compensation for their value.¹

d. WHERE SPECIFIC PERFORMANCE INEQUITABLE. — In *New York* it has been held that where specific performance of a contract has been rendered inequitable by reason of subsequent events, damages may be given in lieu of enforcement.²

e. WHERE PLAINTIFF KNEW PERFORMANCE IMPOSSIBLE. — It has been held that where a plaintiff in an action for specific performance is shown to have known when he instituted his suit that performance was impossible, the cause will not be retained for an assessment of damages, but the bill will be dismissed and the party left to his legal remedy.³

f. PERFORMANCE REFUSED BY REASON OF PLAINTIFF'S FRAUD OR DEFAULT. — Whenever a court of equity declines, by reason of a default on the part of the plaintiff, to decree a specific performance of a contract in his favor, it will also decline to award him damages for the breach.⁴ And where a decree for the performance of a contract to exchange lands is refused on the ground of the complainant's fraud, the defendant, who sets up by cross-bill the payment of money under the contract, may have a decree for its repayment.⁵

g. CASE MADE MUST CALL FOR EQUITABLE RELIEF. — It is well settled in the present connection that a court of equity will not grant pecuniary compensation in lieu of performance, unless the case made out is one for equitable interposition and would entitle the plaintiff to performance *in specie* but for the intervening facts.⁶

2. Damages in Addition to Performance. — It has been held that a court of equity in an action of specific performance may give full and complete relief by awarding the plaintiff not only the conveyance to which he is entitled but also such damages as have flowed from the defendant's default, to be ascertained in any manner which the court in its discretion approves.⁷ And where

181; *Phillips v. Thompson*, 1 Johns. Ch. (N. Y.) 131; *Capps v. Holt*, 5 Jones Eq. (58 N. Car.) 153; *Hilton v. Duncan*, 1 Coldw. (Tenn.) 313.

1. *Boze v. Davis*, 14 Tex. 331.

2. *Hart v. Brown*, (Supm. Ct. Eq. T.) 6 Misc. (N. Y.) 238.

3. Impossibility of Performance Known to Plaintiff. — *Mack v. McIntosh*, 181 Ill. 633; *Sellers v. Greer*, 172 Ill. 549; *McQueen v. Chouteau*, 20 Mo. 222, 64 Am. Dec. 178; *Bartol v. Shaffer*, 7 Northam Co. Rep. (Pa.) 217; *Cunningham v. Duncan*, 4 Wash. 506. See also *Jones v. Tunis*, 99 Va. 220; *Ellett v. Wade*, 47 Ala. 456; *Barlow v. Scott*, 24 N. Y. 40.

4. *Chase v. Hogan*, (N. Y. Super. Ct. Gen. T.) 3 Abb. Pr. N. S. (N. Y.) 57.

When Case Should Be Sent to Jury. — *Goldthwait v. Lynch*, 9 Utah 186.

5. *Hess v. Evans*, (N. J. 1888) 15 Atl. Rep. 310.

6. Case Must Call for Equitable Relief. — *Sims v. McEwen*, 27 Ala. 184; *Townsend v. Vanderwerker*, 20 D. C. 197; *Lewis v. Yale*, 4 Fla. 418; *Bourget v. Monroe*, 58 Mich. 563; *Black v. Black*, 15 Ga. 445; *Scott v. Billgerry*, 40 Miss. 119; *Cooley v. Lobdell*, 153 N. Y. 596; *Matthews v. Matthews*, 133 N. Y. 679; *Wiswall v. McGowan*, Hoffm. (N. Y.) 125; *Chase v. Hogan*, (N. Y. Super. Ct. Gen. T.) 3 Abb. Pr. N. S. (N. Y.) 57; *Konnerup v. Frandsen*, 8 Wash. 551.

Repayment of Purchase Money. — Where an action has been brought for the enforcement of a contract to convey land, in which relief was refused because the writing relied upon was not sufficiently explicit or the contract was indefinite in its terms, it is not within the power of the court to decree a repayment of the purchase money, because this should be recoverable at law. *Murdock v. Anderson*, 4 Jones Eq. (57 N. Car.) 77; *Park v. Minneapolis, etc., R. Co.*, 114 Wis. 347. And see *Ellis v. Ellis*, 1 Dev. Eq. (16 N. Car.) 402.

Possession and Improvements. — But it was held in another case that although specific performance may be refused to a purchaser of real estate when the evidence does not satisfactorily establish the contract as alleged, yet the court may allow compensation when it appears that the party entered into possession under the contract, paid a part of the purchase money, and made valuable improvements, and the compensation decreed may be declared a charge on the land. *Allen v. Young*, 88 Ala. 338.

7. *Worrall v. Munn*, 38 N. Y. 137.

In an Action to Compel the Delivery of Certain Promissory Notes according to contract equity may decree payment by the defendant of an amount which the plaintiff has been compelled to pay on account of the contract, without sending the parties to law as to such matter. *Clarke v. White*, 12 Pet. (U. S.) 178.

there is a defect in the title of the property or a deficiency in subject-matter susceptible of pecuniary estimate, a performance may be decreed with such compensation as is fair and just.¹ Where a court of equity has jurisdiction to decree specific performance of a contract in part, it will award damages for the breach of so much of it as cannot be specifically executed instead of sending the party to his remedy at law.²

XII. CONTRACTS CLASSIFIED ACCORDING TO NATURE AND SUBJECT-MATTER —

1. In General. — It may be stated as a general rule, subject to the exceptions hereinafter noted, that the extraordinary jurisdiction of chancery for the specific enforcement of contracts extends to almost every class of agreements which admit of no adequate remedy at law in damages for their breach.³

Mere Duty to Enter into Contract. — But in certain instances courts of equity have refused to enforce a mere duty to make a contract as distinguished from a contract itself.⁴

Contracts with Corporations. — Contracts with corporations constitute no exception to the jurisdiction of chancery to decree specific performance. Whether the corporation be domestic or foreign, municipal or private, a court of equity exercises the same jurisdiction over its acts and contracts with reference to specific performance as it does over the acts and contracts of private individuals.⁵ But this statement presupposes, in the case of foreign corporations, that jurisdiction of the corporation be obtained as required by law, by the regular service of process upon the corporation, or that jurisdiction be obtained by attachment of property.⁶

2. Adoption. — Contracts for the adoption of children may be specifically enforced;⁷ and though an instrument may be invalid as a contract of adoption, it may be valid as a contract to make a certain testamentary provision for the obligee who has fully performed on his part.⁸

3. Alternative Contracts — *a. IN GENERAL.* — A court of equity will not enforce an alternative contract, because a decree for specific performance must be definite and certain, and a party will not be required to exercise an option

1. *Low v. Low*, 177 Mass. 306; *Melick v. Cross*, 62 N. J. Eq. 545. And see *Beyer v. Marks*, 2 Sweeny (N. Y.) 715.

When Compensation Improper. — Where a purchaser files a bill for the rescission or specific performance of the contract, and fails to establish either branch of his case, his bill cannot be retained, in the absence of some other special equity, for the purpose of decreeing compensation on account of a deficiency in the quantity of land conveyed to him. *Harrison v. Deramus*, 33 Ala. 465.

Suit to Compel Conveyance for Less than Agreed Price. — *Levy v. Hill*, 50 N. Y. App. Div. 294.

2. *Lyle v. Addicks*, 62 N. J. Eq. 123; *Chinn v. Heale*, 1 Munf. (Va.) 63. And see *Davis v. Parker*, 14 Allen (Mass.) 94; *Woodbury v. Luddy*, 14 Allen (Mass.) 1, 92 Am. Dec. 731; *King v. Bardeau*, 6 Johns. Ch. (N. Y.) 38, 10 Am. Dec. 312; *Post v. West Shore R. Co.*, 50 Hun (N. Y.) 301. See also *supra*, this title, *Partial Performance*.

3. See *Foubert v. Turst*, 1 Bro. P. C. (Toml. ed.) 129; *March v. Eastern R. Co.*, 40 N. H. 548, 77 Am. Dec. 732.

4. **Duty to Make Contract.** — Thus, it has been held that a bill in equity by one who claims to be the highest bidder at an auction sale of land, against the auctioneer and the person to whom the land was struck off, to compel the auctioneer to sign a memorandum declaring the plaintiff to be the purchaser, cannot be maintained.

Marcus v. Boston, 136 Mass. 350. In this case the court observed: "It is quite plain that the bill cannot be maintained to enforce the specific performance of a duty to make such a contract, which is the only relief sought."

5. *Roberts v. Cambridge*, 164 Mass. 176. See *Hooper v. Savannah*, etc., R. Co., 69 Ala. 529; *Desper v. Continental Water Meter Co.*, 137 Mass. 252; *Jones v. Boston Mill Corp.*, 4 Pick. (Mass.) 507, 16 Am. Dec. 358; *Cushman v. Thayer Mfg. Jewelry Co.*, 76 N. Y. 373, 32 Am. Rep. 315. Compare *Covington Gaslight Co. v. Covington*, 58 S. W. Rep. 805, 22 Ky. L. Rep. 796.

Contract with County — Fraudulent Representations. — Specific performance will not be decreed to compel a county to perform its contract to convey certain of its lands, where electors were induced to vote for the contract by the fraudulent promises and representations of the purchaser. *Palo Alto County v. Harrison*, 68 Iowa 81.

6. *Desper v. Continental Water Meter Co.*, 137 Mass. 252.

7. **Adoption of Children.** — *Burns v. Smith*, 21 Mont. 251, 69 Am. St. Rep. 653; *Healy v. Healy*, 167 N. Y. 572, 55 N. Y. App. Div. 315; *Merchant v. White*, (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 376.

8. *Burns v. Smith*, 21 Mont. 251, 69 Am. St. Rep. 653; *Godine v. Kidd*, 64 Hun (N. Y.) 585.

and to proceed to take one of the alternatives mentioned in the contract.¹ But a contract originally in the alternative may be enforced, where it has become definite and certain by reason of the fact that one alternative has become impossible of performance.² Likewise where one alternative is not susceptible of specific enforcement on account of its uncertainty, performance may be decreed of the other if not liable to the same objection.³

b. ALTERNATIVE TO PAY MONEY. — Where there is a mere alternative contract to perform a certain act or pay a stipulated sum, equity will not decree performance of the act, because the contract is construed as giving the obligor the option to perform or pay the sum stated.⁴

c. LIQUIDATED DAMAGES. — It has been said that a suit for specific performance cannot be maintained on a contract which provides for liquidated damages on a default.⁵ But if it appears from a construction of the whole contract that the object of the provision for liquidated damages was not to give the obligor an election to pay the damages instead of performing, but to secure performance of the contract, specific performance may still be decreed.⁶ So a bond for a deed which provides for the payment of a certain sum in case of a failure to convey will be regarded in equity as a contract for the sale of land, and as such may be specifically enforced.⁷

d. FORFEITURE TO SECURE PERFORMANCE. — Where the provision for forfeiture in case of default is clearly to secure performance and not to give an election not to perform, specific performance will be decreed.⁸

e. FORFEITURE UPON NONPERFORMANCE. — But it has been held that a court of equity will not specifically enforce a covenant in a deed, where the deed itself provides for a forfeiture of the estate upon nonperformance. In such a case the grantor is regarded as having fixed his remedy, by which he must abide.⁹

f. ELECTION BETWEEN ALTERNATIVES. — A contract in the alternative may be specifically enforced. If one alternative is void, performance of the other may be decreed. If both are enforceable, and the obligor refuses to perform either, then either may be enforced at the option of the obligee.¹⁰ So, also, an undertaking to pay a debt on a day certain or execute a mortgage on particular property to secure the same is not unenforceable as an alternative contract, the obligee having the right, on default in payment, to proceed for specific performance of the contract for a mortgage.¹¹

4. Arbitration — *a. GENERAL RULE.* — It has been held as a general rule that executory contracts of arbitration, or to refer questions of price or value

1. *Armour v. Connolly*, (N. J. 1901) 49 Atl. Rep. 1117.

But Where the Agreement Was to Sell or Lease, specific performance was decreed, the court observing: "The contract binds the defendant either to pay such value or execute a new lease. It is bound to perform its contract by availing itself of one or the other of these alternatives." *Smith v. St. Philip's Church*, 107 N. Y. 610.

2. *Armour v. Connolly*, (N. J. 1901) 49 Atl. Rep. 1117.

3. *Greenleaf v. Blakeman*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 564.

4. *Alternative to Pay Money.* — *Amanda Gold Min., etc., Co. v. People's Min., etc., Co.*, 28 Colo. 251. See *Smith v. Washington Gas Light Co.*, 154 U. S. 559.

Contract to Make Will. — Specific performance of a contract to make a will in a particular manner cannot be enforced where the contract is in the alternative either to make the will or pay a sum of money. *Barrett v. Geisinger*, 179 Ill. 240.

5. *Liquidated Damages.* — *Dukes v. Bash*, 29

Ind. App. 103. And see *Hoskins v. Dougherty*, (Tex. Civ. App. 1902) 69 S. W. Rep. 103; *Kleinschmidt v. Kleinschmidt*, 9 Mont. 477.

6. *Brown v. Norcross*, 59 N. J. Eq. 427. And see *Black v. Maddox*, 104 Ga. 159.

Arbitrary and Wilful Breach. — *O'Connor v. Tyrrell*, 53 N. J. Eq. 15.

Contract Between Tenants in Common. — *Hoffman v. Hoffman*, 52 N. Y. App. Div. 297.

7. *Thornburgh v. Fish*, 11 Mont. 53. And see *Plunkett v. Methodist Episcopal Soc.*, 3 Cush. (Mass.) 561; *Ensign v. Kellogg*, 4 Pick. (Mass.) 1. See also *infra*, this section, *Bonds*.

8. *Amanda Gold Min., etc., Co. v. People's Min., etc., Co.*, 28 Colo. 251.

9. *Woodruff v. Trenton Water Power Co.*, 10 N. J. Eq. 489. And see *Espert v. Wilson*, 190 Ill. 629, *affirming* 90 Ill. App. 111.

10. *Greenleaf v. Blakeman*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 564, 40 N. Y. App. Div. 371.

11. *Bridgeport Electric, etc., Co. v. Meader*, (C. C. A.) 72 Fed. Rep. 115; *Allender v. Evans-Smith Drug Co.*, 3 Indian Ter. 628.

to arbitrators or referees, will not be specifically enforced in equity,¹ nor will arbitrators be compelled to make an award.² And where it is agreed that all matters of difference between the parties shall be finally settled by arbitration, one party has no standing in court to enforce the contract, if he fails to show a refusal by the other party to arbitrate as agreed on.³

Where Contract Incomplete or Uncertain. — Where a contract to submit to arbitration or to ascertain price or value is itself incomplete or uncertain, it will not be specifically enforced.⁴

b. EXCEPTIONS TO GENERAL RULE. — But where the agreement has been acted upon by the parties, and partially executed by them, or where the fixing of the price or value is not of the essence of the agreement, the court may enforce the contract and ascertain for itself what the price or value should be.⁵ So where a valid contract has been entered into for the renewal of a lease by which it is provided that the amount of rent to be paid shall be settled by arbitration, and the party who is to give the lease refuses to appoint an arbitrator, a court of equity will compel a specific performance and order a reference to ascertain what the amount of the rent should be.⁶ So also, as no man should be permitted to take advantage of his own wrong, if a person agrees to sell an estate at a price to be fixed by referees to come upon the land, and thereby prevents the valuation from being made within the prescribed time, specific performance may be decreed.⁷

5. Awards. — When the matter in dispute has been submitted to arbitrators and an award made, equity will require the parties to execute the award, which is treated as the formal contract of the parties.⁸ Thus a bill in equity

1. Contract to Submit to Arbitration — *England*. — *Gourlay v. Somerset*, 19 Ves. Jr. 431; *Street v. Rigby*, 6 Ves. Jr. 815; *Mitchell v. Harris*, 2 Ves. Jr. 129; *Vickers v. Vickers*, L. R. 4 Eq. 529; *Agar v. Mackle*, 2 Sim. & St. 418. And see *Waters v. Taylor*, 15 Ves. Jr. 10; *Nichols v. Chalie*, 14 Ves. Jr. 265; *Wilks v. Davis*, 3 Meriv. 507.

United States. — *Tobey v. Bristol County*, 3 Story (U. S.) 800; *Union Pac. R. Co. v. Chicago, etc., R. Co.*, (C. C. A.) 51 Fed. Rep. 309. *Maryland*. — *Contee v. Dawson*, 2 Bland (Md.) 277; *Griffith v. Frederick County Bank*, 6 Gill & J. (Md.) 424.

Massachusetts. — *Noyes v. Marsh*, 123 Mass. 286; *Pearl v. Harris*, 121 Mass. 390.

New Hampshire. — *March v. Eastern R. Co.*, 40 N. H. 548, 77 Am. Dec. 732; *Smith v. Boston, etc., R. Co.*, 36 N. H. 487.

New Jersey. — *Woodruff v. Woodruff*, 44 N. J. Eq. 349; *Copper v. Wells*, 1 N. J. Eq. 10.

New York. — *Greason v. Keteltas*, 17 N. Y. 491; *Dunnell v. Keteltas*, (Supm. Ct. Gen. T.) 16 Abb. Pr. (N. Y.) 211. *Compare Smith v. St. Philip's Church*, 107 N. Y. 610.

Ohio. — *Lowe v. Brown*, 22 Ohio St. 463; *Conner v. Drake*, 1 Ohio St. 166.

Rhode Island. — *Grosvenor v. Flint*, 20 R. I. 21.

Wisconsin. — *Hopkins v. Gilman*, 22 Wis. 476.

2. Dunnell v. Keteltas, (Supm. Ct. Gen. T.) 16 Abb. Pr. (N. Y.) 211; *Conner v. Drake*, 1 Ohio St. 166.

3. Lasar v. Baldrige, 32 Mo. App. 362.

4. Incomplete and Uncertain Contracts. — *Graham v. Call*, 5 Munf. (Va.) 396; *Baker v. Glass*, 6 Munf. (Va.) 212.

5. Executed Contract — Ascertainment of Value. — *Union Pac. R. Co. v. Chicago, etc., R. Co.*, (C. C. A.) 51 Fed. Rep. 309; *Coles v. Peck*, 96 Ind. 333, 49 Am. Rep. 161; *Hug v. Van Burk-*

leo, 58 Mo. 202; *Arnot v. Alexander*, 44 Mo. 25, 100 Am. Dec. 252; *Strohmaier v. Zeppenfeld*, 3 Mo. App. 429; *Dunnell v. Keteltas*, (Supm. Ct. Gen. T.) 16 Abb. Pr. (N. Y.) 205; *Viany v. Ferran*, (Supm. Ct. Spec. T.) 5 Abb. Pr. N. S. (N. Y.) 110; *Kelso v. Kelly*, 1 Daly (N. Y.) 419; *Bristol v. Bristol, etc., Water Works*, 19 R. I. 413.

6. Renewal of Lease. — *Springer v. Borden*, 154 Ill. 668; *Johnson v. Conger*, (Supm. Ct. Gen. T.) 14 Abb. Pr. (N. Y.) 195; *Dunnell v. Keteltas*, (Supm. Ct. Gen. T.) 16 Abb. Pr. (N. Y.) 205; *Viany v. Ferran*, (Supm. Ct. Spec. T.) 5 Abb. Pr. N. S. (N. Y.) 110; *Kelso v. Kelly*, 1 Daly (N. Y.) 419. And see *Gourlay v. Somerset*, 19 Ves. Jr. 430; *Gregory v. Mighell*, 18 Ves. Jr. 328. But compare *Whitlock v. Duffield, Hoffm.* (N. Y.) 110, and *Robinson v. Ketteltas*, 4 Edw. (N. Y.) 67, reviewed and distinguished in *Kelso v. Kelly*, 1 Daly (N. Y.) 419.

Periodic Appraisal During Pendency of Lease. — *Lowe v. Brown*, 22 Ohio St. 463. But see *contra*, *Grosvenor v. Flint*, 20 R. I. 21.

7. Morse v. Merest, 6 Madd. 27; *Hefrman v. Babcock*, 103 Ind. 461; *Coles v. Peck*, 96 Ind. 333, 49 Am. Rep. 161; *Dunnell v. Keteltas*, (Supm. Ct. Gen. T.) 16 Abb. Pr. (N. Y.) 211; *Schneider v. Hildenbrand*, 14 Tex. Civ. App. 34.

8. Execution of Award — *England*. — *Blundell v. Brettargh*, 17 Ves. Jr. 232; *Wood v. Griffith*, 1 Swanst. 54; *Norton v. Mascall*, 2 Vern. 24; *Hall v. Hardy*, 3 P. Wms. 187.

United States. — *McNeil v. Magee*, 5 Mason (U. S.) 244.

Alabama. — *Kirksey v. Fike*, 27 Ala. 383, 62 Am. Dec. 768. And see *Jones v. Blalock*, 31 Ala. 180.

Connecticut. — *Story v. Norwich, etc., R. Co.*, 24 Conn. 94.

Georgia. — *Overby v. Thrasher*, 47 Ga. 10.

lies to compel the execution of a deed to land pursuant to an award of arbitrators agreed upon by the parties to settle the boundary line between their adjoining lands.¹ And where an award has been made pursuant to a voluntary submission of the parties in writing, although there may have been no acquiescence in the award by the parties, or agreement for its execution, it may be specifically enforced.² And it has also been held that a clause by which each party binds himself to the other in a certain sum, as a penalty, in case he refuses to abide by and perform the award, does not deprive the court of its power to decree specific performance even though the party refusing to perform the award offers to pay the penalty agreed on.³

6. Antenuptial Contracts. — Antenuptial agreements, of which marriage is the consideration, followed by marriage accordingly, will be specifically enforced where the remedy at law is inadequate.⁴ But it has been held that a parol contract required by the statute of frauds to be in writing, made in consideration of marriage, cannot be enforced even though the marriage be performed.⁵

7. Bonds. — The fact that a contract in the form of a bond contains a liquidated penalty for nonperformance does not necessarily limit one who has suffered from its breach to his legal remedy upon the penal action. He may still have specific performance if that would afford him more adequate and satisfactory redress than the assessment of the penalty in his favor.⁶ So a title bond with a condition and a penalty in a definite sum is in equity enforceable as a contract to convey, and the vendee will not be confined to his action at law for the amount of the penalty, but may select his remedy.⁷ But this statement is, of course, subject to the qualification that where the breach of

Massachusetts. — *Hodges v. Saunders*, 17 Pick. (Mass.) 470; *Jones v. Boston Mill Corp.*, 6 Pick. (Mass.) 148, 4 Pick. (Mass.) 507, 16 Am. Dec. 358; *Caldwell v. Dickinson*, 13 Gray (Mass.) 365; *Penniman v. Rodman*, 13 Met. (Mass.) 382.

Mississippi. — *Cook v. Vick*, 2 How. (Miss.) 882.

New York. — *Maury v. Post*, 55 Hun (N. Y.) 454; *Bouck v. Wilber*, 4 Johns. Ch. (N. Y.) 405.

North Carolina. — *Thompson v. Deans*, 6 Jones Eq. (59 N. Car.) 22.

And see *Bubier v. Bubier*, 24 Me. 42; *Backus's Appeal*, 58 Pa. St. 186.

Decision of Ecclesiastical Council. — See *Stearns v. Bedford First Parish*, 21 Pick. (Mass.) 114.

Award Calling for the Payment of Money. — Equity will enforce an award of arbitrators which provides a specific remedy, or prescribes the execution of a specific act, other than the payment of money. *Story v. Norwich*, etc., R. Co., 24 Conn. 94; *Turpin v. Banton*, Hard. (Ky.) 320.

But a court of equity has jurisdiction to enforce specific execution of an award concerning land, or of an agreement for the sale and purchase of land, which involves the enforcement of an award for the payment of money, if the payment of the money is but a part of the award. *Memphis*, etc., R. Co. v. *Scruggs*, 50 Miss. 284; *Wood v. Shepherd*, 2 Patt. & H. (Va.) 442.

Award Invalid as to Part. — Awarding costs, which it is beyond the power of the arbitrators to do, is no ground for refusing specific performance of the residue of the award. *Caldwell v. Dickinson*, 13 Gray (Mass.) 365.

Clerical Irregularity Rendering Award Void in Law. — *Buy's v. Eberhardt*, 3 Mich. 524.

1. *Caldwell v. Dickinson*, 13 Gray (Mass.) 365.

2. *Jones v. Boston Mill Corp.*, 4 Pick. (Mass.) 507, 16 Am. Dec. 358; *Buy's v. Eberhardt*, 3 Mich. 524.

3. *Whitney v. Stone*, 23 Cal. 275.

4. **Antenuptial Contracts.** — *Bell v. Sappington*, 111 Ga. 391; *Hull v. Hull*, 117 Iowa 63; *Sullings v. Sullings*, 9 Allen (Mass.) 234; *Sullings v. Richmond*, 5 Allen (Mass.) 187, 81 Am. Dec. 742; *Thompson v. Tucker-Osborn*, 111 Mich. 470; *Nowack v. Berger*, 133 Mo. 24, 54 Am. St. Rep. 663; *White v. White*, 20 N. Y. App. Div. 560; *Brooks v. Austin*, 95 N. Car. 474.

5. **Statute of Frauds.** — *Russell v. Russell*, 60 N. J. Eq. 282; *Dygart v. Remerschnider*, 32 N. Y. 629; *Reade v. Livingston*, 3 Johns. Ch. (N. Y.) 481, 8 Am. Dec. 520; *Ennis v. Ennis*, 48 Hun (N. Y.) 11; *Brown v. Conger*, 8 Hun (N. Y.) 625; *Hunt v. Hunt*, 55 N. Y. App. Div. 430; *Whyte v. Denike*, 53 N. Y. App. Div. 320; *Lamb v. Lamb*, 18 N. Y. App. Div. 250. And see *Caton v. Caton*, L. R. 1 Ch. 148; *Montacute v. Maxwell*, 1 P. Wms. 620; *Lassence v. Tierney*, 1 Macn. & G. 571; *Manning v. Riley*, 52 N. J. Eq. 44. And see also *Bell v. Sappington*, 111 Ga. 391. But compare *Nowack v. Berger*, 133 Mo. 24, 54 Am. St. Rep. 663.

6. **Bonds.** — *Broadwell v. Broadwell*, 6 Ill. 599; *Daily v. Litchfield*, 10 Mich. 29; *Gordon v. Brown*, 4 Ired. Eq. (39 N. Car.) 399; *Gillis v. Hall*, 7 Phila. (Pa.) 422; *Telfair v. Telfair*, 2 Desaus. (S. Car.) 271.

7. **Title Bond.** — *Hobson v. Trevor*, 1 Stra. 534; *Fulcher v. Daniel*, 80 Ga. 74; *Lyman v. Gedney*, 114 Ill. 388, 55 Am. Rep. 871; *Fitzpatrick v. Beatty*, 6 Ill. 454; *Hull v. Sturdivant*, 46 Me. 34; *Lee v. Kirby*, 104 Mass. 420; *En-*

the condition may be readily and adequately compensated for in damages, the general rule that specific performance will not be decreed where the legal remedy is adequate will apply.¹

8. Compromises. — Compromises are favored in equity, and a contract the consideration of which is a compromise of matters in controversy between the parties will always be enforced where the remedy at law is inadequate.² Pursuant to this rule a written agreement to settle a suit in chancery may be specifically enforced,³ and likewise an agreement between parties that one debt shall be applied in satisfaction of another.⁴ So, also, an agreement to apply on a debt secured by a deed of trust on lands, uncertain and unascertained items of set-off, may be enforced in equity upon a decree for the sale of the lands.⁵

9. Contracts for Testamentary Provisions — *a.* IN GENERAL. — Equity will take cognizance of and specifically enforce a valid contract for the testamentary disposition of the estate of a decedent.⁶ Thus, agreements to devise, if founded upon a sufficient consideration, are enforceable against heirs, devisees,

sign v. Kellogg, 4 Pick. (Mass.) 1; *Plunkett v. Methodist Episcopal Soc.*, 3 Cush. (Mass.) 561; *Dooley v. Watson*, 1 Gray (Mass.) 414; *Hooker v. Pyncheon*, 8 Gray (Mass.) 550; *Thornburgh v. Fish*, 11 Mont. 53.

1. See *McCarter v. Armstrong*, 32 S. Car. 203, affirmed 32 S. Car. 601.

2. **Compromises** — *United States*. — *Ball, etc., Fastener Co. v. Ball Glove Fastening Co.*, (C. C. A.) 58 Fed. Rep. 818; *Gaines v. Molen*, 30 Fed. Rep. 27; *Central Trust Co. v. Wabash, etc., R. Co.*, 29 Fed. Rep. 554. And see *Sutherland v. Straw*, 2 Fed. Rep. 277.

Georgia. — *Watkins v. Watkins*, 24 Ga. 402.

Illinois. — *Hall v. Hall*, 125 Ill. 95.

Massachusetts. — *Cook v. Richardson*, 178 Mass. 125; *Leach v. Fobes*, 11 Gray (Mass.) 506, 71 Am. Dec. 732.

Michigan. — *Weed v. Terry*, Walk. (Mich.) 501, 2 Dougl. (Mich.) 344, 45 Am. Dec. 257.

Minnesota. — *Slingerland v. Slingerland*, 39 Minn. 197.

New Jersey. — *Cutting v. Dana*, 25 N. J. Eq. 265.

New York. — *Deen v. Milne*, 113 N. Y. 303; *Phillips v. Berger*, 8 Barb. (N. Y.) 527.

Vermont. — *Burton v. Landon*, 66 Vt. 361.

Conflicting Titles. — Where two parties claim the same land under conflicting titles, and there is a doubt as to which title is valid, an agreement to compromise and divide the land is founded on a sufficient consideration which will be specifically enforced in equity in the absence of fraud or unfairness. *Weed v. Terry*, 2 Dougl. (Mich.) 344, 45 Am. Dec. 257.

Adequacy of Consideration. — It has been held that equity will decree the specific performance of an agreement of compromise made upon a controversy concerning the validity of a will, without inquiring into the adequacy of the consideration. *Leach v. Fobes*, 11 Gray (Mass.) 506, 71 Am. Dec. 732.

3. *Burton v. Landon*, 66 Vt. 361.

4. *Raleigh v. Raleigh*, 35 Ill. 512.

5. *Kennedy v. Davisson*, 46 W. Va. 433.

6. Contracts for Testamentary Provisions — *England*. — *Jones v. Martin*, 3 Anstr. 882; *Podmore v. Gunning*, 7 Sim. 644; *Walpole v. Orford*, 3 Ves. Jr. 402. Compare *In re Parkin*, (1892) 3 Ch. 510, 3 Reports 9.

United States. — *Townsend v. Vanderwerker*, 160 U. S. 171; *Brown v. Sutton*, 129 U. S. 238; *Jaffee v. Jacobson*, (C. C. A.) 48 Fed. Rep. 24. *California*. — *Owens v. McNally*, 113 Cal. 444. *Georgia*. — *Maddox v. Rowe*, 23 Ga. 434, 68 Am. Dec. 535.

Illinois. — *Walters v. Walters*, 132 Ill. 467; *Smith v. Yocum*, 110 Ill. 145; *McDowell v. Lucas*, 97 Ill. 489.

Iowa. — *Franklin v. Tuckerman*, 68 Iowa 572.

Kansas. — *Newton v. Lyon*, 62 Kan. 306, affirmed on rehearing 62 Kan. 651.

Maryland. — *Haines v. Haines*, 6 Md. 435.

Michigan. — *Wright v. Wright*, 99 Mich. 170; *Carmichael v. Carmichael*, 72 Mich. 76, 16 Am. St. Rep. 528; *Faxton v. Faxon*, 28 Mich. 161. See also *Bird v. Pope*, 73 Mich. 483.

Missouri. — *Alexander v. Alexander*, 150 Mo. 579; *Sharkey v. McDermott*, 91 Mo. 648, 60 Am. Rep. 270; *Sutton v. Hayden*, 62 Mo. 102; *Gupton v. Gupton*, 47 Mo. 37.

Nebraska. — *Kofka v. Rosicky*, 41 Neb. 328, 43 Am. St. Rep. 685.

New Jersey. — *Young v. Young*, 45 N. J. Eq. 27; *Van Dyne v. Vreeland*, 11 N. J. Eq. 371; *Johnson v. Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 773.

New York. — *Parsell v. Stryker*, 41 N. Y. 480; *Rhodes v. Rhodes*, 3 Sandf. Ch. (N. Y.) 279; *Kine v. Farrell*, 71 N. Y. App. Div. 219; *Gates v. Gates*, 34 N. Y. App. Div. 608; *Gall v. Gall*, 64 Hun (N. Y.) 600.

Ohio. — *Shahan v. Swan*, 48 Ohio St. 25, 29 Am. St. Rep. 517.

Pennsylvania. — *Graham v. Graham*, 34 Pa. St. 475.

South Carolina. — *Turnipseed v. Sirrine*, 57 S. Car. 559, 76 Am. St. Rep. 580, rehearing denied 35 S. E. Rep. 1035. And see *Rivers v. Rivers*, 3 Desaus. (S. Car.) 195, 4 Am. Dec. 609.

South Dakota. — *McCullom v. Mackrell*, 13 S. Dak. 262.

Utah. — *Brinton v. Van Cott*, 8 Utah 480.

Virginia. — *Burdine v. Burdine*, 98 Va. 515.

When Promisee's Rights Enforceable. — Where the contract was that if the daughter and her husband would live with the promisor, cultivate his farm, and care for and support himself and wife during their lifetime, such daughter should have a half interest in the farm, it was held

or representatives as though the deceased obligor were a party to the suit,¹ by treating the heirs as trustees and compelling them to convey the property in accordance with the terms of the contract.²

b. WHERE CONTRACT UNFAIR OR INEQUITABLE. — Equity will not, however, decree specific performance of a contract to make a particular testamentary provision if the contract is unconscionable, inequitable, or unjust, or not founded upon a fair consideration.³

c. WHERE TERMS OF CONTRACT UNCERTAIN. — Specific performance of alleged contracts for testamentary provisions will not be enforced where the terms thereof are not sufficiently certain under the rules governing this branch of the subject as discussed elsewhere.⁴

d. WILL INVALID OR REVOKED. — Where a testator, pursuant to a contract to make a certain testamentary provision, executed an instrument invalid as a will but containing the provision contracted for, specific performance was decreed against the heirs of the decedent.⁵ But where the instrument in question was testamentary in character and therefore revocable, and was actually revoked, it was held that specific performance would not be decreed, particularly where it appeared that the plaintiff might present his claim to the estate for the repayment of the consideration for the alleged contract to devise.⁶

e. RATIFICATION OF INCONSISTENT WILL. — Where an alleged promisee in a contract for testamentary provision has ratified a will making an inconsistent disposition of the property, and filed a claim against the estate for the consideration paid, specific performance will be denied.⁷

f. RESCISSION — ACQUIESCENCE. — Where one of the parties to the contract has died, and it appears that he assumed the right to terminate it by giving notice, and that the other parties had acted pursuant to the notice,

that the daughter possessed no interest, legal or equitable, until complete fulfilment on her part and the death of both parents. *Flower v. Cruikshank*, 77 Iowa 110. See also *Francis v. Francis*, 122 Mich. 10.

For the Construction of a Statute with reference to the specific enforcement of a contract of a decedent, see *Christ Church v. Beach*, 7 Wash. 65.

1. Enforceable Against Heirs, Devisees, etc. — *England*. — *Logan v. Wienholt*, 1 Cl. & F. 611; *Needham v. Smith*, 4 Russ. 318; *Lester v. Foxcroft*, Colles 108; *Fortescue v. Hennah*, 19 Ves. Jr. 67; *Walpole v. Orford*, 3 Ves. Jr. 402; *Goilmer v. Battison*, 1 Vern. 48, 2 Vent. 353; *Jones v. Martin*, 3 Anstr. 882.

Alabama. — *Manning v. Pippen*, 86 Ala. 357, 11 Am. St. Rep. 46.

Delaware. — *Carlisle v. Fleming*, 1 Harr. (Del.) 421.

Georgia. — *Maddox v. Rowe*, 23 Ga. 431, 68 Am. Dec. 535.

Illinois. — *Weingartner v. Pabst*, 115 Ill. 412.

Indiana. — *Wallace v. Long*, 105 Ind. 525, 55 Am. Rep. 222 (in effect overruling *Stafford v. Bartholomew*, 2 Ind. 153).

Maryland. — *Frisby v. Parkhurst*, 29 Md. 58, 96 Am. Dec. 503; *Mundorff v. Kilbourn*, 4 Md. 459.

Michigan. — *Leonardson v. Hulin*, 64 Mich. 1; *Wright v. Wright*, 31 Mich. 380.

Missouri. — *Sutton v. Hayden*, 62 Mo. 101; *Gupton v. Gupton*, 47 Mo. 37; *Wright v. Tinsley*, 30 Mo. 389.

New Jersey. — *Davison v. Davison*, 13 N. J. Eq. 246; *Van Duyne v. Vreeland*, 12 N. J. Eq.

142; *Johnson v. Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 773.

New York. — *Parsell v. Stryker*, 41 N. Y. 480; *Stephens v. Reynolds*, 6 N. Y. 459; *Rhodes v. Rhodes*, 3 Sandf. Ch. (N. Y.) 279; *Shakespeare v. Markham*, 10 Hun (N. Y.) 311.

Pennsylvania. — *Taylor v. Mitchell*, 87 Pa. St. 518, 30 Am. Rep. 383; *Logan v. McGinnis*, 12 Pa. St. 32; *McClure v. McClure*, 1 Pa. St. 378.

South Carolina. — *Rivers v. Rivers*, 3 Desaus. (S. Car.) 190, 4 Am. Dec. 609; *Izard v. Middleton*, 1 Desaus. (S. Car.) 116.

2. *Owens v. McNally*, 113 Cal. 444; *Korminsky v. Korminsky*, (N. Y. Super. Ct. Gen. T.) 2 Misc. (N. Y.) 138.

3. *Owens v. McNally*, 113 Cal. 444; *Barrett v. Geisinger*, 179 Ill. 240. And see *Woods v. Evans*, 113 Ill. 186, 55 Am. Rep. 409.

4. Terms of Contract Uncertain. — See *Brown v. Sutton*, 129 U. S. 238; *Walters v. Walters*, 132 Ill. 467; *Woods v. Evans*, 113 Ill. 186, 55 Am. Rep. 409; *Smith v. Yocum*, 110 Ill. 145; *Wallace v. Rappleye*, 103 Ill. 249; *McDowell v. Lucas*, 97 Ill. 489; *Franklin v. Tuckerman*, 68 Iowa 572; *Sharkey v. McDermott*, 91 Mo. 647, 60 Am. Rep. 270; *Young v. Young*, 45 N. J. Eq. 27; *Johnson v. Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 773; *Ripsom v. Hart*, 64 N. Y. App. Div. 593; *Graham v. Graham*, 34 Pa. St. 475. And see *supra*, this title, IV. 2. *f. Certainty*.

5. *Maddox v. Rowe*, 23 Ga. 431, 68 Am. Dec. 535.

6. *Hazleton v. Reed*, 46 Kan. 74, 26 Am. St. Rep. 86.

7. *Laird v. Laird*, 115 Mich. 352.

without complaint, specific performance cannot be decreed at their instance.¹

g. **PAROL AGREEMENTS.**—Parol agreements to make a specific devise of property where clearly established and partly or substantially performed by the promisee are enforceable in equity.² Thus, a parol contract made by one since deceased to give to an infant, in consideration of its unqualified surrender by its mother, a child's share of his estate, will be specifically enforced in equity where fully performed on the part of the mother and the infant.³ So also equity will enforce a parol promise made to a testator, by a legatee, that he would hold the legacy for the benefit of a third person.⁴ But in order to the enforcement of parol contracts for testamentary provisions, the terms thereof must be clearly established and the contracts fully and satisfactorily proven.⁵

h. **CONTRACTS TO MAKE WILL.**—A court of equity will not enforce performance of a contract to make a will in the promisee's favor, as the promisor has his whole life in which to perform and there is no breach until after his death.⁶

10. Contracts to Construct, Erect, or Repair—*a.* **GENERAL RULE.**—It is stated as a general rule that a court of equity will not specifically enforce a contract to construct, erect, or repair buildings or other structures,⁷ for the twofold reason that the nature of the acts to be performed is not such that a

1. *Joyner v. Hoffman*, 59 S. Car. 528.

2. **Parol Agreements**—*United States*.—Brown v. Sutton, 129 U. S. 238.

Illinois.—Walters v. Walters, 132 Ill. 467; Smith v. Yocum, 110 Ill. 145; McDowell v. Lucas, 97 Ill. 489.

Iowa.—Franklin v. Tuckerman, 68 Iowa 572. *Missouri*.—Sharkey v. McDermott, 91 Mo. 647, 60 Am. Rep. 270; Fuchs v. Fuchs, 48 Mo. App. 18. See also Anderson v. Shockley, 82 Mo. 250; West v. Bundy, 78 Mo. 407; Sutton v. Hayden, 62 Mo. 101; Gupton v. Gupton, 47 Mo. 37; Wright v. Tinsley, 30 Mo. 389.

Nebraska.—Kofka v. Rosicky, 41 Neb. 328, 43 Am. St. Rep. 685.

New Jersey.—Young v. Young, 45 N. J. Eq. 27; Johnson v. Hubbell, 10 N. J. Eq. 332, 66 Am. Dec. 773. See also Davison v. Davison, 13 N. J. Eq. 246; Van Dyne v. Vreeland, 11 N. J. Eq. 370, 12 N. J. Eq. 143.

New York.—Korminsky v. Korminsky, (N. Y. Super. Ct. Gen. T.) 2 Misc. (N. Y.) 138. See also Rhodes v. Rhodes, 3 Sandf. Ch. (N. Y.) 279.

Pennsylvania.—Graham v. Graham, 34 Pa. St. 475.

South Dakota.—Lothrop v. Marble, 12 S. Dak. 511, 76 Am. St. Rep. 626.

Utah.—Brinton v. Van Cott, 8 Utah 480.

Vermont.—Smith v. Pierce, 65 Vt. 200.

See also Maddox v. Rowe, 23 Ga. 431, 68 Am. Dec. 535; Bengé v. Hiatt, 82 Ky. 666, 56 Am. Rep. 912.

Personal Services Insusceptible of Money Value.—“We concede the law to be that a court of equity will specifically enforce a promise to leave to another the whole or a definite portion of one's estate, as a reward for peculiar personal services rendered or other acts done by the promisee, which are not susceptible of a money valuation, and were not intended to be paid for in money, provided the consideration has been substantially received at the promisor's death.” *Jaffee v. Jacobson*, (C. C. A.) 48 Fed. Rep. 21. And it is no objection to the enforcement of such a contract that it was entered into

with a third party for the promisee's benefit if the latter has acted under and executed it.

What Constitutes Performance.—See *Turnipseed v. Sirrine*, 57 S. Car. 559, 76 Am. St. Rep. 580, rehearing denied, 35 S. E. Rep. 1035.

Payment of Money as Part Performance.—That this alone is insufficient, see *Cochrane v. McEntee*, (N. J. Eq. 1896) 51 Atl. Rep. 279. And see also *supra*, this title, *Requirements of Statute of Frauds*.

3. *Healy v. Healy*, (Supm. Ct. Eq. Tl) 31 Misc. (N. Y.) 636, affirmed, 55 N. Y. App. Div. 315. And see *Gall v. Gall*, 64 Hun (N. Y.) 601, 138 N. Y. 675; *Gates v. Gates*, 34 N. Y. App. Div. 608.

But see for a somewhat similar case in which performance was denied on the ground that the value of the services rendered was readily ascertainable, *Renz v. Drury*, 57 Kan. 84.

Doctrine that Possession of Property Requisite.

—Where the owner of land made a parol promise to his child to convey lands to him, and the child went into possession relying on such promise, and made valuable improvements, such promise rests on a valuable consideration and may be specifically enforced. *Pond v. Sheean*, 132 Ill. 312.

4. *Vreeland v. Williams*, 32 N. J. Eq. 734.

5. *Shaw v. Schoonover*, 130 Ill. 448; *Semmes v. Worthington*, 38 Md. 298; *Fardy v. Williams*, 38 Md. 493; *Sturges v. Taylor*, (N. J. 1890) 20 Atl. Rep. 369; *Ackerman v. Ackerman*, 24 N. J. Eq. 315; *Wall's Appeal*, 111 Pa. St. 460, 56 Am. Rep. 288. And see *Hudson v. Hudson*, 87 Ga. 678, 27 Am. St. Rep. 270; *Pollock v. Ray*, 85 Pa. St. 428; *Thompson v. Stevens*, 71 Pa. St. 161; *Graham v. Graham*, 34 Pa. St. 475.

6. *Manning v. Pippen*, 86 Ala. 357, 11 Am. St. Rep. 46.

7. **Contracts to Construct, Repair, etc.**—*England*.—*South Wales R. Co. v. Wythes*, 5 De G. M. & G. 880; *Lucas v. Commerford*, 3 Bro. C. C. 166; *Scofield v. Whitehead*, 2 Vern. 127; *London v. Nash*, 3 Atk. 515; *Rayner v. Stone*, 2 Eden 128.

United States.—*Strang v. Richmond, etc., R.*

court of equity could conveniently enforce them,¹ and for the further reason that damages at law would in general be adequate redress,² the party entitled to performance having the option to have the work done by others and then to institute an action at law for the reasonable cost thereof.³

b. EXCEPTIONS. — It has been said, however, that "there is no universal rule that courts of equity never will enforce a contract which requires some building to be done; they have enforced such contracts from the earliest days to the present time."⁴ The fact is, indeed, that the general rule under consideration, like most other rules in the present connection, yields to the consideration that specific performance will be decreed, if practicable, in all cases in which there is no adequate remedy at law,⁵ as where the defendant, as a consideration for the contract, has obtained a conveyance of land.⁶ The courts have also decreed the specific enforcement of a contract to build a railroad crossing,⁷ to construct and maintain a bridge,⁸ or to maintain a railroad at a stipulated location.⁹ And it has also been held that a provision in a contract that a railroad company would, at a particular point, construct "a neat and tasteful station building" might be specifically enforced.¹⁰

11. Contracts to Indemnify or Secure. — Agreements to indemnify or give security, if sufficiently definite and certain, will, as a rule, be specifically enforced if the plaintiff's remedy at law is inadequate.¹¹ It has been held,

Co., (C. C. A.) 101 Fed. Rep. 511; Texas, etc., R. Co. v. Rust, 17 Fed. Rep. 275; Oregonian R. Co. v. Oregon R., etc., Co., 11 Sawy. (U. S.) 33; Ross v. Union Pac. R. Co., Woolw. (U. S.) 26; Texas, etc., R. Co. v. Marshall, 136 U. S. 393; Fallon v. Missouri, etc., R. Co., 1 Dill. (U. S.) 121.

Indiana. — Columbus, etc., R. Co. v. Watson, 26 Ind. 50.

Massachusetts. — Kansas, etc., R. Constr. Co. v. Topeka, etc., R. Co., 135 Mass. 34, 46 Am. Rep. 439.

Missouri. — Mastin v. Halley, 61 Mo. 196.

New Jersey. — Armour v. Connolly, (N. J. 1901) 49 Atl. Rep. 1117; Madison Athletic Assoc. v. Brittin, 60 N. J. Eq. 160; Wharton v. Stoutenburgh, 35 N. J. Eq. 266.

New York. — Beck v. Allison, 56 N. Y. 366, 15 Am. Rep. 430.

Ohio. — Port Clinton R. Co. v. Cleveland, etc., R. Co., 13 Ohio St. 544; Great Southern Hotel Co. v. McClain, 4 Ohio Dec. 309, 3 Ohio N. P. 247.

Pennsylvania. — Dove v. Com. Title Ins., etc., Co., 6 Pa. Dist. 263.

Virginia. — Ewing v. Litchfield, 91 Va. 575.

Wisconsin. — Kendall & Frey, 74 Wis. 26, 17 Am. St. Rep. 118.

1. South Wales R. Co. v. Wythes, 5 De G. M. & G. 880; Lucas v. Commerford, 3 Bro. C. C. 166; Mastin v. Halley, 61 Mo. 196; Madison Athletic Assoc. v. Brittin, 60 N. J. Eq. 160; Beck v. Allison, 56 N. Y. 366, 15 Am. Rep. 430.

2. South Wales R. Co. v. Wythes, 5 De G. M. & G. 880; Lucas v. Commerford, 3 Bro. C. C. 166; Columbus, etc., R. Co. v. Watson, 26 Ind. 50; Minneapolis Mill Co. v. Bassett, 31 Minn. 390; Mastin v. Halley, 61 Mo. 196; Armour v. Connolly, (N. J. 1901) 49 Atl. Rep. 1117; Madison Athletic Assoc. v. Brittin, 60 N. J. Eq. 160; Beck v. Allison, 56 N. Y. 366, 15 Am. Rep. 430; Dove v. Com. Title Ins., etc., Co., 6 Pa. Dist. 263.

3. Lawrence v. Saratoga Lake R. Co., 36 Hun (N. Y.) 474.

4. Holmes, J., in Jones v. Parker, 163 Mass. 564, 47 Am. St. Rep. 485.

A Contract to Build Stairways for the joint use of adjacent properties has been held enforceable. Gregory v. Ingwerson, 32 N. J. Eq. 199. And see Franklyn v. Tuton, 5 Madd. 469; Price v. Penzance, 4 Hare 506.

Fences. — It has been held that the court may compel the performance of an agreement to build fences. Jones v. Seligman, 81 N. Y. 191.

5. Wolverhampton v. Emmons, (1901) 1 K. B. 515, 70 L. J. K. B. 429; Stuyvesant v. New York, 11 Paige (N. Y.) 414. And see London v. Nash, 3 Atk. 515.

Defendant in Possession of Premises. — The rule excluding specific performance would not apply where the premises or thing in question is in the possession of the defendant, so that the plaintiff could not do the work or procure its performance by others. See Lawrence v. Saratoga Lake R. Co., 36 Hun (N. Y.) 474.

6. Wolverhampton v. Emmons, (1901) 1 K. B. 515; Ross v. Union Pac. R. Co., Woolw. (U. S.) 40; Lane v. Pacific, etc., R. Co., (Idaho 1902) 67 Pac. Rep. 656; Kelly v. Nypano R. Co., 23 Pa. Co. Ct. 177; Birchett v. Bolling, 5 Munf. (Va.) 442.

Contract to Construct Pipe Line for Water Supply. — Grubb v. Starkey, 90 Va. 831.

7. Post v. West Shore R. Co., 123 N. Y. 581.

8. Lawrence v. Saratoga Lake R. Co., 36 Hun (N. Y.) 472.

9. Minneapolis, etc., R. Co. v. Cox, 76 Iowa 306, 14 Am. St. Rep. 216. And see Crane v. Chicago, etc., R. Co., 20 Fed. Rep. 402.

10. Lawrence v. Saratoga Lake R. Co., 36 Hun (N. Y.) 473.

11. Contracts for Indemnity. — Robinson v. Cathcart, 2 Cranch (C. C.) 590; Reybold v. Herdman, 2 Del. Ch. 34; Rothholz v. Schwartz, 46 N. J. Eq. 477, 19 Am. St. Rep. 409. See Ranelagh v. Hayes, 1 Vern. 189; Shockley v. Davis, 17 Ga. 177, 63 Am. Dec. 233; Chamberlain v. Blue, 6 Blackf. (Ind.) 491; Michigan State Bank v. Hastings, 1 Dougl. (Mich.) 225,

however, that an executory contract for the transfer of stock as collateral security for a debt, where the debtor has died insolvent, will not be enforced by a court of equity to the injury of other creditors,¹ and specific performance of an agreement calling for "satisfactory security" has been denied on the ground of being vague and indefinite,² and likewise a promise merely "to secure" a creditor.³

12. Continuing Contracts — Successive Acts — *a.* **GENERAL RULE.** — Where the contract by its terms stipulates for a succession of acts, to continue through a considerable period, the performance of which would require the protracted supervision and direction of the court, a decree for specific performance is generally refused.⁴ It has been declared accordingly, that equity will not, as a rule, decree the performance of a contract to carry on railways or operate mines,⁵ nor to keep in repair a railroad throughout a period of many years.⁶

b. **EXCEPTIONS.** — While the prevailing doctrine is as stated, the modern extension of equity jurisprudence has developed many exceptions to the general rule. The tendency seems now to be to decree specific performance, even though the contract does call for a succession of acts, where the remedy at law is clearly inadequate and great injustice would be done if the contract were not performed, particularly where the acts to be done are of a purely ministerial nature and do not require the exercise of personal taste, judgment, or discretion.⁷ This departure from the general rule is particularly noticeable

41 Am. Dec. 570; *Footé v. Garland*, Smed. & M. Ch. (Miss.) 95; *Hoy v. Hansborough*, Freem. (Miss.) 533; *Champion v. Brown*, 6 Johns. Ch. (N. Y.) 398, 10 Am. Dec. 343.

Parol Contract to Execute Mortgage. — A parol contract for a mortgage of personal property, based upon a valuable consideration, may be enforced in a court of equity, if the contract is not such as the statute of frauds requires to be in writing. *Triebert v. Burgess*, 11 Md. 452. But see *Johnson v. Hoover*, 72 Ind. 395.

1. *City F. Ins. Co. v. Olmsted*, 33 Conn. 476. And see *Shipman v. Ætna Ins. Co.*, 29 Conn. 245.

2. *Ladd v. Stevenson*, 43 Hun (N. Y.) 541.

3. *Day v. Griffith*, 15 Iowa 104; *Cole v. Deaham*, 13 Iowa 551.

4. Contract Contemplating Successive Acts — *England.* — *Ryan v. Mutual Tontine Westminster Chambers Assoc.*, 2 Reports 156, (1893) 1 Ch. 116; *Blackett v. Bates*, L. R. 1 Ch. 117; *Wolverhampton, etc., R. Co. v. London, etc., R. Co.*, L. R. 16 Eq. 433; *Gervais v. Edwards*, 2 Dr. & War. 80.

United States. — *Rutland Marble Co. v. Ripley*, 10 Wall. (U. S.) 339; *Berlines Gramophone Co. v. Seaman*, (C. C. A.) 110 Fed. Rep. 30; *Western Union Tel. Co. v. Union Pac. R. Co.*, 1 McCrary (U. S.) 558.

Alabama. — *Chadwick v. Chadwick*, 121 Ala. 580; *Electric Lighting Co. v. Mobile, etc., R. Co.*, 109 Ala. 190, 55 Am. St. Rep. 927; *South, etc., Alabama R. Co. v. Highland Ave., etc., R. Co.*, 98 Ala. 400, 39 Am. St. Rep. 74; *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498, 3 Am. St. Rep. 758.

California. — *Stanton v. Singleton*, 126 Cal. 657. See *Lattin v. Hazard*, 91 Cal. 87.

Georgia. — *Atlanta, etc., R. Co. v. Speer*, 32 Ga. 550, 79 Am. Dec. 305.

Illinois. — *Harley v. Sanitary Dist.*, 54 Ill. App. 337.

Indiana. — *Dukes v. Bash*, 29 Ind. App. 103;

Louisville, etc., R. Co. v. Bodenschatz, etc., Stone Co., 141 Ind. 263; *Lindsay v. Glass*, 119 Ind. 301; *Ikerd v. Beavers*, 106 Ind. 483; *Clark's Case*, 1 Blackf. (Ind.) 122, 12 Am. Dec. 213.

Michigan. — *Roberts v. Kelsey*, 38 Mich. 602; *Blanchard v. Detroit, etc., R. Co.*, 31 Mich. 43, 18 Am. Rep. 142. And see *Bourget v. Monroe*, 58 Mich. 563; *Rust v. Conrad*, 47 Mich. 455, 41 Am. Rep. 720.

Mississippi. — *Bomer v. Canaday*, 79 Miss. 222.

New Jersey. — *Mowers v. Fogg*, 45 N. J. Eq. 120; *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266; *Danforth v. Philadelphia, etc., R. Co.*, 30 N. J. Eq. 12.

New York. — *Standard Fashion Co. v. Siegel-Cooper Co.*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 624, 157 N. Y. 60, 68 Am. St. Rep. 749; *Beck v. Allison*, 56 N. Y. 366, 15 Am. Rep. 430; *Fargo v. New York, etc., R. Co.*, (Supm. Ct.) 3 Misc. (N. Y.) 205.

North Dakota. — *Kidd v. McGinnis*, 1 N. Dak. 331.

Oregon. — *Clarno v. Grayson*, 30 Oregon 111.

South Carolina. — *McCarter v. Armstrong*, 32 S. Car. 203.

Tennessee. — *McCann v. South Nashville St. R. Co.*, 2 Tenn. Ch. 773.

Virginia. — *Ewing v. Litchfield*, 91 Va. 575.

5. *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266.

6. *Oregonian R. Co. v. Oregon R., etc., Co.*, 37 Fed. Rep. 733.

Matters of Administrative Policy. — *Evans v. Union Pac. R. Co.*, 58 Fed. Rep. 499.

7. See *New Orleans v. Tulane Educational Fund*, 46 La. Ann. 861.

Erection and Maintenance of Archway. — *Storer v. Great Western R. Co.*, 2 Y. & C. Ch. 48.

Erection and Maintenance of Wharf. — *Wilson v. Furness R. Co.*, L. R. 9 Eq. 28. And see *Greene v. West Cheshire R. Co.*, L. R. 13 Eq. 44.

in contracts with reference to the operation of railroads, or the use by one of the tracks and facilities of the other, or the joint use of bridges and terminals.¹ This exception to the general doctrine has been said to be founded upon the rights of the public rather than those of the plaintiff,² the theory being that "when the inconvenience of the courts in acting is more than counterbalanced by the inconvenience of the public if they do not act, the interest of the public will prevail."³

c. MERE EXECUTION OF CONTRACT. — As the enforcement of the execution of a contract to perform continuing acts is a different matter from enforcing the performance of the acts themselves, a court of equity, it has been said, will not infrequently enforce the execution of the contract, and then leave the parties to their legal remedies upon a breach of the covenants and conditions contained in it.⁴

13. Delivery, Assignment, and Cancellation of Notes and Claims. — Contracts for the delivery, execution, assignment, or cancellation of promissory notes, and for the transfer of debts and claims, may be enforceable specifically.⁵ Thus a contract for the assignment of a claim against an insolvent estate, the value of which was unascertained and uncertain, may be enforced,⁶ and where a party is entitled to specific performance of a contract for the sale of promissory notes, he is also entitled to an injunction to restrain the defendant from collecting the notes he agreed to sell.⁷

14. Gifts — **a. GENERAL RULE.** — A mere agreement to give land will not be enforced upon proof alone of the promise, whether the promise be oral or written. So long as the obligation rests alone on the promise of the donor, it may be revoked and equity will not decree specific performance.⁸ But a

Construction of Bridge and Railroad Station. — *Lawrence v. Saratoga Lake R. Co.*, 36 Hun (N. Y.) 475.

Contract with Monthly Magazine — Publication of Advertisements. — *Goddard v. American Queen*, 44 N. Y. App. Div. 459.

1. Operation of Railroads. — *Joy v. St. Louis*, 138 U. S. 1; *Union Pac. R. Co. v. Chicago*, etc., R. Co., 163 U. S. 564, *affirming* (C. C. A.) 51 Fed. Rep. 309; *Central Trust Co. v. Wabash*, etc., R. Co., 29 Fed. Rep. 546; *South*, etc., Alabama R. Co. *v. Highland Ave.*, etc., R. Co., 98 Ala. 400, 39 Am. St. Rep. 74; *Schmidt v. Louisville*, etc., R. Co., 101 Ky. 441; *Prospect Park*, etc., R. Co. *v. Coney Island*, etc., R. Co., 144 N. Y. 152; *Cumberland Valley R. Co. v. Gettysburg*, etc., R. Co., 177 Pa. St. 519; *Louisville*, etc., R. Co. *v. Mississippi*, etc., R. Co., 92 Tenn. 681. See *Rome*, etc., R. Co. *v. Ontario Southern R. Co.*, 16 Hun (N. Y.) 445; *Cornwall*, etc., R. Co.'s Appeal, 125 Pa. St. 232; *Dinham v. Bradford*, L. R. 5 Ch. 519; *Tillett v. Charing Cross Bridge Co.*, 26 Beav. 419; *Raphael v. Thames Valley R. Co.*, L. R. 2 Eq. 37; *Gregory v. Mighell*, 18 Ves. Jr. 328; *Tscheider v. Biddle*, 4 Dill. (U. S.) 55; *Hug v. Van Burkleo*, 58 Mo. 202; *Biddle v. Ramsey*, 52 Mo. 153; *Arnot v. Alexander*, 44 Mo. 27, 100 Am. Dec. 252.

Erection and Maintenance of Shops. — *Evans v. Union Pac. R. Co.*, 58 Fed. Rep. 499.

Contracts Between Connecting Lines as to Running of Cars. — *Prospect Park*, etc., R. Co. *v. Coney Island*, etc., R. Co., 144 N. Y. 152.

2. *Joy v. St. Louis*, 138 U. S. 47; *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y. 60, 68 Am. St. Rep. 749; *Prospect Park*, etc., R. Co. *v. Coney Island*, etc., R. Co., 144 N. Y. 152.

3. *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y. 60, 68 Am. St. Rep. 749.

It has been held, therefore, that a contract by which a railroad company agreed with a city to establish permanently the eastern terminus and railroad offices at said city, and also to establish and construct at said city the main machine shops and car works, cannot be specifically enforced against the interests of the public. The remedy of the city for a breach of such contract is at law. *Texas*, etc., R. Co. *v. Marshall*, 136 U. S. 393.

4. *Wharton v. Stoutenburgh*, 35 N. J. Eq. 267. And see *St. Joseph Hydraulic Co. v. Globe Tissue Paper Co.*, 156 Ind. 665.

5. Delivery, Assignment, etc., of Claims, etc. — *Adderley v. Dixon*, 1 Sim. & St. 607; *Doloret v. Rothschild*, 1 Sim. & St. 590; *Wright v. Bell*, 5 Price 325; *Ball v. Coggs*, 1 Bro. P. C. 140 (Toml. ed.); *Clarke v. White*, 12 Pet. (U. S.) 178; *Henderson v. Johns*, 13 Colo. 280; *Williams v. Carpenter*, 14 Colo. 477; *Shockley v. Davis*, 17 Ga. 177, 63 Am. Dec. 233; *McMullen v. Vanzant*, 73 Ill. 190; *Tuttle v. Moore*, 16 Minn. 123; *Fred v. Fred*, (N. J. 1901) 50 Atl. Rep. 776; *Brown v. Runals*, 14 Wis. 693. See also *Kopplin v. Kopplin*, 8 Tex. Civ. App. 625. *Compare* *Callier v. Vivian*, 8 Ala. 903; *Simon v. Wildt*, 84 Ky. 157; *Smith v. Pacific Bank*, 137 Cal. 363.

Title Deeds. — See *Hill v. Rockingham Bank*, 44 N. H. 567; *Snoddy v. Finch*, 9 Rich. Eq. (S. Car.) 355, 70 Am. Dec. 216.

6. *Cutting v. Dana*, 25 N. J. Eq. 265.

7. *Gottschalk v. Stein*, 69 Md. 51.

8. *Anderson v. Scott*, 94 Mo. 637. See generally the title *GIFTS*, vol. 14, p. 1016.

Requisites for Enforcement. — A court of equity will not specifically enforce as against the heirs

contract to convey certain property, the grantee covenanting to pay a stipulated sum as purchase price, is not voluntary and without consideration, although the intent of the parties was that the purchase price should never be paid and that there should be in effect a gift of the land, the debt for the purchase price being subsequently released accordingly.¹

b. DONEE IN POSSESSION—IMPROVEMENTS.—But where the donee has been permitted to go into possession, and has in good faith and in reliance on the promise of the donor made lasting and valuable improvements on the property, specific performance will be decreed, whether the contract be in writing or by parol, for to withhold such relief would enable the donor to perpetrate a positive fraud upon the donee,² and this, although the value of the use and possession of the land during the period of possession exceeded that of the betterments placed upon it.³ It has been held, however, that a mere expression of an intention to make a gift of land, without proof that the promisee expended money or labor on the faith of it, will not sustain a suit for specific performance, especially where the suit was not brought until eleven years from the time when the promise is alleged to have been made, and three years after the death of the promisor, and no sufficient reason is shown for the delay.⁴

c. MERE CHANGE OF POSSESSION.—It has been held that as between father and son or son-in-law, possession of the land alone, under promise of a gift, is not sufficient to entitle the donee to specific performance.⁵

of the grantor an alleged parol gift of real estate, when the evidence does not clearly establish an executed intention to make the gift, nor that possession was taken or improvements made, relying on such gift. *Johnston v. Johnston*, 19 Iowa 74.

Voluntary Declarations of Intent.—*Truman v. Truman*, 79 Iowa 506; *Pullman v. Johnson*, 55 Hun (N. Y.) 612, 8 N. Y. Supp. 775.

1. *Ferry v. Stephens*, 66 N. Y. 321.

2. **Possession and Improvements—England.**—*Crosbie v. McDoual*, 13 Ves. Jr. 148.

United States.—*Neale v. Neale*, 9 Wall. (U. S.) 1.

Arkansas.—*Guynn v. McCauley*, 32 Ark. 97.

California.—*Burlingame v. Rowland*, 77 Cal. 315; *Anson v. Townsend*, 73 Cal. 415; *Manly v. Howlett*, 55 Cal. 94; *Bakersfield Town Hall Assoc. v. Chester*, 55 Cal. 102.

Georgia.—*Causey v. Causey*, 106 Ga. 188; *Looney v. Watson*, 97 Ga. 238; *Rives v. Lamar*, 94 Ga. 186.

Illinois.—*Sanford v. Davis*, 181 Ill. 570; *Irwin v. Dyke*, 114 Ill. 302; *Langston v. Bates*, 84 Ill. 524, 25 Am. Rep. 466; *Wood v. Thornly*, 58 Ill. 464; *Kurtz v. Hibner*, 55 Ill. 514, 8 Am. Rep. 665.

Indiana.—*Drum v. Stevens*, 94 Ind. 181; *Atkinson v. Jackson*, 8 Ind. 31.

Iowa.—*Peters v. Jones*, 35 Iowa 512.

Kansas.—*Galbraith v. Galbraith*, 5 Kan. 402.

Maryland.—*Loney v. Loney*, 86 Md. 652; *Hardesty v. Richardson*, 44 Md. 617, 22 Am. Rep. 57; *Shepherd v. Bevin*, 9 Gill (Md.) 32.

Michigan.—*Briggs v. Briggs*, 113 Mich. 371; *Welch v. Whelpley*, 62 Mich. 15, 4 Am. St. Rep. 810.

Missouri.—*Gibbs v. Whitwell*, 164 Mo. 387; *Anderson v. Scott*, 94 Mo. 637; *Dougherty v. Harsel*, 91 Mo. 161; *West v. Bundy*, 78 Mo. 407; *Hagar v. Hagar*, 71 Mo. 610; *Sitton v. Shipp*, 65 Mo. 297.

Montana.—*Story v. Black*, 5 Mont. 26, 51 Am. Rep. 37.

Nebraska.—*Dawson v. McFaddin*, 22 Neb. 131. And see *Hartman v. Streitz*, 17 Neb. 557.

New Jersey.—*Young v. Young*, 45 N. J. Eq. 27.

New York.—*Freeman v. Freeman*, 43 N. Y. 34, 3 Am. Rep. 657; *Lobdell v. Lobdell*, 36 N. Y. 327; *Patterson v. Copeland*, (Supm. Ct. Gen. T.) 52 How. Pr. (N. Y.) 460; *McCray v. McCray*, 30 Barb. (N. Y.) 633.

North Carolina.—*Thomas v. Kyles*, 1 Jones Eq. (54 N. Car.) 302.

Pennsylvania.—*Houston's Estate*, 5 Pa. Dist. 413.

South Carolina.—*Hunter v. Mills*, 29 S. Car. 72.

Texas.—*Wells v. Davis*, 77 Tex. 636; *Willis v. Matthews*, 46 Tex. 478.

Utah.—*Darke v. Smith*, 14 Utah 35.

Virginia.—*Lightner v. Lightner*, (Va. 1895) 23 S. E. Rep. 301; *Burkholder v. Ludlam*, 30 Gratt. (Va.) 255, 32 Am. Rep. 668.

West Virginia.—*Crim v. England*, 46 W. Va. 480, 76 Am. St. Rep. 826; *Frame v. Frame*, 32 W. Va. 463; *Lorentz v. Lorentz*, 14 W. Va. 761; *Marling v. Marling*, 9 W. Va. 79, 27 Am. Rep. 535.

But compare *Pinckard v. Pinckard*, 23 Ala. 649; *Forward v. Armstead*, 12 Ala. 124, 46 Am. Dec. 246.

Rule of Discretion of Court.—See *Barnes v. Boston*, etc., R. Co., 130 Mass. 388, 6 Am. & Eng. R. Cas. 606; *Curran v. Holyoke Water Power Co.*, 116 Mass. 90; *Smith v. McVeigh*, 11 N. J. Eq. 239.

3. *Doyle v. Wamego First Nat. Bank*, (Tex. Civ. App. 1899) 50 S. W. Rep. 480; *Wells v. Davis*, 77 Tex. 636. But compare *Trout v. Trout*, (Va. 1896) 25 S. E. Rep. 98.

4. *Clark v. Clark*, 122 Ill. 388; *Galloway v. Garland*, 104 Ill. 275; *Pullman v. Johnson*, 55 Hun (N. Y.) 612, 8 N. Y. Supp. 775.

5. *Bright v. Bright*, 41 Ill. 97; *Anderson v. Scott*, 94 Mo. 637.

d. UNDELIVERED DEEDS. — It has been held that where a decedent had executed a deed never delivered, conveying property to his wife and children in consideration of natural love and affection, specific performance would be decreed;¹ though in another case it was decided that an undelivered deed could be of no force or effect for any purpose, and hence would not sustain an action for specific performance.²

e. NATURE OF PROOF REQUIRED. — Where the courts have sustained the donee's right to a conveyance, they have required strict proof of the terms of the gift and the acts done in part performance.³

15. Husband and Wife — *a.* IN GENERAL. — A contract of a husband and wife to convey land, executed and acknowledged as required by law, may be specifically enforced against both.⁴ And specific performance may be maintained against a husband and wife on a contract which the husband made as agent of the wife, subsequently consented to and approved by the latter.⁵

b. HUSBAND'S CONTRACT TO PROCURE WIFE'S CONVEYANCE. — It has been held that a contract by a husband to procure his wife's conveyance of real estate, or the joining with him in a deed, will not be specifically enforced.⁶ It has been said, however, to have been the earlier practice of courts of equity specifically to enforce such contracts, and to require the husband to procure the conveyance by the wife and to imprison him until he did perform his covenant by so doing.⁷

c. REFUSAL OF WIFE TO JOIN IN HUSBAND'S DEED. — Where the wife was not a party to her husband's contract to convey, she will not be required by decree to join him therein and thus relinquish her inchoate right of dower,⁸ nor will the specific performance of such a contract be decreed, unless, it has been held, the purchaser is willing to pay the full purchase price and accept the deed of the husband alone.⁹ But under a statute providing that the husband's deed of the homestead without his wife's signature is a nullity, the husband will not be required to execute a deed where the wife refuses to join.¹⁰

d. COMPENSATION OR INDEMNITY FOR DOWER RIGHT. — It has been said that when the wife of the vendor refuses to join with her husband in the execution of a deed in compliance with the latter's contract to convey, the vendee has the option of accepting performance by the husband to the extent

1. *Jones v. Jones*, 6 Conn. 111, 16 Am. Dec. 35. And see *Bunn v. Winthrop*, 1 Johns. Ch. (N. Y.) 329.

2. *Comer v. Baldwin*, 16 Minn. 172.

3. *Meigs v. Morris*, 63 Ark. 100; *Jones v. Tyler*, 6 Mich. 364; *Griggsby v. Osborn*, 82 Va. 371.

Where Evidence Conflicting. — Where a father, long before the marriage of his daughter, verbally promised that he would convey a tract of land to her at her marriage if she should be dutiful and marry with his consent, it was held that specific performance would not be decreed unless the promise was renewed anterior to the marriage, though after marriage the daughter was put in possession of a part of the land, and made some improvements thereon. *Worley v. Walling*, 1 Har. & J. (Md.) 208.

4. Contracts of Husband and Wife. — *Davis v. Williams*, 121 Ala. 542; *Goldstein v. Curtis*, 63 N. J. Eq. 454. See also the title HUSBAND AND WIFE, vol. 15, p. 852 *et seq.*

5. *Young v. Porter*, 27 Wash. 551.

6. Contract by Husband to Obtain Wife's Conveyance. — *Outram v. Round*, 4 Vin. Abr. 203; *Emery v. Wase*, 8 Ves. Jr. 515; *Clark's Case*, 1 Blackf. (Ind.) 122, 12 Am. Dec. 213; *Ikerd v. Beayers*, 106 Ind. 483; *Weed v. Terry*, 2 Dougl.

(Mich.) 344, 45 Am. Dec. 257; *Peeler v. Levy*, 26 N. J. Eq. 335. And see *Simons v. Bedell*, 122 Cal. 341, 68 Am. St. Rep. 35; *McCormick v. Stephany*, 57 N. J. Eq. 257. Compare, however, *Hall v. Hardy*, 3 P. Wms. 189.

7. See *Hall v. Hardy*, 3 P. Wms. 189; *Morris v. Stephenson*, 7 Ves. Jr. 474; *Leach v. Forney*, 21 Iowa 272, 89 Am. Dec. 574.

8. Wife Not Party to Contract. — *Brown v. Lapham*, 22 Colo. 264; *Venator v. Swenson*, 100 Iowa 295; *Zundelowitz v. Webster*, 96 Iowa 587; *Weed v. Terry*, 2 Dougl. (Mich.) 344, 45 Am. Dec. 257; *Seager v. Burns*, 4 Minn. 141; *Camden, etc., R. Co. v. Adams*, 62 N. J. Eq. 656; *McCormick v. Stephany*, 57 N. J. Eq. 257; *Huffman v. Bradshaw*, 30 Pittsb. Leg. J. N. S. (Pa.) 367; *Hanna v. Phillips*, 1 Grant Cas. (Pa.) 253. And see *Williams v. Thomas*, 7 Kulp (Pa.) 371; *Clarke v. Reins*, 12 Gratt. (Va.) 98; *Armstrong v. Oakley*, 23 Wash. 122.

9. *Barbour v. Hickey*, 2 App. Cas. (D. C.) 207; *Bonnet v. Babbage*, (Supm. Ct. Spec. T.) 19 N. Y. Supp. 934; *Graybill v. Brugh*, 89 Va. 895.

10. *Moses v. McClain*, 82 Ala. 370. And see *Conboy v. Kansas City, etc., R. Co.*, 42 Kan. 658.

of his ability and the retention of so much of the purchase money as shall be proportionate to the utmost possible outstanding interest not conveyed, or to refuse such partial title and have his damages for a breach of the contract.¹ But in a *New Jersey* case it was held that indemnity would not be awarded against the dower right, in an action against the husband, where the refusal of the wife to release was not procured by the contrivance of the husband.²

c. **MARRIED WOMEN**—(1) *In General*.—If a married woman cannot lawfully convey real estate, so neither can she enter into a contract for a conveyance which equity will specifically enforce.³ A married woman may always be compelled by a court of chancery specifically to perform a contract entered into with her husband, and duly acknowledged by her as a married woman, to convey lands in which she has a dower interest.⁴

(2) *Rule under Statutes*.—Where, by statute, a married woman is empowered to contract with reference to and convey her individual property, a contract entered into with the formalities prescribed by law will be specifically enforced.⁵

(3) *Refusal of Husband to Join in Wife's Deed*.—A decree for specific performance of a married woman's contract to convey land cannot require her husband to join in a conveyance of the premises where he was not a party to the contract of sale.⁶

(4) *Sale of Homestead*.—This topic has already been fully discussed.⁷

(5) *Instruments Defectively Executed or Acknowledged*.—If the deed or contract of a married woman has been defectively executed in that her husband did not join, equity will not decree the execution of a new conveyance to perfect the title or specific performance of a contract to convey.⁸ Nor will a contract to convey not separately acknowledged as required by statute be enforced in equity.⁹ It has been held in *Maryland* that an unacknowledged and unrecorded deed by a married woman may be enforced in equity.¹⁰ But

1. *Leach v. Forney*, 21 Iowa 271, 89 Am. Dec. 574; *Troutman v. Gowing*, 16 Iowa 415. And see *Miller v. Nelson*, 64 Iowa 458; *Presser v. Hildenbrand*, 23 Iowa 483. See also *supra*, this title, *Partial Performance—Partial Performance with Compensation for Residue*.

2. *Peeler v. Levy*, 26 N. J. Eq. 335.

3. *Blythe v. Dargin*, 68 Ala. 370; *Bowden v. Bland*, 53 Ark. 53, 22 Am. St. Rep. 179; *Milwee v. Milwee*, 44 Ark. 112; *Butler v. Buckingham*, 5 Day (Conn.) 492, 5 Am. Dec. 174; *Townsend v. Chapin*, 12 Allen (Mass.) 476; *Martin v. Dwelly*, 6 Wend. (N. Y.) 19, 21 Am. Dec. 245. See *Martin v. Mitchell*, 2 Jac. & W. 424.

An Oral Contract by a Married Woman for the sale of her land, made during the lifetime of her husband, cannot be specifically enforced under the doctrine of part performance, in the absence of evidence of a renewal of the contract after the death of the husband or a delivery of possession under such antecedent contract. *Sturm v. McGuffin*, 48 W. Va. 595.

Antenuptial Agreement.—Where a husband and wife had entered into an antenuptial contract by which it was agreed that the wife should release her dower right in the husband's property in consideration of the payment of the sum of two thousand dollars to her at his decease, and he paid the said sum to her during his lifetime, in satisfaction of the agreement, it was held that equity would compel her to release her dower in real estate sold by the husband during coverture, she not having joined in the deed. *Carpenter v. Carpenter*, 40 Hun (N. Y.) 263.

4. *Goldstein v. Curtis*, 63 N. J. Eq. 454. And see *Dakin v. Dakin*, 97 Mich. 284.

And it would seem that an acknowledgment made under the compulsion of a decree might still properly certify that it was the woman's free act and deed, or that, indeed, the conveyance would be valid though unacknowledged, because made under the directions of a chancery decree. *Goldstein v. Curtis*, 63 N. J. Eq. 454. But compare *Corby v. Drew*, 55 N. J. Eq. 387.

5. **Separate Property**.—*Klecka v. Ziegler*, 81 Md. 482; *Hyde v. McConnell*, 42 Neb. 50; *Reed's Estate*, 3 Pa. Dist. 503. And see *Flood v. Thomasson*, (Ky. 1894) 25 S. W. Rep. 108.

6. *Mix v. Baldwin*, 156 Ill. 313.

7. **Homestead**.—See the title **HOMESTEAD**, vol. 15, p. 670. See also *Lyon v. Hardin*, 129 Ala. 643; *Griffith v. Ventress*, 91 Ala. 366, 24 Am. St. Rep. 918; *Cox v. Holcomb*, 87 Ala. 589, 13 Am. St. Rep. 79; *Striplin v. Cooper*, 80 Ala. 256; *Gardner v. Moore*, 75 Ala. 397; *Jenkins v. Harrison*, 66 Ala. 345; *Henderson v. Kirkland*, 127 Ala. 185.

8. **Defective Instruments**.—*Gebb v. Rose*, 40 Md. 387; *Townsend v. Chapin*, 12 Allen (Mass.) 476; *Corby v. Drew*, 55 N. J. Eq. 387; *Brown v. Pechman*, 53 S. Car. 1; *Chapman v. Long*, 66 Vt. 656.

9. *Whitlinger v. Jack*, 16 Pa. Co. Ct. 112. Compare *Reed's Estate*, 3 Pa. Dist. 503.

10. *Brundige v. Poor*, 2 Gill & J. (Md.) 1; *Tierman v. Poor*, 1 Gill & J. (Md.) 216, 19 Am. Dec. 225.

a contrary doctrine has been maintained in other cases.¹

(6) *Suits by Married Women*. — A contract not binding on the plaintiff because of her coverture cannot be specifically enforced at her instance.² So a contract to convey land in consideration of the promise of a married woman to convey her homestead is lacking in mutuality of obligation, and therefore is not enforceable at the suit of the husband and wife, even though the wife tenders performance on her part.³ But where a contract has been fully performed by a married woman, the other party cannot defeat performance on the ground that performance of the contract could not originally have been compelled as against the obligee.⁴

16. Insurance. — Equity will enforce a valid oral contract to insure. This is done, where the loss has occurred, not by actually requiring that a policy issue, but by a decree for the payment of the loss as if a policy had issued.⁵ But a court of chancery will not compel an insurance company to issue a policy of insurance, in pursuance of an alleged contract, unless the proof is clear that such contract has been consummated.⁶

17. Options — *a. GENERAL RULE.* — The general rule is that an optional contract, accepted according to its terms, is enforceable in equity,⁷ though in

1. See *Martin v. Dwelly*, 6 Wend. (N. Y.) 9, 21 Am. Dec. 245. And see *Drury v. Foster*, 2 Wall. (U. S.) 24.

2. *Tarr v. Scott*, 4 Brews. (Pa.) 49.

3. *Williams v. Graves*, 7 Tex. Civ. App. 356.

4. *Hawes v. Favor*, 161 Ill. 440; *Williams v. Graves*, 7 Tex. Civ. App. 356.

5. **Contracts to Insure.** — *Mead v. Davison*, 3 Ad. & El. 303, 30 E. C. L. 95; *Taylor v. Merchants' F. Ins. Co.*, 9 How. (U. S.) 390; *Baile v. St. Joseph F. & M. Ins. Co.*, 73 Mo. 371; *Lightbody v. North American Ins. Co.*, 23 Wend. (N. Y.) 18; *Carpenter v. Mutual Safety Ins. Co.*, 4 Sandf. Ch. (N. Y.) 408; *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.) 645; *Woody v. Old Dominion Ins. Co.*, 31 Gratt. (Va.) 362, 31 Am. Rep. 732; *Croft v. Hanover F. Ins. Co.*, 40 W. Va. 508, 52 Am. St. Rep. 902. And see *Hughes v. Piedmont, etc.*, L. Ins. Co., 55 Ga. 111; *Covenant Mut. Ben. Assoc. v. Sears*, 114 Ill. 108; *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96; *Real Estate Sav. Inst. v. Collonious*, 63 Mo. 290; *Harden v. Farmers', etc., F. Assoc.*, 80 Va. 683. But compare *Nestle v. Knickerbocker L. Ins. Co.*, 12 Phila. (Pa.) 477, 34 Leg. Int. (Pa.) 240.

So also a **Life Insurance Contract** may be enforced where loss has occurred before the policy was issued. *Hebert v. Mutual L. Ins. Co.*, 12 Fed. Rep. 807.

6. *Neville v. Merchants', etc., Mut. Ins. Co.*, 19 Ohio 452.

7. **Options** — *England.* — *Dickinson v. Dodds*, 2 Ch. D. 463, 34 L. T. N. S. 607.

United States. — *Brown v. Slee*, 103 U. S. 828; *Watts v. Kellar*, 56 Fed. Rep. 1, 12 U. S. App. 274; *Johnston v. Trippe*, 33 Fed. Rep. 530; *Waterman v. Waterman*, 27 Fed. Rep. 827; *Willard v. Taylor*, 8 Wall. (U. S.) 557.

Alabama. — *Moses v. McClain*, 82 Ala. 370; *Chambers v. Alabama Iron Co.*, 67 Ala. 353; *Ross v. Parks*, 93 Ala. 153, 30 Am. St. Rep. 47.

California. — *Sayward v. Houghton*, 119 Cal. 545; *Calanchini v. Branstetter*, 84 Cal. 249; *Hall v. Center*, 40 Cal. 65; *De Rutte v. Muldrow*, 16 Cal. 513; *Stanton v. Singleton*, (Cal. 1898) 54 Pac. Rep. 587.

Colorado. — *Byers v. Denver Circle R. Co.*, 13 Colo. 552.

Illinois. — *Guyer v. Warren*, 175 Ill. 328; *Hayes v. O'Brien*, 149 Ill. 403; *Estes v. Furlong*, 59 Ill. 298; *Perkins v. Hadsell*, 50 Ill. 219. *Indiana.* — *Herrman v. Babcock*, 103 Ind. 461; *Souffrain v. McDonald*, 27 Ind. 269.

Maine. — *Rogers v. Saunders*, 16 Me. 97, 33 Am. Dec. 635.

Massachusetts. — *O'Brien v. Boland*, 166 Mass. 481; *Bell v. Boston*, 101 Mass. 510; *Boston, etc., R. Co. v. Bartlett*, 3 Cush. (Mass.) 224.

Montana. — *Ide v. Leiser*, 10 Mont. 5, 24 Am. St. Rep. 17.

Nebraska. — *Donahue v. Potter, etc., Co.*, 63 Neb. 128.

Nevada. — *Schroeder v. Gemeinder*, 10 Nev. 355.

New Jersey. — *Woodruff v. Woodruff*, 44 N. J. Eq. 349; *Houghwout v. Boisubin*, 18 N. J. Eq. 318; *Hawralty v. Warren*, 18 N. J. Eq. 124, 90 Am. Dec. 613; *Madison Athletic Assoc. v. Brittin*, 60 N. J. Eq. 160; *Brooks v. Wentz*, 61 N. J. Eq. 474; *Duffy v. Kelly*, 55 N. J. Eq. 627; *Zimmerman v. Brown*, (N. J. 1897) 36 Atl. Rep. 675; *Benwell v. Newark*, 55 N. J. Eq. 260.

Oregon. — *House v. Jackson*, 24 Oregon 89.

Pennsylvania. — *Yerkes v. Richards*, 153 Pa. St. 646, 34 Am. St. Rep. 721; *Sylvester v. Born*, 132 Pa. St. 467; *Newell's Appeal*, 100 Pa. St. 513; *Smith's Appeal*, 69 Pa. St. 474; *Corson v. Mulvany*, 49 Pa. St. 88, 88 Am. Dec. 485; *Kerr v. Day*, 14 Pa. St. 112, 53 Am. Dec. 526.

Tennessee. — *Bradford v. Foster*, 87 Tenn. 4.

Texas. — *Williams v. Graves*, 7 Tex. Civ. App. 356.

And see *Atkinson v. Whitney*, 67 Miss. 655.

For a discussion of the requisites and validity of option agreements, see the title **OPTIONS**, vol. 21, p. 924.

Contract Held Too Uncertain. — See *Fogg v. Price*, 145 Mass. 513. And see *Hayes v. O'Brien*, (Ill. 1891) 26 N. E. Rep. 601.

Must Be Valid under Statute of Frauds. — *Wright v. Weeks*, 3 Bosw. (N. Y.) 372. And see the title **OPTIONS**, vol. 21, p. 927.

a few instances the erroneous view has been taken that such contracts are unenforceable for lack of mutuality.¹ In order to be enforceable, however, it is expressly laid down that the acceptance of the vendee must be unconditional,² and of the terms and price contained in the option,³ and within the time limited therein.⁴ So an option to purchase is, in the absence of a sufficient consideration, revocable at any time before acceptance, and if it is so revoked it cannot be specifically enforced.⁵

b. REFUSAL TO ACCEPT PURCHASE MONEY. — The refusal of the vendor to accept the purchase money tendered upon election to accept an option does not destroy the right of specific performance, though the vendee might thereupon withdraw his election to purchase.⁶

c. OPTION TO NULLIFY DECREE. — Where either the provisions of the contract or the law would grant to a party the option to nullify a decree for specific performance, the court will not do a vain thing by making such decree.⁷

d. CONTRACTS TERMINABLE AT OPTION OF ONE PARTY. — The doctrine regulating the specific enforcement of a contract terminable on notice at the option of the party seeking equitable relief is considered in another place.⁸

18. Partnership. — Contracts for the entering into or continuance of partnerships will not, in general, be enforced in equity.⁹

19. Patents. — Equity may enforce the specific performance of a contract for the sale or assignment of a patent, as the value of a patent right cannot be ascertained by computation.¹⁰

Plaintiff Applicant for Patent. — A contract that the defendant should assign to the complainant a certain invention and a pending application to obtain a

1. Minority View. — See the title **OPTIONS**, vol. 21, p. 928. See also *Clason v. Bailey*, 14 Johns. (N. Y.) 488; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. (N. Y.) 275; *Benedict v. Lynch*, 1 Johns. Ch. (N. Y.) 370, 7 Am. Dec. 484; *Maynard v. Brown*, 41 Mich. 298.

2. Unconditional Acceptance. — *Langellier v. Schaefer*, 36 Minn. 361. And see the title **OPTIONS**, vol. 21, p. 930.

Held to Be No Variance of Terms. — *Matteson v. Scofield*, 27 Wis. 671.

3. Erickson v. Wallace, 45 Kan. 430; *Bentz v. Eubanks*, 41 Kan. 28; *Barker v. Cross*, 35 Kan. 463; *Barker v. Critzer*, 35 Kan. 459; *Langellier v. Schaefer*, 36 Minn. 361; *Schields v. Horbach*, 30 Neb. 536; *Weaver v. Burr*, 31 W. Va. 736. And see the title **OPTIONS**, vol. 21, p. 930.

4. Pope v. Hoopes, 84 Fed. Rep. 927; *Roberts v. Norton*, 66 Conn. 1; *Schields v. Horbach*, 30 Neb. 536.

Tender One Day Late. — *Kelsey v. Crowther*, 7 Utah 519.

Where No Acceptance of Option. — *Sutherland v. Parkins*, 75 Ill. 338.

5. Crandall v. Willig, 166 Ill. 233. And see the title **OPTIONS**, vol. 21, p. 929.

6. Calanchini v. Branstetter, 84 Cal. 253; *Herrman v. Babcock*, 103 Ind. 461; *Souffrain v. McDonald*, 27 Ind. 269.

7. Rust v. Conrad, 47 Mich. 449, 41 Am. Rep. 720.

8. See supra, this title, *Requisites for Equitable Interposition — Mutuality*.

9. Contracts for Partnerships. — See for the principles applicable to this particular topic the title **PARTNERSHIP**, vol. 22, p. 112. And see *Truitt v. Clark*, 81 Ill. App. 652; *Goldberg v. Kirschstein*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 249.

Period of Duration Fixed — Enforceable. — *Rust v. Conrad*, 47 Mich. 449, 41 Am. Rep. 720; *Wilcox v. Williams*, 92 Hun (N. Y.) 250.

Partnership for Single Transaction — Enforceable. — See *Scott v. Rayment*, L. R. 7 Eq. 115.

Where Duration Not Fixed — Not Enforceable. — *New Brunswick, etc., Co. v. Muggeridge*, 4 Drew 698; *Hercy v. Birch*, 9 Ves. Jr. 357; *Clark v. Truitt*, 183 Ill. 239; *Rust v. Conrad*, 47 Mich. 455, 41 Am. Rep. 720.

Contract Which Defendant Might Dissolve in Fourteen Days — Not Enforceable. — *Sheffield Gas Consumer's Co. v. Harrison*, 17 Beav. 294.

Involving Personal Services — Skill, Judgment, or Discretion — Enforceable. — *Roberts v. Kelsey*, 38 Mich. 602; *Buck v. Smith*, 29 Mich. 166, 18 Am. Rep. 84.

Where Party Has Acted to His Prejudice on Faith of Agreement — Enforceable. — *St. Joseph Hydraulic Co. v. Globe Tissue Paper Co.*, 156 Ind. 665. And see *Buxton v. Lister*, 3 Atk. 383; *England v. Curling*, 8 Beav. 129; *Crawshay v. Maule*, 1 Swanst. 495, 513 note; *Satterthwait v. Marshall*, 4 Del. Ch. 354; *Wilson v. Campbell*, 10 Ill. 383; *Whitworth v. Harris*, 40 Miss. 491; *Wilcox v. Williams*, 92 Hun (N. Y.) 250; *Birchett v. Bolling*, 5 Munf. (Va.) 442.

10. Patents. — See this question discussed in the title **PATENTS**, vol. 22, pp. 422, 437. See also *Hull v. Pitrat*, 45 Fed. Rep. 94; *Corbin v. Tracy*, 34 Conn. 325; *Desper v. Continental Water Meter Co.*, 137 Mass. 252; *Young v. Gilmore*, 59 N. Y. App. Div. 612, 167 N. Y. 500; *Harrigan v. Smith*, 57 N. J. Eq. 635. And see *Harrigan v. Smith*, (N. J. 1898) 40 Atl. Rep. 13; *Hopedale Mach. Co. v. Entwistle*, 133 Mass. 443.

Vague and Uncertain Contract — Adequate Remedy at Law. — *Washburn, etc., Mfg. Co. v. Freeman Wire Co.*, 41 Fed. Rep. 410.

patent therefor cannot be specifically enforced in equity, where the complainant has applied for a patent for the same invention and interference proceedings are pending in the Patent Office on the two applications. The principle involved here is that a complainant cannot assert title in himself and at the same time call on the defendant to convey title.¹

Renewal of License. — A court of equity may specifically enforce a contract for the renewal of a license under a patent.²

Contract Not to Infringe. — It has been held that a court of equity has jurisdiction of a contract whereby the promisor obligates himself not to infringe a patent claimed by the promisee.³

Suit by Vendor. — An action in equity for the specific performance of a contract to purchase a patent at a specified price will not lie, as the vendor has an adequate remedy at law.⁴

20. Personal Services. — The general rule is that equity will refuse to decree specific performance of a contract for personal services involving the exercise of skill, judgment, taste, or discretion,⁵ particularly if the terms of the contract or the nature of the services to be rendered are vague and uncertain,⁶ or if the contract is to continue through a considerable period of time, and would require the constant supervision of the court.⁷ But under proper circumstances equity may enforce specific performance to the extent of restraining the breach of negative covenants in contracts for personal services, as where the defendant has covenanted not to serve others in the capacity in which he has been employed by the plaintiff.⁸

1. *Hildreth v. Thibodeau*, 117 Fed. Rep. 146.

2. *Domestic Tel., etc., Co. v. Metropolitan Telephone, etc., Co.*, 39 N. J. Eq. 160.

3. *American Box Mach. Co. v. Crosman*, 57 Fed. Rep. 1021.

4. *Anderson v. Olsen*, 188 Ill. 502.

5. **Contracts for Personal Services — England.** — *Johnson v. Shrewsbury, etc., R. Co.*, 3 De G. M. & G. 914; *Blackett v. Bates*, L. R. 1 Ch. 117; *Hills v. Croll*, 2 Phil. 60; *Rolfe v. Rolfe*, 15 Sim. 88; *Kemble v. Kean*, 6 Sim. 333; *Kimberley v. Jennings*, 6 Sim. 340; *Fothergill v. Rowland*, L. R. 17 Eq. 132.

United States. — *Allegheny Base Ball Club v. Bennett*, 14 Fed. Rep. 257; *Bickford v. Davis*, 11 Fed. Rep. 549; *Western Union Tel. Co. v. Union Pac. R. Co.*, 3 Fed. Rep. 423.

Alabama. — *South, etc., Alabama R. Co. v. Highland Ave., etc., R. Co.*, 98 Ala. 400, 39 Am. St. Rep. 74; *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498, 3 Am. St. Rep. 758; *Electric Lighting Co. v. Mobile, etc., R. Co.*, 109 Ala. 190, 55 Am. St. Rep. 927.

California. — *O'Brien v. Perry*, 130 Cal. 526; *Stanton v. Singleton*, 126 Cal. 657; *Cooper v. Pena*, 21 Cal. 403.

Georgia. — *Willingham v. Hooven*, 74 Ga. 233, 58 Am. Dec. 435.

Illinois. — *Clark v. Truitt*, 183 Ill. 239, affirming 81 Ill. App. 652; *Welty v. Jacobs*, 171 Ill. 624; *Wollensak v. Briggs*, 119 Ill. 453.

Indiana. — *Ikerd v. Beavers*, 106 Ind. 483; *Dukes v. Bash*, 29 Ind. App. 103; *Clark's Case*, 1 Blackf. (Ind.) 122, 12 Am. Dec. 213.

Michigan. — *Blanchard v. Detroit, etc., R. Co.*, 31 Mich. 43, 18 Am. Rep. 142; *Buck v. Smith*, 29 Mich. 166, 18 Am. Rep. 84.

New Jersey. — *Danforth v. Philadelphia, etc., R. Co.*, 30 N. J. Eq. 12.

New York. — *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y. 60, 68 Am. St. Rep. 749; *Metropolitan Exhibition Co. v. Ward*, (Supm.

Ct.) 24 Abb. N. Cas. (N. Y.) 393; *House v. Clemens*, (C. Pl. Spec. T.) 24 Abb. N. Cas. (N. Y.) 381; *De Pol v. Sohlke*, 7 Robt. (N. Y.) 280; *De Rivafrinol v. Corsetti*, 4 Paige (N. Y.) 264, 25 Am. Dec. 532; *Sanquirico v. Benedetti*, 1 Barb. (N. Y.) 315; *Mapleson v. Del Puente*, (N. Y. Super. Ct. Spec. T.) 13 Abb. N. Cas. (N. Y.) 146; *Fredricks v. Mayer*, (Super. Ct. Spec. T.) 13 How. Pr. (N. Y.) 568.

Ohio. — *Port Clinton R. Co. v. Cleveland, etc., R. Co.*, 13 Ohio St. 544.

Pennsylvania. — *Ford v. Jermon*, 6 Phila. (Pa.) 6, 22 Leg. Int. (Pa.) 44.

South Carolina. — *McCarter v. Armstrong*, 32 S. Car. 203.

Virginia. — *Campbell v. Rust*, 85 Va. 653.

6. *Metropolitan Exhibition Co. v. Ward*, (Supm. Ct.) 24 Abb. N. Cas. (N. Y.) 393; *Ogden v. Philadelphia, etc., Traction Co.*, 202 Pa. St. 480.

7. See cases cited *supra*, this page.

Contracts Abridging Personal Liberty. — As liberty is an inalienable right, in general no contract which deprives a person of his liberty can be specifically enforced. *Matter of Baker*, (Supm. Ct.) 29 How. Pr. (N. Y.) 485. See *Clark's Case*, 1 Blackf. (Ind.) 122, 12 Am. Dec. 213.

8. *Metropolitan Exhibition Co. v. Ward*, (Supm. Ct.) 24 Abb. N. Cas. (N. Y.) 393; *House v. Clemens*, (C. Pl. Spec. T.) 24 Abb. N. Cas. (N. Y.) 381; *Metropolitan Exhibition Co. v. Ewing*, (U. S. Cir. Ct.) 24 Abb. N. Cas. (N. Y.) 419. See also *Lumley v. Wagner*, 1 De G. M. & G. 604, 13 Eng. L. & Eq. 252, overruling *Kemble v. Kean*, 6 Sim. 333; *Montague v. Flockton*, L. R. 16 Eq. 189; *McCaull v. Braham*, 16 Fed. Rep. 37; *Hahn v. Concordia Soc.*, 42 Md. 460; *Daly v. Smith*, (N. Y. Super. Ct. Spec. T.) 49 How. Pr. (N. Y.) 150; *Butler v. Galletti*, (N. Y. Super. Ct.) 21 How. Pr. (N. Y.) 466; *Dupre v. Thompson*, 4 Barb. (N. Y.)

21. Personal Property Contracts — *a.* IN GENERAL. — It has been stated as a general rule that equity will not enforce contracts relating to personal property.¹ But it is well recognized that this rule is general only in so far as it may be stated generally that for the breach of a contract relating to chattels, damages at law are adequate,² and that, therefore, whether or not equity will enforce personal property contracts is, after all, dependent upon the same doctrines as control the jurisdiction of chancery in other cases.³

b. PROPERTY HAVING MARKET VALUE. — Contracts for the sale of goods possessing an easily ascertainable market value, as cotton or wheat, or ordinary merchandise easily found in the market, will not be specifically enforced. The only relief for the breach of such contracts lies in damages at law.⁴

c. WHERE REMEDY AT LAW INADEQUATE — (1) *General Rule.* — Specific performance of contracts relating to personal property will be decreed where under the special circumstances of the particular case a judgment for damages at law would be inadequate.⁵ Or, as the rule as been otherwise expressed,

279; *Bradley v. Bosley*, 1 Barb. Ch. (N. Y.) 125; *Fredricks v. Mayer*, (Super. Ct. Spec. T.) 13 How. Pr. (N. Y.) 567; *Cort v. Lassard*, 18 Oregon 221, 17 Am. St. Rep. 726.

Early American Doctrine, Contra. — This was not the early American practice, however, for some of the leading cases follow *Kemble v. Kean*, 6 Sim. 333, and hold that inasmuch as such covenants cannot be affirmatively enforced their breach cannot be enjoined. See *Burton v. Marshall*, 4 Gill (Md.) 487, 45 Am. Dec. 171; *Hayes v. Willio*, (C. Pl. Spec. T.) 11 Abb. Pr. N. S. (N. Y.) 167; *Sanquirico v. Benedetti*, 1 Barb. (N. Y.) 315; *Hamblin v. Dinneford*, 2 Edw. (N. Y.) 529.

1. Contracts as to Personal Property — *England.* — *Buxton v. Lister*, 3 Atk. 384.

Alabama. — *Dilburn v. Youngblood*, 85 Ala. 449.

California. — *McGarvey v. Hall*, 23 Cal. 140; *McLaughlin v. Piatti*, 27 Cal. 451.

Connecticut. — *Cowles v. Whitman*, 10 Conn. 121, 25 Am. Dec. 60.

Georgia. — *Carolee v. Handelis*, 103 Ga. 299.

Illinois. — *Cohn v. Mitchell*, 115 Ill. 124; *Parker v. Garrison*, 61 Ill. 250; *Harley v. Sanitary Dist.*, 54 Ill. App. 337.

Kentucky. — *Madison v. Chinn*, 3 J. J. Marsh. (Ky.) 230; *Caldwell v. Myers*, Hard. (Ky.) 560.

Massachusetts. — *Jones v. Newhall*, 115 Mass. 244, 15 Am. Rep. 97; *Jones v. Boston Mill Corp.*, 4 Pick. (Mass.) 507, 16 Am. Dec. 358.

New Jersey. — *Joslin v. Stokes*, 38 N. J. Eq. 31; *Kimball v. Morton*, 5 N. J. Eq. 26, 43 Am. Dec. 621.

New York. — *Pennsylvania Coal Co. v. Delaware, etc., Canal Co.*, 31 N. Y. 91.

North Carolina. — *Paddock v. Davenport*, 107 N. Car. 710.

Pennsylvania. — *Foll's Appeal*, 91 Pa. St. 434, 36 Am. Rep. 671; *Northern Cent. R. Co. v. Walworth*, 12 York. Leg. Rec. (Pa.) 121.

South Carolina. — *Lining v. Geddes*, 1 McCord Eq. (S. Car.) 304, 16 Am. Dec. 606.

2. *Rothholz v. Schwartz*, 46 N. J. Eq. 477, 19 Am. St. Rep. 409, citing *Cutting v. Dana*, 25 N. J. Eq. 265. See also *Sullivan v. Tuck*, 1 Md. Ch. 59, and *Triebert v. Burgess*, 11 Md. 464, in which it was held that courts of chancery do not specifically enforce contracts in respect to personal property with the same facility and

universality as contracts relating to real estate, because in the former classes of contracts the courts of law are generally competent to give adequate relief.

3. *Adderley v. Dixon*, 1 Sim. & St. 608; *Cutting v. Dana*, 25 N. J. Eq. 265.

4. Market Value Easily Ascertained. — *Scott v. Billgerry*, 40 Miss. 119; *Ferguson v. Paschall*, 11 Mo. 267; *St. Regis Paper Co. v. Santa Clara Lumber Co.*, 55 N. Y. App. Div. 225. But specific performance has been decreed in case of a contract for the sale of goods in very large quantities, *Buxton v. Lister*, 3 Atk. 384; or where the goods agreed to be sold were indispensable to the complainant's business and the complainant could not obtain them elsewhere, *Equitable Gas Light Co. v. Baltimore Coal Tar, etc., Co.*, 63 Md. 285; *Gloucester Isinglass, etc., Co. v. Russia Cement Co.*, 154 Mass. 92, 26 Am. St. Rep. 214.

5. Damages Inadequate — *England.* — *Doloret v. Rothschild*, 1 Sim. & St. 590; *Adderley v. Dixon*, 1 Sim. & St. 608; *Bryson v. Whitehead*, 1 Sim. & St. 74; *Pooley v. Budd*, 14 Beav. 34; *Duncuft v. Albrecht*, 12 Sim. 189; *Wright v. Bell*, 5 Price 325; *Buxton v. Lister*, 3 Atk. 383; *Wood v. Rowcliffe*, 2 Phil. 382.

United States. — *Southern Express Co. v. Western North Carolina R. Co.*, 99 U. S. 191; *McNamara v. Home Land, etc., Co.*, 105 Fed. Rep. 202.

California. — *Treasurer v. Commercial Coal Min. Co.*, 23 Cal. 393, 83 Am. Dec. 123.

Colorado. — *Colorado Land, etc., Co. v. Adams*, 5 Colo. App. 190; *Frue v. Houghton*, 6 Colo. 318.

Connecticut. — *Cowles v. Whitman*, 10 Conn. 121, 25 Am. Dec. 60.

Idaho. — *Brady v. Yost*, (Idaho 1898) 55 Pac. Rep. 542.

Illinois. — *Parker v. Garrison*, 61 Ill. 253.

Maryland. — *Gottschalk v. Stein*, 69 Md. 51; *Triebert v. Burgess*, 11 Md. 464; *Sullivan v. Tuck*, 1 Md. Ch. 59.

Massachusetts. — *Clark v. Flint*, 22 Pick. (Mass.) 231, 33 Am. Dec. 733; *Todd v. Taft*, 7 Allen (Mass.) 371.

Michigan. — *Peer v. Kean*, 14 Mich. 354.

New Jersey. — *Cutting v. Dana*, 25 N. J. Eq. 265; *Furman v. Clark*, 11 N. J. Eq. 306; *Stevens v. Wilson*, 18 N. J. Eq. 447.

New York. — *Deen v. Milne*, 113 N. Y. 303;

where the complainant has not a clear, complete, and adequate remedy at law, or where some other ingredient of equity jurisdiction is involved in the transaction, the specific performance of a contract for the delivery of chattels will be decreed,¹ as where the measure of damages resulting from the nonperformance of the agreement is uncertain or difficult to ascertain.²

(2) *Chattels Possessing Pretium Affectionis*. — Where the chattel or chattels involved in the suit possess *pretium affectionis*, specific performance will, as a rule, be decreed,³ as heirlooms, family portraits,⁴ antiques and objects of art,⁵ or maps, drawings, and documents of peculiar value to the plaintiff,⁶ or where the chattel is of special or peculiar value on account of sentimental associations.⁷

d. PAROL CONTRACT FOR MORTGAGE. — A parol contract for a mortgage of personal property, based upon a valuable consideration, may be enforced in a court of equity, if the contract is not such as the statute of frauds requires to be in writing.⁸

e. PAYMENT OF CONSIDERATION — ACCOUNTING. — It has been held that equity will entertain jurisdiction in favor of a vendor for the payment of the consideration for the delivery of chattels, where payment was to be made in a particular way or an accounting is necessary to ascertain the amount.⁹

22. Real Property Contracts — *a. IN GENERAL*. — By its very nature, real estate has no measurable money equivalent. One who has a contract which entitles him to the conveyance of land cannot be compelled to accept money compensation instead, for money may not be a fit equivalent. As to him equity will always presume that the land possesses a special value that is not, for the purposes of the suit, convertible into any precise sum. Hence it follows that a contract relating to land will be enforced as a matter of course, if it is fair and definite in its terms, and stands upon a sufficient consideration.¹⁰ But though the contract relates to realty, a court of equity may, under

Carpenter v. Mutual Safety Ins. Co., 4 Sandf. Ch. (N. Y.) 408.

Oregon. — *St. David's Church v. Wood*, 24 Oregon 396, 41 Am. St. Rep. 860.

Pennsylvania. — *Smaltz's Appeal*, 99 Pa. St. 312; *Palmer v. Graham*, 1 Pars. Eq. Cas. (Pa.) 476.

South Carolina. — *Charleston v. Page*, Spears Eq. (S. Car.) 159.

Vermont. — *Fowler v. Sands*, 73 Vt. 236.

Virginia. — *Stuart v. Pennis*, 91 Va. 688.

Washington. — *Young v. Porter*, 27 Wash. 551.

Rule Limited to Special Circumstances. — In *Young v. Daniels*, 2 Iowa 126, 63 Am. Dec. 477, the court said: "In contracts respecting real property, however, courts of equity are in the habit of interposing to grant relief to a far greater extent than in cases respecting personal property; and while in cases respecting chattels this jurisdiction is limited to special circumstances, in cases of land contracts it is universally maintained."

Personalty Contracts Not Enforced as Matter of Cause. — *Roundtree v. McLain*, Hempst. (U. S.) 245; *Mechanics' Bank v. Seton*, 1 Pet. (U. S.) 299; *Savery v. Spence*, 13 Ala. 561; *Johnson v. Rickett*, 5 Cal. 218; *Justices v. Croft*, 18 Ga. 473; *Sullivan v. Tuck*, 1 Md. Ch. 59; *Waters v. Howard*, 1 Md. Ch. 112; *Johnson v. Brooks*, 93 N. Y. 343; *Cushman v. Thayer Mfg. Jewelry Co.*, 76 N. Y. 365, 32 Am. Rep. 315; *Phillips v. Berger*, 2 Barb. (N. Y.) 608; *Lloyd v. Wheatly*, 2 Jones Eq. (55 N. Car.) 267.

1. *Cutting v. Dana*, 25 N. J. Eq. 265; *Stevens v. Wilson*, 18 N. J. Eq. 447.

2. *Cohn v. Mitchell*, 115 Ill. 124.

Loss Unascertainable — Performance Necessary to Justice. — *Sullivan v. Tuck*, 1 Md. Ch. 59; *Hoy v. Hansborough*, Freem. (Miss.) 533; *Furman v. Clark*, 11 N. J. Eq. 306.

3. Pretium Affectionis. — *Lowther v. Lowther*, 13 Ves. Jr. 95; *Lloyd v. Loaring*, 6 Ves. Jr. 773; *Fells v. Read*, 3 Ves. Jr. 70; *Saville v. Tankred*, 1 Ves. 101; *Cohn v. Mitchell*, 115 Ill. 124; *Caldwell v. Myers*, Hard. (Ky.) 560; *Womack v. Smith*, 11 Humph. (Tenn.) 478, 54 Am. Dec. 51. And see *Savery v. Spence*, 13 Ala. 561; *Henderson v. Touchstone*, 22 Ga. 1; *Mallery v. Dudley*, 4 Ga. 52; *Bryan v. Robert*, 1 Strobb. Eq. (S. Car.) 334.

4. *Arundell v. Phipps*, 10 Ves. Jr. 148; *Macclesfield v. Davis*, 3 Ves. & B. 18.

5. *Somerset v. Cookson*, 3 P. Wms. 389; *Pusey v. Pusey*, 1 Vern. 273; *Pearne v. Lisle*, Amb. 77; *Fells v. Read*, 3 Ves. Jr. 70.

6. *McGowin v. Remington*, 12 Pa. St. 56.

7. *Gillett v. Warren*, 10 N. Mex. 523.

But see as holding that where the party has previously placed a money value on the chattel, specific performance may be denied, *Gillett v. Warren*, 10 N. Mex. 523.

8. *Triebert v. Burgess*, 11 Md. 464; *Alexander v. Ghiselin*, 5 Gill (Md.) 138; *Sullivan v. Tuck*, 1 Md. Ch. 59.

Contra. — To the effect, however, that the specific performance of such a contract cannot be enforced, see *Johnson v. Hoover*, 72 Ind. 395.

9. See *Rothholz v. Schwartz*, 46 N. J. Eq. 477, 19 Am. St. Rep. 409; *McKnight v. Robbins*, 5 N. J. Eq. 229.

10. Contracts for Lands — General Rule — United States. — *Hoard v. Chesapeake*, etc., R.

certain circumstances, refuse its aid and leave the parties to their legal remedies, or it may rescind the contract and place the parties *in statu quo* by making compensation.¹ Equity assumes jurisdiction, however, over all manner of rights and interests connected with real estate, for example, in addition to contracts which relate to fee-simple interests in land, leasehold estates, life estates, easements, expectancies, riparian rights, and, indeed, any interest or estate, legal or equitable, which arises out of real property.² It has been held, indeed, that a mere possibility, clothed with an interest in real estate, may be made the subject of a contract which a court of equity will enforce.³

Co., 123 U. S. 222; *McConville v. Howell*, 17 Fed. Rep. 104; *King v. Hamilton*, 4 Pet. (U. S.) 328.

Alabama.—*Sims v. Knight*, 71 Ala. 197.

Colorado.—*Speer v. Craig*, 16 Colo. 478.

Connecticut.—*Hodges v. Kowing*, 58 Conn. 12.

Dakota.—*Buttz v. Colton*, 6 Dak. 306.

Illinois.—*Harding v. Gibbs*, 125 Ill. 85, 8 Am. St. Rep. 345; *Hamilton v. Harvey*, 121 Ill. 469, 2 Am. St. Rep. 118; *Johnson v. Dodge*, 17 Ill. 433.

Indiana.—*Modisett v. Johnson*, 2 Blackf. (Ind.) 431.

Iowa.—*Throckmorton v. Davidson*, 68 Iowa 643; *Keegan v. Williams*, 22 Iowa 378; *Young v. Daniels*, 2 Iowa 126, 63 Am. Dec. 477; *Usher v. Livermore*, 2 Iowa 117.

Kansas.—*Slizer v. Adams*, 10 Kan. App. 377; *Fowler v. Marshall*, 29 Kan. 665.

Kentucky.—*Beeler v. Stewart*, (Ky. 1897) 41 S. W. Rep. 32.

Maryland.—*Newbold v. Peabody Heights Co.*, 70 Md. 493; *Popplein v. Foley*, 61 Md. 381; *Shriver v. Seiss*, 49 Md. 384.

Massachusetts.—*Ensign v. Kellogg*, 4 Pick. (Mass.) 5.

Michigan.—*Wilkinson v. Kneeland*, 125 Mich. 261; *Lovejoy v. Potter*, 60 Mich. 95; *Au Gres Boom Co. v. Whitney*, 26 Mich. 42.

Minnesota.—*St. Paul Division No. 1 v. Brown*, 9 Minn. 157.

Mississippi.—*Aston v. Robinson*, 49 Miss. 348.

New Jersey.—*Snyder v. Greaves*, (N. J. 1891) 21 Atl. Rep. 291.

New York.—*Margraf v. Muir*, 57 N. Y. 155; *Coffin v. Lockhart*, 60 Hun (N. Y.) 178.

North Carolina.—*Kitchen v. Herring*, 7 Ired. Eq. (42 N. Car.) 190.

Rhode Island.—*Middletown v. Newport Hospital*, 16 R. I. 319; *King v. Millard*, 15 R. I. 426.

Virginia.—*Campbell v. Rust*, 85 Va. 653; *Hoover v. Buck*, (Va. 1895) 21 S. E. Rep. 474; *Farrier v. Reynolds*, 88 Va. 141.

West Virginia.—*West Virginia Oil, etc., Co. v. Vinal*, 14 W. Va. 637; *Rader v. Neal*, 13 W. Va. 388; *Abbott v. L'Hommiedieu*, 10 W. Va. 677.

Wisconsin.—*McClellan v. Cross*, 35 Wis. 693.

It has been said, accordingly, that when a contract respecting real property is in its nature and circumstances unobjectionable, it is as much a matter of course for courts of equity to decree specific performance of it as it is for a court of law to give damages for its breach. *Chambers v. Alabama Iron Co.*, 67 Ala. 353; *Bogan v. Daughdrill*, 51 Ala. 312; *McClure v.*

Otrich, 118 Ill. 320; *West Virginia Oil, etc., Co. v. Vinal*, 14 W. Va. 637.

Undertaking in Deed Binding upon Grantee.—*Post v. West Shore R. Co.*, 123 N. Y. 580.

Contract to Execute Title Bond.—*Sterling v. Klepsattle*, 24 Ind. 94, 87 Am. Dec. 319.

1. *West Virginia Oil, etc., Co. v. Vinal*, 14 W. Va. 637. And see *Paddock v. Davenport*, 107 N. Car. 710.

Chancery will not enforce specific performance of a contract to convey land of small value where there are no equitable grounds, and an adequate remedy at law may be had for much less cost. *Blake v. Flatley*, 44 N. J. Eq. 228, 6 Am. St. Rep. 886.

2. *Beach Gravel, etc., Co. v. Simmons*, 62 Ill. App. 646; *Wright v. Brown*, 116 N. Car. 26; *Stuart v. Pennis*, 91 Va. 688.

Easements.—*Purinton v. Northern Illinois R. Co.*, 46 Ill. 297; *Puttman v. Halter*, 24 Iowa 425; *Wetherell v. Brobst*, 23 Iowa 586.

Rule Stated in Case of Expectancies.—It has been frequently held that parties who are interested in the estate of a deceased person, or who have expectancies in estates, may make a contract between themselves as to how the same shall be divided, which equity will specifically enforce, particularly where the contract is for the purpose of settling or avoiding family controversies or adjusting doubtful rights. *Wethered v. Wethered*, 2 Sim. 183; *Beckley v. Newland*, 2 P. Wms. 182; *Hobson v. Trevor*, 2 P. Wms. 191; *Fulton v. Smith*, 27 Ga. 413; *Mastin v. Marlow*, 65 N. Car. 695; *Power's Appeal*, 63 Pa. St. 443; *Bayler v. Com.*, 40 Pa. St. 37, 80 Am. Dec. 551; *Price v. Winston*, 4 Manuf. (Va.) 63. And see the title FAMILY AGREEMENTS OR SETTLEMENTS, vol. 12, p. 875.

But it has been held that a verbal contract between two children, made during the life of the father, whereby disinheritance of one who was contemplating an act in opposition to his father's advice and express desire was sought to be avoided, would not be enforced in equity, because such a compact tended to the destruction of family confidence and the impairment of parental authority. *Mercier v. Mercier*, 50 Ga. 546, 15 Am. Rep. 694.

And to the effect that equity will not decree the specific performance of a contract with reference to an expectancy, see *Lowry v. Spear*, 7 Bush (Ky.) 451.

Riparian Rights.—*Rerick v. Kern*, 14 S. & R. (Pa.) 267, 16 Am. Dec. 497. See also *Carson v. Percy*, 57 Miss. 97; *Coffman v. Robbins*, 8 Oregon 278.

Equitable Interests.—*Townshend v. Goodfellow*, 40 Minn. 312, 12 Am. St. Rep. 736; *Borders v. Murphy*, 78 Ill. 81.

3. *Anderson v. Lewis, Freem. (Miss.)* 178.

So, also, an agreement between the holder of tax sale certificates and the owner of the property so sold providing for the redemption of the certificates may be specifically enforced proportionately where the owner has paid a part of the amount agreed on.¹

b. CONTRACTS OF SALE — (1) *Suits by Vendor* — (a) *In General*. — Though the vendee's duty in these contracts generally consists in nothing beyond the payment of money, for which the law would seem to afford a sufficient remedy, yet the vendor has a right, in a court of equity, to compel him to comply with his agreement by accepting the land and paying for it. This is held permissible, under the equitable doctrine that the enforcement of contracts must be mutual, and that where the vendee would have a right to a decree compelling the conveyance of the land to him, his vendor must likewise be permitted in equity to compel the acceptance of his deed and the payment of the consideration for it. And this the vendor may do, even though he may have an action at law for the purchase money,² although, it has been said, "usually the same necessity for the specific execution of a contract does not exist in the case of a vendor that there is in the case of a vendee."³ A vendor, therefore, in a contract for the sale and purchase of land has a choice of remedies and may proceed in equity for specific performance of the contract of purchase, or at law for the purchase price.⁴

(b) *Title to Be Conveyed* — *aa. IN GENERAL*. — A promise to convey a good title is always implied in an executory contract for the sale of lands, and a purchaser is never bound to accept a defective title, unless he expressly stipulates to take such title knowing its defects.⁵ But where the contract is only for a

1. *U. S. Security, etc., Co. v. Riddle*, 14 Colo. App. 407.

2. *Suit by Vendor — England*. — *Pincke v. Curteis*, 4 Bro. C. C. 329.

United States. — *Cathcart v. Robinson*, 5 Pet. (U. S.) 264; *Raymond v. San Gabriel Valley Land, etc., Co.*, 53 Fed. Rep. 883.

Illinois. — *Heatherwick v. Heatherwick*, 32 Ill. 73; *Andrews v. Sullivan*, 7 Ill. 327, 43 Am. Dec. 53.

Kansas. — *Rock Island Lumber, etc., Co. v. Fairmount Town Co.*, 51 Kan. 394.

Kentucky. — *Senning v. Bush*, 62 S. W. Rep. 489, 23 Ky. L. Rep. 65.

Massachusetts. — *Old Colony R. Corp. v. Evans*, 6 Gray (Mass.) 25, 66 Am. Dec. 394; *Haven v. Lowell*, 5 Met. (Mass.) 35; *Hilliard v. Allen*, 4 Cush. (Mass.) 532.

Missouri. — *Paris v. Haley*, 61 Mo. 453.

Nebraska. — *Davey v. Dakota County*, 19 Neb. 721.

New Jersey. — *Moore v. Baker*, 62 N. J. Eq. 208.

New York. — *Baumann v. Pinckney*, 118 N. Y. 604; *Smyth v. Sturges*, 108 N. Y. 495; *Stone v. Lord*, 80 N. Y. 60; *Rindge v. Baker*, 57 N. Y. 219, 15 Am. Rep. 475; *Crary v. Smith*, 2 N. Y. 60; *Schroeppel v. Hopper*, 40 Barb. (N. Y.) 425; *Phyfe v. Wardell*, 5 Paige (N. Y.) 283, 28 Am. Dec. 425; *Brown v. Haff*, 5 Paige (N. Y.) 235, 28 Am. Dec. 425; *Connecticut v. Sheridan, Clarke* (N. Y.) 533.

North Carolina. — *Springs v. Sanders*, Phil. Eq. (62 N. Car.) 67.

Oregon. — *Johnston v. Wadsworth*, 24 Oregon 494.

Pennsylvania. — *Larison v. Burt*, 4 W. & S. (Pa.) 27; *Finley v. Aiken*, 1 Grant Cas. (Pa.) 83.

Virginia. — *Moore v. Fitz Randolph*, 6 Leigh (Va.) 175, 29 Am. Dec. 208.

Washington. — *Anderson v. Wallace Lumber, etc., Co.*, 30 Wash. 147.

Wisconsin. — *Gates v. Parmly*, 93 Wis. 294.

And see *Memphis, etc., R. Co. v. Scruggs*, 50 Miss. 284. *Compare Holley v. Anness*, 41 S. Car. 349.

Action Against Obligees in Title Bond. — *White v. Hooper*, 6 Jones Eq. (59 N. Car.) 152.

Action by Husband and Wife. — A husband and wife may enforce specific performance of a contract made by them to sell the wife's land, where they have executed and acknowledged their joint deed according to law, and placed it in the hands of a third person to be delivered to the purchaser on his paying the purchase money. *Farley v. Palmer*, 20 Ohio St. 223.

No Defense that Vendee Disappointed in Projected Sale. — *Northrup v. Gibbs*, (Supm. Ct. Gen. T.) 1 N. Y. Supp. 465.

3. *Crary v. Smith*, 2 N. Y. 60.

4. *Pincke v. Curteis*, 4 Bro. C. C. 329; *Smyth v. Sturges*, 108 N. Y. 495; *Brown v. Haff*, 5 Paige (N. Y.) 240, 28 Am. Dec. 425; *Crary v. Smith*, 2 N. Y. 60; *Rindge v. Baker*, 57 N. Y. 219, 15 Am. Rep. 475.

5. *Good Title to Be Conveyed — Georgia*. — *Brunswick Co. v. Dart*, 93 Ga. 747.

Illinois. — *McDonald v. Minnick*, 147 Ill. 651.

Kentucky. — *Tomlin v. McChord*, 5 J. J. Marsh. (Ky.) 135.

Louisiana. — *Lockhart v. Smith*, 47 La. Ann. 121; *Hero v. Bloch*, 44 La. Ann. 1032.

Maine. — *Hill v. Hobart*, 16 Me. 164.

Maryland. — *Peabody Heights Co. v. Wilson*, 82 Md. 186; *Owings v. Baldwin*, 8 Gill (Md.) 337.

Minnesota. — *Corey v. Clarke*, 55 Minn. 311.

New Jersey. — *Bowen v. Vickers*, 2 N. J. Eq. 520, 35 Am. Dec. 516.

New York. — *Irving v. Campbell*, 121 N. Y. 353; *Moore v. Williams*, 115 N. Y. 586, 12 Am.

deed, or for conveyance by a deed described, performance is made by giving such a deed or conveyance as the contract describes, however defective the title may be.¹ So, a contract to convey land by a "good and sufficient deed" is satisfied by a deed conveying a possessory title only, if that was the only title which the grantor had, because the contract must be construed with reference to the title held by the grantor at the time.² And where it appears from the contract or the circumstances accompanying it that the parties had in view merely such a conveyance as would pass all the title which the vendor had, whether defective or not, that is all the vendee can insist on.³

bb. RECORD TITLE. — A perfect record title with no collateral facts to impeach it, is, of course, sufficient.⁴ But while a defect in the record title may, under certain circumstances, furnish a defense to the purchaser, there is no inflexible rule that a vendor must furnish a perfect record or paper title.⁵

cc. TITLE BY ADVERSE POSSESSION. — A title dependent upon adverse possession under color of title will entitle the vendor to a decree, if there is no reasonable doubt as to the nature and duration of such adverse possession and the title acquired thereby.⁶ It has been held, however, that to compel a purchaser to accept a title founded exclusively upon adverse possession, unless the facts of the case are clear and free from all reasonable doubt, would be an abuse of the powers of equity.⁷ And, of course, a title by adverse possession will not be deemed sufficient where the contract implies that the purchaser shall have a perfect record title.⁸

dd. STATUTE OF LIMITATIONS. — A title dependent upon the statute of limitations has been held sufficient for a decree of specific performance.⁹

ee. DEFECTS DUE TO VENDEE. — Where the defect or failure of the vendor's title is the result of any fault on the part of the vendee, the vendor will be entitled to a decree.¹⁰ So a vendee cannot urge, as an objection to the vendor's title, a mechanic's lien which he induced a contractor to file for the purpose of clouding the vendor's title, and embarrassing him in carrying out the agreed sale.¹¹

ff. DEFECTS KNOWN TO VENDEE. — Where the defects of title are known to the

St. Rep. 844; *Reydel v. Reydel*, (Brooklyn City Ct. Gen. T.) 10 Misc. (N. Y.) 273; *Vought v. Williams*, 46 Hun (N. Y.) 638.

Ohio. — *Rife v. Lybarger*, 49 Ohio St. 422; *Pugh v. Chesseldine*, 11 Ohio 109, 37 Am. Dec. 414.

Pennsylvania. — *Creigh v. Shatto*, 9 W. & S. (Pa.) 82.

Texas. — *Burwell v. Sollock*, (Tex. Civ. App. 1895) 32 S. W. Rep. 844.

Virginia. — *Garnett v. Macon*, 6 Call (Va.) 308.

A Purchaser at a Master's Sale, who is not notified of risk in the title, will not be compelled to take unless he can get a legal and equitable estate. *Coster v. Clarke*, 3 Edw. (N. Y.) 428.

1. *Hill v. Hobart*, 16 Me. 164.

2. *Dargin v. Cranson*, 12 Colo. App. 368.

3. *Thompson v. Hawley*, 14 Oregon 199.

4. *Kullmann v. Cox*, 42 N. Y. App. Div. 620.

5. *Hellreigel v. Manning*, 97 N. Y. 58. And see *Shriver v. Shriver*, 86 N. Y. 575; *Murray v. Harway*, 56 N. Y. 337.

6. *Title Acquired by Adverse Possession.* — *Crowell v. Druley*, 19 Ill. App. 509; *Conley v. Finn*, 171 Mass. 70, 68 Am. St. Rep. 399; *Kip v. Hirsh*, 103 N. Y. 565; *Shriver v. Shriver*, 86 N. Y. 575; *Murray v. Harway*, 56 N. Y. 344; *Bohm v. Fay*, (Supm. Ct. Gen. T.) 18 Abb. N. Cas. (N. Y.) 175; *New York Steam Co. v. Stern*, 46 Hun (N. Y.) 206; *Abrams v. Rhoner*,

44 Hun (N. Y.) 507; *Seymour v. De Lancey*, *Hopk.* (N. Y.) 436, 14 Am. Dec. 552; *Ottinger v. Strasburger*, 33 Hun (N. Y.) 466; *Kennedy v. Gramling*, 33 S. Car. 367, 26 Am. St. Rep. 676. See also *O'Connor v. Huggins*, 113 N. Y. 511; *M. E. Church Home v. Thompson*, 1 Silv. App. (N. Y.) 564.

7. *Schultz v. Rose*, (Supm. Ct. Spec. T.) 65 How. Pr. (N. Y.) 75. And see *Smith v. Hollenback*, 51 Ill. 223.

Where the title derived from the so-called adverse possession depended upon a question of fact not clearly established and also a doubtful question of law, the purchaser was held not bound to accept. *McCabe v. Kenny*, 52 Hun (N. Y.) 514.

8. *Noyes v. Johnson*, 139 Mass. 436. And see *Hartley v. James*, 50 N. Y. 42.

9. *O'Connor v. Huggins*, 113 N. Y. 511; *Kip v. Hirsh*, 103 N. Y. 565; *Shober v. Dutton*, 6 Phila. (Pa.) 185, 23 Leg. Int. (Pa.) 84; *Core v. Wigner*, 32 W. Va. 277.

10. *Vendee's Fault.* — Where the purchaser has had the uninterrupted possession and is the cause of the conveyance not being made, he may be compelled to execute the contract, though he had commenced his action before the bill was filed and afterwards obtained judgment on the conveyance bond. *Hughes v. McKinsey*, 5 T. B. Mon. (Ky.) 38.

11. *Mack v. McIntosh*, 181 Ill. 633.

vendee or are in view at the time the contract is made, and the vendor expressly sells such title only as he possesses, without binding himself to warrant the title in any way, he may enforce his contract against the purchaser and compel the acceptance of such title as the parties contemplated in the original agreement.¹

But if, After He Has Gone into Possession, the vendee, who has contracted for a valid title, discovers that the vendor is unable to fulfil his promise to make title by the day named, and immediately upon such discovery surrenders possession, the fact that he originally contracted with a knowledge of the condition of the title will not authorize a court to compel him to accept such title as the vendor can furnish.²

Waiver. — Where a vendee, after knowledge of the defects in the vendor's title, waives such defects, he will not thereafter be heard to set up such defects to defeat an action for specific performance.³

§§. RESERVATIONS, CONDITIONS, RESTRICTIONS. — Where the title tendered by a vendor bound by his contract to convey a free and clear title is subject to restrictions or limitations upon the use of the premises, the vendee will not, in general, be required to perform.⁴ And this rule has been held to apply even though there may be doubt as to the validity of the condition.⁵ So also will specific performance be denied where the property sold is subject to an easement.⁶ But where certain lots were subject to a restriction as to their use, to which the surrounding property was also subject, and which appeared to enhance the value of the property sold instead of decreasing it, specific performance was decreed.⁷

§§. IMMATERIAL DEFECTS — TECHNICALITIES. — Immaterial defects and technical objections, where the purchaser gets substantially what he contracted for, will not be allowed to defeat a sale.⁸ So a trifling variation in the description, or a trifling incumbrance on the title, or a trivial defect in the property which may

1. Known Defects — No Warranty. — *Winne v. Reynolds*, 6 Paige (N. Y.) 407; *Palmer v. Richardson*, 3 Strobb. Eq. (S. Car.) 16; *Blakemore v. Kimmons*, 8 Baxt. (Tenn.) 470; *Leonard v. Woodruff*, 23 Utah 494; *Broyles v. Bee*, 18 W. Va. 514.

A Purchaser at a Foreclosure Sale will not be relieved from his purchase on account of apparent defects in the property, or of defects in the title of which he had notice when he made his bid. *Riggs v. Pursell*, 66 N. Y. 193.

2. Jackson v. Ligon, 3 Leigh (Va.) 161.

Nor will the fact of his having gone into possession preclude his objecting to the final execution of the contract, where he has discovered a defect in the title, provided he abandons possession as soon as he learns of the defect. See *Hoggart v. Scott*, 1 Russ. & M. 293; *Richmond v. Gray*, 3 Allen (Mass.) 25.

3. Canton Co. v. Baltimore, etc., R. Co., 79 Md. 424.

4. Title Subject to Restrictions. — *Adams v. Valentine*, 33 Fed. Rep. 1; *Newbold v. Peabody Heights Co.*, 70 Md. 493; *Second Universalist Soc. v. Dugan*, 65 Md. 460; *Jeffries v. Jeffries*, 117 Mass. 184; *Wetmore v. Bruce*, 118 N. Y. 319; *Gibert v. Peteler*, 38 N. Y. 165, 97 Am. Dec. 785; *Raynor v. Lyon*, 46 Hun (N. Y.) 227; *Post v. Bernheimer*, 31 Hun (N. Y.) 247; *Anders's Estate*, 12 Phila. (Pa.) 45, 35 Leg. Int. (Pa.) 68. And see *Bentley v. Craven*, 17 Beav. 204; *Foley v. M'Keown*, 4 Leigh (Va.) 627.

5. Post v. Bernheimer, 31 Hun (N. Y.) 247.

6. Easements. — *Hymers v. Branch*, 6 Mo.

App. 511; *Mott v. Mott*, 68 N. Y. 246; *Seaman v. Hicks*, 8 Paige (N. Y.) 655; *Boulton v. Bethune*, 21 Grant Ch. (U. C.) 478; *Kronsbiel v. Gage*, 10 Grant Ch. (U. C.) 572; *James v. Freeland*, 5 Grant Ch. (U. C.) 302.

Inapplicable Reservations. — A reservation of mineral and water privileges, where there is no evidence of the existence of minerals or water privileges on the premises, is not a sufficient defect to preclude a decree. *Winne v. Reynolds*, 6 Paige (N. Y.) 407.

7. Riggs v. Pursell, 66 N. Y. 193.

So Also a Purchaser at a Receiver's Sale, in the absence of evidence that the property was not worth the price bid, may be compelled to accept title though he was ignorant of a restriction against the sale of liquors on the premises sold, and though the receiver, after the sale, verbally represented the title to be free from incumbrances. *Campbell v. Parker*, 59 N. J. Eq. 342.

8. Technical Objections. — *Riggs v. Pursell*, 66 N. Y. 193; *McDonald v. Bach*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 96; *Hellreigel v. Manning*, 97 N. Y. 56; *Middleton v. Findla*, 25 Cal. 76.

Invalid Improvement Lien. — When an assessment for a local improvement has been adjudged absolutely void by the Court of Appeals, merely because there was no statute giving to the persons who had assumed the duty of directing the improvement power to do so, a purchaser from another owner of land assessed may not object to completing his purchase because of such assessment. *Chase v. Chase*, 95 N. Y. 373.

be the subject of compensation, will not stand in the way of a decree of specific performance.¹ But this rule has been limited to cases in which the vendor has been guilty of no bad faith, and where the portion which cannot be conveyed is inconsiderable and not material to the enjoyment of that part about which there is no defect.²

ii. **LIENS DISCHARGEABLE OUT OF PURCHASE MONEY.** — The mere existence of liens on property for the discharge of which out of the purchase money the decree may make provision is not a defense to an action of specific performance by the vendor.³ Nor will specific performance be denied on the ground that there are apparent liens on the land which prevent the conveyance of a good title, where the evidence fails to show any actual present lien for any sum whatever, and the liens are either dormant or for other reasons are shown to be of no validity as against the property described in the contract.⁴

(c) **"Marketable" Title** — *aa. GENERAL RULE.* — The nature of the title which a vendor must be qualified to convey where a good title is implied or contracted for is frequently described as a "marketable" title, or one free from reasonable doubt;⁵ that is, not only a title valid in fact, but one that can be again

1. Trifling Variations, Incumbrances, or Defects — *United States.* — *Hepburn v. Auld*, 5 Cranch (U. S.) 262.

Illinois. — *Towner v. Tickner*, 112 Ill. 217; *D'Wolf v. Pratt*, 42 Ill. 198.

Iowa. — *Stevenson v. Polk*, 71 Iowa 278.

Maryland. — *Foley v. Crow*, 37 Md. 51.

New Jersey. — *Van Blarcom v. Hopkins*, 63 N. J. Eq. 466; *Zimmerman v. Brown*, (N. J. 1897) 36 Atl. Rep. 675.

New York. — *King v. Bardeau*, 6 Johns. Ch. (N. Y.) 38, 10 Am. Dec. 312; *Ten Broeck v. Livingston*, 1 Johns. Ch. (N. Y.) 357; *New York Steam Co. v. Stern*, 46 Hun (N. Y.) 206; *Winne v. Reynolds*, 6 Paige (N. Y.) 407; *Guynet v. Mantel*, 4 Duer (N. Y.) 86. And see *McGrane v. Kennedy*, 16 Daly (N. Y.) 241.

West Virginia. — *Morgan v. Brast*, 34 W. Va. 332; *Creigh v. Boggs*, 19 W. Va. 240.

Where Two Adjoining Lots Were Sold Together for one price, and the buildings on one of the lots projected two feet over on the other lot, performance was decreed against the vendee with compensation to him for any diminution in value to be deducted from the price. *King v. Bardeau*, 6 Johns. Ch. (N. Y.) 38, 10 Am. Dec. 312.

Sale of Part to Third Person — Deduction from Purchase Price. — *Vedder v. Evertson*, 3 Paige (N. Y.) 281.

Removal of Doubt. — If there is any doubt concerning the title, and the vendor can remove that doubt at trifling expense, he cannot have specific performance unless he first perfect his title. *Reformed Protestant Dutch Church v. Mott*, 7 Paige (N. Y.) 77, 32 Am. Dec. 613.

The rule prevails whether the doubt arise upon the facts or whether the question be one of law. *Abbott v. James*, 111 N. Y. 673; *Fleming v. Burnham*, 100 N. Y. 8; *Jordan v. Poillon*, 77 N. Y. 518. See *Townshend v. Goodfellow*, 40 Minn. 312, 12 Am. St. Rep. 736; *Hayes v. Nourse*, 114 N. Y. 595, 11 Am. St. Rep. 700.

2. Foley v. Crow, 37 Md. 51.

3. Liens. — *Guild v. Atchison, etc.*, R. Co., 57 Kan. 70, 57 Am. St. Rep. 312; *Frain v. Klein*, 18 N. Y. App. Div. 64; *Upton v. Maurice*, (Tex. Civ. App. 1896) 34 S. W. Rep. 642. And see *Oakey v. Cook*, 41 N. J. Eq. 350; *Edmison v. Zborowski*, 9 S. Dak. 40,

4. Solt v. Anderson, 62 Neb. 153.

5. Marketable Title — England. — *White v. Hay*, 72 L. T. N. S. 281.

United States. — *Wesley v. Eells*, 177 U. S. 370.

Illinois. — *Maltby v. Thews*, 171 Ill. 264; *Garden City Sand Co. v. Miller*, 157 Ill. 225; *Thews v. Maltby*, 69 Ill. App. 30.

Indiana. — *Spraker v. Jenners*, 140 Ind. 688.

Kentucky. — *Robinson v. Henning*, (Ky. 1887) 4 S. W. Rep. 322.

Louisiana. — *Dupuy's Succession*, 33 La. Ann. 277.

Massachusetts. — *Martin v. Hamlin*, 176 Mass. 180; *Batt v. Mallon*, 151 Mass. 477; *First African M. E. Soc. v. Brown*, 147 Mass. 296; *Conley v. Finn*, 171 Mass. 70, 68 Am. St. Rep. 399; *Sturtevant v. Jaques*, 14 Allen (Mass.) 523. See also *Nickerson v. Loud*, 115 Mass. 94.

Minnesota. — *Fairchild v. Marshall*, 42 Minn. 14; *Washburn v. Van Steenwyk*, 32 Minn. 336.

New Jersey. — *Lippincott v. Wikoff*, 54 N. J. Eq. 107.

New York. — *Vought v. Williams*, 120 N. Y. 253, 17 Am. St. Rep. 634; *Kip v. Hirsh*, 103 N. Y. 565; *Warner v. Schweitzer*, 56 N. Y. App. Div. 623; *Wessel v. Cramer*, 56 N. Y. App. Div. 30; *Reiners v. Niederstein*, 55 N. Y. App. Div. 80; *Schultz v. Rose*, (Supm. Ct. Spec. T.) 65 How. Pr. (N. Y.) 75; *Sloane v. Martin*, (Supm. Ct. Spec. T.) 24 N. Y. Supp. 661; *Greenblatt v. Hermann*, 69 Hun (N. Y.) 298. And see *Mott v. Mott*, 68 N. Y. 258; *Shriver v. Shriver*, 86 N. Y. 575.

Rhode Island. — *Van Zandt v. Garretson*, 21 R. I. 418.

South Carolina. — *Butler v. O'Hear*, 1 Desaus. (S. Car.) 382, 1 Am. Dec. 671.

Texas. — *Upton v. Maurice*, (Tex. Civ. App. 1896) 34 S. W. Rep. 642.

Virginia. — *Richards v. Mercer*, 1 Leigh (Va.) 125.

Lis Pendens. — The record of *lis pendens* notice will ordinarily be such a defect of title as will justify the purchaser in refusing the land. *Bull v. Hutchens*, 32 Beav. 615; *Linn v. McLean*, 80 Ala. 360; *Earl v. Campbell*, (Supm. Ct. Spec. T.) 14 How. Pr. (N. Y.) 330.

But the mere presence of such notice does not necessarily create a flaw in the title. It

sold to a reasonable purchaser or mortgaged to a person of reasonable prudence.¹ So where a vendor seeking specific performance is unable to offer the defendant a marketable title, or one the validity of which is free from reasonable doubt, a decree will be denied.² But while a purchaser will not

must appear that the pending suit or claim has some merit or substance before the defendant can successfully resist specific performance. *Hayes v. Nourse*, 114 N. Y. 595, 11 Am. St. Rep. 700.

1. *Irving v. Campbell*, 121 N. Y. 353; *Moore v. Williams*, 115 N. Y. 586. See the phrase defined in vol. 19, p. 1138.

2. *United States*.—*Bigelow v. Armes*, 108 U. S. 10; *Adams v. Valentine*, 33 Fed. Rep. 1; *Sohier v. Williams*, 1 Curt. (U. S.) 479; *Watts v. Waddle*, 6 Pet. (U. S.) 389; *Hepburn v. Auld*, 5 Cranch (U. S.) 262.

California.—*Bruck v. Tucker*, 42 Cal. 346.

District of Columbia.—*American Security, etc., Co. v. Muse*, 4 App. Cas. (D. C.) 12; *Black v. Aman*, 6 Mackey (D. C.) 131.

Illinois.—*Goodkind v. Bartlett*, 153 Ill. 419; *Close v. Stuyvesant*, 132 Ill. 607; *Cooper v. Tiler*, 46 Ill. 462, 95 Am. Dec. 442; *Brown v. Cannon*, 10 Ill. 174; *Thews v. Maltby*, 69 Ill. App. 30.

Indiana.—*Conley v. Dibber*, 91 Ind. 413; *Smith v. Turner*, 50 Ind. 367; *Swihart v. Cline*, 19 Ind. 264.

Kentucky.—*Early v. Douglass*, 62 N. W. Rep. 860, 23 Ky. L. Rep. 298; *Hightower v. Smith*, 5 J. J. Marsh. (Ky.) 542; *Bartlett v. Blanton*, 4 J. J. Marsh. (Ky.) 426; *Barnett v. Higgins*, 4 Dana (Ky.) 565; *Jarman v. Davis*, 4 T. B. Mon. (Ky.) 115; *Beckwith v. Kouns*, 6 B. Mon. (Ky.) 222.

Louisiana.—*Fitzpatrick v. Leake*, 47 La. Ann. 1643; *Beer v. Leonard*, 40 La. Ann. 845.

Maryland.—*Gill v. Wells*, 59 Md. 492.

Massachusetts.—*Hunting v. Damon*, 160 Mass. 441; *Chesman v. Cummings*, 142 Mass. 65; *Noyes v. Johnson*, 139 Mass. 436; *Butts v. Andrews*, 136 Mass. 221; *Cunningham v. Blake*, 121 Mass. 333; *Jeffries v. Jeffries*, 117 Mass. 184; *Hayes v. Harmony Grove Cemetery*, 108 Mass. 400; *Chauncey v. Leominster*, 172 Mass. 340; *Sturtevant v. Jaques*, 14 Allen (Mass.) 526; *Park v. Johnson*, 7 Allen (Mass.) 378; *Richmond v. Gray*, 3 Allen (Mass.) 25.

Michigan.—*Powell v. Conant*, 33 Mich. 396; *Allen v. Atkinson*, 21 Mich. 351.

Minnesota.—*Williams v. Schembri*, 44 Minn. 250; *Richmond v. Koenig*, 43 Minn. 480; *Townshend v. Goodfellow*, 40 Minn. 312, 12 Am. St. Rep. 736.

Missouri.—*Taylor v. Williams*, 45 Mo. 80; *Luckett v. Williamson*, 31 Mo. 54; *Hymers v. Branch*, 6 Mo. App. 511.

New Hampshire.—*Palmer v. Morrison*, 104 N. Y. 132.

New Jersey.—*Cornell v. Andrews*, 35 N. J. Eq. 7; *Dobbs v. Norcross*, 24 N. J. Eq. 327; *Vreeland v. Blauvelt*, 23 N. J. Eq. 483; *Young v. Rathbone*, 16 N. J. Eq. 224, 84 Am. Dec. 151; *St. Mary's Church v. Stockton*, 8 N. J. Eq. 520; *Chambers v. Tulane*, 9 N. J. Eq. 146; *Ely v. Perrine*, 2 N. J. Eq. 396.

New York.—*Dyker Meadow Land, etc., Co. v. Cook*, 159 N. Y. 6; *McPherson v. Schade*, 149 N. Y. 16; *Vought v. Williams*, 120 N. Y.

253, 17 Am. St. Rep. 634; *Moore v. Williams*, 115 N. Y. 586; *Scholle v. Scholle*, 113 N. Y. 261; *Ferry v. Sampson*, 112 N. Y. 415; *Toole v. Toole*, 112 N. Y. 333, 8 Am. St. Rep. 750; *Palmer v. Morrison*, 104 N. Y. 132; *Bostwick v. Beach*, 103 N. Y. 414; *Fleming v. Burnham*, 100 N. Y. 1; *Shriver v. Shriver*, 86 N. Y. 575; *Bensel v. Gray*, 80 N. Y. 517; *Sternberger v. McGovern*, 56 N. Y. 12; *Hinckley v. Smith*, 51 N. Y. 21; *Delavan v. Duncan*, 49 N. Y. 485; *Brooklyn Park Com'rs v. Armstrong*, 45 N. Y. 234, 6 Am. Rep. 70; *Burwell v. Jackson*, 9 N. Y. 535; *Schultz v. Rose*, (Supm. Ct. Spec. T.) 65 How. Pr. (N. Y.) 75; *McPherson v. Smith*, 49 Hun (N. Y.) 254; *Ferris v. Plummer*, 42 Hun (N. Y.) 440; *Walton v. Meeks*, 41 Hun (N. Y.) 311; *People v. Stock Broker's Bldg. Co.*, 28 Hun (N. Y.) 274; *Post v. Weil*, 8 Hun (N. Y.) 418; *Matter of Whitlock*, 32 Barb. (N. Y.) 48; *Brown v. Haff*, 5 Paige (N. Y.) 235, 28 Am. Dec. 425; *Bates v. Delavan*, 5 Paige (N. Y.) 299; *Fowler v. Manheimer*, 70 N. Y. App. Div. 56; *Ellis v. Salomon*, 57 N. Y. App. Div. 118; *Paolillo v. Faber*, 56 N. Y. App. Div. 241; *Paget v. Melcher*, 42 N. Y. App. Div. 76; *Spero v. Schultz*, 14 N. Y. App. Div. 423; *Warner v. Will*, (Brooklyn City Ct. Gen. T.) 5 Misc. (N. Y.) 329; *McGrane v. Kennedy*, 16 Daly (N. Y.) 241; *Drake v. Shiels*, (Supm. Ct. Spec. T.) 7 N. Y. Supp. 209; *Voorhees v. De Myer*, 3 Sandf. Ch. (N. Y.) 614; *Matter of Ladue*, 54 N. Y. Super. Ct. 528; *Seymour v. De Lancey*, Hopk. (N. Y.) 436, 14 Am. Dec. 552. And see *Scholle v. Scholle*, 113 N. Y. 261; *Kilpatrick v. Barron*, 125 N. Y. 751; *Fryer v. Rockefeller*, 63 N. Y. 268.

North Carolina.—*Walsh v. Hall*, 66 N. Car. 233.

Ohio.—*Ludlow v. O'Neil*, 29 Ohio St. 181; *Brown v. Witter*, 10 Ohio 142; *Kellerman v. Government Loan, etc., Co.*, 7 Ohio Dec. 408; *Wilson v. Tappan*, 6 Ohio 172.

Pennsylvania.—*Holt's Appeal*, 98 Pa. St. 257; *Herzberg v. Irwin*, 92 Pa. St. 48; *Swayne v. Lyon*, 67 Pa. St. 436; *Pratt v. Eby*, 67 Pa. St. 396; *Swain v. Fidelity Ins., etc., Deposit Co.*, 54 Pa. St. 455; *Freetly v. Barnhart*, 51 Pa. St. 279; *Speakman v. Forepaugh*, 44 Pa. St. 363; *Nicol v. Carr*, 35 Pa. St. 381; *Bickley v. Biddle*, 33 Pa. St. 276; *Reighard's Estate*, 192 Pa. St. 108.

South Carolina.—*Charleston v. Blohme*, 15 S. Car. 124, 40 Am. Dec. 690; *Lowry v. Muldrow*, 8 Rich. Eq. (S. Car.) 241; *Secrest v. McKenna*, 1 Strobb. Eq. (S. Car.) 356; *Butler v. O'Hear*, 1 Desaus. (S. Car.) 382, 1 Am. Dec. 671.

Tennessee.—*Mullins v. Aiken*, 2 Heisk. (Tenn.) 535; *Starnes v. Allison*, 2 Head (Tenn.) 221; *Collins v. Smith*, 1 Head (Tenn.) 251.

Texas.—*Gober v. Hart*, 36 Tex. 141; *Littlefield v. Tinsley*, 26 Tex. 353.

Virginia.—*Hudson v. Max Meadows Land, etc., Co.*, 99 Va. 537; *Newberry v. French*, 98 Va. 470; *Griffin v. Cunningham*, 19 Gratt. (Va.) 571; *Vail v. Nelson*, 4 Rand. (Va.) 478.

be compelled to take a doubtful title, the doubt must be more than a bare possibility;¹ it must be a reasonable doubt.²

Suspicion or Conjecture. — So a suspicion or conjecture merely, without any facts to support it, does not raise a reasonable doubt as to the validity of a title good upon the record.³

Captious Objections. — "A purchaser cannot justify his refusal to perform his contract by a mere captious objection to the title tendered him."⁴

bb. **DANGER OF LITIGATION.** — A party entitled by his contract to a good or marketable title cannot be compelled to accept a title with reference to which there is reasonable ground to apprehend litigation,⁵ although such a title might be satisfactory to a lawyer or to a purchaser willing to assume the risks of litigation.⁶ The purchaser is justified in demanding a title upon which he may rest reasonably secure without apprehension from the hostile claims of others, which the state of the record or muniments of title give reason to fear may at some time be interposed.⁷ Nor will a vendee be required to accept a title that is doubtful or defective by reason of imperfect or irregular legal proceedings, as where necessary parties have been omitted in foreclosure, or sales have been irregularly conducted by guardians, personal representatives, or public officers, and the vendor has acquired his title, either proximately or remotely, through such proceedings or sales.⁸ But the doctrine that a court of equity will not, by a decree for specific performance, compel a party to accept a title to land which is so doubtful that it may be exposed to litigation, does not apply where no question of fact is involved and all parties in interest are before the court.⁹

West Virginia. — *Boggs v. Bodkin*, 32 W. Va. 566; *Middleton v. Selby*, 19 W. Va. 167; *Linkous v. Cooper*, 2 W. Va. 67. See *Hinchman v. Ballard*, 7 W. Va. 152.

Canada. — *Francis v. St. Germain*, 6 Grant Ch. (U. C.) 636.

1. Bare Possibility. — *Stevenson v. Polk*, 71 Iowa 278; *First African M. E. Soc. v. Brown*, 147 Mass. 296; *Hayes v. Harmony Grove Cemetery*, 108 Mass. 400; *Ebling v. Dreyer*, 149 N. Y. 460; *Cambrelleng v. Purton*, 125 N. Y. 610; *Moser v. Cochrane*, 107 N. Y. 35; *Schermerhorn v. Niblo*, 2 Bosw. (N. Y.) 161; *Webb v. Chisolm*, 24 S. Car. 487; *Laurens v. Lucas*, 6 Rich. Eq. (S. Car.) 217; *Thompson v. Dules*, 5 Rich. Eq. (S. Car.) 370. And see *Ferry v. Sampson*, 112 N. Y. 415; *Cromwell v. Phipps*, 6 Dem. (N. Y.) 60.

Possibility of Unrecorded Deeds. — *Dow v. Whitney*, 147 Mass. 1.

Date of Deed Subsequent to Acknowledgment. — *Dresel v. Jordan*, 104 Mass. 407.

Possibility of Unpublished Will. — *Spring v. Sandford*, 7 Paige (N. Y.) 550.

Legacy Remaining Unpaid. — *Wiltzie v. Shaw*, 29 Hun (N. Y.) 195.

Public Grant Acquiesced in Fifty Years. — *Lyman v. Gedney*, 114 Ill. 388, 55 Am. Rep. 871.

An Uncanceled Mortgage Sixty Years Old is no valid objection to the title where there is no evidence to rebut the legal presumption that it has been satisfied. *Belmont v. O'Brien*, 12 N. Y. 394.

So with an unsatisfied mortgage thirty years old, where a satisfaction piece is shown, though not so authenticated as to be entitled to record. *Pangburn v. Miles*, (Supm. Ct. Spec. T.) 10 Abb. N. Cas. (N. Y.) 42.

2. *Lord Eldon in Stapylton v. Scott*, 16 Ves.

Jr. 272; *Hellreigel v. Manning*, 97 N. Y. 58; *Greenblatt v. Hermann*, 144 N. Y. 13.

3. *Greenblatt v. Hermann*, 144 N. Y. 13.

4. *Hellreigel v. Manning*, 97 N. Y. 58.

5. Apprehension of Litigation. — *Price v. Strange*, 6 Madd. 159; *Early v. Douglass*, 62 S. W. Rep. 860, 23 Ky. L. Rep. 298; *Michenor v. Reinach*, 49 La. Ann. 360; *Daniel v. Shaw*, 166 Mass. 582; *Spencer v. Sandusky*, 46 W. Va. 582.

Defect Need Not Be Conclusively Established. — *Griffin v. Cunningham*, 19 Gratt. (Va.) 571. And see *Butts v. Andrews*, 136 Mass. 221; *Cunningham v. Blake*, 121 Mass. 333; *Brooklyn Park Com'rs v. Armstrong*, 45 N. Y. 234, 6 Am. Rep. 70; *Christian v. Cabell*, 22 Gratt. (Va.) 82.

Pending Litigation. — A purchaser may be compelled to accept a title though an action is pending to set aside, on the ground of fraud, the deed on which the vendor's title depends, where it is conceded that the vendor took the title to the premises in good faith and paid a full consideration and therefore was not affected by the fraud. *Aldrich v. Bailey*, 132 N. Y. 85, reversing 55 Hun (N. Y.) 607, 8 N. Y. Supp. 435.

6. *Spencer v. Sandusky*, 46 W. Va. 582.

7. *Schultz v. Rose*, (Supm. Ct. Spec. T.) 65 How. Pr. (N. Y.) 75.

8. Irregular Legal Proceedings. — *James v. Meyer*, 41 La. Ann. 1100; *Richmond v. Gray*, 3 Allen (Mass.) 25; *Kilpatrick v. Barron*, 125 N. Y. 751; *Lockman v. Reilley*, 29 Hun (N. Y.) 434; *Crosby v. Thedford*, 13 Daly (N. Y.) 150. See also *Morgan v. Morgan*, 2 Wheat. (U. S.) 290; *Tevis v. Richardson*, 7 T. B. Mon. (Ky.) 654; *Swayne v. Lyon*, 67 Pa. St. 436; *Martin v. Porter*, 4 Heisk. (Tenn.) 407; *Littlefield v. Tinsley*, 26 Tex. 353.

9. *Chesman v. Cummings*, 142 Mass. 65,

cc. PROPERTY ADVERSELY POSSESSED. — As a general rule a vendee will not be required to accept a title to property in the actual possession of third persons claiming adversely to the title of the vendor.¹

dd. MATERIAL DEFECTS — DEFICIENCY IN QUANTITY. — Where there is material defect in the vendor's title, or a substantial deficiency in the property contracted to be conveyed, the vendee will not be compelled to take title.²

Need Not Be Incurable Defect. — But to refuse a specific performance of a contract for the purchase of real property, it is not incumbent on the court judicially to determine that there is such inherent defect in the title as that it cannot in the end be cured. It is sufficient to justify the court in withholding this peculiar relief, that upon close scrutiny the title seems doubtful; that it discloses apparent flaws which indicate possible or probable danger of a nature "sufficient to caution a man of reasonable prudence against claims and rights adverse to those of the vendor."³

(a) Vendee Should State Objection. — It has been held that if the purchaser objects to accepting the deed on the ground that the premises are encumbered, it is his duty to make known the objection at the time so as to give the vendor an opportunity to obviate it.⁴ And where a vendee when a deed was tendered objected on a ground specified, it has been held that he should not be allowed to raise other objections after such objection was removed, in an action for specific performance.⁵

(e) Curing Defects — Parol Evidence. — It has frequently been held that defects in the record or paper title may be cured by parol evidence.⁶ But a purchaser will not generally be compelled to take a title where there is a defect in the record title which can be cured only by a resort to parol, and there has not been an undisputed adverse possession for a time sufficient to give title thereby.⁷

Burden of Proof. — Where the defect in a title tendered is disclosed on the face of the record title, the vendee need go no further, but if the defect depends upon some extrinsic fact not appearing in the record, the vendee must prove this fact to justify a refusal to accept the title.⁸

(f) Restitution of Possession. — Where the vendee is in possession of the premises, he is not bound to restore possession to the vendor before making objections to the title, and though the vendee cannot keep both the estate and the price of it, it is the duty of the vendor, if he is unable to make a good title, to refund what has been paid on the contract and demand the possession.⁹

1. Bullard v. Bicknell, 26 N. Y. App. Div. 319.

2. Substantial Defects — United States. — May v. Le Claire, 11 Wall. (U. S.) 217; Hepburn v. Auld, 5 Cranch (U. S.) 262.

Indiana. — Wilson v. Brumfield, 8 Blackf. (Ind.) 146.

Kentucky. — M'Kinny v. Watts, 3 A. K. Marsh. (Ky.) 273; M'Kean v. Reed, Litt. Sel. Cas. (Ky.) 395, 12 Am. Dec. 318.

Mississippi. — Terrell v. Farrar, Walk. (Miss.) 417.

Missouri. — Lockett v. Williamson, 31 Mo. 54.

New York. — Nicklas v. Keller, 9 N. Y. App. Div. 216; McPherson v. Schade, (N. Y. Super. Ct. Gen. T.) 8 Misc. (N. Y.) 424. See Sasserath v. Metzgar, (N. Y. Super. Ct. Eq. T.) 30 Abb. N. Cas. (N. Y.) 407.

North Carolina. — Trimmer v. Gorman, 129 N. Car. 161; Mincey v. Foster, 125 N. Car. 541; Bryan v. Read, 1 Dev. & B. Eq. (21 N. Car.) 78.

Tennessee. — Cunningham v. Sharp, 11 Humph. (Tenn.) 116; Reed v. Noe, 9 Yerg. (Tenn.) 283.

Virginia. — Jackson v. Ligon, 3 Leigh (Va.) 161.

West Virginia. — Heavner v. Morgan, 41 W. Va. 428.

3. Schultz v. Rose, (Supm. Ct. Spec. T.) 65 How. Pr. (N. Y.) 75.

4. McWhorter v. McMahan, 10 Paige (N. Y.) 386; Greenblatt v. Hermann, 144 N. Y. 13.

5. Baker v. Hall, 158 Mass. 361. And see Kirker v. Kaufmann, 31 Pittsb. Leg. J. N. S. (Pa.) 205.

6. Parol Evidence to Cure Defects. — Smith v. Death, 5 Madd. 371; Spencer v. Topham, 22 Beav. 573; Hellreigel v. Manning, 97 N. Y. 58. And see Shriver v. Shriver, 86 N. Y. 575; Murray v. Harway, 56 N. Y. 337.

7. Irving v. Campbell, 121 N. Y. 353. And see Vought v. Williams, 120 N. Y. 253, 17 Am. St. Rep. 634; Moore v. Williams, 115 N. Y. 586; Fleming v. Burnham, 100 N. Y. 1; Fahy v. Cavanagh, 59 N. J. Eq. 278.

8. Greenblatt v. Hermann, 144 N. Y. 13.

9. Gans v. Renshaw, 2 Pa. St. 34, 44 Am. Dec. 152; Kennedy v. Woolfolk, 3 Hayw. (Tenn.) 195.

(g) **Question for Court** — *aa. IN GENERAL.* — It is a question of law for the court whether or not the deed tendered by the vendor of land was sufficient.¹ But the court cannot make a doubtful title marketable by passing upon a disputed question of fact or a doubtful question of law in the absence of the party in whom the outstanding right is vested.² Where, however, all the parties whose interest might be affected by a decree are properly before the court, the title may be pronounced good, and specific performance decreed accordingly.³

bb. RULE OF JUDICIAL DISCRETION. — It has been said that what is sufficient ground for such doubt as to the title as will justify a court in refusing specific performance, cannot be reduced to fixed and determinate principles, as it depends, in some degree, upon the discretion of the court,⁴ though it has been suggested that a reasonable doubt may, as a rule, fairly be said to exist when a court of law would not feel called upon to instruct a jury to find the existence of the fact upon which the vendor's title depends.⁵

(h) **Tender of Title** — *aa. GENERAL RULE.* — To entitle a vendor in a contract for the sale of land to a decree of specific performance as against his vendee, it is essential that a conveyance or deed be tendered, or an offer to execute and tender be made.⁶ And where, it has been held, a tender of a deed has been made, it must be kept good by bringing the deed into court, or by offering to execute such a deed as will vest title in the purchaser.⁷

Assignee of Contract for Deed. — Where the purchaser has assigned his contract

1. **Sufficiency of Deed** — **Question for Court.** — *Moser v. Cochrane*, 107 N. Y. 35; *Beeson v. Porter*, 155 Pa. St. 579.

2. *Fleming v. Burnham*, 100 N. Y. 1; *McCabe v. Kenny*, 52 Hun (N. Y.) 517. And see *Irving v. Campbell*, 121 N. Y. 353.

Effect of Decree. — The decision of a court of equity in an action for specific performance cannot heal inherent weakness in a title, or supply a broken link in the chain thereof, unless the facts and parties essential and affected are before the court, and in a relation and condition to be dealt with. *Schultz v. Rose*, (Supm. Ct. Spec. T.) 65 How. Pr. (N. Y.) 75.

Tendency of English Cases. — It has been said that the later authorities in England have indicated a disposition to change the former rule that where only the vendor and vendee are before the court, and there are other persons interested who will not be bound by the decree, the court will not adjudicate the question of title and compel the vendee to accept it or not as the case may be. The present inclination seems to be to hold that, even as between vendor and purchaser, the court will "ascertain and determine, as it best may, what the law is, and to take that to be the law which it has so ascertained and determined." See *Forster v. Abraham*, L. R. 17 Eq. 351; *Alexander v. Mills*, L. R. 6 Ch. 124; *Osborne v. Rowlett*, 13 Ch. D. 774. And see also *Chesman v. Cummings*, 142 Mass. 65.

3. **Where All Parties Before the Court.** — *Sohier v. Williams*, 1 Curt. (U. S.) 479; *Early v. Douglass*, (Ky. 1901) 62 S. W. Rep. 860; *Gill v. Wells*, 59 Md. 492; *Chesman v. Cummings*, 142 Mass. 65; *Butts v. Andrews*, 136 Mass. 221; *Cornell v. Andrews*, 35 N. J. Eq. 7; *Hatt v. Rich*, 59 N. J. Eq. 492; *People v. Stock Brokers Bldg. Co.*, 92 N. Y. 98.

4. *Shriver v. Shriver*, 86 N. Y. 575. And see *White v. Damon*, 7 Ves. Jr. 35.

Circumstance to Influence Discretion. — See

Brooklyn Park Com'rs v. Armstrong, 45 N. Y. 234, 6 Am. Rep. 70; *Seaman v. Vawdrey*, 16 Ves. Jr. 390.

5. *Shriver v. Shriver*, 86 N. Y. 575. And see *Emery v. Grocock*, 6 Madd. 54; *Lowes v. Lush*, 14 Ves. Jr. 548.

6. **Tender by Vendor.** — *Pincke v. Curteis*, 4 Bro. C. C. 329; *Soper v. Gabe*, 55 Kan. 646; *Tinney v. Ashley*, 15 Pick. (Mass.) 546, 26 Am. Dec. 620; *Bidwell v. Garrison*, (N. J. 1897) 36 Atl. Rep. 941; *Johnston v. Wadsworth*, 24 Oregon 494. And see *Powell v. Dayton*, etc., R. Co., 13 Oregon 446; *Morgan v. Morgan*, 2 Wheat. (U. S.) 290.

But the Neglect of a Vendor for Nearly Four Months after the maturity of the deferred payments under a contract for the sale of land to make tender of a deed will not estop him from enforcing the contract where the parties thereto have not treated it as rescinded and no hardship has resulted to the purchaser by reason of the delay. *Wooding v. Crain*, 10 Wash. 35.

Where No Injury by Delay. — *Woodson v. Scott*, 1 Dana (Ky.) 470.

Tender by Executor or Administrator. — In an action by an administrator to recover the purchase money on his intestate's contract for the sale of land, the tender of a deed is not essential. All that is required in such a case is that the plaintiff must show that he is able and willing to make the deed, and the court can have the title conveyed on payment of purchase money. *Faulkner v. Williman*, (Ky. 1891) 16 S. W. Rep. 352. And see *Mhoon v. Wilkerson*, 47 Miss. 633.

Agreement Between Stockholders — Tender of Corporate Deed. — *White v. Boreing*, (Ky. 1898) 45 S. W. Rep. 242.

7. *Goodwine v. Morey*, 111 Ind. 68; *Overly v. Tipton*, 68 Ind. 410; *Sowle v. Holdridge*, 63 Ind. 213; *Melton v. Coffelt*, 59 Ind. 310; *Benton v. Shreeve*, 4 Ind. 66.

for a deed before payment and the assignee has neglected to make the payments, a tender of conveyance is properly made to the original purchaser.¹

Insufficient Tender. — It has been held that a mere offer to assign a bond for title is not a sufficient tender of title.²

bb. WHEN TENDER UNNECESSARY. — Where it is clear from the circumstances that the tender of a conveyance would have been vain and unavailing, a formal tender of a conveyance will always be excused.³

cc. CONFORMITY WITH CONTRACT. — The title tendered by the vendor must, of course, conform to the title contracted to be conveyed, or specific performance by the vendee will not be compelled.⁴ So if the defendant shows a material discrepancy in the description or quantity of the land he will defeat the vendor's suit.⁵

dd. CONTRACT FOR "SATISFACTORY" TITLE. — One who has contracted for a "satisfactory title" cannot be compelled to accept one that is not satisfactory to him, even though it appear to be altogether unobjectionable.⁶ So where, by the terms of a sale, any purchaser should have the right to examine the title, and if not satisfied with it he should not be required to comply with the terms of the sale, specific performance will not be decreed where the purchaser, relying on such terms, employed counsel to examine the title, and then refused, in consequence of such examination, to accept the title.⁷

ee. ACQUISITION OF TITLE BY VENDOR. — It will not defeat an action for specific performance by a vendor that he did not have title to the property in question at the time the contract was made, or was to have been performed,⁸ provided

1. *Corbus v. Teed*, 69 Ill. 205; *Brinkerhoff v. Olp*, 35 Barb. (N. Y.) 27.

2. *Landers v. McIntyre*, 8 Wash. 203.

3. **Where Tender Dispensed With.** — *Bucklen v. Hasterlik*, 155 Ill. 423, *affirmed* 51 Ill. App. 132; *Brown v. Norcross*, 59 N. J. Eq. 427; *Eleventh St. Church of Christ v. Pennington*, 10 Ohio Cir. Dec. 74, 18 Ohio Cir. Ct. 408; *Maxwell v. Pittenger*, 3 N. J. Eq. 156; *Lee v. Stone*, 21 R. I. 123.

4. **Title Must Conform to Contract.** — *Tate v. Pensacola, etc., Development Co.*, 37 Fla. 439, 53 Am. St. Rep. 251; *Forster v. Winfield*, 142 N. Y. 327; *Kirker v. Kaufmann*, 31 Pittsb. Leg. J. N. S. (Pa.) 205; *Hudson v. Max Meadows Land, etc., Co.*, 99 Va. 537.

5. *Miller v. Chetwood*, 2 N. J. Eq. 199; *Snedaker v. Moore*, 2 Duv. (Ky.) 542.

Where there is a substantial defect with respect to the nature, character, situation, extent, or quality of the estate, which was unknown to the purchaser, he will not be compelled to accept the title. *Ellicott v. White*, 43 Md. 145.

6. *Crigler v. Blair*, 2 Ohio Cir. Dec. 573, 4 Ohio Cir. Ct. 324.

7. *Averett v. Lipscombe*, 76 Va. 404.

8. **Where Vendor Did Not Have Title When Contract Made** — *England.* — *Coffin v. Cooper*, 14 Ves. Jr. 205; *Mortlock v. Buller*, 10 Ves. Jr. 315; *Wynn v. Morgan*, 7 Ves. Jr. 202; *Langford v. Pitt*, 2 P. Wms. 630; *Hoggart v. Scott*, 1 Russ. & M. 293.

United States. — *Hepburn v. Auld*, 5 Cranch (U. S.) 262; *Hepburn v. Dunlop*, 1 Wheat. (U. S.) 179.

Alabama. — *Weaver v. Childress*, 3 Stew. (Ala.) 363; *Hays v. Hall*, 4 Port. (Ala.) 374, 30 Am. Dec. 530.

Illinois. — *Mason v. Caldwell*, 10 Ill. 196, 48 Am. Dec. 330.

Kentucky. — *Hisle v. Witherspoon*, (Ky. 1897)

42 S. W. Rep. 842. See *Logan v. Bull*, 78 Ky. 607.

Maryland. — *Maryland Constr. Co. v. Kuper*, 90 Md. 529.

Massachusetts. — *Dresel v. Jordan*, 104 Mass. 407.

Minnesota. — *Townshend v. Goodfellow*, 40 Minn. 312, 12 Am. St. Rep. 736.

Missouri. — *Luckett v. Williamson*, 37 Mo. 395.

Nebraska. — *Seaver v. Hall*, 50 Neb. 878.

New York. — *Haffey v. Lynch*, 143 N. Y. 241; *Jenkins v. Fahey*, 73 N. Y. 355; *Hinckley v. Smith*, 51 N. Y. 21; *Viele v. Troy, etc., R. Co.*, 20 N. Y. 184; *Reformed Protestant Dutch Church v. Mott*, 7 Paige (N. Y.) 77, 32 Am. Dec. 613; *Wells v. Smith*, 7 Paige (N. Y.) 22, 31 Am. Dec. 274; *Winne v. Reynolds*, 6 Paige (N. Y.) 407; *Brown v. Haff*, 5 Paige (N. Y.) 235, 28 Am. Dec. 425; *Pierce v. Nichols*, 1 Paige (N. Y.) 244; *Clute v. Robison*, 2 Johns. (N. Y.) 595; *Stevenson v. Spratt*, 35 N. Y. Super. Ct. 503; *McDonald v. Bach*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 96, *affirmed* 51 N. Y. App. Div. 549.

North Carolina. — *Hobson v. Buchanan*, 96 N. Car. 444.

Ohio. — *Wilson v. Tappan*, 6 Ohio 172.

Pennsylvania. — *Townsend v. Lewis*, 35 Pa. St. 125; *Moss v. Hanson*, 17 Pa. St. 379.

South Carolina. — *Miller v. Cramer*, 48 S. Car. 282; *Lyles v. Kirkpatrick*, 9 S. Car. 265; *Dubose v. James, McMull. Eq.* (S. Car.) 55.

Tennessee. — *Fraker v. Brazelton*, 12 Lea (Tenn.) 278.

Washington. — *Wooding v. Crain*, 10 Wash. 35.

West Virginia. — *Core v. Wigner*, 32 W. Va. 277; *Rader v. Neal*, 13 W. Va. 388.

Wisconsin. — *Williamson v. Neeves*, 94 Wis. 656; *Gates v. Parmly*, 93 Wis. 294.

the vendor has been guilty of no fraud upon the vendee, and will be able to convey at the time of the rendition of the decree.¹

Nor Is the Mere Evidence of Mortgages or Liens on Property such a violation of a contract to furnish a good title as to deprive the vendor of the right to sue for specific performance, as it is only necessary that the incumbrances should be removed when the deed was delivered.²

Time to Perfect Title. — Where the vendor has contracted in good faith and without fraud or concealment, the court may even allow him a reasonable time, as a matter of favor, to perfect his title.³ But this will not be done where it would prejudice the rights of the vendee, as where time was of the essence of the contract.⁴ So where time is material, and there has been a delay by the vendor in obtaining title and tendering a deed, the vendee will not be required to accept.⁵

Acquiescence in Vendor's Delay. — It has been held also that a purchaser who knows that the title is insufficient at the time he contracts for it and that it will take time to make it perfect, or who, learning this after his purchase, acquiesces in the delay and enters further into the execution of the purchase, is bound by such acquiescence, and will not be heard to complain of the title offered him, or the delay in perfecting it.⁶

(2) *Suits by Vendee* — (a) **In General.** — Contracts for the sale of real estate are, of course, enforceable at the suit of the vendee,⁷ who is entitled to compel the conveyance of the title and property contracted for.⁸ But where defects in the title are known to all parties at the time the contract is made and are

If the vendor never had a title to convey he cannot enforce specific performance against the vendee, though he tenders a good deed from the owner of the property. Thus, where a man agreed to sell real estate, the title to which was in his wife, he cannot tender a deed executed by himself only, and obtain a decree of specific performance. The principle here is that the contract at all times lacks mutuality of obligation. *Luse v. Deitz*, 46 Iowa 205. See also *Ley v. Huber*, 3 Watts (Pa.) 367; *Moroney v. Townsend*, 5 Phila. (Pa.) 357, 21 Leg. Int. (Pa.) 37. Compare *Shreck v. Pierce*, 3 Iowa 350.

1. *Alvarez v. Brannan*, 7 Cal. 503, 68 Am. Dec. 274; *Cook v. Bean*, 17 Ind. 504; *Seaver v. Hall*, 50 Neb. 878; *Topp v. White*, 12 Heisk. (Tenn.) 165; *Spencer v. Sandusky*, 46 W. Va. 582; *Williamson v. Neeves*, 94 Wis. 656. And see the cases in the preceding note.

2. **Incumbrances** — *England.* — *Coffin v. Cooper*, 14 Ves. Jr. 205; *Mortlock v. Buller*, 10 Ves. Jr. 292; *Langford v. Pitt*, 2 P. Wms. 629. *United States.* — *Watts v. Waddle*, 6 Pet. (U. S.) 389; *Hepburn v. Auld*, 5 Cranch (U. S.) 262; *Hepburn v. Dunlop*, 1 Wheat. (U. S.) 179. *New Jersey.* — *Oakey v. Cook*, 41 N. J. Eq. 350.

New York. — *Jenkins v. Fahey*, 73 N. Y. 355; *Stevenson v. Maxwell*, 2 N. Y. 408; *Baldwin v. Salter*, 8 Paige (N. Y.) 473; *Reformed Protestant Dutch Church v. Mott*, 7 Paige (N. Y.) 77, 32 Am. Dec. 613; *Pierce v. Nichols*, 1 Paige (N. Y.) 244; *Seymour v. Delancy*, 3 Cow. (N. Y.) 445, 15 Am. Dec. 270.

3. **Time Allowed to Perfect Title.** — *Logan v. Bull*, 78 Ky. 607; *National Webster Bank v. Eldridge*, 115 Mass. 424; *Dresel v. Jordan*, 104 Mass. 407; *Mays v. Swope*, 8 Gratt. (Va.) 46; *Christian v. Cabell*, 22 Gratt. (Va.) 82; *Rader v. Neal*, 13 W. Va. 373.

Loss of Title Deed — **Secondary Evidence** as to

Contents. — *Re Halifax Commercial Banking Co.*, 79 L. T. N. S. 536. And see *Bryant v. Busk*, 4 Russ. 1; *Moulton v. Edmonds*, 1 De G. F. & J. 246.

4. *Logan v. Bull*, 78 Ky. 607; *Dresel v. Jordan*, 104 Mass. 407; *Mays v. Swope*, 8 Gratt. (Va.) 46; *Rader v. Neal*, 13 W. Va. 388. See also *People v. Stock Brokers Bldg. Co.*, 92 N. Y. 98, reversing 28 Hun (N. Y.) 274.

Action for Breach of Covenant. — *Clark v. Tucker*, 2 Sandf. (N. Y.) 157.

5. *Richmond v. Gray*, 3 Allen (Mass.) 25. And see *Lloyd v. Collett*, 4 Bro. C. C. 469; *Wynn v. Morgan*, 7 Ves. Jr. 202; *White v. Morgan*, (Ky. 1897) 42 S. W. Rep. 403.

6. *Vail v. Nelson*, 4 Rand. (Va.) 478; *Rader v. Neal*, 13 W. Va. 373.

7. **Suit by Vendee.** — *Murphy v. McVicker*, 4 McLean (U. S.) 252; *Ridgely v. Clodfelter*, 43 Ill. 195; *Lawson v. McKenzie*, 44 Iowa 663; *Johnson v. Johnson*, 40 Md. 189; *Austin v. Wacks*, 30 Minn. 335; *Taylor v. Rowland*, 26 Tex. 293; *Stark v. Wilder*, 36 Vt. 752.

Option to Purchase — **Joint Lessees** — **Assignment.** — *Souffrain v. McDonald*, 27 Ind. 269.

Conveyance upon Condition. — *Plymouth Mfg. Co.'s Appeal*, 81* Pa. St. 147.

Contract Secured by Penalty. — *Dooley v. Watson*, 1 Gray (Mass.) 414.

Contract with Copartnership. — *Townshend v. Goodfellow*, 40 Minn. 312, 12 Am. St. Rep. 736.

8. **Where the Property Was to Be Conveyed Free from Incumbrances**, it was held that the court might direct the bringing into court of the purchase money and the discharge of the incumbrances, instead of the payment thereof to the defendant. *Grant v. Beronio*, 97 Cal. 496.

Deed Without Title as Covenant to Convey. — A deed made by one who, at the time, has no title, is regarded as a covenant to convey. *Moore v. Crawford*, 130 U. S. 122.

contemplated in the making of it, the vendee can only compel the conveyance of such title as he agreed to accept, and will not, of course, be allowed to claim title.¹ The vendor, however, cannot, as a rule, be heard to object to his own title. If the purchaser is satisfied to accept what the vendor is able to convey, a decree will be rendered.² Nor is the vendor excused by the return to his vendee of the consideration; for it requires the same mutual consent to cancel a contract that it requires to make one.³

Damages in Lieu of Performance. — In some instances where specific performance of a title free and clear of incumbrances cannot be decreed on account of liens on the property, the court has declined to decree specific performance but has retained the cause for such an award of damages as might be proper.⁴

(b) **Inability of Vendor to Perform.** — Where it is shown that the vendor is, in fact, unable to perform, a decree for specific performance of the contract according to its terms will not be rendered.⁵

Subsequent Acquisition of Title. — But where the vendor has subsequently acquired title and the vendee has meanwhile made payments of the purchase price and has gone into possession and made improvements, the vendor's subsequent acquisition of title inures to the purchaser's benefit and he may compel a conveyance to himself of such after-acquired interest.⁶

(c) **Partial Performance — Compensation.** — Where a vendor cannot make a complete title to all the land sold as agreed, he will not be permitted to take advantage of his own wrong or default, but the purchaser, as a rule, has his election to proceed *pro tanto* with an abatement in the purchase price for the deficiency in the title.⁷

(d) **Payment or Tender** — *aa. GENERAL RULE.* — Before a vendee of real estate is entitled to specific performance of a contract to convey, he must show a payment of the consideration, or a tender, or what is equivalent in equity thereto.⁸

1. *Winne v. Reynolds*, 6 Paige (N. Y.) 407. See also *Mills v. Van Voorhis*, 23 Barb. (N. Y.) 125.

2. *Westervelt v. Matheson, Hoffm.* (N. Y.) 37; *Hyde v. Kelley*, 10 Ohio 215; *Bates v. Swiger*, 40 W. Va. 420.

3. *Avery v. Morrison*, 40 Kan. 151; *Buchanan v. Brown, Cooke* (Tenn.) 185.

4. *Donath v. Germania Land Co.*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 641. See further in this connection *supra*, this title, *Damages in Lieu of or in Addition to Specific Performance*.

5. *Louisville, etc., R. Co. v. Bodenschatz, etc.*, *Stone Co.*, 141 Ind. 251.

Vendor May Not Disable Himself — Efforts to Acquire Title. — *Welborn v. Sechrist*, 88 N. Car. 287. See also *Snowman v. Hartford*, 57 Me. 397; *Oldham v. Faris*, 3 A. K. Marsh. (Ky.) 405.

6. See *Moore v. Crawford*, 130 U. S. 122; *Thompson v. Myrick*, 20 Minn. 205; *Dodson v. Hays*, 29 W. Va. 577.

7. **Partial Performance — Election by Vendee** — *Arkansas*. — *Bonner v. Little*, 38 Ark. 397.

California. — *Brandt v. Clark*, 81 Cal. 634.

Illinois. — *Lancaster v. Roberts*, 144 Ill. 213; *Hale v. Cravener*, 128 Ill. 408; *Spear v. Griffith*, 86 Ill. 552.

Iowa. — *Townsend v. Blanchard*, 117 Iowa 36.

Massachusetts. — *Jeffries v. Jeffries*, 117 Mass. 184; *Woodbury v. Luddy*, 14 Allen (Mass.) 1, 92 Am. Dec. 731.

Michigan. — *Powell v. Conant*, 33 Mich. 396.

Minnesota. — *Chicago, etc., R. Co. v. Durant*, 44 Minn. 361.

New York. — *Peters v. Delaplaine*, 49 N. Y.

368; *Harsha v. Reid*, 45 N. Y. 415; *Morss v. Elmendorf*, 11 Paige (N. Y.) 277; *Waters v. Travis*, 9 Johns. (N. Y.) 465; *Allerton v. Johnson*, 3 Sandf. Ch. (N. Y.) 72.

Wisconsin. — *Wright v. Young*, 6 Wis. 127, 70 Am. Dec. 453.

8. **Payment or Tender by Vendee** — *United States*. — *Kelsey v. Crowther*, 162 U. S. 404; *Kentucky Distilleries, etc., Co. v. Warwick Co.*, 109 Fed. Rep. 280.

California. — *Goodale v. West*, 5 Cal. 339.

District of Columbia. — *Jenkins v. Locke*, 3 App. Cas. (D. C.) 485; *Barbour v. Hickey*, 2 App. Cas. (D. C.) 207.

Georgia. — *Black v. Maddox*, 104 Ga. 157.

Illinois. — *Sterricker v. McBride*, 157 Ill. 70; *Doyle v. Teas*, 5 Ill. 202; *Allison v. Clark*, 1 Ill. 348.

Indiana. — *Hills v. Hills*, 94 Ind. 436; *West v. Chase*, 3 Ind. 301.

Iowa. — *Rogers v. Taylor*, 40 Iowa 193; *Jones v. Alley*, 4 Greene (Iowa) 181; *Wright v. Le Claire*, 4 Greene (Iowa) 420; *McDanel v. Kimbrell*, 3 Greene (Iowa) 335; *Huff v. Jennings, Morr.* (Iowa) 454.

Missouri. — *Rosenberger v. Jones*, 118 Mo. 559.

Nebraska. — *Izard v. Kimmel*, 26 Neb. 51.

New Jersey. — *Ware v. Lippincott*, (N. J. 1887) 10 Atl. Rep. 404.

New York. — *Northrup v. Gibbs*, (Supm. Ct. Gen. T.) 1 N. Y. Supp. 465.

North Carolina. — *Oliver v. Dix*, 1 Dev. & B. Eq. (21 N. Car.) 605.

Pennsylvania. — *Orne v. Kittanning Coal Co.*, 114 Pa. St. 172; *Irvin v. Bleakley*, 67 Pa. St. 24.

But as a general rule, unless time was of the essence of the contract and the contract itself required payment or tender on a day certain,¹ a technical legal tender is not required,² it being sufficient that the vendee is able and willing to perform, and makes this apparent to the court.³ So also it has been held that where a vendee is ready, able, and willing to carry out his part of the contract at the time of final decree, his want of complete ability at the time of the filing of his bill is immaterial.⁴

Vendor's Defenses. — A vendor in a contract of sale will not be permitted to make the defense that his purchaser has not complied with his part of the contract, unless he shows that he was ready to fulfil his own obligation.⁵ It has been held, in the same way, that the vendor will not be relieved from his obligation because of the failure of the vendee to pay the purchase price, if such failure came about through the act of the vendor.⁶

bb. WHEN TENDER UNNECESSARY. — A tender before suit, however, will never be required of a vendee where the vendor has denied or repudiated the contract,⁷

Texas. — *Hunter v. Clayton*, (Tex. Civ. App. 1896) 36 S. W. Rep. 326.

A Vendee Who Has Gone into Possession under a Parol Contract. can enforce performance only when he is sued for the land, "by showing equities and making tender of unpaid purchase money before judgment." *Stone Land, etc., Co. v. Boon*, 73 Tex. 555; *Ufford v. Wells*, 52 Tex. 617; *Polk v. Kyser*, 21 Tex. Civ. App. 676.

Insufficient Tender. — *Ledwith v. Reichard*, 203 Pa. St. 277; *Sanford v. Bartholomew*, 33 Kan. 38; *Casady v. Scallen*, 15 Iowa 93.

1. Tender on Day Certain. — *Kentucky Distilleries, etc., Co. v. Warwick Co.*, 109 Fed. Rep. 280; *Kelsey v. Crowther*, 162 U. S. 404; *Jenkins v. Locke*, 3 App. Cas. (D. C.) 485.

Tender After Bill Filed. — *Knickerbacker v. Harris*, 1 Paige (N. Y.) 209.

2. Technical Legal Tender Unnecessary. — *United States.* — *Svabada v. Cheney*, 28 Fed. Rep. 500.

Georgia. — *Kerr v. Hammond*, 97 Ga. 567.

Illinois. — *Watson v. White*, 152 Ill. 364.

Indiana. — *Fall v. Hazelrigg*, 45 Ind. 576, 15 Am. Rep. 278; *Lynch v. Jennings*, 43 Ind. 276; *Hunter v. Bales*, 24 Ind. 299.

Iowa. — *McDanel v. Kimbrell*, 3 Greene (Iowa) 335.

Massachusetts. — *Irvin v. Gregory*, 13 Gray (Mass.) 215.

Nebraska. — *Izard v. Kimmel*, 26 Neb. 51.

New York. — *Selleck v. Tallman*, 87 N. Y. 106; *Beebe v. Dowd*, 22 Barb. (N. Y.) 255; *Birdsall v. Waldron*, 2 Edw. (N. Y.) 315.

Pennsylvania. — *Shattuck v. Cunningham*, 166 Pa. St. 368.

Rhode Island. — *Hall v. Whittier*, 10 R. I. 530.

Texas. — *Kalklosh v. Haney*, 4 Tex. Civ. App. 118.

Substantial Performance. — A tender of an amount due upon a contract for the sale of land will, if not complained of as insufficient at the time, be good, although it may not be adequate to cover taxes or a partnership liability growing out of a nursery concern, these being matters subordinate to the sale. *Morgan v. Herrick*, 21 Ill. 481.

Misapprehension as to Correct Amount. — *Totty v. Harris*, (Iowa 1891) 48 N. W. Rep. 1050. See also *Irvin v. Gregory*, 13 Gray (Mass.) 215.

3. Ability and Willingness to Perform. — *Atkinson v. Hudson*, 44 Ark. 192; *Watson v. White*, 152 Ill. 364; *Fall v. Hazelrigg*, 45 Ind. 576, 15 Am. Rep. 278; *Lynch v. Jennings*, 43 Ind. 276; *Hunter v. Bales*, 24 Ind. 299; *McDanel v. Kimbrell*, 3 Greene (Iowa) 335; *Irvin v. Gregory*, 13 Gray (Mass.) 215; *Boyce v. Francis*, 56 Miss. 573; *Kalklosh v. Haney*, 4 Tex. Civ. App. 118.

A showing of a willingness to pay if the plaintiff can get a good title is a sufficient tender to support the suit when the obligor has sold the land in controversy and has died, and the rights of the plaintiff and the second vendee have not been judicially settled. *Laverty v. Hall*, 19 Iowa 526.

Election to Tender Money or Services. — Where the purchaser in a contract for the conveyance of land has the option to pay in money or labor at his election, if election is made to pay in money and the proper amount is tendered, the contract will be specifically enforced. *Owen v. Frink*, 24 Cal. 171.

Credit for Services Rendered. — A vendee of land at a fixed price, payable in services for a definite term, is entitled, in a suit for specific performance by the vendor, to credit for so much of such term as the vendee may serve, and the vendor cannot apply the credit to another account. *Young v. Harris*, 36 Ark. 162.

4. Moore's Estate, 8 Pa. Dist. 84. And see *Coffin v. Cooper*, 14 Ves. Jr. 205; *Wynn v. Morgan*, 7 Ves. Jr. 202; *Tiernan v. Roland*, 15 Pa. St. 436.

5. Mix v. Beach, 46 Ill. 311.

6. Bass v. Gilliland, 5 Ala. 761.

7. When Tender by Vendee Unnecessary — *England.* — *Hunter v. Daniel*, 4 Hare 420.

United States. — *Cheney v. Libby*, 134 U. S. 68; *Pollock v. Brainard*, 26 Fed. Rep. 732.

California. — *Dowd v. Clarke*, 54 Cal. 48; *Goodale v. West*, 5 Cal. 339.

Indiana. — *Harshman v. Mitchell*, 117 Ind. 312; *Martin v. Merritt*, 57 Ind. 34, 26 Am. Rep. 45; *Turner v. Parry*, 27 Ind. 163.

Iowa. — *Veeder v. McMurray*, 70 Iowa 118; *Hopwood v. Corbin*, 63 Iowa 218; *Young v. Daniels*, 2 Iowa 126, 63 Am. Dec. 477.

Massachusetts. — *Irvin v. Gregory*, 13 Gray (Mass.) 215.

Minnesota. — *Brown v. Eaton*, 21 Minn. 409; *Gill v. Newell*, 13 Minn. 462.

or where it is evident from all the facts that a tender would have been unavailing.¹

(e) **Tender of Deed.** — The general rule in the *United States* is believed to be that it is not incumbent upon the vendee of real estate, in the absence of a stipulation to such effect, to prepare and tender a deed to the vendor,² although the contrary has been declared to be the *English* practice.³

(f) **Vendee's Refusal to Accept Title.** — As a general rule, a vendee cannot sue for specific performance and at the same time refuse the vendor's title on the ground that it is defective.⁴ But a vendee may insist upon specific performance of a contract to convey realty after the removal of incumbrances thereon, although he rejected a deed when tendered, on the ground of such incumbrances.⁵ So where a vendor, having at the time a marketable title, contracts to sell land, but becomes unable to perform because of a defect which, without his fault, arose subsequently to the making of the contract of sale, the vendee may obtain specific performance where the defect has disappeared at the time of the trial of the action.⁶

Objections Not Urged in Good Faith. — Equity will not decree specific performance of a contract for the sale of real estate in favor of the purchaser or his assignee where the defendant's failure to perform was due to an objection to the title not urged by the purchaser in good faith.⁷

(g) **Contracts to Reconvey.** — A contract for the reconveyance of land upon the performance of a condition or upon failure thereof, is enforceable

Mississippi. — *Wilbourn v. Bishop*, 62 Miss. 341.

Missouri. — *Deichmann v. Deichmann*, 49 Mo. 107.

New York. — *Baumann v. Pinckney*, 118 N. Y. 604; *Crary v. Smith*, 2 N. Y. 60; *Bellinger v. Kitts*, 6 Barb. (N. Y.) 273; *Birdsall v. Waldron*, 2 Edw. (N. Y.) 315; *North v. Pepper*, 21 Wend. (N. Y.) 636.

Ohio. — *Brock v. Hidy*, 13 Ohio St. 306.

Pennsylvania. — *Shattuck v. Cunningham*, 166 Pa. St. 368.

Tennessee. — *Bradford v. Foster*, 87 Tenn. 4.

Vermont. — *Welch v. Darling*, 59 Vt. 136.

Virginia. — *White v. Dobson*, 17 Gratt. (Va.) 262.

Wisconsin. — *Cunningham v. Brown*, 44 Wis. 72; *Wright v. Young*, 6 Wis. 127, 70 Am. Dec. 453.

1. *Stewart v. Cross*, 66 Ala. 22; *Root v. Johnson*, 99 Ala. 90; *Luchetti v. Frost*, 133 Cal. xix; *Deichmann v. Deichmann*, 49 Mo. 107.

Conveyance Refused on Ground of Incumbrance. — *Mathison v. Wilson*, 87 Ill. 51.

Lessee's Option to Purchase. — *Kerr v. Purdy*, 50 Barb. (N. Y.) 24.

2. **Preparation of Deed.** — *Taylor v. Longworth*, 14 Pet. (U. S.) 172; *Parker v. McAllister*, 14 Ind. 12; *Hill v. Hobart*, 16 Me. 164; *Tinney v. Ashley*, 15 Pick. (Mass.) 546, 26 Am. Dec. 620; *Daily v. Litchfield*, 10 Mich. 29; *St. Paul Div. No. 1 v. Brown*, 9 Minn. 157; *Wells v. Smith*, 2 Edw. (N. Y.) 79.

In a *Nevada* case, however, it was said to be questionable whether the vendee was required to tender conveyance to be executed, though such was the safer practice. *Schroeder v. Gemeinder*, 10 Nev. 367.

3. See *Tinney v. Ashley*, 15 Pick. (Mass.) 546, 26 Am. Dec. 620; *Wells v. Smith*, 2 Edw. (N. Y.) 79.

4. *Youghiogheny River Coal Co. v. Stone-*

man, 31 Pittsb. Leg. J. N. S. (Pa.) 302. See also *Haffey v. Lynch*, 68 Hun (N. Y.) 507.

A Party Who Has Refused a Title When Tendered on the Ground of a Particular Defect, cannot maintain an action for specific performance while the title remains in the same condition. *Goldthwait v. Lynch*, 9 Utah 186.

Where the Vendee Objected to the Deed Tendered on a Particular Ground, an Objection on Other Grounds Will Not Avail Him in a subsequent action for specific performance, the court being authorized to require conveyance in such form and effect as would comply with the contract. *Coy v. Minneapolis, etc., R. Co.*, 116 Iowa 558.

If a Vendor Refuses a Tender of the Purchase-Money on the ground that he is not bound to make any conveyance, he cannot afterward claim that the tender was insufficient because the purchaser at the time thereof requested him to execute a deed which did not correctly describe the land. *Carskaddon v. Kennedy*, 40 N. J. Eq. 259.

Failure to Object. — So, also, a vendee to whom a deed was tendered cannot object, to defeat an action for specific performance, that the property was erroneously described, where no such objection was made when the deed was presented. *Schroeder v. Gemeinder*, 10 Nev. 367.

Vendor's Failure Due to Vendee's Bad Faith. — A court of equity will not decree specific performance of a contract for the sale of real estate in favor of the purchaser or his assignee, where the failure to perform was due to an objection urged in bad faith by the purchaser. *Mack v. McIntosh*, 181 Ill. 633.

5. *Oliver Min. Co. v. Clark*, 69 Minn. 75. And see *Scannell v. American Soda Fountain Co.*, 161 Mo. 606; *McCormick v. Stephany*, 61 N. J. Eq. 208.

6. *Haffey v. Lynch*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 256.

7. *Mack v. McIntosh*, 181 Ill. 635.

specifically at the demand of the obligee.¹ But a contract for reconveyance between the parties to a voluntary transaction made for the purpose of protecting the property from the creditors of the vendor, will not be enforced in equity.²

c. **CONTRACTS TO MORTGAGE** — (1) *In General*. — Equity may decree specific performance of a contract to execute a mortgage upon real estate,³ provided the contract is sufficiently definite and certain in its provisions.⁴ But equity will not give to an executed agreement of the parties contemplating no further act by either, any different effect from that which the law attributes, as by decreeing that a mortgage shall stand as security for advances in excess of the sum expressed in the mortgage, pursuant to a parol agreement of the parties when the mortgage was executed.⁵

(2) *Parol Contracts*. — In *England* the doctrine seems to prevail that a deposit of title deeds by a debtor with his creditor is evidence of an agreement to give a mortgage, enforceable in equity by treating the transaction as an equitable mortgage, and this notwithstanding the requirements of the statute of frauds.⁶ But in the *United States* a mere parol agreement to execute a mortgage on real property is not enforceable, unless "money or value has been parted with on the faith of it, and the circumstances are such as to render it inequitable to refuse relief,"⁷ or there has been, otherwise, such performance or part performance as takes the case out of the statute of frauds.⁸ When this is the case, however, such agreements will be enforced.⁹

1. **Contract to Reconvey**. — *Jackson v. Gray*, 9 Ga. 77; *Love v. Sortwell*, 124 Mass. 446; *Robinson v. Robinson*, 9 Gray (Mass.) 447, 69 Am. Dec. 301; *Hickey v. Dole*, 66 N. H. 336, 49 Am. St. Rep. 614; *Van Doren v. Robinson*, 16 N. J. Eq. 256; *Combs v. Little*, 4 N. J. Eq. 310, 40 Am. Dec. 207; *Leeds v. Penrose*, (N. J. 1887) 8 Atl. Rep. 520; *Coble v. Branson*, 98 N. Car. 160; *Stamper v. Stamper*, 121 N. Car. 251; *Kramer v. Dinsmore*, 152 Pa. St. 264.

Contract Between Execution Debtor and Creditor. — *Combs v. Little*, 4 N. J. Eq. 310, 40 Am. Dec. 207. And see *Rose v. Bates*, 12 Mo. 30; *Coble v. Branson*, 98 N. Car. 160. Compare *Corliss v. Conable*, 74 Iowa 58.

Circumstances Held Not to Constitute Failure of Condition. — *Lovering v. Fogg*, 18 Pick. (Mass.) 540.

2. *Dent v. Ferguson*, 132 U. S. 50; *Parrott v. Baker*, 82 Ga. 364; *Songer v. Partridge*, 107 Ill. 529; *Ford v. Lewis*, 10 B. Mon. (Ky.) 127.

3. **Contract to Execute Mortgage** — *England*. — *Walker v. Barnes*, 3 Madd. 247; *Hermann v. Hodges*, L. R. 16 Eq. 18; *Ashton v. Corrigan*, L. R. 13 Eq. 76; *Seaton v. Twyford*, L. R. 11 Eq. 591; *In re Humble*, 11 Ir. Ch. 132; *Hunter v. Langford*, 2 Molloy 272; *Matter of Strand Music Hall Co.*, 3 De G. J. & S. 147.

Canada. — *Gould v. Hamilton*, 5 Grant Ch. (U. C.) 192; *McKay v. Reed*, 1 Ch. Chamb. (Ont.) 208.

United States. — *Robinson v. Cathcart*, 2 Cranch. (C. C.) 590.

Arkansas. — *Richardson v. Hamlett*, 33 Ark. 237.

Indiana. — *Arnold v. Cord*, 16 Ind. 177.

Indian Territory. — *Allender v. Evans-Smith Drug Co.*, 3 Indian Ter. 628.

Iowa. — *Cole v. Dealham*, 13 Iowa 551.

Maryland. — *Cole v. Cole*, 41 Md. 301; *Alexander v. Chiselin*, 5 Gill (Md.) 138.

Michigan. — *Hicks v. Turck*, 72 Mich. 311; *McClintock v. Laing*, 22 Mich. 212.

Minnesota. — *Irvine v. Armstrong*, 31 Minn. 216.

New Hampshire. — *Lawrence v. Lawrence*, 42 N. H. 109.

New Jersey. — *Nichols v. Williams*, 22 N. J. Eq. 63.

New York. — *Stoddard v. Hart*, 23 N. Y. 556.

Ohio. — *Ogden v. Ogden*, 4 Ohio St. 182.

South Carolina. — *Johnson v. Slawson*, Bailey Eq. (S. Car.) 463.

4. **Agreement Lacking Finality, Definiteness, and Certainty**. — *Magee v. McManus*, 70 Cal. 553.

Mere Time of Payment Not Fixed. — A contract to give a mortgage is not too indefinite to be specifically enforced because no time is limited for the payment of the mortgage. In such case the parties are presumed to intend that the payment is to be made in a reasonable time. *Triebert v. Burgess*, 11 Md. 452.

5. *Stoddard v. Hart*, 23 N. Y. 556.

6. See the title **EQUITABLE MORTGAGES**, vol. 11, p. 131.

7. *Stoddard v. Hart*, 23 N. Y. 561. See also *Worden v. Crist*, 106 Ill. 326.

Forbearance. — Where an oral agreement to execute a mortgage to secure an existing debt is made to secure a postponement of the debt, and the mortgage is not executed on the specified date, such an agreement, although oral, is not within the statute of frauds, but creates a lien on the property which a court of equity will enforce. *Allender v. Evans-Smith Drug Co.*, 3 Indian Ter. 628.

8. **Payment of Consideration — Insufficient Part Performance under New Hampshire Statute**. — See *Brown v. Drew*, 67 N. H. 569.

9. *Magee v. McManus*, 70 Cal. 553; *Cole v. Cole*, 41 Md. 301; *Fletcher v. Hagerman*, 120 Mich. 466; *Leahey v. Leahey*, 11 Mo. App. 413; *Dean v. Anderson*, 34 N. J. Eq. 496; *Stoddard v. Hart*, 23 N. Y. 556; *Baker v. Baker*, 2 S. Dak. 261, 39 Am. St. Rep. 776.

(3) *Agreements to Satisfy Mortgage*. — Agreements to satisfy or remove mortgage liens are specifically enforceable in equity.¹ So also a parol agreement by the mortgagee to release the mortgagor from his personal liability if he will convey the lands to a third person may be enforced by the mortgagor after performance on his part.²

(4) *Agreements Between Incumbrancers*. — Agreements between senior and junior mortgagees as to the foreclosure, sale, and protection of their respective interests, will be enforced in equity.³

d. EASEMENTS. — A contract for the conveyance of a right of way may be enforced specifically.⁴

e. EXCHANGE. — Contracts for the exchange of real property are the frequent subject of equitable enforcement.⁵ A contract for the exchange of lands will not be enforced where the party seeking performance is not able to give a marketable title to his property,⁶ unless, indeed, the contract did not call for such title, or the other party has gone into possession with knowledge of the existing defect.⁷

f. LEASES. — (1) *In General*. — Agreements to execute leases of real property may be enforced in equity,⁸ provided, of course, there is a completed con-

Where a Debtor Conveys Land under an express verbal agreement that the same shall be held for and applied to the payment of certain debts due the grantee and others, such agreement may be proved and enforced in equity. *Shields v. Whitaker*, 82 N. Car. 516.

1. *Agreement to Satisfy Mortgage*. — *Neal v. Speigle*, 33 Ark. 63; *Bennett v. Abrams*, 41 Barb. (N. Y.) 619; *Malins v. Brown*, 4 N. Y. 403; *Brewer's Appeal*, 104 Pa. St. 417; *Ackla v. Ackla*, 6 Pa. St. 228; *Weir v. Mundell*, 3 Brews. (Pa.) 594; *Barkley v. Barkley*, 14 Rich. Eq. (S. Car.) 12; *Stark v. Wilder*, 36 Vt. 752.

After Obligor's Conveyance with Warranty. — *Bennett v. Abrams*, 41 Barb. (N. Y.) 619.

2. *Coyle v. Davis*, 20 Wis. 564.

3. See *Pearson v. Pearson*, 131 Ill. 464.

Agreement Between First and Second Mortgagees. — *Livingston v. Painter*, (Supm. Ct. Gen. T.) 19 Abb. Pr. (N. Y.) 28.

And the Holder of a First Mortgage, who is induced to take a third mortgage by the written unsealed agreement of the holder of the second, may enforce this agreement in an equitable action brought against him by the holder of the second for redemption of the land from the first. *Shaw v. Abbott*, 61 N. H. 254.

4. *Easements*. — *Puttman v. Haltey*, 24 Iowa 425; *Wetherell v. Brobst*, 23 Iowa 586.

5. *Contract to Exchange*. — *United States v. Purcell v. Miner*, 4 Wall. (U. S.) 513.

Alabama. — *Goodlett v. Hansell*, 66 Ala. 151. *District of Columbia*. — *Armes v. Bigelow*, 3 MacArthur (D. C.) 442.

Illinois. — *Cusack v. Budasz*, 187 Ill. 392; *Baker v. Allison*, 186 Ill. 613.

Kentucky. — *Overstreet v. Rice*, 4 Bush (Ky.) 1, 96 Am. Dec. 279.

Massachusetts. — *Boynton v. Hazelboom*, 14 Allen (Mass.) 107, 92 Am. Dec. 738; *Park v. Johnson*, 4 Allen (Mass.) 259.

Michigan. — *Bowman v. Gork*, 106 Mich. 163.

Nebraska. — *Henry, etc., Co. v. Halter*, 58 Neb. 685; *Te Poel v. Shutt*, 57 Neb. 592. And see *Cooper v. Chittenden*, 33 Neb. 313.

Virginia. — *Parrill v. McKinley*, 9 Gratt. (Va.) 1, 58 Am. Dec. 212.

West Virginia. — *Boggs v. Bodkin*, 32 W. Va. 566; *Rader v. Neal*, 13 W. Va. 373.

And see *Sternberger v. McGovern*, 56 N. Y. 12.

Statute of Frauds. — It has been held that an actual conveyance made and accepted by one party to another, pursuant to an oral contract of exchange, takes the contract out of the statute of frauds and renders it enforceable in equity. *Swain v. Burnette*, 89 Cal. 564. And see *Bennett v. Abrams*, 41 Barb. (N. Y.) 619; *Barnes v. Teague*, 1 Jones Eq. (54 N. Car.) 277, 62 Am. Dec. 200; *Parrill v. McKinley*, 9 Gratt. (Va.) 1, 58 Am. Dec. 212.

Immaterial Misstatement. — So a contract of this nature will be enforced although it appears that one property which was to be exchanged, subject to a mortgage for a certain amount, was in fact subject to three mortgages aggregating that amount, all being held by the same mortgagee. Such a condition does not disclose a material variance. *Evans v. Fox*, 8 Pa. Dist. 383.

Want of Diligence Sufficient to Defeat Action. — *Platt v. Zimmermann*, (N. Y. Super. Ct. Gen. T.) 13 Misc. (N. Y.) 519.

6. *Boggs v. Bodkin*, 32 W. Va. 566. See also *Bigelow v. Arms*, 108 U. S. 10.

Entire Contract. — *Compensation for Defects*. — *Sternberger v. McGovern*, 56 N. Y. 12.

7. See *Beck v. Bridgeman*, 40 Ark. 382.

8. *Leases*. — *Hexter v. Pearce*, (1900) 1 Ch. 341; *McCarger v. Rood*, 47 Cal. 138; *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266; *Smith v. St. Philip's Church*, 107 N. Y. 610; *Wendell v. Stone*, 39 Hun (N. Y.) 382; *Wallace v. Scoggins*, 17 Oregon 476; *Seaman v. Aschermann*, 51 Wis. 678, 37 Am. Rep. 849. See generally the title *LEASES*, vol. 18, p. 593. Compare *Laroussini v. Werlein*, 48 La. Ann. 13; *Effinger v. Hain*, 10 Pa. Dist. 107.

Execution of Lease After Expiration of Period. — *Wilkinson v. Torkington*, 2 Y. & C. Exch. 726; *Nesbitt v. Meyer*, 1 Swanst. 223; *Satterthwait v. Marshall*, 4 Del. Ch. 355; *St. Joseph Hydraulic Co. v. Globe Tissue Paper Co.*, 156 Ind. 665.

Building Incomplete. — A bill to compel specific performance of an agreement for the lease of a

tract therefor,¹ the terms of which are reasonably definite and certain.²

(2) *Covenants in Leases.* — The performance by the lessor of valid contracts contained in leases may be compelled in equity,³ but a lessor who has an adequate remedy at law cannot maintain an action for specific performance,⁴ nor, if a covenant in a lease is so ambiguous and doubtful that it is difficult to ascertain its meaning, will specific performance be decreed.⁵

A Lessee's Option to Purchase or Renew the lease is enforceable in equity, and is not objectionable for lack of mutuality or as a unilateral contract.⁶

But as Time Is Generally of the Essence of the Contract in covenants of renewal in written leases where the giving of notice of intention to renew within a specified time is made a condition precedent to such renewal, such covenants will not, as a rule, be specifically enforced unless notice has been given as provided by the terms of the contract.⁷

(3) *Breach of Covenants by Lessee.* — An agreement for making a lease will not be specifically enforced against the proposed lessor if the intended lessee has already violated a condition of the lease or violated covenants therein which would be ground of forfeiture.⁸ But if it is fairly doubtful whether the condition has in fact been broken by the prospective lessee, the execution of the lease may be directed and antedated the time of the alleged breach, so that the issue may be fairly presented in an action at law.⁹

(4) *Parol Leases.* — Leases of real property not in writing, and beyond the period permitted by the statute of frauds for leases in parol, may, nevertheless, be enforced where there has been part performance by the lessee.¹⁰ But where one party agrees by parol to lease land to another for a term of years to begin in the future, and agrees at the time to put such parol contract in writing, but no consideration passes between the parties, either party may disregard the parol contract,¹¹ and even, it has been held, if the lessee go on

building, to commence at a future day on completion of the building, cannot be brought before the building is completed. *Friedman v. McAdory*, 85 Ala. 61.

Necessity for Lessor's Consent — Assignment. — *Hurlbut v. Kantzler*, 112 Ill. 482.

1. **Contract Incomplete.** — *Mayer v. McCreery*, 119 N. Y. 434.

2. **Duration of Lease Not Fixed.** — *Myers v. Forbes*, 24 Md. 598.

Rent Uncertain. *Robinson v. Kettletas*, 4 Edw. (N. Y.) 67. See also *Gelston v. Sigmund*, 27 Md. 334.

Uncertainty as to Nature of Tenancy and Consideration. — *Rutan v. Crawford*, 45 N. J. Eq. 99.

Agreement Held Sufficiently Certain. — *Clark v. Clark*, 49 Cal. 586.

3. *Jones v. Parker*, 163 Mass. 564, 47 Am. St. Rep. 485.

Covenant to Repair. — *Vallotton v. Seignett*, (Supm. Ct. Spec. T.) 2 Abb. Pr. (N. Y.) 121.

Compensation for Improvements. — *Berry v. Van Winkle*, 2 N. J. Eq. 269.

4. *Allison v. Lurig Coal Co.*, 12 Ohio Cir. Dec. 504, 22 Ohio Cir. Ct. 489.

5. *Buckmaster v. Thompson*, 36 N. Y. 557.

6. **Option to Purchase or Renew — Alabama.** — *Davis v. Robert*, 89 Ala. 402, 18 Am. St. Rep. 126.

Arizona. — *Monihon v. Wakelin*, (Ariz. 1899) 56 Pac. Rep. 735.

California. — *Hall v. Center*, 40 Cal. 63.

Georgia. — *Robinson v. Perry*, 21 Ga. 183, 68 Am. Dec. 455.

Indiana. — *Souffrain v. McDonald*, 27 Ind. 269.

Massachusetts. — *Ryder v. Robinson*, 109 Mass. 67.

Nevada. — *Schroeder v. Gemeinder*, 10 Nev. 355.

New Jersey. — *Waters v. Bew*, 52 N. J. Eq. 791; *Ten Eyck v. Manning*, 52 N. J. Eq. 50; *Page v. Martin*, 46 N. J. Eq. 585; *Hawralty v. Warren*, 18 N. J. Eq. 126, 90 Am. Dec. 613; *McCormick v. Stephany*, 57 N. J. Eq. 257.

New York. — *Smith v. St. Philips Church*, 107 N. Y. 610.

Oregon. — *House v. Jackson*, 24 Oregon 89. See the title LEASES, vol. 18, p. 593.

See *Whitlock v. Duffield, Hoffm.* (N. Y.) 110, for the case of a covenant which could not be enforced for the reason that there was held to be no contract.

7. *Monihon v. Wakelin*, (Ariz. 1899) 56 Pac. Rep. 735.

Exception to Rule — Particular Facts. — See *Monihon v. Wakelin*, (Ariz. 1899) 56 Pac. Rep. 735.

8. *St. Joseph Hydraulic Co. v. Globe Tissue Paper Co.*, 156 Ind. 671; *Bamberger v. Johnson*, 86 Md. 38.

9. *St. Joseph Hydraulic Co. v. Globe Tissue Paper Co.*, 156 Ind. 671; *Noonan v. Orton*, 21 Wis. 283. And see *Lillie v. Legh*, 3 De G. & J. 204; *Rankin v. Lay*, 2 De G. F. & J. 72; *Pain v. Coombs*, 1 De G. & J. 34.

10. *St. Joseph Hydraulic Co. v. Globe Tissue Paper Co.*, 156 Ind. 665; *Deeds v. Stephens*, (Idaho 1902) 69 Pac. Rep. 534; *Kincaid v. Kincaid*, 85 Hun (N. Y.) 141; *Wallace v. Scoggins*, 17 Oregon 476. See *supra*, this title, *Partial Performance*.

11. *Pulse v. Hamer*, 8 Oregon 251. And see *Page v. Carnine*, 29 Wash. 387.

the land at the commencement of the term named in the parol agreement but without the request of the lessor, his possession thus obtained will not give him any rights under such parol contract.¹

g. PARTITION. — An oral contract of partition may be enforced in equity where there has been such part performance as to take the case out of the statute of frauds.²

23. Stock in Corporations — *a. IN GENERAL.* — Whether or not a contract for the sale of corporate stock will be specifically enforced depends upon the adequacy of the remedy at law.

b. WHEN CONTRACT ENFORCED — (1) *In General.* — Where the corporate stock to which the contract relates is not procurable in the market, and its pecuniary value is not readily ascertainable, specific performance will, as a rule, be decreed,³ especially where the court acquires jurisdiction of the action on the ground that it is an action to enforce a trust.⁴

(2) *Where Stock of Peculiar Value to Plaintiff.* — Where the stock with reference to which the contract is made is of peculiar value to the plaintiff in order that he may obtain a proper and legitimate control over the management of a private corporation, specific performance will, as a rule, be decreed.⁵

c. WHEN PERFORMANCE DENIED — (1) *In General.* — Specific performance of a contract for the purchase or sale of stock will not be decreed where the stock is purchasable on the market or has a money value which may be readily computed.⁶ Nor will a contract for the sale of stock be enforced

1. See *Pulse v. Hamer*, 8 Oregon 251.

2. *Partition.* — *Petrav v. Howell*, 20 Ark. 615; *Weed v. Terry*, 2 Dougl. (Mich.) 344, 45 Am. Dec. 257.

3. *Contracts for Sale of Stock* — *England.* — *Cheale v. Kenward*, 3 De G. & J. 27; *Shaw v. Fisher*, 2 De G. & Sm. 11, 5 De G. M. & G. 596; *Paine v. Hutchinson*, L. R. 3 Ch. 388; *Hawkins v. Maltby*, L. R. 3 Ch. 188; *Gardener v. Pullen*, 2 Vern. 394; *Duncuft v. Albrecht*, 12 Sim. 189; *Parish v. Parish*, 32 Beav. 207; *Poole v. Middleton*, 29 Beav. 646; *Doloret v. Rothschild*, 1 Sim. & St. 590.

United States. — *Bissell v. Farmers'*, etc., Bank, 5 McLean (U. S.) 505; *Newton v. Wooley*, 105 Fed. Rep. 541; *Krohn v. Williamson*, 62 Fed. Rep. 869.

Alabama. — *Moses v. Scott*, 84 Ala. 608.

California. — *Fleishman v. Woods*, 135 Cal. 256; *Krouse v. Woodward*, 110 Cal. 638; *Treasurer v. Commercial Coal Min. Co.*, 23 Cal. 390.

Colorado. — *Frue v. Houghton*, 6 Colo. 318.

Delaware. — See *Diamond State Iron Co. v. Todd*, 6 Del. Ch. 163.

Kentucky. — *Baldwin v. Com.*, 11 Bush (Ky.) 417.

Massachusetts. — *New England Trust Co. v. Abbott*, 162 Mass. 148; *Adams v. Messenger*, 147 Mass. 185, 9 Am. St. Rep. 679; *Leach v. Fobes*, 11 Gray (Mass.) 506, 71 Am. Dec. 732.

New York. — *Johnson v. Brooks*, 93 N. Y. 337; *White v. Schuyler*, (Supm. Ct. Gen. T.) 1 Abb. Pr. N. S. (N. Y.) 300, 31 How. Pr. (N. Y.) 38.

North Carolina. — *Ashe v. Johnson*, 2 Jones Eq. (55 N. Car.) 149; *Austin v. Gillaspie*, 1 Jones Eq. (54 N. Car.) 261.

Pennsylvania. — *Northern Cent. R. Co. v. Walworth*, 193 Pa. St. 207, 74 Am. St. Rep. 683, 12 York Leg. Rec. (Pa.) 121; *Goodwin Gas Stove, etc., Co.'s Appeal*, 117 Pa. St. 514, 2 Am. St. Rep. 696; *Bartol v. Shaffer*, 7 Northam Co. Rep. (Pa.) 217.

Rhode Island. — *Manton v. Ray*, 18 R. I. 672, 49 Am. St. Rep. 811.

Contract Held Not Void for Uncertainty. — See *Northern Cent. R. Co. v. Walworth*, 193 Pa. St. 207, 74 Am. St. Rep. 683.

4. *Krohn v. Williamson*, 62 Fed. Rep. 869; *Johnson v. Brooks*, 93 N. Y. 337; *Goodwin Gas Stove, etc., Co.'s Appeal*, 117 Pa. St. 514, 2 Am. St. Rep. 696.

5. *Stock of Peculiar Value to Plaintiff.* — *Perin v. Megibben*, 53 Fed. Rep. 86; *O'Neill v. Webb*, 78 Mo. App. 1, 2 Mo. App. Rep. 141; *Scruggs v. Cotterill*, 67 N. Y. App. Div. 583. And see *Bomeisler v. Forster*, 154 N. Y. 239; *Cushman v. Thayer Mfg. Jewelry Co.*, 76 N. Y. 365, 32 Am. Rep. 315; *Bumgardner v. Leavitt*, 35 W. Va. 194.

6. *Where Stock Readily Purchasable* — *England.* — *Shaw v. Fisher*, 5 De G. M. & G. 596.

United States. — *Ross v. Union Pac. R. Co.*, Woolw. (U. S.) 36; *Fallon v. Missouri, etc., R. Co.*, 1 Dill. (U. S.) 121; *Bissell v. Farmers'*, etc., Bank, 5 McLean (U. S.) 495.

Connecticut. — *Cowles v. Whitman*, 10 Conn. 121, 25 Am. Dec. 60.

Illinois. — *Barton v. De Wolf*, 108 Ill. 195.

Maryland. — *Ryan v. McLane*, 91 Md. 175. See also *Gottschalk v. Stein*, 69 Md. 51.

Massachusetts. — *Adams v. Messenger*, 147 Mass. 185, 9 Am. St. Rep. 679; *Noyes v. Marsh*, 123 Mass. 287.

Minnesota. — *Northern Trust Co. v. Markell*, 61 Minn. 271; *Moulton v. Warren Mfg. Co.*, 81 Minn. 259.

Missouri. — *Ferguson v. Paschall*, 11 Mo. 267.

New Hampshire. — *Eckstein v. Downing*, 64 N. H. 248, 10 Am. St. Rep. 404; *Eastman v. Plumer*, 46 N. H. 464.

Pennsylvania. — *Rigg v. Reading, etc., St. R. Co.*, 191 Pa. St. 298; *Foll's Appeal*, 91 Pa. St. 434, 36 Am. Rep. 671; *Strasburg R. Co. v. Echternacht*, 21 Pa. St. 220, 60 Am. Dec. 49.

where it involves an attempt improperly to interfere with the rights of other stockholders.¹

(2) *Contract Induced by Fraud*. — Where the contract for the sale of stock, entered into with an officer of the corporation, was induced by the fraud and bad faith of such officer, specific performance will not be decreed in his favor.²

(3) *Contract Contrary to Public Policy*. — Nor will specific performance be compelled where the contract sought to be enforced is void as against public policy.³ So the court will not lend its aid to compel the enforcement of a contract for the sale of national bank stock where the avowed object of the purchase of the stock is to obtain control of the bank by the purchaser.⁴

(4) *Corporation to Be Organized in Futuro*. — A contract for the sale or transfer of stock in a corporation never created cannot, of course, be performed.⁵

(5) *Where Defendant Not Owner of Stock*. — It may, of course, be laid down as a general rule that specific performance of a contract for the sale of stock will not be decreed as against a party who has no power to convey by reason of lack of title to the stock.⁶ But where he has retained a part, the contract will be specifically enforced as to such part.⁷

(6) *Laches*. — The plaintiff must be diligent in seeking his remedy, and where there has been an unreasonable delay on his part in so doing the court will not aid him.⁸

d. STOCK SUBSCRIPTIONS — TRANSFERS. — A contract to issue stock to a subscriber therefor will not be specifically enforced where it appears that the defendant company has already issued its stock to the full amount authorized by law and has no more to issue.⁹ Nor will the issuance of stock be compelled where the complainant did not comply with the terms and conditions of the contract of subscription, whereby the corporation issued the stock so subscribed for to other persons.¹⁰ A contract to subscribe for stock will not, as a rule, be enforced, damages at law being adequate.¹¹ An action will lie, however, to compel a transfer upon its books by a manufacturing corporation of shares of its capital stock to the owner thereof, where a recovery of damages for a refusal to transfer would be inadequate compensation.¹²

24. Support and Maintenance. — There is some conflict of authority as to whether equity will decree specific performance of a contract for support and maintenance on the ground that the acts to be performed are of a continuous and personal nature, of undefined character, requiring skill and judgment.¹³ So also where the consideration for the contract of conveyance was the vendee's undertaking to support and maintain the vendor during life, a decree has been

West Virginia. — *Hissam v. Parrish*, 41 W. Va. 686, 56 Am. St. Rep. 892.

Wisconsin. — *Avery v. Ryan*, 74 Wis. 591.

See also *Blake v. Flatley*, 44 N. J. Eq. 228, 6 Am. St. Rep. 886.

1. *Fremont v. Stone*, 42 Barb. (N. Y.) 169. And see *Converse v. Hood*, 149 Mass. 471.

2. **Fraud**. — *Diamond State Iron Co. v. Todd*, 6 Del. Ch. 163.

3. *Noyes v. Marsh*, 123 Mass. 286.

Quasi-Public Corporations. — That a contract for the sale of shares of stock to enable the buyer to control a quasi-public corporation such as a railroad company, will not be enforced, see *Ryan v. McLane*, 91 Md. 175.

4. *Foll's Appeal*, 91 Pa. St. 434, 36 Am. Rep. 671.

5. *Burton v. Shotwell*, 13 Bush (Ky.) 272; *Sessions v. Elwell*, 71 Hun (N. Y.) 612, 24 N. Y. Supp. 599. And see *Sturgis v. Galindo*, 59 Cal. 28, 43 Am. Rep. 239; *Brehm v. Sperry*, 92 Md. 378.

Uncertainty and Inadequacy of Consideration. — *Riordan v. Stout*, 17 App. Cas. (D. C.) 397.

6. *Jones v. Tunis*, 99 Va. 220, 3 Va. Sup. Ct. 140. See also *Columbie v. Chichester*, 2 Phil. 27.

7. *Turner v. Moy*, 32 L. T. N. S. 56.

8. *York v. Passaic Rolling-Mill Co.*, 30 Fed. Rep. 471; *Diamond State Iron Co. v. Todd*, 6 Del. Ch. 163.

9. **Stock Subscriptions**. — *Lacombe v. Forstall*, 123 U. S. 562; *Summerlin v. Fronteriza Silver Min., etc., Co.*, 41 Fed. Rep. 249.

10. *Sewall v. Eastern R. Co.*, 9 Cush. (Mass.) 5.

11. *Strasburg R. Co. v. Echternacht*, 21 Pa. St. 220, 60 Am. Dec. 49. But see *New Brunswick, etc., R., etc., Co. v. Muggeridge*, 4 Drew. 686.

12. *Cushman v. Thayer Mfg. Jewelry Co.*, 76 N. Y. 365, 32 Am. Rep. 315. And see *Birmingham Nat. Bank v. Roden*, 97 Ala. 404.

13. **Support and Maintenance**. — To the effect that such contracts will not be enforced, see

refused on the ground that performance by the vendee could not be compelled.¹ On the other hand, such contracts have been held specifically enforceable in equity,² and in one case a reference was ordered to determine what was a suitable provision for support and maintenance.³

25. Trusts — *a. IN GENERAL.* — Equity frequently exercises jurisdiction to compel the specific performance of trusts, express, implied, or constructive.⁴ And this may be so even though the trust may require the payment of money merely,⁵ or relates only to personal property.⁶ Thus, one who buys stock in behalf of another may be compelled to fulfil his trust by transferring it to him.⁷ And likewise specific performance will be granted to compel the delivery of promissory notes and other instruments in writing to the persons entitled to the possession thereof, when an express trust in reference thereto has been created by the terms of the contract.⁸

b. IMPLIED OR CONSTRUCTIVE TRUSTS — STATUTE OF FRAUDS. — Where a trust in respect of land arises by implication, construction, or operation of law, as where the legal title was obtained by undue influence or false representations, it is not within the statute of frauds though not evidenced in writing.⁹ But the mere refusal of a trustee to execute a parol trust, or the denial of its existence, is not such a fraud as to take the case out of the statute of frauds, and authorize equity to enforce the trust.¹⁰

c. VIOLATION OF TRUSTS. — Equity will never, of course, in the exercise of its jurisdiction of specific performance, compel a violation of trust.¹¹

26. Miscellaneous. — Some miscellaneous instances in which the specific performance of contracts has been decreed will be found in the notes.¹²

Chadwick v. Chadwick, 121 Ala. 580; *Mowers v. Fogg*, 45 N. J. Eq. 120.

1. *Gardner v. Knight*, 124 Ala. 273. See also *Bourget v. Monroe*, 58 Mich. 563.

2. *Clancy v. Flusky*, 187 Ill. 605; *Stillings v. Stillings*, 67 N. H. 584; *Hackett v. Hackett*, 67 N. H. 424; *Chubb v. Peckham*, 13 N. J. Eq. 207; *Watson v. Smith*, 7 Oregon 448.

3. *Chubb v. Peckham*, 13 N. J. Eq. 207.

4. **Trusts** — *United States.* — *Krohn v. Williamson*, 62 Fed. Rep. 869; *Ball, etc., Fastener Co. v. Ball Glove Fastener Co.*, (C. C. A.) 58 Fed. Rep. 818.

Colorado. — *Henderson v. Johns*, 13 Colo. 280.

Connecticut. — *Cowles v. Whitman*, 10 Conn. 121, 25 Am. Dec. 60.

Illinois. — *Brophy v. Lawler*, 107 Ill. 284.

Maine. — *Draper v. Stone*, 71 Me. 175; *Buck v. Swazey*, 35 Me. 41, 56 Am. Dec. 681.

Massachusetts. — *Boyd v. Soule*, 8 Gray (Mass.) 554.

Missouri. — *In re Ferguson*, 124 Mo. 574.

New Jersey. — *Kimball v. Morton*, 5 N. J. Eq. 26, 43 Am. Dec. 621.

New York. — *Woodruff v. Erie R. Co.*, 93 N. Y. 609.

North Carolina. — *Sprague v. Bond*, 108 N. Car. 382.

Pennsylvania. — *Simes v. Everson*, 46 Pa. St. 309; *McGowin v. Remington*, 12 Pa. St. 56, 51 Am. Dec. 584.

Rhode Island. — *Chafee v. Sprague*, 16 R. I. 189.

Tennessee. — *Koen v. White*, Meigs (Tenn.) 358.

Texas. — *Hodges v. Johnson*, 15 Tex. 570. And see *Forrest v. Elwes*, 4 Ves. Jr. 492; *Fyfe v. Swaby*, 16 Jur. 49; *Stanton v. Percival*, 5 H. L. Cas. 257.

The Heirs at Law of a Deceased Person may be compelled to execute a deed for land which their ancestor held in trust for the complainant. *Holderman v. Gray*, 130 Ill. 442.

Voluntary Contract. — Courts of equity will do nothing towards perfecting a voluntary contract for the creation of a trust, nor regard it as binding so long as it remains executory. *Webb's Estate*, 49 Cal. 542.

5. See *Buck v. Swazey*, 35 Me. 41, 56 Am. Dec. 681; *Boyd v. Soule*, 8 Gray (Mass.) 554; *Woodruff v. Erie R. Co.*, 93 N. Y. 609.

Division of Proceeds of Land. — *Sprague v. Bond*, 108 N. Car. 382.

6. *Pooley v. Budd*, 14 Beav. 34; *Wood v. Rowcliffe*, 2 Phil. 382; *Cowles v. Whitman*, 10 Conn. 121, 25 Am. Dec. 60; *Peer v. Kean*, 14 Mich. 354.

7. *Cowles v. Whitman*, 10 Conn. 121, 25 Am. Dec. 60; *Draper v. Stone*, 71 Me. 175; *Kimball v. Morton*, 5 N. J. Eq. 26, 43 Am. Dec. 621; *Simes v. Everson*, 46 Pa. St. 309; *McGowin v. Remington*, 12 Pa. St. 56, 51 Am. Dec. 584.

8. *Henderson v. Johns*, 13 Colo. 280.

9. *Scott v. Harris*, 113 Ill. 447. And see the title IMPLIED TRUSTS, vol. 15, p. 1119.

10. *Scott v. Harris*, 113 Ill. 447; *Farnham v. Clements*, 51 Me. 426.

11. *Jones v. Holladay*, 2 App. Cas. (D. C.) 279; *Repetto v. Baylor*, 61 N. J. Eq. 501.

12. **Annuities.** — A trustee in a separation agreement may enforce the specific performance of a stipulation by the husband to secure the payment of an annual allowance to his wife. *Greenleaf v. Blakeman*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 564.

"Grub Stake Contracts" will be enforced by the courts, but only as other contracts; that is to say, it is not enough for parties to assert that they have rights in order to secure legal pro-

XIII. RULE AS TO PRIVIES AND REPRESENTATIVES — 1. In General. — Wherever the specific execution of a contract or covenant respecting lands would have been decreed as between the original parties, it will be decreed as between all persons claiming title under them in privy of estate or of representation or of title, unless controlling equities have intervened;¹ and this without regard to the form or technical character of the contract.²

2. Heirs and devisees. — Thus specific performance may be decreed against the heirs or devisees of a vendor or obligor in a contract of sale,³ and the

tection, but they must be able to prove in each case a clear and definite contract, and that by the terms and conditions of such contract, and compliance therewith on their part, rights have become vested." *Cisna v. Mallory*, 84 Fed. Rep. 851. And see *Meylette v. Brennan*, 20 Colo. 242.

Particular Contracts. — See for contracts dependent upon particular facts, *Brown v. Smith*, 109 Fed. Rep. 26; *Fanny Rawlings Min. Co. v. Tribe*, 29 Colo. 302; *Swan v. Mutual Reserve Fund L. Assoc.*, 20 N. Y. App. Div. 255; *Frompt v. Lessig*, 174 Pa. St. 487; *Fowler v. Burke*, 13 Wash. 13.

1. General Rule as to Privies and Representatives — England. — *Burgess v. Wheate*, 1 W. Bl. 123; *Smith v. Hibbard*, 2 Dick. 730; *Hackett v. McNamara*, Ll. & G. t. Plunk. 283.

Alabama. — *Peck v. Ashurst*, 108 Ala. 429; *Meyer v. Mitchell*, 75 Ala. 475; *Chambers v. Alabama Iron Co.*, 67 Ala. 353; *Hays v. Hall*, 4 Port. (Ala.) 374, 30 Am. Dec. 530.

Kansas. — *Wilson v. Emig*, 44 Kan. 125.

Maine. — *Godfrey v. Dwinell*, 40 Me. 94.

Maryland. — *Worthington v. Lee*, 61 Md. 530; *Cole v. Cole*, 41 Md. 301.

Massachusetts. — *Curran v. Holyoke Water Power Co.*, 116 Mass. 90; *Ryder v. Robinson*, 109 Mass. 67. And see *Fowler v. Rice*, 17 Pick. (Mass.) 100.

Michigan. — *Lovejoy v. Potter*, 60 Mich. 95.

Minnesota. — *Thompson v. Myrick*, 20 Minn. 205.

Mississippi. — *Boyce v. Francis*, 56 Miss. 573.

Missouri. — *In re Ferguson*, 124 Mo. 574; *Leahey v. Leahey*, 11 Mo. App. 413.

New Jersey. — *Coles v. Freeney*, 52 N. J. Eq. 493; *Young v. Young*, 51 N. J. Eq. 491; *Robbins v. McKnight*, 5 N. J. Eq. 642, 45 Am. Dec. 406.

New York. — *Raynor v. Lyon*, 46 Hun (N. Y.) 227; *Wheeler v. Crosby*, 20 Hun (N. Y.) 140; *Champion v. Brown*, 6 Johns. Ch. (N. Y.) 398, 10 Am. Dec. 343.

Pennsylvania. — *White v. Patterson*, 139 Pa. St. 429.

Wisconsin. — *Fisher v. Moolick*, 13 Wis. 321.

Strict Legal Privy Unnecessary. — *Ewins v. Gordon*, 49 N. H. 444. And see *Hook v. Kinneer*, 3 Swanst. 417; *Hill v. Gomme*, 5 Myl. & C. 250, 1 Beav. 540; *Colyear v. Mulgrave*, 2 Keen 81; *Vernon v. Vernon*, 2 P. Wms. 594.

Circumstances Held No Waiver of Right. — *Wheeler v. Wheeler*, (Supm. Ct. Gen. T.) 2 N. Y. Supp. 496.

Decree Against Executor Individually. — *Agan v. Barry*, 66 N. Y. App. Div. 101.

2. Worthington v. Lee, 61 Md. 530.

3. Heirs and devisees — England. — *Holt v. Holt*, 2 Vern. 322.

United States. — *Bohanan v. Giles*, 26 Fed.

Rep. 204; *Moore v. Crawford*, 130 U. S. 122; *Davis v. Davis*, 89 Fed. Rep. 532.

Alabama. — *Jenkins v. Harrison*, 66 Ala. 345; *Strange v. Watson*, 11 Ala. 324.

California. — *Matter of Dick*, 74 Cal. 284.

Georgia. — *Maddox v. Rowe*, 23 Ga. 431, 68 Am. Dec. 535.

Illinois. — *Joiner v. Duncan*, 174 Ill. 252.

Indiana. — *Butler v. Holtzman*, 55 Ind. 125.

Iowa. — *Stewart v. Noble*, 1 Greene (Iowa) 26.

Kansas. — *Everett v. Dilley*, 39 Kan. 73; *James v. Hollanden*, 7 Kan. App. 811, 52 Pac. Rep. 913.

Kentucky. — *Berryman v. Mullins*, 8 B. Mon. (Ky.) 152; *Trabue v. North*, 2 A. K. Marsh. (Ky.) 361.

Maine. — *Woodbury v. Gardner*, 77 Me. 68; *Godfrey v. Dwinell*, 40 Me. 94.

Maryland. — *Partridge v. Dorsey*, 3 Har. & J. (Md.) 302.

Massachusetts. — *Ryder v. Robinson*, 109 Mass. 67; *Root v. Blake*, 14 Pick. (Mass.) 271; *Boyd v. Soule*, 8 Gray (Mass.) 554.

Michigan. — *Gardner v. Warren*, 52 Mich. 309.

Minnesota. — *Mousseau v. Mousseau*, 40 Minn. 236.

Mississippi. — *Jackson v. McCoy*, 56 Miss. 781.

New Jersey. — *Morris v. Morris*, (N. J. 1888) 13 Atl. Rep. 267.

New York. — *Moore v. Burrows*, 34 Barb. (N. Y.) 173; *Wheeler v. Crosby*, 20 Hun (N. Y.) 140; *Herrick v. Starkweather*, 54 Hun (N. Y.) 532.

North Carolina. — *White v. Hooper*, 6 Jones Eq. (59 N. Car.) 152; *Rutherford v. Green*, 2 Ired. Eq. (37 N. Car.) 121.

South Carolina. — *Hunter v. Mills*, 29 S. Car. 72; *Glaze v. Drayton*, 1 Desaus. (S. Car.) 109.

Texas. — *Hibbert v. Aylott*, 52 Tex. 530; *Robinson v. McDonald*, 11 Tex. 385, 62 Am. Dec. 480.

Vermont. — *Smith v. Pierce*, 65 Vt. 200.

Virginia. — *Fishburne v. Ferguson*, 85 Va. 321; *Goddin v. Vaughn*, 14 Gratt. (Va.) 102; *Moore v. Fitz Randolph*, 6 Leigh (Va.) 175, 29 Am. Dec. 208.

West Virginia. — *Bryson v. McShane*, 48 W. Va. 126.

Wisconsin. — *Thrall v. Thrall*, 60 Wis. 503.

Decree Against Infant Heir. — On a bill against the infant heir for specific performance of a contract of the ancestor, the court may direct a conveyance by the infant when of age, and in the meantime may authorize the vendee to take and hold possession, and will restrain the infant from interfering with the possession, or encumbering the title. *Sutphen v. Fowler*, 9

heirs or devisees of a vendee or obligee in a contract may likewise sue for specific performance.¹

3. Vendees and Assignees. — **The Assignee of a Contract** for sale or conveyance may as a rule sue for its specific performance.² But where the assignee of a contract of purchase has not fulfilled the conditions binding upon his assignor, specific performance will not be decreed.³ Nor will the assignee be permitted, as a rule, to substitute his personal liability upon unperformed conditions for that of his assignor, against the consent of the obligor in the contract, and performance decreed against the latter,⁴ though the obligor may, by acceptance of the assignee in place of the assignor, preclude himself from raising this objection.⁵

A Vendee who takes property or enters into a contract with notice of the prior conflicting rights or equities of a third person cannot have specific performance of the contract.⁶ On the other hand, a vendee or assignee who takes with notice of prior equities will, in general, be required to perform the contract of his vendor or assignor.⁷

Paige (N. Y.) 280. See also *Wilkinson v. Wilkinson*, 1 Desaus. (S. Car.) 201.

Committee of Insane Heir. — Where the vendor dies before the performance of the contract, leaving, as his sole heir at law, a child who is a lunatic, a court of equity may decree specific performance of the contract, and order the committee of the lunatic to execute all necessary conveyances. *Swartwout v. Burr*, 1 Barb. (N. Y.) 496.

1. *Bissell v. Heyward*, 96 U. S. 580; *Davenport v. Latimer*, 53 S. Car. 563.

But Where the Heirs of a Vendee Who Had a Parol Contract for eight hundred acres of land, and had paid the whole price, conveyed one hundred acres thereof to a third person, it was held that the latter could not maintain a bill to compel a conveyance by the heirs of the original vendor. *Lord v. Underdunk*, 1 Sandf. Ch. (N. Y.) 46.

2. Right of Assignee — *Arkansas*. — *Weis v. Meyer*, (Ark. 1886) 1 S. W. Rep. 679.

California. — *Eshleman v. Henrietta Vineyard Co.*, 102 Cal. 199.

Colorado. — *Hunt v. Hayt*, 10 Colo. 278.

Georgia. — *Robinson v. Perry*, 21 Ga. 183, 68 Am. Dec. 455.

Illinois. — *Fuller v. Bradley*, 160 Ill. 51.

Kentucky. — *Johnson v. Hughart*, 85 Ky. 657.

Massachusetts. — *Wass v. Mugridge*, 128

Mass. 394; *Love v. Sortwell*, 124 Mass. 446;

Gannett v. Albree, 103 Mass. 372; *Ensign v.*

Kellogg, 4 Pick. (Mass.) 1.

Missouri. — *Pomeroy v. Fullerton*, 113 Mo. 440.

Nebraska. — *Wagner v. Cheney*, 16 Neb. 202.

New Jersey. — *Robbins v. McKnight*, 5 N. J. Eq. 642, 45 Am. Dec. 406.

New York. — *Dodge v. Miller*, 81 Hun (N. Y.) 102.

Assignees of Purchase-money Notes. — *Walker v. Kee*, 16 S. Car. 76.

Mortgagee of Vendee May Enforce Specific Performance against Vendor. — *Ricker v. Moore*, 77 Me. 292.

Right to Creditors. — It has been held that where a debtor has partly performed his contract to purchase real estate his creditors may come in and complete it and compel the conveyance to them. *Ayer v. Bartlett*, 6 Pick. (Mass.) 76.

3. *Smallwood v. Mercer*, 1 Wash. (Va.) 290.

4. *Rice v. Gibbs*, 40 Neb. 264.

5. *Camp v. Wiggins*, 72 Iowa 643. See also *Hannah v. Wahlberg*, 128 Cal. 407.

6. **Right of Vendee** — *England*. — *Atcherley v. Vernon*, 10 Mod. 518; *Daniels v. Davison*, 16 Ves. Jr. 249; *Taylor v. Stibbert*, 2 Ves. Jr. 437.

Colorado. — *Ross v. Purse*, 17 Colo. 24.

Illinois. — *Mack v. McIntosh*, 181 Ill. 633; *Chicago, etc., R. Co. v. Hay*, 119 Ill. 507.

Indiana. — *Walker v. Cox*, 25 Ind. 271; *Hunter v. Bales*, 24 Ind. 299.

Iowa. — *Keegan v. Williams*, 22 Iowa 378.

Kansas. — *Wilson v. Emig*, 44 Kan. 125; *Gregg v. Hamilton*, 12 Kan. 333.

Maine. — *Ash v. Hare*, 73 Me. 401; *Foss v. Haynes*, 31 Me. 81.

Massachusetts. — *Connihan v. Thompson*, 111 Mass. 270; *Hayward v. Cain*, 110 Mass. 273;

Loving v. Fogg, 18 Pick. (Mass.) 540; *Murphy v. Marland*, 8 Cush. (Mass.) 575.

Michigan. — *Grummett v. Gingrass*, 77 Mich. 369; *Farwell v. Johnston*, 64 Mich. 342; *Dowling v. Bergin*, 47 Mich. 188.

Mississippi. — *Carson v. Percy*, 57 Miss. 97; *Hines v. Baine, Smed. & M. Ch. (Miss.)* 530.

Missouri. — *Thompson v. Henry*, 85 Mo. 451.

Nebraska. — *Blake v. McMurtry*, 25 Neb. 290; *Hughes v. Reese*, 22 Neb. 78.

New Hampshire. — *Abbott v. Baldwin*, 61 N. H. 583.

New Jersey. — *Page v. Martin*, 46 N. J. Eq. 585; *Young v. Young*, 45 N. J. Eq. 27.

New York. — *Lavery v. Moore*, 33 N. Y. 658; *Post v. West Shore R. Co.*, 50 Hun (N. Y.) 301; *Merithew v. Andrews*, 44 Barb. (N. Y.) 200; *Cordes v. Kenney*, 5 Silv. Sup. (N. Y.)

4; *Champion v. Brown*, 6 Johns. Ch. (N. Y.) 402, 10 Am. Dec. 343; *Wadsworth v. Wendell*,

5 Johns. Ch. (N. Y.) 224.

Tennessee. — *Otis v. Payne*, 86 Tenn. 663.

Texas. — *Kennedy v. Embry*, 72 Tex. 387.

Virginia. — *Smallwood v. Mercer*, 1 Wash. (Va.) 290.

7. *England*. — *Hine v. Dodd*, 2 Atk. 275; *Wildgoose v. Wayland, Gouldsb.* 147.

United States. — *Flagg v. Mann*, 2 Sumn. (U. S.) 551.

Alabama. — *Maulden v. Armistead*, 18 Ala. 500.

Georgia. — *Bryant v. Booze*, 55 Ga. 438.

Fraud.—Conveyances made and taken for the purpose of defeating an action for specific performance of a contract for the sale of real estate will be set aside as fraudulent and void, and performance enforced in favor of the party originally entitled.¹

Innocent Purchasers.—Specific performance will not, as a rule, be decreed against a *bona fide* purchaser for a valuable consideration, who has no notice of outstanding equities.² But even as against a purchaser without notice of his vendor's previous contract to convey, it has been held that a conveyance may be decreed upon reimbursement of the amount of his partial payments.³

Vendee in Voluntary Conveyance.—One who takes a conveyance without having given a valuable consideration therefor is bound by his grantor's contract to convey to another irrespective of notice of a prior contract.⁴

4. Mere Personal Covenants.—Mere personal covenants of a party are not enforceable against his heirs, devisees, or vendees.⁵

XIV. EVIDENCE AND BURDEN OF PROOF—1. **Intent and Understanding of Parties.**—What the parties intended and understood by the contract is, in general, admissible. Thus the defendant may show that his understanding as to the extent of the property included, or the meaning of the contract, differed from that of the plaintiff at the time it was executed.⁶

2. Surrounding Circumstances.—In actions for specific performance the circumstances under which the contract was made may generally be shown.⁷

3. Consideration.—Some courts have required evidence of a valuable consideration before granting a decree.⁸ It may be shown by parol evidence that the consideration has been paid.⁹ And the defendant may also show by parol evidence that the contract was without consideration.¹⁰

4. Fraud or Mistake.—Evidence is always admissible in behalf of a defendant in an action for specific performance that, through fraud or mistake, the writing does not express the real agreement of the parties, or that he was induced to enter into it through mistake, fraud, or bad faith.¹¹ And it has been held that to justify refusing specific performance on such grounds much

Kansas.—*Topeka Water Supply Co. v. Root*, 56 Kan. 187.

Maine.—*White v. Mooers*, 86 Me. 62; *Ash v. Hare*, 73 Me. 401.

Massachusetts.—*Mansfield v. Hodgdon*, 147 Mass. 304; *Clark v. Flint*, 22 Pick. (Mass.) 231, 33 Am. Dec. 733; *Andrews v. Brown*, 3 Cush. (Mass.) 136; *Pingree v. Coffin*, 12 Gray (Mass.) 288.

Michigan.—*Palmer v. Palmer*, 114 Mich. 509; *Bird v. Hall*, 30 Mich. 374.

Nebraska.—*Hughes v. Reese*, 22 Neb. 78.

Virginia.—*Neel v. Neel*, 80 Va. 584; *McKee v. Barley*, 11 Gratt. (Va.) 340.

West Virginia.—*Camden v. Dewing*, 47 W. Va. 310; *Bates v. Swiger*, 40 W. Va. 420.

1. *Davies v. Collins*, 25 N. Y. App. Div. 272; *Bull v. Bell*, 4 Wis. 54. See also *Barrett v. Geisinger*, 179 Ill. 240.

Conveyance Obtained by False Representations.—Where a vendee obtained a conveyance of land by false representations to the vendor that a third person, to whom the vendor had contracted to sell, did not intend to take the property, such vendee may be compelled to convey to such third person upon the punctual performance of the conditions on his part. *Dement v. Bonham*, 26 Ill. 158.

2. Innocent Purchasers.—*Shields v. Trammell*, 19 Ark. 51; *Ferrier v. Buzick*, 2 Iowa 136; *Russell v. Moffitt*, 6 How. (Miss.) 303; *Angel v. Methodist Protestant Church*, 47 N. Y. App.

Div. 459; *Doar v. Gibbes*, Bailey Eq. (S. Car.) 371.

3. *Brinton v. Scull*, 55 N. J. Eq. 747.

4. *Young v. Young*, 45 N. J. Eq. 27.

5. **Mere Personal Covenants.**—*Daly v. Josslyn*, (Idaho 1901) 65 Pac. Rep. 442; *Weisman v. Smith*, 6 Jones Eq. (59 N. Car.) 124.

6. **Intention of Parties.**—*Burr v. Knowles*, 72 Iowa 764; *Veth v. Gierth*, 92 Mo. 97; *Coles v. Bowne*, 10 Paige (N. Y.) 526; *Cortelyou's Appeal*, 102 Pa. St. 576.

7. *Printup v. Mitchell*, 17 Ga. 558, 63 Am. Dec. 258; *Lennon v. Stiles*, (Supm. Ct. Gen. T.) 5 N. Y. Supp. 870; *Campbell v. McClenachan*, 6 S. & R. (Pa.) 171; *Ratcliffe v. Allison*, 3 Rand. (Va.) 537.

8. **Evidence of Consideration.**—See *Morris v. Lewis*, 33 Ala. 53; *Cutsinger v. Ballard*, 115 Ind. 93; *Allen v. Davison*, 16 Ind. 416; *Phillips v. Frye*, 14 Allen (Mass.) 36; *Weed v. Terry*, Walk. (Mich.) 501, 2 Dougl. (Mich.) 344, 45 Am. Dec. 257.

For a Decision upon What Is Sufficient Prima Facie Evidence of a Consideration, see *South Portland Land Co. v. Munger*, 36 Oregon 457.

9. *Vincent v. Larson*, 1 Idaho 241.

10. *Jefferys v. Jefferys*, Cr. & Ph. 138; *Short v. Price*, 17 Tex. 403.

11. **Fraud or Mistake**—*England*.—*Barnard v. Cave*, 26 Beav. 253; *Baxendale v. Seale*, 19 Beav. 601; *Watson v. Marston*, 4 De G. M. & G. 230; *Clarke v. Grant*, 14 Ves. Jr. 519; *Cal-*

less proof is required than would be necessary to sustain a bill to set aside a contract for fraud or mistake.¹

5. Rescission, Release, Discharge. — A parol rescission of a written contract or a release or discharge of the contract may be set up in opposition to a bill for specific performance.²

6. Opinion Evidence — Question of Law. — The opinion of conveyancers as to the sufficiency of the vendor's title is not admissible in a suit for specific performance, where the defense is that the vendor did not have a good title. The question of the sufficiency of the title is one of law for the court.³

7. Presumptions. — It has been said that ordinarily presumptions will not be indulged in favor of the contract sought to be enforced, but the complainant will be put to full proof of the terms and provisions of the agreement. Thus the presumption of payment arising from lapse of time is not applicable in aid of a party seeking affirmative relief in equity, and therefore specific performance will not be decreed on such presumption of payment.⁴ But in a case where possession had been taken under a deed and the deed destroyed accidentally, the possession continuing for many years was held to create a presumption in favor of the deed against the grantor's creditors, and specific performance was decreed.⁵

8. Parol Evidence — a. GENERAL RULE. — The general rule respecting the admissibility of parol evidence to contradict, vary, or modify contracts in writing applies in actions for specific performance,⁶ where there is no fraud other than that of invoking the rule stated against the admissibility of such evidence.⁷ It has been held, however, that a court of equity must necessarily exercise more liberality in admitting evidence in order to reach the equity of the case than would be allowed by a court of law.⁸ This liberality is more frequently exercised in behalf of the defendant than of the complainant, and in behalf of the former any good reason why the equitable relief demanded should not be granted may be shown by competent parol evidence.⁹ It has been held accordingly, that though a defendant resisting

verley v. Williams, 1 Ves. Jr. 210; *Joynes v. Stratham*, 3 Atk. 388; *Ball v. Storie*, 1 Sim. & St. 210.

United States. — *Cathcart v. Robinson*, 5 Pet. (U. S.) 264.

Connecticut. — *Quinn v. Roath*, 37 Conn. 16.

Massachusetts. — *Western R. Corp. v. Babcock*, 6 Met. (Mass.) 346; *Park v. Johnson*, 4 Allen (Mass.) 259.

Michigan. — *Chambers v. Livermore*, 15 Mich. 381.

New Jersey. — *Ryno v. Darby*, 20 N. J. Eq. 231. And see *Stoutenburgh v. Tompkins*, 9 N. J. Eq. 332.

New York. — *Rider v. Powell*, 28 N. Y. 310.

Virginia. — *Towner v. Lucas*, 13 Gratt. (Va.) 714.

For an Illustration of what has been held insufficient evidence of fraud and misrepresentation to defeat an action for specific performance, see *Hallinger v. Zimmerman*, 58 N. J. Eq. 217.

1. *Clark v. Maurer*, 77 Iowa 717. And see *Jackson v. Ashton*, 11 Pet. (U. S.) 229; *Cathcart v. Robinson*, 5 Pet. (U. S.) 264; *Benton v. Shreeve*, 4 Ind. 66; *Clitherall v. Ogilvie*, 1 Desaus. (S. Car.) 250.

2. *McCorkle v. Brown*, 9 Smed. & M. (Miss.) 167; *England v. Jackson*, 3 Humph. (Tenn.) 584.

Release and Discharge. — A father purchased land from his son without taking a deed, but

paid the purchase money, took possession, and improved the land. Afterwards some of the heirs of the father brought a suit against the heirs of the said son for specific performance, and it was held that a discharge of the performance of the contract was shown by evidence that the son repeatedly declared to his father that he was ready to make a deed; that the father lived twenty-two years after the purchase, and always refused to accept a deed, and declared that he intended his son or his son's children to have the property. *Tolson v. Tolson*, 10 Mo. 736.

For Evidence Insufficient to Show Waiver of Abandonment in an action for specific performance, see *Cunningham v. Cunningham*, 46 W. Va. 1.

3. *Moser v. Cochrane*, 107 N. Y. 35.

4. *Morey v. Farmers' L. & T. Co.*, 14 N. Y. 302; *Lawrence v. Ball*, 14 N. Y. 477.

5. *Wade v. Greenwood*, 2 Rob. (Va.) 474, 40 Am. Dec. 759.

6. **Parol Evidence.** — *Hall v. Chelsea First Nat. Bank*, 173 Mass. 16, 73 Am. St. Rep. 255; *Schenck v. Spring Lake Beach Imp. Co.*, 47 N. J. Eq. 44; *Hancock v. Edwards*, 7 Humph. (Tenn.) 349.

7. *Hall v. Chelsea First Nat. Bank*, 173 Mass. 16, 73 Am. St. Rep. 255.

8. *Stoutenburgh v. Tompkins*, 9 N. J. Eq. 332. See also *Redfield v. Gleason*, 61 Vt. 220, 15 Am. St. Rep. 889.

9. *Veth v. Gierth*, 92 Mo. 97; *Herren v. Rich*, 95 N. Car. 500; *Lennon v. Stiles*, (Supm. Ct.

specific performance may offer parol evidence that by reason of fraud the written agreement does not express the real agreement of the parties, the plaintiff cannot do so for the purpose of varying the contract and obtaining specific performance as varied by the proof.¹

Statute of Frauds. — Where a contract required by the statute of frauds to be in writing is denied, parol evidence thereof is inadmissible, in the absence of part performance, or other circumstances taking it out of the general rule.²

b. TO IDENTIFY PROPERTY CONVEYED. — It is well settled, in actions for specific performance, that parol evidence is admissible to identify the property conveyed where this involves merely the application of an adequate description to the subject-matter intended.³

c. WHERE PROPERTY INSUFFICIENTLY DESCRIBED. — The rule is otherwise where an insufficient description is given, or where there is no description.⁴ The courts, it has been held, never receive parol evidence both to describe the land and then to apply the description.⁵

d. PATENT AMBIGUITIES. — A patent ambiguity in the description of the property embraced in the deed is not to be explained by parol testimony, but the courts will endeavor to give all possible effect to the intention of the parties as they can ascertain it from the remainder of the contract, even to the contradiction of an erroneous call in the description.⁶

e. LATENT AMBIGUITIES. — A latent ambiguity in the description of the property embraced in the deed may, as a rule, be explained by parol proof in an action for specific enforcement.⁷

f. TO CURE UNCERTAINTY IN CONTRACT. — It is competent for a vendor in a suit for specific performance to show the true meaning of the contract

Gen. T.) 5 N. Y. Supp. 870. See also *Quinn v. Roath*, 37 Conn. 16.

In a Suit by Vendors of Land Sold at Public Auction, against the purchaser to compel him to comply, parol evidence is admissible to prove that the written memorandum of contract, signed by the auctioneer, did not contain the stipulation relied on as a condition. *Averett v. Lipscombe*, 76 Va. 404.

1. *Woolam v. Hearn*, 7 Ves. Jr. 211.

2. *North v. Bunn*, 122 N. Car. 766.

Evidence Held Incompetent. — On a bill for specific performance of a verbal contract for the sale of land, proof on the part of the vendor that he had verbally sold the land to the deceased husband of the complainant in his lifetime was regarded as not material to the issue, the question being whether he had sold to the complainant. The equities of the heirs of the deceased party, it was said, could be settled in another suit. *Adkinson v. Tanner*, 68 Ill. 247.

3. Parol Evidence to Identify Property — *England*. — *Miller v. Travers*, 8 Bing. 244, 21 E. C. L. 288.

California. — *Towle v. Carmelo Land, etc., Co.*, 99 Cal. 397; *Preble v. Abrahams*, 88 Cal. 245, 22 Am. St. Rep. 301.

Connecticut. — *Nichols v. Johnson*, 10 Conn. 192.

Illinois. — *Lyman v. Gedney*, 114 Ill. 388, 55 Am. Rep. 871; *McLennan v. Johnston*, 60 Ill. 306; *Cossitt v. Hobbs*, 56 Ill. 231.

Indiana. — *Miller v. Campbell*, 52 Ind. 125; *Baldwin v. Kerlin*, 46 Ind. 426; *Colerick v. Hooper*, 3 Ind. 316, 56 Am. Dec. 505.

Iowa. — *Brown v. Ward*, 110 Iowa 123.

Kansas. — *Bacon v. Leslie*, 50 Kan. 494, 34 Am. St. Rep. 134; *Ross v. Allen*, 45 Kan. 231; *Hollis v. Burgess*, 37 Kan. 487.

Massachusetts. — *Gerrish v. Towne*, 3 Gray (Mass.) 82.

North Carolina. — *Murdock v. Anderson*, 4 Jones Eq. (57 N. Car.) 77; *North Carolina Institute v. Norwood*, Busb. Eq. (45 N. Car.) 65. And see *Allen v. Chambers*, 4 Ired. Eq. (39 N. Car.) 125.

Pennsylvania. — *Smith's Appeal*, 69 Pa. St. 474; *Ferguson v. Staver*, 33 Pa. St. 411.

Wisconsin. — *Stout v. Weaver*, 72 Wis. 148. And see *Combs v. Scott*, 76 Wis. 662.

But compare in this connection *Doherty v. Hill*, 144 Mass. 467, in which it seems to have been held that where different tracts of land of the vendor come equally within the description contained in the contract to convey, parol evidence is not admissible to show what property was intended.

4. No Description — Insufficient Description. — *Miller v. Travers*, 8 Bing. 244, 21 E. C. L. 288; *Nichols v. Johnson*, 10 Conn. 192; *Miller v. Campbell*, 52 Ind. 125; *Baldwin v. Kerlin*, 46 Ind. 426; *Torr v. Torr*, 20 Ind. 118; *Waring v. Ayres*, 40 N. Y. 357; *Murdock v. Anderson*, 4 Jones Eq. (57 N. Car.) 77; *North Carolina Institute v. Norwood*, Busb. Eq. (45 N. Car.) 65. And see *Allen v. Chambers*, 4 Ired. Eq. (39 N. Car.) 125; *Combs v. Scott*, 76 Wis. 662.

5. *Baldwin v. Kerlin*, 46 Ind. 426; *Ferguson v. Staver*, 33 Pa. St. 411.

6. *Hamilton v. Harvey*, 121 Ill. 469, 2 Am. St. Rep. 118; *Carr v. Passaic Land Imp., etc., Co.*, 19 N. J. Eq. 424; *Brookman v. Kurzman*, 94 N. Y. 272. And see the title *AMBIGUITY*, vol. 2, p. 287.

7. *Lyman v. Gedney*, 114 Ill. 388, 55 Am. Rep. 871. And see *McLennan v. Johnston*, 60 Ill. 306; *Cossitt v. Hobbs*, 56 Ill. 231.

by parol evidence, where it is evident, from the incompleteness of the memorandum, that the parties intended to reserve the right to supply deficiencies by parol proof.¹ But where the reference to the land to be sold is so vague and uncertain that a description will have to be supplied, such uncertainty cannot be cured by parol testimony.²

g. TO EXPLAIN CONTRACT. — Where the construction of a contract, the specific performance of which is sought, is in doubt, parol evidence is admissible to explain it.³

9. Burden of Proof — *a.* GENERAL RULE. — The general rule is, in actions for specific performance, that the plaintiff must establish each material issue in the case by a fair preponderance of evidence.⁴

Distinction Between Plaintiff and Defendant. — It has been said in this connection that it requires much less strength of case on the part of a defendant to resist a bill to perform a contract than it does on the part of a plaintiff to maintain a bill to enforce a specific performance.⁵

b. MUST ESTABLISH CONTRACT. — The burden is upon the complainant in an action for specific performance to establish the making and terms of the contract, the enforcement of which is sought.⁶ So where the evidence is conflicting and the contract or the material terms thereof left in doubt, specific performance will be denied.⁷

c. CONDITIONS PRECEDENT. — The burden is on the plaintiff in an action for the specific enforcement of a contract to show the performance of the conditions precedent on his part.⁸

1. *Fowler v. Redican*, 52 Ill. 405. But compare *Hyde v. Cooper*, 13 Rich. Eq. (S. Car.) 250.

2. *Newman v. Perrill*, 73 Ind. 153; *Gigos v. Cochran*, 54 Ind. 593; *Miller v. Campbell*, 52 Ind. 125; *Baldwin v. Kerlin*, 46 Ind. 426; *Nippolt v. Kammon*, 39 Minn. 372; *Ryan v. Davis*, 5 Mont. 505; *Dobson v. Litton*, 5 Coldw. (Tenn.) 616; *Jones v. Carver*, 59 Tex. 293.

3. *Coutt v. Craig*, 2 Hen. & M. (Va.) 618. See also *Whitworth v. Harris*, 40 Miss. 483.

4. **Burden of Proof** — General Rule. — *Hagerman v. Bates*, (Colo. 1902) 69 Pac. Rep. 526; *Swales v. Jackson*, 126 Ind. 282; *Wiley v. Colston*, 86 Va. 520.

5. *Casey v. Holmes*, 10 Ala. 776; *Vawter v. Bacon*, 89 Ind. 565; *Crane v. Gough*, 4 Md. 316; *Tyson v. Watts*, 1 Md. Ch. 13; *In re Ferguson*, 124 Mo. 574; *Veth v. Gierth*, 92 Mo. 104; *Trigg v. Read*, 5 Humph. (Tenn.) 529, 42 Am. Dec. 447.

6. **Making of Contract and Its Terms** — *United States*. — *Crane v. Chicago*, etc., R. Co., 20 Fed. Rep. 402.

Alabama. — *Sims v. McEwen*, 27 Ala. 184.

California. — *Magee v. McManus*, 70 Cal. 553.

Colorado. — *Hagerman v. Bates*, (Colo. 1902) 69 Pac. Rep. 526.

Delaware. — *Burton v. Vessels*, 5 Del. Ch. 568.

Illinois. — *Ralls v. Ralls*, 82 Ill. 243; *Tiefnan v. Granger*, 65 Ill. 351; *Allen v. Webb*, 64 Ill. 342; *Carver v. Lasater*, 36 Ill. 182.

Indiana. — *Swales v. Jackson*, 126 Ind. 282; *Cutsinger v. Ballard*, 115 Ind. 93.

Iowa. — *Wilmer v. Farris*, 40 Iowa 309; *Williamson v. Williamson*, 4 Iowa 279.

Kentucky. — *Maderia v. Hopkins*, 12 B. Mon. (Ky.) 595.

Maine. — *Higgins v. Butler*, 78 Me. 520.

Michigan. — *Switzer v. Gardner*, 41 Mich. 164; *Wright v. Wright*, 31 Mich. 380.

Missouri. — *Veth v. Gierth*, 92 Mo. 97; *Foster v. Kimmons*, 54 Mo. 488; *Lapham v. Dreisvogt*, 36 Mo. App. 275.

Nebraska. — *Worthington v. Worthington*, 32 Neb. 334.

New Jersey. — *Brewer v. Wilson*, 17 N. J. Eq. 180.

New York. — *Lobdell v. Lobdell*, 36 N. Y. 327.

Ohio. — *Walsh v. Barton*, 24 Ohio St. 28; *Suydam v. Columbus Ins. Co.*, 18 Ohio 459.

Oregon. — *Odell v. Morin*, 5 Oregon 96.

Vermont. — *Allen v. Fiske*, 42 Vt. 462.

Virginia. — *Rockecharlie v. Rockecharlie*, (Va. 1898) 29 S. E. Rep. 825; *Wiley v. Colston*, 86 Va. 520.

West Virginia. — *McCully v. McLean*, 48 W. Va. 625; *Boggs v. Bodkin*, 32 W. Va. 566.

Wisconsin. — *Hadfield v. Skelton*, 69 Wis. 460.

And see *Spencer v. De Witt C. Hay Library Assoc.*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 608.

Evidence Held Admissible. — Where the land was contracted for at so much per acre, the purchase money to be paid in instalments, to be secured by bond and mortgage, the deeds under which the defendant held the land were held competent *prima facie* evidence of the number of acres, to show that the bonds and mortgages, tendered in pursuance of the contract, were for the proper amounts, and evidence to show that the plaintiff had cut timber on part of the tract under the contract is also relevant. *Hanna v. Phillips*, 1 Grant Cas. (Pa.) 253.

7. *Dalzell v. Dueber Watch-Case Mfg. Co.*, 149 U. S. 315; *Cleland v. Aiken*, 23 Pa. Co. Ct. 1, 30 Pittsb. L. J. N. S. (Pa.) 172; *Spears v. Long*, 32 S. Car. 528; *Rockecharlie v. Rockecharlie*, (Va. 1898) 29 S. E. Rep. 825.

8. *Cook v. Roberson*, (Tex. Civ. App. 1898) 46 S. W. Rep. 866.

d. TO SHOW TITLE. — Where, in an action by a vendor of property against the vendee, to enforce the performance of a contract of sale, the title of the former is denied, the burden of the issue is upon him.¹

e. TO EVADE STATUTE OF FRAUDS. — Where the contract sued on is within the statute of frauds, the burden of proof is upon the party who seeks to enforce it to show that such things have been done as part performance, as will take it out of the statute.²

f. ORAL CONTRACTS TO CONVEY LAND. — With reference to such contracts the rule as frequently stated is that in order to invoke specific performance the contract must be established by clear, satisfactory, and convincing proof.³ But specific performance of a parol agreement for the conveyance of land will not be refused because of a conflict of testimony concerning the exact terms of the contract, if from the whole evidence the contract can be determined with reasonable certainty.⁴ Some courts, however, have held in terms, that in suits for the specific performance of oral contracts, a mere preponderance of evidence is not sufficient, a higher degree of proof than this being required to induce the exercise of the court's discretion.⁵

g. RESULTING TRUSTS. — In an action to establish a resulting trust and secure specific performance, it has been held that a mere preponderance of evidence is not sufficient, the requirement being that the plaintiff's rights must be clearly and fully established.⁶

h. AFFIRMATIVE DEFENSES. — Where the defendant, in an action for specific performance, pleads fraud, mistake, rescission by a new contract, or some other affirmative defense, the burden as to such defense is generally upon him.⁷ So where the vendee in a contract fixing no day for performance claims that such date was fixed by a subsequent agreement, the burden is on him to show this by competent proof,⁸ and where two signers of a contract, sued for performance, set up that the contract was not to become operative unless signed also by a third, the burden is on them to show this.⁹

i. CASES DECIDED UPON PARTICULAR FACTS. — A number of cases, decided upon particular facts in each instance, in which it was decided either that the evidence was insufficient to warrant specific performance, or that, on the other hand, enforcement should be decreed, will be found in the notes.¹⁰

1. *Burden of Proof to Show Title.* — Cornell v. Andrus, 36 N. J. Eq. 321; Wilson v. Holden, (Supm. Ct. Gen. T.) 16 Abb. Pr. (N. Y.) 133; Schultz v. Rose, (Supm. Ct. Spec. T.) 65 How. Pr. (N. Y.) 75; Upton v. Maurice, (Tex. Civ. App. 1896) 34 S. W. Rep. 642.

2. *Godschalk v. Fulmer*, 176 Ill. 64; *Luzader v. Richmond*, 128 Ind. 344; *Swales v. Jackson*, 126 Ind. 282; *Townsend v. Hawkins*, 45 Mo. 286; *Wiley v. Colston*, 86 Va. 520. See also *Allen v. Young*, 88 Ala. 338; *Annan v. Merritt*, 13 Conn. 478; *Miller v. Nelson*, 64 Iowa 458.

3. *Oral Contracts — Evidence Must Be Clear.* — *Marr v. Shaw*, 51 Fed. Rep. 860; *Cuppy v. Allen*, 176 Ill. 162; *McTague v. Finnegan*, 54 N. J. Eq. 454; *Richardson v. Orth*, 40 Oregon 252; *Hale, etc., Mfg. Co. v. Norcross*, 199 Pa. St. 283; *Pennybacker v. Maupin*, 96 Va. 461; *O'Connor v. Jackson*, 23 Wash. 224; *Knight v. Knight*, 51 W. Va. 518; *McCully v. McLean*, 48 W. Va. 625; *Harris v. Elliott*, 45 W. Va. 245.

4. *Mudgett v. Clay*, 5 Wash. 103.

5. *Dewey v. Spring Valley Land Co.*, 98 Wis. 83. And see *Shenandoah Valley R. Co. v. Lewis*, 76 Va. 833; *Docter v. Furch*, 91 Wis. 464; *Hadfield v. Skelton*, 69 Wis. 460; *Combs v. Scott*, 76 Wis. 662; *Menasha v. Wisconsin Cent. R. Co.*, 65 Wis. 502; *Benson v. Cutler*, 53 Wis. 107; *Williams v. Williams*, 50 Wis. 311;

Blanchard v. McDougal, 6 Wis. 167, 70 Am. Dec. 458.

"Reasonable Doubt." — In *Printup v. Mitchell*, 17 Ga. 567, 63 Am. Dec. 258, it was held that a parol contract for land, like the reformation of a deed by parol proof, should be made out so clearly, strongly, and satisfactorily, as to leave no reasonable doubt as to the agreement.

6. *Rice v. Rigley*, (Idaho 1900) 61 Pac. Rep. 290. And see *Reynolds v. Caldwell*, 80 Ala. 232; *Proudfoot v. Wightman*, 78 Ill. 556; *Johnson v. Quarles*, 46 Mo. 423; *Ringo v. Richardson*, 53 Mo. 385; *Barbour v. Barbour*, 51 N. J. Eq. 271; *Agricultural Mechanical, etc., Assoc. v. Brewster*, 51 Tex. 263.

7. *Affirmative Defenses.* — *Pike v. Underhill*, 24 Ark. 124; *Crawford v. Paine*, 19 Iowa 172; *Lexington v. Lindsay*, 2 A. K. Marsh. (Ky.) 443; *Ferrussac v. Thorn*, 1 Barb. (N. Y.) 42; *Wheeler v. Wheeler*, (Supm. Ct. Gen. T.) 2 N. Y. Supp. 496; *Durst v. Swift*, 11 Tex. 273.

Burden to Show Forfeiture. — *Eaton v. Schneider*, 185 Ill. 508.

8. *Cramer v. Mooney*, 59 N. J. Eq. 164. 9. *Stanton v. Singleton*, (Cal. 1898) 54 Pac. Rep. 587.

10. *Evidence Held Insufficient to Warrant Decree — England.* — *Jeffery v. Stewart*, 80 L. T. N. S. 17.

XV. OPERATION AND EFFECT OF DECREE — 1. How Decree Operates — a. GENERAL RULE — In Personam. — It is well settled that a decree for the specific performance of a contract operates primarily *in personam*.¹

But in a Limited and Qualified Sense it may also be said to operate *in rem*, when the property is within the jurisdiction of the court, but the defendant is absent in a foreign state or country, performance in such circumstances being usually accomplished by the appointment of a commissioner or master who executes the will of the court.² It is not therefore always essential to the jurisdiction that the defendant be personally before the court, for in many instances the presence within the jurisdiction of the property involved gives the court the opportunity to enforce its decree, and enables it to control possession and title to chattels, even where the party sought to be bound is not subject to judicial process.³

To Compel the Performance of Personal Acts or Covenants, however, or the execution of a contract containing obligations of this nature, it is essential that the court have personal jurisdiction of the party to be compelled.⁴ It has been held, accordingly, that the court will not decree specific performance of a contract to purchase land where, by reason of the nonresidence of the defendant and the absence of personal service, the court cannot bind him personally by its decree.⁵ And where the contract required the performance of acts in another state, a decree for specific enforcement has been denied.⁶

Contract Executed in Foreign Country. — It is, of course, entirely immaterial to jurisdiction for specific performance that the contract sought to be enforced was made in a foreign country, provided that a foreign contract, to be specifically enforced, must be legally enforceable in the country where it was entered into,

United States. — *White v. Wansey*, (C. C. A.) 116 Fed. Rep. 345; *Cisna v. Mallory*, 84 Fed. Rep. 851; *Walcott v. Watson*, 53 Fed. Rep. 429.

Alabama. — *Brown v. Weaver*, 113 Ala. 228.

Georgia. — *Dwight v. Jones*, 115 Ga. 744.

Illinois. — *Wright v. Raftery*, 181 Ill. 464; *Sloniger v. Sloniger*, 161 Ill. 270; *Barrett v. Geisinger*, 148 Ill. 98.

Iowa. — *Briles v. Goodrich*, 116 Iowa 517.

Kentucky. — *Turner v. Trosper*, (Ky. 1902) 69 S. W. Rep. 1089.

Maryland. — *Thistle Mills Co. v. Bone*, 92 Md. 47.

Nebraska. — *Lewis v. North*, 62 Neb. 552.

New York. — *Ripsom v. Hart*, 64 N. Y. App. Div. 593; *Merchant v. White*, (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 376.

Oregon. — *Stone v. Ladd*, 40 Oregon 606; *Richardson v. Orth*, 40 Oregon 252.

Pennsylvania. — *Van Horn v. Munnell*, 145 Pa. St. 497.

Virginia. — *Blair v. Sheridan*, 86 Va. 527; *Helton v. Johnson*, (Va. 1897) 27 S. E. Rep. 579; *William, etc., College v. Powell*, 12 Gratt. (Va.) 372.

Washington. — *Anderson v. Schneider*, 22 Wash. 363.

West Virginia. — *Gillaspie v. James*, 48 W. Va. 284; *Sturm v. McGuffin*, 48 W. Va. 595; *McCully v. McLean*, 48 W. Va. 625.

Wisconsin. — *Rodman v. Rodman*, 112 Wis. 378.

Cases in Which Evidence Held Sufficient. — *Whisenant v. Gordon*, 101 Ala. 250; *Burris v. Anderson*, 27 Colo. 506; *Whiton v. Whiton*, 179 Ill. 32; *Grant v. Bradstreet*, 87 Me. 583; *Russell v. Russell*, 94 Mich. 122; *Edwards v. Waghorn*, 107 Mich. 679; *International Bank v. Fife*,

95 Mo. 118; *Roberts v. Lord*, 67 N. H. 594; *Spotts v. Spotts*, 4 Pa. Super. Ct. 448; *Franklin v. Salem Bldg. Assoc.*, (Va. 1896) 25 S. E. Rep. 97.

1. In Personam — England. — *Derby v. Athol*, 1 Ves. 202; *Penn v. Baltimore*, 1 Ves. 444; *Ardglasse v. Muschamp*, 1 Vern. 237; *Preston v. Archer*, cited in *Arglasse v. Muschamp*, 1 Vern. 135.

United States. — *Massie v. Watts*, 6 Cranch (U. S.) 159.

Illinois. — *Cloud v. Greasley*, 125 Ill. 313.

Maryland. — *Worthington v. Lee*, 61 Md. 530; *White v. White*, 7 Gill & J. (Md.) 208.

Massachusetts. — *Davis v. Parker*, 14 Allen (Mass.) 94.

Michigan. — *Hicks v. Turck*, 86 Mich. 214.

New Jersey. — *Wood v. Warner*, 15 N. J. Eq. 81.

New York. — *Cleveland v. Burrill*, 25 Barb. (N. Y.) 532; *Mitchell v. Bunch*, 2 Paige (N. Y.) 615, 22 Am. Dec. 669.

Tennessee. — *Johnson v. Kimbo*, 3 Head (Tenn.) 557, 75 Am. Dec. 781.

Vermont. — *Davis v. Hulett*, 58 Vt. 90.

2. Rourke v. McLaughlin, 38 Cal. 196; *Epperly v. Ferguson*, (Iowa 1902) 91 N. W. Rep. 816; *Burrall v. Eames*, 5 Wis. 260.

3. See March v. Eastern R. Co., 40 N. H. 548, 77 Am. Dec. 732.

4. Huntington First Nat. Bank v. Henry, 156 Ind. 1; *Worthington v. Lee*, 61 Md. 531; *Kansas, etc., R. Constr. Co. v. Topeka, etc., R. Co.*, 135 Mass. 34, 46 Am. Rep. 439, 16 Am. & Eng. R. Cas. 495; *Kuhlman v. E. J. Hart Co.*, (Tenn. Ch. 1900) 59 S. W. Rep. 455.

5. Merrill v. Beckwith, 163 Mass. 503.

6. Kansas, etc., R. Constr. Co. v. Topeka, etc., R. Co., 135 Mass. 34, 46 Am. Rep. 439.

as well as consistent with the law and policy of the country wherein enforcement is sought.¹

b. SITUS OF SUBJECT-MATTER. — Where the person of the defendant is properly before the court, the situs of the property or subject-matter of the contract is wholly immaterial,² and the court assumes jurisdiction of aliens or nonresidents found within its jurisdiction and served with process, to the same extent as over its own citizens.³ But where part only of the persons from whom such conveyance is required are residents of the state, and the court has not acquired jurisdiction over the persons of the nonresidents, so that complete relief cannot be had, performance will not be decreed.⁴

c. PERFORMANCE COMPELLED THROUGH AGENT. — It has been held that specific performance of a contract to convey land might be enforced although both the owner of the property and the land itself were out of the jurisdiction of the court, where a conveyance had been executed and placed in the hands of an agent under the jurisdiction of the court, and the agent refused to deliver pursuant to the terms of the contract.⁵

1. *Hope v. Hope*, 8 De G. M. & G. 731, 26 L. J. Ch. 417.

2. *Situs of Subject-matter — England.* — *White v. Hall*, 12 Ves. Jr. 323; *Jackson v. Petrie*, 10 Ves. Jr. 164; *Cranstown v. Johnston*, 3 Ves. Jr. 170, 5 Ves. Jr. 277; *Penn v. Baltimore*, 1 Ves. 444, 3 Hare & W. Lead. Cas. 787; *Toller v. Carteret*, 2 Vern. 494; *Kildare v. Eustace*, 1 Vern. 419; *Arglasse v. Muschamp*, 1 Vern. 75; *Preston v. Archer*, cited in *Arglasse v. Muschamp*, 1 Vern. 135; *Portarlington v. Soulbly*, 3 Myl. & K. 108; *Pike v. Hoare*, 2 Eden 185; *Foster v. Vassall*, 3 Atk. 589; *Archer v. Preston*, 1 Eq. Cas. Abr. 133, par. 3. And see *Ardglasse v. Muschamp*, 1 Vern. 237; *Derby v. Athol*, 1 Ves. 202.

United States. — *Watkins v. Holman*, 16 Pet. (U. S.) 25; *Coldwell v. Carrington*, 9 Pet. (U. S.) 86; *Watts v. Waddle*, 6 Pet. (U. S.) 400. And see *Massie v. Watts*, 6 Cranch (U. S.) 148.

California. — *Loaiza v. Superior Ct.*, 85 Cal. 32; *Rourke v. McLaughlin*, 38 Cal. 196.

Illinois. — *Cloud v. Greasley*, 125 Ill. 313. See also *Baker v. Rockabrand*, 118 Ill. 365; *Cooley v. Scarlett*, 38 Ill. 316, 87 Am. Dec. 298.

Indiana. — *Monnett v. Turpie*, 132 Ind. 486, 133 Ind. 428; *Bethell v. Bethell*, 92 Ind. 318; *Dehart v. Dehart*, 15 Ind. 167; *Coon v. Cook*, 6 Ind. 268.

Kentucky. — *McQuerry v. Gilliland*, 89 Ky. 434.

Louisiana. — *McDowell v. Read*, 3 La. Ann. 391.

Maine. — *Stephenson v. Davis*, 56 Me. 75.

Maryland. — *Worthington v. Lee*, 61 Md. 530; *Keyser v. Rice*, 47 Md. 203, 28 Am. Rep. 448; *Stansbury v. Fringer*, 11 Gill & J. (Md.) 149; *White v. White*, 7 Gill & J. (Md.) 208.

Massachusetts. — *Brown v. Desmond*, 100 Mass. 267; *Davis v. Parker*, 14 Allen (Mass.) 94; *Pingree v. Coffin*, 12 Gray (Mass.) 304.

Michigan. — *Hicks v. Turck*, 86 Mich. 214.

Missouri. — *Olney v. Eaton*, 66 Mo. 563.

New Hampshire. — *March v. Eastern R. Co.*, 40 N. H. 548, 77 Am. Dec. 732; *Great Falls Mfg. Co. v. Worster*, 23 N. H. 462.

New Jersey. — *Potter v. Hollister*, 45 N. J. Eq. 508; *Davis v. Headley*, 22 N. J. Eq. 120; *Wood v. Warner*, 15 N. J. Eq. 81.

New York. — *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192; *Newton v. Bronson*, 13 N. Y.

587, 67 Am. Dec. 89; *Bailey v. Ryder*, 10 N. Y. 363; *Sutphen v. Fowler*, 9 Paige (N. Y.) 280; *Mitchell v. Bunch*, 2 Paige (N. Y.) 606, 22 Am. Dec. 669; *Mead v. Merritt*, 2 Paige (N. Y.) 402; *Cleveland v. Burrill*, 25 Barb. (N. Y.) 532; *Shattuck v. Cassidy*, 3 Edw. (N. Y.) 152; *De Klyn v. Watkins*, 3 Sandf. Ch. (N. Y.) 185; *Myres v. De Mier*, 4 Daly, (N. Y.) 343, *affirmed* 52 N. Y. 647; *Ward v. Arredondo*, Hopk. (N. Y.) 213, 14 Am. Dec. 543.

North Carolina. — *Orr v. Irwin*, 2 Law Repos. (4 N. Car.) 465.

Ohio. — *Snook v. Snmetzer*, 25 Ohio St. 516; *Burnley v. Stevenson*, 24 Ohio St. 474, 15 Am. Rep. 621; *Penn v. Hayward*, 14 Ohio St. 302.

Oregon. — *Johnston v. Wadsworth*, 24 Oregon 494.

Pennsylvania. — *Conover v. Wright*, 9 Pa. Dist. 688.

Tennessee. — *Wicks v. Caruthers*, 13 Lea (Tenn.) 353; *Western Union Tel. Co. v. Western, etc., R. Co.*, 8 Baxt. (Tenn.) 60; *Johnson v. Kimbro*, 3 Head (Tenn.) 557, 75 Am. Dec. 781. See also *Pickett v. Ferguson*, 86 Tenn. 643. But see *Isler v. Outlaw*, 4 Humph. (Tenn.) 129.

Vermont. — *Davis v. Hulett*, 58 Vt. 90.

Virginia. — *Hughes v. Hall*, 5 Munf. (Va.) 431; *Guerrant v. Fowler*, 1 Hen. & M. (Va.) 5; *Farley v. Shippin*, Wythe (Va.) 135.

Compelling Defendant to Bring Property Within Jurisdiction. — *Mitchell v. Bunch*, 2 Paige (N. Y.) 615, 22 Am. Dec. 674.

3. Aliens and Nonresidents. — *MacGregor v. MacGregor*, 9 Iowa 65; *Pingree v. Coffin*, 12 Gray (Mass.) 288; *Dooley v. Watson*, 1 Gray (Mass.) 414; *Cleveland v. Burrill*, 25 Barb. (N. Y.) 532; *Mitchell v. Bunch*, 2 Paige (N. Y.) 606, 22 Am. Dec. 669; *Penn v. Hayward*, 14 Ohio St. 302. But see *Porter v. Worthington*, 14 Ala. 584; *Smith v. Iverson*, 22 Ga. 190; *Carter v. Jordan*, 15 Ga. 76; *Akin v. Lloyd*, 28 Ill. 331; *Birchard v. Cheever*, 40 Vt. 94, all decided with reference to certain jurisdictional rules to the effect that actions in chancery must be brought in the county of the defendant's residence.

4. *Penn v. Hayward*, 14 Ohio St. 302.

5. *Ward v. Arredondo*, Hopk. (N. Y.) 213, 14 Am. Dec. 543. See *Myres v. De Mier*, 4 Daly (N. Y.) 343.

2. How Decree Enforced. — Where a decree of specific performance calls for the performance of certain acts on the part of a defendant properly before the court, enforcement thereof may be coerced by proceedings for contempt.¹

As Against a Corporation the decree may be enforced by *distringas* or sequestration.²

3. Effect upon Title to Property. — It has been intimated that a court of equity has not inherent power to pass title to real estate within its jurisdiction by force of its decree,³ though by statute in some jurisdictions this power is conferred upon it whenever essential to the complete exercise of its jurisdiction.⁴ Nor does a decree of specific performance of a contract to convey have the effect of a judicial sale, in the absence of a statute so providing.⁵ But other cases have held that as to property within the territorial jurisdiction of the court the title may be passed by decree alone, or by the execution of a deed by a commissioner or master.⁶ Where the property, with reference to which the contract was made, is in another state or country, a decree of the domestic court cannot pass title.⁷ Nor, of course, will the deed of a master, executed pursuant to order of court, operate to transfer real property situated beyond the territorial jurisdiction of the court.⁸

XVI. WAIVER, FORFEITURE, AND ABANDONMENT — 1. Mutual Rescission. — The right to enforce an agreement in equity is lost where the party seeking performance has consented to a rescission of the contract.⁹ But the court will indulge no presumptions in favor of a waiver, nor infer it upon slight proof.¹⁰

The Conveyance by Mistake to a Third Person, of land contracted to be sold to another, will not operate as a rescission of the contract of sale, when the mistake is rectified by a conveyance to the vendor in time to permit the tender of a sufficient deed to the purchaser under the contract for the sale of the land.¹¹

2. Forfeiture by Default. — Where a party has made default in the performance of a contract to purchase after the tender of a deed and demand of

1. Contempt. — Epperly v. Ferguson, (Iowa 1902) 91 N. W. Rep. 816; Wharton v. Stoutenburgh, 39 N. J. Eq. 299; Penn v. Hayward, 14 Ohio St. 302.

2. Jones v. Boston Mill Corp., 4 Pick. (Mass.) 507, 16 Am. Dec. 358.

3. Passing Title. — Matteson v. Scofield, 27 Wis. 671.

4. Matteson v. Scofield, 27 Wis. 671. And see Georgia Code, 1882, § 4209.

5. Gilman v. Hamilton, 16 Ill. 225.

6. Sproule v. Winant, 7 T. B. Mon. (Ky.) 195, 18 Am. Dec. 164; Simmons v. Conklin, 129 Mich. 190; Burnley v. Stevenson, 24 Ohio St. 474, 15 Am. Rep. 621; Daniels v. Stevens, 19 Ohio 222; Wade v. Greenwood, 2 Rob. (Va.) 474, 40 Am. Dec. 759; Burrall v. Eames, 5 Wis. 260.

Personal Service of Process. — But to the effect that there must be personal service on the defendant before such decree can be rendered, see Spurr v. Scoville, 3 Cush. (Mass.) 578.

7. Burnley v. Stevenson, 24 Ohio St. 474, 15 Am. Rep. 621; Daniels v. Stevens, 19 Ohio 222. And see Watts v. Waddle, 6 Pet. (U. S.) 389; Page v. McKee, 3 Bush (Ky.) 135, 96 Am. Dec. 201; Ward v. Arredondo, Hopk. (N. Y.) 213, 14 Am. Dec. 543; Telfair v. Telfair, 2 Desaus. (S. Car.) 271; Howard v. Huffman, 3 Head (Tenn.) 562, 75 Am. Dec. 783.

8. Burnley v. Stevenson, 24 Ohio St. 474, 15 Am. Rep. 621.

9. Rescission — England. — Powell v. Hankey, 2 P. Wms. 82.

United States. — York v. Passaic Rolling-Mill Co., 30 Fed. Rep. 471.

Arkansas. — Hubbard v. Gray, 21 Ark. 501. See also Walworth v. Miles, 23 Ark. 653.

California. — Green v. Covillaud, 10 Cal. 317, 70 Am. Dec. 725; Conrad v. Lindley, 2 Cal. 173.

Delaware. — Maxfield v. Terry, 4 Del. Ch. 618.

Illinois. — Lasher v. Loeffler, 190 Ill. 150; Harrison v. Polar Star Lodge No. 652, 116 Ill. 279; Hale v. Bryant, 109 Ill. 34.

Kansas. — Fowler v. Marshall, 29 Kan. 665.

Michigan. — Cathro v. Gray, 108 Mich. 429; Webster v. Brown, 67 Mich. 328.

New York. — Arnoux v. Homans, (C. Pl. Gen. T.) 25 How. Pr. (N. Y.) 427.

North Carolina. — Falls v. Carpenter, 1 Dev. & B. (21 N. Car.) 237, 28 Am. Dec. 613.

Pennsylvania. — Russell v. Baughman, 94 Pa. St. 400; Boyce v. M'Culloch, 3 W. & S. (Pa.) 429, 39 Am. Dec. 35.

And see Smith v. Hogle, 116 Iowa 645.

Substituted Contract — Waiver of First. — Ford v. Euker, 86 Va. 75.

Abandonment of Contract After Dissolution by Parol. — Washington v. M'Gee, 7 T. B. Mon. (Ky.) 131.

10. Hanthorne v. Brooklyn L. Ins. Co., 5 Mo. App. 73; Huffman v. Hummer, 18 N. J. Eq. 83.

11. Wooding v. Crain, 10 Wash. 35.

performance, he will be deemed to have forfeited his right to a specific enforcement of the contract.¹

3. Abandonment. — Where the contract in suit has been abandoned by the party seeking enforcement, or both parties have consented to an abandonment thereof, specific performance will be denied.² But a vendor has no right to insist, in a suit against him for specific performance, that the vendee had abandoned his right to relief, while the bonds given for the purchase money were still held by the vendor, and he never made an offer to surrender them to the vendee.³

4. Action at Law. — The right to the specific performance of a contract may be waived and lost by the recovery of a judgment at law for damages for breach of the contract.⁴ It has been said, however, that the mere commencement of an action at law will not bar a suit for specific performance, though the plaintiff cannot carry both to judgment, and may be compelled, at any stage of the proceedings, to elect which he will further prosecute.⁵ But the commencement of an action at law is not, *ipso facto*, a deprivation of the right to sue in equity for specific performance.⁶

SPECIFIC QUESTION. — See note 7.

SPECIFIC TAXES. (See also the titles *REVENUE LAWS*, vol. 24, p. 883; *TAXATION*.) — A specific tax is a tax of so many cents or dollars on a pound,

1. *Pearis v. Covillaud*, 6 Cal. 617, 56 Am. Dec. 543.

Default After Notice to Perform. — Where no time is fixed for the performance of a contract, and a party who is in no default himself and who tenders a present performance of the stipulations on his side, gives notice of his intention to abandon it unless it be performed within a reasonable time, and the other party does not proceed promptly in the assertion of his rights after such notice, he will be held to have acquiesced in the notice and abandoned his right to a specific performance. *Prothro v. Smith*, 6 Rich. Eq. (S. Car.) 324.

2. Abandonment. — *York v. Passaic Rolling-Mill Co.*, 30 Fed. Rep. 471; *Lasher v. Loeffler*, 190 Ill. 150; *Cuppy v. Allen*, 176 Ill. 162; *Mahon v. Leech*, 11 N. Dak. 181; *Magnusson v. Linwell*, 9 N. Dak. 157; *Ott v. Heineman*, 31 Pittsb. Leg. J. N. S. (Pa.) 161; *Herman v. Gieseke*, (Tex. Civ. App. 1895) 33 S. W. Rep. 1006.

What Constitutes Abandonment. — *Garnett v. Macon*, 2 Brock. (U. S.) 185.

Attempted Resale to Vendor. — *Holden v. Purefoy*, 108 N. Car. 163.

Pleading Statute of Frauds. — *Payne v. Graves*, 5 Leigh (Va.) 561.

3. White v. Butcher, 6 Jones Eq. (59 N. Car.) 231.

4. Action at Law as Waiver. — *Sainter v. Ferguson*, 1 Macn. & G. 286; *Buckmaster v. Grundy*, 8 Ill. 626; *Funk v. McKeoun*, 4 J. J. Marsh. (Ky.) 162; *Marston v. Humphrey*, 24 Me. 513; *Stuyvesant v. New York*, 11 Paige (N. Y.) 414; *Moore v. Fitz Randolph*, 6 Leigh (Va.) 175, 29 Am. Dec. 208; *Long v. Colston*, 1 Hen. & M. (Va.) 111.

Performance Sought After Increase in Value of Property. — A vendor having declined to proceed with the contract of sale because his wife refused to assent to it, the vendee sued for damages, but the action was not brought to trial. After nearly two years, when the property had

appreciated in value, the vendee sued for specific performance, proposing to accept a conveyance subject to the wife's contingent dower rights, and it was held that specific performance was waived. *Ford v. Euker*, 86 Va. 75.

Denial of Specific Performance — Damages Instead. — Where a plaintiff, on being denied specific performance, is awarded a judgment for damages for breach of the contract, if he insists on his right for damages it will be decreed a waiver of his right to specific performance. *Goldthwait v. Lynch*, 9 Utah 186.

5. *Connihan v. Thompson*, 111 Mass. 270. And see *Livingston v. Kane*, 3 Johns. Ch. (N. Y.) 224; *Rogers v. Vosburgh*, 4 Johns. Ch. (N. Y.) 84; *Long v. Colston*, 1 Hen. & M. (Va.) 110.

Damages in Addition to Specific Performance. — Where a contract between copartners stipulated that a certain tract of land should be conveyed in fee to one of the two contracting parties, but the other, fraudulently combining with a third person, procured a conveyance to the latter, it was held that the partner to whom the conveyance should have been made was not confined to a suit for specific performance, but might proceed against his copartner for damages. *Snodgrass v. Snodgrass*, 32 Ind. 406.

6. *Brush v. Vandenberg*, 1 Edw. (N. Y.) 21.

Illustration. — So where a conveyance had not been made because a purchaser of land had had the continuous possession thereof, it was held that he might be compelled specifically to execute the contract, although before bill filed for specific performance he had obtained judgment for breach of the covenant to convey. *Hughes v. McKinsey*, 5 T. B. Mon. (Ky.) 38.

7. Specific Question. — In *Cummings v. Taylor*, 21 Minn. 369, it was said: "It is a case triable by the court, under section 199, c. 66, Gen. Stat., in which *specific questions* of fact may be tried by a jury or referred. It is perhaps hardly necessary to add that a *specific question* is a question specified, *i. e.*, distinctly stated." See also *Berkey v. Judd*, 14 Minn. 394.

yard, gallon, or other quantity measurable, the instrument of measure being such as the nature of the article requires.¹

SPECIFY. — To specify means to point out; to particularize; to designate by words one thing from another.²

SPECIMEN. — See note 3.

SPECULATE. — See note 4.

SPECULATIVE DAMAGES. — See the title DAMAGES, vol. 8, p. 608.

SPEECH. — See note 5.

SPEED — SPEEDILY. — See note 6.

SPEEDWAY. — See note 7.

SPEEDY TRIAL. — See note 8.

SPELLING. — See the titles ABBREVIATIONS, vol. 1, p. 97; INTERPRETATION AND CONSTRUCTION, vol. 17, p. 1, and the cross-references there given; VERDICT. As to the doctrine of *idem sonans* see the title NAME, vol. 21, p. 313.

1. **Specific Tax.** — *Pingree v. Auditor-Gen.*, 120 Mich. 98.

A *specific tax* is defined to be a tax which imposes a specific sum by the head or number, or by some standard of weight or measurement, and which requires no assessment beyond a listing and classification of the subjects to be taxed. *Cooley on Taxation* (2d ed.) 238; *Pingree v. Auditor-Gen.*, 120 Mich. 95; *Union Trust Co. v. Probate Judge*, 125 Mich. 487.

A statute provided for taxes against vacant lots in front of which water pipes had been laid. In speaking of this tax in *Jones v. Board of Com'rs*, 34 Mich. 276, the court said: "It is not in any sense a *specific tax*, and this is not claimed. *Specific taxes* are laid upon certain classes of business or pursuits. But these are laid only upon persons and property not holding the relation of water consumers dealing with the commissioners. It would be absurd to call these *specific taxes*."

An inheritance tax has been held to be a *specific tax*. *Union Trust Co. v. Probate Judge*, 125 Mich. 487.

Telegraph and Telephone. — A statute providing for the assessment of telegraph and telephone lines within the state at their true cash value, and for the levying of a tax upon such assessment at a rate which should equal the average rate of taxes, general, municipal, and local, levied throughout the state, was held not to provide for a *specific tax*. *Pingree v. Auditor-Gen.*, 120 Mich. 95.

2. **Specify.** — *Stewart v. Jaques*, 77 Ga. 368.

3. **Specimen.** — In *People v. Freeman*, 1 Idaho 323, it was said: "The word *specimen* has a meaning well understood, particularly in this mining country. When we speak of *specimens* of quartz, it is as fully understood here what is meant as if you should speak of a horse. Webster defines the word thus: 'A part or small portion of anything; a sample. A cabinet of minerals consists of *specimens*.'"

4. **Speculate** — **Instruction.** — A trial court was requested to instruct that "the jury cannot *speculate* upon what might have been done or attempted by Cronise & Co. after the delivery by them of the gold certificates or gold checks to the person calling himself John Ross had they been apprised that the certificate was a forgery after such delivery." The appellate court said: "If, by the word *speculate*,

which is the word of controlling meaning in the request, was meant to guess, or to reason to practical results from unproven premises, doubtless the jury had no right so to do. And there would have been no error in the learned judge if he had so told the jury. But it would have been in the nature of an abstract proposition, not necessarily involved in nor growing out of the particular case." *Continental Nat. Bank v. Commonwealth Nat. Bank*, 50 N. Y. 587.

5. **Articulate Speech.** — See ARTICULATE SPEECH, vol. 2, p. 947.

6. **With All Convenient Speed.** — In *Gill v. Browne*, (C. C. A.) 53 Fed. Rep. 396, in construing a stipulation that a ship should "with all convenient *speed* sail and proceed to Philadelphia," it was held that the language "with all convenient *speed*" meant "reasonable diligence with reference to the trading voyage which the ship had already undertaken."

Moderate Speed. — See MODERATE, vol. 20, p. 836.

Speedily as Same Can Be Done. — It has been held that a direction that an action shall be brought "as *speedily* as the same can be done" does not necessarily require that such action should be commenced at the next term of the court in which it is to be brought. *Guild v. Hale*, 15 Mass. 455.

Speedily as Possible. — A partnership was to be closed up as *speedily* as possible by the liquidating partner. It was held that it was the duty of the liquidating partner to sell certain produce exchange certificates belonging to the firm within a reasonable time after the dissolution of the partnership. *Smith v. Underhill*, (Supm. Ct. Gen. T.) 19 N. Y. Supp. 249.

7. **Speedway.** — In *Howe v. Lowell*, 171 Mass. 581, it was said: "It seems to us that the *speedway* may properly be said to be a boulevard, within the meaning of that word in the conditions of the deeds."

8. **Speedy Trial.** (See also the title CONSTITUTIONAL LAW, vol. 6, pp. 962, 992.) — A *speedy trial* "simply means that the trial shall take place as soon as possible after the indictment is found without depriving the prosecution of a reasonable time for preparation." *Lawson v. Territory*, 8 Okla. 1, quoting *Clark on Crim. Pro.*, § 143.

SPENDTHRIFTS AND SPENDTHRIFT TRUSTS.

BY HERBERT WHARTON BEALL.

I. SPENDTHRIFTS, 137.

II. SPENDTHRIFT TRUSTS, 138.

1. *Definition*, 138.
2. *Validity*, 138.
 - a. *English Doctrine*, 138.
 - b. *American Doctrine*, 139.
 - c. *Arguments Pro and Con*, 140.
 - (1) *Alienability and Rights of Creditors*, 140.
 - (2) *Argument Not Applicable to Trust Estate*, 140.
 - (3) *Rights of Creditors Not Impaired*, 140.
 - (4) *English Doctrine Inconsistent*, 141.
 - (5) *Analogous to Separate Estate of Wife and Exemption Laws*, 141.
 - (6) *Trust Not Immoral*, 141.
3. *Creation of Trust*, 141.
 - a. *Express Words Not Necessary*, 141.
 - b. *Grounds of Inference*, 142.
 - c. *Cestui Que Trust in Being Not Necessary*, 142.
4. *Trust Must Be Active*, 143.
5. *Interest of Beneficiary and Discretion of Trustee*, 143.
 - a. *In General*, 143.
 - b. *When Trust Fund Will Be Protected*, 143.
 - c. *When Trust Fund May Be Reached*, 144.
 - d. *Discretion of Trustee*, 144.
 - (1) *Unqualified*, 144.
 - (2) *As to Time*, 145.
 - (3) *As to Amount*, 145.
6. *Beneficiary One of Several Cestuis Que Trustent*, 146.
7. *Beneficiary Also Trustee*, 147.
8. *Donor Also Beneficiary*, 147.
9. *Duties and Liabilities of Trustee*, 147.
10. *Power of Donor over Corpus of Estate*, 148.
11. *Statutory Provisions*, 148.

CROSS-REFERENCES.

For matters of *PROCEDURE*, see in the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE* the title *TRUSTS AND TRUSTEES*, vol. 22, p. 1.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work. *RESTRAINTS ON ALIENATION*, vol. 24, p. 863; *TRUSTS AND TRUSTEES*; *WILLS*.

I. SPENDTHRIFTS — *Definition*. — A spendthrift is one who spends lavishly, improvidently, and foolishly; an unthrifty spender; a prodigal.¹

1. *Definition*. — *Cent. Dict.*

Other Definitions. — The *Georgia* code allows trusts for the benefit of any person who is, "on account of mental weakness, intemperate habits, wasteful and profligate habits, unfit to be intrusted with the right and management of property." *Civ. Code Ga.*, 1895, § 3149 (2306); *Sinnott v. Moore*, 113 *Ga.* 908.

The *Maine* statute provides for the appointment of a guardian by the judge of probate, for persons who have become incapable of managing their affairs "by excessive drinking, gambling, idleness, or debauchery of any kind," or "who so spend or waste their estate as to expose themselves or families to want or suffering, or their towns to expense." *Rev.*

Moral Obliquity Not Involved. — But the term as used in the law of spendthrift trusts does not necessarily signify moral obliquity. It means merely one in whose behalf or for whose support a fund is provided in such a way as to be exempt from the entire control and disposition of the beneficiary, and from liability for his individual debts.¹

II. SPENDTHRIFT TRUSTS — 1. Definition. — "Spendthrift trust" is the term commonly applied to those trusts that are created with a view of providing a fund for the maintenance of another, and at the same time securing it against his own improvidence or incapacity for self-protection. The provisions against alienation of the trust fund by the voluntary act of the beneficiary, or *in invitum* by his creditors, are the usual incidents of such trusts.²

2. Validity — a. ENGLISH DOCTRINE. — It is well settled in *England* and in some of the states of the *Union*, that where property is given to a man for his life, the donor cannot take away from the estate the incidents of a life estate, chief among which are alienability and liability for debts, and no distinction is recognized in this regard between life estates and estates in fee.³

Cesser or Limitation of the Estate. — The *English* rule is subject to the qualification that although the policy of the law does not permit property to be so limited that a donee will continue in the enjoyment of it notwithstanding his bankruptcy, a donor may, if he sees fit, make the estate determinable upon the bankruptcy of the donee. In such a case the creditors are deprived

Stat. Me., c. 67, § 4, cl. 2; *Young v. Young*, 87 Me. 49.

In *New Hampshire* a spendthrift is defined by statute to be "a person liable to be put under guardianship by reason of excessive drinking, gaming, idleness, debauchery, or vicious habits of any kind." *Morey's Appeal*, 57 N. H. 54.

1. Moral Obliquity Not Involved. — See *Holdship v. Patterson*, 7 Watts (Pa.) 547; *Rees v. Livingston*, 41 Pa. St. 113.

2. Spendthrift Trust Defined. — *Bennett v. Bennett*, 66 Ill. App. 37; *Patten v. Herring*, 9 Tex. Civ. App. 640.

3. Validity — English Doctrine. — *Davidson v. Chalmers*, 33 Beav. 653; *Brandon v. Robinson*, 18 Ves. Jr. 429; *Piercy v. Roberts*, 1 Myl. & K. 4; *Rochford v. Hackman*, 16 Jur. 212, 10 Eng. L. & Eq. 64; *Younghusband v. Gisborne*, 1 Coll. Ch. Cas. 400; *Green v. Spicer*, 1 Russ. & M. 395; *Graves v. Dolphin*, 1 Sim. 66; *Snowdon v. Dales*, 6 Sim. 524. But see *Twopeny v. Peyton*, 10 Sim. 487; *Godden v. Crowhurst*, 10 Sim. 642.

United States. — The English rule was at one time that of the federal courts. *Sandford v. Lackland*, 2 Dill. (U. S.) 6; *Nichols v. Levy*, 5 Wall. (U. S.) 433.

Alabama. — *Fellows v. Tann*, 9 Ala. 999; *Rugely v. Robinson*, 10 Ala. 702, affirmed 19 Ala. 404; *Jasper v. Howard*, 12 Ala. 652; *Hill v. McRae*, 27 Ala. 182; *Robertson v. Johnston*, 36 Ala. 197; *Smith v. Moore*, 37 Ala. 327; *Taylor v. Harwell*, 65 Ala. 1; *Jones v. Reese*, 65 Ala. 134.

Arkansas. — *Lindsey v. Harrison*, 8 Ark. 302, obiter; *Honnett v. Williams*, 66 Ark. 148.

Delaware. — *Gray v. Corbit*, 4 Del. Ch. 135 (dictum).

Georgia. — *Kempton v. Hallowell*, 24 Ga. 52, 71 Am. Dec. 112; *Bailie v. McWhorter*, 56 Ga. 183. Compare *Sinnott v. Moore*, 113 Ga. 908.

Hawaii. — *Harris v. Judd*, 3 Hawaii 421.

Kentucky. — *Eastland v. Jordan*, 3 Bibb (Ky.) 186; *Jones v. Langhorne*, 3 Bibb (Ky.) 453; *Cosby v. Ferguson*, 3 J. J. Marsh. (Ky.) 264; *Blanchard v. Taylor*, 7 B. Mon. (Ky.) 645; *Flournoy v. Johnson*, 7 B. Mon. (Ky.) 693; *Samuel v. Salter*, 3 Met. (Ky.) 259; *Anderson v. Briscoe*, 12 Bush (Ky.) 344; *Knefler v. Shreve*, 78 Ky. 297. But see *Pope v. Elliott*, 8 B. Mon. (Ky.) 56; *White v. Thomas*, 8 Bush (Ky.) 651; *Davidson v. Kemper*, 79 Ky. 5.

New Jersey. — In New Jersey the extent of a creditor's right is provided by statute, but it would seem that in cases to which the statute does not apply, the English rule is adopted. *Hardenburgh v. Blair*, 30 N. J. Eq. 42, reversed 30 N. J. Eq. 645, upon the ground that the case fell within the statute, and that therefore common-law principles were not applicable.

New York. — *Bryan v. Knickerbacker*, 1 Barb. Ch. (N. Y.) 409; *Bramhall v. Ferris*, 14 N. Y. 41; *Rome Exch. Bank v. Eames*, 4 Abb. App. Dec. (N. Y.) 83. See also *Havens v. Healy*, 15 Barb. (N. Y.) 296. The subject is now regulated by statute in New York. See *infra*, this section, *Statutory Provisions*.

North Carolina. — *Dick v. Pitchford*, 1 Dev. & B. Eq. (21 N. Car.) 480; *State Bank v. Foreney*, 2 Ired. Eq. (37 N. Car.) 181; *Mebane v. Mebane*, 4 Ired. Eq. (39 N. Car.) 131, 44 Am. Dec. 102; *Pace v. Pace*, 73 N. Car. 119. But see *Monroe v. Trenholm*, 112 N. Car. 634, 114 N. Car. 590.

Ohio. — *Wallace v. Smith*, 2 Handy (Ohio) 79; *Stanley v. Thornton*, 4 Ohio Cir. Dec. 677, 7 Ohio Cir. Ct. 455; *Hobbs v. Smith*, 15 Ohio St. 424.

Rhode Island. — *Tillinghast v. Bradford*, 5 R. I. 212.

South Carolina. — *Heath v. Bishop*, 4 Rich. Eq. (S. Car.) 46, 55 Am. Dec. 654; *Wylie v. White*, 10 Rich. Eq. (S. Car.) 294. See also *Brown v. Cleary*, 1 Rich. Eq. (S. Car.) 301.

of the estate by the act which deprives the donee thereof at the same time. But if the estate be given for the personal support of the beneficiary, free from liability for debts, without such cesser or limitation, the property will pass upon bankruptcy to the assignee.¹

b. AMERICAN DOCTRINE — In General. — While some of the states have adopted the English doctrine to its fullest extent, such doctrine is not supported by the weight of authority in the United States. The doctrine of spendthrift trusts, first recognized by the courts of Pennsylvania,² has been there and elsewhere largely extended, and has been adopted by a majority of the states in which the question has come before the court, and in most instances by the newer states, when occasion arose; and it is now so firmly implanted in the United States that it may with propriety be called the American doctrine.³

Rule Stated. — This doctrine is, that it is lawful for a testator or grantor to create a trust estate for the life of the *cestui que trust*, with the provision that the latter shall receive and enjoy the avails at times and in amounts either fixed by the instrument or left to the discretion of the trustee, and that such avails shall not be subject to alienation by the beneficiary nor liable for his debts.⁴

1. Cesser or Limitation of the Estate. — *Graves v. Dolphin*, 1 Sim. 66; *Youngehusband v. Gisborne*, 1 Coll. Ch. Cas. 400; *Rochford v. Hackman*, 16 Jur. 212; *Mebane v. Mebane*, 4 Ired. Eq. (39 N. Car.) 131, 44 Am. Dec. 102; *Pace v. Pace*, 73 N. Car. 119; *Heath v. Bishop*, 4 Rich. Eq. (S. Car.) 46, 55 Am. Dec. 654.

In *Brandon v. Robinson*, 18 Ves. Jr. 429, Lord Eldon says: "There is an obvious distinction between a disposition to a man until he becomes bankrupt and then over, and an attempt to give him property and to prevent his creditors from obtaining any interest in it though it is his. * * * There is no doubt that property may be given to a man until he shall become bankrupt. * * * If the condition is so expressed as to amount to a limitation, reducing the interest short of a life estate, neither the man nor his assignees can have it beyond the period limited."

2. The American Doctrine. — *Fisher v. Taylor*, 2 Rawle (Pa.) 33; *Shankland's Appeal*, 47 Pa. St. 114.

3. In Jouroimon v. Massengill, 86 Tenn. 81, the recognition of the legality of spendthrift trusts, it is said, "may well be termed the American rule."

4. Rule Stated — United States. — *Spindle v. Shreve*, 9 Biss. (U. S.) 201, 111 U. S. 546; *Nichols v. Eaton*, 91 U. S. 716; *Hyde v. Woods*, 94 U. S. 523. It has been said that the defense of spendthrift trusts by Mr. Justice Miller in *Nichols v. Eaton*, 91 U. S. 716, "which is the chief reliance of the supporters of spendthrift trusts, is * * * entirely unnecessary to the decision of the case." Gray on Alienation of Property (1st ed.), § 254. But that the learned judge did not regard it as foreign to the necessities of the case appears from his own statement that "the judgment of the court may rest equally well on either of the propositions which we have discussed. We think the decree of the court below may be satisfactorily affirmed on both of them." But admitting that it is *obiter* it may with equal truth be said that the opinion sets forth in apt language and with great vigor the grounds upon which the doctrine of spend-

thrift trusts rested in the jurisdictions that had then adopted it, and has exerted a powerful influence in spreading the doctrine to other jurisdictions and in making it the doctrine of the United States courts. It is one of the many instances in which the dictum of one case has been adopted as the law of succeeding cases.

California. — *Seymour v. McAvoy*, 121 Cal. 438.

Connecticut. — There is no decision in Connecticut which commits the state unequivocally to either the English or the American doctrine. There are dicta both ways. *Donalds v. Plumb*, 8 Conn. 447; *Williams v. Robinson*, 16 Conn. 517; *Leavitt v. Beirne*, 21 Conn. 1 (dictum in favor of the American doctrine); *Johnson v. Connecticut Bank*, 21 Conn. 148; *Watson v. Cleveland*, 21 Conn. 538 (explaining *Leavitt v. Beirne*, 21 Conn. 1); *Farmers', etc., Sav. Bank v. Brewer*, 27 Conn. 600; *Easterly v. Keney*, 36 Conn. 18 (dictum in favor of the English doctrine); *Smith v. Wildman*, 37 Conn. 384; *Clement's Appeal*, 49 Conn. 519; *Tolland County Mut. F. Ins. Co. v. Underwood*, 50 Conn. 493; *Huntington v. Jones*, 72 Conn. 45.

District of Columbia. — *Fearson v. Dunlop*, 21 D. C. 236.

Illinois. — *Steib v. Whitehead*, 111 Ill. 247; *King v. King*, 168 Ill. 273; *Re Qua v. Graham*, 187 Ill. 70; *Binns v. La Forge*, 191 Ill. 607; *Emerson v. Marks*, 24 Ill. App. 642; *Bennett v. Bennett*, 66 Ill. App. 37.

Indiana. — *Martin v. Davis*, 82 Ind. 38; *Thompson v. Murphy*, 10 Ind. App. 464.

Maine. — *Roberts v. Stevens*, 84 Me. 325; *Murphy v. Delano*, 95 Me. 233.

Maryland. — *Smith v. Towers*, 69 Md. 87. See also *Maryland Grange Agency v. Lee*, 72 Md. 163. But see *Warner v. Rice*, 66 Md. 436; *Baker v. Keiser*, 75 Md. 332.

Massachusetts. — *Braman v. Stiles*, 2 Pick. (Mass.) 462; *Perkins v. Hays*, 3 Gray (Mass.) 405; *Russell v. Grinnell*, 105 Mass. 425; *Hall v. Williams*, 120 Mass. 346; *Sparhawk v. Cloon*, 125 Mass. 266; *Broadway Nat. Bank v. Adams*, 133 Mass. 171; *Foster v. Foster*, 133 Mass. 179; *Russell v. Milton*, 133 Mass. 180; *Baker v.*

c. ARGUMENTS PRO AND CON — (1) *Alienability and Rights of Creditors*. — The English rule proceeds upon the reasoning that spendthrift trusts cannot be supported without doing violence, first, to the principle that all estates are endowed by law with the quality of alienability, and second, to the rights of creditors to whose just demands all property of the debtor should be held amenable both at law and in equity.¹ In the jurisdictions in which the American rule prevails, these arguments have been regarded as unsatisfactory, as easily answered, and as outweighed by others deemed perfectly satisfactory and unanswerable. These arguments are stated in the next following subdivisions of this section.

(2) *Argument Not Applicable to Trust Estate*. — It is said that alienability, while an inseparable incident of legal life estates and estates in fee, is not so of equitable life estates or of property charged with a trust. The trustee invested with the legal estate takes it, of course, subject to all its incidents; and the *cestui que trust* invested with the right to the proceeds has the absolute right to dispose of them when received, so that neither principal nor income can be said to be inalienable.²

(3) *Rights of Creditors Not Impaired*. — In answer to the argument affecting the rights of creditors, the courts holding to the American rule have failed to perceive how a creditor can be injured or defrauded by the recognition of the

Brown, 146 Mass. 369; Claffin v. Claffin, 149 Mass. 19, 14 Am. St. Rep. 393; Billings v. Marsh, 153 Mass. 311, 25 Am. St. Rep. 635; Wemyss v. White, 159 Mass. 484; Crawford v. Langmaid, 171 Mass. 310; Munroe v. Dewey, 176 Mass. 184; Nickerson v. Van Horn, 181 Mass. 562.

Mississippi. — Leigh v. Harrison, 69 Miss. 933.

Missouri. — Lampert v. Haydel, 96 Mo. 444, 97 Am. Dec. 336; Partridge v. Cavender, 96 Mo. 452. See also Pickens v. Dorris, 20 Mo. App. 5; Montague v. Crane, 12 Mo. App. 582. But see McIlvaine v. Smith, 42 Mo. 55, 97 Am. Dec. 295; Bank of Commerce v. Chambers, 96 Mo. 459; Lackland v. Smith, 5 Mo. App. 153; Kingman v. Winchell, (Mo. 1892) 20 S. W. Rep. 296.

Pennsylvania. — Fisher v. Taylor, 2 Rawle (Pa.) 33; Holdship v. Patterson, 7 Watts (Pa.) 547; Ashhurst v. Given, 5 W. & S. (Pa.) 323; Smith v. Savidge, 4 Penny (Pa.) 323; Buckman v. Wolbert, 9 Phila. (Pa.) 207, 31 Leg. Int. (Pa.) 204; Norris v. Johnston, 5 Pa. St. 168; Shankland's Appeal, 47 Pa. St. 114; Keyser's Appeal, 57 Pa. St. 241; Rife v. Geyer, 59 Pa. St. 396, 98 Am. Dec. 351; Keyser v. Mitchell, 67 Pa. St. 476; Huber's Appeal, 80 Pa. St. 356; Thackara v. Mintzer, 100 Pa. St. 154; Mannerback's Estate, 133 Pa. St. 342; Stambaugh's Estate, 135 Pa. St. 586; Hibbs's Estate, 143 Pa. St. 219; Goe's Estate, 146 Pa. St. 431, 28 Am. St. Rep. 805; Barker's Estate, 159 Pa. St. 518; Seitzinger's Estate, 170 Pa. St. 500; Krebs's Estate, 184 Pa. St. 222; Beder's Estate, 190 Pa. St. 606; Eshbach's Estate, 197 Pa. St. 154; Brubaker v. Huber, 13 Pa. Co. Ct. 78; Schell's Estate, 15 Pa. Co. Ct. 374. But see Overman's Appeal, 88 Pa. St. 276; King's Estate, 147 Pa. St. 410. Compare Lancaster v. Dolan, 1 Rawle (Pa.) 231, 18 Am. Dec. 625.

Tennessee. — Turley v. Massengill, 7 Lea

(Tenn.) 353; Hooberry v. Harding, 3 Tenn. Ch. 677, favored the English rule. But the later cases have overthrown that doctrine and seem to have established firmly and finally the American doctrine. Jourlomon v. Massengill, 86 Tenn. 81; Henson v. Wright, 88 Tenn. 501; Porter v. Lee, 88 Tenn. 782; and Nashville First Nat. Bank v. Nashville Trust Co., (Tenn. Ch. 1901) 62 S. W. Rep. 392. In Tennessee the liability of a judgment debtor is largely determined by statute. See *infra*, this title, *Statutory Provisions*.

Texas. — Gamble v. Dabney, 20 Tex. 69; Patten v. Herring, 9 Tex. Civ. App. 640; McClelland v. McClelland, (Tex. Civ. App. 1896) 37 S. W. Rep. 350.

Vermont. — White v. White, 30 Vt. 338; Barnes v. Dow, 59 Vt. 530. See also Hoyt v. Swift, 13 Vt. 129, 37 Am. Dec. 586; Weller v. Weller, 18 Vt. 55; Roberts v. Hall, 35 Vt. 28; Whitcomb v. Cardell, 45 Vt. 24.

Virginia. — Garland v. Garland, 87 Va. 758, 24 Am. St. Rep. 682. But see Young v. Easley, 94 Va. 193. The early Virginia cases happen to deal with the question of separable interests of two or more *cestuis que trustent*. See *infra*, this section, *Beneficiary One of Several Cestuis Que Trustent*.

Wisconsin. — See Bridge v. Ward, 35 Wis. 687; Sumner v. Newton, 64 Wis. 210; Lambert v. Perelles, 87 Wis. 449. As to the Wisconsin statute, see *infra*, this section, *Statutory Provisions*.

1. See the cases cited *supra*, this section, *English Doctrine*.

2. *Alienability Not Necessarily Incident to Trust Estates*. — Nichols v. Eaton, 91 U. S. 716; Seymour v. McAvoy, 121 Cal. 438; Smith v. Towers, 69 Md. 87; Broadway Nat. Bank v. Adams, 133 Mass. 171; Lampert v. Haydel, 96 Mo. 444, 97 Am. Dec. 336; Moore's Estate, 198 Pa. St. 612; Camp v. Cleary, 76 Va. 140; Jourlomon v. Massengill, 86 Tenn. 81, *overruling* Turley v. Massengill, 7 Lea (Tenn.) 353. See also 4 Kent Com. 131.

right in a donor to limit his bounty according to his own will. They cite the maxim, *cujus est dare, ejus est disponere*, as embodying rights at least equal to those of creditors of one upon whom a testator chooses to bestow his bounty. A creditor of such donee has, it is said, no right to look to the property of another man for the payment of his debts. As to past debts such creditors are no worse off after their debtor becomes the donee of a spendthrift trust than they were before, and as to future debts it is their own folly if they choose to rely upon a fund which by the very terms of its donation it is impossible for them to reach, of which fact they are advised actually or constructively by the registry laws of the United States. Moreover, it is not deemed against public policy for a testator to provide a support for a spendthrift child, since it is the interest of the public that such child shall not become a public burden.¹ The rights of creditors are not deemed any more sacred than the right of property involved in the execution of the trust; or the right which a testator has that the will he made should be carried out, and not one that the court makes for him.²

(4) *English Doctrine Inconsistent*. — It has been pointed out as inconsistent with the solicitude shown under the English rule in behalf of creditors, that the donor may defeat the claims of creditors by providing for a cesser or limitation over of the estate upon attempted alienation or bankruptcy of the donee, thus doing indirectly what the spendthrift trust does directly but with equally fatal results to the creditor.³ Sound reason, it is argued, seems to maintain that such a distinction is too shadowy for a court of equity to follow, especially so as by a direct restraint upon alienation the intention of the donor is effectuated, and by the indirect method his intention is frustrated and overthrown.⁴

(5) *Analogous to Separate Estate of Wife and Exemption Laws*. — Further, it has been pointed out with much apparent force, that a spendthrift trust is entirely in line with those branches of the law which exempt property from the claims of creditors in behalf of married women, and with the homestead exemption acts of the different states by which an unfortunate debtor is allowed to retain a certain and sometimes quite a large amount of property not liable for the payment of his debts.⁵

(6) *Trust Not Immoral*. — Finally it has been urged that not only is there nothing immoral or inconsistent in a spendthrift trust so far as regards the creditors of the beneficiary, but that such a provision by a donor, originating in the warmest ties of affection and seeking to afford to the beneficiary a sure and unqualified refuge against the vicissitudes of fortune, merits the approbation and protection of a court of equity.⁶

3. Creation of Trust — *a. EXPRESS WORDS NOT NECESSARY*. — It is not

1. Rights of Creditors — *United States*. — *Nichols v. Eaton*, 91 U. S. 716.

Illinois. — *Steib v. Whitehead*, 111 Ill. 247.

Kentucky. — *Pope v. Elliott*, 8 B. Mon. (Ky.) 56.

Massachusetts. — *Broadway Nat. Bank v. Adams*, 133 Mass. 174; *Clafin v. Clafin*, 149 Mass. 19, 14 Am. St. Rep. 393.

Mississippi. — *Leigh v. Harrison*, 69 Miss. 933.

Missouri. — *Partridge v. Cavender*, 96 Mo. 452; *Pickens v. Dorris*, 20 Mo. App. 5.

Pennsylvania. — *Ashhurst v. Given*, 5 W. & S. (Pa.) 323; *Moore's Estate*, 98 Pa. St. 612; *Ward's Estate*, 13 W. N. C. (Pa.) 283.

Tennessee. — *Jourlmon v. Massengill*, 86 Tenn. 81.

2. Right to Have Will Carried Out. — *Maryland Grange Agency v. Lee*, 72 Md. 163; *Hall v. Williams*, 120 Mass. 346; *Sparhawk v. Cloon*,

125 Mass. 266; *Clafin v. Clafin*, 149 Mass. 19, 14 Am. St. Rep. 393; *Partridge v. Cavender*, 96 Mo. 452; *Fisher v. Taylor*, 2 Rawle (Pa.) 33. See also the title LEGACIES AND DEVISES, vol. 18, p. 807.

3. English Doctrine Inconsistent. — *Seymour v. McAvoy*, 121 Cal. 438; *Smith v. Towers*, 69 Md. 87; *Broadway Nat. Bank v. Adams*, 133 Mass. 171; *Norris v. Johnston*, 5 Pa. St. 288; *Jourlmon v. Massengill*, 86 Tenn. 81.

4. Lampert v. Haydel, 96 Mo. 450, 97 Am. Dec. 336.

5. Analogous to Separate Estate of Wife and Exemption Laws. — *Lampert v. Haydel*, 96 Mo. 446; *Norris v. Johnston*, 5 Pa. St. 288.

6. Trust Not Immoral. — *Pope v. Elliott*, 8 B. Mon. (Ky.) 56; *Lampert v. Haydel*, 96 Mo. 444, 97 Am. Dec. 336; *Holdship v. Patterson*, 7 Watts (Pa.) 547; *Ashhurst v. Given*, 5 W. & S. (Pa.) 323; *Norris v. Johnston*, 5 Pa. St. 288.

necessary that an instrument creating a spendthrift trust should contain an express declaration that the interest of the *cestui que trust* in the trust estate shall be beyond the reach of his creditors, providing such appears to be the clear intention of the testator or donor as gathered from all parts of the instrument construed together in the light of the circumstances. The court will look to the intention disclosed by the whole instrument, rather than to the language employed in any particular clause of it.¹

b. GROUNDS OF INFERENCE. — Such a trust has been inferred from the fact that the gift was only of the income and that a trustee was interposed.² On the other hand, an express declaration that money paid to an executor is for the benefit of the heirs and is not to be in any way or manner liable for their debts, or taken by their creditors in any way or form, is not sufficient to protect it from creditors where there is no clear expression of an intention to create a trust.³ And it has been held that simply vesting a trust estate in the trustee, with directions to collect rents and pay them over to the *cestui que trust* during his life, will not secure such income to the beneficiary without some provision against alienation or liability for debts, although there was a clear intention on the part of the donor to provide a maintenance for her son.⁴ Moreover, a provision in the will that the income should be paid for the sole and separate use of the beneficiary, and on her own receipt, has been held to indicate merely that it was to be her sole and separate estate, and not to amount to a restriction upon alienation.⁵ Where a trust in favor of the beneficiary is made manifest in the instrument creating it, and where creditors may be held to have notice of a condition through the instrumentality of the registry laws, such creditors are held to have contracted with notice of the beneficiary's limited rights; but where no circumstances exist from which the intention to withdraw the gift from the claim of creditors may be inferred, and no notice is brought home to the creditors, the court has declined to infer such intention from facts *aliunde*.⁶

c. CESTUI QUE TRUST IN BEING NOT NECESSARY. — It is not necessary for the creation of a spendthrift trust that a *cestui que trust* in being should be named, nor even that he should be known as such before the death of a trustee for life, where the *cestui que trust* is not to take until the death of the trustee. It is sufficient if the person designated be in existence and can be identified at the time of the death of the trustee.⁷

1. Express Words Not Necessary — *California.* — Seymour v. McAvoy, 121 Cal. 442.

Illinois. — King v. King, 168 Ill. 273; Bennett v. Bennett, 66 Ill. App. 37.

Kentucky. — Pope v. Elliott, 8 B. Mon. (Ky.) 56.

Maine. — Roberts v. Stevens, 84 Me. 325; Murphy v. Delano, 95 Me. 233.

Maryland. — Maryland Grange Agency v. Lee, 72 Md. 163.

Massachusetts. — Braman v. Stiles, 2 Pick. (Mass.) 462; Hall v. Williams, 120 Mass. 344; Foster v. Foster, 133 Mass. 179; Baker v. Brown, 146 Mass. 369; Wemyss v. White, 159 Mass. 484; Crawford v. Langmaid, 171 Mass. 309; Nickerson v. Van Horn, 181 Mass. 562.

Missouri. — Pickens v. Dorris, 20 Mo. App. 5. *New York.* — See Craig v. Hone, 2 Edw. (N. Y.) 553.

Pennsylvania. — Ashhurst v. Given, 5 W. & S. (Pa.) 323; Keyser v. Mitchell, 67 Pa. St. 476; Stambaugh's Estate, 135 Pa. St. 585; Winthrop Co. v. Clinton, 196 Pa. St. 472.

Tennessee. — Jourolmon v. Massengill, 86 Tenn. 83; Nashville First Nat. Bank v. Nashville Trust Co., (Tenn. Ch. 1901) 62 S. W. Rep. 392,

Texas. — Gamble v. Dabney, 20 Tex. 69; Patten v. Herring, 9 Tex. Civ. App. 640; McClelland v. McClelland, (Tex. Civ. App. 1896) 37 S. W. Rep. 350.

Vermont. — Wales v. Bowdish, 61 Vt. 23.

Words Held Sufficient to Create Spendthrift Trusts. — See Brandon v. Robinson, 18 Ves. Jr. 429; Graves v. Dolphin, 1 Sim. 66; Snowdon v. Dales, 6 Sim. 524; Yarnold v. Moorhouse, 1 Russ. & M. 364; Rippon v. Norton, 2 Beav. 64; Schell's Estate, 15 Pa. Co. Ct. 374. See also Ashhurst's Appeal, 77 Pa. St. 464.

2. Inferred from Gift of Income Only, or Interposition of Trustee. — Stambaugh's Estate, 135 Pa. St. 586.

3. Potter v. Merrill, 143 Mass. 190; Maynard v. Cleaves, 149 Mass. 307; Smeltzer v. Goslee, 172 Pa. St. 298; Young v. Easley, 94 Va. 193. But see King v. King, 168 Ill. 273; Winthrop Co. v. Clinton, 196 Pa. St. 472.

4. Girard L. Ins., etc., Co. v. Chambers, 46 Pa. St. 485, 86 Am. Dec. 513.

5. Forbes v. Lothrop, 137 Mass. 523.

6. Pickens v. Dorris, 20 Mo. App. 5.

7. Cestui Que Trust in Being Not Necessary. — Ashhurst v. Given, 5 W. & S. (Pa.) 323.

4. Trust Must Be Active. — A spendthrift trust, to be effectual, must be an active trust — one which will not be executed by the statute of uses. The legal estate must vest in the trustee and must remain so vested, and not pass over and merge into the equitable estate of the *cestui que trust*.¹ And the mere fact that the trustee is endowed with discretion as to payments does not invalidate such trust.²

Tests. — Whether the trust is active or passive will depend upon whether the donor has imposed directly or impliedly upon the trustee any duty the performance of which requires that the estate shall be vested in him. If so, an estate coextensive with the duties to be performed will vest in the trustee; if not, the legal ownership will pass to the beneficiary. This rule is identical with the rule adopted by the courts of England, and of such states of the Union as have adopted the statute of uses, to determine whether or not the trust is a dry trust and therefore executed by the statute, or an active trust and not within the purview of the statute.³

The Most Usual Duties Thus Imposed upon the Trustees are to collect and receive rents, issues, interest, and income, and after deducting expenses, to pay over the same to the *cestui que trust*, or to make such other distribution as may be provided for;⁴ or to occupy and manage the estate and conduct the business, and out of the profits make investments, or purchase other property for the use of the beneficiaries.⁵

5. Interest of Beneficiary and Discretion of Trustee — a. IN GENERAL. — In an instrument creating a spendthrift trust, the discretion of the trustee is, as to its nature and amount, usually specified or may be ascertained from the context. This discretion of the trustee and the interest of the *cestui que trust* are so opposed in nature, that, roughly speaking, the amount of the one determines inversely the amount of the other. If the one is large, the other is correspondingly small, and *vice versa*. In any given case, therefore, the rights of creditors will depend upon the question how much and of what kind is the interest of the debtor in the fund sought to be reached; and this can only be answered by ascertaining the nature and extent of the discretion conferred upon the trustee.

b. WHEN TRUST FUND WILL BE PROTECTED. — The cases, therefore, in which the interest of a *cestui que trust* has been protected against creditors are those in which, in the varying language of the cases, he takes no estate whatever,⁶ has nothing that he can alienate,⁷ has no right of possession,⁸ has no absolute interest in or right to the income,⁹ has no beneficial interest,¹⁰

1. Trust Must Be Active — United States. — *Spindle v. Shreve*, 111 U. S. 546.

New Jersey. — *Hardenburgh v. Blair*, 30 N. J. Eq. 645.

Pennsylvania. — *Fisher v. Taylor*, 2 Rawle (Pa.) 33; *Ashhurst v. Given*, 5 W. & S. (Pa.) 323; *Vaux v. Parke*, 7 W. & S. (Pa.) 19; *Brown v. Williamson*, 36 Pa. St. 338; *Barnett's Appeal*, 46 Pa. St. 392, 86 Am. Dec. 502; *Girard L. Ins., etc., Co. v. Chambers*, 46 Pa. St. 485, 86 Am. Dec. 513; *Shankland's Appeal*, 47 Pa. St. 113; *Keyser's Appeal*, 57 Pa. St. 241; *Rife v. Geyer*, 59 Pa. St. 396, 98 Am. Dec. 351; *Huber's Appeal*, 80 Pa. St. 348; *Thackara v. Mintzer*, 100 Pa. St. 154; *Stambaugh's Estate*, 135 Pa. St. 586; *Krebs's Estate*, 184 Pa. St. 222; *Schell's Estate*, 15 Pa. Co. Ct. 374.

Tennessee. — *Turley v. Massengill*, 7 Lea (Tenn.) 365; *Henderson v. Hill*, 9 Lea (Tenn.) 25; *Hooberry v. Harding*, 10 Lea (Tenn.) 392; *Jourlmon v. Massengill*, 86 Tenn. 81; *Porter v. Lee*, 88 Tenn. 782; *Nashville First Nat. Bank v. Nashville Trust Co.*, (Tenn. Ch. 1901) 62 S. W. Rep. 392; *Henson v. Wright*, 88 Tenn. 501.

Vermont. — *Barnes v. Dow*, 59 Vt. 530.

2. Discretion of Trustee Does Not Invalidate. — *Brubaker v. Huber*, 13 Pa. Co. Ct. 78.

3. Tests. — *Turley v. Massengill*, 7 Lea (Tenn.) 365; *Nashville First Nat. Bank v. Nashville Trust Co.*, (Tenn. Ch. 1901) 62 S. W. Rep. 392.

4. Trustees' Ordinary Duties. — *Hardenburgh v. Blair*, 30 N. J. Eq. 645; *Fisher v. Taylor*, 2 Rawle (Pa.) 33; *Girard L. Ins., etc., Co. v. Chambers*, 46 Pa. St. 485, 86 Am. Dec. 513; *Shankland's Appeal*, 47 Pa. St. 114; *Rife v. Geyer*, 59 Pa. St. 396, 98 Am. Dec. 351; *Stambaugh's Estate*, 135 Pa. St. 586; *Krebs's Estate*, 184 Pa. St. 222; *Porter v. Lee*, 88 Tenn. 786.

5. Ashhurst v. Given, 5 W. & S. (Pa.) 323.

6. When Trust Fund Will Be Protected. — *Garner v. Wills*, 92 Ky. 386.

7. Perkins v. Hays, 3 Gray (Mass.) 405; *De-graw v. Clason*, 11 Paige (N. Y.) 136.

8. Easterly v. Keney, 36 Conn. 22.

9. Wemyss v. White, 159 Mass. 484; *Still v. Spear*, 45 Pa. St. 168.

10. Parsons v. Spencer, 83 Ky. 305; *Maryland*

but only a qualified right to support,¹ and has an equitable interest only.²

Endangering the Trust. — The *cestui que trust* is held not to be entitled to call for the legal estate when, from the nature of the trust, its ownership is not immediate and absolute and when it would defeat or put it in his power to defeat or endanger a legitimate ulterior limitation of the trust.³

Interest in Mortgaged Property. — Where a bond and mortgage is assigned with the provision that the avails of the mortgage are to be applied to the necessary support and maintenance of the designated beneficiary during his natural life, such beneficial interest extends only to what shall from time to time be necessary for the purpose specified. The assignor retains the equitable title to the fund, beyond what may be required for that purpose, and if the fund should not be exhausted in the necessary support and maintenance of the *cestui que trust* during his life, the balance remaining would belong to and be disposed of as part of the estate of the assignor. The *cestui que trust* cannot, as such, assign the whole fund; his power of disposition is limited to his interest.⁴

Beneficiary May Not Mortgage Life Interest. — A beneficiary under a will, entitled to a life support in the trust estate, has no power to mortgage the estate, and a mortgage executed jointly by such beneficiary and a remainderman is valid only as against the latter.⁵

c. WHEN TRUST FUND MAY BE REACHED. — On the other hand, where the *cestui que trust* has an absolute right to the fund or its avails,⁶ such as a right to occupy land and to receive the income therefrom,⁷ or where the income is directed to be paid for his sole and separate use, taking his receipt therefor,⁸ or where it is his absolute property⁹ and may therefore be alienated by him,¹⁰ or where he has paid a consideration for it by giving something in return,¹¹ as by releasing a right such as curtesy in his wife's estate,¹² — in all such cases his interest may be reached either at law or in equity for the satisfaction of the claims of his creditors.¹³

d. DISCRETION OF TRUSTEE — (1) *Unqualified.* — Where, moreover, the income has been withdrawn from the disposal of the *cestui que trust* and its disposition placed within the absolute and unqualified discretion of the trustee, it is beyond the reach of the claims of creditors, either at law or in equity in most jurisdictions.¹⁴

Grange Agency v. Lee, 72 Md. 163; Bryan v. Knickerbacker, 1 Barb. Ch. (N. Y.) 430; Brown v. Williamson, 36 Pa. St. 338.

1. **Right of Support Only.** — Baker v. Brown, 146 Mass. 369; Garland v. Garland, 87 Va. 758, 24 Am. St. Rep. 682.

2. *McIlvaine v. Smith*, 42 Mo. 55, 97 Am. Dec. 295; *Shankland's Appeal*, 47 Pa. St. 114; *Rife v. Geyer*, 59 Pa. St. 396, 98 Am. Dec. 351; *Mannerback's Estate*, 133 Pa. St. 342.

3. **Endangering the Trust.** — *Battle v. Petway*, 5 Ired. L. (27 N. Car.) 576, 44 Am. Dec. 59, Ruffin, C. J.

4. **Interest in Mortgaged Property.** — *Brown v. Harris*, 25 Barb. (N. Y.) 134.

5. **Beneficiary May Not Mortgage Life Interest.** — *Barnes v. Dow*, 59 Vt. 530.

6. **When Trust Fund May Be Reached.** — *Kingman v. Winchell*, (Mo. 1892) 20 S. W. Rep. 296; *Heath v. Bishop*, 4 Rich. Eq. (S. Car.) 46, 55 Am. Dec. 654.

7. *Upham v. Varney*, 15 N. H. 462.

8. *Forbes v. Lothrop*, 137 Mass. 523.

9. *Girard L. Ins., etc., Co. v. Chambers*, 46 Pa. St. 485, 86 Am. Dec. 513.

10. *Sears v. Choate*, 146 Mass. 398.

11. *Roberts v. Hall*, 35 Vt. 33; *Hutchinson v. Maxwell*, 100 Va. 172.

12. *Bank of Commerce v. Chambers*, 96 Mo. 459.

13. Where the *cestui que trust* used his own money in building a house upon land of which he had merely the use, the court appointed a receiver to take the rents of the house as distinguished from the value of the land, and to apply them in payment of the creditor's judgment. *Johnson v. Woodruff*, 8 N. J. Eq. 120.

14. **Discretion of Trustee — Unqualified** — *England*. — *Piercy v. Roberts*, 1 Myl. & K. 4; *Snowdon v. Dales*, 6 Sim. 524; *Twopeny v. Peyton*, 10 Sim. 487; *Green v. Spicer*, 1 Russ. & M. 395. *Alabama*. — *Taylor v. Harwell*, 65 Ala. 1.

District of Columbia. — *Fearson v. Dunlop*, 21 D. C. 236.

Kentucky. — *Bland v. Bland*, 90 Ky. 400, 29 Am. St. Rep. 390.

Maine. — *Murphy v. Delano*, 95 Me. 233.

Massachusetts. — *Foster v. Foster*, 133 Mass. 179.

New Jersey. — *Arnwin v. Carroll*, 8 N. J. Eq. 625; *Hardenburgh v. Blair*, 30 N. J. Eq. 645.

Pennsylvania. — *Keyser v. Mitchell*, 67 Pa. St. 476; *Huber's Appeal*, 80 Pa. St. 356; *Barker's Estate*, 159 Pa. St. 518.

South Carolina. — *Heath v. Bishop*, 4 Rich. Eq. (S. Car.) 46, 55 Am. Dec. 654.

Kentucky Rule. — But it has been held in Kentucky, under the statutes rendering trust estates liable to the debts of beneficiaries, that an unqualified discretion in the trustees cannot save the estate from the claims of creditors, since such discretion is subject to the control of a court of equity.¹

Interference of Court with Discretion. — The court will not interfere with the exercise of their discretion by trustees, until it is shown that there has been some abuse of their authority.²

Trustee Resigning, Discretion Continues with Appointee. — Where one trustee resigns and another is appointed in his place, the latter by virtue of the *Massachusetts* statute has the same power and may therefore exercise the same discretion as belonged to the resigning trustee. Such discretion is a part of the trust, and is not merely a personal confidence in the persons named as trustees.³

Renunciation of Trust by Trustee. — Where the trustees have a discretionary power of depriving the *cestui que trust* of the fund, if they renounce that power and pay the fund into court, it vests in the *cestui que trust*, since the power of deprivation is one which the court cannot exercise.⁴

Discretion Construed to Effectuate Trust. — Where discretionary power is given to the trustee to withhold and invest part of the income, such power must be so construed, if possible, as to make it operative. But such a provision does not in terms, or by necessary implication, require permanent accumulations by the trustee, but the whole income may be used for the benefit of the *cestui que trust*. A contingent fund should, however, be provided in anticipation of decrease of income, or of sickness and the like.⁵

Discretion Narrowed by Construction. — In some cases the discretion conferred upon the trustee has been construed to be much narrower than it appeared to be upon its face. Thus where the author of a trust created in his own favor, in order to shield himself from creditors, conferred upon his trustee a discretion as to whether he would or would not pay over the rents and profits to such author, it was held that such discretion did not empower the trustee to withhold such fund altogether, but extended merely to the manner of its application.⁶

(2) **As to Time.** — Where an estate is given to trustees and the only limitation expressed is, that they shall hold it and its accumulations until the *cestui que trust* shall reach a specified age beyond twenty-one, the trustees have no beneficial interest in the estate so held, and the beneficiary is entitled to the whole fund upon his attaining the age of twenty-one.⁷

Discretion Ends with Death of Beneficiary. — It has been held, where the discretion extended only to the time of payment, that such discretion must be based upon the habits, conditions, and circumstances of the *cestui que trust*, and that when this personal basis of judgment has been removed by the death of the latter, the authority to postpone payment is thereby terminated.⁸

(3) **As to Amount.** — Where the discretion of the trustee extends only to

1. **Kentucky Rule.** — *Pope v. Elliott*, 8 B. Mon. (Ky.) 62; *Samuel v. Ellis*, 12 B. Mon. (Ky.) 480; *Samuel v. Salter*, 3 Met. (Ky.) 259; *Marshall v. Rash*, 87 Ky. 116, 12 Am. St. Rep. 467.

2. **Interference of Court with Discretion.** — *Leavitt v. Beirne*, 21 Conn. 2.

3. **Trustee Resigning, Discretion Continues with Appointee.** — Pub. Stat., c. 141, § 6; *Wemyss v. White*, 159 Mass. 484.

4. **Renunciation of Trust by Trustee.** — *Matter of Coe*, 4 Kay & J. 199.

5. **Discretion Construed to Effectuate Trust.** — *Hibbs's Estate*, 143 Pa. St. 219.

6. **Discretion Narrowed by Construction.** — *Green v. Spicer*, 1 Russ. & M. 395; *Snowdon v. Dales*, 6 Sim. 524; *Warner v. Rice*, 66 Md. 440.

7. **As to Time.** — *Josselyn v. Josselyn*, 9 Sim. 63; *Saunders v. Vautier*, 4 Beav. 115; *Rocke v. Rocke*, 9 Beav. 66; *Re Young*, 18 Beav. 199; *Gosling v. Gosling*, Johns. Ch. (Eng.) 265; *Macgrath v. Morehead*, L. R. 12 Eq. 491; *Sandford v. Lackland*, 2 Dill. (U. S.) 6. See also to annuity, *Nickerson v. Van Horn*, 181 Mass. 562.

Direction as to Maintenance and Education During Minority. — *In re Coleman*, 39 Ch. D. 443, *distinguishing* *Green v. Spicer*, 1 Russ. & M. 395, and *Younghusband v. Gisborne*, 1 Coll. Ch. Cas. 400; *In re Neil*, 62 L. T. N. S. 649, *following* *In re Coleman*, 39 Ch. D. 443. See also *In re Bullock*, 60 L. J. Ch. 341, 64 L. T. N. S. 736.

8. **Discretion Ends with Death of Beneficiary.** — *Baeder's Estate*, 190 Pa. St. 606.

the amount to be paid from time to time, and the manner of spending the fund for the benefit of the beneficiary, it has generally been held that the interest of such beneficiary is assignable by him and will pass to assignees under the bankrupt and assignment acts, and is liable to be reached by a creditor's bill.¹

6. Beneficiary One of Several Cestuis Que Trustent. — There is a practical difficulty in reaching the interest of the *cestui que trust* where it would otherwise be liable for his debts, when he is merely one of several *cestuis que trustent* for whose joint support or interest the fund has been provided. Of course, in jurisdictions where such fund is protected as a spendthrift trust, the difficulty would not arise, because the fund would not be liable to execution in any event. In jurisdictions where spendthrift trusts are not allowed, the courts have laid down the general rule that if such interest be incapable of separation or identification, or if to reach such interest would interfere with and defeat either the provisions for other *cestuis que trustent*, or the discretionary power of the trustee in the management and control of the property in the interest of all the *cestuis que trustent*, such fund will be protected and will not be available toward the payment of the claims of creditors.² But if such interest of the debtor can be separated, it may be reached by the proper method either at law or in equity.³

Ratable Portion of Surplus. — It has happened, not infrequently, that where property has been given to a wife or mother for the sole and separate use of herself and children, free from the claims of the husband's creditors, the courts have been compelled to determine the interest of the children. There is a class of cases where the language has been construed to confer a right to a joint support upon all the members of the family, in which case the creditors have been allowed to reach only the wife's ratable portion of any surplus left after providing for the support of herself and family.⁴

Interest Not Joint. — There is another class of cases in which the courts have held that the words employed did not give any estate to the child or children, but merely indicated the motive for the gift to the mother.⁵

1. As to Amount. — *Havens v. Healy*, 15 Barb. (N. Y.) 301; *Hallett v. Thompson*, 5 Paige (N. Y.) 583; *Degraw v. Clason*, 11 Paige (N. Y.) 136; *Bryan v. Knickerbacker*, 1 Barb. Ch. (N. Y.) 409.

2. Where Interests Are Inseparable — *England*. — *Holmes v. Penney*, 3 Kay & J. 90; *Wetherell v. Wilson*, 1 Keen 81; *Godden v. Crowhurst*, 10 Sim. 642; *Rippon v. Norton*, 2 Beav. 63.

United States. — *Durant v. Massachusetts Hospital L. Ins. Co.*, 2 Lowell (U. S.) 575.

Alabama. — *Fellows v. Tann*, 9 Ala. 999; *Jasper v. Howard*, 12 Ala. 652; *Bell v. Watkins*, 82 Ala. 512, 60 Am. Rep. 756. But see *Hill v. McRae*, 27 Ala. 182.

Connecticut. — *Tolland County Mut. F. Ins. Co. v. Underwood*, 50 Conn. 493.

Georgia. — *Kempton v. Hallowell*, 24 Ga. 52, 71 Am. Dec. 112.

Kentucky. — *Rudd v. Hagan*, 86 Ky. 159.

Maryland. — *Warner v. Rice*, 66 Md. 436.

Massachusetts. — *Foster v. Foster*, 133 Mass. 179.

South Carolina. — *Heath v. Bishop*, 4 Rich. Eq. (S. Car.) 46, 55 Am. Dec. 654, *obiter*; *Wylie v. White*, 10 Rich. Eq. (S. Car.) 294.

Vermont. — *White v. White*, 30 Vt. 338.

Virginia. — *Perkins v. Dickinson*, 3 Gratt. (Va.) 320; *Nickell v. Handly*, 10 Gratt. (Va.) 336; *Johnston v. Zane*, 11 Gratt. (Va.) 552;

Doswell v. Anderson, 1 Patt. & H. (Va.) 185; *Camp v. Cleary*, 76 Va. 140. See also *Armstrong v. Pitts*, 13 Gratt. (Va.) 235.

3. Where Interests Are Separable — *England*. — *Page v. Way*, 3 Beav. 20; *Wallace v. Anderson*, 16 Beav. 533; *Carr v. Living*, 28 Beav. 647; *Kearsley v. Woodcock*, 3 Hare 185; *In re Coleman*, 39 Ch. D. 443; *Lord v. Bunn*, 2 Y. & C. Ch. 98. See also *In re Neil*, 62 L. T. N. S. 649; *In re Bullock*, 60 L. J. Ch. 341.

United States. — *Raynolds v. Hanna*, 55 Fed. Rep. 783; *sub nom. Brooks v. Raynolds*, (C. C. A.) 59 Fed. Rep. 923.

Alabama. — *Rugely v. Robinson*, 10 Ala. 702, *affirmed* 19 Ala. 404; *Robertson v. Johnston*, 36 Ala. 197; *Taylor v. Harwell*, 65 Ala. 1; *Jones v. Reese*, 65 Ala. 134.

Kentucky. — *Cosby v. Ferguson*, 3 J. J. Marsh. (Ky.) 264; *Flournoy v. Johnson*, 7 B. Mon. (Ky.) 693.

Virginia. — *Nickell v. Handly*, 10 Gratt. (Va.) 336, *obiter*. See also *French v. Waterman*, 79 Va. 617.

4. Ratable Portion of Surplus. — *Countts v. Walker*, 2 Leigh (Va.) 268; *Markham v. Guerrant*, 4 Leigh (Va.) 279; *Nickell v. Handly*, 10 Gratt. (Va.) 336.

5. Interest Not Joint. — *Wallace v. Dold*, 3 Leigh (Va.) 258; *Stinson v. Day*, 1 Rob. (Va.) 435; *Penn v. Whitehead*, 17 Gratt. (Va.) 503, 94 Am. Dec. 478; *Leake v. Benson*, 29 Gratt.

Must First Get Judgment at Law. — Although the trust may have been created for the support and maintenance of the family, a creditor of the husband and father sometimes cannot come into a court of equity to charge the trust subject with their debts, without having first obtained judgment at law, although the debt was contracted for necessities for the support of the family.¹

7. Beneficiary Also Trustee. — It has been held that there can be no valid spendthrift trust where the trustee is also *cestui que trust*, with the absolute ownership of the subject of the trust whether income or principal.² But the trust is not vitiated by the appointment of the *cestui que trust* as one of several trustees where the manner of the application of the fund is left to the discretion, not of the judgment debtor alone but of all, or, in case of disagreement, to the majority of those to whom the trust is confided, and where the *cestui que trust* is without power to control or direct the manner of its application if his wishes are repugnant to those of the majority of his associates.³

8. Donor Also Beneficiary. — A donor or settlor cannot, even in jurisdictions where spendthrift trusts are allowed, so dispose of his property for his own use, benefit, or support, as to put it beyond the reach of liability for his future debts. If such donor continues *sui juris*, and if there appears to be no reason for such disposition, except to withdraw his property from such liability, he cannot through the medium of a trust thus retain the temporal ownership without its usual incidents.⁴

Applies to Single Woman. — The same rule has been applied to a single woman not in anticipation of marriage.⁵

But Equity Will Not Set Aside Such Conveyance in Behalf of Spendthrift. — On the other hand, where a spendthrift, to prevent the dissipation of his estate, conveys it to a trustee to pay the income to his wife and children during his life, for their sole and separate use so as not to be subject to his debts, equity will not relieve him by setting aside the conveyance, although it conveys away practically his whole estate without reserving any power of revocation or of support for himself.⁶

9. Duties and Liabilities of Trustee. — The general principles applicable to trustees generally apply here.⁷

(Va.) 153; Bain v. Buff, 76 Va. 371; Stace v. Bumgardner, 89 Va. 418; Tyack v. Berkeley, 100 Va. 296.

1. Must First Get Judgment at Law. — Markham v. Guerrant, 4 Leigh (Va.) 279; Armstrong v. Pitts, 13 Gratt. (Va.) 235. But see Huntington v. Jones, 72 Conn. 45.

2. Where Beneficiary Is Also Trustee — United States. — Durant v. Massachusetts Hospital L. Ins. Co., 2 Lowell (U. S.) 575.

Alabama. — Fellows v. Tann, 9 Ala. 999.

Connecticut. — Tolland County Mut. F. Ins. Co. v. Underwood, 50 Conn. 493.

Michigan. — Cummings v. Corey, 58 Mich. 494.

New Hampshire. — Chase v. Currier, 63 N. H. 90.

New Jersey. — Bolles v. State Trust Co., 27 N. J. Eq. 308.

Ohio. — Hobbs v. Smith, 15 Ohio St. 419.

Pennsylvania. — Hahn v. Hutchinson, 159 Pa. St. 133; Ehrisman v. Sener, 162 Pa. St. 577; Wanner v. Snyder, 177 Pa. St. 208.

South Carolina. — Wylie v. White, 10 Rich. Eq. (S. Car.) 294. But see Jones v. Fort, 1 Rich. Eq. (S. Car.) 50.

3. Nichols v. Eaton, 91 U. S. 716; Wetmore v. Truslow, 51 N. Y. 338.

4. Donor Also Beneficiary — Maryland. — Warner v. Rice, 66 Md. 436.

Massachusetts. — Pacific Nat. Bank v. Win-

dram, 133 Mass. 175; Jackson v. Von Zedlitz, 136 Mass. 342; Taylor v. Buttrick, 165 Mass. 551.

Missouri. — McIlvaine v. Smith, 42 Mo. 45, 97 Am. Dec. 295; Lackland v. Smith, 5 Mo. App. 153.

New Jersey. — Woodruff v. Johnson, 8 N. J. Eq. 730; Hardenburgh v. Blair, 30 N. J. Eq. 645; Lippincott v. Evens, 35 N. J. Eq. 558.

New York. — Bryan v. Knickerbacker, 1 Barb. Ch. (N. Y.) 409; Schenck v. Barnes, 156 N. Y. 316.

Pennsylvania. — Johnson v. Harvey, 2 P. & W. (Pa.) 82, 21 Am. Dec. 426; Mackason's Appeal, 42 Pa. St. 337, 82 Am. Dec. 517; Merri-man v. Munson, 134 Pa. St. 114; Ghormley v. Smith, 139 Pa. St. 584, 23 Am. St. Rep. 215; Andress v. Lewis, 17 W. N. C. (Pa.) 270; Lewis v. Miller, 21 W. N. C. (Pa.) 94.

Tennessee. — Menken v. Brinkley, 94 Tenn. 721.

5. Applies to Single Woman. — Warner v. Rice, 66 Md. 436; Ghormley v. Smith, 139 Pa. St. 584, 23 Am. St. Rep. 215; Mackason's Appeal, 42 Pa. St. 337, 82 Am. Dec. 517.

6. But Equity Will Not Set Aside Such Conveyance in Behalf of Spendthrift. — Merriman v. Munson, 134 Pa. St. 114.

7. Duties and Liabilities of Trustee. — See the title TRUSTS.

Cannot Pay Principal Without Order of Court. — It has been held that a trustee of a spendthrift trust created for the protection of a life tenant of personalty will not be protected by a release from the life tenant in paying over the principal without an order from the court, but that he will be surcharged with such payment.¹

Under New York Statute. — And in case of a trust to receive the rents and profits and to apply the same to the use of the *cestui que trust*, the latter has the right under the New York statute, if he is competent to manage his own affairs, to direct how such rents and profits shall be applied after they have been received by the trustees. The court of chancery will protect the trustee if he acts in good faith in refusing to pay over such rents and profits to the *cestui que trust* who is improvident and likely to waste them.²

In Virginia. — A trustee has not the power, however, in Virginia to pledge, for a debt contracted by the *cestui que trust*, prospective profits of a trust estate necessary for his current support.³

Must Respect Wishes of Cestui Que Trust. — Where the trustees are, by the will, given permission to sell a portion of the estate to pay the debts of the *cestui que trust*, the permission being for the benefit of the *cestui que trust* may be waived by him, and the trustees are not bound to sell for the purpose indicated and should not do so against the protestations of the *cestui que trust*.⁴

10. Power of Donor over Corpus of Estate. — Where a grantor without fraud conveys property to trustees to pay over the rents and profits to him during his life, with power to sell the real estate and pay the proceeds to him at their option, retaining, however, the power of disposal by will, he does not retain such an interest in the principal of the estate as may be reached by his creditors.⁵

11. Statutory Provisions. — In several of the states the liability of trust estates to the claims of creditors is regulated by statute. The statute of *New York*, if not the earliest on the subject, has been the most widely copied in the other states.

New York. — The New York statute provided that "where a trust is created to receive the rents and profits of lands, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, shall be liable in equity to the claims of the creditors of such person, in the same manner as other personal property which cannot be reached by an execution at law."⁶ By another act, jurisdiction is conferred upon the court of chancery in creditors' suits, to compel the discovery of any property belonging to the judgment debtor, or held in trust for him, and to prevent the delivery or payment thereof to him, but the following exception is added: "except when such trust has been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself."⁷

Statutes Construed. — The cases construing these clauses reveal considerable

1. **Cannot Pay Principal Without Order of Court.** — *Stambaugh's Estate*, 135 Pa. St. 586.

2. **Under New York Statute.** — *Gott v. Cook*, 7 Paige (N. Y.) 522.

3. **In Virginia.** — *Markham v. Guerrant*, 4 Leigh (Va.) 279. See also *Pope v. Elliott*, 8 B. Mon. (Ky.) 56.

4. **Must Respect Wishes of Cestui Que Trust.** — *Rowan v. Rowan*, 2 Duv. (Ky.) 412.

As to the discretion of the trustee as it affects the interest of the *cestui que trust*, see the section *Interest of Beneficiary and Discretion of Trustee*.

5. **Power of Donor over Corpus of Estate.** — *Crawford v. Langmaid*, 171 Mass. 309.

6. **New York.** — 1 Rev. Stat. 729, § 57.

7. 2 Rev. Stat. 173, §§ 38, 39; Code Civ. Pro., § 1879.

The statute conferring jurisdiction upon the chancery court is said to owe its origin to some uncertainty in the law created by the decisions in *Hadden v. Spader*, 20 Johns. (N. Y.) 554, and *Donovan v. Finn*, Hopk. (N. Y.) 59. The former case had proceeded upon the broad ground that chancery had jurisdiction in such cases to reach every species of property of the debtor without regard to circumstances of fraud or trust. The latter case considered fraud or trust to be the only legitimate ground of equitable jurisdiction to control the debtor in the disposition of his property after a judgment and execution had proved unavailing. The

diversity of opinion, especially as to the meaning of the exception quoted. It has been argued that the exception was intended to extend to the entire income and to place it beyond the reach of creditors.¹

Surplus of Income Liable to Creditors. — But such interpretation has been rejected in many cases, and it is well settled by the great weight of authority that the income of both real and personal estate beyond what is necessary for the suitable support of the debtor and those dependent upon him, in the manner in which they have been accustomed to live, is clearly applicable under the statute to the claims of his creditors.²

Statute Applies to Personal Property. — The section of the statute providing that where a trust is created to receive the rents and profits of land, the surplus will be liable to the claims of creditors, has been held to apply to trusts of personal property for a like purpose by the analogy which the courts have deemed it wise to preserve between interests or estates in land, or the income thereof, and similar interests in personal property.³ But the interest of the *cestui que trust* will not pass to a receiver until it has actually become due and payable, and perhaps not until it has in some way been determined that there will be a surplus.⁴ And where there is no allegation or proof that the income is larger than necessary for the support of the debtor and his family, creditors cannot reach it.⁵

statute settled the question by giving the court of chancery power "to compel the discovery of any property, money, or thing in action belonging to the defendant, and to any property, money, or thing in action due to him or held in trust for him," adding, however, the exception above quoted of funds held in trust proceeding from some other person than the defendant himself. *Craig v. Hone*, 2 Edw. (N. Y.) 553; *Scoville v. Halladay*, (Supm. Ct. Gen. T.) 16 Abb. N. Cas. (N. Y.) 43. See also *Pettit v. Candler*, 3 Wend. (N. Y.) 618.

1. *Campbell v. Foster*, 35 N. Y. 361. Where this case really held was, that a receiver in supplementary proceedings cannot maintain a suit to reach so much of the income of a trust fund as is not required for the suitable support of the debtor. Everything else said by the judge in support of his construction of the statute was *obiter*. To the same effect is *Locke v. Mabbett*, 2 Keyes (N. Y.) 457. See also *Williams v. Thorn*, 70 N. Y. 270.

2. **Surplus of Income Liable to Creditors.** — *Stewart v. McMartin*, 5 Barb. (N. Y.) 438; *Genet v. Beekman*, 45 Barb. (N. Y.) 382; *McEvoy v. Appleby*, 27 Hun (N. Y.) 44; *Kilroy v. Wood*, 42 Hun (N. Y.) 636; *Card v. Meincke*, 72 Hun (N. Y.) 299; *Le Roy v. Rogers*, 3 Paige (N. Y.) 236; *Hallett v. Thompson*, 5 Paige (N. Y.) 583; *Degraw v. Clason*, 11 Paige (N. Y.) 136; *L'Amoureux v. Van Rensselaer*, 1 Barb. (N. Y.) 34; *Sillick v. Mason*, 2 Barb. Ch. (N. Y.) 79; *Craig v. Hone*, 2 Edw. (N. Y.) 569; *Rider v. Mason*, 4 Sandf. Ch. (N. Y.) 351; *Scott v. Nevius*, 6 Duer (N. Y.) 672; *Moulton v. de ma Carty*, 6 Robt. (N. Y.) 533; *Genet v. Foster*, (N. Y. Super. Ct.) 18 How. Pr. (N. Y.) 50; *Bramhall v. Ferris*, 14 N. Y. 41; *Graff v. Bonnett*, 31 N. Y. 9, 88 Am. Dec. 236; *Williams v. Thorn*, 70 N. Y. 270; *Stow v. Chapin*, (Supm. Ct. Gen. T.) 4 N. Y. Supp. 496; *Miller v. Miller*, (Supm. Ct. Spec. T.) 1 Abb. N. Cas. (N. Y.) 30; *Tolles v. Wood*, (Ct. App.) 16 Abb. N. Cas. (N. Y.) 1, 99 N. Y. 618. See also *Locke v. Mabbett*, 2 Keyes (N. Y.) 457; *Clute v. Bool*, 8 Paige (N. Y.) 83. But see *Hann v.*

Van Voorhis, (Supm. Ct. Spec. T.) 15 Abb. Pr. N. S. (N. Y.) 79, *overruled* in *Williams v. Thorn*, 70 N. Y. 280.

3. **Statute Applies to Personal Property.** — *Graff v. Bonnett*, 31 N. Y. 9, 88 Am. Dec. 236; *Williams v. Thorn*, 70 N. Y. 272; *Mills v. Husson*, 140 N. Y. 99; *Tolles v. Wood*, 99 N. Y. 616. See also *Cutting v. Cutting*, 86 N. Y. 544; *Lent v. Howard*, 89 N. Y. 181; *Hutton v. Benkard*, 92 N. Y. 295; *Crook v. Lowry*, 95 N. Y. 103; *Cochrane v. Schell*, 140 N. Y. 534.

4. *Scott v. Nevius*, 6 Duer (N. Y.) 672; *Graff v. Bonnett*, 31 N. Y. 9, 88 Am. Dec. 236. See also *Clute v. Bool*, 8 Paige (N. Y.) 83; *Bryan v. Knickerbacker*, 1 Barb. Ch. (N. Y.) 409.

5. *Le Roy v. Rogers*, 3 Paige (N. Y.) 234; *Bramhall v. Ferris*, 14 N. Y. 41.

California. — Civ. Code, § 859 (taking effect July 1, 1901) subjects to the payment of creditors the surplus of rents and profits of real property only, beyond the sum necessary for the education and support of the beneficiary and his family, "unless the trust was created by another person, and the instrument creating the trust otherwise expressly provides." By subsequent sections of the same act, the provision of section 859 is made to apply to trusts of personal property.

Georgia. — Civ. Code (1895), § 3149, authorizing the creation of trust estates for the benefit of a minor or person *non compos mentis*, has been construed not to authorize the creation of a trust for the benefit of a man *sui juris* to shield him from the claims of creditors. *Gray v. Obeare*, 54 Ga. 231, 59 Ga. 679. See also *Sinnott v. Moore*, 113 Ga. 908.

Illinois. — Hurd's Rev. Stat. (1893), c. 22, § 49, follows closely the wording of the New York statute, and subjects any property or thing in action belonging to defendant, or due to him or held in trust for him, except when the trust has been created by some person other than the defendant himself. *Spindle v. Shreve*, 111 U. S. 546.

SPENT BILLS OF LADING. — See note 1.

SPILE. — See note 2.

SPINNING PLANT. — See note 3.

Indiana. — Horner's Annot. Stat. (1901), § 2972, denies the beneficiary under a trust for the receipt of the rents and profits of land, the right to dispose of his interest unless such right be conferred by the instrument creating the trust. *Locke v. Barbour*, 62 Ind. 577.

Kansas. — The statute in this state is similar to that of Indiana given *supra*. Gen. Stat. Kan. (1897), c. 113, § 4.

Kentucky. — As early as 1796 Kentucky practically re-enacted the statute of uses by declaring that all trust estates should be liable for the debts of a *cestui que trust* the same as if they were legal estates. This statute has been often construed, and has put a quietus upon every attempt to create a spendthrift trust. *Eastland v. Jordan*, 3 Bibb (Ky.) 186; *Jones v. Langhorne*, 3 Bibb (Ky.) 453; *Cosby v. Ferguson*, 3 J. J. Marsh. (Ky.) 264; *Blanchard v. Taylor*, 7 B. Mon. (Ky.) 645; *Flournoy v. Johnson*, 7 B. Mon. (Ky.) 693; *Pope v. Elliott*, 8 B. Mon. (Ky.) 56; *Samuel v. Salter*, 3 Met. (Ky.) 259; *Rowan v. Rowan*, 2 Duv. (Ky.) 412; *White v. Thomas*, 8 Bush (Ky.) 661; *Anderson v. Briscoe*, 12 Bush (Ky.) 344; *Davidson v. Kemper*, 79 Ky. 5; *Woolley v. Preston*, 82 Ky. 415; *Parsons v. Spencer*, 83 Ky. 305; *Marshall v. Rash*, 87 Ky. 116, 12 Am. St. Rep. 467; *Bland v. Bland*, 90 Ky. 400, 29 Am. St. Rep. 390; *Bull v. Kentucky Nat. Bank*, 90 Ky. 452.

Maine. — Rev. Stat., c. 67, § 4, cl. 2, provides for the appointment of a guardian by a judge of probate for two classes of persons: first, those who have become incapable of managing their affairs through excessive drinking and the like; and second, those "who so spend or waste their estate as to expose themselves or families to want or suffering, or their towns to expense." *Young v. Young*, 87 Me. 49.

Michigan. — Comp. Laws (1897), 8841, § 13, follows the New York statute. *Spring v. Randall*, 107 Mich. 103. See also *Cummings v. Corey*, 58 Mich. 494.

Minnesota. — Minnesota follows New York. Stat. Minn. (1894), § 4286.

Mississippi. — The statute makes trust estates amenable to demands of creditors as if they were legal estates. Code Miss. (1892), § 2449 (1204). The effect of this statute is to subject equitable assets to sale under execution at law, but such assets are and always have been liable in equity independently of the statute. *Leigh v. Harrison*, 69 Miss. 933.

New Hampshire. — What property is subject to attachment, and what is exempt, is regulated by statute. Pub. Stat. and Session Laws (1901), c. 220. It has been held that a stipulation in a deed of property conveyed, that it should not be liable for the debts of a grantee, was an attempt to exercise legislative power over the statute of exemptions and was therefore void. *Wellington v. Janvrin*, 60 N. H. 178. See also *Johnson v. Cushing*, 15 N. H. 298, 41 Am. Dec. 694; *Upham v. Varney*, 15 N. H. 462.

New Jersey. — New Jersey follows the phraseology of the New York statutes. Gen. Stat. N. J., vol. 1, p. 280, construed in *Frazier v. Barnum*, 19 N. J. Eq. 317; *Arnwine v. Carroll*,

8 N. J. Eq. 620; *Bacon v. Bonham*, 27 N. J. Eq. 209; *Hardenburgh v. Blair*, 30 N. J. Eq. 645; *Force v. Brown*, 32 N. J. Eq. 118; *Adler v. Turnbull*, 57 N. J. L. 62. The statute of 1880 attempted to limit the protection afforded a spendthrift trust by providing that the amount of the income exempt from execution should be \$4,000. *Halstead v. Westervelt*, 41 N. J. Eq. 100; *Chosen Freeholders v. Henry*, 41 N. J. Eq. 388. Such limitation as to the amount was subsequently repealed. 2 Gen. Stat. N. J., tit. Executions, §§ 23, 39, 41, p. 1423.

North Dakota. — The Civil Code provides that the "beneficiary of a trust for the receipt of the rents and profits of real property, or for the payment of an annuity out of such rents and profits, may be restrained from disposing of his interest in such trust during his life or for a term of years, by the instrument creating the trust." Rev. Code N. Dak., § 3398.

South Dakota. — South Dakota follows the lead of New York in subjecting to the claims of creditors the surplus of rents and profits beyond the sum necessary for the education and support of the beneficiary. Annot. Stat. S. Dak. (1901), § 3712.

1. **Spent Bills of Lading.** (See also the title *BILLS OF LADING*, vol. 4, p. 507.) — In *Mairs v. Baltimore*, etc., R. Co., 73 N. Y. App. Div. 270, it was said: "The bills which were issued did not have either stamped or written upon their face the words 'Not negotiable,' but the goods represented thereby were delivered to the person entitled thereto, as named in the bill, but without the production or surrender of the bill of lading. Such bills became, therefore, * * * what are denominated *spent bills*." See also *Colgate v. Pennsylvania Co.*, 102 N. Y. 120.

2. **Spile.** — "In *The Chase*, Young Adm. Dec. 113, this word is used, as is common in America, in the sense of stake or post. The decree was affirmed by the privy council, and of this the American Law Review said: 'Their lordships were good enough to say in their opinion, "Nothing need be said about the word *spile*." It may be the word used there. It means a post.' There is an undefinable charm in this supercilious reflection upon colonial etymology. We find that Worcester speaks respectfully enough of the word; and if we thought as much of the matter as did the judicial committee, we would examine other dictionaries, which we venture to believe they did not.' Webster also speaks 'respectfully of it.' Browne's Judicial Interpretation 435.

3. **Spinning Plant.** — In American Cent. Ins. Co. v. Landau, 62 N. J. Eq. 102, it was said: "It is to be remarked that the machinery covered by these policies was simply a throwing plant; that is, a plant which takes raw silk after it is wound from the cocoon and reeled into hanks, and doubles and twists it into silk threads of varying size and strength, according to the needs of the dyer and weaver. It is not even a *spinning plant* in the proper sense of the term, because it does not elongate the fibre by drawing it out, as is done in the case of wool and cotton, but it simply reels and twists it."

SPIRIT — SPIRITS. (See also the title INTOXICATING LIQUORS, vol. 17, p. 189, and see DISTILLED SPIRITS, vol. 9, p. 615.) — Spirit is defined as a strong, pungent liquor usually obtained by distillation, as rum, brandy, gin, whiskey, etc.;¹ also as “a liquid produced by distillation, especially alcohol; the spirits of wine from which it was first distilled; hence, rum, whiskey, brandy, and other distilled liquors having much alcohol, in distinction from wine and malt liquors.”²

SPIRIT GAS. — See GAS, vol. 14, p. 914.

SPIRITUAL. — See note 3.

SPIRITUALISM. — See the titles CHARITIES AND TRUSTS FOR CHARITABLE USES, vol. 5, p. 893; FALSE PRETENSES AND CHEATS, vol. 12, p. 792; TESTAMENTARY CAPACITY; UNDUE INFLUENCE.

SPIRITUALITY. — See note 4.

SPITTING BLOOD. — See note 5.

SPLINE KEY. — See note 6.

SPOIL. — See note 7.

1. **Spirits.** — Webster's Dict., quoted in *Winning v. Gow*, 32 U. C. Q. B. 535, in which case it was held that gin was *spirits*.

In *Caswell v. State*, 2 Humph. (Tenn.) 403, it was said: “Mr. Webster, in his eighteenth definition of the word *spirit*, calls it a strong, pungent, stimulating liquor, obtained by distillation, as rum, brandy, gin, whiskey. Wine he defines to be the fermented juice of grapes. Dr. Johnson defines *spirit* to be an inflammable liquor, raised by distillation, and wine the fermented juice of the grape. The word *spirit* is derived from the Latin word *spiritus*, one meaning of which is life. The discovery of the art of distillation belongs to the alchemists, who made it in the course of their investigations after what they called the *elixir vita*, a liquid the discovery of which was to render man immortal.”

Spirits are distilled liquors. *Fritz v. State*, 1 Baxt. (Tenn.) 17.

2. **Spirit.** — In *re McDonough*, 49 Fed. Rep. 360, quoting *Webst. Dict.*

“*Spirit* is the name of an inflammable liquor produced by distillation.” *State v. Moore*, 5 Blackf. (Ind.) 118.

Alcohol. — In *State v. Giersch*, 98 N. Car. 723, it was said: “The term *spirit* or *spirits* has a general meaning, as applied to fluids, mostly of a lighter character than ordinary water, obtained but not produced by distillation; but as applied particularly to liquors, they signify the essence, the extract, the purest solution, the highly rectified *spirit*, the pure alcohol contained in them. The *spirit* of liquors is really the alcohol in them; it is this characteristic, this essential element, that makes them *spirituous* — that gives to all liquors of whatever kind their intoxicating quality and effect.”

“The word *spirit* generally refers to ethyl alcohol.” *Matheson v. Campbell*, 69 Fed. Rep. 615.

Proof of Spirits. — See PROOF, vol. 23, p. 246.

3. **Spiritual.** — The charge in an indictment was that the defendant, on, etc., at, etc., “unlawfully sold to one J. W. a quantity of *spiritual* liquors, by retail, less than a quart, to wit, one-half pint of spirituous liquors for five cents in money, he, the defendant, not being licensed to vend *spiritual* liquors by retail; contrary,” etc. It was held that the indictment was not

bad for using the word *spiritual* instead of “spirituous.” *State v. Clark*, 3 Ind. 451.

4. **Spirituality.** — In *Miller v. Kirkpatrick*, 29 Pa. St. 230, in holding the salary of a minister to be subject to a tax, the court said: “The money paid to a minister for his services and designed for his personal benefit is very far from being a mere *spirituality*. It is designed to supply his temporal wants. It is appropriated to that object alone. His services to the congregation may indeed be spiritual, but he would not be able to live long if his compensation were of the same character. Fortunately for him it is not so, but is paid in a currency as tangible and purely temporal as the wants it provides for.” See generally the title EXEMPTIONS (FROM TAXATION), vol. 12, p. 331.

5. **Spitting Blood.** — As to the meaning of this term in insurance, see the title LIFE INSURANCE, vol. 19, p. 64, and see *Mutual Ben. L. Ins. Co. v. Robison*, (C. C. A.) 58 Fed. Rep. 727; *Singleton v. St. Louis Mut. Ins. Co.*, 66 Mo. 76, in which latter case, in holding that parol evidence was admissible to show in what sense the term *spitting blood* was used in an application for insurance, the court said: “There is something ambiguous in the term *spitting of blood*. There is room for interpretation. Literally, the meaning is *spitting blood*, whether from the teeth, gums, or lungs, but it would be absurd to hold that it was used in that sense in the application.”

6. **Spline Key.** — A *spline key* is a small bar which is used to fasten the pulley to the shaft. *Andersen v. Berlin Mills Co.*, (C. C. A.) 88 Fed. Rep. 945.

7. **Spoil — Ballots.** (See also the title ELECTIONS, vol. 10, p. 552.) — In *People v. Campbell*, 138 Cal. 21, in construing a statutory provision that if a voter *spoiled* a ballot he should return it to the ballot clerk and receive another in its place, the court said: “The voter *spoils* a ballot when he marks it different from the mode in which he wishes to vote, or places thereon any mark by which it may be identified. He is not permitted to correct the ballot himself by erasing the mark, but must procure another in its stead.”

Spoiled Lumber. — In *Harris v. Rathbun*, 2 Keyes (N. Y.) 313, it was said: “It [the con-

SPOLIATION. — See the title ALTERATION OF INSTRUMENTS, vol. 2, p. 185.

SPORT — SPORTING. — To sport is “to divert; to make merry; to represent by any kind of play; to exhibit or bring out in public, as to sport a new equipage; to play; to frolic; to wanton; to practice the diversions of the field; to trifle.”¹ Sporting means indulging in sport; practicing the diversions of the field.²

SPRAG, SPRAGGER, ETC. — See note 3.

SPRAIN. — To sprain is “to weaken, as a joint, ligament, or muscle, by sudden and excessive exertion, as by wrenching; to overstrain or stretch injuriously, but without luxation; as to sprain one’s ankle.”⁴

SPRING. (See also the title WATERS AND WATERCOURSES.) — A spring of water is a place where water by natural forces issues from the ground.⁵

tract] further provided that if the plaintiff should *spoil* any lumber, he should retain it and allow a specified price. I am unable to appreciate the position taken by the plaintiff that, by the terms of the contract, lumber not sawed according to these specifications was *spoiled* lumber. I should infer, from the known and acknowledged signification of the word, that by *spoiled* lumber it was only intended to include such as was rendered unfit for market.”

1. **Sport.** — Wirth v. Calhoun, (Neb. 1902) 89 N. W. Rep. 787, quoting Webst. Dict.

2. **Sporting.** — Wirth v. Calhoun, (Neb. 1902) 89 N. W. Rep. 787.

Sunday Law. (See also the title SUNDAY AND HOLIDAYS.) — In Wirth v. Calhoun, (Neb. 1902) 89 N. W. Rep. 785, it was held that a contract whereby a party was required to furnish one performance, consisting of music, dancing, and feats of contortion, each day of the week, including Sunday, was not invalid as in contravention of Crim. Code Neb. (1899), § 241, such performances not falling within the prohibition of said section.

Same — Riding or Driving. — A Sunday statute made it unlawful for any person to be found on Sunday “*sporting*, rioting, quarreling, hunting, fishing, or shooting.” In holding that this statute did not cover riding or driving, the court said: “The only possible doubt is as to the meaning of the word *sporting*; but, whatever may be included within the meaning of that word, we do not believe that the legislature intended to inhibit the quiet, peaceful, and invigorating exercise of either walking or riding upon the sabbath day, although no urgent necessity or charity may prompt the exercise.” Nagle v. Brown, 37 Ohio St. 9.

Same — Baseball. — Playing baseball has been held to come within the definition of *sporting* as that term was used in a Sunday act. State v. O’Rourke, 35 Neb. 614.

Sporting House. — In a policy of insurance the house insured was described as “occupied as a *sporting* house.” It was held that, as the term *sporting* house has an innocent as well as a guilty meaning, it could not be said, without proof of the sense in which the term was used, that the policy showed conclusively that the occupancy of the house was for unlawful purposes. White v. Western Assur. Co., 52 Minn. 352.

Sporting Paper. — In McFarlane v. Hulton, (1899) 1 Ch. 890, it was held that a paper devoted to *sports*, but which excluded all racing

and betting intelligence, was not a *sporting* paper within an agreement not to print or publish any *sporting* paper within a certain district.

3. **Sprags.** — In Cutts v. Ward, L. R. 2 Q. B. 364, it was said: “The word technically called *sprags* cannot come within the words ‘tools or implements,’ but I think it may be considered as ‘materials.’”

Sprag — Spragger. — In South West Imp. Co. v. Smith, 85 Va. 313, it was said: “The mules are then unhitched, and the car turned over to an employee called a *spragger*, whose duty it is to apply the brakes and to *sprag* it; that is, as an additional precaution to keep the car stationary, to put a block of wood in front of the wheels, or, as it is also called, to ‘chock’ it.”

Sprag — Mining. — See McLean County Coal Co. v. Lamprecht, 51 Ill. 651.

4. **Ft. Worth, etc., R. Co. v. Rogers,** 21 Tex. Civ. App. 605, quoting Webst. Dict.

5. **Spring.** — Furner v. Seabury, 59 Hun (N. Y.) 279; Magoon v. Harris, 46 Vt. 264, in which latter case it was held that a grant of the privilege of taking water from *springs* in a certain locality conveys no right to take it where it does not thus issue from the ground. See also Bloodgood v. Ayers, 108 N. Y. 400.

But in Proprietors of Mills v. Braintree Water Supply Co., 149 Mass. 484, it was said: “*Spring*, as the word is generally used, means the source of supply issuing from the earth, or found therein by digging or otherwise opening it.”

Definite Extent. — In Taylor v. St. Helens, 6 Ch. D. 272, it was said: “When we talk of a *spring* of water we mean a source of water of a definite or nearly definite area, the word *spring* coming from the water *springing* or bubbling up. It may be an underground *spring* which supplies a well, and we say that water ‘wells up.’ It may be the ordinary *spring* from which a small stream or rivulet runs above the ground. But those are definite things. A *spring* of water means a natural source of water of a definite and well-marked extent.”

Surface Water. — In Kohala Sugar Co. v. Wight, 11 Hawaii 646, it was said: “‘Kupunaokane’ appears to be a hole in which water from a large extent of swampy ground above it collects. It is not strictly a *spring* in the sense that it is water coming perennially to the surface from invisible subterranean sources. We, however, call it a *spring*. In time of drouth its water diminishes greatly in amount, though

SPRING HOUSE. — See note 1.

SPRINGING USE. — See the title USES, STATUTE OF.

SPRING PLATE. — See note 2.

SPURIOUS. — See note 3.

SQUANDER — SQUANDERER. — To squander is to scatter lavishly; to spend profusely; to throw away prodigally; to waste; and a squanderer is a spendthrift, a prodigal, a waster.⁴

SQUARE. (See also the title PARKS AND PUBLIC SQUARES, vol. 21, p. 1066.) — The terms "square" and "block" are convertible, and are used synonymously.⁵ For other meanings of the term and of phrases in which it occurs, see note 6.

it is less affected by drouth than any other sources of water in the vicinity."

Stream. (See also *STREAM*, *post.*) — In conveying a certain lot the grantor reserved "the spring." In construing this reservation, the court said: "The stream was the outlet of a spring a short distance off on the next lot. It hardly appeared as a stream to casual observation, and it was finally lost in the ground. Nothing would have been more natural than to describe it as a spring, and it cannot be contended seriously that such a slight inaccuracy of expression is to make inoperative words clearly intended to reserve something assumed to be well known to or easily recognized by the parties, as is shown by the use of the definite article — 'the spring.'" *Peck v. Clark*, 142 Mass. 439.

1. **Spring House.** — In *Willoughb v. Shipman*, 28 Mo. 52, it was held that a spring house was embraced in the term "outhouses."

2. **Spring Plate.** — In *Hart, etc., Mfg. Co. v. Anchor Electric Co.*, 82 Fed. Rep. 914, it was said: "In regard to the spring plate, he says that its function is to unite one end of the spring with the central shaft or hub, so that the spring may exert a pressure tending to rotate the shaft. All this is found in the respondents' structure — that is to say, one end of the spring is united with the central shaft in such a way as to exert pressure tending to rotate it; but there is no theory of the definition of words by virtue of which the function of the spring plate can be held to be what is so stated by the respondents' witness. The natural interpretation of the term spring plate, in this connection, is a plate which holds up the spring. That is the function which is performed by it here, and there is no rule for any technical interpretation of the term, so far as we are aware, or which is pointed out to us, which gives it any other signification."

3. **Spurious Bill.** — "A spurious bill may be a legitimate impression from the genuine plate, but it must have the signatures of persons not the officers of the bank whence it purports to have issued, or else the names of fictitious persons. A spurious bill, also, may be an illegitimate impression from the genuine plate, or an impression from a counterfeit plate, but it must have such signatures or names as we have just indicated." *Kirby v. State*, 1 Ohio St. 187. See generally the title COUNTERFEITING, vol. 7, p. 875.

4. **Squander — Squanderer.** — *McDougal v. Calef*, 34 N. H. 543.

5. **Square Synonymous with Block.** — See *Block*, vol. 4, p. 582.

The terms square and "block" are used synonymously as meaning the territory bounded by four streets. *Harrison v. People*, 195 Ill. 470.

The word "square," as used in a city charter, providing that street improvements shall be made "at the exclusive cost of the owners of the lots in each fourth of a square," means each subdivision of territory bounded on all sides by principal streets. *Caldwell v. Rupert*, 10 Bush (Ky.) 183; *Broadway Baptist Church v. McAtee*, 8 Bush (Ky.) 508.

Public Use. — In *M. E. Church v. Hoboken*, 33 N. J. L. 17, it was said: "The word square, on this plot of ground, indicated a public use, either for purposes of a free passage or to be ornamented and improved for grounds of pleasure, amusement, recreation, or health. That is the proper and natural meaning of the term and its ordinary and usual signification." See also *Rowzee v. Pierce*, 75 Miss. 846.

Streets. — In *De Witt County v. Clinton*, 194 Ill. 524, it was said: "In ordinary acceptance, the words 'public square' would be understood to mean the plat of ground devoted to public purposes, and not the territory of the streets adjoining the sides of the public square. If, however, the streets so surrounding a plat of ground on which the court house is located should be marked and designated on the plat of the city or village, by the proprietor thereof, as the 'public square,' we see no reason why such designation might not be a sufficiently definite description of the territory occupied by such streets."

6. **Shape.** — An English statute imposed a duty on all cast-plate glass which was to be "squared into plates of a superficies not less than 1,485 inches." In *Atty.-Gen. v. Cast-Plate Glass Co.*, 1 Anstr. 44, Eyre, C. B., said of this statute: "I have no doubt in saying that the legislature used the word square not in the strict but in the common acceptance, confining it to rectangular but not to equilateral figures."

So in *Robertson v. Day*, 5 App. Cas. 63, it was held that the terms "one square mile" and "five miles square," as used in a public-land statute, meant areas of those dimensions, and not land geometrically square.

In *Atty.-Gen. v. Toronto*, 10 Grant Ch. (U. C.) 439, in construing a statute which gave to a city council power to alter, divert, and stop up roads, streets, squares, etc., or other public communications, the court said: "I do not think the word square, so used, means a square of ground in the literal sense of the term, for hardly such a space would be any-

SQUATTER. — A squatter may be defined to be a person who settles or locates on land without obtaining a legal title.¹

SR. (See also the titles ABBREVIATIONS, vol. 1, p. 97; ELECTIONS, vol. 10, p. 724; NAME, vol. 21, p. 310; and see JUNIOR, vol. 17, p. 1036.) — "Sr." is no part of the name of a person.²

STAB. — The word "stab" imports a wound made with a pointed instrument.³

STABLE. (See also the titles LIVERY-STABLE KEEPERS, vol. 19, p. 429; NUISANCES, vol. 21, pp. 685, 693, 697; and see HOUSE, vol. 15, p. 770.) — A stable is a house, shed, or building for beasts to lodge and feed in.⁴

STACK. — See note 5.

STAGE. — See note 6.

where found. Nor do I think it means merely an open space used as a means of communication, like a street, contended for by Mr. Strong. The mischief which might be worked by shutting up such a piece of ground round which parties had built, or over which alone they had access to a tenement, would be much greater than shutting up a park or pleasure grounds. I think it must receive the wide construction which is given to the word in ordinary parlance, and that it includes a park, or an open or inclosed space devoted to such an use."

Square of Ten Lines of Brevier. — Upon the meaning of the words "square of ten lines of brevier" in a statute providing a price for the publication of legal notices, see *Brown v. Lucas County*, 94 Iowa 70.

Square Yard. (See also the titles WEIGHTS AND MEASURES; WORKING CONTRACTS.) — A contract stipulating for the payment of a certain rate "per square yard" for the removal of dirt means cubic yard. *Louisville v. Hyatt*, 2 B. Mon. (Ky.) 182.

That custom is admissible to explain the meaning of the term "square yard," see *Breen v. Moran*, 51 Minn. 525.

Square Inch of Water. — See *Janesville Cotton Mills v. Ford*, 82 Wis. 416.

Square Thing. — In *Ivey v. Pioneer Sav., etc., Co.*, 113 Ala. 359, it was said: "The act is given the character of petit larceny, which carries with it the imputation that it was wickedly done; and this thought is accentuated by the injunction that Ivey must be made to do the square thing in the matter. The term square was here used in the sense of the following definitions given by lexicographers: 'Rendering equal justice; exact; fair; honest.' See Webster. Taken with the context, which denounced the act as grossly unreasonable, and possessing characteristics of larceny, the term square was used in this letter in the sense of 'honest,' and the command was that Ivey must be coerced to do the honest thing, which implies, in the connection used, that he had been dishonest."

1. **Squatter.** — *McAdam on Landlord and Tenant*, § 283, followed in *O'Donnell v. McIntyre*, (County Ct.) 16 Abb. N. Cas. (N. Y.) 86.

A better definition, perhaps, is: a person who settles or locates on land without any claim or color of title. See *Sykes v. Hayes*, 5 Biss. (U. S.) 530.

Squatter and Settler Distinguished — British Columbian Land Acts. — See *Hoggan v. Esquimalt, etc., R. Co.*, (1894) A. C. 434.

2. **Sr.** — *Hunt v. Searcy*, 167 Mo. 158; *Neil v. Dillon*, 3 Mo. 59.

3. **Stab.** — *State v. Patza*, 3 La. Ann. 514; *State v. Lowry*, 33 La. Ann. 1224. See also *Ruby v. State*, 7 Mo. 206.

To constitute stabbing, the knife need not enter any further than to penetrate the skin and draw blood — certainly half an inch or even one-eighth of an inch would be deep enough. *Ward v. State*, 56 Ga. 408.

Stab and Cut, Wound, or Penetrate. — See *Cut*, vol. 8, p. 533, and see *Solomon v. State*, 100 Ga. 81.

Stab — Strike. — A statute made it an offense to "cut, thrust, or stab any other person with a knife, dirk, or sword, or other deadly weapon, without killing such person." It was held that striking with a blacksmith's tongs, *Com. v. Hawkins*, 11 Bush (Ky.) 603, or with a large wooden club, *Erwin v. Com.*, 96 Ky. 422, was not an offense within this statute.

4. **Stable.** — *Dugle v. State*, 100 Ind. 260, quoting *Webst. Dict.* This was a prosecution for arson.

A stable has been held to be a "building" within a statute defining burglary. See *BUILDING*, vol. 4, p. 995, and see *Clark v. State*, 69 Wis. 203.

5. **Stack.** — In *Reg. v. McKeever, Ir. R. 5 C. L. 90*, it was held that a cock of hay differs from a stack of hay, in that the former is a small conical heap into which hay is formed temporarily in the field to protect it from the rain, while the latter is a large heap of hay saved and made up and protected from the weather. The court said: "Webster defines a cock of hay to be a 'small conical pile, so shaped for shedding the rain, and called in England a cop; whilst a stack is a large conical pile sometimes covered with thatch.'"

A quantity of straw packed on a lory (a small cart or wagon), in course of transmission to market, and left for the night in the yard of an inn, is not a stack of straw. *Reg. v. Satchwell, L. R. 2 C. C. 21.*

A stack is not necessarily something erected out of doors. *Reg. v. Munson*, 2 Cox C. C. 187.

Stack and Shock. — See *SHOCK*, vol. 25, p. 1058.

The Words "All the Hay and Grain in the Barn and in Stacks" have been held to include grain in the straw. *Briggs v. Taylor*, 35 Vt. 66.

6. **Stage Play.** (See also the title THEATRES.) — In *Wigan v. Strange, L. R. 1 C. P. 181*, it was said: "I am utterly unable to define, with any satisfactory approach to exactness, at what point public dancing in a place unlicensed by the chamberlain ceases to be lawful and be-

STAGECOACH. (See also **MAIL COACH — MAIL STAGE**, vol. 19, p. 608.) — A stagecoach or stage wagon is defined to be a coach or other carriage running regularly from one place to another for the conveyance of passengers.¹

STAKE. — See the title **BOUNDARIES**, vol. 4, p. 778.

STAKED OFF. — See note 2.

STAKEHOLDER. (See also the titles **BAILMENTS**, vol. 3, p. 732; **DEPOSIT**, vol. 9, p. 279; **GAMBLING CONTRACTS**, vol. 14, p. 576; **GAMING**, vol. 14, p. 664; **ILLEGAL CONTRACTS**, vol. 15, p. 927.) — A stakeholder is a depositary for both parties of the money advanced by them, respectively, with a naked authority to deliver it over upon the proposed contingency. He is not regarded as a party to the illegal contract.³

STAKE RACE. — See note 4.

"STAL." — See note 5.

STALE CLAIM. — See the titles **LACHES**, vol. 18, p. 97; **LIMITATION OF ACTIONS**, vol. 19, p. 136.

STALE DEMAND. — See the titles **LACHES**, vol. 18, p. 95; **LIMITATION OF ACTIONS**, vol. 19, p. 136.

STALE LEVY. — See note 6.

STALL — STALLAGE. — See the title **MARKETS**, vol. 19, p. 1142.

STALLION. (See also the titles **HORSES**, vol. 15, p. 750; **NUISANCES**, vol. 21, p. 684.) — See note 7.

STAMP TAX. — See the titles **REVENUE LAWS**, vol. 24, p. 934; **TAXATION**.

STAND, STANDING, ETC. — See note 8.

comes a *stage* play or an entertainment of the *stage*."

Dock. — Upon the construction of the statute 21 and 22 Vict., c. 92, § 221, the court said: "The word *stage*, according to the interpretation clause in the act (§ 3), is included in the term 'dock,' though not in the term 'wet dock' (see also section 596, sub-sec. (c), Merchant Shipping Act, 1894)." The *Servia*, (1898) P. 44.

1. **Stagecoach.** — *Talcott Mountain Turnpike Co. v. Marshall*, 11 Conn. 199.

"A *stage* is any carriage that travels by set stages." *Middlesex Turnpike Co. v. Wentworth*, 9 Conn. 374.

Stagecoach and Streetcar Held to Be Synonymous. — See **CAR**, vol. 5, p. 145, note.

Stagecoach and Pleasure Carriage. — See **CARRIAGE**, vol. 5, p. 152, note.

Stage Carriage Distinguished from Hackney Carriage. — See *Skinner v. Usher*, L. R. 7 Q. B. 428.

2. **Staked Off.** (See also the title **MINES AND MINING CLAIMS**, vol. 20, p. 712 *et seq.*) — A statute provided for the forfeiture of a mining claim after being abandoned, and further provided that no claim should be regarded as good and valid unless *staked off* with the owner's name. In construing this provision the court said: "The phrase *staked off*, occurring in both of these regulations, evidently refers to marking the boundaries of claims by stakes, or at least to the posting of stakes along the vein or its croppings, so as to indicate to other prospectors the ground intended to be appropriated. It is hardly possible that this phrase, as thus used, could mean simply the erection of a single stake, containing a notice somewhat similar to that required upon what is now denominated the 'discovery stake.'" *Becker v. Pugh*, 9 Colo. 592.

3. **Stakeholder.** — *Danley v. Hartley*, 178 Pa.

St. 27. See also the title **GAMBLING CONTRACTS**, vol. 14, p. 631 *et seq.*

4. **Stake Race — Free Handicap.** — In *Stone v. Clay*, (C. C. A.) 61 Fed. Rep. 892, it was said: "As it is expressed in Rule 37: 'A person entering a horse thereby becomes liable for the entrance money, stake, or forfeit;' that is to say, in a *stake race* he becomes absolutely liable to the extent of the prescribed forfeit, and liable for the entrance money or stake, on condition that within the time allowed his horse shall not be declared out; but in the free handicap, to which class the race of July 5th belonged, while he does not become absolutely liable at first for any sum, he does, by entering his horse, become liable for the entrance fee on condition that his horse shall not be declared out. In other words, there is absolute liability on the part of the subscriber only in the *stake race*, but in both the *stake race* and the free handicap there is a conditional liability; the condition in one, the same as in the other, being that the horse shall not be declared out."

5. **Stal.** — *Stal.* used instead of "steal," has been held not to vitiate an indictment. *Wills v. State*, 4 Blackf. (Ind.) 457.

6. **Stale Levy.** — See *Terry v. Americus Bank*, 77 Ga. 520.

7. **Stallion.** — In *Aylesworth v. Chicago*, etc., R. Co., 30 Iowa 460, a statute prohibiting *stallions* from running at large was held not to have been intended to apply to colts until they were of such an age as to be troublesome to mares or dangerous to be at large. The court said: "Webster defines the word *stallion* a horse not castrated, a stock horse. A horse colt just foaled is a horse not castrated, but he is not a stock horse."

8. **Stand.** — In *Bon v. Railway Pass. Assur. Co.*, 56 Iowa 666, 41 Am. Rep. 127, it was held that one who passes from one car to another

STANDARD. — See note 1.

STANDARD GRADE. — See note 2.

STANDARD OF TIME. — See the title TIME, COMPUTATION OF.

STAND COMMITTED. — See note 3.

STANDING ARMY. — See note 4.

STANDING ASIDE. — See the title JURY AND JURY TRIAL, vol. 17, p. 1190.

STANDING BY. (See also the title ESTOPPEL, vol. 11, p. 421.) — The term "standing by," so often used in the books and reports in discussing cases of estoppel, does not mean actual presence or actual participation in the transaction, but it means silence where there is knowledge and a duty to make a disclosure.⁵

STANDING CROP. — See note 6.

does not *stand* on the platform. See also *Sawtelle v. Railway Pass. Assur. Co.*, 15 Blatchf. (U. S.) 216; *Buel v. New York Cent. R. Co.*, 31 N. Y. 314, 88 Am. Dec. 271.

Standing. — In *Carroll v. Granite Mfg. Co.*, 11 Md. 411, it was said: "The word *standing* often signifies placed or situated; thus, we say London *stands* on the Thames."

Stand on Street. — An ordinance provided that "no person shall *stand* on any street * * * for the sale of any article, * * * unless duly licensed." It appeared that the defendant came into a certain street and sold newspapers; that he would *stand* for about five minutes and then move a little, walking backwards and forwards within a space of fifteen feet. It was held to be error to instruct the jury that if the defendant stopped in the manner described, he would be guilty of *standing* in violation of the ordinance. *Com. v. Elliott*, 121 Mass. 367.

An ordinance of the city of Boston provided that no hack driver should "*stand* with such carriage to solicit passengers in any street." It was held that a driver who left his carriage *standing* in the street, and solicited passengers inside a railroad station out of sight of the carriage, was within the ordinance. *Com. v. Matthews*, 122 Mass. 62.

Standing in My Name. — In *Kunkel v. Macgill*, 56 Md. 123, it was said: "Government securities, bonds, and shares of stock of corporations, it is admitted, may be specifically bequeathed. The words 'my,' or 'in my possession,' or '*standing* in my name,' and other like expressions, referring to the corpus of the fund, have generally been relied on as showing such intention." See also *Norris v. Harrison*, 2 Madd. 267; *Barton v. Cooke*, 5 Ves. Jr. 461.

Good Standing in a society not only implies that a party is a member of the society, but that he has a good reputation therein. In the present instance the words are to be construed with reference to the language of the certificate, and when this is done they manifestly mean not only good reputation, but good conduct — *i. e.*, freedom from a violation of the pledge of total abstinence." *Smith v. Knights of Father Mathew*, 36 Mo. App. 192, *quoting* *Royal Templars v. Curd*, 111 Ill. 284.

1. **Standard.** — In *Kenny v. Gillet*, 70 Md. 578, it was said: "Again, by calling it '*Standard* He-No' tea there is a plain implication that there are various grades of it, and that this is the *standard* or best article of the kind."

In *Myers v. Menefe*, (Tex. Civ. App. 1902) 68 S. W. Rep. 542, it was held that the word *standard*, in specifications of a railroad company calling for oak *standard* cross-ties, had reference "not only to the workmanship and dimensions of the ties, but to kind and quality."

2. **Standard Grade.** — A grant of a certain tract of land to a college provided that if the college failed to maintain a "college of *standard grade* on said grounds," the grounds should revert to the grantor. In construing this provision the court said: "The evidence abundantly shows that the courses of study pursued in the plaintiff's college were up to the average of the colleges of Iowa, if not above them; that the professors and teachers were of good ability, and well qualified for their respective positions. It is shown that they worked for small compensation. Surely that does not affect their ability, nor necessarily their efficiency. It appears that their work has been faithfully and conscientiously done. It is urged that a college cannot be a college of *standard grade* when the professors also teach in the preparatory department. If that be so, then it is clear, from the evidence in this case, that there is in Iowa no denominational college of *standard grade*. Such double duty is shown by the evidence to be the rule, and not the exception, in colleges in Iowa generally." *Des Moines University v. Polk County Homestead, etc., Co.*, 87 Iowa 36.

3. **Stand Committed.** — Where an order directed that a defendant should "*stand committed*," instead of using the statute phrase "be committed," it was held that the difference of phraseology was unimportant. *Young v. Makepeace*, 103 Mass. 57.

4. **Standing Army.** — *Standing army* means regular army, in contradistinction to a force composed of volunteers. *Franklin Beneficial Assoc. v. Com.*, 10 Pa. St. 360.

And that the national guard or state militia is not a *standing army*, see the title MILITIA, vol. 20, p. 668, note. See also *ARMY*, vol. 2, p. 829.

5. **Standing By.** — *Kuriger v. Joest*, 22 Ind. App. 633; *Anderson v. Hubble*, 93 Ind. 573, 47 Am. Rep. 394; *Gatling v. Rodman*, 6 Ind. 289; *Catherwood v. Watson*, 65 Ind. 576; *Richardson v. Chickering*, 41 N. H. 380, 77 Am. Dec. 769.

6. **Standing Crop.** (See also the title CROPS, vol. 8, p. 301.) — A *standing crop* is a crop not severed from the freehold. *Holly v. State*, 54 Ala. 240.

STANDING DETACHED. — See note 1.

STANDING TREES — STANDING WOOD. (See also the title TREES AND TIMBER.) — See note 2.

STAND TO. — See note 3.

1. **Standing Detached.** — A policy of insurance was upon a two-story frame building *standing detached*. In an action upon the policy the insurance company offered to prove that among insurance men *standing detached* meant that the house was at least twenty-five feet from external exposure. It was held that this evidence was properly rejected, Gilbert, J., saying: "The phrase is not in the slightest degree ambiguous, and extrinsic proof was not admissible to give it a meaning different from its plain import." *Hill v. Hibernia Ins. Co.*, 10 Hun (N. Y.) 30.

2. **Standing Wood.** — In *Strout v. Harper*, 72 Me. 270, it was held that a reservation of all *standing wood* upon a lot included trees suitable for timber as well as trees suitable for fuel, where there was nothing to indicate that the term *standing wood* was used in a more limited sense; and it was also held that it was permissible to show that the words were used in a more limited sense.

3. **Stand To.** — "To *stand to*, in common acceptance, signifies to remain fixed in a pur-

pose, to abide by a contract or assertion. But in legal parlance it has obtained, by long usage, an active and efficient meaning and imports an act to be done by the party. Thus, if the condition of a bond be 'that I shall *stand to* the award of J. S., and he doth award me to pay twenty pounds to W. S. by such a day, and on the day I do tender him the twenty pounds, but he doth refuse it, in this case I have sufficiently performed the condition, and the obligation is saved. So again, 'if the condition be that I shall *stand to* the award of J. S., and he award that I shall enter a retraxit in a suit depending between me and the other party, and I do not so, but am nonsuit, or do discontinue my suit, this is no good performance of the condition.' 1 Shep. Touch. 373. Awards and judgments bear so near a resemblance to each other that a bond conditioned to *stand to* one could not reasonably bear a different construction from a bond conditioned to *stand to* the other." *Molton v. Hooks*, 3 Hawks (N. Car.) 348.

STARE DECISIS.

By BASIL JONES.

I. DEFINITION, 159.

1. *Stare Decisis*, 159.
2. *Precedent*, 159.
3. *Obiter Dicta*, 160.

II. GENERAL CONSIDERATION, 160.

III. APPLICATION OF RULE, 161.

1. *In General*, 161.
2. *Decisions Construing Common Law*, 162.
3. *Decisions Construing Constitutional Questions*, 162.
4. *Questions of Practice*, 163.
5. *Decisions of Courts of Last Resort*, 163.
 - a. *In General*, 163.
 - b. *Decisions Binding on Lower Courts*, 163.
 - c. *Effect of Change in Decision*, 164.
 - d. *Conflict Between State and Federal Courts*, 164.
 - e. *Decision by Divided Court*, 165.
 - f. *Dicta*, 165.
 - g. *Affirmance Without Opinion*, 165.
6. *Decisions of Co-ordinate Courts*, 165.
7. *Decisions of Intermediate Courts*, 166.
8. *Decision by Divided Court*, 166.
9. *Where Precedent Has Been Approved by Legislature*, 167.
10. *Single Decisions*, 167.
 - a. *In General*, 167.
 - b. *Where Former Precedent Has Been Overruled*, 168.
 - c. *Single Decision as Rule of Property*, 168.
11. *Change in Personnel of Court*, 168.
12. *Dicta*, 168.
 - a. *In General*, 168.
 - b. *Interpretation of Language of Court*, 169.
 - (1) *In General*, 169.
 - (2) *General Expressions*, 169.
 - c. *Reasoning and Illustrations in Opinion*, 170.
 - d. *Questions Not Argued*, 170.
 - e. *Where Several Points Are Decided*, 171.
 - f. *Dicta as Rule of Property*, 171.

IV. STATE DECISIONS AS PRECEDENTS IN FEDERAL COURTS, 171.

V. FEDERAL DECISIONS AS PRECEDENTS IN STATE COURTS, 172.

1. *Construction of Federal Constitution and Statutes*, 172.
 - a. *Federal Constitution*, 172.
 - (1) *In General*, 172.
 - (2) *Constitutionality of Federal Statutes*, 172.
 - (3) *Constitutionality of State Statutes under Federal Constitution*, 173.
 - b. *Federal Statutes and Treaties*, 173.
 - c. *Decisions of Inferior Courts*, 174.
 - d. *Dicta*, 175.
2. *Construction of State Constitutions and Statutes*, 175.
3. *Where Federal Court Has Appellate Jurisdiction*, 176.
4. *In Matters of General Jurisprudence*, 176.
5. *In Territorial Courts*, 176.

VI. DECISIONS OF OTHER DEPARTMENTS OF GOVERNMENT, 176.**VII. DECISIONS OF COURTS OF ANOTHER STATE AS PRECEDENTS, 176.**

1. *Construction of Constitution and Statutes of Other States*, 176.
2. *Decisions of Inferior Courts*, 177.
3. *Decision of Foreign State as Rule of Property*, 178.
4. *Conflict Between Federal and State Decisions*, 178.
5. *Province of Court and Jury*, 178.
6. *Effect of Change of State Boundary on Precedents*, 178.
7. *Adopted Statutes*, 178.

VIII. DECISIONS OF HOUSE OF LORDS, 178.**IX. RETROSPECTIVE EFFECT OF CHANGE OF DECISION, 179.****X. ERRONEOUS PRECEDENTS AS RULES OF PROPERTY, 180.**

1. *In General*, 180.
2. *Where Real Property Is Involved*, 181.
3. *Where Contracts Are Involved*, 182.
 - a. *In General*, 182.
 - b. *Charters of Corporations*, 182.
4. *Commercial Usages*, 183.

XI. LIMITATION OF RULE, 183.**XII. LAW OF THE CASE, 184.**

1. *General Statement of Doctrine*, 184.
2. *Relations to Res Judicata and Stare Decisis*, 188.
3. *Reasons for Doctrine*, 189.
4. *Application of Doctrine*, 189.
 - a. *In General*, 189.
 - b. *To What Courts Doctrine Applicable*, 190.
 - c. *Question of Law and Fact*, 191.
 - d. *Changed Circumstances on Second Trial*, 191.
 - (1) *Different State of Facts on Second Trial*, 191.
 - (2) *Subject-matter Same but Parties Different*, 192.
 - e. *Point Decided and Dicta*, 192.
 - f. *New Trial and Proceedings Therein*, 193.
 - (1) *In General*, 193.
 - (2) *Questions on Second Appeal*, 194.

CROSS-REFERENCES.

For matters of *PROCEDURE*, see *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, titles *APPEALS*, vol. 2, p. 373; *MANDATE AND PROCEEDINGS THEREON*, vol. 13, p. 842; *UNITED STATES COURTS*, vol. 22, p. 324.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject see in this work the title *RES JUDICATA*, vol. 24, p. 704, and references there given.

I. DEFINITION — 1. Stare Decisis. — The doctrine of *stare decisis et non quieta movere*, which means to adhere to decided cases and not disturb matters established,¹ is the doctrine of precedents.²

2. Precedent. — A precedent is a judicial decision which serves as a rule for future determination in similar or analogous cases.³ A decision is to be

1. **Definition.** — *English Law Dict.*

2. *The Madrid*, 40 Fed. Rep. 677.

Rule of Self-preservation. — See *Ellison v. Georgia R. Co.*, 87 Ga. 691, in which Bleckley, C. J., treats, in a highly original way, of the neces-

sity which this ground affords for observing the rule.

Stare Decisis and Res Judicata Distinguished. — See the title *RES JUDICATA*, vol. 24, p. 715 *et seq.*

3. Precedent Defined. — *Cent. Dict.*

regarded as a precedent when it furnishes rules which may be applied in settling the rights of parties in other cases.¹

3. Obiter Dicta. — *Obiter dicta* are expressions of opinion by the court on legal questions suggested by the case before it, but not arising in such a manner as to require decision. The abbreviated term "*dicta*" is also applied to these expressions.²

Judicial Dictum. — An expression of opinion upon a point involved in a case, argued by counsel and deliberately passed upon by the court, though not essential to the disposition of the case, if a dictum, should be considered a judicial dictum as distinguished from a mere *obiter dictum*, which is an expression originating alone with the judge writing the opinion, as an argument or illustration.³

II. GENERAL CONSIDERATION. — The principle embodied in the maxim has been for centuries recognized and acted upon in English law.⁴ As early as A. D. 1454 there was a judicial declaration as to the necessity of respecting the authority of decided cases.⁵ The doctrine of *stare decisis* owes its origin and observance to the recognition of the necessity for stability and uniformity in the construction and interpretation of the law. It is too evident to require discussion that the interests of the state and of the individual and the proper administration of justice require that there should be settled rules in these matters. The application of the doctrine necessarily cannot be according to fixed rules, but must be determined in each case by the discretion of the court.⁶ It has been stated that decided cases bear the same relation to the

1. *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56. See also *Fisher v. Prince*, 3 Burr. 1364.

2. **Definition.** — See *Dictum*, vol. 9, p. 452. See also the following cases:

England. — *Quinn v. Leathem*, (1901) A. C. 495.

United States. — *Cross v. Burke*, 146 U. S. 82; *Carroll v. Carroll*, 16 How. (U. S.) 275; *Patillo v. Allen-West Commission Co.*, (C. C. A.) 108 Fed. Rep. 723.

California. — *Mulford v. Estudillo*, 32 Cal. 131.

Delaware. — *State v. Green*, 1 Penn. (Del.) 63.

Florida. — *Hart v. Stribling*, 25 Fla. 435.

Iowa. — *State v. Brookhart*, 113 Iowa 250.

Michigan. — *Ellsworth v. Hall*, 48 Mich. 407.

Mississippi. — *Menken v. Frank*, 58 Miss. 283.

New York. — *People v. Police Com'rs*, 174 N. Y. 450; *Colonial City Traction Co. v. Kingston City R. Co.*, 154 N. Y. 493; *Rohrbach v. Germania F. Ins. Co.*, 62 N. Y. 47, 20 Am. Rep. 451; *Ryan v. New York*, 78 N. Y. App. Div. 134; *People v. Leubischer*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 495.

Ohio. — *Strauss v. Jacobs*, 10 Ohio Dec. 132. *Tennessee.* — *Louisville, etc., R. Co. v. Davidson County Ct.*, 1 Sneed (Tenn.) 637, 62 Am. Dec. 424.

Virginia. — *Lewis v. Thornton*, 6 Munf. (Va.) 87.

Dicta are the opinions of a judge which do not embody the resolution or determination of the court, and, being made without argument, or full consideration of the point, are not the professed deliberate determinations of the judge himself; *obiter dicta* are such opinions uttered by the way, not upon the point or question pending, but as if turning aside for the time from the main topic of the case to collateral subjects. *Rohrbach v. Germania F. Ins. Co.*, 62 N. Y. 47, 20 Am. Rep. 451.

In the Early English Cases the term is used with reference to random remarks made by a judge at *nisi prius*, not embodying his ruling on any question presented to him. *State v. Brookhart*, 113 Iowa 250. See *Saunderson v. Bowles*, 4 Burr. 2064; *Steel v. Houghton*, 1 H. Bl. 51; *Parton v. Williams*, 3 B. & Ald. 339, 5 E. C. L. 312.

"An *Obiter Dictum* in the Language of the Law is a gratuitous opinion, an individual impertinence, which, whether it be wise or foolish, right or wrong, bindeth none, not even the lips that utter it." *Hart v. Stribling*, 25 Fla. 435.

3. *Brown v. Chicago, etc., R. Co.*, 102 Wis. 137; *Buchiner v. Chicago, etc., R. Co.*, 60 Wis. 264.

4. **General Consideration.** — 1 Bl. Com. 69; *Pollock First Book on Jurisprudence* 299. See also 9 Harv. L. Rev. 27.

5. Y. B. 33 Henry VI., 41a.

The Precept, Omnis Innovatio Plus Novitate Perturbat Quam Utilitatem Prodest, has been long accepted and recommended, as well by the good sense on which it is founded as its beneficial effects in maintaining the permanency of rules after once fixed, established, and known to the community. *Roof v. Charlotte, etc., R. Co.*, 4 S. Car. 61.

6. *England.* — *In re Hallett*, 13 Ch. D. 696; *Hamilton v. Baker*, 14 App. Cas. 209.

United States. — *Pollock v. Farmers L. & T. Co.*, 157 U. S. 637, dissenting opinion of White and Harlan, JJ.

California. — *Giblin v. Jordan*, 6 Cal. 418; *Welch v. Sullivan*, 8 Cal. 188.

Colorado. — *Harvey v. Travelers' Ins. Co.*, 18 Colo. 354.

Delaware. — *Daniels v. State*, 2 Penn. (Del.) 586.

Indiana. — *Haskett v. Maxey*, 134 Ind. 183; *Paul v. Davis*, 100 Ind. 428; *Rockhill v. Nelson*, 24 Ind. 422.

science of the law that a convincing series of experiments bear to any other branch of inductive philosophy. They are, on being promulgated, immediately relied upon according to their character, either as confirming an old or forming a new principle of action. They are continually multiplying throughout the whole extent of the court's jurisdiction and form the basis of a claim to numerous and valuable rights, offensive and defensive.¹ The doctrine, as its name shows, has only to do with direct and controlling decisions, especially precedents for future cases involving the same or similar issues. Its application is in no way affected by dicta.²

III. APPLICATION OF RULE — 1. In General. — Under the application of the doctrine contained in this maxim, where a series of decisions, or even a single decision,³ of a court of last resort has been accepted as the proper interpretation of the law and has been acted upon and become a rule of property,⁴ the courts are slow to interfere with the principle announced by the decision, and it may be upheld even though they would decide otherwise were the question a new one.⁵ The doctrine of *stare decisis* cannot be invoked in favor of decisions on former statutes which were merely similar to but not identical with the one under review.⁶

Subsequent Observations on Decision. — It has been stated that in the consideration of the doctrine of *stare decisis* the interpretation is to be broader than that generally given to decisions, or rather the effect of prior decisions is more comprehensive and wider reaching. For not only are actual decisions followed, but it is even claimed that any subsequent allegation as to what is deter-

Iowa. — *State v. Silvers*, 82 Iowa 714; *Davidson v. Biggs*, 61 Iowa 309.

Kentucky. — *Tribble v. Taul*, 7 T. B. Mon. (Ky.) 455.

Michigan. — *Henry v. Quackenbush*, 48 Mich. 415; *McCutcheon v. Homer*, 43 Mich. 483, 38 Am. Rep. 212.

Mississippi. — *Adams v. Yazoo, etc., R. Co.*, 77 Miss. 194.

Nebraska. — *State v. Savage*, (Neb. 1902) 91 N. W. Rep. 557.

New York. — *North River Steam Boat Co. v. Livingston*, 3 Cow. (N. Y.) 713.

Oregon. — *Paulson v. Portland*, 16 Oregon 450.

Pennsylvania. — *Callender v. Keystone Mut. L. Ins. Co.*, 23 Pa. St. 471.

Texas. — *Higgins v. Bordages*, 88 Tex. 458, 53 Am. St. Rep. 770; *Willis v. Owen*, 43 Tex. 48.

Utah. — *Kimball v. Grantsville*, 19 Utah 368. *Wisconsin.* — *Brader v. Brader*, 110 Wis. 423; *Pratt v. Brown*, 3 Wis. 603.

1. *Bates v. Relyea*, 23 Wend. (N. Y.) 340. See also *Verdin v. St. Louis*, 131 Mo. 26.

2. See *infra*, this title, *Application of Rule — Dicta*.

3. See *infra*, this section, *Single Decisions*.

4. See *infra*, this section, *Erroneous Precedents as Rules of Property*.

5. **How Applied — England.** — *Harvey v. Farquhar*, L. R. 2 H. L. Sc. 192.

United States. — *McCullough v. Virginia*, 172 U. S. 102; *Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 301; *Buchanan v. Knoxville, etc., R. Co.*, (C. C. A.) 71 Fed. Rep. 324; *The Madrid*, 40 Fed. Rep. 677.

California. — *Angus v. Plum*, 121 Cal. 608; *McFarland v. Pico*, 8 Cal. 631.

Colorado. — *Harvey v. Travelers Ins. Co.*, 18 Colo. 354.

Delaware. — *Daniels v. State*, 2 Penn. (Del.) 586; *Truxton v. Fait, etc., Co.*, 1 Penn. (Del.) 483, 73 Am. St. Rep. 81.

Illinois. — *Hopkins v. McCann*, 19 Ill. 113.

Indiana. — *Haskett v. Maxey*, 134 Ind. 182.

Iowa. — *State v. Silvers*, 82 Iowa 714; *Davidson v. Biggs*, 61 Iowa 309.

Kansas. — *Jansen v. Atchison*, 16 Kan. 358.

Kentucky. — *Tribble v. Taul*, 7 T. B. Mon. (Ky.) 455.

Michigan. — *Henry v. Quackenbush*, 48 Mich. 415; *McCutcheon v. Homer*, 43 Mich. 483, 38 Am. Rep. 212.

Missouri. — *White v. Wabash Western R. Co.*, 34 Mo. App. 71.

Nebraska. — *Richardson Drug Co. v. Raymond*, 59 Neb. 157; *State v. Hill*, 47 Neb. 456.

New York. — *Baker v. Lorillard*, 4 N. Y. 257; *North River Steam Boat Co. v. Livingston*, 3 Cow. (N. Y.) 713.

Ohio. — *Cincinnati v. Taft*, 63 Ohio St. 141.

Oregon. — *Paulson v. Portland*, 16 Oregon 450.

Pennsylvania. — *Com. v. National Oil Co.*, 157 Pa. St. 516; *Com. v. Mill Creek Coal Co.*, 157 Pa. St. 524.

South Carolina. — *Roof v. Charlotte, etc., R. Co.*, 4 S. Car. 61; *Morse v. Adams*, 2 S. Car. 56.

Utah. — *Kimball v. Grantsville*, 19 Utah 368. *Virginia.* — *Postal Tel. Cable Co. v. Farmville, etc., R. Co.*, 96 Va. 661.

Wisconsin. — *Brader v. Brader*, 110 Wis. 423; *Eau Claire Nat. Bank v. Benson*, 106 Wis. 624; *Downer v. Miller*, 15 Wis. 612; *Pratt v. Brown*, 3 Wis. 603.

6. **Decisions on Former Statutes.** — *Pollock v. Farmers' L. & T. Co.*, 157 U. S. 574; *Wood v. Brady*, 150 U. S. 20; *Adams v. Yazoo, etc., R. Co.*, 77 Miss. 194.

mined in any case is to be respected, so that not only the particular case but any subsequent interpretation or explanation of its meaning is to be regarded as coming within the doctrine and final.¹

2. Decisions Construing Common Law. — It has been seen in a previous article that either court will follow the precedents of its own state in expounding the general rules of the common law and will not be governed by decisions in sister states.² Such decisions will have only such weight as their reasoning entitles them to, but they possess none of the conclusive force of precedents.³

3. Decisions Construing Constitutional Questions. — There is a conflict of authority as to whether or not the doctrine of *stare decisis* applies to decisions determining the constitutional questions. According to one view the doctrine is peculiarly applicable to decisions interpreting the provisions of a constitution, as it would seem that it is in the highest degree essential that there should be a stable and uniform interpretation of the organic law.⁴ Other authorities make no distinction in the application of the doctrine to decisions passing upon questions of this nature, and determine whether or not it is to be applied to decisions declaring a statute constitutional⁵ or unconstitutional, by the same principles which control in other cases.⁶ Where the constitutionality of the statute has been passed upon by the court of last resort an inferior court will adhere to the decision even though new reasons are advanced against the constitutionality of the statute, as it will be presumed that all of the reasons which could have been advanced were considered and held insufficient.⁷ According to another view the doctrine cannot control questions involving the construction and interpretation of the organic law.⁸ While the decisions in such cases will not be entirely disregarded and may, in the case of a doubtful interpretation, control the views of the court, they will be considered merely as authorities tending to aid in arriving at a proper conclusion and not as a rule to be followed without inquiry.⁹ A reason advanced to support this distinction between decisions construing statutes and those construing the constitution is that if the people are dissatisfied with the construction of a statute, the frequently recurring sessions of the legislature afford easy opportunity to repeal, alter, or modify the statute, while the constitution is organic, intended to be enduring until changed conditions of society demand more stringent or less restrictive regulations, and if a decision construes the constitution in a manner not acceptable to the people, the opportunity of changing the organic law is remote. Moreover, no set of judges ought to have the right to tie the hands of their successors on constitutional questions, any more than one general assembly should those of its successors on legislative matters.¹⁰

Construction Not Presumed. — Courts seldom undertake to pass upon the validity of legislation where the question is not raised by the parties. The fact that a

1. *Matheson v. Hearin*, 29 Ala. 210.

2. **Construction of Common Law.** — See the title *COMMON LAW*, vol. 6, p. 283. See also *Nathan v. Lee*, 152 Ind. 232; *Alexander v. Lebanon Bank*, 19 Tex. Civ. App. 620. *Compare* *Forepaugh v. Delaware, etc., R. Co.*, 128 Pa. St. 217, 15 Am. St. Rep. 672.

3. *Swift v. Tyson*, 16 Pet. (U. S.) 1; *Franklin v. Twogood*, 25 Iowa 520, 96 Am. Dec. 73.

4. **Doctrine Peculiarly Applicable.** — *Judges' Cases*, 102 Tenn. 510.

5. **No Distinction in Application.** — *Ferris v. Coover*, 11 Cal. 176; *Seale v. Mitchell*, 5 Cal. 401; *Bothwell v. Millikan*, 104 Ind. 162; *Brown v. Eagle Creek, etc., Gravel Road Co.*, 78 Ind. 421; *Ricketts v. Spraker*, 77 Ind. 371; *State v. Stout*, 61 Ind. 143; *Missouri, etc., R. Co. v. Steinberger*, 60 Kan. 856; *Adams v. Yazoo, etc., R. Co.*, 77 Miss. 194; *Lombard v. Lombard*, 57

Miss. 177; *Amoskeag Mfg. Co. v. Goodale*, 62 N. H. 66; *Paulson v. Portland*, 16 Oregon 450; *Com. v. National Oil Co.*, 157 Pa. St. 524; *Bogard v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 494; *Gill v. Parker*, 31 Vt. 610.

6. *Campbell v. Los Angeles Gold Mine Co.*, 28 Colo. 256; *Denney v. State*, 144 Ind. 503; *Hughes v. Hughes*, 4 T. B. Mon. (Ky.) 42.

7. *Com. v. Geesey*, 1 Pa. Super. Ct. 502.

8. **Rule Not Applied.** — *Boyd v. State*, 53 Ala. 608; *Allardt v. People*, 197 Ill. 501; *Osage Valley, etc., R. Co. v. Morgan County Ct.*, 53 Mo. 158; *Higgins v. Bordages*, 88 Tex. 458, 53 Am. St. Rep. 770; *Willis v. Owen*, 43 Tex. 41.

9. *Higgins v. Bordages*, 88 Tex. 458, 53 Am. St. Rep. 770; *Willis v. Owen*, 43 Tex. 41.

10. *Mountain Grove Bank v. Douglas County*, 146 Mo. 42.

statute has been construed, its meaning defined, and its provisions enforced, in other decisions, does not conclude the court upon its constitutionality merely because that point might have been raised and determined in the first instance.¹

4. Questions of Practice. — The rule of *stare decisis* also applies to decisions settling questions of practice. Such decisions will be adhered to even though another construction would be adopted were the question an open one.² If, however, an error which has been committed ill-advisedly in a former opinion in passing upon a matter of practice can be corrected without substantial injury being suffered by litigants by reason of reliance upon the precedent so established, the court will not be governed by the former decisions.³

5. Decisions of Court of Last Resort — *a. IN GENERAL.* — The doctrine of *stare decisis* is based upon the assumption that the rules of law to which this doctrine applies have previously been determined by a court having final jurisdiction on the questions involved. For this reason, where the decision of a tribunal is subject to review by one having superior authority over it for that purpose, or the question determined may be passed upon by such tribunal in another case, the doctrine of *stare decisis* does not apply with full force until the same questions have been determined by the court of last resort.⁴ So it does not apply to the construction placed upon a federal statute by the former decision of a state court. In such a case the construction can only be authoritatively settled by a decision of the Supreme Court of the United States.⁵

b. DECISIONS BINDING ON LOWER COURTS. — Under the rule of *stare decisis*, where a principle has been passed upon by the court of last resort, it is the duty of all inferior tribunals to adhere to the decision, without regard to their views as to its propriety, until the decision has been reversed or overruled by the court of last resort or altered by legislative enactment.⁶ This duty of

1. *Boyd v. Alabama*, 94 U. S. 645. See also *Adams v. Yazoo, etc.*, R. Co., 77 Miss. 194.

2. **Matters of Practice.** — *Fraser v. Ehrensperger*, 12 Q. B. D. 310; *Germania Iron Co. v. James*, (C. C. A.) 89 Fed. Rep. 811; *Harvey v. Travelers Ins. Co.*, 18 Colo. 354; *Weaver v. Gardner*, 14 Kan. 347; *Dickhut v. Durrell*, 11 Ill. 72; *Lauve's Succession*, 6 La. Ann. 529; *Russell v. Chicago*, 22 Ill. 283; *People v. McGoldrick*, (Supm. Ct. Spec. T.) 24 Civ. Pro. (N. Y.) 292; *Sheldon v. Newton*, 3 Ohio St. 494; *Northern Pac. R. Co. v. Wells*, 2 Wash. Ter. 303; *Sauer v. Steinbauer*, 10 Wis. 370. See also *Smith v. Ely*, 15 How. (U. S.) 137. Compare *State v. Hill*, 47 Neb. 436.

3. *Rich v. Chicago*, 59 Ill. 286; *Wetzstein v. Boston, etc., Consol. Copper, etc., Min. Co.*, 25 Mont. 135; *Simpkins v. White*, 43 W. Va. 125.

4. **Decision by Court of Last Resort.** — *Ocean Beach Assoc. v. Brinley*, 34 N. J. Eq. 438; *American Mortg. Co. v. Hopper*, (C. C. A.) 64 Fed. Rep. 553; *Bridge v. Johnson*, 5 Wend. (N. Y.) 372. See also *Reid v. People*, 29 Colo. 333.

5. **Federal Statute Construed by State Court.** — *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 27 Colo. 1.

6. **Duty of Inferior Court to Follow** — *England. French v. Macale*, 4 Ir. Eq. 568; *Atty.-Gen. v. Windsor*, 6 Jur. N. S. 833; *Wilson v. Wilson*, 5 H. L. Cas. 40; *Topham v. Portland*, 17 W. R. 911; *Beamish v. Beamish*, 8 Jur. N. S. 770.

United States. — *Farmers' L. & T. Co. v. Detroit, etc.*, R. Co., 71 Fed. Rep. 29; *Norton v. Wheaton*, 57 Fed. Rep. 927; *Lau Ow Bew v. U. S.*, (C. C. A.) 47 Fed. Rep. 641; *Wooster v. Handy*, 21 Fed. Rep. 51; *Crooks v. Stuart*, 7 Fed. Rep. 800.

California. — *People v. McGuire*, 45 Cal. 56. *Delaware.* — *State v. Green*, 1 Penn. (Del.)

63. *District of Columbia.* — *Goodyear Dental Vulcanite Co. v. Brightwell, MacArthur & M.* (D. C.) 74.

Illinois. — *Field v. People*, 3 Ill. 79.

Indiana. — *Leard v. Leard*, 30 Ind. 171; *Julian v. Beal*, 34 Ind. 371; *Kelley v. Crawfordville*, 14 Ind. App. 81.

Iowa. — *Telford v. Barney*, 1 Greene (Iowa) 575.

Kansas. — *Missouri, etc., R. Co. v. Steinberger*, 60 Kan. 856.

Louisiana. — *State v. Judge*, 38 La. Ann. 921.

Missouri. — *Sedalia v. Gold*, 91 Mo. App. 32; *Wells v. Adams*, 88 Mo. App. 215; *Becker v. Schutte*, 85 Mo. App. 57; *Schafer v. St. Louis, etc., R. Co.*, 76 Mo. App. 131; *Seaboard Nat. Bank v. Woesten*, 76 Mo. App. 155; *White v. Wabash Western R. Co.*, 34 Mo. App. 57; *Shoenberg v. Heyer*, 91 Mo. App. 389.

New York. — *Venice v. Breed*, 65 Barb. (N. Y.) 597; *Costello v. Syracuse, etc., R. Co.*, 65 Barb. (N. Y.) 92; *Rochester, etc., R. Co. v. Clarke Nat. Bank*, 60 Barb. (N. Y.) 234; *Smith v. Lehigh Valley R. Co.*, 77 N. Y. App. Div. 43; *Mechanics', etc., Bank v. Dakin*, 8 Hun (N. Y.) 431; *Palmer v. Lawrence*, 5 N. Y. 389; *Poole v. Kermit*, 37 N. Y. Super. Ct. 114; *Hanford v. Arther*, 4 Hill (N. Y.) 271; *New-York Firemen Ins. Co. v. De Wolf*, 2 Cow. (N. Y.) 56; *Udike v. Campbell*, 4 E. D. Smith (N. Y.) 570; *White v. Chouteau*, 1 E. D. Smith (N. Y.) 493.

Ohio. — *Vattier v. Cheseldine*, 1 Ohio Dec. (Reprint) 127, 2 West. L. J. 475; *Cincinnati*

the lower courts to follow the decisions rendered by the intermediate courts of the state is not affected by the fact that the court of last resort of a sister state has rendered a contrary decision upon the same principle.¹ In *Indiana* the lower court is bound by the law as declared by the court of last resort of the state, and its decision must conform thereto unless the lower court is of the opinion that the law was wrongly declared. In such event it is provided by statute that where two of the judges of either division of the lower court are of the opinion that a ruling precedent of the supreme court is erroneous, the case, with a written statement of the reasons for the opinion, shall be transferred to the supreme court. Where this course is not followed it must be concluded that two of the judges of the lower court were not of the opinion that the precedent was erroneous.²

c. EFFECT OF CHANGE IN DECISION. — As there can be but one prevailing rule of law upon the same subject of the same kind, the proper course to be followed by the inferior courts where there has been more than one decision by the court of last resort is to adhere to the latest decision without regard to whether or not that decision is in harmony with earlier decisions of the court of last resort on the same question.³ An inferior court must make its final decree in a cause accord with the decision of the court of last resort on the question, even though this decision is rendered after the inferior court has made an interlocutory decree.⁴ But where the inferior court has rendered a final decree settling the rights of the parties in accordance with the latest decision of the court of last resort, and its judgment has been affirmed by that court, the matter will not be reopened merely because the court of last resort has changed its ruling upon the principle in a subsequent decision.⁵

Under the *Missouri Constitution* the last previous ruling of the supreme court on any question of law or equity is in all cases controlling upon the inferior courts. The inferior court must, therefore, follow the latest decision of the court of last resort even in dealing with the rights which accrued while the overruled decision was still in force.⁶

d. CONFLICT BETWEEN STATE AND FEDERAL COURTS. — An inferior state court is bound by the decisions of the court of last resort of the state unless these decisions are reversed by the federal court upon appeal from the judgment of the state court of last resort, in which event effect must be given to the federal decision in the case in which it is made; but whether the legal principles enunciated by the federal court shall be applied in other cases must be determined by the state court of last resort, especially when that court and the federal court differ as to the law.⁷

Appellate Jurisdiction of Federal Court. — The fact that the power to review a decision is vested in the Supreme Court of the United States does not abate the authority of the court of last resort in the state over the inferior state tribunal. Therefore the latter will abide by the decisions of the state courts of last resort although they are opposed to decisions of the federal court ren-

Gas Light, etc., Co. v. Bowman, 1 Handy (Ohio) 289.

Pennsylvania. — *Ascherson v. Bethlehem Iron Co.*, 2 Pa. Dist. 597; *Com. v. Geesey*, 1 Pa. Super. Ct. 502; *Wheeler v. Rice*, 8 Phila. (Pa.) 115.

Tennessee. — *Hambough v. Carney*, (Tenn. Ch. 1901) 62 S. W. Rep. 503; *Rush v. Moore*, (Tenn. Ch. 1897) 48 S. W. Rep. 90.

Texas. — *Jones v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1893) 23 S. W. Rep. 186.

Wisconsin. — *Atty.-Gen. v. Lum*, 2 Wis. 507.

1. *Decisions in Other States.* — *Head v. Smith*, (Supm. Ct.) 44 How. Pr. (N. Y.) 476.

2. *Wagner v. Carskadon*, 28 Ind. App. 573.

3. *Change in Decision.* — *Becker v. Schutte*, 85 Mo. App. 57; *Sedalia v. Gold*, 91 Mo. App. 32; *Costello v. Syracuse, etc., R. Co.*, 65 Barb. (N. Y.) 92; *Delaware County v. Foote*, 9 Hun (N. Y.) 527; *Mechanics', etc., Bank v. Dakin*, 8 Hun (N. Y.) 431; *Harbert v. Monongahela River R. Co.*, 50 W. Va. 253.

4. *Conformance of Decree of Trial Court to Opinion of Supreme Court.* — *Wooster v. Handy*, 21 Fed. Rep. 51.

5. *Harburg v. Arnold*, 87 Mo. App. 326.

6. *Sedalia v. Gold*, 91 Mo. App. 32.

7. *Conflict Between State and Federal Court.* — *Venice v. Breed*, 65 Barb. (N. Y.) 597. See also *Ascherson v. Bethlehem Iron Co.*, 2 Pa. Dist. 597.

dered upon the same principle.¹ Even where an appeal has been taken from the decision of the state court of last resort to the Supreme Court of the United States, the inferior court is not absolved from the duty of following the decision of the tribunal of last resort of the state.²

e **DECISION BY DIVIDED COURT.**—While the fact that the decision was rendered by an equally divided vote of the court of last resort may have left the law unsettled as far as that court is concerned, it does not in any degree lessen the weight of authority that properly belongs to it as a precedent when the same matter is before an inferior court.³

Number of Judges Concurring.—In some jurisdictions the authority of a decision as a precedent in subsequent cases is also dependent upon the number of judges who concur therein.⁴ It would seem that if a majority of the judges do not agree upon the principle on which the decision is based the decision is not authority.⁵

f. **DICTA.**—Inferior tribunals are bound by the conclusions of the court of last resort, and cannot treat them as dicta on the theory that the questions determined were not properly raised by the record and were not necessary to the determination of the case.⁶ The ground principle or reasoning of the court of last resort in rendering a decision is also binding as authority on the inferior tribunal.⁷ Also what is said by a supreme judicial tribunal in an advisory way as to matters of procedure in trial courts should be followed as a judicial direction.⁸ That the judgment is not conclusive and is not binding upon the inferior tribunal, does not relieve it from following the principle decided.⁹

g. **AFFIRMANCE WITHOUT OPINION.**—Where a decision of the court of last resort affirming a decision of an inferior court sustaining the validity of a rule is rendered without an opinion, it is not a proper inference that the Supreme Court considered the rule of doubtful validity, but rather that it regarded the grounds of challenge to the validity of the rule as without foundation.¹⁰

6. Decisions of Co-ordinate Courts.—To secure uniformity of decisions a court will, as a general rule, adhere to a principle laid down by a court having co-ordinate jurisdiction until it is changed by the decision of a higher court. This rule is followed by both state and federal courts.¹¹ Thus, a federal circuit court will abide by decisions made in its circuits even though it considers the decision inconsistent with principle and though it would not take the same view were the question a new one.¹²

1. Duty to Follow State Supreme Court Not Affected.—*Poole v. Kermit*, 37 N. Y. Super. Ct. 114.

2. Rochester, etc., R. Co. v. Clarke Nat. Bank, 60 Barb. (N. Y.) 234.

3. Decision by Divided Court.—*Birkhead v. Brown*, 5 Sandf. (N. Y.) 134. See also *infra*, this section, **8. Decision by Divided Court.**

4. Number Concurring.—*Gilbert v. State*, 116 Ga. 819; *Hill v. State*, 112 Ga. 400; *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56; *Whiting v. West Point*, 88 Va. 905, 29 Am. St. Rep. 750; *Bruff v. Thompson*, 31 W. Va. 16.

5. Woodruff v. Parham, 8 Wall. (U. S.) 123; *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56; *Mansfield v. Doolin*, 1 R. 4 C. L. 17; *People v. Cole*, 43 N. Y. 508.

6. Dicta.—*Gibson v. Chouteau*, 7 Mo. App. 1; *Strauss v. Jacobs*, 10 Ohio Dec. 132. See also *infra*, this section, **Dicta.**

7. Reasoning of Court.—*Cincinnati Gas Light, etc., Co. v. Bowman*, 1 Handy (Ohio) 289.

8. Suggestions as to Procedure.—*Mauch v. Hartford*, 112 Wis. 40.

9. Birdseye v. Rogers, (Tex. Civ. App. 1899) 52 S. W. Rep. 985.

10. Effect of Affirmance Without Opinion.—*Fidelity, etc., Co. v. U. S.*, 187 U. S. 315.

11. Co-ordinate Courts.—*Shreve v. Cheesman*, (C. C. A.) 69 Fed. Rep. 785; *The Madrid*, 40 Fed. Rep. 677; *The Chelmsford*, 34 Fed. Rep. 399; *Reed v. Atlantic, etc., R. Co.*, 21 Fed. Rep. 283; *Hayes v. Dayton*, 20 Fed. Rep. 690; *Wells v. Oregon R., etc., Co.*, 15 Fed. Rep. 561; *Edgar-ton v. Furst, etc., Mfg. Co.*, 9 Fed. Rep. 450; *Goodyear v. Providence Rubber Co.*, 2 Cliff. (U. S.) 351; *Goodyear Dental Vulcanite Co. v. Willis*, 1 Flipp. (U. S.) 388; *White v. The Cynthia*, 10 Reporter 232, 29 Fed. Cas. No. 17,546a. See also *In re Hallett*, 13 Ch. D. 696; *Hardenburgh v. Crary*, 50 Barb. (N. Y.) 32; *Bentley v. Goodwin*, 38 Barb. (N. Y.) 633; *Andrews v. Wallace*, 29 Barb. (N. Y.) 350; *Malan v. Simpson*, (Supm. Ct. Spec. T.) 20 How. Pr. (N. Y.) 488; *State v. Fosdick*, 1 Ohio Cir. Dec. 145, 1 Ohio Cir. Ct. 265; *Columbus, etc., R. Co. v. Celley*, 1 Ohio Cir. Dec. 146.

12. Federal Circuit Courts.—*Northern Pac. R.*

Rule Discretionary. — This rule is not, however, considered absolutely binding, but may be departed from in the discretion of the court.¹ So a court will not follow decisions of a co-ordinate court where they are evidently made through mistake, or are so clearly erroneous that the error is undoubted.² Nor has the rule any application either by its terms or the reason on which it is founded where irremediable mischief will be caused by continuing the error contained in the decision which is invoked.³ Where the decisions of a co-ordinate court are not uniform upon the general question at issue in the case, it cannot be said that any of them has become a rule of property within the principle and the doctrine of *stare decisis*. In such a case, therefore, the court will follow its own views in settling the principle.⁴

7. Decisions of Intermediate Courts. — The deliberate opinion of an intermediate court construing a statute is binding as a precedent upon the lower courts as long as the decision stands unreversed by the court pronouncing it, or by a higher court, and must be so accepted whenever the question arises in another proceeding.⁵ Where, however, the point involved is not a legal principle, but has to do with the status of a statute, and it is evident that a statutory provision has been overlooked in the consideration of the question, the decision of the intermediate court will not be deemed a precedent by an inferior court in passing upon the question.⁶ So, too, a decision of an intermediate court which is merely *pro forma* and rendered without argument or consideration, and for the avowed purpose of hastening a determination of the question by the court of last resort, will not be deemed binding upon the lower court.⁷ Where the arrangement of the lower courts and judicial divisions of a state is such that each division has a tribunal to which appeal lies, the inferior tribunals in every such division should follow the decision of its own appellate court rather than the conflicting decision of the appellate court of another division, until the question is settled by the court of last resort in the state.⁸ The decisions of the full bench will control the opinion of a single justice, unless there has been some flagrant error committed, sufficient to justify a change.⁹

8. Decision by Divided Court. — Where the judgment of the lower court is affirmed by reason of an equal division of opinion in the appellate court, the judgment, while binding in the particular case as fully as a decision rendered by a unanimous court, is not binding as a precedent in subsequent cases.

Co. v. Sanders, 47 Fed. Rep. 604; *Celluloid Mfg. Co. v. Zylonite Brush, etc., Co.*, 27 Fed. Rep. 291.

1. Rule Not Arbitrary. — *Northern Pac. R. Co. v. Sanders*, 47 Fed. Rep. 604; *Bentley v. Goodwin*, 38 Barb. (N. Y.) 633; *Andrews v. Wallace*, 29 Barb. (N. Y.) 350; *Malon v. Simpson*, (Supm. Ct. Spec. T.) 20 How. Pr. (N. Y.) 488; *State v. Fosdick*, 1 Ohio Cir. Dec. 145, 1 Ohio Cir. Ct. 265.

2. *Malon v. Simpson*, (Supm. Ct. Spec. T.) 20 How. Pr. (N. Y.) 488; *Bentley v. Goodwin*, 38 Barb. (N. Y.) 633.

3. Avoiding Irremediable Mischief. — *Many v. Sizer*, 1 Fish. Pat. Cas. 31, 16 Fed. Cas. No. 9,057.

4. Decisions of Co-ordinate Courts Not Uniform. — *The Madrid*, 40 Fed. Rep. 677. See also *American Mortg. Co. v. Hopper*, (C. C. A.) 64 Fed. Rep. 553.

5. Decisions of Intermediate Courts. — *Flaucher v. Camden*, 56 N. J. L. 244; *Head v. Smith*, (Supm. Ct.) 44 How. Pr. (N. Y.) 476; *Burt v. Powis*, (Supm. Ct. Gen. T.) 16 How. Pr. (N. Y.) 289; *Malon v. Simpson*, (Supm. Ct. Spec. T.) 20 How. Pr. (N. Y.) 488; *U. S. Trust Co.*

v. Black, (Supm. Ct. Spec. T.) 9 Misc. (N. Y.) 653; *Western Nat. Bank v. Faber*, (Supm. Ct. Tr. T.) 29 Misc. (N. Y.) 467.

Decisions of General Term of New York Supreme Court on Questions of Practice as Authority. — *Burt v. Powis*, (Supm. Ct. Gen. T.) 16 How. Pr. (N. Y.) 289.

Decision of Federal Court of Another Circuit as Precedent. — See the title UNITED STATES COURTS.

6. *Overheiser v. Morehouse*, (Supm. Ct. Spec. T.) 16 Abb. N. Cas. (N. Y.) 208.

7. *Matter of McGinness*, (Surrogate Ct.) 13 Misc. (N. Y.) 714.

8. *Jones v. New York, etc., R. Co.*, 29 Barb. (N. Y.) 633; *Malon v. Simpson*, (Supm. Ct. Spec. T.) 20 How. Pr. (N. Y.) 488; *Nichols v. Fanning*, (County Ct.) 20 Misc. (N. Y.) 73.

9. Decisions by Full Bench. — *Bentley v. Goodwin*, 38 Barb. (N. Y.) 640; *Loring v. U. S. Vulcanized Gutta Percha Belting, etc., Co.*, 30 Barb. (N. Y.) 646; *Adams v. Bush*, (Supm. Ct. Gen. T.) 4 Abb. Pr. N. S. (N. Y.) 118; *People v. Brooklyn*, 9 Barb. (N. Y.) 544; *Harris v. Clark*, 2 Barb. (N. Y.) 101.

When the same question arises in a subsequent case between other parties it is treated as an open one and the former decision is not to be invoked as *stare decisis*.¹ When an appeal presents two or more questions, and the members of the court are equally divided upon one or more of them, and the judgment is reversed upon other points where there is agreement, the opinion of the judges who agree with the court below in regard to the questions as to which an equal division exists, becomes the law of the case as to such questions.²

9. Where Precedent Has Been Approved by Legislature. — The courts are extremely reluctant to overturn a decision construing a statute when the construction has in any manner received the sanction of the legislature.³ Where the amendment of the statute leaves unchanged a section of the statute which has been construed by the court of last resort in the state, it will be presumed that the legislature in the new law intended to adopt the construction placed upon this section by the court.⁴ Also a decision will be adhered to where the legislature, in revising the statute laws of the state, has not seen fit to change the statute construed.⁵

10. Single Decisions — *a.* IN GENERAL. — Distinction has also been drawn in the application of the doctrine of *stare decisis* where only one decision is relied upon as establishing the doctrine. For a variety of reasons a series of decisions will be given more weight than a single decision. There is less likelihood of error; any points, decisions, or statutes overlooked in the one may be considered in subsequent cases; the probability of an injurious effect on property rights is less where there is a single decision than where there is a series.⁶

Nature of Question Decided. — When a question involving important public or private rights extending through all coming time has been passed upon on a single occasion, and the decision can in no just sense be said to have been acquiesced in, it is not only the right but the duty of the courts, when properly called upon, to re-examine the questions involved and again subject them to judicial scrutiny.⁷ Nor is the doctrine applied to prevent the reversing or overruling of a single decision upon a disputed or doubtful point,⁸ or of one

1. Decision by Divided Court. — *Hanifen v. Armitage*, 117 Fed. Rep. 845; *Etting v. U. S. Bank*, 11 Wheat. (U. S.) 5; *Hopkins v. McCann*, 19 Ill. 113; *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56; *Morse v. Gould*, 11 N. Y. 281, 62 Am. Dec. 103; *People v. New York*, 25 Wend. (N. Y.) 252, 35 Am. Dec. 669; *Bridge v. Johnson*, 5 Wend. (N. Y.) 342; *Durham v. Richmond*, etc., R. Co., 113 N. Car. 240; *Griel's Estate*, 171 Pa. St. 412; *Rider v. Snow*, 20 Can. Sup. Ct. 12. See also the titles DIVISION OF OPINION, 7 ENCYC. OF PL. AND PR. 44, and RES JUDICATA, vol. 24 of this work, p. 715.

Under South Carolina Constitution, Art. 5, § 12 a judgment affirmed by an equal division of the Supreme Court is binding authority in all similar subsequent cases until overruled. *Florence v. Berry*, 62 S. Car. 469.

2. Smith v. Brannin, 79 Ky. 114.

3. Legislative Ratification. — *Grubbs v. State*, 24 Ind. 296; *Fisher v. Horicon Iron, etc., Co.*, 10 Wis. 355.

4. Hall v. White, 94 Tex. 452.

5. Flannery v. Givens, (Ky. 1899) 52 S. W. Rep. 962.

6. Single Decisions — *California*. — *Hihn v. Courtis*, 31 Cal. 398; *Duff v. Fisher*, 15 Cal. 376.

Colorado. — *Harvey v. Travelers Ins. Co.*, 18 Colo. 354.

Illinois. — *Stevens v. Pratt*, 101 Ill. 206;

Mallett v. Butcher, 41 Ill. 382; *Hopkins v. McCann*, 19 Ill. 113; *Frink v. Darst*, 14 Ill. 304, 58 Am. Dec. 575.

Indiana. — *Jackson County v. State*, 155 Ind. 604.

Iowa. — *State v. Silvers*, 82 Iowa 714.

Kentucky. — *Montgomery County Fiscal Ct. v. Trimble*, 104 Ky. 629.

Louisiana. — *Lagrange v. Barre*, 11 Rob. (La.) 302; *Griffin v. His Creditors*, 6 Rob. (La.) 225; *Smith v. Smith*, 13 La. 441.

Missouri. — *Mountain Grove Bank v. Douglas County*, 146 Mo. 42; *Sedalia v. Gold*, 91 Mo. App. 32.

New York. — *Leavitt v. Blatchford*, 17 N. Y. 533; *Butler v. Van Wyck*, 1 Hill (N. Y.) 462; *Woolsey v. Judd*, 4 Duer (N. Y.) 379.

Pennsylvania. — *Callender v. Keystone Mut. L. Ins. Co.*, 23 Pa. St. 474.

Texas. — *Groesbeck v. Golden*, (Tex. 1887) 7 S. W. Rep. 363.

Utah. — *Kimball v. Grantsville*, 19 Utah 368.

Virginia. — *Postal Tel. Cable Co. v. Farmville, etc.*, R. Co., 96 Va. 661.

Wisconsin. — *Pratt v. Brown*, 3 Wis. 603.

7. Continuing Interests. — *Montgomery County Fiscal Ct. v. Trimble*, 104 Ky. 629; *Kimball v. Grantsville*, 19 Utah 368; *Pratt v. Brown*, 3 Wis. 603.

8. Hopkins v. McCann, 19 Ill. 113.

in which the point in controversy does not appear to have been thoroughly investigated,¹ or to a decision creating a rule of law for a case which has not been subsequently applied to other cases,² or to a single judgment followed in no other case, rendered by a bare majority of the court, and construing the statute in a manner which is palpably erroneous and contrary to public policy as tending to foster and promote a monopoly,³ or where the decision was made without notice of the statute, and, in effect, sets the statute aside.⁴

b. WHERE FORMER PRECEDENT HAS BEEN OVERRULED.—It is to be considered, in determining the weight to be given a single decision, whether or not it is a reversal or overruling of any prior case. A case simply establishing a point, without in any way interfering with or contradicting any previous case, would have more weight, of course, than one which was in conflict with previous decisions or dicta.⁵ So where the points involved were decided in opposition to well-established decisions which should have governed, and injustice or hardship will result from adhering to the decision, the courts will not apply the rule of *stare decisis*.⁶ Or when there has been an erroneous decision in one case, and the doctrine of all the cases which have preceded and followed it is contrary, in reference to the matters decided, to the doctrine of that case, it will not be upheld as *stare decisis* although it may never have been expressly overruled.⁷

c. SINGLE DECISION AS RULE OF PROPERTY.—Even a single adjudication of a court of last resort upon a matter presented for its determination is not to be questioned or disregarded except for the most cogent reasons and only in a case where it is plain that the judgment was the result of a mistaken view of the condition of the law applicable to the question.⁸ And it will not be disregarded even then when the decision has been so long acquiesced in and acted upon that a return to the proper principle would disastrously affect existing interests,⁹ or where the statute construed has been afterwards re-enacted or continued in force without any change.¹⁰

11. Change in Personnel of Court.—A change in the personnel¹¹ or organization¹² of the court affords no ground for the reopening of a question which has been once settled authoritatively by it.

12. Dicta—*a. IN GENERAL.*—An expression in an opinion on a matter not necessary to the ascertainment of the right or title in question between the parties does not constitute a part of the decision, but is a dictum and not to be applied under the rule of *stare decisis*.¹³ When a judge has thought it

1. *Lagrange v. Barre*, 11 Rob. (La.) 302.

2. *McDonald v. Davey*, 22 Wash. 366.

3. *Postal Tel. Cable Co. v. Farmville, etc.*, R. Co., 96 Va. 661.

4. *Duff v. Fisher*, 15 Cal. 376.

5. *Single Decision Reversing Precedent.*—*Oglesby v. Attrill*, 14 Fed. Rep. 214; *Young v. Downcy*, 150 Mo. 317; *Levy v. Hitsche*, 40 La. Ann. 500; *People v. Brooklyn*, 9 Barb. (N. Y.) 543; *Groesbeck v. Golden*, (Tex. 1887) 7 S. W. Rep. 363.

6. *Callender v. Keystone Mut. L. Ins. Co.*, 23 Pa. St. 471; *Kimball v. Grantsville*, 19 Utah 368.

7. *Groesbeck v. Golden*, (Tex. 1887) 7 S. W. Rep. 362.

8. *Rule of Property.*—*Wilson v. Ward Lumber Co.*, 67 Fed. Rep. 674; *Verdin v. St. Louis*, 131 Mo. 26; *State v. Taylor*, (N. J. 1902) 53 Atl. Rep. 392; *Rumsey v. New York, etc.*, R. Co., 133 N. Y. 79, 28 Am. St. Rep. 600.

9. *Baker v. Tucker*, 14 Jur. 771; *Long v. Long*, 79 Mo. 644; *State v. Taylor*, (N. J. 1902) 53 Atl. Rep. 392.

10. *Handlin v. Morgan County*, 57 Mo. 114.

11. *Change in Personnel.*—*Louis Sniders' Sons Co. v. Armstrong*, 37 Fed. Rep. 18; *Norton v. Taxing Dist.*, 36 Fed. Rep. 99; *Morgan v. Parker*, 1 Dana (Ky.) 444; *McCutcheon v. Homer*, 43 Mich. 483, 38 Am. Rep. 212; *Olcott v. Tioga R. Co.*, 26 Barb. (N. Y.) 147; *Spicer v. Norton*, 13 Barb. (N. Y.) 542; *Lewis v. Wilson*, 1 McCord Eq. (S. Car.) 210.

12. *Davis v. Superior Ct.*, 63 Cal. 581; *Doolittle v. Shelton*, 1 Greene (Iowa) 272; *Hammond v. Ridgely*, 5 Har. & J. (Md.) 245, 9 Am. Dec. 522; *Lovett v. German Reformed Church*, 12 Barb. (N. Y.) 67; *Parker v. Pomeroy*, 2 Wis. 112.

13. *Dicta—England.*—*Ex p. Cox*, 20 Q. B. D. 1.

United States.—*Cross v. Burke*, 146 U. S. 86; *Werner v. King*, 96 U. S. 218; *Carroll v. Carroll*, 16 How. (U. S.) 287; *Patillo v. Allen-West Commission Co.*, (C. C. A.) 108 Fed. Rep. 723.

California.—*Mulford v. Estudillo*, 32 Cal. 131; *Trinity County v. McCammon*, 25 Cal. 117.

Florida.—*Hart v. Stribling*, 25 Fla. 435.

necessary for the purposes of a case to make an examination of the practice of his court and to state this practice, such a statement, if not necessary for the actual decision of the case and therefore not binding as a decision, is, nevertheless, entitled to great weight.¹ By other authorities, however, the line is not so strictly drawn, and all that is deemed necessary to render the decision of a court of last resort authoritative on any point decided is to show that there was an application of the judicial mind to the precise question adjudged.² According to this view, the judgment of a court is authority upon all propositions assumed by it to be within the issues, and all the questions presented and considered and deliberately decided leading up to the final conclusion are considered to be as effectually passed upon as the ultimate question solved.³ Nothing is *obiter*, strictly speaking, except mere statements or observations upon matters not within the questions presented.⁴

b. INTERPRETATION OF LANGUAGE OF COURT — (1) In General. — The language used in the opinions of the court must be construed in the light of the circumstances connected with each case. Its influence and weight as a precedent are also largely dependent upon them. The language in argument or findings may have a restricted or enlarged interpretation by reason of its connection with a specific statement of facts.⁵ Also the opinion and decision of a court must be read and examined as a whole in the light of the facts upon which it is based, and not applied by picking out particular parts or sentences. The facts are the foundation of the entire structure, which cannot with safety be used without reference to the facts.⁶ The decision is only an authority for what it actually decides, and cannot be quoted for a proposition which may seem to follow logically from it.⁷

(2) *General Expressions.* — General expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented. The reason is obvious. The question actually before the court is investigated with care and considered in its full extent; other principles, which may serve to illustrate, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.⁸

Illinois. — *Stow v. People*, 25 Ill. 81.

Indiana. — *Lucas v. Tippecanoe County*, 44 Ind. 524.

Iowa. — *State v. Brookhart*, 113 Iowa 250; *Stern v. Fountain*, 112 Iowa 96.

Louisiana. — *State v. Rohfrisch*, 12 La. Ann. 382.

Michigan. — *Ellsworth v. Hall*, 48 Mich. 407.

Mississippi. — *Adams v. Yazoo, etc.*, R. Co., 77 Miss. 194; *Menken v. Frank*, 58 Miss. 283.

Missouri. — *St. Louis, etc.*, R. Co. v. *Fowler*, 142 Mo. 670.

Nevada. — *State v. Clarke*, 3 Nev. 566.

New York. — *Colonial City Traction Co. v. Kingston City R. Co.*, 154 N. Y. 493; *Stokes v. Stokes*, 155 N. Y. 581; *Ryan v. New York*, 78 N. Y. App. Div. 134; *Matter of Klock*, 30 N. Y. App. Div. 24; *People v. Leubischer*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 495.

Ohio. — *State v. Baughman*, 38 Ohio St. 455.

Virginia. — *Lewis v. Thornton*, 6 Munf. (Va.) 87.

1. *Statement of Rules of Practice.* — *Ex p. Cox*, 20 Q. B. D. 1.

2. *Carstairs v. Cochran*, 95 Md. 488; *Michael v. Morey*, 26 Md. 261, 90 Am. Dec. 106; *Alexander v. Worthington*, 5 Md. 471.

3. *School Dist. No. 28 v. Stocker*, 42 N. J.

L. 115; *Brown v. Chicago, etc.*, R. Co., 102 Wis. 137.

4. *Brown v. Chicago, etc.*, R. Co., 102 Wis. 137; *Buchner v. Chicago, etc.*, R. Co., 60 Wis. 264.

5. *Interpretation of Language of Court.* — *People v. Winkler*, 9 Cal. 236; *Miller v. Marigny*, 10 La. Ann. 338; *Holcomb v. Bonnell*, 32 Mich. 6.

6. *Larzelere v. Starkweather*, 38 Mich. 96; *Pass v. McRea*, 36 Miss. 148.

7. *Extent of Authority.* — *Quinn v. Leathem*, (1901) A. C. 495.

8. *General Expressions — England.* — *Quinn v. Leathem*, (1901) A. C. 495; *Revell v. Hussey*, 2 Ball & B. 286; *Richardson v. Mellish*, 2 Bing. 248, 9 E. C. L. 404.

United States. — *U. S. v. Wong Kim Ark*, 169 U. S. 649; *Pollock v. Farmers' L. & T. Co.*, 157 U. S. 429; *Northern Bank v. Porter Tp.*, 110 U. S. 608; *Carroll v. Carroll*, 16 How. (U. S.) 275; *Cohen v. Virginia*, 6 Wheat. (U. S.) 264; *King v. Pomeroy*, (C. C. A.) 121 Fed. Rep. 287; *Matz v. Chicago, etc.*, R. Co., 85 Fed. Rep. 180; *U. S. v. Addyston Pipe, etc., Co.*, (C. C. A.) 85 Fed. Rep. 271; *King v. McLeary Asylum*, (C. C. A.) 64 Fed. Rep. 331; *Northern Pac. R. Co. v. Sanders*, 46 Fed. Rep. 239; *Fidelity Trust Co. v. Gill Car Co.*, 25 Fed. Rep. 737; *Hovey v.*

c. **REASONING AND ILLUSTRATIONS IN OPINION.** — The reasoning, references, illustrations, and analogies contained in the opinion are not precedents.¹ While the opinion announces the decision of the court, it does not follow that each member has arrived at his conclusion by the same reasoning or bases it on the same principles.²

d. **QUESTIONS NOT ARGUED.** — The weight of a judicial decision may depend in a considerable degree upon whether or not the point ruled upon was urged and discussed before the court.³ Where it is the settled practice of a court that a judgment will not be reversed for errors not argued in the briefs of counsel, a decision affirming a judgment does not become a precedent as to any question not argued or expressly presented to the court, and left unnoticed in the opinion, although it might have been raised, and, if raised, have been decisive of the case.⁴ Even though a question may not have been fully argued, yet it cannot be said that the decision thereon is *obiter dictum* where the question was directly involved in the issues and the mind of the court was directly drawn to and distinctly expressed upon the subject.⁵ An inferior court cannot decide adversely to a decision of a court of last resort and send the case up to that court again upon the ground that in the former decision of the court of last resort certain points were not sufficiently argued or noticed by the justice delivering the opinion there.⁶ It is, however, equally true that where there has been a long series of uniform decisions assuming the same principle and reaching the same conclusion upon facts which are alike and in which a certain point is involved, the fact that the point was not raised in any of these cases by counsel or stated by the court is support for the view that the point has no foundation.⁷

Presumption. — If a point is essential to the decision rendered, it will be pre-

Home Ins. Co., 12 Fed. Cas. No. 6,743; Hudson v. Schwab, 18 Nat. Bankr. Reg. 480, 12 Fed. Cas. No. 6,835.

California. — Matter of Johnson, 98 Cal. 531; Norris v. Moody, 84 Cal. 143; *Ex p.* Young Ah Gow, 73 Cal. 438; Hart v. Burnett, 15 Cal. 598; Uhlfelder v. Levy, 9 Cal. 607.

Colorado. — Olin v. Denver, etc., R. Co., 25 Colo. 177; Wadsworth v. Union Pac. R. Co., 18 Colo. 600, 36 Am. St. Rep. 309.

Illinois. — Mayer v. Erhardt, 88 Ill. 452.

Indiana. — Lake Shore, etc., R. Co. v. Wilson, 11 Ind. App. 488.

Kansas. — Pacific Express Co. v. Foley, 46 Kan. 457, 26 Am. St. Rep. 107.

Louisiana. — De Ende v. Moore, 2 Mart. N. S. (La.) 336.

Maine. — Haines v. Lewiston, 84 Me., 18; Decoster v. Wing, 76 Me. 450.

Maryland. — Alexander v. Worthington, 5 Md. 471.

Massachusetts. — Blanchard v. Russell, 13 Mass. 7.

Michigan. — Hastings Nat. Bank v. Hibbard, 48 Mich. 457; Holcomb v. Bonnell, 32 Mich. 6.

Mississippi. — Adams v. Yazoo, etc., R. Co., 77 Miss. 194.

Missouri. — St. Louis Gas Light Co. v. St. Louis Gas, etc., Co., 16 Mo. App. 52.

Montana. — King v. Amy, etc., Consol. Min. Co., 9 Mont. 543.

New Mexico. — Coler v. Santa Fe County, 6 N. Mex. 88.

New York. — People v. Police Com'rs, 174 N. Y. 450; People v. State Board of Tax Com'rs, 174 N. Y. 417; Southard v. Curley, 134 N. Y. 148, 30 Am. St. Rep. 642; Colonial City Traction Co. v. Kingston City R. Co., 154 N. Y. 493;

Stokes v. Stokes, 155 N. Y. 581; People v. Leubischer, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 495; Matter of Klock, 30 N. Y. App. Div. 24.

Pennsylvania. — Frants v. Brown, 17 S. & R. (Pa.) 287.

Texas. — Warren v. Wallis, 42 Tex. 472.

1. **Reasons and Illustrations.** — Lucas v. Tippecanoe County, 44 Ind. 524; Brown v. Coon, 36 Ill. 243, 85 Am. Dec. 402; Davis v. Millaudon, 17 La. Ann. 97, 87 Am. Dec. 517; Alexander v. Worthington, 5 Md. 471; People v. Leubischer, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 495; Louisville, etc., R. Co. v. Davidson County Ct., 1 Sneed (Tenn.) 695, 62 Am. Dec. 424; Brown v. Chicago, etc., R. Co., 102 Wis. 137. See also Atty.-Gen. v. Windsor, 6 Jur. N. S. 833.

2. Lucas v. Tippecanoe County, 44 Ind. 524; Larzelere v. Starkweather, 38 Mich. 96; Louisville, etc., R. Co. v. Davidson County Ct., 1 Sneed (Tenn.) 695, 62 Am. Dec. 424.

3. **Points Not Argued.** — People v. Brooklyn, 9 Barb. (N. Y.) 544; Harris v. Clark, 2 Barb. (N. Y.) 94; Butler v. Van Wyck, 1 Hill (N. Y.) 438, *dissenting* opinion of Bronson, J. See also Bini v. Smith, 161 N. Y. 120; Bratsch v. People, 195 Ill. 165; Molony v. Dows, (C. Pl. Tr. T.) 8 Abb. Pr. (N. Y.) 316.

4. Larson v. First Nat. Bank, (Neb. 1902) 92 N. W. Rep. 729.

5. **Question Directly Raised.** — Michael v. Morey, 26 Md. 239, 90 Am. Dec. 106.

6. **Refusal to Follow Decision as Not Well Considered.** — New York, etc., R. Co. v. Schuyler, (Supm. Ct. Spec. T.) 8 Abb. Pr. (N. Y.) 239.

7. Webb v. Rome, etc., R. Co., 49 N. Y. 420, 10 Am. Rep. 389.

sumed that it was duly considered, and that all that could be urged for or against it was presented to the court; but if it appears from the report of the case that it was not taken or inquired into at all there is no ground for this presumption, and the authority of the case is proportionately weakened.¹

e. WHERE SEVERAL POINTS ARE DECIDED. — Where the record presents two or more points, any one of which, if sustained, would determine the case, and the court decides them all, the decision upon any one of the points cannot be regarded as *obiter*.² Nor can it be said that a case is not authority on a point because, though that point was properly presented and decided in the regular course of the consideration of the cause, another point was found in the end which disposed of the whole matter. The decision on such a question is as much a part of the judgment of the court as is that on any other of the matters on which the case as a whole depends.³ The fact that the decision might have been placed upon a different ground existing in the case does not render a question expressly decided by the court a dictum.⁴ Where a rehearing is granted on one ground but refused on another, the original decision as to the latter is binding as a precedent.⁵

Subordinate Propositions. — A proposition assumed or decided by the court to be true, and which must be so assumed or decided in order to establish another proposition which expresses the conclusion of the court, is as effectually passed upon and settled in that court as the very matter directly decided.⁶ When the court finds it necessary to announce a principle to meet the contentions of one of the parties and to constitute the basis of one of the stages by which it reaches the opposite conclusion, this principle is not to be considered a dictum. The manner in which it is applied to the case does not destroy its weight as an authoritative exposition of the law upon which the adjudication rests.⁷

f. DICTA AS RULE OF PROPERTY. — Dicta, while not binding in themselves, may become finally a part of the recognized law of the land. Even though they have not the merit of having regarded legal principles accurately, yet, having by frequent repetition and approval obtained a familiar place in the current decisions, they may ultimately be clothed with the same, or substantially the same, strength and importance attached to precedents.⁸ So where there is an accepted dictum of the law, which has long formed the basis of contracts and upon the faith of which rights have vested, the courts will decline to overrule it.⁹ It has been said that some of the most sacred canons of the common law had their origin in the mere dicta of some wise judges. To be valuable, however, they must, of course, be right.¹⁰

IV. STATE DECISIONS AS PRECEDENTS IN FEDERAL COURTS. — The question how far the decisions of state courts are binding as precedents upon the federal courts will be discussed in another title in this work.¹¹

1. Presumption as to Points Essential to Decision. — *Molony v. Dows*, (C. Pl. Tr. T.) 8 Abb. Pr. (N. Y.) 316.

2. Decision on Several Points. — *Hawes v. Contra Costa Water Co.*, 5 Sawy. (U. S.) 287; *Starr v. Stark*, 2 Sawy. (U. S.) 639; *Ott v. Lake Shore, etc.*, R. Co., 10 Ohio Cir. Dec. 85; *Porter v. Lee*, 88 Tenn. 782; *Bates v. Taylor*, 87 Tenn. 325. See also *State v. Brookhart*, 113 Iowa 250.

3. *Railroad Cos. v. Schutte*, 103 U. S. 143; *Carstairs v. Cochran*, 95 Md. 488.

4. *Alexander v. Worthington*, 5 Md. 471; *Clark v. Thomas*, 4 Heisk. (Tenn.) 419.

5. *Mayo v. Washington*, 122 N. Car. 5.

6. Subordinate Propositions. — *School Dist. No. 28 v. Stocker*, 42 N. J. L. 115.

7. Principle Announced to Meet Contention of Party. — *Allen v. Flood*, (1898) A. C. 1; *Kirby v. Boyette*, 118 N. Car. 244.

8. Dicta as Rule of Property. — *Ocean Beach Assoc. v. Brinley*, 34 N. J. Eq. 439; *Kirby v. Boyette*, 118 N. Car. 244; *Lewis v. Thornton*, 6 Munf. (Va.) 87. See also *Menken v. Frank*, 58 Miss. 283.

Effect Given to Dictum of Foreign Court under Agreed Statement. — *Haven v. Haven*, 181 Mass. 573.

9. Dictum or Basis of Contracts. — *In re Rosher*, 26 Ch. D. 801; *Kirby v. Boyette*, 118 N. Car. 244.

10. Dicta as Origin of Rules of Law. — *Buchner v. Chicago, etc.*, R. Co., 60 Wis. 264.

11. See the title UNITED STATES COURTS.

V. FEDERAL DECISIONS AS PRECEDENTS IN STATE COURTS — 1. Construction of Federal Constitution and Statutes — a. FEDERAL CONSTITUTION — (1) In General. — On all questions which involve the construction of the Constitution of the United States, the Supreme Court of the United States is the ultimate tribunal. Its decision on such questions cannot be withstood or disregarded by the state court without a dereliction of duty and a violation of the cardinal principles of the federal government. And when a construction is given by this tribunal to any particular part or paragraph of the Federal Constitution, as applied to a particular subject-matter, such decision is of paramount authority and is binding upon the state courts in all cases in which the same provision of the Federal Constitution is to be applied to the same or similar subject-matter.¹ The doctrine of *stare decisis*, when based on the decisions of a state court in a question involving the construction of the Federal Constitution, must, therefore, yield to the determination of such a question by the United States Supreme Court.² Nor can the state courts, by indirect measures, overrule such a decision of the Supreme Court of the United States. Thus, the state courts cannot nullify the effect of a federal decision that certain bonds in the hands of innocent purchasers or holders for value are valid by requiring resident holders of such bonds to deliver them up to be canceled.³

Comity. — It has been stated that this recognition is based on comity between the federal Supreme Court and the state courts, under which the federal courts accept as binding upon them the construction placed by the supreme tribunals of the several states upon their own constitutions and statutes, and that, *per contra*, it is justly due that the state courts should pay equal regard to the adjudications of the federal Supreme Court upon the Federal Constitution. The states are interested in the preservation of this comity, as, while the federal Supreme Court, in the exercise of its appellate jurisdiction, can enforce its construction of the federal constitution and laws, even in defiance of the state courts, the latter have only the principle of comity to depend on in order to secure the performance of the correlative duty of the federal courts.⁴

(2) Constitutionality of Federal Statutes. — The decision of the United States Supreme Court as to the constitutionality or unconstitutionality of a federal statute is therefore binding upon the state courts and must be followed by them.⁵

1. Construction of Federal Constitution. — California. — *Ferris v. Coover*, 11 Cal. 175.

Connecticut. — *Hempstead v. Reed*, 6 Conn. 480.

Delaware. — *Caldwell v. Armour*, 1 Penn. (Del.) 545.

Illinois. — *McInhill v. Odell*, 62 Ill. 169.

Indiana. — *Indianapolis v. Navin*, 151 Ind. 139; *Churchman v. Martin*, 54 Ind. 380.

Kentucky. — *Eubank v. Poston*, 5 T. B. Mon. (Ky.) 285; *Bodley v. Gaither*, 3 T. B. Mon. (Ky.) 57; *U. S. Bank v. Norton*, 3 A. K. Marsh. (Ky.) 422.

Louisiana. — *Laughlin v. Louisiana, etc.*, Ice Co., 35 La. Ann. 1184; *Saloy v. New Orleans*, 33 La. Ann. 79.

Maryland. — *Baltimore v. Baltimore, etc.*, R. Co., 6 Gill (Md.) 288, 48 Am. Dec. 531.

Massachusetts. — *Mooney v. Hinds*, 160 Mass. 469; *Eliot v. McCormick*, 144 Mass. 10.

Michigan. — *Caldwell v. Gale*, 11 Mich. 77.

Mississippi. — *Bailey v. Fitz-Gerald*, 56 Miss. 578.

Missouri. — *Paddock v. Missouri Pac. R. Co.*, 155 Mo. 524.

Nebraska. — *State v. Sioux City*, 46 Neb. 682; *Bressler v. Wayne County*, 25 Neb. 468; *Franklin v. Kelley*, 2 Neb. 79.

New Hampshire. — *Newmarket Bank v. Butler*, 45 N. H. 236.

New York. — *Harris v. Jex*, 55 N. Y. 421, 14 Am. Rep. 285; *Towle v. Forney*, 14 N. Y. 423; *Hicks v. Hotchkiss*, 7 Johns. Ch. (N. Y.) 297.

Ohio. — *Lee v. Citizens' Bank*, 5 Ohio Dec. (Reprint) 21, 1 Am. L. Rec. 385.

Pennsylvania. — *Com. v. Lewis*, 6 Binn. (Pa.) 266; *Lebanon Bank v. Mangan*, 28 Pa. St. 452.

Texas. — *Osborne v. Barnett*, 1 Tex. App. Civ. Cas., § 129; *Kipper v. State*, (Tex. Crim. 1901) 62 S. W. Rep. 420.

Contrary View. — In *Padelford v. Savannah*, 14 Ga. 438, the binding authority of the construction placed by the Supreme Court of the United States upon the Federal Constitution was denied, the court holding that the state powers were co-equal and co-ordinate with those of the Supreme Court of the United States and that the latter could not make for it a precedent.

2. *State v. Ardoin*, 51 La. Ann. 169.

3. **Supreme Court of United States Not to Be Overruled by Indirection.** — *Dallas County v. Merrill*, 77 Mo. 573.

4. **Comity.** — *Saloy v. New Orleans*, 33 La. Ann. 79.

5. **Constitutionality of Federal Statute.** — *Black v. Lusk*, 69 Ill. 70; *Com. v. Morrison*, 2 A. K.

(3) *Constitutionality of State Statutes under Federal Constitution.* — So, also, the decision of the Supreme Court of the United States upon the constitutionality of the provisions of state constitutions or statutes under the Federal Constitution is binding upon the state courts.¹ Thus the decision of the Supreme Court of the United States that state decisions holding a state statute unconstitutional under the Federal Constitution had not become a rule of property, and that the statute is not unconstitutional, is binding on the state court.²

b. *FEDERAL STATUTES AND TREATIES.* — In determining the construction to be placed upon statutes enacted by Congress,³ and treaties of the United States,⁴ the Supreme Court of the United States is the highest and most authoritative tribunal, and decisions of that court upon the meaning of these statutes and treaties must override those of the state courts upon the same subject. This is true even though the state court has placed a different construction upon similar provisions of the state statutes and constitutions.⁵

Illustrations. — So the decisions of the Supreme Court of the United States are authoritative and binding upon the state courts in regard to any question affecting the construction of a grant of land made by the United States;⁶ the construction placed by it on statutes providing for the alienation of the public domain;⁷ its decisions upon questions concerning the jurisdiction of the federal judiciary;⁸ its determination upon questions concerning the legal tender of the United States,⁹ and as to questions arising under the federal national banking

Marsh. (Ky.) 75; *Sims's Case*, 7 Cush. (Mass.) 285; *Baldwin v. Baker*, 121 Mich. 259; *Barringer v. Fisher*, 45 Miss. 200; *Stockton v. Dundee Mfg. Co.*, 22 N. J. Eq. 56; *Keene v. Mould*, 16 Ohio 12; *Ex p. Bushnell*, 9 Ohio St. 77; *Burwell v. Burgess*, 32 Gratt. (Va.) 472.

1. *Constitutionality of State Statute.* — *Cook v. Moffat*, 5 How. (U. S.) 308; *Caldwell v. Armour*, 1 Penn. (Del.) 545; *Breitung v. Chicago*, 92 Ill. App. 118; *Smoot v. Lafferty*, 7 Ill. 383; *McClure v. Owen*, 26 Iowa 243; *State v. Fullerton*, 7 Rob. (La.) 219; *State v. Intoxicating Liquors*, 95 Me. 140; *Paddock v. Missouri Pac. R. Co.*, 155 Mo. 524; *Cochran v. Darcy*, 5 S. Car. 125; *State v. Hernando Ins. Co.*, 97 Tenn. 85; *Kipper v. State*, (Tex. Crim. 1901) 62 S. W. Rep. 420. See also *Ballard v. Wiltshire*, 28 Ind. 341.

2. *State v. Hernando Ins. Co.*, 97 Tenn. 85.

3. *Federal Statutes — California.* — *Ferris v. Coover*, 11 Cal. 175.

Georgia. — *Clews v. Mumford*, 78 Ga. 476.

Illinois. — *U. S. Express Co. v. People*, 195 Ill. 155; *Penn v. Bornman*, 102 Ill. 523; *McGoon v. Shirk*, 54 Ill. 408, 5 Am. Rep. 122; *Lender v. Kidder*, 23 Ill. 49.

Indiana. — *Indianapolis v. Navin*, 151 Ind. 139; *Richmond First Nat. Bank v. Turner*, 154 Ind. 456; *Wasson v. Indianapolis First Nat. Bank*, 107 Ind. 206; *Churchman v. Martin*, 54 Ind. 380.

Kentucky. — *Bodley v. Gaither*, 3 T. B. Mon. (Ky.) 57; *Moore v. Allen*, 3 J. J. Marsh. (Ky.) 612; *U. S. Bank v. Norton*, 3 A. K. Marsh. (Ky.) 422.

Michigan. — *Caldwell v. Gale*, 11 Mich. 77.

Mississippi. — *Bailey v. Fitz-Gerald*, 56 Miss. 578; *Deans v. McLendon*, 30 Miss. 343.

Missouri. — *Haseltine v. Central Nat. Bank*, 155 Mo. 66; *Central Nat. Bank v. Haseltine*, 155 Mo. 58.

Nebraska. — *Bressler v. Wayne County*, 25 Neb. 468.

New Jersey. — *Stockton v. Dundee Mfg. Co.*, 22 N. J. Eq. 56.

New York. — *Harris v. Jex*, 55 N. Y. 421, 14 Am. Rep. 285; *Towle v. Forney*, 14 N. Y. 423; *American Ins. Co. v. Fisk*, 1 Paige (N. Y.) 90.

Ohio. — *Trustees v. Cuppett*, 52 Ohio St. 567; *Wellington First Nat. Bank v. Chapman*, 4 Ohio Cir. Dec. 252; *In re Brophy*, 4 Ohio Dec. 391.

Pennsylvania. — *Com. v. Lewis*, 6 Binn. (Pa.) 266.

Wisconsin. — *Security Nat. Bank v. St. Croix Power Co.*, (Wis. 1903) 94 N. W. Rep. 74.

4. *Treaties.* — *Indianapolis v. Navin*, 151 Ind. 139; *Pontalba v. Copland*, 3 La. Ann. 86; *Purvis v. Harmanson*, 4 La. Ann. 421; *Baltimore v. Baltimore, etc., R. Co.*, 6 Gill (Md.) 288, 48 Am. Dec. 531; *Bailey v. Fitz-Gerald*, 56 Miss. 578; *Deans v. McLendon*, 30 Miss. 343. See also the title *TREATIES*, *infra*.

5. *State Decisions as to Similar State Statutes.* — *Lee v. Citizens' Bank*, 5 Ohio Dec. (Reprint) 21, 1 Am. L. Rec. 385.

6. *Land Grants.* — *Gilmore v. Sapp*, 100 Ill. 297; *Washougal, etc., Transp. Co. v. Dallis, etc., Nav. Co.*, 27 Wash. 490.

The State Courts Are Not Controlled, however, by the decisions of the federal courts in determining the question of riparian rights in lands on non-navigable waters conveyed by a federal grant. *Fuller v. Shedd*, 161 Ill. 462, 52 Am. St. Rep. 380.

7. *Land Laws in General.* — *Pontalba v. Copland*, 3 La. Ann. 86; *Purvis v. Harmanson*, 4 La. Ann. 421.

8. *Jurisdiction of Federal Courts.* — *Ex p. Holman*, 28 Iowa 88, 4 Am. Rep. 159; *Clark v. Wolf*, 29 Iowa 197; *Feusier v. Lammon*, 6 Nev. 200.

9. *Legal Tender.* — *Townsend v. Jennison*, 44 Vt. 315.

act with regard to the powers of the corporations created thereunder.¹

Comity. — When a question of the construction of an Act of Congress which has been determined by the Supreme Court of the United States arises in a state court, the state court follows the construction of the federal court, on the principle of comity, although the case in which the question arises is one where the ultimate jurisdiction is vested in the state court.²

The Rules of Interpretation which obtain in federal courts as to the construction of the Bankrupt Act will be followed by the state courts.³ A state court may also adopt and be bound by the decision of the Supreme Court of the United States respecting the state insolvent laws.⁴

Application of Construction. — But on the other hand, upon the question of the effect or application of the construction placed on a federal statute by the United States Supreme Court as a defense in a given case properly brought in the state courts, the state court may properly follow its own decisions, even when differing from the decisions of the federal courts. Such questions are not federal questions.⁵

Jurisdiction. — To render the sentence of a district court of the United States, sitting as a court of admiralty, and deciding the question of prize, conclusive on the same point arising incidentally in the state courts, such district court must have had jurisdiction of the subject-matter; and as to whether it had or not, the state courts are competent to examine and decide.⁶

Effect of Change in Decision. — These decisions of the Supreme Court of the United States as to the effect and constitutionality of federal statutes must be received by the state courts as they are from time to time determined and declared by the former.⁷ A previous decision by a state court attempting to construe a federal statute in accordance with the construction placed thereon by the United States Supreme Court will not control where later decisions of the federal court are not in harmony with the construction adopted by the state court.⁸

c. DECISIONS OF INFERIOR COURTS. — In case of a conflict between the decisions of the Federal Circuit Court of Appeals and a state supreme court, a state court of the first instance will follow the decisions of the state supreme court.⁹ Nor is the construction placed by the United States Circuit Court upon a federal statute binding upon the state supreme court. While its decisions will be respectfully considered, an examination of their soundness is not precluded.¹⁰ An inferior state court will also follow the decisions of the court of last resort in the state upon a question of which the latter has jurisdiction, even though this decision is in conflict with one rendered by the Supreme Court of the United States.¹¹

1. National Banking Act. — *Penn. v. Bornman*, 102 Ill. 523; *Duncomb v. New York, etc., R. Co.*, 84 N. Y. 190; *Aberdeen First Nat. Bank v. Andrews*, 7 Wash. 261, 38 Am. St. Rep. 885.

2. Comity in Interpreting Federal Statutes. — *York v. Conde*, 147 N. Y. 486.

In *Railway Pass. Assur. Co. v. Pierce*, 27 Ohio St. 155, the court said: "Whilst it is true, as was said in the case of *Skelly v. Jefferson Branch of State Bank* (9 Ohio St. 606), that the decisions of the Supreme Court of the United States, though entitled to the highest respect, do not bind and conclude the judgment of a state court as the decision of a superior upon an inferior court of the same system; yet it would practically be useless to adhere to our convictions, unless there were reasons to expect that the question, when again presented to that court, would be decided differently."

3. Bankruptcy Act. — *Rugely v. Robinson*, 19 Ala. 404.

4. Insolvency Laws. — *State v. Krebs*, 6 Har. & J. (Md.) 31. See also *Braynard v. Marshall*, 8 Pick. (Mass.) 194.

5. Application of Construction Not a Federal Question. — *Security Nat. Bank v. St. Croix Power Co.*, (Wis. 1903) 94 N. W. Rep. 74.

6. Inquiry by State Court into Jurisdiction of Federal Court. — *Slocum v. Wheeler*, 1 Conn. 429.

7. Change in Decision. — *Stockton v. Dundee Mfg. Co.*, 22 N. J. Eq. 56.

8. Richmond First Nat. Bank v. Turner, 154 Ind. 456.

9. Conflict between State Supreme Court and Federal Circuit Court of Appeals. — *Ascherson v. Bethlehem Iron Co.*, 2 Pa. Dist. 597.

10. Franklin v. Kelley, 2 Neb. 79.

11. Conflict between State Supreme Court and Supreme Court of United States. — *Devitt v. Providence Washington Ins. Co.*, 61 N. Y. App. Div. 390.

d. **Dicta.** — The state court is not, however, required to extend the effect of the federal decisions beyond what was actually decided. It will not reverse its decisions because the Supreme Court of the United States would, from their language, probably do this when the question came before them. All that is necessary is that full effect should be given to the federal decisions rendered upon the case under consideration.¹ So until the question of the constitutionality of the state statute has been decided it is not obligatory upon the state court to hold that a statute of the state is in violation of that constitution, even if it may be possible, judging from certain remarks in an opinion delivered by the Supreme Court of the United States, that the constitutionality of the statute may be denied.² Also the construction placed by the Supreme Court of the United States upon a provision of the Federal Constitution is not binding upon the state court when the facts of the case before the state court do not bring it within the case decided before the federal court. In such a case the court will apply the maxim that general expressions in every opinion are to be taken in connection with the case in which those expressions are used; if they go beyond the case they may be respected, but should not control the judgment in a subsequent suit.³

2. Construction of State Constitutions and Statutes. — The interpretation and construction of the constitutions and statutes of the several states, and the determination whether the statutes have been enacted in accordance with the requirements of the state constitutions, and are or are not in violation of any provision of such constitutions, are questions to be finally passed upon by the courts of the several states, and their decisions upon these matters are authoritative and binding even though adverse to the decisions of the Supreme Court of the United States.⁴ This right of the courts of the several states to construe the statutes of their respective states is not impaired or abridged by the jurisdiction which is given to the Supreme Court of the United States to decide the question of the validity of the statute of any state upon the ground of its being repugnant to the Constitution of the United States, except in case of the particular statute which the Supreme Court may declare unconstitutional. Therefore when a statute of a state is alleged to be unconstitutional, upon the ground that it impairs a contract or right created or secured by a former statute, the jurisdiction of the federal court does not extend to making an authoritative construction of such former statute which would be binding on the courts of that state; but, in such a case, the state courts have the power to expound that statute, and declare what rights are secured by it; and the federal court may decide whether the last statute violates or impairs the rights thus declared to be secured.⁵

1. State Court Not Bound by Dicta of Federal Court. — *Baltimore v. Baltimore, etc.*, R. Co., 6 Gill (Md.) 288, 48 Am. Dec. 531; *North River Steam Boat Co. v. Livingston*, 3 Cow. (N. Y.) 713. See also *supra*, this title, *Application of Rule — Dicta*.

2. State v. Intoxicating Liquors, 95 Me. 140.

3. Barber Asphalt Paving Co. v. French, 158 Mo. 534. See also *Cohen v. Virginia*, 6 Wheat. (U. S.) 399; *Parsons v. District of Columbia*, 170 U. S. 45.

4. State Constitutions and Statutes — United States. — *Boyd v. Alabama*, 94 U. S. 645.

California. — *People v. Linda Vista Irrigation Dist.*, 128 Cal. 477.

Georgia. — *Baldy v. Hunter*, 98 Ga. 170; *Nelms v. Summers*, 54 Ga. 605.

Illinois. — *Penn v. Bormanman*, 102 Ill. 523; *Lender v. Kidder*, 23 Ill. 49.

Indiana. — *Indianapolis v. Navin*, 151 Ind. 139.

Iowa. — *Goodnow v. Wells*, 67 Iowa 654; *McCure v. Owen*, 26 Iowa 243.

Kentucky. — *Perry v. Wheeler*, 12 Bush (Ky.) 541; *Eubank v. Poston*, 5 T. B. Mon. (Ky.) 285; *Bodley v. Gaither*, 3 T. B. Mon. (Ky.) 57.

Louisiana. — *State v. Citizens' Bank*, 52 La. Ann. 1086; *Levy v. Mentz*, 23 La. Ann. 261.

Mississippi. — *Bailey v. Fitz-Gerald*, 56 Miss. 578; *Deans v. McLendon*, 30 Miss. 343; *Doe v. Hamilton*, 23 Miss. 496, 57 Am. Dec. 149; *McIntyre v. Ingraham*, 35 Miss. 25.

Missouri. — *State v. Trammel*, 106 Mo. 510. *Nebraska.* — *Franklin v. Kelley*, 2 Neb. 79.

New York. — *Towle v. Forney*, 14 N. Y. 423.

Ohio. — *Sandusky City Bank v. Wilbor*, 7 Ohio St. 481; *Wilkins v. Philips*, 3 Ohio 49, 17 Am. Dec. 579.

Pennsylvania. — *Lebanon Bank v. Mangan*, 28 Pa. St. 452.

Texas. — See *El Paso v. Ft. Dearborn Nat. Bank*, (Tex. Civ. App. 1903) 71 S. W. Rep. 799.

5. Jurisdiction of State Courts as to Constitutionality of Local Statutes. — *McIntyre v. Ingraham*, 35 Miss. 25.

3. Where Federal Court Has Appellate Jurisdiction. — Where the question is one of which the Supreme Court of the United States has appellate jurisdiction upon a writ of error to a state court, the decisions of the former upon the question are binding upon the state tribunals and will be followed by them.¹

4. In Matters of General Jurisprudence. — The view has also been taken that in order to insure consistency of decisions upon questions of law which have general application to the several states, such as questions of commercial law, the decisions of the Supreme Court of the United States should be followed as a common standard, even in regard to cases of which the state court has final jurisdiction, as the decisions of the federal court will be more readily followed by common consent than would the decisions of a court of any particular state.² But where a contrary view is established in a state by the decisions of its courts in passing upon a question of such nature, the courts of the state, especially the inferior courts, will adhere to the conclusions which obtain in their own jurisdiction.³

5. In Territorial Courts. — The decision rendered by the Supreme Court of the United States upon a question of law is binding upon a state court where the matter involving the same question arose when the state was a territory even though before the trial of the cause the territory had been admitted to statehood.⁴ Where the legislature of the territory by adopting a statute of a state takes also the construction placed upon the statute by the courts of that state, the construction so adopted is not altered by a contrary view taken by the Supreme Court of the United States in construing a similar statute of another state.⁵

Questions of Practice. — While, in the absence of territorial legislation, courts of the territory are controlled by the decisions of the United States Supreme Court upon questions of pleading and practice, when its legislature has prescribed rules of pleading and practice which do not infringe the Constitution of the United States or violate the federal statutes applicable to the territory, the territorial courts are governed by them and not by the decisions of the federal courts.⁶

VI. DECISIONS OF OTHER DEPARTMENTS OF GOVERNMENT. — The doctrine of *stare decisis* will not be so construed as to compel the courts to adhere to decisions by any other department of the government than the judicial. While the decisions and long-continued practice of the other departments will be given proper weight as evidence, they will not be considered as having the same binding authority as decisions.⁷

VII. DECISIONS OF COURTS OF ANOTHER STATE AS PRECEDENTS — **1. Construction of Constitutions and Statutes of Other States.** — The construction to be placed upon the provisions of the constitution and statutes of a state is properly for the determination of the courts of that state. Where,

1. Under Appellate Jurisdiction. — *Jefferson Branch Bank v. Skelly*, 1 Black (U. S.) 436, *reversing Skelly v. Jefferson Branch of State Bank*, 9 Ohio St. 606; *San Benito County v. Southern Pac. R. Co.*, 77 Cal. 518; *United Land Assoc. v. Pacific Imp. Co.*, (Cal. 1902) 69 Pac. Rep. 1064; *Belcher v. Chambers*, 53 Cal. 635; *Bodley v. Gaither*, 3 T. B. Mon. (Ky.) 57; *State v. Ardoin*, 51 La. Ann. 169; *Bailey v. Fitz-Gerald*, 56 Miss. 578; *McKee v. Brooks*, 64 Tex. 255; *Venice v. Breed*, 65 Barb. (N. Y.) 597. See also *Railway Pass. Assur. Co. v. Pierce*, 27 Ohio St. 155.

2. General Law. — *Eubank v. Poston*, 5 T. B. Mon. (Ky.) 285; *Stoddard v. Long Island R. Co.*, 5 Sandf. (N. Y.) 180; *American Ins. Co. v. Insley*, 7 Pa. St. 223, 47 Am. Dec. 509; *Pickle v. Muse*, 88 Tenn. 380, 17 Am. St. Rep.

900; *Bell v. Perkins*, Peck (Tenn.) 261, 14 Am. Dec. 745. See also *Biddle Hardware Co. v. Adams Express Co.*, 8 Pa. Dist. 43. *Compare Franklin v. Kelley*, 2 Neb. 79; *Lebanon Bank v. Mangan*, 28 Pa. St. 452.

3. *Mynard v. Syracuse, etc., R. Co.*, 7 Hun (N. Y.) 399.

4. State Courts Succeeding Territorial Courts — *Choate v. Spencer*, 13 Mont. 127, 40 Am. St. Rep. 425; *Sullivan v. Helena*, 10 Mont. 134.

5. Territory Adopting State Statute and Construction Thereof. — *People v. Ritchie*, 12 Utah 180.

6. Pleading and Practice in Territorial Courts. — *People v. Ritchie*, 12 Utah 180.

7. See the titles STATE AND PUBLIC LANDS, *post*; STATUTES, *post*; TREATIES; UNITED STATES COURTS.

therefore, the necessity for the consideration of such questions arises in a court of another state, that court will, as a general rule, follow the decisions of the courts of the state to which the constitution and statutes pertain.¹ This duty of the courts of one state to follow the decisions of the courts of another upon such questions, is a duty resting upon comity alone,² and is not imposed by the provision of the United States Constitution which requires that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."³ So where the court of last resort of a state under whose laws a corporation was organized has construed a statute so as to uphold the right of a creditor of the corporation to proceed directly against a stockholder, the courts of another state are bound to follow the decision, although in a previous case between other parties they decided to the contrary; and this is the case although the legislature of the first-mentioned state, in the meantime, but after the right of the plaintiff had accrued, had changed the law so as to take from the creditor his direct remedy against the stockholder.⁴ This rule of comity is binding even though the examining court finds that upon similar language in a statute, enacted by its own state, it would place a different or even an opposite construction.⁵

Decision Not in Evidence. — It has been stated that where only the statute is in evidence, and not the decisions construing it, the courts of another state will merely consult the decisions as they would other reported cases, to aid in arriving at a correct conclusion upon the statute, and will not regard them as authoritative and binding expositions of the statute.⁶

2. Decisions of Inferior Courts. — The same recognition will not, it

1. Decisions of Other States — United States.
Prentice v. Zane, 11 Law Rep. 204, 19 Fed. Cas. No. 11,383; *Humphreyville Copper Co. v. Sterling*, Brunner Col. Cas. (U. S.) 3, 12 Fed. Cas. No. 6,872.

Connecticut. — *Fish v. Smith*, 73 Conn. 377.
Georgia. — *Krogg v. Atlanta*, etc., R. Co., 77 Ga. 202, 4 Am. St. Rep. 79; *Clark v. Turner*, 73 Ga. 1.

Illinois. — *Bell v. Farwell*, 176 Ill. 489, 68 Am. Rep. 194; *Van Matre v. Sankey*, 148 Ill. 536, 39 Am. St. Rep. 196; *Fowler v. Lamson*, 146 Ill. 472, 37 Am. St. Rep. 163; *Patterson v. Lynde*, 112 Ill. 207.

Indiana. — *Nathan v. Lee*, 152 Ind. 232.

Iowa. — *Fred. Miller Brewing Co. v. Capital Ins. Co.*, 111 Iowa 590; *Brown v. Philipps*, 16 Iowa 210.

Kansas. — *Crooker v. Pearson*, 41 Kan. 410.

Louisiana. — *Cucullu v. Louisiana Ins. Co.*, 5 Mart. N. S. (La.) 464, 16 Am. Dec. 199. See also *Shelden v. Miller*, 9 La. Ann. 187.

Massachusetts. — *Broadway Nat. Bank v. Baker*, 176 Mass. 294.

Mississippi. — *McIntyre v. Ingraham*, 35 Miss. 25.

Missouri. — *McMerty v. Morrison*, 62 Mo. 140.

New Jersey. — *Roubicek v. Haddad*, 67 N. J. L. 522; *Rosenbaum v. U. S. Credit System Co.*, 64 N. J. L. 34; *Watson v. Lane*, 52 N. J. L. 550; *Lane v. Watson*, 51 N. J. L. 186; *American Print Works v. Lawrence*, 23 N. J. L. 590, 57 Am. Dec. 420.

New York. — *St. Nicholas Bank v. State Nat. Bank*, 128 N. Y. 26; *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48, 38 Am. Rep. 491; *Faulkner v. Hart*, 82 N. Y. 413, 37 Am. Rep. 574; *Dodge v. Platte County*, 82 N. Y. 218; *Jessup v. Carnegie*, 80 N. Y. 441, 36 Am. Rep. 643;

Hunt v. Hunt, 72 N. Y. 236, 28 Am. Rep. 129; *Howe v. Welch*, (N. Y. City Ct. Gen. T.) 17 Abb. N. Cas. (N. Y.) 397; *Viele v. Wells*, (Supm. Ct. Spec. T.) 9 Abb. N. Cas. (N. Y.) 277; *Hoyt v. Shelden*, 3 Bosw. (N. Y.) 302; *Hoyt v. Thompson*, 3 Sandf. (N. Y.) 421.

North Carolina. — *Watson v. Orr*, 3 Dev. L. (14 N. Car.) 161.

Ohio. — *Spencer v. King*, 5 Ohio Dec. 113.

Pennsylvania. — *Forepaugh v. Delaware*, etc., R. Co., 128 Pa. St. 217, 15 Am. St. Rep. 672; *Grant v. Henry Clay Coal Co.*, 80 Pa. St. 208; *Merrimac Min. Co. v. Levy*, 54 Pa. St. 227, 93 Am. Dec. 697; *Schmaltz v. York Mfg. Co.*, 204 Pa. St. 1.

South Carolina. — *Johnston v. South Western R. Bank*, 3 Strobb. Eq. (S. Car.) 263.

Washington. — *Whitman v. Mast*, etc., Co., 11 Wash. 318, 48 Am. St. Rep. 874.

West Virginia. — *Gilchrist v. West Virginia Oil*, etc., Co., 21 W. Va. 115, 45 Am. Rep. 555.

Wisconsin. — *Eau Claire Nat. Bank v. Benson*, 106 Wis. 624.

Construction of Statute of State by State Court as Precedent in Federal Court. — See the title UNITED STATES COURTS.

2. *Wiggins' Ferry Co. v. Chicago*, etc., R. Co., 11 Fed. Rep. 381; *Nathan v. Lee*, 152 Ind. 232; *Franklin v. Twogood*, 25 Iowa 520, 96 Am. Dec. 73.

3. *Wiggins' Ferry Co. v. Chicago*, etc., R. Co., 11 Fed. Rep. 381; *Hancock Nat. Bank v. Farnum*, 20 R. I. 466.

4. *Ball v. Anderson*, 196 Pa. St. 86.

5. Construction Followed Though Not Approved. — *Bell v. Farwell*, 176 Ill. 489, 68 Am. St. Rep. 194; *Van Matre v. Sankey*, 148 Ill. 536, 39 Am. St. Rep. 106.

6. Necessity of Putting Decisions in Evidence. — *Nelson v. Goree*, 34 Ala. 565.

seems, be given to the decisions of the lower courts of another state.¹

In the Case of a Conflict between the decision of an inferior court of a foreign state construing a statute of that state, and the decision of the court of last resort of another state construing the same statute, an inferior court of the latter state will follow the decision of the court of its own state.²

3. Decision of Foreign State as Rule of Property.—It would seem that where a statute of one state has been interpreted by decisions which have become rules of property, the courts of another state will not, in dealing with a contract based upon these decisions, adopt a later construction placed upon the statute by the courts of the former state.³

4. Conflict Between Federal and State Decisions.—Where the question is one concerning the citizens of a state, though growing out of the constitutional or legislative provisions of another state, and there is a conflict between the federal tribunals and those of the latter state as to the proper construction to be placed upon such provisions, the courts of the former state will regard the question as a new one.⁴

5. Province of Court and Jury.—Where on the trial of an issue respecting the law of another state the decisions of the courts of the state are given in evidence to the jury, it is the province of the jury to determine whether or not such decisions have been made, but it is the duty of the court to construe and deduce from them the rules of law which they establish.⁵

6. Effect of Change of State Boundary on Precedents.—The effect of decisions as precedents is not changed by the setting off of new states or varying the boundaries so that it might seem that an old decision would not be a precedent in a different state.⁶

7. Adopted Statutes.—Where a statute of another state or country is adopted by legislative enactment it may be said, as a general rule, that the courts adopt the construction put upon the statute by the courts of the state or country from which it was taken up to the time of the adoption of the statute. In so doing they act upon the presumption that the legislature was familiar with the construction put upon the statute in the state or country from which it was taken.⁷

VIII. DECISIONS OF HOUSE OF LORDS.—A decision of the English House of Lords, acting in its judicial character, when once given upon a point of law is thereafter conclusive upon the house and upon every court of the kingdom until altered by an act of Parliament, and the question cannot be raised again and re-argued as if it were *res integra*.⁸ This rule applies also to decisions pronounced on the technical rule of the house which provides that where upon a division the numbers are equal, *semper præsumitur pro neganti*. A decision so pronounced is just as binding as if it had been pronounced without a contrary vote.⁹ There are, however, authorities which state that while the house

1. Inferior Courts of Other States.—Van Matre v. Sankey, 148 Ill. 536, 39 Am. St. Rep. 196; Schmalz v. York Mfg. Co., 204 Pa. St. 1.

In New York L. Ins. Co. v. English, 95 Tex. 391, while the court stated that the statute of a sister state will be construed as if it were a domestic statute, the decisions of such sister state also being examined for any light which they may throw upon the question, it refused to adhere to the views announced by the court of last resort of that state and followed the view taken by an inferior court.

2. Conflicting Decisions.—Matter of Robertson, (Surrogate Ct.) 23 Misc. (N. Y.) 450.

3. Foreign Decision as Rule of Property.—Jessup v. Carnegie, 80 N. Y. 441, 36 Am. Rep. 643.

4. Cotton v. Brien, 6 Rob. (La.) 115.

5. Province of Court and Jury.—Alexander v. Pennsylvania Co., 48 Ohio St. 623; Ott v. Lake Shore, etc., R. Co., 10 Ohio Cir. Dec. 85.

6. Change of State Boundaries as Affecting Precedents.—Pyles v. Riverside Furniture Co., 30 W. Va. 123; Wilson v. Perry, 29 W. Va. 169.

7. See the title STATUTES. See also Kohn v. McKinnon, 90 Fed. Rep. 623.

8. House of Lords.—Topham v. Portland, 17 W. R. 911; London Tramways Co. v. London County Council, (1898) A. C. 375; Atty.-Gen. v. Windsor, 6 Jur. N. S. 833; Beamish v. Beamish, 6 Jur. N. S. 770; Thellusson v. Rendlesham, 7 H. L. Cas. 429; Fletcher v. Sonders, 1 Bligh N. S. 144; Bright v. Hutton, 3 H. L. Cas. 391, opinion of Lord Campbell.

9. Beamish v. Beamish, 8 Jur. N. S. 770; Atty.-Gen. v. Windsor, 6 Jur. N. S. 833.

is bound by its own decisions as much as any given court, so that it cannot reverse its decision in a particular case, yet it possesses, like every court of justice, an inherent power to correct an error into which it may have fallen, and is not bound by a rule of law which it may have laid down if, in a subsequent cause, it finds reason to depart therefrom.¹

IX. RETROSPECTIVE EFFECT OF CHANGE OF DECISION. — The effect of overruling a decision and refusing to abide by the precedent there laid down is retrospective and makes the law at the time of the overruled decision as it is declared to be in the last decision.²

Effect on Contract Rights. — But after a statute has been settled by judicial construction, the construction becomes, as far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment, and contract obligations entered into or vested rights acquired while the former decision was in force cannot be impaired.³ This is also true of decisions construing constitutional provisions.⁴ The rule that retrospective operation should not be given to a change in judicial opinions respecting the constitutional validity of legislative enactments can be invoked, however, only to avoid the impairment of the obligation of contracts which have been entered into pursuant to statutory provisions and in reliance upon former adjudications respecting their validity.⁵ The rights which the law protects must be also real. They must be rights of property, or those founded on contract, express or implied.⁶ The rule above stated in respect to the effect of the judicial construction of a statute upon rights acquired under it should not be applied to constructions which can at most be implied only from something that was actually decided. In order to come within the provisions of the rule the construction of the statute should have been directly involved in the case decided.⁷

Under Federal Constitution. — There is not, however, an impairment of a contract within the prohibition of the Federal Constitution where there has been merely a judicial decision of a state court and no legislative action, a judicial decision not being deemed a law, within the meaning of the provision. To give the United States Supreme Court jurisdiction where the alleged impairment arises from a decision of a state court which is not based on subsequent

1. *Hamilton v. Baker*, 14 App. Cas. 209; *Bright v. Hutton*, 3 H. L. Cas. 341; *Wilson v. Wilson*, 5 H. L. Cas. 67. See also *Atty.-Gen. v. Queen's Free Chapel*, 24 Beav. 715.

2. **Retrospective Effect.** — *In re Dunham*, 9 Phila. (Pa.) 471, 29 Leg. Int. (Pa.) 383, 8 Fed. Cas. No. 4,146; *Center School Tp. v. State*, 150 Ind. 168; *Haskett v. Maxey*, 134 Ind. 182; *Center School Tp. v. State*, 20 Ind. App. 706; *Stockton v. Dundee Mfg. Co.*, 22 N. J. Eq. 56; *Storrie v. Cortes*, 90 Tex. 283; *Harbert v. Monongahela River R. Co.*, 50 W. Va. 253; *Falconer v. Simmons*, 51 W. Va. 172. See also *Butler v. Van Wyck*, 1 Hill (N. Y.) 438.

3. **Impairment of Contracts** — *United States*. — *Green County v. Conness*, 109 U. S. 104; *Taylor v. Ypsilanti*, 105 U. S. 60; *New Buffalo v. Cambria Iron Co.*, 105 U. S. 73; *Douglass v. Pike County*, 101 U. S. 677; *Ohio L. Ins., etc., Co. v. Debolt*, 116 How. (U. S.) 431; *In re Dunham*, 9 Phila. (Pa.) 471, 29 Leg. Int. (Pa.) 383, 8 Fed. Cas. No. 4,146.

Indiana. — *Byrum v. Henderson*, 151 Ind. 102; *Center School Tp. v. State*, 150 Ind. 168; *Myers v. Boyd*, 144 Ind. 496; *Stephenson v. Boody*, 139 Ind. 60; *Haskett v. Maxey*, 134 Ind.

182; *Center School Tp. v. State*, 20 Ind. App. 706.

Louisiana. — *Levy v. Hitsche*, 40 La. Ann. 500; *State v. Thompson*, 10 La. Ann. 122; *Hawkins v. Beer*, 37 La. Ann. 55.

Missouri. — *Mountain Grove Bank v. Douglas County*, 146 Mo. 42; *Sedalia v. Gold*, 91 Mo. App. 32.

New Jersey. — *Stockton v. Dundee Mfg. Co.*, 22 N. J. Eq. 56.

Tennessee. — *Richardson v. Marshall County*, 100 Tenn. 346. See also *State v. Bristol*, (Tenn. 1902) 70 S. W. Rep. 1031.

West Virginia. — *Falconer v. Simmons*, 51 W. Va. 172; *McMaster v. Dyer*, 44 W. Va. 644.

See also the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 15, p. 1046. Compare *Storrie v. Cortes*, 90 Tex. 283.

4. *Mountain Grove Bank v. Douglas County*, 146 Mo. 42; *Sedalia v. Gold*, 91 Mo. App. 32.

5. *Lewis v. Symmes*, 61 Ohio St. 471, 76 Am. St. Rep. 428.

6. *Center School Tp. v. State*, 150 Ind. 168; *Center School Tp. v. State*, 20 Ind. App. 706.

7. **Construction Implied from Actual Decision.** — *St. Louis, etc., R. Co. v. Fowler*, 142 Mo. 670.

legislation, the case must come up on appeal from the judgment of a United States court, not from a state court.¹

In Criminal Cases. — The doctrine of *stare decisis* in criminal cases cannot be carried to the extent of allowing the violators of law a vested interest in rules which have been erroneously sanctioned, and will not protect them in regard to a crime committed while the decision is not yet overruled.²

X. ERRONEOUS PRECEDENTS AS RULES OF PROPERTY — 1. In General. — As has been seen in a preceding section, the doctrine of *stare decisis* is based on the necessity for uniformity and stability in the interpretation and construction of the law.³ It has been said that the strictness with which the doctrine is applied varies according to the nature of the question involved.⁴ It is most strictly applied when decisions have settled a rule of property upon which rights are predicated, and under which titles have vested,⁵ especially those relating to real estate,⁶ and where they have become the basis of contract relations.⁷ Where the decisions do not involve such matters, but have to do with other questions, as, for example, where personal liberty is involved, the courts will be governed by merely that general consideration which favors certainty and stability in the law.⁸

1. Under Federal Constitution. — Weber v. Rogan, 188 U. S. 10; Mobile Transp. Co. v. Mobile, 187 U. S. 479; Gulf, etc., R. Co. v. Hewes, 183 U. S. 66; Yazoo, etc., R. Co. v. Adams, 180 U. S. 41; Remington Paper Co. v. Watson, 173 U. S. 443; McCullough v. Virginia, 172 U. S. 102; Bacon v. Texas, 163 U. S. 207; Central Land Co. v. Laidley, 159 U. S. 103; New Orleans Waterworks Co. v. Louisiana Sugar Refining Co., 125 U. S. 18; Lehigh Water Co. v. Easton, 121 U. S. 388.

2. Stare Decisis in Criminal Cases. — Lanier v. State, 57 Miss. 102.

3. See supra, this title, Definition; General Consideration.

4. Application of Doctrine Varies with Nature of Question. — Daniels v. State, 2 Penn. (Del.) 586; Downer v. Miller, 15 Wis. 612.

5. Strict Application — Rule of Property — England. — Pugh v. Golden Valley R. Co., 15 Ch. D. 330; Smith v. Keal, 9 Q. B. D. 340.

United States. — Grignon v. Astor, 2 How. (U. S.) 343; Garth v. Arnold, (C. C. A.) 115 Fed. Rep. 468; The Madrid, 40 Fed. Rep. 677; Shreve v. Cheesman, (C. C. A.) 69 Fed. Rep. 785.

Alabama. — Bennett v. Bennett, 34 Ala. 53; Matheson v. Hearin, 29 Ala. 210; McVay v. Ijams, 27 Ala. 238.

Arkansas. — Taliaferro v. Barnett, 47 Ark. 359.

California. — Smith v. Ferries, etc., R. Co., (Cal. 1897) 51 Pac. Rep. 710; Sacramento Bank v. Alcorn, 121 Cal. 379; Seale v. Mitchell, 5 Cal. 402.

Colorado. — Colorado Seminary v. Arapahoe County, (Colo. 1903) 71 Pac. Rep. 410; Calhoun Gold Min. Co. v. Ajax Gold Min. Co., 27 Colo. 1.

Delaware. — Daniels v. State, 2 Penn. (Del.) 586.

Illinois. — Reichert v. McClure, 23 Ill. 516; Braxon v. Bressler, 64 Ill. 488; Rich v. Chicago, 59 Ill. 286.

Indiana. — Jasper County v. Allman, 142 Ind. 573; Haskett v. Maxey, 134 Ind. 182; Pond v. Irwin, 113 Ind. 243; Hines v. Driver, 89 Ind. 339; Frank v. Evansville, etc., R. Co., 111 Ind. 132; Harrow v. Myers, 29 Ind. 469; Grubbs v.

State, 24 Ind. 295; Rockhill v. Nelson, 24 Ind. 422; Lindsay v. Lindsay, 47 Ind. 283.

Mississippi. — Lombard v. Lombard, 57 Miss. 171; Ex p. Bridewell, 57 Miss. 177; Boon v. Bowers, 30 Miss. 246.

Missouri. — Simpson v. Stoddard County, 173 Mo. 421; Young v. Downey, 150 Mo. 317; St. Louis, etc., R. Co. v. Clark, 119 Mo. 357; Reed v. Ownby, 44 Mo. 204; Sedalia v. Gold, 91 Mo. App. 32.

Nebraska. — State v. Hill, 47 Neb. 456; State v. Savage, (Neb. 1902) 91 N. W. Rep. 557.

New Jersey. — State v. Taylor, (N. J. 1902) 53 Atl. Rep. 392.

New York. — Mott v. Clayton, 9 N. Y. App. Div. 181; Goodell v. Jackson, 20 Johns. (N. Y.) 693, 11 Am. Dec. 351; Van Winkle v. Constantine, 10 N. Y. 422.

Ohio. — Shumaker v. Pearson, 67 Ohio St. 330; Kearny v. Buttles, 1 Ohio St. 362.

Oregon. — Paulson v. Portland, 16 Oregon 450.

Pennsylvania. — White v. Kyle, 1 S. & R. (Pa.) 515.

South Carolina. — State v. Aiken, 42 S. Car. 222; Ex p. White, 33 S. Car. 450; Gage v. Charleston, 3 S. Car. 491.

Tennessee. — State v. Whitworth, 8 Lea (Tenn.) 594.

Texas. — Hall v. White, 94 Tex. 452; Higgins v. Bordages, 88 Tex. 458, 53 Am. St. Rep. 770; Willis v. Owen, 43 Tex. 48.

Utah. — Kimball v. Grantsville, 19 Utah 368.

Virginia. — Postal Tel. Cable Co. v. Farmville, etc., R. Co., 96 Va. 661.

West Virginia. — Pyles v. Riverside Furniture Co., 30 W. Va. 123.

Wisconsin. — Brader v. Brader, 110 Wis. 423; Pittelkow v. Milwaukee, 94 Wis. 651; Fisher v. Horicon Iron, etc., Co., 10 Wis. 351; Pratt v. Brown, 3 Wis. 603; Kneeland v. Milwaukee, 15 Wis. 454.

6. See infra, this section, Where Real Property Is Involved.

7. Real Estate. — See *infra*, this section, *Where Contracts Are Involved.*

8. Contracts. — Daniels v. State, 2 Penn. (Del.) 586; Downer v. Miller, 15 Wis. 612.

Rule of Local Application. — The rule is especially binding as to a decision which has become a rule of property of purely local application. So, the construction placed upon the charter of a city as to the manner of making special assessments, which has been acted upon by the council of the city, will not be interfered with.¹

2. Where Real Property Is Involved. — Stability is especially requisite in the law in regard to titles to real property. Titles may be largely or wholly dependent upon previous decisions, and landed interests would be jeopardized by sudden or frequent changes in the interpretation or construction of legal principles. By reason of this the courts are always reluctant to overrule or reverse a decision when title to real property will be involved. Therefore, when a court of last resort has announced principles affecting the acquisition of title to real property, and the principles thus announced have become established and have been frequently recognized and conformed to, and property rights have been acquired thereunder, it has been generally held that the decisions should not be overturned save by the interposition of the legislative power, even though the principles announced therein might otherwise be questioned.² The rule obtains as to a decision upon which conveyancers have relied, even though in the opinion of the court the decision is anomalous and not sound.³

Alienation and Descent of Property. — The decisions of courts of law also become a rule for the regulation of the alienation⁴ and descent of real estate, and where that rule has been sanctioned and adopted in the courts, it should be adhered to under the rule of *stare decisis*, unless it be manifestly wrong and unjust.⁵

1. Rule of Local Application. — *Pittelkow v. Milwaukee*, 94 Wis. 651. See also *Motz v. Detroit*, 18 Mich. 495.

2. Where Real Property Involved. — *United States.* — *Minnesota Min. Co. v. National Min. Co.*, 3 Wall. (U. S.) 332; *Garth v. Arnold*, (C. C. A.) 115 Fed. Rep. 468; *Germania Iron Co. v. James*, (C. C. A.) 89 Fed. Rep. 811; *American Mortg. Co. v. Hopper*, (C. C. A.) 64 Fed. Rep. 553; *The Madrid*, 40 Fed. Rep. 677.

Alabama. — *Bibb v. Bibb*, 79 Ala. 437; *Bennett v. Bennett*, 34 Ala. 53; *Matheson v. Hearin*, 29 Ala. 210.

Arkansas. — *Townsend v. Martin*, 55 Ark. 192.

California. — *Hihn v. Courtis*, 31 Cal. 402; *Pioche v. Paul*, 22 Cal. 110; *Clark v. Troy*, 20 Cal. 219; *Duff v. Fisher*, 15 Cal. 382; *Giblin v. Jordan*, 6 Cal. 418; *Smith v. McDonald*, 42 Cal. 484.

Colorado. — *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 27 Colo. 1.

Delaware. — *Daniels v. State*, 2 Penn. (Del.) 586; *Truxton v. Fait, etc., Co.*, 1 Penn. (Del.) 483, 73 Am. St. Rep. 81.

Georgia. — *Scott v. Stewart*, 84 Ga. 772.

Indiana. — *Haskett v. Maxey*, 134 Ind. 182; *Pond v. Irwin*, 113 Ind. 243; *Lindsay v. Lindsay*, 47 Ind. 286; *Frank v. Evansville, etc., R. Co.*, 111 Ind. 132; *Harrow v. Myers*, 29 Ind. 470; *Rockhill v. Nelson*, 24 Ind. 424; *Ewing v. Ewing*, 24 Ind. 470; *Carver v. Louthain*, 38 Ind. 530.

Iowa. — *Lemp v. Hastings*, 4 Greene (Iowa) 449.

Kentucky. — *Nickels v. Com.*, (Ky. 1901) 64 S. W. Rep. 448; *Uhl v. Reynolds*, (Ky. 1901) 64 S. W. Rep. 498.

Louisiana. — *Levy v. Hitsche*, 40 La. Ann. 500.

Michigan. — *People v. Cicott*, 16 Mich. 283, 97 Am. Dec. 141; *Emerson v. Atwater*, 7 Mich. 23.

Mississippi. — *Davidson v. Allen*, 36 Miss. 421; *Boon v. Bowers*, 30 Miss. 256, 64 Am. Dec. 159; *Hogatt v. Bingaman*, 7 How. (Miss.) 569.

Missouri. — *Sedalia v. Gold*, 91 Mo. App. 32; *Reed v. Ownby*, 44 Mo. 206.

New Jersey. — *State v. Taylor*, (N. J. 1902) 53 Atl. Rep. 392.

New York. — *Baker v. Lorillard*, 4 N. Y. 261; *Lion v. Burtiss*, 20 Johns. (N. Y.) 487; *Mott v. Clayton*, 9 N. Y. App. Div. 181.

Ohio. — *June v. Purcell*, 36 Ohio St. 396; *Kearny v. Buttles*, 1 Ohio St. 366.

Oregon. — *Paulson v. Portland*, 16 Oregon 450.

Pennsylvania. — *Bright v. Esterly*, 199 Pa. St. 88.

South Carolina. — *State v. Aiken*, 42 S. Car. 222.

Tennessee. — *State v. Whitworth*, 8 Lea (Tenn.) 594.

Texas. — *Dean v. Gibson*, (Tex. Civ. App. 1898) 48 S. W. Rep. 57; *Higgins v. Bordages*, 88 Tex. 458, 53 Am. St. Rep. 770; *Mayman v. Revieri*, 47 Tex. 357; *Willis v. Owen*, 43 Tex. 48; *Sydnor v. Gascoigne*, 11 Tex. 455.

Utah. — *Kimball v. Grantsville*, 19 Utah 368.

Wisconsin. — *Downer v. Miller*, 15 Wis. 612.

3. Rule Applicable Regardless of Correctness of Decision. — *In re Lashmar*, (1891) 1 Ch. 258.

4. Alienation and Descent. — *Lion v. Burtiss*, 20 Johns. (N. Y.) 483; *Kirby v. Boyette*, 118 N. Car. 244.

5. *Bennett v. Bennett*, 34 Ala. 53; *Rockhill v. Nelson*, 24 Ind. 422; *Lion v. Burtiss*, 20 Johns. (N. Y.) 483.

Wills. — So the construction placed upon a statute regulating wills which has been followed for many years will not be disturbed even though the court is doubtful as to its correctness, as many persons may have acted upon the faith that such construction was correct and have rested the disposition of their property upon the belief. If it were clear, however, that the construction was wrong, the court would refuse to abide by it without regard to the result.¹

3. Where Contracts Are Involved — *a. IN GENERAL.* — So also, if a principle of law doubtful in its character or uncertain in the manner of its application has been settled by a series of decisions until it has become the basis of contract relations, it should not be overthrown except from the most urgent considerations of public policy.² Thus, where bonds have been bought and sold upon the faith of a decision, and the business world has dealt and contracted in reliance upon the law as there declared, the courts will abide by such decision.³ Where a decision construing a contract or a statute upon which a much-used contract is founded has long been acted upon, it will be considered that subsequent contracts have been entered into subject to it, and the decision will be followed even though the court would not have come to the same conclusion in the first instance.⁴ But where the decision is not such that contracts would be influenced thereby, the court will adopt its own construction.⁵ So, where the overruling of a decision as to the effect of an appeal bond,⁶ or as to the liability of sureties on the bonds of personal representatives,⁷ would impose upon those who became sureties on such bonds, relying upon the decision, obligations which they did not voluntarily incur and from which they had a right to suppose themselves exempted, the rule of *stare decisis* will be applied.

Claim to an Office. — Where decisions have been rendered regarding the manner in which shall be determined the legality of a vote whereby a person is chosen to fill an official position, it is largely within the power of any court to decide whether it will follow an established precedent. This is a question which it does not lie entirely with the judiciary to determine. The legislative department may take such action in the premises as will conclude the courts from further decision and bind them by its legislation. Still, when there is any doubt as to the construction to be put upon legislative language, it is very properly brought before the courts for interpretation.⁸ The right to public office is not contractual, and the rule of law that after a statute has been construed the contract becomes, as to contract rights, a part of the statute, is not applicable.⁹

b. CHARTERS OF CORPORATIONS. — The rule will also be applied where the construction which has been placed upon a provision of a corporate charter has long remained undisturbed. This is especially the case where, in granting charters after the decision has been rendered, the legislature has failed to impose such terms therein as to render the different constructions essential.¹⁰

1. **Law of Wills.** — *Airey v. Bower*, 12 App. Cas. 263. See also *Schori v. Stephens*, 62 Ind. 441; *Wilson v. Perry*, 29 W. Va. 169.

2. **When Contracts Involved.** — *Tancred v. Scotland Steel Co.*, 15 App. Cas. 125; *Pugh v. Golden Valley R. Co.*, 15 Ch. D. 330; *Pandorf v. Hamilton*, 17 Q. B. D. 670; *Palmer v. Johnson*, 13 Q. B. D. 351; *Jasper County v. Allman*, 142 Ind. 573; *Haskett v. Maxey*, 134 Ind. 182; *Higgins v. Bordages*, 88 Tex. 458, 53 Am. St. Rep. 770; *Willis v. Owen*, 43 Tex. 48; *Kimball v. Grantsville*, 19 Utah 368.

3. **Commercial Transactions.** — *Smith v. Ferris, etc.*, R. Co., (Cal. 1897) 51 Pac. Rep. 710.

4. **Rule Long Acted on.** — *In re Wallis*, 25 Q. B. D. 176; *Pandorf v. Hamilton*, 17 Q. B. D. 670; *Philippis v. Rees*, 24 Q. B. D. 17; *Tancred*

v. Scotland Steel Co., 15 App. Cas. 125; *Lohre v. Aitchinson*, 3 Q. B. D. 558; *In re Rosher*, 26 Ch. D. 821; *Reg. v. Edwards*, 13 Q. B. D. 586.

5. **Decision Not Infringing Contracts.** — *Philippis v. Rees*, 24 Q. B. D. 17.

6. **Effect of Appeal Bond.** — *Reid v. Donovan*, (Mich. 1903) 93 N. W. Rep. 914.

7. **Liability of Sureties on Fiduciary Bonds.** — *Flannery v. Givens*, (Ky. 1899) 52 S. W. Rep. 962.

8. **Right to Office.** — *People v. Cicott*, 16 Mich. 283, 97 Am. Dec. 141.

9. *Sudbury v. Monroe County*, 157 Ind. 446. See also *infra*, this title, *Retrospective Effect of Change of Decision*.

10. **Charters.** — *St. Louis R. Co. v. Southern R. Co.*, 138 Mo. 591.

But where the effect of a change in the construction will be only as to future dealings and will not affect rights already acquired by the corporation, the court will not be bound by a single decision, the effect of which is to interfere with the vested rights of all property owners to the possession and enjoyment of their property.¹ Nor can the doctrine be invoked where the charter which is being construed is not identical with the one construed in the earlier decision.²

4. Commercial Usages. — The rule of *stare decisis* embraces also those matters of general commercial importance which tend to influence future business transactions, and commercial usages which have been established under decisions of the court, even where the decisions may have been erroneous.³ So, the construction which has long been placed upon documents in daily use in mercantile affairs and which has thereafter been accepted in the courts and in the mercantile world, should be abided by without regard to the construction which would be adopted were the matter *res integra*. Also, if those documents construed in such a manner have been for many years applied in a particular way in cases wherein the facts are similar, it is equally material to adhere to that application.⁴

XI. LIMITATION OF RULE. — This doctrine is not an arbitrary rule of positive law which forbids the questioning, under any circumstances, of all decisions or the exercise of judicial discretion in relation thereto, but is subject to reasonable limitations. There are clear and palpable mistakes of law which should be corrected, especially when it can be done without injury to any person or property. If no injury or injustice would result to any one, and a future and permanent benefit would undoubtedly result, the correction should be made at once. No prior decision is to be reversed without good and sufficient cause, yet the rule is not in any sense iron-clad, and the future and permanent good of the public is to be considered rather than any particular case or interest. Even if the decision affects real-estate interests and titles, there may be cases where it is plainly the duty of the court to interfere and overrule a bad decision. Precedent should not have an overwhelming or despotic influence in shaping legal decisions. No elementary or well-settled principle of law can be violated by any decision for any length of time. The benefit to the public in the future is of greater moment than any incorrect decision in the past. Wherever a correction can be made without working more harm than good, it should be done.⁵ This does not, however, authorize

1. St. Louis, etc., R. Co. v. Clark, 119 Mo. 357.

2. Adams v. Yazoo, etc., R. Co., 77 Miss. 194.

3. **Commercial Usages.** — Daniels v. State, 2 Penn. (Del.) 586; Truxton v. Fait, etc., Co., 1 Penn. (Del.) 483, 73 Am. St. Rep. 81; Davidson v. Allen, 36 Miss. 419; Rothschild v. Grix, 31 Mich. 150, 18 Am. Rep. 171; Kimball v. Grantsville, 19 Utah 368; Downer v. Miller, 15 Wis. 612.

4. Pandorf v. Hamilton, 17 Q. B. D. 670.

5. **Rule Not Inflexible** — England. — Bright v. Hutton, 3 H. L. Cas. 341, 12 Eng. L. & Eq. 1; Hamilton v. Baker, 14 App. Cas. 209. See also Smith v. Keal, 9 Q. B. D. 340; *In re Hallett*, 13 Ch. D. 696.

United States. — The Madrid, 40 Fed. Rep. 677; Wilson v. Ward Lumber Co., 67 Fed. Rep. 674.

California. — San Francisco v. Spring Valley Water Works, 48 Cal. 509; Pioche v. Paul, 22 Cal. 106; Aud v. Magruder, 10 Cal. 291; McFarland v. Pico, 8 Cal. 631; Bryan v. Berry, 6 Cal. 394.

Colorado. — Colorado Seminary v. Arapahoe County, (Colo. 1903) 71 Pac. Rep. 410; Calhoun Gold Min. Co. v. Ajax Gold Min. Co., 27 Colo. 1; Harvey v. Travelers' Ins. Co., 18 Colo. 354.

Delaware. — Truxton v. Fait, etc., Co., 1 Penn. (Del.) 483, 73 Am. St. Rep. 81; Daniels v. State, 2 Penn. (Del.) 586.

Georgia. — Ellison v. Georgia R. Co., 87 Ga. 691.

Indiana. — Jasper County v. Allman, 142 Ind. 573; Paul v. Davis, 100 Ind. 422; Rockhill v. Nelson, 24 Ind. 422.

Iowa. — Remy v. Iowa Cent. R. Co., 116 Iowa 133.

Kentucky. — Tribble v. Taul, 7 T. B. Mon. (Ky.) 455.

Mississippi. — Boon v. Bowers, 30 Miss. 246, 64 Am. Dec. 159; Gwin v. McCarroll, 1 Smed. & M. (Miss.) 371.

Missouri. — Mountain Grove Bank v. Douglas County, 146 Mo. 42; Young v. Downey, 150 Mo. 317.

New York. — Church v. Brown, 21 N. Y. 315; Rumsey v. New York, etc., R. Co., 133 N. Y. 79,

a court, merely for the sake of restoring the harmony and symmetry of the law, to overthrow a doctrine which has, through a series of decisions, come to be regarded universally as fixed and settled. In such case the court may, however, with propriety circumscribe the anomalous doctrine within as narrow limits as possible.¹

Nature of Right Involved.—Where vital and important public or private rights are concerned, and the decisions regarding them are to have a direct and permanent influence in all future time, it becomes the duty as well as the right of the court to consider them carefully and to allow no previous error to continue if it can be corrected. The foundation of the rule of *stare decisis* was promulgated on the ground of public policy, and it would be an egregious mistake to allow more harm than good to accrue from it. Much not only of legislation but of judicial decisions is based upon the broad ground of public policy, and this latter must not be lost sight of. Permanent rights should not be interfered with if it can be avoided; others may with less hesitancy.² Furthermore, the same or a subsequent court would be fully justified in overruling cases hastily, and clearly erroneously, decided, under which no valuable rights can grow up and the overruling of which will produce no inconvenience; also recent cases, under which valuable rights have not yet been acquired, which stand alone or practically alone and are manifestly erroneous departures from the law as before well settled.³

Unconstitutional Decisions.—When a decision is considered to be antagonistic to the express provisions of the constitution of the state, the doctrine of *stare decisis* cannot be invoked to sustain such decision.⁴ The doctrine will not be applied in favor of a case which, while apparently within the purview of the precedent, is in reality an attempt to take an improper advantage of the rule laid down.⁵

XII. LAW OF THE CASE — 1. General Statement of Doctrine.—The doctrine of “the law of the case” may be stated thus: A matter decided on one appeal cannot be re-examined on a second appeal in the same case, for the decision of an appellate court, whether right or wrong, in a case before it, is conclusive upon the points presented throughout all the subsequent proceedings in the case

28 Am. St. Rep. 600; *Morse v. Gould*, 11 N. Y. 281, 62 Am. Dec. 103; *Gifford v. Livingston*, 2 Den. (N. Y.) 392; *People v. Brooklyn*, 9 Barb. (N. Y.) 535; *North River Steam Boat Co. v. Livingston*, 3 Cow. (N. Y.) 713; *Romaine v. Kinshimer*, 2 Hilt. (N. Y.) 519.

North Carolina.—*Stern v. Lee*, 115 N. Car. 426.

Ohio.—*Bane v. Wick*, 6 Ohio St. 14.

Oregon.—*State v. Clark*, 9 Oregon 466.

Pennsylvania.—*Callender v. Keystone Mut. L. Ins. Co.*, 23 Pa. St. 471.

South Carolina.—*State v. Chester*, 39 S. Car. 307; *State v. Aiken*, 42 S. Car. 222; *Ex p. White*, 33 S. Car. 450; *Dinkins v. Vaughan*, 1 McCord L. (S. Car.) 554.

Tennessee.—*Barton v. Shall, Peck* (Tenn.) 215.

Texas.—*Groesbeck v. Golden*, (Tex. 1887) 7 S. W. Rep. 362.

Utah.—*Kimball v. Grantsville*, 19 Utah 368.

West Virginia.—*Weston v. Ralston*, 48 W. Va. 170.

1. *Judson v. Gray*, 11 N. Y. 408.

2. *When Departed From — Alabama.*—*Hardigree v. Mitnum*, 51 Ala. 151.

California.—*Aud v. Magruder*, 10 Cal. 291; *Hart v. Burnett*, 15 Cal. 530.

Indiana.—*Hibbits v. Jack*, 97 Ind. 570, 49 Am. Rep. 478; *Jasper County v. Allman*, 142 Ind. 573; *Hines v. Driver*, 89 Ind. 339; *Harrow v. Myers*, 29 Ind. 469.

Kentucky.—*Pratt v. Breckinridge*, (Ky. 1901) 65 S. W. Rep. 136. *Compare South v. Thomas*, 7 T. B. Mon. (Ky.) 59; *Tribble v. Taul*, 7 T. B. Mon. (Ky.) 455.

Minnesota.—*Hollinshead v. Von Glahn*, 4 Minn. 190.

Mississippi.—*Jones v. Madison County*, 72 Miss. 778; *Adams v. Yazoo, etc.*, R. Co., 77 Miss. 194.

Nevada.—*Linn v. Minor*, 4 Nev. 462.

New York.—*Butler v. Van Wyck*, 1 Hill (N. Y.) 459.

Pennsylvania.—*Callender v. Keystone Mut. L. Ins. Co.*, 23 Pa. St. 474.

Texas.—*Sydnor v. Gascoigne*, 11 Tex. 449; *Higgins v. Bordages*, 88 Tex. 468, 53 Am. St. Rep. 770; *Willis v. Owen*, 43 Tex. 48.

West Virginia.—*Ralston v. Weston*, 46 W. Va. 544, 76 Am. St. Rep. 834.

Wisconsin.—*Pratt v. Brown*, 3 Wis. 609.

3. *Hihn v. Courtis*, 31 Cal. 398.

4. *Higgins v. Bordages*, 88 Tex. 458, 53 Am. St. Rep. 770.

5. *Southern Pac. R. Co. v. Robinson*, 132 Cal. 408.

both upon the appellate court itself and upon the trial court.¹ Concisely it is

1. *United States*. — *Himely v. Rose*, 5 Cranch (U. S.) 313; *Martin v. Hunter*, 1 Wheat. (U. S.) 304; *Sibbald v. U. S.*, 12 Pet. (U. S.) 488; *Washington Bridge Co. v. Stewart*, 3 How. (U. S.) 413; *Corning v. Troy Iron, etc., Factory*, 15 How. (U. S.) 466; *Roberts v. Cooper*, 20 How. (U. S.) 481; *Tyler v. Magwire*, 17 Wall. (U. S.) 283; *Supervisors v. Kennicott*, 94 U. S. 498; *Clark v. Keith*, 106 U. S. 464; *Chaffin v. Taylor*, 116 U. S. 567; *Barney v. Winona, etc., R. Co.*, 117 U. S. 231; *Great Western Tel. Co. v. Burnham*, 162 U. S. 343; *Thompson v. Maxwell Land Grant, etc., Co.*, 168 U. S. 456; *Yazoo, etc., R. Co. v. Adams*, 180 U. S. 77; *Illinois v. Illinois Cent. R. Co.*, 184 U. S. 77; *U. S. v. Camou*, 184 U. S. 574; *Balch v. Haas*, (C. C. A.) 73 Fed. Rep. 974; *Mohrenstecher v. Westervelt*, (C. C. A.) 87 Fed. Rep. 157; *Montgomery v. McDermott*, 99 Fed. Rep. 502; *Supreme Lodge, etc., v. Lloyd*, (C. C. A.) 107 Fed. Rep. 70; *Austin v. Bartholomew*, (C. C. A.) 107 Fed. Rep. 349; *Standard Sewing Mach. Co. v. Leslie*, (C. C. A.) 118 Fed. Rep. 557; *Clark v. Brown*, (C. C. A.) 119 Fed. Rep. 130; *Stoll v. Lovig*, (C. C. A.) 120 Fed. Rep. 805.

Alabama. — *Meredith v. Naish*, 4 Stew. & P. (Ala.) 59; *Gee v. Williamson*, 1 Port. (Ala.) 313, 27 Am. Dec. 628; *Johnson v. Glascock*, 2 Ala. 522; *Russell v. La Roque*, 13 Ala. 149; *Goodwin v. McGehee*, 15 Ala. 232; *Rugely v. Robinson*, 19 Ala. 404; *Price v. Price*, 23 Ala. 609; *Weaver v. Weaver*, 23 Ala. 789; *Bryan v. Weems*, 25 Ala. 195; *Matthews v. Sands*, 29 Ala. 136; *Miller v. Jones*, 29 Ala. 174; *Stein v. Ashby*, 30 Ala. 363; *Goodman v. Walker*, 29 Ala. 444, 30 Ala. 482, 68 Am. Dec. 134; *Huffman v. State*, 30 Ala. 532; *Pearson v. Darrington*, 32 Ala. 266; *Montgomery v. Gilmer*, 33 Ala. 116, 70 Am. Dec. 562; *Thompson v. Dill*, 34 Ala. 175; *Bryant v. Boothe*, 35 Ala. 269; *Sanders v. Godley*, 36 Ala. 50; *Roundtree v. Turner*, 36 Ala. 555; *Preslar v. Stallworth*, 37 Ala. 402. This rule is abrogated by the code, which requires a second appeal to be considered without regard to former rulings. *Moulton v. Reid*, 54 Ala. 320.

Arizona. — *Snyder v. Pima County*, (Ariz. 1898) 53 Pac. Rep. 6.

Arkansas. — *Ex p. Jones*, 2 Ark. 93; *Porter v. Doe*, 10 Ark. 186 (*overruling* *Rutherford v. Lafferty*, 7 Ark. 402); *Pulaski County v. Lincoln*, 13 Ark. 103; *Rector v. Danley*, 14 Ark. 304; *Baxter v. Brooks*, 29 Ark. 185; *Taliaferro v. Barnett*, 47 Ark. 359; *Clark v. Hershy*, 52 Ark. 480; *Vogel v. Little Rock*, 55 Ark. 609; *Dyer v. Ambleton*, 56 Ark. 170.

California. — *Dewey v. Gray*, 2 Cal. 374; *Gunter v. Laffan*, 7 Cal. 588; *Davidson v. Dallas*, 15 Cal. 82; *Phelan v. San Francisco*, 20 Cal. 39; *Leese v. Clark*, 20 Cal. 388; *Lucas v. San Francisco*, 28 Cal. 595; *Megerle v. Ashe*, 47 Cal. 632; *Jaffe v. Skae*, 48 Cal. 540; *Sharon v. Sharon*, 79 Cal. 686; *Klauber v. San Diego St. Car Co.*, 98 Cal. 105; *People v. Hamilton*, 103 Cal. 488; *Woodside v. Tynan*, (Cal. 1897) 50 Pac. Rep. 424.

Colorado. — *Lee v. Stahl*, 13 Colo. 174; *Routt v. Greenwood Cemetery Co.*, 18 Colo. 132; *Israel v. Arthur*, 18 Colo. 158; *Kansas Pac. R. Co. v. Bayles*, 19 Colo. 348; *Wilson v. Bates*,

21 Colo. 115; *Smith v. Smith*, 24 Colo. 527, 65 Am. St. Rep. 251; *Chicosa Irrigating Ditch Co. v. El Moro Ditch Co.*, 10 Colo. App. 276; *Sprague Invest. Co. v. Mouat Lumber, etc., Co.*, 14 Colo. App. 114.

Connecticut. — *Nichols v. Bridgeport*, 27 Conn. 459; *New Haven, etc., Co. v. State*, 44 Conn. 376; *Tyler v. Hamersley*, 44 Conn. 414. See also *Zaleski v. Clark*, 45 Conn. 397.

District of Columbia. — *Holcomb v. Dearing*, 8 App. Cas. (D. C.) 301.

Florida. — *Doyle v. Wade*, 23 Fla. 90, 11 Am. St. Rep. 334; *Anderson v. Northrop*, (Fla. 1902) 33 So. Rep. 419.

Georgia. — *McWilliams v. Walthall*, 77 Ga. 7; *Atlanta v. First Methodist Church*, 83 Ga. 448; *Ingram v. Mercer University*, 102 Ga. 226; *Allen v. Schweigert*, 113 Ga. 71; *Willingham v. Sterling Cycle Works*, 113 Ga. 953; *Burke v. Ledsinger*, 115 Ga. 195; *Southern Mut. Ins. Co. v. Hudson*, 115 Ga. 638.

Idaho. — *Lindsay v. People*, 1 Idaho 438.

Illinois. — *Hollowbush v. McConnel*, 12 Ill. 203; *Briscoe v. Lloyd*, 64 Ill. 33; *Kingsbury v. Buckner*, 70 Ill. 514; *Rising v. Carr*, 70 Ill. 596; *Tuttle v. Garrett*, 74 Ill. 444; *Washburn, etc., Mfg. Co. v. Chicago Galvanized Wire Fence Co.*, 119 Ill. 31; *Mix v. People*, 122 Ill. 641; *Smyth v. Neff*, 123 Ill. 310; *Brooklyn v. Orthwein*, 140 Ill. 620; *Henning v. Eldridge*, 146 Ill. 305; *Pease v. Ditto*, 189 Ill. 456; *Bradley v. Lightcap*, 201 Ill. 511; *Brewer v. National Union Bldg. Assoc.*, 64 Ill. App. 161; *Cook v. Moulton*, 64 Ill. App. 429; *Owen v. Aetna Iron Works*, 76 Ill. App. 325; *Penn v. Schmisser*, 77 Ill. App. 526; *Harris v. McDonald*, 93 Ill. App. 191; *James v. Illinois Cent. R. Co.*, 93 Ill. App. 294; *Murphy v. Murphy*, 93 Ill. App. 671; *Walker v. Freeman*, 94 Ill. App. 357; *Westbrook v. Fredrickson*, 97 Ill. App. 40.

Indiana. — *Dodge v. Gaylord*, 53 Ind. 365; *Kress v. State*, 65 Ind. 106; *Richmond St. R. Co. v. Reed*, 83 Ind. 9; *Forgerson v. Smith*, 104 Ind. 246; *Pittsburgh, etc., R. Co. v. Hixon*, 110 Ind. 225; *Continental L. Ins. Co. v. Houser*, 111 Ind. 266; *McKinney v. State*, 117 Ind. 26; *Lillie v. Trentman*, 130 Ind. 16; *Huntington County v. Bonebrake*, 146 Ind. 311; *James v. Lake Erie, etc., R. Co.*, 148 Ind. 615; *Turpie v. Lowe*, 158 Ind. 47; *Brunson v. Henry*, (Ind. 1897) 47 N. E. Rep. 1063; *Phenix Ins. Co. v. Moffitt*, (Ind. 1898) 51 N. E. Rep. 948; *Greenwood v. Island Coal Co.*, 26 Ind. App. 425; *Terre Haute, etc., R. Co. v. Zehner*, 28 Ind. App. 229; *Pittsburgh, etc., R. Co. v. Mahoney*, 29 Ind. App. 654.

Iowa. — *Adams County v. Burlington, etc., R. Co.*, 55 Iowa 94; *Windsor v. Cobb*, 74 Iowa 709; *Heffner v. Brownell*, 75 Iowa 341; *Rice v. Grand Lodge*, 103 Iowa 643; *McFall v. Iowa Cent. R. Co.*, 104 Iowa 47; *Hendershott v. Western Union Tel. Co.*, 114 Iowa 415; *Benton County Sav. Bank v. Boddicker*, 117 Iowa 407; *Cowles v. Chicago, etc., R. Co.*, (Iowa 1902) 88 N. W. Rep. 1072.

Kansas. — *Headley v. Challiss*, 15 Kan. 602; *Crockett v. Gray*, 31 Kan. 351; *Western News Co. v. Wilmarth*, 34 Kan. 254; *Wheelock v. Myers*, 64 Kan. 52; *Branner v. Webb*, 65 Kan. 857, 68 Pac. Rep. 1107. But, while a ruling fol-

said that the decision on appeal becomes "the law of the case." While the

lowed in all ordinary cases, the court may reconsider and reverse a prior decision on a second appeal, if the first decision was clearly erroneous. *Central Branch Union Pac. R. Co. v. Shoup*, 28 Kan. 394, 42 Am. Rep. 163.

Kentucky.—*Legrand v. Baker*, 6 T. B. Mon. (Ky.) 243; *Ford v. Gregory*, 10 B. Mon. (Ky.) 183; *Davis v. McCorkle*, 14 Bush (Ky.) 746; *Smith v. Brannin*, 79 Ky. 114; *Maddox v. Williams*, 87 Ky. 150; *Hopkins v. Adam Roth Grocery Co.*, 105 Ky. 357; *Edmonson v. Kentucky Cent. R. Co.*, 105 Ky. 479; *Isert v. Davis*, (Ky. 1896) 37 S. W. Rep. 151; *Montgomery v. Gaar*, (Ky. 1896) 37 S. W. Rep. 580; *Louisville, etc., R. Co. v. Sarvant*, (Ky. 1898) 44 S. W. Rep. 88; *Schmetzer v. Louisville, etc., R. Co.*, (Ky. 1898) 44 S. W. Rep. 395; *Com. v. Louisville, etc., R. Co.*, (Ky. 1898) 46 S. W. Rep. 206; *Bean v. Meguiar*, (Ky. 1898) 47 S. W. Rep. 771; *Bottoms v. Bruner's Chapel, etc., Turnpike Co.*, (Ky. 1901) 62 S. W. Rep. 20; *Windisch-Mulhauser Brewing Co. v. Bacom*, (Ky. 1901) 64 S. W. Rep. 629; *Campbell v. Fidelity, etc., Co.*, (Ky. 1902) 66 S. W. Rep. 1033; *Louisville, etc., R. Co. v. Penrod*, (Ky. 1902) 66 S. W. Rep. 1013, 1042; *Farmers', etc., Tobacco Warehouse Co. v. Gibbons*, (Ky. 1903) 72 S. W. Rep. 12.

Louisiana.—*Vincent v. Philips*, 48 La. Ann. 351 (where the court says that the previous appeal in the case "must be taken to have settled the law of the case and to have fixed the rights of all parties in respect to this suit, whether it be strictly and technically *res judicata* or not"); *Taxpayers v. O'Kelly*, 49 La. Ann. 1043; *State v. Judges*, 105 La. 309; *Milwaukee Trust Co. v. Germania Ins. Co.*, 106 La. 669. See also *Lacroix v. Menard*, 7 Mart. N. S. (La.) 346; *State v. Judge*, 12 Rob. (La.) 320; *Conery v. New Orleans Waterworks Company*, 42 La. Ann. 441; *Ledoux v. Lavedan*, 49 La. Ann. 913; *Rivers v. Oak Lawn Sugar Co.*, 105 La. 783.

Maryland.—*Clerklee v. Mundell*, 4 Har. & J. (Md.) 497; *Hammond v. Ridgely*, 5 Har. & J. (Md.) 278, 9 Am. Dec. 522; *Mong v. Bell*, 7 Gill (Md.) 244; *Thomas v. Doub*, 1 Md. 324; *Young v. Frost*, 1 Md. 377; *Emory v. Owings*, 3 Md. 178; *Hammond v. Inloes*, 4 Md. 138; *Preston v. Leighton*, 6 Md. 88; *Mitchell v. Mitchell*, 6 Md. 224; *Brown v. Somerville*, 8 Md. 444; *Thomson v. Albert*, 15 Md. 268; *Cumberland Coal, etc., Co. v. Sherman*, 20 Md. 117; *Waters v. Waters*, 28 Md. 11; *Maryland Coal Co. v. Baker*, 85 Md. 688; *Abraham v. Mercantile Trust, etc., Co.*, 86 Md. 254; *State v. Cowen*, 94 Md. 487.

Massachusetts.—In *Booth v. Com.*, 7 Met. (Mass.) 286, it was held that after an affirmation on an appeal putting in issue the validity of the judgment in all matters of law, a second writ of error would not lie for any cause which existed at the time of the judgment. See also *Hayes v. Collins*, 114 Mass. 54.

Michigan.—*Mynning v. Detroit, etc., R. Co.*, 67 Mich. 677; *Hickox v. Chicago, etc., R. Co.*, 94 Mich. 237; *Pierce v. Underwood*, 112 Mich. 186; *John A. Tolman Co. v. Reed*, 115 Mich. 71; *Union Nat. Bank v. Rich*, 116 Mich. 414; *Hall v. Murdock*, 119 Mich. 389.

Minnesota.—*Ayer v. Stewart*, 16 Minn. 89;

Schleuder v. Corey, 30 Minn. 501; *Bradshaw v. Duluth Imperial Mill Co.*, 52 Minn. 59; *Johnson v. Northwestern Telephone Exch. Co.*, 54 Minn. 37; *Tilleny v. Wolverton*, 54 Minn. 75; *Maxwell v. Schwartz*, 55 Minn. 414; *Bradley v. Norris*, 67 Minn. 48; *St. Paul Trust Co. v. Kittson*, 67 Minn. 61; *Clark v. B. B. Richards Lumber Co.*, 72 Minn. 397; *Hibbs v. Marpe*, 84 Minn. 178; *Terryll v. Faribault*, 84 Minn. 341.

Mississippi.—*Green v. McDonald*, 13 Smed. & M. (Miss.) 445; *Smith v. Elder*, 14 Smed. & M. (Miss.) 100; *Henderson v. Winchester*, 31 Miss. 290; *Bridgeforth v. Gray*, 39 Miss. 136; *Adams v. Yazoo, etc., R. Co.*, 77 Miss. 315. See also *Stewart v. Stebbins*, 30 Miss. 66.

Missouri.—In this state many cases are in accord with the text. Overall *v. Ellis*, 38 Mo. 209; *Chouteau v. Gibson*, 76 Mo. 38; *Chapman v. Kansas City, etc., R. Co.*, 146 Mo. 494; *Carey v. West*, 165 Mo. 455; *Feurt v. Ambrose*, 34 Mo. App. 360; *Hombs v. Corbin*, 34 Mo. App. 393; *Carpenter v. McDavitt*, 66 Mo. App. 1; *State v. Morse*, 66 Mo. App. 303; *Fink v. Lancashire Ins. Co.*, 66 Mo. App. 513; *Crecelius v. Bierman*, 68 Mo. App. 34; *Hastings v. Hennessey*, 70 Mo. App. 354; *J. H. North Furniture, etc., Co. v. Davis*, 86 Mo. App. 296; *Livingston v. Allen*, 87 Mo. App. 179; *Girard L. Ins., etc., Co. v. Mangold*, 94 Mo. App. 125; *Marshall v. Ferguson*, 94 Mo. App. 175. The Supreme Court, however, has been inclined to reserve its power to reconsider, and the accepted doctrine of that court seems to be that a prior appellate decision in a case is conclusive on the trial court, but, while generally adhered to upon a second appeal, if the appellate court in its discretion is satisfied that gross injustice has been done or that greater injury would result from following than from overruling the earlier decision, it will be overruled. *Chambers v. Smith*, 30 Mo. 156; *Grumley v. Webb*, 48 Mo. 562; *Metropolitan Bank v. Taylor*, 62 Mo. 338; *Bealey v. Smith*, 158 Mo. 522, 81 Am. St. Rep. 317; *State v. Hathhorn*, 166 Mo. 229. In *Baker v. Kansas City, etc., R. Co.*, 147 Mo. 140, the court, after considering many cases, states that a decision on a previous appeal is the law of the case where the points "have been fairly presented, no mistake having been made in regard to the record in the case, and where no decision of this court has been overruled inadvertently," [citing *Hamilton v. Marks*, 63 Mo. 172; *Keith v. Keith*, 97 Mo. 231; *Hichman v. Link*, 116 Mo. 123; *Gwin v. Waggoner*, 116 Mo. 151; *Bird v. Sellers*, 122 Mo. 32; *Wilson v. Beckwith*, 140 Mo. 369; *Kelly v. Thuey*, 143 Mo. 437].

Montana.—*Creighton v. Hershfield*, 2 Mont. 169; *Daniels v. Andes Ins. Co.*, 2 Mont. 500; *Palmer v. Murray*, 8 Mont. 174; *Kelley v. Cable Co.*, 8 Mont. 440; *Davenport v. Kleinschmidt*, 8 Mont. 467; *Maddox v. Teague*, 18 Mont. 512; *Priest v. Eide*, 19 Mont. 53; *Murray v. Polglase*, 23 Mont. 424; *Wastl v. Montana Union R. Co.*, 24 Mont. 159; *Yellowstone Nat. Bank v. Gagnon*, 25 Mont. 268; *Mahoney v. Butte Hardware Co.*, 27 Mont. 463.

Nebraska.—*Hiatt v. Brooks*, 17 Neb. 33; *O'Donohue v. Hendrix*, 17 Neb. 287; *Leighton v. Stuart*, 19 Neb. 546; *Marion v. State*, 20 Neb. 233, 57 Am. Rep. 825; *Lane v. Starkey*, 20 Neb.

doctrine as thus stated obtains in the larger number of jurisdictions, in a few

586; Chicago, etc., R. Co. v. Hull, 24 Neb. 740; Meyer v. Shamp, 26 Neb. 729; Coburn v. Watson, 48 Neb. 257; Fuller v. Cunningham, 48 Neb. 857; Omaha L. Assoc. v. Kettenbach, 55 Neb. 330; Mead v. Tzschuck, 57 Neb. 615; Hayden v. Frederickson, 59 Neb. 141; Richardson Drug Co. v. Teasdale, 59 Neb. 150; Nebraska Sav., etc., Bank v. Brewster, 59 Neb. 535; Todd v. Houghton, 59 Neb. 538; Leavitt v. Bell, 59 Neb. 595; Barker v. Wheeler, 60 Neb. 470; Motley v. Motley, 60 Neb. 593; School Dist. v. Fiske, 61 Neb. 3; Holt v. Schneider, 61 Neb. 370; Chicago, etc., R. Co. v. Yost, 61 Neb. 530; Anheuser-Busch Brewing Assoc. v. Hier, 61 Neb. 582; Argabright v. State, 62 Neb. 402; Barton v. Shull, 62 Neb. 570; Gadsden v. Thrush, 63 Neb. 881; State v. Paxton, (Neb. 1902) 90 N. W. Rep. 983; Commercial State Bank v. Ketcham, (Neb. 1902) 92 N. W. Rep. 998. In *Hastings v. Foxworthy*, 45 Neb. 676, the rule is examined and criticised, and it is declared that previous decisions when erroneous may be overruled on a subsequent appeal, unless they are of such a character as to fall within the doctrine of *res judicata*. But this decision seems to have had little effect. The holding in *Whittenberg v. Mollyneaux*, 60 Neb. 583, is in conflict with it, and it is *disapproved* by name in *Smith v. Neufeld*, 61 Neb. 701.

New Hampshire.—*Bell v. Woodward*, 47 N. H. 539, 48 N. H. 437; *Stanton v. Thompson*, 49 N. H. 275; *Bell v. Lamprey*, 58 N. H. 124; *Carter v. Jackson*, 58 N. H. 156; *Plaisted v. Holmes*, 58 N. H. 619; *Amoskeag Mfg. Co. v. Head*, 59 N. H. 332; *Weare v. Deering*, 60 N. H. 56; *Cox v. Leviston*, 66 N. H. 167; *Hedding v. Gallagher*, 70 N. H. 631.

New Mexico.—*Rupe v. New Mexico Lumber Assoc.*, 3 N. Mex. 312; *Crary v. Field*, 10 N. Mex. 257; *Flourney v. Bullock*, (N. Mex. 1901) 66 Pac. Rep. 547; *U. S. v. Denver, etc.*, R. Co., (N. Mex. 1901) 66 Pac. Rep. 550; *Armijo v. Mountain Electric Co.*, (N. Mex. 1902) 67 Pac. Rep. 726.

New York.—A decision of the Court of Appeals, though by the second division, becomes the law of the case. *Furniss v. Ferguson*, 34 N. Y. 485; *Justice v. Lang*, 52 N. Y. 323; *Terry v. Wait*, 56 N. Y. 91; *Joslin v. Cowee*, 56 N. Y. 626; *Moore v. Simmons*, 133 N. Y. 695; *Williamsburgh Sav. Bank v. Solon*, 136 N. Y. 477; *Mygatt v. Coe*, 142 N. Y. 79; *Roberts v. Buckley*, 145 N. Y. 229; *Matter of Laudy*, 161 N. Y. 429. See also *Hosack v. Rogers*, 25 Wend. (N. Y.) 313. The law of the case constitutes no iron rule which precludes the court from modifying or reversing its judgment in the same case; but in order to justify such a course, manifest error must be shown, as in overlooking some statutory provision or controlling decision of the court. In other words, such a case must be presented as would require the court to grant a reargument. *Eaton v. Alger*, 47 N. Y. 345; *Worrall v. Munn*, 53 N. Y. 187; *Cluff v. Day*, 141 N. Y. 580. The Appellate Division recognizes the conclusive force of a decision by it on a previous appeal, though in a different department. *Feldman v. McGraw*, 14 N. Y. App. Div. 631; *Stokes v. Hyde*, 24 N. Y. App. Div. 624; *Solomon v. Continental F. Ins. Co.*,

28 N. Y. App. Div. 213; *Nelson v. Lohigh Valley R. Co.*, 37 N. Y. App. Div. 631, *affirmed* 165 N. Y. 635; *Wild v. Porter*, 59 N. Y. App. Div. 350, *affirmed* 173 N. Y. 614; *Weigley v. Kneeland*, 60 N. Y. App. Div. 614, *affirmed* 172 N. Y. 625; *Fortunato v. New York*, 74 N. Y. App. Div. 441, *modified* 173 N. Y. 608; *Leeds v. New York Tel. Co.*, 79 N. Y. App. Div. 121. See also *Guidet v. New York*, 37 N. Y. Super. Ct. 124. A decision in the same case of the General Term of the Supreme Court, while entitled to the utmost respect, is not conclusive on the Appellate Division, and may in a proper case be reversed. *Sias v. Rochester R. Co.*, 18 N. Y. App. Div. 506. See also *Solomon v. Continental F. Ins. Co.*, 28 N. Y. App. Div. 213.

North Carolina.—*Warden v. McKinnon*, 99 N. Car. 251; *Pretzfelder v. Merchants Ins. Co's*, 123 N. Car. 164; *Hendon v. North Carolina R. Co.*, 127 N. Car. 110; *Shoef v. Frost*, 127 N. Car. 306; *Wright v. Southern R. Co.*, 128 N. Car. 77; *Kramer v. Southern R. Co.*, 128 N. Car. 269; *State Hospital v. Fountain*, 129 N. Car. 90; *Setzer v. Setzer*, 129 N. Car. 296; *Holley v. Smith*, 132 N. Car. 36.

Ohio.—*Hinton v. McNeil*, 5 Ohio 511; *Pollock v. Cohen*, 32 Ohio St. 514.

Oregon.—*Powell v. Dayton, etc.*, R. Co., 14 Oregon 22; *Applegate v. Dowell*, 17 Oregon 299; *Portland Trust Co. v. Coulter*, 23 Oregon 131; *Stager v. Troy Laundry Co.*, 41 Oregon 141.

Pennsylvania.—*Bolton v. Hey*, 168 Pa. St. 418; *Rich v. Black*, 181 Pa. St. 290; *Giberson v. Patterson Mills Co.*, 187 Pa. St. 525; *Lancaster v. Frescoln*, 203 Pa. St. 640; *Marsh v. Pier*, 4 Rawle (Pa.) 289, 26 Am. Dec. 131; *Corry v. Corry Chair Co.*, 18 Pa. Super. Ct. 281.

South Carolina.—*Kibler v. Bridges*, 5 S. Car. 335; *Manufacturing Co. v. Price*, 6 S. Car. 278; *Warren v. Raymond*, 17 S. Car. 163; *Ex p. Knox*, 17 S. Car. 207; *Frost v. Frost*, 21 S. Car. 501; *Turner v. Interstate Bldg., etc., Assoc.*, 51 S. Car. 33; *McAlister v. Hamilton*, 61 S. Car. 6; *Carpenter v. Lewis*, 65 S. Car. 400; *Jones v. Charleston, etc., R. Co.*, 65 S. Car. 410.

South Dakota.—*Plymouth County Bank v. Gilman*, 3 S. Dak. 170, 44 Am. St. Rep. 782; *St. Croix Lumber Co. v. Mitchell*, 4 S. Dak. 487; *Tanderup v. Hansen*, 8 S. Dak. 375; *Wright v. Lee*, 10 S. Dak. 263; *Bem v. Shoemaker*, 10 S. Dak. 453; *Crammer v. Kohn*, 11 S. Dak. 245.

Tennessee.—*Collins v. North British, etc.*, Ins. Co., 91 Tenn. 432. See also *Illinois Cent. R. Co. v. Bentz*, 108 Tenn. 674.

Texas.—The law of the case is not conclusive, but on a second appeal the former decision will be reviewed only for urgent reasons or in exceptional cases. The power to reconsider exists; its exercise rests in the discretion of the court in the particular circumstances of the case. *Burns v. Ledbetter*, 56 Tex. 282; *Frankland v. Cassaday*, 62 Tex. 418; *Bomar v. Parker*, 66 Tex. 438; *Adams v. Fisher*, 75 Tex. 657; *Galveston, etc., R. Co. v. Faber*, 77 Tex. 153; *Kempner v. Huddleston*, 90 Tex. 182; *Moor v. Moor*, (Tex. Civ. App. 1901) 63 S. W. Rep. 347; *Sisk v. Joyce*, (Tex. Civ. App. 1902) 68 S. W. Rep. 50. An early case denies the exist-

states its application varies to some extent.¹

2. Relations to Res Judicata and Stare Decisis.—The law of the case as understood and applied in some states differs alike from *res judicata* and from *stare decisis*, though it is sometimes stated to rest on one or the other of these doctrines.² It is anomalous, so far as *res judicata* is concerned, in that the conclusiveness of the first judgment on appeal does not depend upon the character of that judgment as final or otherwise.³ It varies from the doctrine of *stare decisis* in the fact that the first judgment cannot be overruled on a second appeal as applied to the facts of the case between the parties thereto.⁴ But some authorities refuse to regard the expression "law of the case" as connoting a distinct legal rule, and hold that so far as the decision on the first appeal

ence of such a rule. *Meyers v. Dittmar*, 47 Tex. 373.

Utah.—*Silva v. Pickard*, 14 Utah 249; *Herriman Irrigation Co. v. Keel*, 25 Utah 96.

Vermont.—*Stacy v. Vermont Cent. R. Co.*, 32 Vt. 551; *Amsden v. Atwood*, 68 Vt. 322.

Virginia.—*Stuart v. Heiskell*, 86 Va. 191; *Woodbridge v. Green*, (Va. 1897) 26 S. E. Rep. 578; *Carper v. Norfolk, etc.*, R. Co., 95 Va. 43; *Sims v. Tyrer*, 96 Va. 14; *Haffner v. Chesapeake, etc.*, R. Co., 96 Va. 528.

Washington.—*Oregon R., etc., Co. v. Dacres*, 1 Wash. 199; *Wilkes v. Davies*, 8 Wash. 112; *Taylor v. Gale*, 24 Wash. 336; *Payette v. Ferrier*, (Wash. 1903) 71 Pac. Rep. 546; *State v. Moss*, 13 Wash. 42; *Dennis v. Kass*, 13 Wash. 137; *Furth v. Snell*, 13 Wash. 660; *Taake v. Seattle*, 18 Wash. 178; *State v. Superior Ct.*, 19 Wash. 114; *Smith v. Seattle*, 20 Wash. 613.

Wisconsin.—*Atty.-Gen. v. Lum*, 2 Wis. 507; *Cole v. Clarke*, 3 Wis. 323; *Pierce v. Kneeland*, 9 Wis. 23; *Eastman v. Harteau*, 12 Wis. 267; *Reed v. Jones*, 15 Wis. 40; *Akerly v. Vilas*, 24 Wis. 165, 1 Am. Rep. 166; *Wright v. Sperry*, 25 Wis. 617; *Hopkins v. Hopkins*, 40 Wis. 462; *Klatt v. N. C. Foster Lumber Co.*, 97 Wis. 641; *Wisconsin Marine, etc., Ins. Co. v. Mann*, 100 Wis. 596; *Trapp v. New Birdsall Co.*, 109 Wis. 543; *Hill v. American Surety Co.*, 112 Wis. 627; *Gates v. Parmly*, 113 Wis. 147; *Shaft v. Carey*, 115 Wis. 155.

1. See *Alabama, Kansas, Massachusetts, Missouri, Nebraska, New York, Texas*, in the preceding note.

2. Res Judicata Basis of Rule.—*Soule v. Dawes*, 14 Cal. 247; *Bradley v. Norris*, 67 Minn. 48; *Silva v. Pickard*, 14 Utah 245; *Potter v. Ajax Min. Co.*, 22 Utah 273.

Conclusiveness of Decision on Former Appeal Stated as Res Judicata—*United States*.—*Austin v. Bartholomew*, (C. C. A.) 107 Fed. Rep. 353.

Colorado.—*Kansas Pac. R. Co. v. Bayles*, 19 Colo. 348. See also *Schmidt v. Denver First Nat. Bank*, 10 Colo. App. 261 ("practically treated as *res judicata*").

Georgia.—*McWilliams v. Walthall*, 77 Ga. 7.

Illinois.—*Rising v. Carr*, 70 Ill. 596.

Iowa.—*Adams County v. Burlington, etc.*, R. Co., 55 Iowa 98.

Kentucky.—*Farmers', etc., Tobacco Warehouse Co. v. Gibbons*, (Ky. 1903) 72 S. W. Rep. 12.

Michigan.—*Union Nat. Bank v. Rich*, 116 Mich. 414.

Missouri.—*Chouteau v. Gibson*, 76 Mo. 38.

North Carolina.—*Kramer v. Southern R. Co.*, 128 N. Car. 269.

South Carolina.—*Warren v. Raymond*, 17 S. Car. 163.

Wisconsin.—*Parker v. Pomeroy*, 2 Wis. 112; *Downer v. Cross*, 2 Wis. 371; *Akerly v. Vilas*, 24 Wis. 165, 1 Am. Rep. 166; *Wright v. Sperry*, 25 Wis. 617; *Noonan v. Orton*, 27 Wis. 300; *McLeod v. Bertschy*, 34 Wis. 244; *Du Pont v. Davis*, 35 Wis. 631; *Hutchinson v. Chicago, etc.*, R. Co., 41 Wis. 541; *Fire Dept. v. Tuttle*, 50 Wis. 552; *Ellis v. Northern Pac. R. Co.*, 80 Wis. 459, 27 Am. St. Rep. 44; *Gano v. Chicago, etc.*, R. Co., 66 Wis. 12; *Kiekhoefer v. Hidershede*, 113 Wis. 280; *Collins v. Janesville*, 111 Wis. 348.

Res Judicata and Stare Decisis.—*Smyth v. Neff*, 123 Ill. 310.

Rule Treated as Stare Decisis.—*Louisville, etc.*, R. Co. v. Penrod, (Ky. 1902) 66 S. W. Rep. 1013; *Bealey v. Smith*, 158 Mo. 522, 81 Am. St. Rep. 317; *Hombs v. Corbin*, 34 Mo. App. 393; *Chicago, etc.*, R. Co. v. Hull, 24 Neb. 740; *Worral v. Munn*, 53 N. Y. 187.

3. How Differs from Res Judicata.—The judgment "may be final, in the sense of a definitive determination of the matter, or it may be interlocutory, but it is final so far as the jurisdiction over it is concerned, or any power of control after the issuance of the mandate and the lapse of the term at which judgment is rendered." *Davidson v. Dallas*, 15 Cal. 83.

Thus when the appellate court reverses a case and awards a *venire de novo* its judgment is still the law of the case. *Leese v. Clark*, 20 Cal. 417. See also *Baxton v. Brooks*, 29 Ark. 185.

A Decision on Appeal from the Grant or Denial of a Preliminary Injunction becomes the law of the case. *Western Union Tel. Co. v. Toledo*, (C. C. A.) 121 Fed. Rep. 734; *Murphey v. Harker*, 115 Ga. 91; *Savannah, etc.*, R. Co. v. Savannah, 115 Ga. 137; *Harris v. McDonald*, 93 Ill. App. 191, affirmed 194 Ill. 75. See also the title *RES JUDICATA*, vol. 24, p. 818, note 4, and compare *Hadden v. Dooley*, (C. C. A.) 92 Fed. Rep. 278, reversing *Hadden v. Natchaug Silk Co.*, 84 Fed. Rep. 80.

4. How Differs from Stare Decisis.—An appellate judgment "in the case in which it is made is more than authority; it is a final adjudication, from the consequences of which the court cannot depart, nor the parties relieve themselves." *Phelan v. San Francisco*, 20 Cal. 39; *Leese v. Clark*, 20 Cal. 417. See also *Nieto v. Carpenter*, 21 Cal. 488; *Lee v. Stahl*, 13 Colo. 174; *Hopkins v. Adam Roth Grocery Co.*, 105 Ky. 357; *Bradley v. Norris*, 67 Minn. 48.

constitutes a final judgment, it is *res judicata* and binding, but so far as the judgment is not final it is within the doctrine of *stare decisis* and may be overruled on a second appeal even in the same case.¹

3. Reasons for Doctrine. — The reason for the rule of the finality of the appellate decision is sometimes alleged (without direct reference to either *stare decisis* or *res judicata*) to be found in the want of power in an appellate court to modify its own judgments otherwise than on a rehearing, and in that the issuance of a mandate for a retrial takes the case out of its jurisdiction.² Again, the rule has been said to be "necessary to enable an appellate court to perform its duties satisfactorily and efficiently, which would be impossible if a question once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal."³ If a different rule were admitted, it is said, every change in the personnel of the bench would produce confusion.⁴

4. Application of Doctrine — *a. IN GENERAL.* — The question as to the application of the doctrine most frequently arises where a case has been before an appellate court, and certain rules of law applicable thereto have been announced by that court and the cause remanded for a new trial. In such a case the law as laid down upon the first appeal will be held to be the law of the case on the second appeal, and will be adhered to by the court without any investigation as to whether or not the court is then satisfied with the law as so laid down. It may be possible that some courts have in some particular case applied the law established in one case in another not technically the same, but it will be found that it was substantially identical with the one in which the rule was laid down.⁵ What has been decided by a case afterwards over-

1. Rule Resolved into Res Judicata and Stare Decisis. — *Hasting v. Foxworthy*, 45 Neb. 676, where the subject is critically examined on authority and principle by Irvine, Comr. See also *Central Branch Union Pac. R. Co. v. Shoup*, 28 Kan. 294, 42 Am. Rep. 163; *Steele v. Boley*, 7 Utah 64; *U. S. v. Elliot*, 12 Utah 119.

A Mere Dismissal of a First Appeal Is No Bar on a second appeal to raising questions which might have been raised on the first appeal. *Adamson v. Sundby*, 51 Minn. 460.

When All That Is Decided Is that the Judgment Is Reversed, as where the members of the court place their judgment on different grounds, "a determination of the appeal would be no authority even in the same case." *Oakley v. Aspinwall*, 13 N. Y. 507, *per* Comstock, J.

When Two Conflicting Opinions Have Been Delivered in the same case at different times, neither of them will be binding on a third appeal, but the whole matter is open. *Moore v. Barclay*, 23 Ala. 739.

2. Reasons for Doctrine of Finality — *United States*. — *Washington Bridge Co. v. Stewart*, 3 How. (U. S.) 425; *Peck v. Sanderson*, 18 How. (U. S.) 42; *Sizer v. Many*, 16 How. (U. S.) 103; *Balch v. Haas*, (C. C. A.) 73 Fed. Rep. 976.

California. — *Leese v. Clark*, 20 Cal. 417; *Davidson v. Dallas*, 15 Cal. 83; *Sharon v. Sharon*, 79 Cal. 690.

Illinois. — *Henning v. Eldridge*, 146 Ill. 305. *South Carolina*. — *Ex p. Dunovant*, 16 S. Car. 299; *Ex p. Knox*, 17 S. Car. 207; *Jones v. Charleston*, etc., R. Co., 65 S. Car. 410; *Carpenter v. Lewis*, 65 S. Car. 400.

Utah. — *Silva v. Pickard*, 14 Utah 245.

An Appellate Court Has No Appellate Jurisdic-

tion over Itself. — *Sibbald v. U. S.*, 12 Pet. (U. S.) 488; *Martin v. Hunter*, 1 Wheat. (U. S.) 304; *Corning v. Troy Iron, etc., Factory*, 15 How. (U. S.) 466; *Kingsbury v. Buckner*, 70 Ill. 514; *Wright v. Southern R. Co.*, 123 N. Car. 77.

After the Expiration of the Term at Which a Decision Is Made the court has no power to review or reverse its decision. *Tyler v. Magwire*, 17 Wall. (U. S.) 283; *Sibbald v. U. S.* 12 Pet. (U. S.) 488; *Brooks v. Hanauer*, 22 Ark. 174; *Rawdon v. Rapley*, 14 Ark. 203, 58 Am. Dec. 370; *Real Estate Bank v. Rawdon*, 5 Ark. 558; *Smith v. Dudley*, 2 Ark. 66; *Davidson v. Dallas*, 15 Cal. 83; *Brooklyn v. Orthwein*, 140 Ill. 620.

When Fraud or Imposition has been practiced on the court, or the remittitur granted improvidently on a false suggestion, jurisdiction is not lost. *Vance v. Pena*, 36 Cal. 328; *Rowland v. Kreyenhagen*, 24 Cal. 52.

3. Great Western Tel. Co. v. Burnham, 162 U. S. 343, *per* Gray, J.

Rule Necessary as Matter of Policy in Order to End Litigation. — *Sharon v. Sharon*, 79 Cal. 654; *Ogden v. Larrabee*, 70 Ill. 510; *Kramer v. Southern R. Co.*, 128 N. Car. 269; *Stager v. Troy Laundry Co.*, 41 Oregon 141. See also *RES JUDICATA*, vol. 24, p. 713.

4. Personnel of Court. — *Clary v. Hoagland*, 6 Cal. 688; *Oakley v. Aspinwall*, 13 N. Y. 505.

"There would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on its opinions, or speculate on chances from changes in its members." *Roberts v. Cooper*, 20 How. (U. S.) 481; *Standard Sewing Mach. Co. v. Leslie*, (C. C. A.) 118 Fed. Rep. 557.

5. Doctrine Stated. — *Wilkes v. Davies*, 8 Wash. 112, *per* Hoyt, J., *dissenting*.

ruled, continues to be the law of that case as between the parties and those claiming under them.¹

When Two Appeals Are Allowed in the Same Case, one from the judgment, the other from an order granting or denying a new trial, the decision of a rule of law in the appeal first reached does not prevent the court from modifying or changing such rule on the second appeal; for until the second appeal is approved of no further action can be taken in the case, and until that time it should be considered as within the control of the court.²

Does Not Command Favor of Court. — It has been said that the doctrine that an estoppel in a case is created by an erroneous ruling on appeal has nothing to commend it to favor, and courts have declared that its application will not be extended beyond the cases in which it has been held to apply.³

b. TO WHAT COURTS DOCTRINE APPLICABLE. — There is some authority that the doctrine of the law of the case applies only to the decisions of courts of last resort and not to intermediate appellate courts,⁴ but on the other hand it has been held that when an appellant ceases to pursue his appeal from one appellate court to another the decision of the court where he sees fit to rest is final within the meaning of the rule.⁵ On this point there is some disagreement among the authorities. Intermediate appellate courts⁶ and even trial courts in certain cases⁷ apply the doctrine, but the question whether a decision of an intermediate court is conclusive before a court of final resort on a later appeal perhaps depends on the principles of *res judicata*.⁸

1. Overruled Case. — *Hardigree v. Mitchum*, 51 Ala. 151; *Hibbitts v. Jack*, 97 Ind. 570, 49 Am. Rep. 478; *Thomson v. Albert*, 15 Md. 268; *Bolton v. Hey*, 168 Pa. St. 418; *Jones v. Charleston, etc.*, R. Co., 65 S. Car. 410.

But it has been held that if a first decision on appeal has been overruled pending the second trial, it is the duty of the trial court at the second trial to follow the latest expression of the Supreme Court. *Barton v. Thompson*, 56 Iowa 571. See also *Matthews v. Matthews*, 154 N. Y. 288, reversing 8 N. Y. App. Div. 616.

2. Two Appeals. — *Sharon v. Sharon*, 79 Cal. 654.

3. Not to Be Extended. — *Wixson v. Devine*, 80 Cal. 385; *Mattingly v. Pennie*, 105 Cal. 514, 45 Am. St. Rep. 87. See also *Wastl v. Montana Union R. Co.*, 24 Mont. 165.

4. Courts of Last Resort. — *Lawrence v. Bailou*, 37 Cal. 518; *Brown v. Tourtelotte*, 24 Colo. 204.

The Opinion of an Intermediate Appellate Court, in a former stage of the litigation, although not excepted to, is not the law of the case before the court of final resort. *Pueblo v. Shutt Invest. Co.*, 28 Colo. 524.

Federal Decision as Law of Case in State Court. — Where an action instituted in the federal courts has been appealed to the Circuit Court of Appeals and the judgment there reversed and the cause remanded for a new trial, the decision of the Circuit Court of Appeals does not become the law of the case in a subsequent action instituted in the state court by the plaintiff after taking a voluntary nonsuit in the federal court. *Illinois Cent. R. Co. v. Bentz*, 108 Tenn. 670.

5. Rule Not Confined to Courts of Last Resort. — *Clore v. Davis*, (Ky. 1897) 40 S. W. Rep. 380; *Silva v. Pickard*, 14 Utah 252 [apparently overruling *U. S. v. Elliot*, 12 Utah 125; *Jungk v. Reed*, 12 Utah 211]. See also *Goodrich v. Thompson*, 4 Day (Conn.) 221.

Where the highest court of a state has on a second appeal regarded its prior judgment as the law of the case, such prior judgment involving no federal question, an appeal from the second judgment to the Supreme Court of the United States will be dismissed. *Northern Pac. R. Co. v. Ellis*, 144 U. S. 458.

6. See *Morgan v. Johnson*, (C. C. A.) 106 Fed. Rep. 452; *Henning v. Eldridge*, 146 Ill. 305; *Abbey v. Wheeler*, 170 N. Y. 126 reversing on other points 58 N. Y. App. Div. 451.

An Intermediate Contrary Decision in another and a different case in the state court does not affect the law of the case in a federal court. *Haley v. Kilpatrick*, (C. C. A.) 104 Fed. Rep. 647.

7. A Decision of a Trial Court on a point has been held to be not subject to review before another judge of the same court when the point ruled on is presented in a subsequent stage of the same case. *Oglesby v. Attrill*, 14 Fed. Rep. 214; *Cole Silver Min. Co. v. Virginia, etc.*, *Water Co.*, 1 Sawy. (U. S.) 685; *Wakelee v. Davis*, 44 Fed. Rep. 532; *Turner v. Indianapolis, etc.*, R. Co., 8 Biss. (U. S.) 380; *Alexander v. Alexander*, 120 N. Car. 472; *Walbridge v. Union Mfg. Co.*, 5 Ohio Dec. 203; *Hunter v. Ruff*, 47 S. Car. 525, 58 Am. St. Rep. 907. See also the title *RES JUDICATA*, vol. 24, p. 819. But compare *Richman v. Muscatine County*, 77 Iowa 513, 14 Am. St. Rep. 308; *Seery v. Murray*, 107 Iowa 384.

But as Long as a Case Is In Fieri, the court may alter its opinion. *Langford v. Wilkinson County*, 75 Ga. 502.

And after an appeal on a second trial, propositions not passed on by the court above are not binding. *Kibler v. Southern R. Co.*, 64 S. Car. 242.

8. See *Brown v. Tourtelotte*, 24 Colo. 204; *Siedenbach v. Riley*, 111 N. Y. 560; *Wilcox v. Hawley*, 31 N. Y. 648.

Second judgments of the Supreme Court based on the principle of the law of the case

c. **QUESTIONS OF LAW AND FACT.**—The law of the case has been held to embrace only questions of law identical with those on a prior appeal,¹ and a decision on appeal on a question of fact does not become the law of the case, nor estop the parties on a second trial from showing the true state of the facts.²

d. **CHANGED CIRCUMSTANCES ON SECOND TRIAL.**—(1) *Different State of Facts on Second Trial.*—It follows that where on the second trial a new state of facts is established, the previous rulings of the appellate court cease to be the law of the case, for the rule can be invoked only when the facts reappear in the same circumstances in which they were originally presented.³

have been reversed without consideration of this feature by the New York Court of Appeals. *Brennan v. New York*, 62 N. Y. 365, reversing 1 Hun (N. Y.) 315; *Dougherty v. Horseheads*, 159 N. Y. 154, reversing 5 N. Y. App. Div. 625.

In *Missouri* a prior determination by the Court of Appeals was held binding on the Supreme Court. *Lackland v. Smith*, 75 Mo. 307.

But in *Hennessy v. Bavarian Brewing Co.*, 145 Mo. 104, 68 Am. St. Rep. 554, a contrary decision is arrived at on the principle that the law of the case is conclusive "only where the second appeal is taken to the same court that formerly decided the case." See to the same effect *Paddock v. Missouri Pac. R. Co.*, 155 Mo. 524.

In *Illinois* it has been held that a judgment of the Appellate Court, if of such a character that an appeal lies to the Supreme Court, is, if no further appeal be taken, conclusive on the matters determined, when the case after a second trial and a second appeal to the Appellate Court finally comes before the Supreme Court. *Henning v. Eldridge*, 146 Ill. 305. But it is otherwise when the first decision of the Appellate Court is not final. *Board of Trade v. Nelson*, 162 Ill. 431, 53 Am. St. Rep. 312.

The opinion of the court of last resort on a former appeal controls subsequent decisions of a court of intermediate appeal, where the case is again before the court of intermediate appeal. *Union Nat. Bank v. Post*, 93 Ill. App. 339, affirmed 192 Ill. 385; *Gaston v. Hayden*, 98 Mo. App. 683; *Rose v. Hawley*, 69 Hun (N. Y.) 614, 23 N. Y. Supp. 373; *Buker v. Leighton Lea Assoc.*, 63 N. Y. App. Div. 507; *Griffen v. Manice*, 74 N. Y. App. Div. 371, affirmed 174 N. Y. 505; *Hutchinson v. Manhattan Co.*, 49 N. Y. App. Div. 629, affirmed 170 N. Y. 579; *Matter of Jerome Ave.*, 78 N. Y. App. Div. 631; *Stokes v. Mustain*, (Tex. Civ. App. 1898) 44 S. W. Rep. 404.

By constitutional provision in *Missouri* it is the duty of the courts of appeal to follow the last previous ruling of the Supreme Court on any question of law or equity, regardless of their own previous decision in the case. *Hamilton v. Aurora F. & M. Ins. Co.*, 35 Mo. App. 263; *Buchanan v. Cole*, 65 Mo. App. 495; *Thompson v. Irwin*, 76 Mo. App. 418; *Wolf v. Dwelling House Ins. Co.*, 86 Mo. App. 580.

1. **Questions of Law.**—*McGraw v. Friend*, etc., *Lumber Co.*, 133 Cal. 589; *Robinson v. Thornton*, 114 Cal. 275; *Matter of Lux*, 114 Cal. 73; *Wallace v. Sisson*, 114 Cal. 42; *Sneed v. Osborn*, 25 Cal. 629; *Southern Mut. Ins. Co. v. Hudson*, 115 Ga. 638; *Savannah*, etc., *R. v. Savannah*, 115 Ga. 137; *Ingram v. Mercer University*, 102 Ga. 226; *Atlanta v. First Metho-*

dist Church, 83 Ga. 448; *Herriman Irrigation Co. v. Keel*, 25 Utah 102.

Decision on Demurrer.—Where a former appeal overruled a demurrer to the complaint, thus holding the complaint sufficient in its statement of facts, it constitutes an estoppel to allege on a second appeal that the action was brought in the name of the wrong plaintiff. *Reclamation Dist. No. 3 v. Goldman*, 65 Cal. 636.

2. **Decision on Facts Not Law of Case—California.**—*Robinson v. Thornton*, 114 Cal. 275; *Wallace v. Sisson*, 114 Cal. 42; *Mattingly v. Pennie*, 105 Cal. 514, 45 Am. St. Rep. 87; *Mitchell v. Davis*, 23 Cal. 383.

Colorado.—*Johnson v. Bailey*, 17 Colo. 59.

Georgia.—*Collins v. Carr*, 116 Ga. 39.

Indiana.—*Dodge v. Gaylord*, 53 Ind. 365.

Nebraska.—*Missouri Pac. R. Co. v. Fox*, 60 Neb. 531 (explaining *Wittenberg v. Mollyneaux*, 59 Neb. 203); *Lane v. Starkey*, 20 Neb. 586.

New York.—*Csatlos v. Metropolitan St. R. Co.*, 78 N. Y. App. Div. 635.

Virginia.—*Haffner v. Chesapeake*, etc., *R. Co.*, 96 Va. 528.

Case Reconsidered Only When Facts Bring It Within Rule Relating to Rehearing.—*Ayer v. Stewart*, 16 Minn. 89. See title REHEARING, 18 ENCYC. OF PL. AND PR. 1.

3. **New State of Facts on Second Trial—United States.**—*Patton v. Southern R. Co.*, (C. C. A.) 111 Fed. Rep. 712; *Balch v. Haas*, (C. C. A.) 73 Fed. Rep. 974; *Thatcher v. Gottlieb*, (C. C. A.) 59 Fed. Rep. 872.

Alabama.—*Malone v. Carroll*, 33 Ala. 191; *Walker v. Forbes*, 31 Ala. 9; *Gee v. Williamson*, 1 Port. (Ala.) 313, 27 Am. Dec. 628.

California.—*Benson v. Shotwell*, 103 Cal. 163; *Sharon v. Sharon*, 79 Cal. 634; *McLeran v. Benton*, 73 Cal. 329, 2 Am. St. Rep. 814; *Cross v. Zellerbach*, 63 Cal. 623; *Meeks v. Southern Pac. R. Co.*, 56 Cal. 513; *Donner v. Palmer*, 51 Cal. 629; *Jaffe v. Skae*, 48 Cal. 540; *Trinity County v. McCammon*, 25 Cal. 121; *Mitchell v. Davis*, 23 Cal. 381.

Colorado.—*Smith v. Smith*, 24 Colo. 527, 65 Am. St. Rep. 251; *Johnson v. Bailey*, 17 Colo. 59.

Connecticut.—See *Sargent v. New Haven Steamboat Co.*, 65 Conn. 116.

Georgia.—*Bass Dry Goods Co. v. Granite City Mfg. Co.*, 116 Ga. 176; *Clarke v. Havard*, 115 Ga. 882; *Murphey v. Harker*, 115 Ga. 91; *Central R., etc., Co. v. Smith*, 80 Ga. 526.

Illinois.—*Hanchett v. Ives*, 171 Ill. 122; *Lang v. Metzger*, 101 Ill. App. 380; *Middeke v. Balder*, 98 Ill. App. 525, affirmed 198 Ill. 590, 92 Am. St. Rep. 284; *World's Columbian Exposition Co. v. Lehigh*, 94 Ill. App. 433; *Fay v. Slaughter*, 94 Ill. App. 111.

(2) *Subject-matter Same but Parties Different.*—A decision on a prior appeal in a case between different parties but involving the identical subject-matter does not become the law of the case, but falls within the rule of *stare decisis* and should be followed unless manifestly erroneous.¹

e. POINT DECIDED AND DICTA.—An appellate court is estopped by a prior decision in the same case as to points distinctly and necessarily involved and determined on the former hearing.² The point may be necessarily determined so as to be the law of the case, although the question is not expressly treated in the opinion of the court on appeal.³ The presumption is

Indiana.—Dodge v. Gaylord, 53 Ind. 365.

Iowa.—Larkin v. Burlington, etc., R. Co., 91 Iowa 654; Adams County v. Burlington, etc., R. Co., 55 Iowa 94.

Kentucky.—Ohio Valley R. Co. v. Com., (Ky. 1899) 49 S. W. Rep. 548.

Maryland.—Maryland Coal Co. v. Baker, 85 Md. 688; Frisby v. Parkhurst, 29 Md. 58, 96 Am. Dec. 503; Brown v. Somersville, 8 Md. 444; Hammond v. Inloes, 4 Md. 138.

Missouri.—Fuchs v. St. Louis, 167 Mo. 652; Butler County v. Boatmen's Bank, 165 Mo. 456; Bealey v. Smith, 158 Mo. 522, 81 Am. St. Rep. 317; Kelly v. Thuey, 143 Mo. 437; Boettger v. Scherpe, etc., Architectural Iron Co., 136 Mo. 531; Finley v. Babb, 173 Mo. 257; Gratton, etc., Mfg. Co. v. Troll, 77 Mo. App. 339.

Montana.—Maddox v. Teague, 18 Mont. 512. *Nebraska.*—State v. Paxton, (Neb. 1902) 90 N. W. Rep. 983; Sutton First Nat. Bank v. Grosshans, 61 Neb. 575; Stockham Bank v. Alter, 61 Neb. 359; State v. Cass County, 60 Neb. 566; Mead v. Tzschuck, 57 Neb. 615.

New York.—Griffen v. Manice, 74 N. Y. App. Div. 371, affirmed 174 N. Y. 505; Douglass v. Northern Cent. R. Co., 59 N. Y. App. Div. 470; Hutchinson v. Manhattan Co., 49 N. Y. App. Div. 629, affirmed 170 N. Y. 579; St. Regis Paper Co. v. Santa Clara Lumber Co., (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 428, affirmed 62 N. Y. App. Div. 538.

South Dakota.—Plymouth County Bank v. Gilman, 3 S. Dak. 171, 44 Am. St. Rep. 782.

Utah.—Herriman Irrigation Co. v. Keel, 25 Utah 96.

Vermont.—Amsden v. Atwood, 68 Vt. 322.

Virginia.—Carper v. Norfolk, etc., R. Co., 95 Va. 43.

Washington.—Furth v. Snell, 13 Wash. 664.

So there is no estoppel where the prior decision was founded on an erroneous translation of a Spanish document now presented to the court in a correct translation. Nieto v. Carpenter, 21 Cal. 455.

A Decision on Demurrer to a Complaint Alleging Fraud is not binding on a second appeal where the facts show no fraud. Bennett v. Wilson, 133 Cal. 379.

1. Same Matter Between Different Parties.—Cleveland v. Cleveland, etc., R. Co., 93 Fed. Rep. 113; Simonds Counter Machinery Co. v. Knox, 39 Fed. Rep. 702; Kolb v. Swann, 68 Md. 516; Dunklin County v. Chouteau, 120 Mo. 577; Whittemore v. Cope, 11 Utah 359.

Amended Complaint Omitting One Party—Law of Case.—Mississinewa Min. Co. v. Andrews, 28 Ind. App. 496.

Second Appeal by Different Parties.—Where in a suit against several parties the plaintiff

appealed, the appellate court on a subsequent appeal by parties defendant will follow the decision in the plaintiff's appeal where the questions before it on the subsequent appeal were necessarily involved and settled on the prior appeal. Morrison v. Kuhn, (C. C. A.) 80 Fed. Rep. 740. See also Hallissy v. West Chicago Park Com'rs, 177 Ill. 598.

Judgment in a Prior Action Between Same Parties Involving Same Subject-matter is not conclusive as within the law of the case. Central Kentucky Asylum v. Hauns, (Ky. 1901) 64 S. W. Rep. 643.

2. Appellate Court Bound by Former Decision in Same Case—United States.—Ouray County v. Geer, (C. C. A.) 108 Fed. Rep. 478; Balch v. Haas, (C. C. A.) 73 Fed. Rep. 977.

California.—Faulkner v. Hendy, 123 Cal. 467; Matter of Central Irrigation Dist., 117 Cal. 388; Anderson v. Hancock, 64 Cal. 455; Phelan v. San Francisco, 20 Cal. 39; Heinlen v. Martin, 59 Cal. 181.

Colorado.—Schmidt v. Denver First Nat. Bank, 10 Colo. App. 261.

Indiana.—Wine v. Woods, 158 Ind. 391; Elliott v. Cale, 113 Ind. 383.

Maryland.—Hammond v. Ridgely, 5 Har. & J. (Md.) 278, 9 Am. Dec. 522; Young v. Frost, 1 Md. 377.

Montana.—Wastl v. Montana Union R. Co., 24 Mont. 159.

Nebraska.—State v. Paxton, (Neb. 1902) 90 N. W. Rep. 983; State v. Cass County, 60 Neb. 566; Hayden v. Frederickson, 59 Neb. 141; Wittenberg v. Mollyneaux, 59 Neb. 203; Home F. Ins. Co. v. Johansen, 59 Neb. 349.

New Hampshire.—See Stanton v. Thompson, 49 N. H. 275.

New Mexico.—U. S. v. Denver, etc., R. Co., (N. Mex. 1901) 66 Pac. Rep. 550.

New York.—Guidet v. New York, 37 N. Y. Super. Ct. 124.

South Carolina.—Kibler v. Southern R. Co., 64 S. Car. 242; Jennings v. Parr, 54 S. Car. 109.

Utah.—Herriman Irrigation Co. v. Keel, 25 Utah 102.

Virginia.—Sims v. Tyrer, 96 Va. 14.

Wisconsin.—Shaft v. Carey, 115 Wis. 155; Finney v. Guy, 111 Wis. 296.

3. Point May Be Determined Though Not Expressly Treated in Opinion.—Savannah, etc., R. Co. v. Savannah, 115 Ga. 137. See also Watkins v. Lawton, 69 Ga. 671; McKinney v. State, 117 Ind. 26; Crockett v. Gray, 31 Kan. 351; Murray v. Polglase, 23 Mont. 424; Priest v. Eide, 19 Mont. 53; U. S. v. Denver, etc., R. Co., (N. Mex. 1901) 66 Pac. Rep. 550; Joslin v. Cowee, 56 N. Y. 626.

that all the facts in the case bearing on the points decided have received due consideration whether all or none of them are mentioned in the opinion.¹ But dicta, expressions of opinion by the appellate court on matters the disposition of which was not required, create no estoppel.² When the first judgment is a general reversal and remanding, on the second appeal the court may look at the opinion rendered previously to ascertain the real ground of decision.³

Point Not Raised.—When a point was not raised or considered on a former appeal, the appellate court has been held not bound.⁴

Jurisdiction.—An appellate court having decided in the affirmative the question of the jurisdiction of the lower court either expressly or by implication in entertaining an appeal from the judgment, the parties are estopped to question its jurisdiction on a second appeal.⁵

f. NEW TRIAL AND PROCEEDINGS THEREIN—(1) *In General.*—When a case has been remanded for further proceedings or for a new trial, it is the duty of the trial court to follow the opinion of the appellate court, and the former has no power to review or amend the appellate decision.⁶

1 Presumption of Due Consideration.—*Mulford v. Estudillo*, 32 Cal. 131. See also *Smith v. Brannin*, 79 Ky. 114; *Hastings v. Hennessey*, 70 Mo. App. 354; *Myers v. South Bethlehem*, 149 Pa. St. 91; *Stuart v. Heiskell*, 86 Va. 191; *Taylor v. Gale*, 24 Wash. 336; *Smith v. Seattle*, 20 Wash. 613.

A judgment by an appellate court establishes as the law of the case, not only the result expressed in the former judgment, but also every legal proposition essential to sustain the judgment and assented to by a majority of the court; and the evidence of these propositions is to be found in the opinion delivered in the former appeal. *Furniss v. Ferguson*, 34 N. Y. 485; *Warren v. Raymond*, 17 S. Car. 163.

When the Evidence Was Incomplete in the Record on a former appeal, the expressions of the court founded thereon are not binding on a second trial. *Neal v. Marion*, 129 N. Car. 345.

First Decision Must Be on the Merits to Create Estoppel.—*Cook v. Moulton*, 64 Ill. App. 429.

Law of Another State Settled Pending Second Trial.—When a case involves the validity of a contract of another state, and the highest court of that state has settled the law in relation thereto pending a second trial, the trial court should follow such decision even though it is contrary to the view laid down by the Supreme Court on a first appeal, when on that appeal no claim was made that the contract was other than domestic and that point was not examined by the courts. *John A. Tolman Co. v. Reed*, 115 Mich. 71.

2. Dicta.—*United States.*—*Barney v. Winona, etc.*, R. Co., 117 U. S. 231; *Patillo v. Allen-West Commission Co.*, (C. C. A.) 108 Fed. Rep. 723.

Alabama.—*Jesse v. Carter*, 28 Ala. 475.

Arkansas.—*Clark v. Hershey*, 52 Ark. 473.

California.—*Mulford v. Estudillo*, 32 Cal. 139; *Trinity County v. McCammon*, 25 Cal. 121.

Indiana.—*Forgerson v. Smith*, 104 Ind. 247; *Union School Tp. v. Crawfordville First Nat. Bank*, 102 Ind. 464; *Richmond St. R. Co. v. Reed*, 83 Ind. 9.

Mississippi.—*Hart v. Chemical Nat. Bank*, (Miss. 1900) 27 So. Rep. 926.

Nebraska.—*State v. Paxton*, (Neb. 1902) 90

N. W. Rep. 983; *Wittenberg v. Mollyneaux*, 60 Neb. 583.

Utah.—*Herriman Irrigation Co. v. Keel*, 25 Utah 99; *Potter v. Ajax Min. Co.*, 22 Utah 283.

Wisconsin.—*Case v. Hoffman*, 100 Wis. 314; *Lathrop v. Knapp*, 37 Wis. 307.

3. Examining Previous Opinion.—*Walker v. Freeman*, 94 Ill. App. 357; *Noonan v. Orton*, 31 Wis. 265.

Where upon a former appeal the reversal turned upon a minor point only, but the important elements of the case were argued and decided, these matters are not mere dicta and cannot be gone into again upon a second appeal. *Adams v. Fisher*, 75 Tex. 657.

4. Point Not Raised or Considered.—*Balch v. Haas* (C. C. A.) 73 Fed. Rep. 977; *Matthews v. Sands*, 29 Ala. 139; *People v. Hamilton*, 103 Cal. 488; *Sprague Invest. Co. v. Mouat Lumber, etc.*, Co., 14 Colo. App. 107; *Pennsylvania Co. v. Bond*, 202 Ill. 95; *Davis v. Krug*, 95 Ind. 9; *Haynes v. Trenton*, 123 Mo. 326; *Keith v. Keith*, 97 Mo. 231; *Sweeney v. Montana Cent. R. Co.*, 25 Mont. 543; *Wastl v. Montana Union R. Co.*, 24 Mont. 164; *Jennings v. Parr*, 54 S. Car. 109. See also *Duval v. Farmers' Bank*, 9 Gill & J. (Md.) 31; *Guidet v. New York*, 37 N. Y. Super. Ct. 124.

5. Decision as to Jurisdiction of Lower Court.—*Skillem v. May*, 6 Cranch (U. S.) 267; *Washington Bridge Co. v. Stewart*, 3 How. (U. S.) 424; *Cable v. U. S. Life Ins. Co.* (C. C. A.) 111 Fed. Rep. 19; *Clary v. Hoagland*, 6 Cal. 685; *Lindsay v. People*, 1 Idaho 438. But see *Semple v. Anderson*, 9 Ill. 546.

6. Further Proceedings in Lower Court.—*United States.*—*Stewart v. Salamon*, 97 U. S. 361; *Olsen v. North Pac. Lumber Co.* (C. C. A.) 119 Fed. Rep. 77; *Martin v. People's Bank*, 115 Fed. Rep. 226; *In re Henschel*, 114 Fed. Rep. 968.

Alabama.—*Johnson v. Glascock*, 2 Ala. 519.

Arkansas.—*Walker v. Walker*, 7 Ark. 542;

Ex p. Jones, 2 Ark. 93.

Colorado.—*Hendrie, etc., Mfg. Co. v. Collins*, 29 Colo. 102.

District of Columbia.—*Farrow v. Eclipse Bicycle Co.*, 18 App. Cas. (D. C.) 111; *Holcomb v. Dearing*, 8 App. Cas. (D. C.) 301.

No Error When Decision Followed. — If the new trial is, had in accordance with the decision above, no error can be alleged in the action of the court.¹

(2) *Questions on Second Appeal.* — The second appeal brings up for consideration only the proceedings of the lower court after the mandate of the appellate court.² Error existing at the time of the former adjudication will

Georgia. — Russell v. Mohr-Weil Lumber Co., 115 Ga. 35; Norton v. Paragon Oil Can Co., 105 Ga. 466.

Illinois. — Perisho v. Perisho, 95 Ill. App. 644.

Indiana. — McClaren v. Indianapolis, etc., R. Co., 83 Ind. 319.

Missouri. — State v. Spencer, 166 Mo. 271; Bealey v. Smith, 158 Mo. 522, 81 Am. St. Rep. 317; May v. Crawford, 150 Mo. 524; Hennessy v. Bavarian Brewing Co., 145 Mo. 104, 68 Am. St. Rep. 554.

New York. — Moore v. Simmons, 133 N. Y. 695.

North Carolina. — Pretzfelder v. Merchants Ins. Co., 123 N. Car. 167. See also title RES JUDICATA, vol. 24, p. 718, note paragraph *Proceedings in Execution of Judgments.*

When a Judgment Is Reversed simply the opinion of the appellate court must be followed in the new trial so far as applicable. Sharp v. Miller, 66 Cal. 98.

Appellate Decisions Must Be Followed. — The trial court "cannot vary" the decision of the appellate court, "or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it further than to settle so much as has been remanded." *In re Sanford Fork, etc., Co.*, 160 U. S. 255. See also Henderson v. Winchester, 31 Miss. 290.

Putting in Issue Proposition Determined on Appeal. — A denial at a retrial putting in issue a proposition determined on the first appeal may be stricken out. Agne v. Seitsinger, 104 Iowa 482.

1 No Error in Following Decision of Appellate Court. — *United States.* — Stewart v. Salamon, 97 U. S. 361.

Alabama. — Malone v. Carroll, 33 Ala. 191.

Arkansas. — Porter v. Doe, 10 Ark. 186.

California. — Leese v. Clark, 20 Cal. 388.

Indiana. — Pittsburgh, etc., R. Co. v. Hixon, 110 Ind. 225; Evansville v. Senhenn, 26 Ind. App. 362.

Iowa. — Hendershott v. Western Union Tel. Co., 114 Iowa 415.

Maryland. — Mong v. Bell, 7 Gill (Md.) 244; Hammond v. Ridgely, 5 Har. & J. (Md.) 278, 9 Am. Dec. 522; Clerklee v. Mundell, 4 Har. & J. (Md.) 497; Hambleton v. Tenant, 4 Har. & J. (Md.) 440; Young v. Frost, 1 Md. 377.

Missouri. — Stump v. Hornback, 109 Mo. 272; New York Store Merchantile Co. v. Chapman, 89 Mo. App. 554; Eisenburg v. Northwest Turn, etc., Assoc., 72 Mo. App. 513; Redpath v. Lawrence, 48 Mo. App. 427; Feurt v. Ambrose, 34 Mo. App. 360.

Nebraska. — Ripp v. Hale, 45 Neb. 567.

New York. — Oakley v. Aspinwall, 13 N. Y. 505.

North Carolina. — Kramer v. Southern R. Co., 128 N. Car. 269; Ogburn v. Wilson, 96 N. Car. 211.

Pennsylvania. — Giberson v. Patterson Mills Co., 187 Pa. St. 525.

Where Between the Two Trials a Statute Is Repealed on which the first decision was based, the judge on the second trial should not follow the appellate ruling. Wheelock v. Myers, 64 Kan. 47.

Intermediate Appellate Court. — In *Colorado* where a case in the Court of Appeals was removed to the Supreme Court, the opinion of the Supreme Court remanding the case for want of jurisdiction is a decision of the matters passed on. Board of Public Works v. Denver Telephone Co., 15 Colo. App. 505.

Form of Mandate. — So far as the remanding order contains specific directions, the court below has no discretion in obeying the mandate; but beyond this the trial court is at liberty to take further proceedings, provided it is controlled by the rules of law established on the appeal, but it should not entertain objections which are a mere repetition in varying phraseology of questions already passed on by the Appellate Court. Green v. Springfield, 130 Ill. 515.

2. What Before Court on Second Appeal. — *United States.* — U. S. v. Camou, 184 U. S. 574; Illinois v. Illinois Cent. R. Co., 184 U. S. 77; Supervisors v. Kennicott, 94 U. S. 498; Tyler v. Magwire, 17 Wall. (U. S.) 283; The Santa Maria, 10 Wheat. (U. S.) 431; Browder v. McArthur, 7 Wheat. (U. S.) 58; Washington Bridge Co. v. Stewart, 3 How. (U. S.) 424; Haley v. Kilpatrick, (C. C. A.) 104 Fed. Rep. 647; Mathews v. Columbia Nat. Bank, (C. C. A.) 100 Fed. Rep. 397; Balch v. Haas, (C. C. A.) 73 Fed. Rep. 975.

Arkansas. — Fortenberry v. Frazier, 5 Ark. 202, 39 Am. Dec. 373.

Connecticut. — Fowler v. Bishop, 32 Conn. 199; Nichols v. Bridgeport, 27 Conn. 459; Smith v. Lewis, 26 Conn. 110.

Illinois. — Smyth v. Neff, 123 Ill. 310; Mix v. People, 122 Ill. 641; Walker v. Doane, 108 Ill. 236; Newberry v. Blatchford, 106 Ill. 584; Ogden v. Larrabee, 70 Ill. 510; Semple v. Anderson, 9 Ill. 546.

Indiana. — Dodge v. Gaylord, 53 Ind. 365; Hobson v. Doe, 4 Blackf. (Ind.) 487.

Kentucky. — Bean v. Meguiar, (Ky. 1898) 47 S. W. Rep. 771.

Maryland. — Bridendolph v. Zeller, 5 Md. 64; Young v. Frost, 1 Md. 377.

Massachusetts. — Booth v. Com., 7 Met. (Mass.) 285. See also O'Malley v. Twenty-five Associates, 178 Mass. 555.

Minnesota. — St. Paul Trust Co. v. Kittson, 67 Minn. 61.

Mississippi. — Green v. McDonald, 13 Smed. & M. (Miss.) 445.

Missouri. — Chapman v. Kansas City, etc., R. Co., 146 Mo. 481; Chambers v. Smith, 30 Mo. 156. See Stump v. Hornback, 109 Mo. 272.

Nebraska. — Meyer v. Shamp, 26 Neb. 729.

be deemed waived by a failure to assign it, for a party cannot be permitted to assign successive errors on the same record.¹

START. — The word "start" is not limited to setting out on a journey or a race; it means as well the commencement of an enterprise or an undertaking.²

STATE, STATEMENT, ETC. — To state is defined to mean to aver or allege; to express the particulars of; to represent fully in words; to make known specifically; to explain; to narrate; to recite facts.³ A statement is a formal embodiment in language of matter communicated to another.⁴

New York. — *Leeds v. New York Tel. Co.*, 79 N. Y. App. Div. 127.

Pennsylvania. — *Rich v. Black*, 181 Pa. St. 293.

South Carolina. — *Brooks v. Brooks*, 16 S. Car. 621.

Texas. — *Texas, etc., R. Co. v. Roberts*, (Tex. Civ. App. 1897) 45 S. W. Rep. 218.

1. **Waiver of Error at Time of Former Adjudication.** — *Ogden v. Larrabee*, 70 Ill. 510; *Pollock v. Cohen*, 32 Ohio St. 514; *Corry v. Corry Chair Co.*, 18 Pa. Super. Ct. 281; *Pierce v. Kneeland*, 9 Ws. 23. See also *Hibbs v. Marpe*, 84 Minn. 178; *Tilleny v. Wolverton*, 54 Minn. 75; *Schleuder v. Corey*, 30 Minn. 501; *Marshall v. Ferguson*, 94 Mo. App. 177; *Bell v. Woodward*, 47 N. H. 539. But see *Haynes v. Trenton*, 123 Mo. 326.

When a Case Is Reversed and Remanded Generally, the pleadings may be amended and additional evidence introduced, but there can be no discussion upon questions already settled in the Supreme Court; when remanded with specific directions the court below has no power to do anything but carry out the directions. *Brooklyn v. Orthwein*, 140 Ill. 620; *Hook v. Richeson*, 115 Ill. 431; *Boggs v. Willard*, 70 Ill. 315, 22 Am. Rep. 77.

2. **Start.** — *Graw v. Manning*, 54 Iowa 721. And see that case for the facts which were held sufficient to bring a debtor within a clause of the *Iowa* statute on attachments, as one who had started to leave the state.

Started in Sense of Set at Work. — See *Lockhard v. Avery*, 8 Ala. 503.

3. **State.** — *Butts v. Long*, 94 Mo. App. 687; *Foley v. Royal Arcanum*, 151 N. Y. 201.

State in Writing. — A statute provided that a mortgagee should, when demanding payment of the money due to him, *state* in writing a just and true account of the debt or demand for which the property was liable to him and deliver it to the attaching officer. In construing this provision in *Campbell v. Eastman*, 170 Mass. 524, the court said: "The words '*state*' in writing a just and true account' indicate a purpose on the part of the legislature to secure for the attaching creditor definite and particular information." See also *Hanly v. Davis*, 170 Mass. 517.

State and Show. — In *Spalding v. Spalding*, (Supm. Ct.) 3 How. Pr. (N. Y.) 301, it was said: "The words *state* and '*show*' have a different legal signification. *Stating* a case to be within the purview of a statute is simply alleging that it is, while '*showing*' it to be so consists of a disclosure of the facts which bring it within the statute."

There is a material distinction between showing a fact and *stating* it. In the former case

satisfactory proof may be required; in the latter the mere recital of the fact is sufficient. *Meadow Valley Min. Co. v. Dodds*, 7 Nev. 148. See also *De Corvet v. Dolan*, 7 Wash. 369.

Stating and Referring. — A statute provided that in suits for certain penalties it should be lawful to declare generally in debt, "*stating* the section of the act or the by-law or ordinance" under which the penalty was claimed. It was held that the word *stating* must be understood as synonymous with "referring." *Utica v. Richardson*, 6 Hill (N. Y.) 302.

Slander. — In an action for slander it was alleged that the defendant did represent and *state* certain facts. It was held that a fair interpretation of the words "represent and *state*" implied that the language complained of was actually used by the defendant. *Butts v. Long*, 94 Mo. App. 692.

4. **Statement.** — *Foley v. Royal Arcanum*, 151 N. Y. 201.

Statement of Demand. — In *Rush's Opinion*, 2 *Browne* (Pa.) 20, Appendix, it was said: "The word *statement* does not occur in any English writer or classical authority, nor is it to be found in any dictionary. The verb 'to state,' as defined in the dictionaries, is to represent anything, in all the circumstances of modification—it is to represent facts and transactions, fully and at large. To file a *statement* of a demand must therefore be understood to be an exhibition in writing of all the material circumstances of the contract, such as time, place, and the consideration on which the debt was founded."

Statement and Certificate. — A statute provided that the judges of election should canvass the votes polled in the manner provided by law and make a certain *statement* or certificate of the number of votes cast. It was held that the words *statement* and "certificate" in this statute were used as equivalent terms. *People v. Nordheim*, 99 Ill. 560.

Declaration. — An act to regulate arbitrations in proceedings in courts of justice required that a *statement* of the plaintiff's demand be filed on or before the third day of the term to which the process was returnable. It was held that a declaration was a *statement* within the meaning of this act. *McCarney v. McCamm*, 2 *Browne* (Pa.) 47. See also *Rush's Opinion*, 2 *Browne* (Pa.) 23, Appendix.

Facts. — The word *statement* is not necessarily limited to the *statement* of the facts or the substance of a case; it may also include the provisions of a contract. *Foley v. Royal Arcanum*, 151 N. Y. 196.

Statement on Appeal. (See also the title *STATEMENT OF FACTS ON APPEAL*, 20 *ENCYC. OF PL. AND PR.* 550.) — In *Williams v. Rice*, 13 Nev.

STATE AGENT. — See note 1.

234, it was held that a *statement* that had been prepared as a *statement* on a motion for a new trial could not be construed as a *statement* on appeal.

Witnesses. (See also the titles EVIDENCE, vol. 11, p. 543; WITNESSES.) — Within a statute prohibiting a party sued by the personal representative of a decedent from testifying as to any "transaction with or *statement* by" the deceased, a *statement* is "the act of stating, reciting, or presenting, verbally or on paper." "That the exchange or novation of notes was accomplished by means of written correspondence between the parties signifies nothing in determining the competency or incompetency of Thomason's testimony. A written transaction with or *statement* by a deceased person is no more a matter about which the adverse party may testify than a verbal transaction or *statement*. The statute makes no distinction. Its prohibition, on the contrary, is general, not limited to transactions and *statements* of one kind or the other, but comprehending both. No transaction with or *statement* by a deceased person is excepted, but all such are included; hence the only way to reach a construction different from that herein announced would be through the unwarranted assumption that the words *statement* and 'transaction,' in their proper use, relate alone to things said and done verbally. Webster defines a transaction as 'the doing or performing of any business; the management of an affair.' Effecting the novation of notes, whether by word of mouth or through written correspondence, is, unquestionably, the doing or performing of a matter of business, the management of an affair; therefore it is a transaction, whether accomplished by the one mode or the other. The

same author defines *statement* thus: 'the act of stating, reciting, or presenting, verbally or on paper.' To limit the disqualification to verbal transactions and *statements* would do the greatest violence to both the letter and spirit of the statute, and place the estates of dead persons, which it was designed to protect, at the mercy of corrupt parties. Even doubtful language would be so construed as to avoid such a result." *Montague v. Thomason*, 91 Tenn. 173.

1. **State Agent.** — In *Stone v. Travelers' Ins. Co.*, 78 Mo. 655, a sheriff returned a summons as having been served on the *state agent* of a foreign insurance company. It was held that the words *state agent* sufficiently designated the person served as that person appointed by the company for the purpose of receiving service of process in accordance with a statute providing for the appointment of such an agent; the court saying: "The return of the officer that he had, in the manner stated, served 'Horace Power, *state agent* of the Travelers Insurance Company of Hartford, Connecticut, the within named defendant,' sufficiently designates said Power as the person appointed by the defendant under section 6013 of the Revised Statutes, upon whom process might be served in suits instituted against said company. The person required to be appointed under said section is designated therein both as an agent and an attorney. The return would have been more precise if it had described Power as the *state agent* of the defendant for the service of process or to receive service of process, but that he was such agent may be fairly implied from the use of the words *state agent*. We are of opinion that the return of the officer is, in this particular, sufficient."

STATE AND PUBLIC LANDS.

BY THE EDITORIAL STAFF.

- I. SCOPE OF TITLE, 212.**
- II. TERMINOLOGY AND DEFINITIONS, 212.**
- III. HOW ACQUIRED BY STATE — SOURCES OF PRIVATE RIGHTS, 213.**
 - 1. *In General*, 213.
 - 2. *In English Dependencies*, 213.
 - a. *General Rule*, 213.
 - b. *Colonial America*, 213.
 - c. *Canada*, 213.
 - 3. *In United States*, 214.
 - a. *Original States*, 214.
 - b. *National Government and New States*, 215.
 - c. *Kentucky and West Virginia*, 216.
 - d. *Maine*, 216.
 - e. *Tennessee*, 216.
 - f. *Texas*, 216.
 - g. *Vermont*, 216.
 - h. *Lands under Navigable Waters — Tide Lands*, 216.
 - i. *Private Rights Antedating Cessions of Territory*, 217.
- IV. POWER OF ADMINISTRATION AND SALE, 217.**
 - 1. *Public Lands of United States*, 217.
 - 2. *Public Lands of States*, 219.
 - 3. *Canadian Lands*, 219.
- V. LANDS SUBJECT TO DISPOSITION, 219.**
 - 1. *Granted Lands*, 219.
 - 2. *Lands to Which Inchoate Rights Have Attached*, 221.
 - 3. *Lands Withdrawn from Sale or Reserved*, 222.
 - a. *Reservations*, 222.
 - b. *Withdrawals*, 224.
 - c. *Power to Reserve or Withdraw Lands*, 225.
 - 4. *Lands Reverted to Government*, 225.
 - 5. *Tide Lands and Lands under Navigable Waters*, 226.
 - 6. *Islands*, 226.
 - 7. *Lands Occupied or Claimed by Indians*, 226.
 - a. *In General*, 226.
 - b. *Indian Reservations*, 227.
- VI. POSSESSORY RIGHTS IN PUBLIC LAND, 228.**
 - 1. *As Against Government and Its Grantees*, 228.
 - a. *General Rule*, 228.
 - b. *Exceptions to Rule*, 230.
 - (1) *In General*, 230.
 - (2) *Under United States Settlement Laws*, 232.
 - (3) *Occupancy as Ground for Equitable Relief Against Grants to Others*, 232.
 - 2. *As Between Strangers to Government Title*, 232.
 - a. *In General*, 232.
 - b. *Sales and Incumbrances*, 234.
 - c. *Character of Right as Property*, 235.
- VII. DISPOSAL OF UNITED STATES AND CANADIAN LANDS, 236.**
 - 1. *Surveys*, 236.
 - 2. *Public and Private Sales*, 238.

STATE AND PUBLIC LANDS.

3. *Pre-emptions*, 241.
 - a. *Introductory*, 241.
 - b. *Nature of Right*, 241.
 - c. *Lands Subject to Pre-emption*, 242.
 - (1) *In General*, 242.
 - (2) *Lands Excepted from Pre-emption*, 242.
 - (a) *Indian Lands*, 242.
 - (b) *Reservations*, 243.
 - (c) *Town Sites and Lands Within Limits of Town*, 243.
 - aa. *Not Subject to Pre-emption*, 243.
 - bb. *Actual Occupancy Necessary*, 243.
 - cc. *Judicial Notice of Situation of Lands*, 243.
 - dd. *Settlement upon Land "Afterwards Ascertained" to Be Within Corporate Limits*, 243.
 - (d) *Lands Occupied for Purposes of Trade and Business*, 244.
 - (e) *Saline or Mining Lands*, 244.
 - d. *Amount of Land Which Might Be Pre-empted*, 244.
 - e. *Who Might Acquire Pre-emption Rights*, 244.
 - (1) *Qualifications*, 244.
 - (2) *Disqualifications*, 245.
 - f. *Settlement by Two or More Persons*, 245.
 - g. *Death of Pre-emptor*, 246.
 - (1) *Entry in Favor of Heirs*, 246.
 - (2) *Who Entitled as Heirs*, 246.
 - (3) *Land Not Subject to Debts of Pre-emptor or Expenses of Administration*, 246.
 - (4) *Heirs Tenants in Common*, 246.
 - (5) *Land Could Not Be Devised by Pre-emptor*, 246.
 - h. *Settlement, Occupation, and Improvement*, 246.
 - i. *Proceedings to Acquire Right*, 247.
 - (1) *Necessity for Compliance with Statute*, 247.
 - (2) *Declaratory Statement*, 248.
 - (a) *In General*, 248.
 - (b) *Lands Must Have Been Subject to Pre-emption*, 248.
 - (c) *Statement in Assumed Name*, 248.
 - (d) *Defective Statement — Second Filing*, 248.
 - (e) *Time for Filing Statement*, 248.
 - aa. *Land Subject to Private Entry*, 248.
 - bb. *Land Not Proclaimed for Sale*, 248.
 - cc. *Unsurveyed Land*, 248.
 - dd. *Effect of Failure to File Within Required Time*, 249.
 - (f) *Acceptance and Approval*, 249.
 - j. *Jurisdiction to Pass on Pre-emption Claims*, 249.
 - k. *Right Could Be Exercised But Once*, 250.
 - l. *Rights of Pre-emptor During Occupancy and Before Purchase*, 250.
 - m. *Assignment of Right*, 250.
 - n. *Final Proof and Payment*, 250.
 - o. *Abandonment of Right*, 251.
 - p. *Title Acquired by Completing Purchase*, 251.
 - q. *Actions By and Against Pre-emptors*, 251.
 - (1) *Presumption of Legality of Entry*, 251.
 - (2) *Limitation of Actions*, 251.
 - (3) *Who Might Attack Title of Pre-emptor*, 251.
 - r. *Retrospective Effect of Pre-emption Laws*, 251.
 4. *Homesteads and Free Grants*, 251.
 - a. *Introductory — Nature of Right*, 251.

STATE AND PUBLIC LANDS.

- b. Land Subject to Homestead Entry, 252.*
- c. Amount of Land Which May Be Acquired, 252.*
- d. How Homestead Laid Off, 252.*
- e. Who May Acquire Homestead Rights, 252.*
- f. Preliminary Affidavit and Payment — Entry, 253.*
- g. Change from Pre-emption to Homestead Entry, 253.*
- h. Residence and Cultivation, 254.*
- i. Final Proofs, 254.*
- j. Interest and Rights of Homesteader After Entry and Before Right to Patent Complete, 254.*
- k. Death of Homesteader, 255.*
- l. Jurisdiction to Pass on Homestead Claims, 255.*
- m. Relation Back of Patent, 255.*
- n. Taxation of Homestead, 255.*
- o. Homestead Not Liable for Debts Contracted Before Issuance of Patent, 256.*
- p. Restrictions on Alienation, 256.*
- 5. *New Madrid Locations, 256.*
 - a. Purpose and Provisions of Act of 1815, 256.*
 - (1) *In General, 256.*
 - (2) *Procedure for Acquiring Land under Act, 256.*
 - (3) *Persons Entitled to Benefit of Act, 256.*
 - (4) *Lands Subject to Location, 257.*
 - (5) *When Location Complete, 257.*
 - (6) *Relinquishment of Injured Lands, 257.*
 - (7) *Actions of Ejectment — Missouri Statute, 258.*
 - b. Provisions of Act of 1822, 258.*
 - c. Provisions of Act of 1864, 258.*
- 6. *Timber Culture, 258.*
- 7. *Licenses to Cut Timber, 259.*
 - a. In Canada, 259.*
 - b. In United States, 261.*

VIII DISPOSAL OF STATE LANDS, 261.

- 1. *California, 261.*
 - a. Title and Power of Disposal, 261.*
 - (1) *In General, 261.*
 - (2) *Necessity for Survey, 261.*
 - (3) *Act of Congress "to Quiet Land Titles," 261.*
 - b. Policy of State Declared by Constitution, 261.*
 - c. Sale of Lands Suitable for Cultivation Restricted to Actual Settlers, 262.*
 - d. Construction of Constitutional Provisions, 262.*
 - (1) *In General, 262.*
 - (2) *What Lands Are "Suitable for Cultivation," 262.*
 - (3) *Meaning of "Actual Settler," 262.*
 - e. Application to Purchase, 263.*
 - (1) *Necessity for Compliance with Statutory Requirements, 263.*
 - (2) *Curative Statutes, 263.*
 - (3) *Defective or Irregular Application Cured by Patent, 264.*
 - f. Terms of Payment and Forfeiture for Nonpayment, 264.*
- 2. *Virginia and Kentucky, 264.*
 - a. In General, 264.*
 - b. Entries, 264.*
 - (1) *Certainty and Precision, 264.*
 - (2) *Notoriety, 265.*
 - (3) *Repugnancy and Surplusage, 265.*
 - (4) *Ambiguity, 266.*
 - (5) *Conflicting Entries, 266.*
 - (6) *Right Conferred by Entry, 266.*

STATE AND PUBLIC LANDS.

- (7) *Vacant Lands Only May Be Entered*, 266
- (8) *Several Entries by One Person*, 266.
- (9) *Withdrawal of Entry*, 266.
- (10) *Calls*, 266.
- (11) *Evidence*, 267.
 - (a) *Presumptions*, 267.
 - (b) *Parol Evidence*, 267.
 - (c) *Surveyor's Report*, 267.
- c. *Surveys*, 267.
 - (1) *Must Conform to Entries*, 267.
 - (2) *Must Be Within Prescribed Time*, 268.
 - (3) *Lines Must Approximate Square*, 268.
 - (4) *Title Dates from Survey*, 268.
 - (5) *Conflicting Patents*, 268.
 - (6) *Magnetic Meridian Used*, 269.
 - (7) *Mode of Measurement*, 269.
 - (8) *Record*, 269.
 - (9) *Duty of Surveyor*, 269.
 - (10) *Survey Without Warrant*, 269.
- d. *Caveats*, 269.
- e. *Pre-emption Rights*, 270.
 - (1) *In General*, 270.
 - (2) *Calls*, 270.
 - (3) *Improvements*, 270.
 - (4) *Time*, 270.
 - (5) *Notice*, 270.
- 3. *Pennsylvania*, 270.
 - a. *Origin of Title of State*, 271.
 - b. *Land Office*, 271.
 - c. *Policy of Land Laws*, 271.
 - d. *Modes of Obtaining Title*, 271.
 - (1) *Proceedings in Land Office*, 271.
 - (a) *Application and Warrant or Location*, 271.
 - aa. *In General*, 271.
 - bb. *Descriptive Applications and Warrants*, 272.
 - (aa) *Definition*, 272.
 - (bb) *Operation and Effect*, 272.
 - cc. *Loose or Indescriptive Warrants, etc.*, 273.
 - dd. *Shifted Warrants and Applications*, 273.
 - ee. *Warrants for Improvements*, 274.
 - (b) *Survey*, 274.
 - aa. *Necessity*, 274.
 - bb. *Authority to Make*, 274.
 - cc. *Requisites, Validity, and Effect*, 275.
 - (aa) *In General*, 275.
 - (bb) *Effect as Evidence of Title*, 276.
 - (cc) *Presumption of Regularity*, 276.
 - (dd) *Return of Survey—Resurvey*, 277.
 - dd. *Excess or Deficiency in Quantity*, 278.
 - ee. *Compensation of Surveyors*, 279.
 - (c) *Patents*, 279.
 - aa. *Authority to Issue*, 279.
 - bb. *Ownership*, 279.
 - cc. *Validity and Effect*, 279.
 - (aa) *In General*, 279.
 - (bb) *Fraud in Procurement*, 280.
 - (cc) *Land Not Included in Survey*, 280.
 - (2) *Settlement and Improvement*, 280.
 - (a) *Settlement as Mode of Acquiring Title*, 280.
 - (b) *Who May Be Settler*, 280.

STATE AND PUBLIC LANDS.

- (c) *Validity and Requisites of Settlement*, 281.
 - aa. *In General*, 281.
 - bb. *Purpose of Occupation*, 281.
- (d) *Lands Subject to Settlement*, 281.
- (e) *Nature and Extent of Settler's Rights*, 282.
 - aa. *Character of Property Rights Acquired*, 282.
 - bb. *Designation and Extent of Claim*, 282.
 - cc. *Priorities*, 282.
- e. *Pre-emption Rights*, 283.
 - (1) *Under Proprietary Government*, 283.
 - (2) *Under State Government*, 283.
- 4. *Texas*, 284.
 - a. *Land Certificates Defined and Characterized*, 284.
 - (1) *Unlocated Certificates*, 284.
 - (2) *Located Certificates*, 284.
 - b. *Acquisition of Public Lands Prior to Annexation by United States*, 284.
 - (1) *General Colonization Laws*, 284.
 - (2) *Colonization or Empresario Contracts*, 286.
 - c. *Acquisition of Public Lands Since Annexation*, 286.
 - (1) *Under Homestead Donation Laws*, 286.
 - (a) *In General*, 286.
 - (b) *Prerequisites to Acquisition of Title*, 286.
 - aa. *Settlement and Application*, 286.
 - bb. *Survey*, 287.
 - cc. *Return of Field Notes to General Land Office*, 287.
 - dd. *Residence for Three Consecutive Years*, 288.
 - (c) *Validity of Patent*, 288.
 - (d) *When Land Acquired Is Community Property*, 288.
 - (e) *What Land Open to Acquisition*, 288.
 - (f) *What Constitutes Abandonment of Claim*, 289.
 - (2) *Through Medium of Land Certificates*, 289.
 - (a) *In General*, 289.
 - (b) *To Whom Certificates May Be Issued*, 289.
 - (c) *Upon What Lands Certificates May Be Located*, 290.
 - (d) *When Duplicate Certificates May Be Issued*, 290.
 - (e) *Essential Conditions to Be Performed Before Patent Will Issue*, 291.
 - aa. *General Constitutional Requirement*, 291.
 - bb. *Entry or Application and File*, 291.
 - (aa) *Entry or Application—Requisites*, 291.
 - (bb) *Filing Application and Certificate in Surveyor's Office*, 291.
 - aaa. *Rule Stated*, 291.
 - bbb. *Who May Make and File Application*, 291.
 - (cc) *Rights of Location Where Certificate Entitles Two or More Persons to Land*, 291.
 - (dd) *When Certificates May Be Lifted or Floated*, 292.
 - (ee) *Effect of Application and File*, 292.
 - cc. *Survey*, 292.
 - (aa) *In General*, 292.
 - (bb) *By Whom Made*, 293.
 - (cc) *How Made*, 293.
 - (dd) *Surveyor's Certificate*, 293.
 - (ee) *When Certified Copy of Record of Field Notes May Be Obtained*, 294.

- dd. Return of Field Notes and Certificate to General Land Office, 294.*
 - (aa) In General, 294.*
 - (bb) Waiver of Neglect to Return Field Notes Within Time Prescribed, 295.*
 - (cc) Withdrawal of Certificate Not Permissible, 295.*
 - (dd) Certified Copy of Certificate as Evidence, 295.*
 - (ee) Issuance of Certificate for Unlocated Balance, 295.*
 - (ff) Return of Field Notes After Withdrawal, 295.*
- ee. Conditions Essential to Acquisition of Title under Confederate Certificates, 296.*
- ff. Effect of Void Survey, 296.*
- (f) Nature of Right Acquired by Performance of Conditions, 296.*
 - (g) Abandonment of Location and Survey, 296.*
 - aa. Right to Abandon, 296.*
 - bb. What Constitutes Abandonment, 296.*
 - (h) Issuance of Patent, 297.*
 - (i) Right Acquired by Patentee, 297.*
- (3) By Purchase or Lease, 297.*
 - (a) Unappropriated Lands Situated in Organized Counties, 297.*
 - aa. In General, 297.*
 - bb. Lands Situated Within Inclosures of Actual Bona Fide Settlers, 298.*
 - cc. Acquisition of Lands under Homestead Donation Laws Not Prohibited, 298.*
 - (b) Construction of Former Laws Relating to Purchase of Unappropriated Lands, 298.*
 - (c) School and Asylum Lands, 298.*
 - aa. Acquisition by Purchase, 298.*
 - (aa) In General, 298.*
 - (bb) Classification and Valuation, 299.*
 - (cc) Who May Purchase, 299.*
 - (dd) Quantity That May Be Purchased, 299.*
 - (ee) Provision as to Situation of Lands Purchased, 300.*
 - (ff) Price of Lands, 300.*
 - (gg) Conditions Essential to Acquisition, 300.*
 - aaa. Application and Affidavit, 300.*
 - bbb. Cash Payment and Obligation, 300.*
 - ccc. Residence and Proof Thereof, 301.*
 - (hh) When Sale Deemed Effective, 301.*
 - (ii) Powers of Commissioner of General Land Office, 301.*
 - (jj) Remedies of Applicants from Whom Lands Are Wrongfully Withheld, 301.*
 - aaa. In General, 301.*
 - bbb. When Mandamus Will Issue, 302.*

STATE AND PUBLIC LANDS.

- (kk) *Sale of Lands by Purchaser*, 302.
 - aaa. *Right to Sell*, 302.
 - bbb. *Conditions to Be Performed by Vendee*, 302.

- (ll) *Forfeiture of Lands*, 303.
 - aaa. *For Nonpayment of Interest*, 303.
 - (aaa) *Rule Stated*, 303.
 - (bbb) *When Claim Will Be Reinstated*, 303.
 - bbb. *For Nonresidence*, 303.
 - ccc. *Mistake in Classification Does Not Authorize Cancellation of Sale*, 303.

- bb. *Acquisition by Lease*, 303.
 - (aa) *In General*, 303.
 - (bb) *Length of Lease*, 304.
 - (cc) *Amount of Rent*, 304.
 - (dd) *Application for Lease*, 304.
 - (ee) *Acceptance of Application — Execution and Delivery of Lease*, 304.
 - (ff) *Payment of Rent*, 304.
 - (gg) *Cancellation of Lease for Nonpayment of Rent*, 304.
 - (hh) *Right of Lessee on Expiration of Lease to Purchase or Re-lease*, 304.
 - (ii) *When Leased Lands May Be Sold*, 305.

5. *Other States*, 305.

IX. TOWN SITES, 308.

1. *Acts of Congress*, 308.

a. *General Legislation*, 308.

- (1) *Provisions of Statutes*, 308.
- (2) *Title and Interest Acquired by Trustees*, 309.
 - (a) *In General*, 309.
 - (b) *Title Passes to Successor*, 309.
- (3) *Validity and Conclusiveness of Acts and Conveyances of Trustees*, 310.
- (4) *Who Are Beneficiaries under Town-site Law*, 310.
 - (a) *In General*, 310.
 - (b) *Conflicting Claims*, 310.
 - (c) *Who May Be Occupants*, 311.
 - (d) *What Constitutes Occupancy*, 311.
- (5) *Rights of Occupants*, 311.
 - (a) *In General*, 311.
 - (b) *When Rights Vest*, 312.
 - (c) *When Legal Title Vests*, 312.
- (6) *Streets and Public Squares*, 313.
 - (a) *Dedication by Congress*, 313.
 - (b) *Dedication by Trustee*, 313.
 - (c) *Dedication by Occupant or Owner*, 313.
 - (d) *Title to Streets*, 314.
- (7) *Mineral Lands*, 314.
- (8) *Abandonment*, 314.
- (9) *Evidence*, 314.
- (10) *State Acts Giving Effect to Act of Congress*, 314.

b. *Special Legislation*, 315.

- (1) *For Particular Municipalities*, 315.
- (2) *For Oklahoma and Alaska*, 315.

2. *Acts of State Legislatures*, 315.

X. BOUNTY AND DONATION LANDS, 315.

1. *Technical Terms Unnecessary*, 315.
2. *Construction of Grants*, 315.
3. *Oregon Donation Act*, 316.
 - a. *In General*, 316.
 - b. *Grant Not One in Præsent*, 316.
 - c. *Interest Before Patent Not Liable for Debts*, 316.
 - d. *Consideration for Grant*, 316.
 - e. *Conditions Precedent*, 316.
 - f. *Meaning of "Residence,"* 316.
 - g. *Performance of Conditions Vests Title*, 317.
 - h. *Affidavit Required as to Use*, 317.
 - i. *Determination of Boundary Lines*, 317.
 - j. *Sufficiency of Description*, 317.
 - k. *Residence on Either of Two Sections*, 317.
 - l. *Where Husband Was Divorced*, 317.
 - m. *Reservation for Military Purposes*, 317.
 - n. *Damages for Occupation*, 318.
 - o. *Abandonment of Location*, 318.
 - p. *Evidence*, 318.
 - q. *Rights of Women under Act*, 318.
 - (1) *Married Women*, 318.
 - (2) *Nature of Wife's Interest*, 318.
 - (3) *Where Husband Failed to Make Proof*, 318.
 - (4) *Where Husband Died Before Proof*, 318.
 - (5) *Where Wife Was Divorced*, 318.
 - (6) *Widow Entitled to Dower*, 318.
 - (7) *Rights of Unmarried Women*, 319.
 - r. *Rights of Children and Heirs*, 319.
 - s. *Devolution by Local Law*, 319.
 - t. *Proviso Against Sale Before Patent*, 319.
4. *Virginia Military District*, 319.
5. *Five Per Cent. Bounty*, 320.
6. *Mississippi Donation*, 320.
7. *North Carolina Grants*, 320.
8. *Lovely Claim*, 321.
9. *Louisiana Grants*, 321.
10. *Oklahoma Grant*, 321.
11. *Miscellaneous*, 321.

XI. LOCATIONS OF PUBLIC LAND BY AGENTS, 321.

1. *Claim as Locator*, 321.
2. *Contract for Location*, 321.
 - a. *Must Be Express*, 321.
 - b. *Power to Make*, 322.
 - c. *By Whom Signed*, 322.
 - d. *Need Not Be Written*, 322.
 - e. *Death of Party*, 322.
 - f. *Action upon*, 323.
3. *Locator*, 323.
 - a. *Evidence of Authority*, 323.
 - b. *Duties under Contract*, 323.
 - c. *Powers under Contract*, 323.
 - d. *Rights on Performance*, 323.

XII. GRANTS IN AID OF RAILROADS, 324.

1. *In General*, 324.
2. *Construction of Railroad Grants*, 324.
3. *Title of Railroads*, 325.
 - a. *Nature of Title*, 325.

STATE AND PUBLIC LANDS.

- b. Time of Vesting, 325.*
 - (1) *As to Place Lands, 325.*
 - (2) *As to Indemnity Lands, 326.*
- c. Conditions Precedent to Vesting of Title, 327.*
 - (1) *Location of Line and Filing of Map, 327.*
 - (2) *Construction of Road, 327.*
- d. Forfeiture, 327.*
 - (1) *In General, 327.*
 - (2) *How Declared, 328.*
 - (3) *Reverter, 328.*
 - (4) *Prior Grants Not Affected, 328*
 - (5) *Defenses, 329.*
 - (6) *Application of Equitable Rule, 329.*
- 4. Withdrawal of Lands Granted, 329.*
 - a. By Secretary of Interior, 329.*
 - b. By Operation of Law, 330.*
 - c. Revocation of Withdrawal, 330.*
 - d. Withdrawal of Indemnity Lands, 330.*
- 5. Rights as Against Settlers, 330.*
 - a. Within Place Limits, 330.*
 - b. Within Indemnity Limits, 332.*
- 6. Selection of Lands by Railroad, 333.*
 - a. In Place Limits, 333.*
 - (1) *Location, 333.*
 - (2) *Quantity, 333.*
 - (3) *Sidetracks, Branches, and Extensions, 334.*
 - (4) *Lands in Another State, 334.*
 - (5) *Mineral Lands, 334*
 - b. In Indemnity Limits, 334.*
 - c. Swamp Lands, 335.*
- 7. Conflicting Grants, 335.*
- 8. Right of Railroad to Mortgage Lands Granted, 336.*
- 9. Right of Way over Public Lands, 336.*
 - a. Meaning of Right of Way, 336.*
 - b. Nature of Grant, 337.*
 - (1) *In General, 337.*
 - (2) *Grant to Named Railroad, 337.*
 - (3) *Grant by General Statute, 337.*
 - c. Nature of Title, 337.*
 - d. Conditions Precedent to Vesting of Title, 338.*
 - e. Right of Way Through Canyons, 338.*
 - f. Over School Lands, 338.*
 - g. Rights as Against Settlers, 338.*
 - h. Change of Location, 338.*
 - i. Forfeiture, 339.*
- 10. Transportation of Troops and Mails, 339.*

XIII. GRANTS FOR INTERNAL IMPROVEMENTS, 339.

- 1. Grant of 1841, 339.*
 - a. In General, 339.*
 - b. Character of Grant, 339.*
 - c. Lands Subject to Location, 339.*
 - d. Time of Making Location, 339.*
 - e. Act to Quiet Land Titles in California, 340.*
- 2. Canal-land Grants, 340.*
- 3. Wagon-road Grants, 341.*
 - a. In General, 341.*
 - b. Character of Grants, 341.*
 - c. Terms and Conditions of Grants, 341.*
- 4. Miscellaneous Grants, 342.*

XIV. SWAMP-LAND GRANTS, 343.

1. *In General*, 343.
2. "*Swamp and Overflowed Lands*," 345.
3. "*Unfit for Cultivation*," 345.
4. *Legal Subdivisions*, 346.
5. *Priority of Existing Equities*, 346.
6. *Identification of Lands*, 346.
 - a. *Character of Lands as to Time*, 346.
 - b. *On Failure of Secretary of Interior to Determine Character of Land*, 347.
 - (1) *In General*, 347.
 - (2) *Patent from State*, 347.
 - (3) *Selection by State Officers*, 347.
 - (4) *Failure of State Officers to Select*, 347.
 - (5) *Ex-parte Proceedings of Federal Land Department*, 347.
 - c. *Decision of Secretary of Interior as to Character of Land*, 348.
 - d. *Act of Congress March 3, 1857*, 349.
 - e. *Act of Congress July 23, 1866*, 349.
7. *Conflicts Between State and Federal Grants*, 349.
 - a. *In General*, 349.
 - b. *Confirmation by State of Federal Grants*, 350.
8. *Conflicting Grants to State*, 350.
9. *Disposition of Swamp Lands by State*, 351.
 - a. *General Power of State*, 351.
 - b. *Validity and Effect of State Grants*, 352.
 - c. *Who May Purchase — Preferential Rights of Purchase*, 353.
 - d. *General Rights of Purchasers*, 354.

XV. SCHOOL AND UNIVERSITY GRANTS, 354.

1. *By Federal Government*, 354.
 - a. *In General*, 354.
 - b. *Title and Tenure of State or Territory*, 354.
 - (1) *Vesting of Title*, 354.
 - (a) *In General*, 354.
 - (b) *Necessity for Completion and Approval of Survey*, 355.
 - (2) *Effect of Reservation from Sale*, 355.
 - (3) *Tenure*, 356.
 - c. *Control and Power of Disposal After Grant or Reservation*, 357.
 - (1) *As Between General Government and State or Territory*, 357.
 - (a) *In General*, 357.
 - (b) *Before Survey*, 358.
 - (2) *Constitutional and Statutory Provisions*, 358.
 - d. *Grants of Land as Indemnity for School Sections Otherwise Disposed of*, 359.
 - (1) *In General*, 359.
 - (2) *Vesting of Title*, 360.
 - (3) *Selection of Indemnity Lands Outside State*, 360.
2. *By States*, 360.
3. *Sales and Leases of School and University Lands*, 361.
 - a. *Power to Sell or Lease*, 361.
 - b. *Consent of Congress*, 361.
 - (1) *Under Grant*, 361.
 - (2) *Under Reservation*, 362.
 - (3) *Under Compact Between United States and Tennessee*, 362.
 - c. *Consent of Inhabitants of Township*, 362.
 - (1) *In General*, 362.
 - (2) *Method of Obtaining Consent*, 363.
 - d. *Proceedings Prior to Sale or Lease*, 363.
 - (1) *In General*, 363.

STATE AND PUBLIC LANDS.

- (2) *Application for Private Sale*, 363.
- (3) *Appraisal of Lands*, 363.
- e. *Who May Make Sale or Lease*, 363.
- f. *Settler's Preferential Right to Purchase*, 364.
- g. *Mode of Conducting Sale*, 364.
- h. *Withholding Lands from Sale*, 364.
- i. *Terms of Sale or Lease*, 365.
 - (1) *In General*, 365.
 - (2) *Remedies for Noncompliance with Terms of Sale or Lease*, 365.
 - (a) *Rescission or Annulment of Contract*, 365.
 - (b) *Resale on Failure of Immediate Payment*, 365.
 - (c) *Forfeiture*, 365.
 - aa. *In General*, 365.
 - bb. *Who Can Take Advantage of Default*, 366.
 - cc. *Notice of Default*, 366.
 - dd. *Period of Redemption and Recovery of Possession Thereafter*, 367.
 - ee. *Forfeiture of State University Lands*, 367.
 - (aa) *In General*, 367.
 - (bb) *Repeal of Statute Authorizing Forfeiture*, 367.
 - (d) *Resale After Forfeiture or Default*, 367.
 - aa. *In General*, 367.
 - bb. *Whether Remedy by Resale Exclusive*, 368.
 - cc. *Purchaser's Right of Redemption*, 368.
 - dd. *Purchaser's Right to Surplus on Resale*, 368.
- j. *Fraud, Mistake, or Irregularity in Sale*, 368.
- k. *Reoffering for Sale When Land Not Sold*, 369.
- 4. *Legislative Confirmation of Irregular or Unauthorized Selections, Locations, and Sales*, 369.
 - a. *In General*, 369.
 - b. *Acts of Congress Relating to California Lands*, 369.
- 5. *Diverting Land or Proceeds from Purposes of Grant*, 370.
 - a. *In General*, 370.
 - b. *Purchaser's Title Not Affected*, 370.
- 6. *Purchaser's Contract and Certificate of Purchase or Location*, 370.
 - a. *By Whom Executed*, 370.
 - b. *Nature and Incidents of Certificate*, 370.
 - c. *Title or Interest Acquired*, 371.
 - (1) *In General*, 371.
 - (2) *Title or Interest Defined by Statute*, 371.
 - (a) *In General*, 371.
 - (b) *Nature and Incidents of Statutory Title*, 372.
 - d. *Transfer of Purchaser's Title or Interest*, 372.
 - (1) *By Conveyance*, 372.
 - (2) *By Mortgage*, 372.
 - (3) *By Assignment of Certificate*, 372.
 - (a) *Assignability of Certificate*, 372.
 - (b) *Method of Assignment*, 372.
 - (c) *Certificates Not Negotiable*, 373.
 - (4) *Distinction Between Assignment of Certificate and Conveyance of Purchaser's Title*, 373.
 - e. *Acknowledgment and Recording*, 373.

XVI. LAND DEPARTMENT OFFICIALS AND PROCEEDINGS, 374.

- 1. *General Statement*, 374.
- 2. *Specific Officers Considered*, 375.
 - a. *Registers and Receivers*, 375.
 - (1) *Powers and Duties*, 375.

- (2) *Salary and Commissions*, 375.
- (3) *Liability on Official Bonds*, 375.
- b. *Commissioner of General Land Office*, 376.
- c. *Secretary of Interior*, 377.
 - (1) *In General*, 377.
 - (2) *Review of Decision of Secretary*, 377.
 - (a) *Review by Secretary*, 377.
 - (b) *Appeal to President*, 378.
- d. *Surveyors*, 378.
- e. *Timber Agents*, 378.
- f. *Board of Equitable Adjudication*, 378.
- 3. *Rules of Procedure*, 379.
 - a. *In General*, 379.
 - b. *Application of Rules of Pleading*, 379.
- 4. *Effect and Conclusiveness of Proceedings*, 379.
 - a. *Cancellation by Land Department*, 379.
 - (1) *Prior to Issuance of Patent*, 379.
 - (a) *In General*, 379.
 - (b) *Cancellation for Fraud*, 380.
 - (c) *Abandonment*, 380.
 - (d) *Necessity of Notice and Hearing*, 381.
 - (e) *Cancellation Obtained through Fraud or Error of Law*, 382.
 - (f) *Return of Purchase Money*, 382.
 - aa. *In General*, 382.
 - bb. *Who Entitled to Repayment*, 382.
 - cc. *Effect of Voluntary Abandonment*, 383.
 - dd. *Effect of Fraud*, 383.
 - ee. *Necessity of Surrender of Duplicate Receipt*, 383.
 - (2) *Cancellation of Patent*, 383.
 - (a) *In General*, 383.
 - (b) *In Case of Nonacceptance*, 384.
 - (c) *Correction of Clerical Errors*, 384.
- b. *Review by Courts*, 384.
 - (1) *Prior to Issuance of Patent*, 384.
 - (a) *In General*, 384.
 - (b) *Protection of Possessory Rights*, 385.
 - aa. *In General*, 385.
 - bb. *Enforcement of Contracts Relating to Possessory Rights*, 387.
 - (c) *State Land Contests in Courts*, 387.
 - (2) *Subsequent to Issuance of Patent*, 387.
 - (a) *In General*, 387.
 - (b) *Collateral Attack*, 390.
 - aa. *In General*, 390.
 - bb. *Effect of Statutes Allowing Equitable Defense*, 391.
 - cc. *Statutes Giving to Certificates of Purchase Effect as Evidence of Legal Title*, 392.
 - dd. *Conflicting Patents*, 392.
 - ee. *Attacking Surveys*, 393.
 - ff. *Void Patents*, 393.
 - (aa) *In General*, 393.
 - (bb) *Presumption of Validity*, 395.
 - (cc) *Attack by Stranger*, 395.
 - (c) *Direct Attack*, 396.
 - aa. *Suit by Government*, 396.
 - (aa) *In General*, 396.
 - (bb) *Patent Issued Without Authority*, 396.

STATE AND PUBLIC LANDS.

- (cc) *Fraud, Mistake, and Error of Law*, 396.
- bb. *Suit by Private Individual*, 397.
 - (aa) *In General*, 397.
 - (bb) *Error or Misconstruction of Law*, 399.
 - (cc) *Fraud*, 399.
 - (dd) *Mistake or Inadvertence*, 400.
 - (ee) *Newly Discovered Evidence*, 400.
 - (ff) *Want of Jurisdiction*, 400.
 - (gg) *Who Entitled to Relief*, 401.
 - (hh) *Correcting Surveys*, 402.
- cc. *Return of Purchase Money*, 402.
- (3) *Decisions of Land Department as Aids to Statutory Construction*, 403.

XVII. INCHOATE RIGHT OR TITLE AND GRANT, 403.

- 1. *Right and Title Prior to Issuance of Patent*, 403.
 - a. *Before Right to Patent Complete*, 403.
 - b. *After Right to Patent Complete*, 403.
 - (1) *Title*, 403.
 - (2) *Right to Possession*, 404.
 - (3) *Right to Maintain Actions*, 404.
- 2. *Assignment, Incumbrance, and Alienation of Inchoate Right*, 405.
 - a. *Interests Acquired from Federal Government*, 405.
 - (1) *Assignment of Land Warrants and Right to Enter Public Lands*, 405.
 - (2) *Voluntary Conveyances and Contracts to Convey Land*, 406.
 - (a) *In General*, 406.
 - (b) *Statutory Restrictions*, 408.
 - (3) *Mortgages*, 411.
 - (4) *Involuntary Alienation*, 413.
 - (5) *Resulting Trusts*, 415.
 - (6) *Contracts with Regard to Improvements*, 415.
 - (7) *Relinquishment of Entries and Entry Rights*, 415.
 - (8) *Effect of Unlawful Transfers on Title of Patentee*, 416.
 - b. *Interests Acquired from State*, 416.
 - (1) *In General*, 416.
 - (2) *Preferential Rights of Purchase*, 417.
 - (3) *Land Warrants and Scrip*, 417.
 - (4) *Interest under Certificate of Purchase*, 419.
- 3. *Manner of Granting Public Lands*, 420.
 - a. *By Patent*, 420.
 - (1) *In General*, 420.
 - (2) *Execution of Patent*, 420.
 - (3) *Recitals in Patent*, 421.
 - (4) *Delivery and Acceptance of Patent*, 421.
 - (5) *Recording Patent*, 422.
 - (6) *When Patent Takes Effect*, 422.
 - b. *By Direct Legislative Act*, 423.
- 4. *Construction and Operation of Grants*, 425.
 - a. *Strict or Liberal Construction as to Grantee*, 425.
 - (1) *Strict Construction General Rule*, 425.
 - (2) *Grant Made Gratuitously*, 426.
 - (3) *Grant Made on Consideration*, 426.
 - (4) *Intent and Purpose Controlling*, 426.
 - (a) *General Principles*, 426.
 - (b) *Legislative Grants Construed as Statutes*, 427.
 - aa. *Principle Stated*, 427.
 - bb. *How and When Grant Operates*, 427.

- cc. *Present Power of Identification of Lands*, 427.
- dd. *Nature and Quantum of Estate Granted*, 428.
- ee. *Particular Matters to Be Considered in Construing Grant*, 428.
 - (aa) *Contemporaneous History and Condition of Country*, 428.
 - (bb) *Prior Legislation upon Same Subject*, 428.
- (c) *Legislative Grants for Purpose of Public Improvement*, 428.
- b. *"Practical Interpretation" Shown by Conduct of Parties*, 429.
- c. *Grants by Federal Government of Lands Abutting on Waters — Construction Governed by State Law*, 429.
- d. *Operation of Grant in Respect to Seizin or Possession*, 429.
- e. *Death of Grantee Before Issuance of Patent*, 430.
 - (1) *Common-law Rule*, 430.
 - (2) *Practice Adopted to Avoid Rule*, 430.
 - (a) *Statement of Practice*, 430.
 - (b) *Construction of Certificate, Patent, or Confirmation to Heirs, etc.*, 431.
 - aa. *To "Heirs" and "Legal Representatives" of Decedent*, 431.
 - bb. *Whether Heirs Take by Descent or by Purchase*, 431.
 - cc. *To Executors or Administrators of Decedent*, 432.
 - dd. *What Law Controls in Ascertaining Grantees*, 432.
 - ee. *Limitation to Successors Restricted by Statute under Which Patent Is Issued*, 432.
- (3) *Statutes Passed to Avoid Rule*, 432.
 - (a) *Introductory*, 432.
 - (b) *Canadian Heir-and-Devisee Act*, 432.
 - (c) *Federal Statute*, 432.
 - aa. *Terms of Act*, 432.
 - bb. *To What Lands Applicable*, 433.
 - cc. *Construction and Effect of Act*, 433.
 - (d) *Kentucky Statutes*, 434.
 - aa. *Early Statute*, 434.
 - bb. *Later Form of Statute*, 435.
 - (e) *New York Statute*, 435.
 - (f) *North Carolina and Tennessee Statute*, 435.
 - (g) *Texas Statute*, 436.
- 5. *Conditions Precedent and Subsequent*, 436.
 - a. *In General*, 436.
 - b. *Power to Prescribe Conditions*, 437.
 - c. *Construction of Conditions Subsequent*, 437.
 - d. *Who Can Enforce Forfeiture on Breach of Condition Subsequent*, 437.
 - e. *Mode of Enforcing Forfeiture on Breach of Condition Subsequent*, 438.
 - f. *Waiver of Conditions*, 439.
 - (1) *Conditions Precedent*, 439.
 - (2) *Conditions Subsequent*, 439.
 - g. *Estoppel to Enforce Forfeiture for Breach of Condition Subsequent*, 440.
- 6. *Exceptions and Reservations*, 440.
 - a. *Exceptions*, 440.
 - (1) *In General*, 440.

STATE AND PUBLIC LANDS.

- (2) *Adverse Possession of Excepted Land*, 440.
- (3) *Burden of Proving Locality of Excepted Land*, 440.
- (4) *Description of Exception in Grant*, 440.

b. Reservations, 441.

- (1) *Unauthorized and Repugnant Reservation*, 441.
- (2) *Patent Not Containing Reservation Required by Statute*, 441.
- (3) *Right of Patentee to Maintain Trover*, 441.
- (4) *Reservations for Public Uses*, 441.
 - (a) *In General*, 441.
 - (b) *Nonexistence of Beneficiary of Reservation*, 441.
 - (c) *Right to Revoke Reservation*, 441.
 - (d) *Reservation of Highways*, 442.

7. *Direct and Collateral Attack — Conflicting Rights and Grants*, 442.

XVIII. BONA FIDE PURCHASERS — NOTICE, 442.

- 1. *General Rule*, 442.
- 2. *Scope of Rule*, 442.
- 3. *Equitable Doctrine of Notice*, 443.
 - a. *Purchasers for Value and Without Notice*, 443.
 - (1) *Of Legal Title*, 443.
 - (2) *Of Equitable Title*, 444.
 - (3) *As Against Government*, 444.
 - b. *Purchasers with Notice*, 445.
 - (1) *In General*, 445.
 - (2) *Operation of Recording Acts*, 445.
- 4. *Statutes Adjusting Invalid or Forfeited Rights or Grants*, 446.

XIX. ESTOPPEL, LACHES, AND LIMITATIONS, 447.

XX. EVIDENCE, 448.

- 1. *Patent*, 448.
 - a. *Issuance*, 448.
 - b. *As Evidence*, 449.
 - c. *Copy as Evidence*, 449.
- 2. *Evidence to Show Title*, 450.
- 3. *Pre-emption*, 450.
- 4. *Location of Grant*, 450.
- 5. *Land-office Records*, 451.
 - a. *Judicial Notice*, 451.
 - b. *Contest in Land Office*, 451.
 - c. *Land Certificates*, 451.

XXI. DEPREDATIONS ON PUBLIC LANDS, 452.

- 1. *In General*, 452.
- 2. *Meaning of "Timber,"* 453.
- 3. *Inclosures*, 453.
- 4. *Intent as Affecting Liability*, 454.
 - a. *Cutting Timber*, 454.
 - b. *Inclosure of Land*, 454.
- 5. *Grants to Railroads*, 454.
- 6. *Rules and Regulations of Secretary*, 455.
- 7. *Damages*, 455.
- 8. *Defenses*, 456.
 - a. *In General*, 456.
 - b. *Rights of Homesteaders to Use Timber*, 456.
 - c. *Color of Title*, 459.
- 9. *Evidence*, 459.

XXII. OFFENSES AGAINST LAND LAWS, 460.

- 1. *Forgery*, 460.
- 2. *Fraud*, 460.
- 3. *Perjury*, 460.
- 4. *Injuring or Intimidating Occupant*, 460.

CROSS-REFERENCES.

For matters of *PROCEDURE*, see the title *PUBLIC LANDS*, 17 *ENCYCLOPÆDIA OF PLEADING AND PRACTICE* 127, and the cross-references there given.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ADVERSE POSSESSION*, vol. 1, p. 875; *BOUNDARIES*, vol. 4, p. 756; *CANALS*, vol. 5, p. 117; *COMMUNITY PROPERTY*, vol. 6, p. 293; *CROPS*, vol. 8, p. 301; *DAMS*, vol. 8, p. 699; *DEDICATION*, vol. 9, p. 72; *DOWER*, vol. 10, p. 156; *EJECTMENT*, vol. 10, p. 483; *EXEMPTIONS (FROM TAXATION)*, vol. 12, p. 266; *FENCES*, vol. 12, p. 1035; *FIXTURES*, vol. 13, p. 620; *HOMESTEAD*, vol. 15, p. 516; *IMPROVEMENTS*, vol. 16, p. 101; *INDIANS*, vol. 16, p. 212; *LAKES AND PONDS*, vol. 18, p. 129; *MINES AND MINING CLAIMS*, vol. 20, p. 677; *NAVIGABLE WATERS*, vol. 21, p. 424; *REAL PROPERTY*, vol. 23, p. 933; *WATERS AND WATERCOURSES*.

I. SCOPE OF TITLE.—The purpose of this title is to discuss the primary acquisition of private rights in landed property and the various sources of land titles in the United States and Canada.

II. TERMINOLOGY AND DEFINITIONS.—The words "public lands" are habitually used in the United States to describe those lands belonging to the federal government or to a state which are open to acquisition as private property under general land laws. The term "state lands" is sometimes used in the same sense of lands owned by a state.¹ The words "public domain" frequently have the same meaning.² Equivalent words in common use in the general land legislation and decisions of the original states were "unappropriated lands," "vacant lands," and "waste lands."³ The expressions "public lands" and "state lands" are, however, often used in a broader sense, including lands belonging to the nation, state, or other sovereignty which are not subject to the operation of the general land laws.⁴ As a rule there is no statutory definition of the words, and they are not always used in the same sense in statutes passed for different purposes. In each case that meaning

1. "Public Lands."—*Newhall v. Sanger*, 92 U. S. 761; *Doolan v. Carr*, 125 U. S. 618; *Bardon v. Northern Pac. R. Co.*, 145 U. S. 535; *Mann v. Tacoma Land Co.*, 153 U. S. 273, *affirming* 44 Fed. Rep. 27; *Frost v. Wenie*, 157 U. S. 46; *Barker v. Harvey*, 181 U. S. 481; *Minnesota v. Hitchcock*, 185 U. S. 373; *Northern Pac. R. Co. v. Maclay*, (C. C. A.) 61 Fed. Rep. 554; *U. S. v. Blendauer*, 122 Fed. Rep. 703; *Rierson v. St. Louis, etc., R. Co.*, 59 Kan. 32; *Stewart v. Altstock*, 22 Oregon 183. See also *Heydenfeldt v. Daney Gold, etc., Min. Co.*, 10 Nev. 290, *affirmed* 93 U. S. 634.

"State Lands."—See *Seattle, etc., R. Co. v. State*, 7 Wash. 156, 38 Am. St. Rep. 866.

2. "Public Domain."—See *DOMAIN*, vol. 10, p. 3; and see *Barker v. Harvey*, 181 U. S. 481; *Teague v. Green*, 7 Tex. Civ. App. 368.

3. See *infra*, this title, *Disposal of State Lands*.

"The Word 'Vacant,' when applied to lands, means those which have not been appropriated by individuals." *Marshall v. Bompert*, 18 Mo. 84, *approved* in *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, (C. C. A.) 112 Fed. Rep. 4.

4. Inclusive Meaning of Words "Public Lands" and "State Lands."—*U. S. v. Bisel*, 8 Mont. 20 [followed in *U. S. v. Flaherty*, 8 Mont. 31]; *State v. Kennard*, 57 Neb. 711, *affirming* on rehearing 56 Neb. 254; *Cotulla v. Laxson*, 60 Tex. 443 [approved in *State v. Thompson*, 64 Tex.

690]; *U. S. v. Elliot*, 12 Utah 119, *overruling* 7 Utah 389; *Barkley v. U. S.*, 3 Wash. Ter. 522.

"In the Acquisition of Foreign Territory since the establishment of this government, the great body of the land acquired became the property of the United States, and is known as their 'public lands.'" *Del Monte Min., etc., Co. v. Last Chance Min., etc., Co.*, 171 U. S. 55.

Tide Lands are "state lands" in a certain sense—that is, they belong to the state; but in the nomenclature of the *Washington* constitution and statutes the latter term does not always include the former. *Seattle, etc., R. Co. v. State*, 7 Wash. 150, 38 Am. St. Rep. 866.

"Public Domain."—"The public lands of a state are frequently termed the 'public domain' or 'domain of the state.'" *People v. Shearer*, 30 Cal. 658.

"Public Land Laws."—The words "public land laws" contained in the Act of Congress of March 2, 1889, confirming the title to lands in Michigan theretofore disposed of by the land department of the United States "under color of the public land laws," refer not simply to the statutes making general dispositions of the public domain, but to any laws of Congress, special or general, by which public lands were disposed of. *Lake Superior Ship Canal, etc., Co. v. Cunningham*, 155 U. S. 354, *affirming* 44 Fed. Rep. 819.

should be given which comports with the intention.¹ Cases discussing the meaning and use in the nomenclature of public-land legislation and decision of various other words and terms having a general application will be found in the notes.² Those having restricted application, such as "pre-emption," "homestead," and the like, will be found discussed and defined elsewhere in this work in the titles dealing specifically with the rights to which they respectively refer.

III. HOW ACQUIRED BY STATE — SOURCES OF PRIVATE RIGHTS — 1. In General. — The first possessions of England and other European nations in American territory were not claimed by right of conquest, but by right of discovery; the native Indian population being regarded as mere temporary occupants of the soil, and the absolute rights of property and dominion belonging to the nation by which any particular portion was first discovered.³ The acquisition of these possessions by the different nations, the distribution of the territory among them, and the many transmutations of title to and sovereignty over large portions of it since are matters for historical rather than legal discussion; but a general designation of the sources of land titles is necessary to a proper understanding of the subject here treated.

2. In English Dependencies — a. GENERAL RULE. — Under the theory of the British constitution the title to ungranted English lands is in the crown as representing the nation, and the exclusive power of administration and sale resides in the crown as a branch of the royal prerogative. The principle applies as fully to British possessions in America as to those in England.⁴

b. COLONIAL AMERICA. — In the English proprietary colonies in America, the crown charters vested in the proprietary the title to the unappropriated

1. *U. S. v. Bisel*, 8 Mont. 20.

In *Washington, by Statute*, section 5 of the land law ('Ball. Annot. Codes & Stat. Wash. 1897, § 2134), it is provided that all lands described in section 4 of that law (and section 4 describes school lands, university lands, all sorts of granted lands, tide lands, shore lands, and harbor areas) are "public lands," and that the terms "public lands" and "state lands" shall be defined and deemed to be synonymous whenever either is used in the act. *State v. Bridges*, 19 Wash. 431. See also *Sullivan v. Callvert*, 27 Wash. 600.

2. "Appropriated" and "Unappropriated." — *People v. State Land Office*, 23 Mich. 270; *State v. Sioux City, etc.*, R. Co., 7 Neb. 357; *Springer v. Clopath*, 26 Nev. 183; *McSorley v. Hill*, 2 Wash. 649. See also *infra*, this title, *Lands Subject to Disposition — Lands Withdrawn from Sale or Reserved*; and see *APPROPRIATE — APPROPRIATION*, vol. 2, p. 515, note.

"Confirmation." — *Bernard v. Bougard*, Harr. (Mich.) 130; *O'Hanlon v. Perry*, 9 Mo. 805. See also *infra*, this title, *Inchoate Right or Title and Grant — Manner of Granting Public Lands*; and see *CONFIRMATION*, vol. 6, p. 588.

"Entry." — See *ENTER — ENTRY*, vol. 11, p. 42; and see *McComas v. Gannard*, Minor (Ala.) 424, *affirmed sub nom.* Chotard v. Pope, 12 Wheat. (U. S.) 587; *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 629; *Sturr v. Beck*, 6 Dak. 71, *affirmed* 133 U. S. 547; *Denney v. Dodson*, 13 Sawy. (U. S.) 68, 32 Fed. Rep. 899; *St. Paul, etc.*, R. Co. v. Greenhalgh, 26 Fed. Rep. 563, *affirmed* 131 U. S. 19; *U. S. v. Four Bottles Sour-Mash Whisky*, 90 Fed. Rep. 720; *Goolsbee v. Fordham*, 49 Ala. 202; *McMichael v. Murphy*, (Okla. 1902) 70 Pac. Rep. 189.

"Float." — See *FLOAT*, vol. 13, p. 683; and see

Hays v. Steiger, 156 U. S. 387; *Rector v. Gaines*, 19 Ark. 71.

"Grant." — See *GRANT*, vol. 14, p. 1111, and see *Northern Pac. R. Co. v. Sanders*, 47 Fed. Rep. 604.

The word "grant," as ordinarily used, conveys the idea of a grant from the government. In its legal sense, however, it means as well a grant by an individual. *St. Louis, etc., R. Co. v. Whitaker*, 68 Tex. 630.

"Location." — See *LOCATE — LOCATED — LOCATION*, vol. 19, p. 515.

"Sale." — *Culver v. Uthe*, 133 U. S. 655 [*distinguishing* *Five per Cent. Cases*, 110 U. S. 471]; *Northern Pac. R. Co. v. Sanders*, 47 Fed. Rep. 604.

3. Early Possessions — How Acquired. — *Martin v. Waddell*, 16 Pet. (U. S.) 367; *Caldwell v. Robinson*, 59 Fed. Rep. 653, *affirmed* (C. C. A.) 67 Fed. Rep. 391, *appeal dismissed* 165 U. S. 359; *Thompson v. Johnston*, 6 Binn. (Pa.) 68, *per Brackenridge, J.* See also the title *INDIANS*, vol. 16, p. 229 *et seq.*

A discovery of an uninhabited country by persons who acknowledge some existing government is made for the benefit of the whole nation; and the vacant soil is to be disposed of by that organ of the government which has constitutional power to dispose of the national dominions. *Case v. Toftus*, 39 Fed. Rep. 730 [*quoting* *Johnson v. M'Intosh*, 8 Wheat. (U. S.) 595]; *American Guano Co. v. U. S. Guano Co.*, 44 Barb. (N. Y.) 23.

4. English Territory — Crown as Source of Private Titles. — *Johnson v. M'Intosh*, 8 Wheat. (U. S.) 595 [*cited with approval in* *Reg. v. St. Catherine's Milling, etc., Co.*, 10 Ont. 196]; *Martin v. Waddell*, 16 Pet. (U. S.) 367; *Cunningham v. Browning*, 1 Bland (Md.) 299.

lands and the power to sell and otherwise dispose of them.¹ In the other colonies, known as royal colonies, the paramount right to the soil remained in the crown, and grants were made either by it or, through deputation, by the colonial government.²

c. CANADA. — In Canada, while the legal estate remains in the crown, it has generally granted to the provinces the beneficial interest, together with the power of administration and sale. The existing constitution gives to each province, subject to the administration and control of its own legislature, the entire beneficial interest in all lands within its boundaries which at the time of the union were vested in the crown, except such lands as the dominion had acquired a right to or might assume under the terms of that instrument.³

3. In United States — a. ORIGINAL STATES. — On their declaration of independence, the English colonies in America became independent states, and succeeded to all the sovereign rights of the crown and of the proprietaries in and over the unappropriated lands within their respective boundaries. These rights, including that of administration and sale, continued to reside in the states,⁴ except as to lands subsequently ceded by them to the United

1. Proprietary Colonies. — See *Conn v. Penn*, Pet. (C. C.) 496, 6 Fed. Cas. No. 3,104, *reversed* on other grounds 5 Wheat. (U. S.) 424; *Hurst v. Durnell*, 1 Wash. (U. S.) 262, 12 Fed. Cas. No. 6,927; *Howard v. Moale*, 2 Har. & J. (Md.) 249; *Cunningham v. Browning*, 1 Bland (Md.) 299; *Baltimore v. McKim*, 3 Bland (Md.) 453; *Proprietary Claims*, 10 Haz. Reg. (Pa.) 113.

2. Royal Colonies. — *Johnson v. M'Intosh*, 8 Wheat. (U. S.) 543; *Montgomery v. Doe*, 13 Smed. & M. (Miss.) 161; *Seneca Nation v. Christie*, 126 N. Y. 122, *affirming* 49 Hun (N. Y.) 524; *Paine v. Smead*, 1 D. Chip. (Vt.) 56, N. Chip. (Vt.) 99; *Noland v. Cromwell*, 4 Munf. (Va.) 155; *French v. Loyal Co.*, 5 Leigh (Va.) 650; *Willow River Club v. Wade*, 100 Wis. 86.

"The Public Lands in the thirteen original states, respectively, were of course originally granted by the crown directly, by way of charters, patents, or otherwise, to chartered governments, to provincial establishments, to proprietary governments — as to William Penn and to the Duke of York — or to individuals." *Willow River Club v. Wade*, 100 Wis. 86.

3. Canadian Lands — In General. — *St. Catherine's Milling, etc., Co. v. Reg.*, 14 App. Cas. 46, *affirming* 13 Can. Sup. Ct. 577, which *affirmed* 10 Ont. 196; *Atty.-Gen. v. Atty.-Gen.*, 14 App. Cas. 295, *reversing* 14 Can. Sup. Ct. 345; *Queen Victoria Niagara Falls Park v. Howard*, 23 Ont. 1, *affirmed* 23 Ont. App. 355. See generally the title DOMINION OF CANADA, vol. 10, p. 42.

Northwest Territories Not Included Within Limits of Any Province. — See the title DOMINION OF CANADA, vol. 10, p. 45.

Laws and Regulations of England. — In *Doe v. Friesman*, 5 U. C. Q. B. O. S. 661, it was said that neither the statute 1 Anne, stat. 1, c. 7, upon which the whole stress was laid in of *Harper v. Charlesworth*, 4 B. & C. 574, 10 E. C. L. 412, nor any of the statutory regulations and restrictions respecting the granting, leasing, or managing of the crown lands in England, has ever been treated as in force here. "They are, in the nature of things, wholly inapplicable to this province, and all that has been done by the government here and in the other colonies has been done without regard to them."

A Transfer of Land by a Province to the Dominion Government to aid the latter in con-

structing a railroad beneficial to the former does not take the land out of the province or make the dominion a freeholder within it. On the sale of the land by the dominion it ceases to be public land and reverts to the same position as if it had been settled by the provisional government in the ordinary course of administration. *Atty.-Gen. v. Atty.-Gen.*, 14 App. Cas. 295, *reversing* on other grounds 14 Can. Sup. Ct. 345.

Pre-existing Rights. — By section 109 of the British North America Act the transfer of the land to the provinces is "subject to any trust existing in respect thereof and to any interest other than that of the said province in the same." *Booth v. McIntyre*, 31 U. C. C. P. 183. To the same effect is *Foran v. McIntyre*, 45 U. C. Q. B. 288. See also *McArthur v. Northern, etc., Junction R. Co.*, 17 Ont. App. 86, *dismissing appeal* from 15 Ont. 733.

4. Original States — In General. — *Deweese v. Reinhard*, 165 U. S. 386, *affirming* (C. C. A.) 61 Fed. Rep. 777; *Fletcher v. Peck*, 6 Cranch (U. S.) 87; *Clements v. Anderson*, 46 Miss. 581; *Seneca Nation v. Christie*, 126 N. Y. 122, *affirming* 49 Hun (N. Y.) 524; *French v. Loyal Co.*, 5 Leigh (Va.) 650; *Willow River Club v. Wade*, 100 Wis. 86.

Proprietary Colonies. — See *Fisher v. Halde-man*, 20 How. (U. S.) 186; *Morris v. U. S.*, 174 U. S. 196; *Penn v. Klyne*, 1 Wash. (U. S.) 207, 4 Dall. (U. S.) 402, Pet. (C. C.) 497, note, 19 Fed. Cas. No. 10,935; *Penn v. Groff*, 1 Wash. (U. S.) 390, 19 Fed. Cas. No. 10,932; *Howard v. Moale*, 2 Har. & J. (Md.) 249; *Ringgold v. Malott*, 1 Har. & J. (Md.) 299; *Cunningham v. Browning*, 1 Bland (Md.) 299; *Smith v. Devecmon*, 30 Md. 473; *Com. v. Berks County*, 109 Pa. St. 214, 16 W. N. C. (Pa.) 205.

Various Sources of Title Designated Generally. — The title to vacant land within the states that originally formed the United States remained in those states severally, while the title to land subsequently acquired by the United States, whether through cession from the original states, by conquest, or by treaty, has been retained by the general government — lands lying with the state of Texas furnishing one notable exception. *Deweese v. Reinhard*, 165 U. S. 386, *affirming* (C. C. A.) 61 Fed. Rep. 777.

The fundamental idea underlying the titles to

States or to other states.¹

b NATIONAL GOVERNMENT AND NEW STATES.—The territorial possessions of the national government began soon after the formation of the Union, originating in compacts entered into between the United States and several of the original states, whereby the western boundary lines of the states were fixed and the territory extending indefinitely beyond, claimed by the states under their colonial charters, was ceded to the United States. Title to the immense tracts of ungranted lands since acquired by treaties with other nations and by conquest vested in the national government by force of the Federal Constitution.² On the creation of new states out of this national domain the unappropriated lands within their limits have not been transferred to them, but Congress has made large grants to these states out of such lands for school, internal improvement, and other purposes.³

lands in the United States is that the state, if one of the "old thirteen," is seized of all the lands within her limits not granted, and as to the new states and territories, the seizin is in the United States to the like extent. *Clements v. Anderson*, 46 Miss. 581.

Thus, in *Massachusetts* the commonwealth is entitled to all the lands within its limits, as original owner, to which individuals cannot make title. *Com. v. Little*, 5 Dane Abr. 407.

So in *New York*, when by the Revolution the colony became separated from the crown of Great Britain, and a republican government was formed, the people succeeded the king in the ownership of all lands within the state which had not already been granted away; and they became thenceforth the source of all private titles. *People v. Trinity Church*, 22 N. Y. 44, *affirming* 30 Barb. (N. Y.) 537. To similar effect see *Jackson v. Hart*, 12 Johns. (N. Y.) 77, 7 Am. Dec. 280; *Wendell v. People*, 8 Wend. (N. Y.) 183, 22 Am. Dec. 635; *People v. Denison*, 17 Wend. (N. Y.) 312, 31 Am. Dec. 297; *People v. Van Rensselaer*, 8 Barb. (N. Y.) 189, *reversed* on other grounds 9 N. Y. 291.

1. For the More Important Cessions see *infra*, this section, *National Government and New States*.

Boundary-line Agreements.—In several instances sovereign rights over ungranted lands were transferred by agreements settling boundary-line disputes. See for example *Robinson v. Campbell*, 3 Wheat. (U. S.) 212; *Marlatt v. Silk*, 11 Pet. (U. S.) 1; *Poole v. Fleeger*, 11 Pet. (U. S.) 186; *Coffee v. Groover*, 123 U. S. 1, *reversing* on other grounds 20 Fla. 64, 19 Fla. 61; *Morris v. U. S.*, 174 U. S. 196; *Ritchie v. Woods*, 11 Wash. (U. S.) 11, 20 Fed. Cas. No. 11,865; *Salmons v. Webb*, 12 B. Mon. (Ky.) 365; *Com. v. Bowman*, (Ky. 1889) 11 S. W. Rep. 28; *Freeman v. Loftis*, 6 Jones L. (51 N. Car.) 524; *Smith v. Brown*, 1 Yeates (Pa.) 513; *Moore v. McClure*, 2 Brev. (S. Car.) 139; *Campbell v. Crockett*, 8 Yerg. (Tenn.) 225; *Parker v. Claiborne*, 2 Swan (Tenn.) 565; *Sharp v. Van Winkle*, 12 Lea (Tenn.) 15.

2. **Territorial Possessions of National Government**—In General.—*Harcourt v. Gaillard*, 12 Wheat. (U. S.) 524; *Deweese v. Reinhard*, 165 U. S. 386, *affirming* (C. C. A.) 61 Fed. Rep. 777; *Clements v. Anderson*, 46 Miss. 581; *Territory v. Lee*, 2 Mont. 124; *Vansickle v. Haines*, 7 Nev. 249; *Seneca Nation v. Christie*, 126 N. Y. 122, *affirming* 49 Hun (N. Y.) 524. And see generally the cases cited *infra*, this note.

Cessions by Original States.—See *Handley v. Anthony*, 5 Wheat. (U. S.) 375; *Miller v. Kerr*, 7 Wheat. (U. S.) 1; *Harcourt v. Gaillard*, 12 Wheat. (U. S.) 523; *Jackson v. Clark*, 1 Pet. (U. S.) 629; *Lindsey v. Miller*, 6 Pet. (U. S.) 667, *affirming* 1 McLean (U. S.) 32, 17 Fed. Cas. No. 9, 580; *Pollard v. Hagan*, 3 How. (U. S.) 212; *Fussell v. Gregg*, 113 U. S. 550, *affirming* 8 Fed. Rep. 384; *Indiana v. Kentucky*, 136 U. S. 479; *Illinois Steel Co. v. Budzisz*, 82 Fed. Rep. 160, writ of error dismissed 170 U. S. 41; *Palmer v. Cuyahoga County*, 3 McLean (U. S.) 226, 18 Fed. Cas. No. 10,688; *Doe v. Hill*, 1 Ill. 304; *McConnell v. Wilcox*, 2 Ill. 344, *reversed* on other grounds 13 Pet. (U. S.) 498; *Rose v. Buckland*, 17 Ill. 309; *Hebert v. Lavalley*, 27 Ill. 448; *Kaskaskia v. McClure*, 167 Ill. 23.

For the Cession by North Carolina see *infra*, this subsection, *Tennessee*.

District of Columbia—Concessions by Maryland and Virginia to United States for Permanent Seat of Government.—*Shoemaker v. U. S.*, 147 U. S. 282; *Morris v. U. S.*, 174 U. S. 196; *Campbell v. Morris*, 3 Har. & M. (Md.) 535.

Acquisitions by Treaty and by Conquest.—See the title TREATIES; and for the *Oregon* territory and *Alaska*, see *Shively v. Bowlby*, 152 U. S. 1, *affirming* 22 Oregon 410; *Case v. Loftus*, 39 Fed. Rep. 730; *Puget Sound Agricultural Co. v. Pierce County*, 1 Wash. Ter. 159; *Kinthead v. U. S.*, 150 U. S. 483; *Miller v. Blackett*, 47 Fed. Rep. 547; *Callen v. Hope*, 75 Fed. Rep. 758; *Carroll v. Price*, 81 Fed. Rep. 137.

3. **Ungranted Lands in the New States.**—*Deweese v. Reinhard*, 165 U. S. 386, *affirming* (C. C. A.) 61 Fed. Rep. 777.

In *Colorado*, outside of a few small tracts of land used for specific purposes, the only lands owned by the state were received as donations from the general government for specific purposes, such as schools, public buildings, etc. Enabling Act, §§ 7-10; *In re Canal Certificates*, 19 Colo. 63.

Under the *Desert Land Act* of Congress of Aug. 18, 1894 (28 U. S. Stat. at L. 422, c. 301), the state only gets the legal title to the land granted for the benefit of the real owners, actual settlers upon the land, irrigating and cultivating it. Such lands are not public lands of the state within a constitutional provision to the effect that all lands in the state that have been, or may hereafter be, granted to the state by Congress shall be public lands and shall be held in trust for the people, to be disposed of as hereafter provided for the respective purposes for

c. KENTUCKY AND WEST VIRGINIA. — Kentucky and West Virginia were erected as independent states out of Virginia territory and succeeded to the sovereign rights of Virginia over the ungranted lands within their respective boundaries.¹

d. MAINE. — The state of Maine was erected out of Massachusetts territory in the year 1820. By the Act of Separation one half of the ungranted lands within the limits of the new state became its property and the other half was retained by the commonwealth. In 1853, by deed, the commonwealth transferred its remaining interests to the state.²

e. TENNESSEE. — The state of Tennessee was formed out of territory ceded by North Carolina to the United States. On its admission to the Union, Congress omitted to require a renunciation by it of all rights over the unappropriated lands within its borders, and the state set up a claim to them. By compact, in the nature of a treaty between the parties, the lands were partitioned between them. Later the United States released and surrendered to the state all right and title to lands remaining unappropriated.³

f. TEXAS. — The ungranted lands within the borders of Texas never became a part of the national domain. When the republic was annexed to the United States and erected into a state of the Union, the state retained title to and control over them.⁴

g. VERMONT. — Both New Hampshire and New York claimed jurisdiction over the territory now within the limits of the state of Vermont, but in the year 1791 it was erected into an independent state of the Union.⁵

h. LANDS UNDER NAVIGABLE WATERS — TIDE LANDS. — Absolute property in and dominion and sovereignty over tide lands and lands under navigable waters, in the original states, were reserved to the several states. The title to such lands in the territory acquired by the United States vested in the national government equally with the title to upland; and while they hold it as a territory they may, for appropriate purposes, grant private rights therein. On the creation of new states, however, sovereign rights in the tide lands and

which they have been or may be granted. State *v. Wright*, 17 Mont. 565.

The *Secession of a State from the Union* at the time of the war of the rebellion did not work any forfeiture of title to the lands previously granted to it by the United States or other property belonging to the state, or render invalid grants made by the Confederate state government. *Cole v. Thompson*, 35 La. Ann. 1026, approved in *Betz v. Illinois Cent. R. Co.*, 52 La. Ann. 893.

1. *Kentucky and West Virginia.* — See the "Compact with Virginia," Stat. Ky. (1894), p. 43; Const. W. Va. (1872), arts. 2 and 13.

2. *Maine.* — *Roberts v. Richard*, 84 Me. 1. See also Rev. Stat. Me. (1883), p. v; appendix, p. 1003 *et seq.*; *Lapish v. Wells*, 6 Me. 175; *Emerson v. Washington County*, 9 Me. 88; *Fisk v. Briggs*, 12 Me. 373.

3. *Tennessee.* — *Burton v. Williams*, 3 Wheat. (U. S.) 529; Act Cong. Feb. 18, 1841, c. 7, § 5 U. S. Stat. at L. 412; Act Cong. Aug. 7, 1846, c. 92, § 9 U. S. Stat. at L. 66. See further *Polk v. Wendal*, 9 Cranch (U. S.) 87 [*reversing* 2 Overt. (Tenn.) 118], *sub nom.* *Polk v. Wendell*, 5 Wheat. (U. S.) 293; *Miller v. Holt*, 1 Overt. (Tenn.) 243; *George v. Gamble*, 2 Overt. (Tenn.) 170; *Bass v. Dinwiddie*, *Cooke* (Tenn.) 130, Brun. Col. Cas. (U. S.) 190, 2 Fed. Cas. No. 1,092; *Carson v. Gordon*, *Cooke* (Tenn.) 149 Brun. Col. Cas. (U. S.) 208, 5 Fed. Cas. No. 2,463; *Townsend v. Shipp*, *Cooke* (Tenn.) 302;

Thompson v. Kendrick, 5 Hayw. (Tenn.) 114; *Huntsman v. Randolph*, 5 Hayw. (Tenn.) 263; *Williams v. Wilson*, Mart. & Y. (Tenn.) 248; *Gillespie v. Cunningham*, 2 Humph. (Tenn.) 19; *Knox v. Thomas*, 5 Humph. (Tenn.) 573 [*citing* *Edwards v. Batts*, 5 Yerg. (Tenn.) 441]; *Egnew v. Cochrane*, 2 Head (Tenn.) 320; *Fogg v. Williams*, 2 Head (Tenn.) 474; *Williams v. Donell*, 2 Head (Tenn.) 695; *Buck v. Williams*, 10 Heisk. (Tenn.) 264; *Calloway v. Hopkins*, 11 Heisk. (Tenn.) 349.

4. *Texas.* — See *Hancock v. Walsh*, 3 Woods (U. S.) 351, 11 Fed. Cas. No. 6,012; *Houston*, etc., R. Co. *v. Kuechler*, 36 Tex. 428, *per* Walker, J.; *Baldwin v. Goldfrank*, 9 Tex. Civ. App. 269.

Boundary Line Cessions to United States. — *U. S. v. Choctaw Nation*, 179 U. S. 510; *Baldwin v. Goldfrank*, 9 Tex. Civ. App. 269.

Lands for a long time claimed by the state of Texas as being within its boundaries, and which it had erected into a county known as Greer county, were held to be a part of the public lands of the United States, in an action brought by the United States against the state. *U. S. v. Texas*, 162 U. S. 1, 143 U. S. 621. See also *Day Land*, etc., Co. *v. State*, 68 Tex. 526.

5. *Vermont.* — See Stat. Vt. (1894), p. 51, note; *Paine v. Smead*, 1 D. Chip. (Vt.) 56, N. Chip. (Vt.) 99; *Lord v. Bigelow*, 8 Vt. 445; *Pawlet v. Clark*, 9 Cranch (U. S.) 292.

lands under navigable waters within their boundaries pass to the respective states.¹

i. **PRIVATE RIGHTS ANTEDATING CESSIONS OF TERRITORY.**—By express stipulation in the various cessions of territory between the states and to the United States, private rights of property in land acquired by grant from the former sovereign, rightful when made, were generally protected, and the new government was required to perfect valid inchoate interests, and sometimes even void titles and rights, initiated prior to the cession. With respect to absolute rights it is no doubt the received doctrine in the United States that the general principles of international law prevent their subversion even without an agreement to that effect.² The duty to recognize these pre-existing rights belongs to the political branch of the government, uncontrolled by the judiciary so long as no constitutional provision is infringed; and the political power may lawfully require, as essential to the validity of complete as well as inchoate titles, that the claimant shall make proof of their genuineness to its satisfaction and within a limited period of time.³

IV. POWER OF ADMINISTRATION AND SALE — 1. Public Lands of United States.—The general power to dispose of and make all needful rules and regulations respecting the public domain of the United States is delegated to Congress by the Federal Constitution. It is subject to no limitations. Congress has the absolute right to dispose of public land to such persons, at such times, in such modes, and by such titles as it may deem most advantageous to the public fisc, or in other respects most politic. This right cannot be interfered

1. Lands under Navigable Waters — Tide Lands.

— See the title *NAVIGABLE WATERS*, vol. 21, pp. 430 *et seq.*, 436, 437. See also *U. S. v. Mission Rock Co.*, 189 U. S. 391, *affirming* (C. C. A.) 109 Fed. Rep. 763; *Kean v. Calumet Canal, etc.*, Co., 190 U. S. 452, *affirming* 150 Ind. 699; *Hardin v. Shedd*, 190 U. S. 508, *affirming* 177 Ill. 123, 161 Ill. 462, 52 Am. St. Rep. 380; *Case v. Loftus*, 39 Fed. Rep. 730; *Chisolm v. Caines*, 67 Fed. Rep. 285; *Heckman v. Sutter*, (C. C. A.) 119 Fed. Rep. 83; *Mobile Transp. Co. v. Mobile*, 128 Ala. 335, *affirmed* 187 U. S. 478; *Chapin v. Bourne*, 8 Cal. 294; *Ward v. Mulford*, 32 Cal. 365; *Le Roy v. Dunkerly*, 54 Cal. 452; *Lux v. Haggin*, 69 Cal. 335; *Browne v. Kennedy*, 5 Har. & J. (Md.) 196; *Chapman v. Hoskins*, 2 Md. Ch. 485; *Arnold v. Mundy*, 6 N. J. L. 1, 10 Am. Dec. 356; *American Dock, etc., Co. v. Public Schools*, 39 N. J. Eq. 412; *Morse v. O'Connell*, 7 Wash. 119; *Washougal, etc., Transp. Co. v. Dalles, etc., Nav. Co.*, 27 Wash. 490; *Sullivan v. Callvert*, 27 Wash. 600.

The Usual Condition in Enabling Acts, that the people of the proposed new state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundary thereof, has no application to tide lands and lands under navigable waters. *Mann v. Tacoma Land Co.*, 153 U. S. 273, *affirming* 44 Fed. Rep. 27.

The Public Lands of a New State are distinguishable into two general classes: first, those which it holds by virtue of grants from the United States; second, those which it owns by reason of its sovereignty, consisting of the tide lands and lands under navigable waters, if any, within its borders. See *People v. Morrill*, 26 Cal. 336.

2. Rights Antedating Cessions of Territory.— See generally the titles *INTERNATIONAL LAW*, vol. 16, p. 1130; *TREATIES*. See also the cases

cited *supra*, in this subsection, relating to the different cessions; and see *Langdeau v. Hanes*, 21 Wall. (U. S.) 521; *Chicago, etc., R. Co. v. McGinn*, 114 U. S. 542; *Coffee v. Groover*, 123 U. S. 1, *reversing* on other grounds 20 Fla. 64, 19 Fla. 61; *Barker v. Harvey*, 181 U. S. 481, *affirming* 126 Cal. 262; *Palmer v. Cuyahoga County*, 3 McLean (U. S.) 226, 18 Fed. Cas. No. 10,688; *Hancock v. Walsh*, 3 Woods (U. S.) 351, 11 Fed. Cas. No. 6,012; *Callen v. Hope*, 75 Fed. Rep. 758; *Woodworth v. Fulton*, 1 Cal. 295; *Teschemacher v. Thompson*, 18 Cal. 11, 79 Am. Dec. 151; *Nixon v. Houillon*, 20 La. Ann. 515; *Sanborn v. Vance*, 69 Mich. 224; *Puget Sound Agricultural Co. v. Pierce County*, 1 Wash. Ter. 159.

Connecticut Claims in Pennsylvania.— See *Keene v. Harris*, 3 Wash. (U. S.) 178, 14 Fed. Cas. No. 7,642; *Vanhorne v. Dorrance*, 2 Dall. (U. S.) 304, 28 Fed. Cas. No. 16,857; *Barney v. Sutton*, 2 Watts (Pa.) 31; *Irish v. Scovill*, 6 Binn. (Pa.) 55; *Enslin v. Bowman*, 6 Binn. (Pa.) 462; *Pickering v. Rutty*, 1 S. & R. (Pa.) 511; *Evans v. Com.*, 2 S. & R. (Pa.) 441; *Overton v. Tracey*, 14 S. & R. (Pa.) 311.

3. Duty to Recognize and Secure Pre-existing Rights Political.— *League v. De Young*, 11 How. (U. S.) 185, *affirming* 2 Tex. 497; *Botiller v. Dominguez*, 130 U. S. 238, *reversing* 74 Cal. 457; *Astiazaran v. Santa Rita Land, etc., Co.*, 148 U. S. 80; *Rio Arriba Land, etc., Co. v. U. S.*, 167 U. S. 298; *Mitchell v. Furman*, 180 U. S. 402; *Barker v. Harvey*, 181 U. S. 481, *affirming* 126 Cal. 262; *Land Com'rs v. Walling*, Dall. (Tex.) 524; *Johns v. Republic*, Dall. (Tex.) 621; *Hosner v. De Young*, 1 Tex. 764 [*distinguished* in *Sherwood v. Fleming*, 25 Tex. Supp. 408]; *Jones v. Menard*, 1 Tex. 771; *Trimble v. Smithers*, 1 Tex. 790; *Kemper v. Victoria*, 3 Tex. 135; *Jones v. Borden*, 5 Tex. 410; *Paschal v. Perez*, 7 Tex. 348; *Peck v. Moody*, 23 Tex. 93.

with or embarrassed by state legislation; and to prevent the possibility of any attempted interference a provision against it has usually been inserted in the compacts admitting new states into the Union.¹ It seems that the treaty-making power may also appropriate or otherwise dispose of public land of the United States, without the consent of Congress either first had or by ratification.² After private rights in the land have fully vested, if it lies within a state, all power of the general government over it ceases save such as is incident to the general relation of the state to the Federal Union. It then becomes subject to state legislation to the same extent as other property within the state, except so far as is otherwise lawfully provided in the laws of the United States which disposed of it.³

1. Administration and Sale by Congress — United States.— *U. S. v. Gratiot*, 14 Pet. (U. S.) 526, *affirming* 1 McLean (U. S.) 454; *Pollard v. Hagan*, 3 How. (U. S.) 212; *Jourdan v. Barrett*, 4 How. (U. S.) 169; *Irvine v. Marshall*, 20 How. (U. S.) 558; *Morehouse v. Phelps*, 21 How. (U. S.) 294, *reversing* 18 Ill. 473, *sub nom.* *Phelps v. Smith*, 15 Ill. 573; *Gibson v. Chouteau*, 13 Wall. (U. S.) 92, *reversing* 39 Mo. 537; *Van Brocklin v. Tennessee*, 117 U. S. 151; *Wisconsin Cent. R. Co. v. Price County*, 133 U. S. 496, *reversing* on other grounds 64 Wis. 579; *Camfield v. U. S.*, 167 U. S. 518, *affirming* (C. C. A.) 66 Fed. Rep. 101; *Kean v. Calumet Canal, etc.*, Co., 190 U. S. 479, opinion of Mr. Justice White; *Turner v. American Baptist Missionary Union*, 5 McLean (U. S.) 344, 24 Fed. Cas. No. 14,251; *U. S. v. Railroad Bridge Co.*, 6 McLean (U. S.) 517, 27 Fed. Cas. No. 16,114; *Root v. Shields, Woolw.* (U. S.) 340, 20 Fed. Cas. No. 12,038; *Union Mill, etc., Co. v. Ferris*, 2 Sawy. (U. S.) 176, 24 Fed. Cas. No. 14,371, *followed* *Union Mill, etc., Co. v. Dangberg*, 2 Sawy. (U. S.) 450, 24 Fed. Cas. No. 14,370; *McCarty v. Mann*, 2 Dill. (U. S.) 441, 15 Fed. Cas. No. 8,685, *affirmed* 19 Wall. (U. S.) 20; *Seymour v. Sanders*, 3 Dill. (U. S.) 437, 21 Fed. Cas. No. 12,690; *Emblem v. Lincoln Land Co.*, 94 Fed. Rep. 710, *affirmed* (C. C. A.) 102 Fed. Rep. 559, 184 U. S. 660.

Arkansas.— *Sorrels v. Self*, 43 Ark. 451.
California.— *People v. Folsom*, 5 Cal. 374; *Moore v. Smaw*, 17 Cal. 199, 79 Am. Dec. 123, *overruling* *Hicks v. Bell*, 3 Cal. 220; *Kile v. Tubbs*, 23 Cal. 432; *Doran v. Central Pac. R. Co.*, 24 Cal. 246; *Miller v. Little*, 47 Cal. 348.
Colorado.— *Fee v. Brown*, 17 Colo. 510, *affirmed* 162 U. S. 602.
Illinois.— *Rose v. Buckland*, 17 Ill. 309.
Iowa.— *David v. Rickabaugh*, 32 Iowa 540; *Waters v. Bush*, 42 Iowa 255.
Kansas.— *Parker v. Winsor*, 5 Kan. 363.

Louisiana.— *Terry v. Hennen*, 4 La. Ann. 458.

Michigan.— *Clark v. Hall*, 19 Mich. 357; *People v. Kidd*, 23 Mich. 440; *Davis v. Filer*, 40 Mich. 310.

Minnesota.— *Camp v. Smith*, 2 Minn. 155; *State v. Bachelder*, 5 Minn. 223, *reversed* on other grounds 1 Wall. (U. S.) 109; *Irvine v. Marshall*, 7 Minn. 286; *Russell v. Lowth*, 21 Minn. 167.

Missouri.— *O'Hanlon v. Perry*, 9 Mo. 805.

Montana.— *Territory v. Lee*, 2 Mont. 124.

Nebraska.— *Morton v. Green*, 2 Neb. 441.

Nevada.— *Vansickle v. Haines*, 7 Nev. 249.

Wisconsin.— *Parkinson v. Bracken*, 1 Pin. (Wis.) 174, 39 Am. Dec. 296; *Farrington v.*

Wilson, 29 Wis. 383; *Gile v. Hallock*, 33 Wis. 523.

Lands Within a State.— The control and enjoyment and disposal, by the United States, of its own property, are independent of the locality of such property, whether it be situated in a state or territory. *Irvine v. Marshall*, 20 How. (U. S.) 558.

Except, however, that the state cannot interfere with the primary disposal by the United States of the land, the interest of the United States in the land is simply that of a proprietor and not that of a municipal sovereign. *Woodruff v. North Bloomfield Gravel Min. Co.*, 9 Sawy. (U. S.) 441, 18 Fed. Rep. 753; *People v. Shearer*, 30 Cal. 645; *Lux v. Haggin*, 69 Cal. 255.

A new state admitted into the Union as an equal member has the right to regulate the killing of game within its borders; and this right is superior to a provision in a treaty granting to certain Indians "the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon." *Ward v. Race Horse*, 163 U. S. 504.

Power to Lease.— The power to dispose of the public lands of the United States vested in Congress by article 4, § 3, of the Federal Constitution, includes the power to lease as well as to sell. *U. S. v. Gratiot*, 14 Pet. (U. S.) 526; *Lorimer v. Lewis, Morr.* (Iowa) 253, 39 Am. Dec. 461.

Questions of Title Determined by Laws of United State.— Whenever the question in any court, state or federal, is whether title to land which has once been property of the United States has passed, that question must be resolved by the laws of the United States. *Wilson v. Jackson*, 13 Pet. (U. S.) 498, *reversing* on other grounds 2 Ill. 344; *Lott v. Prudhomme*, 3 Rob. (La.) 293; *Bell v. Hearne*, 10 La. Ann. 515, *reversed* on other grounds 19 How. (U. S.) 252; *Whitney v. Detroit Lumber Co.*, 78 Wis. 240; *Mendota Club v. Anderson*, 101 Wis. 479.

2. Appropriation of Public Land by Treaty.— *Holden v. Joy*, 17 Wall. (U. S.) 211, 247; *Jones v. Meehan*, 175 U. S. 1; *U. S. v. Payne*, 2 McCrary (U. S.) 289, 8 Fed. Rep. 883; *Parker v. Winsor*, 5 Kan. 363; *Wood v. Missouri, etc., R. Co.*, 11 Kan. 324; *Stockton v. Williams*, 1 Dougl. (Mich.) 546, *affirming* *Walk*. (Mich.) 120; *Utah Min., etc., Co. v. Dickert, etc., Sulphur Co.*, 6 Utah 183. Compare *Turner v. American Baptist Missionary Union*, 5 McLean (U. S.) 344, 24 Fed. Cas. No. 14,251; *Parker v. Duff* 47 Cal. 554.

3. Federal Power Ceases After Sale Where Land Lies Within a State.— *Wilcox v. Jackson*, 13

2. Public Lands of States. — The power to control and dispose of the public lands of a state resides in its legislature; and subject to any constitutional provisions, or conditions under which the state acquired the particular land, the power may be exercised upon such terms and under such regulations as the legislature shall deem proper and expedient.¹

3. Canadian Lands. — This subject has already been generally discussed.²

V. LANDS SUBJECT TO DISPOSITION — 1. Granted Lands. — Once a tract of land has been granted by the government, it is segregated from the body of such lands, and is no longer subject to any other disposition by the government, either directly or under the general land laws, unless the grant is set aside and annulled in due course or is absolutely void; and no conditions or limitations can be superadded, unless power to do so is reserved.³ Though a grant by

Pet. (U. S.) 498, *reversing* on other grounds 2 Ill. 344; *Pollard v. Hagan*, 3 How. (U. S.) 212; *Irvine v. Marshall*, 20 How. (U. S.) 558; *Seymour v. Sanders*, 3 Dill. (U. S.) 437, 21 Fed. Cas. No. 12,690; *David v. Rickabaugh*, 32 Iowa 540; *Lott v. Prudhomme*, 3 Rob. (La.) 293; *Bell v. Hearne*, 10 La. Ann. 515, *reversed* on other grounds 19 How. (U. S.) 252; *People v. Kidd*, 23 Mich. 440; *State v. Bachelder*, 5 Minn. 223, *reversed* on other grounds 1 Wall. (U. S.) 109; *Irvine v. Marshall*, 7 Minn. 286; *Paige v. Peters*, 70 Wis. 178, 5 Am. St. Rep. 156.

State Interference with Grants Made Prior to Its Admission. — It may be doubted whether a state subsequently created out of the territory in which grants have been made by the United States could prevent their enjoyment. This could only be done on the same terms upon which the state could refuse a recognition of its own previously granted right, for in such matters it would only succeed to the authority of Congress over the territory. *St. Joseph, etc., R. Co. v. Baldwin*, 103 U. S. 426, *reversing* on other grounds 7 Neb. 247; *Van Wyck v. Knevals*, 106 U. S. 360; *St. Paul, etc., R. Co. v. Phelps*, 137 U. S. 528, *reversing* on other grounds 26 Fed. Rep. 569.

1. Public Lands of States. — See *Fletcher v. Peck*, 6 Cranch (U. S.) 87; *Oakley v. Stuart*, 52 Cal. 521; *White v. Douglass*, 71 Cal. 115; *Harris v. Dyer*, 27 Ga. 211; *Patterson v. Trabue*, 3 J. J. Marsh. (Ky.) 598; *Cole v. Thompson*, 35 La. Ann. 1026; *Smith v. Devecmon*, 30 Md. 473; *Rogers v. Port Huron, etc., R. Co.*, 45 Mich. 460; *Brown v. Brown*, 103 N. Car. 213; *Thomas v. Daniel*, 2 McCord L. (S. Car.) 354; *McConnell v. Madisonville*, 2 Humph. (Tenn.) 53; *Caledonia County Grammar School v. Burt*, 11 Vt. 632; *State v. Cunningham*, 88 Wis. 81. See generally the discussion of the land systems of the different states, *infra*, this title.

The State, being the owner of the land, can dispose thereof upon any terms it pleases, providing they are not inconsistent with the organic law of the state or with the grants under which it holds. *Taylor v. Weston*, 77 Cal. 534. See also *Bryan v. Crump*, 55 Tex. 1.

The Constitution of Colorado places the administration and disposal of the public lands of the state in the hands of a state board, to be conducted by them "under such regulations as may be prescribed by law." *In re Leasing of State Lands*, 18 Colo. 359; *In re Canal Certificates*, 19 Colo. 63.

Land Granted to State for Use of Militia. — In the absence of any action by the legislature, land granted by the United States to the state for the use and occupation of the militia is under the care and control of the governor by virtue of his constitutional power as commander-in-chief of the military forces of the state. *In re Opinion of Judges*, 13 S. Dak. 191.

State Laws and Decisions Binding upon the United States Courts. — The doctrine of a state with respect to its public lands, where they are fixed and can be satisfactorily ascertained, are as binding upon the courts of the United States as upon those of the state. *Bush v. Ware*, 15 Pet. (U. S.) 93, *affirming* 1 McLean (U. S.) 533, 29 Fed. Cas. No. 17,171; *Johnson v. Pannel*, 2 Wheat. (U. S.) 206; *Robinson v. Campbell*, 3 Wheat. (U. S.) 212; *Polk v. Wendell*, 5 Wheat. (U. S.) 293; *Elmendorf v. Taylor*, 10 Wheat. (U. S.) 152; *Ritchie v. Woods*, 1 Wash. (U. S.) 11, 20 Fed. Cas. No. 11,865; *Chisolm v. Caines*, 67 Fed. Rep. 285; *State v. Houtz*, 25 Leg. Int. (Pa.) 244, 15 Pittsb. Leg. J. (Pa.) 409, 22 Fed. Cas. No. 13,062.

2. See *supra*, III. 2. In English Dependencies.

3. Lands Previously Granted — United States. — *Terrett v. Taylor*, 9 Cranch (U. S.) 43; *Stringer v. Young*, 3 Pet. (U. S.) 319; *New Orleans v. U. S.*, 10 Pet. (U. S.) 731; *Reichert v. Felps*, 6 Wall. (U. S.) 160, *affirming* 33 Ill. 434; *Best v. Polk*, 18 Wall. (U. S.) 112; *Chandler v. Calumet, etc., Min. Co.*, 149 U. S. 79, *affirming* 36 Fed. Rep. 665; *Lake Superior Ship Canal, etc., Co. v. Cunningham*, 155 U. S. 354, *affirming* 44 Fed. Rep. 819, which granted new trial in 44 Fed. Rep. 587; *U. S. v. McGraw*, 8 Sawy. (U. S.) 156, 12 Fed. Rep. 449; *Taboreck v. Burlington, etc., R. Co.*, 2 McCrary (U. S.) 407, 13 Fed. Rep. 103; *Callen v. Hope*, 75 Fed. Rep. 758; *Morgan v. Rogers*, (C. C. A.) 79 Fed. Rep. 577, writ of error dismissed 173 U. S. 702. See also *Union Mill, etc., Co. v. Ferris*, 2 Sawy. (U. S.) 176, 24 Fed. Cas. No. 14,371.

Alabama. — *Dudley v. Gallups*, 128 Ala. 236; *Vankirk Land, etc., Co. v. Green*, 132 Ala. 348.

California. — *Pratt v. Crane*, 58 Cal. 533; *Lux v. Haggin*, 69 Cal. 255; *McLaughlin v. Menotti*, 89 Cal. 354; *Kirby v. Potter*, 138 Cal. 686.

Georgia. — *Moody v. Fleming*, 4 Ga. 115, 48 Am. Dec. 210; *Hilliard v. Connelly*, 7 Ga. 172.

Illinois. — *Doe v. Hill*, 1 Ill. 304; *Illinois, etc., Canal v. Haven*, 10 Ill. 548; *Payne v. Markle*, 89 Ill. 66; *School Trustees v. Schroll*, 120 Ill. 509, 60 Am. Rep. 575.

the government contains no saving clause, but is general of the land, it passes no other right than that of the public.¹

A State Grant is also a contract within the provision of the Federal Constitution prohibiting the impairment of the obligation of contracts.²

Failure to Use and Occupy Granted Land. — Land once granted by the government by absolute and indefeasible title does not revert to it by failure of the

Indiana. — Daggett v. Bonewitz, 107 Ind. 276.

Kentucky — *Void Patents.* — Gen. Stat. Ky., c. 109, § 3 (Stat. 1894, § 4704), provides that "every entry, survey, or patent made or issued under this chapter shall be void, so far as it embraces lands previously entered, surveyed, or patented." Kirk v. Williamson, 82 Ky. 162; Goosling v. Smith, 90 Ky. 157; Terry v. Johnson, 96 Ky. 95; Gibson v. Board, 102 Ky. 505. This section has application to prior patents which are void as well as those which are valid or only voidable. Roberts v. Davidson, 83 Ky. 279; Eastern Kentucky Land Co. v. Ferguson, (Ky. 1901) 65 S. W. Rep. 830.

Louisiana. — Seymour v. Cooley, 3 Mart. N. S. (La.) 397; Culliver v. Garic, 11 La. 88; Culliver v. Berge, 1 Rob. (La.) 427; Marks v. Martin, 27 La. Ann. 527, affirmed 97 U. S. 345; Mower v. Kemp, 42 La. Ann. 1007; Breaux Renoudet Cypress Lumber Co. v. Shadel, 52 La. Ann. 2094; McDade v. Bossier Levee Board, 109 La. 625. See also Latiolais v. Richard, 6 Mart. N. S. (La.) 214.

Maryland. — Tolson v. Lanham, 2 Har. & J. (Md.) 174.

Michigan. — Byrne v. Beeson, 1 Dougl. (Mich.) 179; Flint, etc., R. Co. v. Gordon, 41 Mich. 420; Sterling v. Jackson, 69 Mich. 488.

Minnesota. — St. Paul, etc., R. Co. v. Brown, 24 Minn. 517.

Mississippi. — Hit-tuk-ho-mi v. Watts, 7 Smed. & M. (Miss.) 363.

Nebraska. — Koenig v. Omaha, etc., R. Co., 3 Neb. 373.

North Carolina. — McNamee v. Alexander, 109 N. Car. 242; State v. Spencer, 114 N. Car. 770; Rowe v. Cape Fear Lumber Co., 129 N. Car. 96, modifying on other grounds 128 N. Car. 301; Stewart v. Keener, 131 N. Car. 486.

Oregon. — Olney v. Moore, 13 Oregon 238.

Tennessee. — Sheppard v. Johnson, 2 Humph. (Tenn.) 285.

Texas. — Sutton v. Carabajal, 26 Tex. 497; Clark v. Smith, 59 Tex. 275. See also Metzler v. Johnson, 1 Tex. Civ. App. 137. By article 14, § 2, of the constitution, land certificates cannot be located upon any land titled or equitably owned under color of title, where the right is a matter of record or evidenced by the occupation of the land. Winsor v. O'Connor, 69 Tex. 571, distinguished Howell v. Hanrick, 88 Tex. 383; Hanrick v. Dodd, 62 Tex. 75; Gunter v. Meade, 78 Tex. 634; Faulk v. Sanderson, 89 Tex. 692; Creswell Ranche, etc., Co. v. Waldstein, (Tex. Civ. App. 1894) 28 S. W. Rep. 260; Yochum v. McCurdy, (Tex. Civ. App. 1897) 39 S. W. Rep. 210; Texas, etc., R. Co. v. Barber, (Tex. Civ. App. 1902) 71 S. W. Rep. 393. See also Decourt v. Sproul, 66 Tex. 368; Bryan v. Crump, 55 Tex. 1.

Utah. — Knudsen v. Omanson, 10 Utah 124.

Vermont. — Poultney v. Wells, 1 Aik. (Vt.) 180.

Virginia. — French v. Loyal Co., 5 Leigh (Va.) 627.

Canada. — Doe v. Principal Officers, etc., 3 U. C. Q. B. 387; Reg. v. Farwell, 14 Can. Sup. Ct. 392; Farwell v. Reg., 22 Can. Sup. Ct. 553, affirming 3 Can. Exch. 271; Davidson v. Benjamin, 9 Nova Scotia 474, per Young, C. J.

See generally *infra*, this title, *Land Department Officials and Proceedings* — *Effect and Conclusiveness of Proceedings*.

A Patent appropriates the land it covers, and land, being no longer vacant, is no longer subject to location. If the patent has been issued irregularly the government may provide means for repealing it; but no individual has a right to annul it, to consider the land still vacant, and appropriate it to himself. Hoofnagle v. Anderson, 7 Wheat. (U. S.) 212, quoted with approval in Horsky v. Moran, 21 Mont. 345, and Decourt v. Sproul, 66 Tex. 368.

A Grant by Congress to a State is no more subject to be recalled at the will of Congress than a grant to an individual. Busch v. Donohue, 31 Mich. 481.

State Control Over Land Granted by It to County. — Simpson v. Stoddard County, 173 Mo. 421.

1. Jackson v. Catlin, 2 Johns. (N. Y.) 248, 3 Am. Dec. 415, citing Barrington's Case, 8 Coke 138, and Lucy v. Levington, 1 Vent. 175, approved U. S. v. Arredondo, 6 Pet. (U. S.) 737.

2. **State Grant a Contract.** — Fletcher v. Peck, 6 Cranch (U. S.) 87; Green v. Biddle, 8 Wheat. (U. S.) 1; Rice v. Minnesota, etc., R. Co., 1 Black (U. S.) 358; Davis v. Gray, 16 Wall. (U. S.) 216, affirming 1 Woods (U. S.) 420; Grogan v. San Francisco, 18 Cal. 590; Bruce v. Schuyler, 9 Ill. 221, 46 Am. Dec. 458; State v. Springfield Tp., 6 Ind. 83; Kidd v. Central Trust, etc., Co., (Ky. 1901) 65 S. W. Rep. 355; Houston, etc., R. Co. v. Kuechler, 36 Tex. 382, cited Galveston, etc., R. Co. v. Gross, 47 Tex. 428; Houston, etc., R. Co. v. Texas, etc., R. Co., 70 Tex. 657; Houston, etc., R. Co. v. State, (Tex. Civ. App. 1896) 39 S. W. Rep. 390, affirmed 95 Tex. 507; Caledonia County Grammar School v. Burt, 11 Vt. 632. Compare Thomson v. Baker, 90 Tex. 163, holding that the right cannot be enforced by action against state officers without the consent of the state. See generally the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 15, pp. 1047 *et seq.*

Provision Exempting Land from Taxation. — State v. Wilson, 7 Cranch (U. S.) 164, distinguished Miami County v. Brackenridge, 12 Kan. 114, which was approved Peck v. Miami County, 4 Dill. (U. S.) 370, 19 Fed. Cas. No. 10,891; McGee v. Mathis, 4 Wall. (U. S.) 143, reversing 21 Ark. 40; Memphis, etc., R. Co. v. Loftin, 105 U. S. 258; State v. Crittenden County Ct., 19 Ark. 360. See also Herrick v. Randolph, 13 Vt. 525.

grantee to use and occupy it. The doctrine of abandonment does not apply to a perfect title, but only to imperfect titles.¹

2. Lands to Which Inchoate Rights Have Attached. — The right to acquire land, once vested, and attached to a particular tract, is as effective as a grant in segregating the land from the public domain. The tract cannot be otherwise disposed of by the government unless the equity is subsequently lost by abandonment, cancellation, or the like; and on the grant passing it relates back to the initiation of the right, cutting off all intervening claims.² The

1. Failure to Use and Occupy Granted Land. — *Callen v. Hope*, 75 Fed. Rep. 758; *People v. Snyder*, 51 Barb. (N. Y.) 589, *affirming* 41 N. Y. 397; *Hoffman v. Bell*, 61 Pa. St. 444; *Bear Valley Coal Co. v. Dewart*, 95 Pa. St. 72. See also *Holtzapple v. Phillibaum*, 4 Wash. (U. S.) 356, 12 Fed. Cas. No. 6,648; *Dikes v. Miller*, 24 Tex. 417, 25 Tex. Supp. 281, 78 Am. Dec. 571; *Phillips v. J. B. Watkins Land Mortg. Co.*, 90 Tex. 195. Compare *Sutton v. McLeod*, 29 Ga. 589.

2. Lands to Which Inchoate Rights Have Attached. — *United States*. — *Stephens v. M'Cargo*, 9 Wheat. (U. S.) 502; *Ross v. Doe*, 1 Pet. (U. S.) 656; *U. S. v. Fitzgerald*, 15 Pet. (U. S.) 407; *Carroll v. Safford*, 3 How. (U. S.) 441; *Cunningham v. Ashley*, 14 How. (U. S.) 377, 13 Ark. 654, *reversing* 12 Ark. 296; *Witherspoon v. Duncan*, 4 Wall. (U. S.) 210; *Stark v. Starr*, 6 Wall. (U. S.) 402, *reversing* 2 Oregon 118; *Gibson v. Chouteau*, 13 Wall. (U. S.) 92, *reversing* 39 Mo. 537; *Shepley v. Cowan*, 91 U. S. 330, *reversing* 52 Mo. 559; *Wirth v. Branson*, 98 U. S. 118; *Simmons v. Wagner*, 101 U. S. 260; *Deffebach v. Hawke*, 115 U. S. 392; *Cornelius v. Kessel*, 128 U. S. 456; *Hastings, etc., v. Whitney*, 132 U. S. 357, *affirming* 34 Minn. 538; *Sturr v. Beck*, 133 U. S. 547, *affirming* 6 Dak. 71; *Benson Min., etc., Co. v. Alta Min., etc., Co.*, 145 U. S. 428; *Parsons v. Venzke*, 164 U. S. 89, *affirming* 4 N. Dak. 452; *Astrom v. Hammond*, 3 McLean (U. S.) 107, 2 Fed. Cas. No. 596; *Union Mill, etc., Co. v. Dangberg*, 2 Sawy. (U. S.) 450, 24 Fed. Cas. No. 14,370; *U. S. v. Tichenor*, 8 Sawy. (U. S.) 142, 12 Fed. Rep. 415, *followed* *U. S. v. McGraw*, 8 Sawy. (U. S.) 156, 12 Fed. Rep. 449; *Hayner v. Stanley*, 8 Sawy. (U. S.) 225, 13 Fed. Rep. 217; *Pacific Coast Min., etc., Co. v. Sprago*, 8 Sawy. (U. S.) 645, 16 Fed. Rep. 348; *Smith v. Mitchell*, 12 Sawy. (U. S.) 651, 32 Fed. Rep. 681; *Hot Springs Cases*, 10 Ct. Cl. 289, *affirmed* on other grounds 92 U. S. 698; *St. Paul, etc., R. Co. v. Greenhalgh*, 26 Fed. Rep. 563, *affirmed* 139 U. S. 19; *Northern Pac. R. Co. v. Sanders*, 49 Fed. Rep. 129, *affirming* 46 Fed. Rep. 239, 47 Fed. Rep. 604, *affirmed* 166 U. S. 620; *U. S. v. Turner*, 54 Fed. Rep. 228; *U. S. v. Southern Pac. R. Co.*, 76 Fed. Rep. 134; *Hartman v. Warren*, (C. C. A.) 76 Fed. Rep. 157, *affirming* 70 Fed. Rep. 946; *James v. Germania Iron Co.*, (C. C. A.) 107 Fed. Rep. 597, *affirming sub nom.* *Germania Iron Co. v. Craig*, 98 Fed. Rep. 23; *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, (C. C. A.) 112 Fed. Rep. 4, *affirming* 104 Fed. Rep. 20, *affirmed* 190 U. S. 301.

Arkansas. — *Hale v. Gaines*, 19 Ark. 94, *affirmed* on other grounds 22 How. (U. S.) 144; *Trulock v. Taylor*, 26 Ark. 54; *Coleman v. Hill*, 44 Ark. 452; *Chowning v. Stanfield*, 49 Ark. 87.

California. — *McNear v. Hutchinson*, 31 Cal. 177; *Bludworth v. Lake*, 33 Cal. 255; *Young v. Shinn*, 48 Cal. 26, *citing* *Smith v. Athern*, 34 Cal. 506; *Easton v. O'Reilly*, 63 Cal. 305; *Cothrin v. Faber*, 68 Cal. 39; *Witcher v. Conklin*, 84 Cal. 499; *Miller v. Byrd*, 90 Cal. 150; *McCabe v. Goodwin*, 106 Cal. 486; *McGuire v. Brown*, 106 Cal. 660, *overruling* *Osgood v. El Dorado Water, etc., Min. Co.*, 56 Cal. 571, and *Farley v. Spring Valley Min., etc., Co.*, 58 Cal. 142; *Pioneer Land Co. v. Maddux*, 109 Cal. 633, 50 Am. St. Rep. 67; *Graves v. Hebborn*, 125 Cal. 400.

Colorado. — *Denver, etc., R. Co. v. Wilson*, 28 Colo. 6.

Illinois. — *Rogers v. Brent*, 10 Ill. 573, 50 Am. Dec. 422; *Danforth v. Morrical*, 84 Ill. 456.

Indiana. — *Moyer v. McCullough*, 1 Ind. 339.

Iowa. — *Cavender v. Smith*, 3 Greene (Iowa) 349, 56 Am. Dec. 541; *Arnold v. Grimes*, 2 Iowa 1; *Klein v. Argenbright*, 26 Iowa 493; *Waters v. Bush*, 42 Iowa 255; *Rankin v. Miller*, 43 Iowa 11.

Kansas. — *Burlington, etc., R. Co. v. Johnson*, 38 Kan. 142.

Louisiana. — *Godeau v. Phillips*, 3 La. 60; *Lefebvre v. Comeau*, 11 La. 321; *Kittridge v. Breaud*, 4 Rob. (La.) 79; *Laforest v. Downing*, 16 La. Ann. 301; *Broussard v. Pharr*, 48 La. Ann. 230; *Betz v. Illinois Cent. R. Co.*, 52 La. Ann. 893.

Maryland. — *Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co.*, 4 Gill & J. (Md.) 54; *U. S. v. Great Falls Mfg. Co.*, 21 Md. 119.

Michigan. — *Johnson v. Ballou*, 28 Mich. 379; *Hedley v. Leonard*, 35 Mich. 71; *Robertson v. State Land Office*, 44 Mich. 274.

Minnesota. — *Red River, etc., R. Co. v. Sture*, 32 Minn. 95, *cited* *Pairier v. Itasca County*, 68 Minn. 297.

Mississippi. — *McAfee v. Keirn*, 7 Smed. & M. (Miss.) 780; *Jackson v. Dilworth*, 39 Miss. 772.

Missouri. — *Pettigrew v. Shirley*, 9 Mo. 683; *Wickersham v. Woodbeck*, 57 Mo. 59; *Hammond v. Johnston*, 93 Mo. 198.

Oklahoma. — *McMichael v. Murphy*, (Okla. 1902) 70 Pac. Rep. 189; *Hodges v. Colcord*, (Okla. 1902) 70 Pac. Rep. 383.

Oregon. — *Larsen v. Oregon R., etc., Co.*, 19 Oregon 240; *Faul v. Cooke*, 19 Oregon 455, 20 Am. St. Rep. 836; *Johnson v. Bridal Veil Lumbering Co.*, 24 Oregon 182.

Tennessee. — *McConnell v. Madisonville*, 2 Humph. (Tenn.) 53.

Texas. — *Sherwood v. Fleming*, 25 Tex. Supp. 408; *Wright v. Hawkins*, 28 Tex. 452; *Burleson v. Durham*, 46 Tex. 152; *De Montel v. Speed*, 53 Tex. 339; *Milam County v. Bateman*, 54 Tex. 153; *White v. Martin*, 66 Tex. 340; *Cox v. Houston, etc., R. Co.*, 68 Tex. 226.

vesting of the right creates a contract between the applicant and the state which is within the protection of laws against the impairment of the obligation of contracts.¹ The steps necessary to be taken to vest the right, to keep it alive and perfect it, and the extent to which a void or voidable right will segregate the land, vary greatly in the different jurisdictions, there being little uniformity in the statutes and decisions of the courts. Where a right after having vested is lost, the tract segregated by it has been generally treated as again subject to acquisition as public, unappropriated, or vacant land, as if no right had ever attached, unless there is some positive law to the contrary. The status of the land upon the lapse of the right is frequently declared by statute.²

3. Lands Withdrawn from Sale or Reserved — *a. RESERVATIONS.* — It has been a common practice from the earliest period to reserve parcels of public lands from time to time and appropriate them to public or other special purposes.³ Reserved lands are often expressly excepted from the operation of general legislative grants and land laws, but even without being thus.

Canada. — *Doe v. Westover*, 1 U. C. Err. & App. 465.

There Is No Difference in this respect between a cash and a donation entry. *Witherspoon v. Duncan*, 4 Wall. (U. S.) 210, *approved* *Hastings, etc.*, R. Co. v. Whitney, 132 U. S. 357, which *affirmed* 34 Minn. 538; *Milam County v. Bateman*, 54 Tex. 153.

Doctrine of Relation. — See generally the title *RELATION*, vol. 24, p. 274.

1. Vested Right a Contract. — *Pennoyer v. McConaughy*, 140 U. S. 1, *affirming* 14 Sawy. (U. S.) 584, 43 Fed. Rep. 196, 339; *Montgomery v. Casson*, 16 Cal. 189; *McCabe v. Goodwin*, 106 Cal. 486; *Brinsfield v. Carter*, 2 Ga. 143; *Winter v. Jones*, 10 Ga. 190, 54 Am. Dec. 382; *Butler v. Chariton County Ct.*, 13 Mo. 112; *Jumbo Cattle Co. v. Bacon*, 79 Tex. 5; *State v. School, etc.*, *Lands Com'rs*, 4 Wis. 414. See also *Hardy v. Branch Bank*, 15 Ala. 722. See generally the title *IMPAIRMENT OF OBLIGATION OF CONTRACTS*, vol. 15, p. 1047 *et seq.*

2. See generally the discussion of the various modes by which public lands may be acquired, *infra*, this title.

Vesting of Preference Right to Purchase under Act of Congress of May 14, 1880 (21 U. S. Stat. at L. 140), given to any person who has contested and procured the cancellation of any preemption, homestead, or timber culture entry. *Emblem v. Lincoln Land Co.*, 94 Fed. Rep. 710, *affirmed* (C. C. A.) 102 Fed. Rep. 559, which was *affirmed* 184 U. S. 660; *Sproat v. Durland*, 2 Okla. 24; *Hodges v. Colcord*, (Okla. 1902) 70 Pac. Rep. 383.

Vesting of Right under Act of Congress of June 4, 1897 (30 U. S. Stat. at L. 36), which gives the owner of, or *bona fide* settler upon, a tract of land afterwards included within a forest reservation the right to relinquish the same and select in lieu thereof a tract of "vacant land open to settlement." *Olive Land, etc., Co. v. Olmstead*, 103 Fed. Rep. 568; *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, (C. C. A.) 112 Fed. Rep. 4, *affirming* 104 Fed. Rep. 20, *affirmed* 190 U. S. 301.

Vesting of Right under Act of Congress of June 3, 1878 (20 U. S. Stat. at L. 89), for the sale of timber and stone lands. *U. S. v. Braddock*, 50 Fed. Rep. 669.

Status of Land upon Lapse of Right Previously Vested. — *Jones v. Chiles*, 4 J. J. Marsh. (Ky.) 610. See also for various illustrations *Moss v. Downman*, 176 U. S. 413, *affirming* (C. C. A.) 88 Fed. Rep. 181, 82 Fed. Rep. 810; *Huideköper v. McClean*, 1 Wash. (U. S.) 136, 12 Fed. Cas. No. 6,852; *Wells v. Wright*, 3 Wash. (U. S.) 250, 29 Fed. Cas. No. 17,405; *Lanning v. London*, 4 Wash. (U. S.) 159, 14 Fed. Cas. No. 8,074; *Holtzapple v. Philibaum*, 4 Wash. (U. S.) 356, 12 Fed. Cas. No. 6,648; *Smith v. Mitchell*, 12 Sawy. (U. S.) 651, 32 Fed. Rep. 681; *Northern Pac. R. Co. v. Meadows*, 46 Fed. Rep. 254; *Evans v. Durango Land, etc., Co.*, (C. C. A.) 80 Fed. Rep. 433; *Maffet v. Quine*, 93 Fed. Rep. 347, *rehearing denied* 95 Fed. Rep. 199; *Edwards v. Begole*, (C. C. A.) 121 Fed. Rep. 1; *Emslie v. Young*, 24 Kan. 732; *Wait v. State Land Office*, 87 Mich. 353; *Boyd v. Mammoth Spring Imp., etc., Co.*, 137 Mo. 482; *Husbands v. Mosier*, 26 Oregon 55; *Morris v. Neighman*, 4 Dall. (Pa.) 210; *Huntsman v. Randolph*, 5 Hayw. (Tenn.) 263; *Horne v. Gambrell*, 1 Tex. App. Civ. Cas., § 998; *Bolton v. La Camas Water Power Co.*, 10 Wash. 246.

Void and Voidable Rights. — See the cases cited in the second preceding note. See also *Miller v. Kerr*, 7 Wheat. (U. S.) 1; *Drew v. Valentine*, 18 Fed. Rep. 712, *appeal dismissed* without opinion 131 U. S. 449; *Graham v. Smith*, 1 Humph. (Tenn.) 546; *Copeland v. Woods*, 2 Humph. (Tenn.) 330; *Johnson v. Lucas*, 11 Humph. (Tenn.) 306; *Rainey v. Aydelette*, 4 Heisk. (Tenn.) 122; *McSorley v. Hill*, 2 Wash. 638. Compare as to voidable rights *Metzler v. Johnson*, 1 Tex. Civ. App. 137, *citing* *Martin v. Brown*, 62 Tex. 469, *followed* *Hitsen v. Glascock*, 2 Tex. Civ. App. 617.

3. Reservation of Lands — In General. — *Choctaw v. Pope*, 12 Wheat. (U. S.) 587, *affirming sub nom.* *McComas v. Gannard*, Minor (Ala.) 422; *Grisar v. McDowell*, 6 Wall. (U. S.) 363, *citing* *Nevada Ditch Co. v. Bennett*, 30 Oregon 59, 60 Am. St. Rep. 777.

There is no distinction between the right of the government to sell its lands and the right to appropriate them to a particular purpose or reserve them entirely from location. *State v. Delesdenier*, 7 Tex. 76.

All the public lands are considered as open

excepted no such grant or law will be construed to embrace them or to operate upon them. Provided the reservation was lawfully made, the lands covered by it are as effectually severed from the mass of the public lands as if granted, and cannot be otherwise appropriated without special authority so long as it remains in force.¹ Title to the land, being still in the government,

to entry and sale under general laws except so far as particular lands have been lawfully reserved or withdrawn. *Lockhart v. Johnson*, 181 U. S. 516; *French v. Bankhead*, 11 Gratt. (Va.) 136; *Garrison v. Hall*, 75 Va. 150.

Words "Appropriated" and "Reserved."—The word "appropriated" is frequently used to designate lands set apart by the government for particular purposes and as thus used is synonymous with the word "reserved." *Gammage v. Powell*, 61 Tex. 629. To a similar effect, see *Wilcox v. Jackson*, 13 Pet. (U. S.) 498, 2 Ill. 344; *State v. Delesdenier*, 7 Tex. 76; *Day Land, etc., Co. v. State*, 68 Tex. 526.

"Reservation" Defined.—See *RESERVATION*, vol. 24, p. 658; *Sanger v. Sargent*, 8 Sawy. (U. S.) 93, 21 Fed. Cas. No. 12,319.

1. Land Reserved for Military Purposes.—*Wilcox v. Jackson*, 13 Pet. (U. S.) 498, reversing 2 Ill. 344; *U. S. v. Chicago*, 7 How. (U. S.) 185; *U. S. v. Stone*, 2 Wall. (U. S.) 525; *Grisar v. McDowell*, 6 Wall. (U. S.) 363; *Morrow v. Whitney*, 95 U. S. 551, reversing 36 Wis. 438, 112 U. S. 693, affirming 50 Wis. 197; *Johnson v. Drew*, 171 U. S. 93, affirming 34 Fla. 130, 43 Am. St. Rep. 172; *U. S. v. Baltimore, etc., R. Co.*, 1 Hughes (U. S.) 138, 24 Fed. Cas. No. 14,510; *U. S. v. Railroad Bridge Co.*, 6 McLean (U. S.) 517, 27 Fed. Cas. No. 16,114; *U. S. v. Tichenor*, 8 Sawy. (U. S.) 142, 12 Fed. Rep. 415; *U. S. v. McGraw*, 8 Sawy. (U. S.) 156, 12 Fed. Rep. 449; *Johnson's Case*, 2 Ct. Cl. 391, 8 Ct. Cl. 243; *Illinois v. Illinois Cent. R. Co.*, 33 Fed. Rep. 730, modified on other grounds 146 U. S. 387; *Lear v. U. S.*, 50 Fed. Rep. 65; *Walsh v. Ford*, 1 Alaska 146; *Behrends v. Goldstein*, 1 Alaska 518; *Florida Town Imp. Co. v. Bigalsky*, (Fla. 1902) 33 So. Rep. 450; *Culliver v. Berge*, 1 Rob. (La.) 427; *Kelly v. Dalles*, 19 Oregon 299; *Spaulding v. Martin*, 11 Wis. 262.

Salt and Mineral Land Reservations.—See the title MINES AND MINING CLAIMS, vol. 20, p. 677; *Edwards v. Darby*, 12 Wheat. (U. S.) 207; *Morton v. Nebraska*, 21 Wall. (U. S.) 660; *Indiana v. Miller*, 3 McLean (U. S.) 151, 13 Fed. Cas. No. 7,022; *U. S. v. Reed*, 28 Fed. Rep. 482; *Northern Pac. R. Co. v. Sanders*, 49 Fed. Rep. 129, affirming 46 Fed. Rep. 239, 47 Fed. Rep. 604, affirmed 166 U. S. 620; *Oakes v. Myers*, 68 Fed. Rep. 807; *U. S. v. Central Pac. R. Co.*, 84 Fed. Rep. 218; *Garrard v. Silver Peak Mines*, (C. C. A.) 94 Fed. Rep. 983, affirming 82 Fed. Rep. 578; *Northern Pac. R. Co. v. Soderberg*, 99 Fed. Rep. 506, affirmed (C. C. A.) 104 Fed. Rep. 425, which was affirmed 188 U. S. 526; *Olive Land, etc., Co. v. Olmstead*, 103 Fed. Rep. 568; *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 104 Fed. Rep. 20, affirmed (C. C. A.) 112 Fed. Rep. 4, affirmed 190 U. S. 301; *U. S. v. Blackburn*, (Ariz. 1897) 48 Pac. Rep. 904; *Callahan v. James*, (Cal. 1902) 71 Pac. Rep. 104; *Patterson v. Trabue*, 3 J. J. Marsh. (Ky.) 598; *Atty.-Gen. v. Smith*, 31 Mich. 359; *Silver Bow Min., etc., Co. v. Clark*, 5 Mont. 378; *Horsky*

v. Moran, 21 Mont. 345; *Parmelee v. Oswego, etc., R. Co.*, 7 Barb. (N. Y.) 599, affirmed 6 N. Y. 74; *Adams v. Reed*, 11 Utah 480.

Town-site Reservations.—*Hoggan v. Esquimalt, etc., R. Co.*, (1894) A. C. 429, affirming 20 Can. Sup. Ct. 235; *Chotard v. Pope*, 12 Wheat. (U. S.) 587, affirming sub nom. *McComas v. Gannard*, Minor (Ala.) 422; *Leviston v. Ryan*, 75 Cal. 293; *Brooke v. Jordan*, 14 Mont. 375, cited *Neill v. Jordan*, 15 Mont. 47; *Com. v. M'Kissick*, 4 Dall. (Pa.) 292; *Freytag v. Powell*, 1 Whart. (Pa.) 536; *Barton v. Bouvier*, 1 Phila. (Pa.) 523, 12 Leg. Int. (Pa.) 14; *Hawkins v. Arthur*, 2 Bay (S. Car.) 195; *McConnell v. Madisonville*, 2 Humph. (Tenn.) 53.

The prohibition against pre-emption of land within the limits of a city or town does not prevent its acquisition in other modes by which public land may be acquired. *Leviston v. Ryan*, 75 Cal. 293, citing *Doll v. Meador*, 16 Cal. 295.

Forest Reservations.—*U. S. v. Tygh Valley Land, etc., Co.*, 76 Fed. Rep. 693; *Olive Land, etc., Co. v. Olmstead*, 103 Fed. Rep. 568; *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, (C. C. A.) 112 Fed. Rep. 4, affirming 104 Fed. Rep. 20, affirmed 190 U. S. 301; *Holmes v. U. S.*, (C. C. A.) 118 Fed. Rep. 995, reversing 105 Fed. Rep. 41; *U. S. v. Blendauer*, 122 Fed. Rep. 703.

Lands Reserved for Educational Purposes.—*Kissell v. St. Louis Public Schools*, 18 How. (U. S.) 19, affirming 16 Mo. 553; *Cooper v. Roberts*, 18 How. (U. S.) 173, reversing 6 McLean (U. S.) 93, 6 Fed. Cas. No. 3,201; *Dunn v. Barnum*, 10 U. S. App. 86, 51 Fed. Rep. 355; *Bres v. Louviere*, 37 La. Ann. 736; *Cummings v. Powell*, 97 Mo. 524, 116 Mo. 473, 38 Am. St. Rep. 610; *Day Land, etc., Co. v. State*, 68 Tex. 526; *Teague v. Green*, 7 Tex. Civ. App. 368.

Hot Springs Arkansas Reservation.—*Hale v. Gaines*, 22 How. (U. S.) 144, affirming 19 Ark. 94; *Hot Springs Cases*, 92 U. S. 698, affirming 10 Ct. Cl. 289, 433; *Rector v. Gaines*, 19 Ark. 71, followed *Hunter v. Gaines*, 19 Ark. 93, and *Butler v. Gaines*, 19 Ark. 95; *Gaines v. Hale*, 26 Ark. 168, affirmed on other grounds 93 U. S. 3.

Indian Reservations.—See *infra*, this section, *Lands Occupied or Claimed by Indians*.

Miscellaneous Reservations.—*U. S. v. Fitzgerald*, 15 Pet. (U. S.) 407; *Clements v. Warner*, 24 How. (U. S.) 394; *Oaksmith v. Johnston*, 92 U. S. 343; *Penn v. Groff*, 1 Wash. (U. S.) 390, 19 Fed. Cas. No. 10,932; *Conn v. Penn*, 4 Wash. (U. S.) 430, 6 Fed. Cas. No. 3,105; *Turner v. American Baptist Missionary Union*, 5 McLean (U. S.) 344, 24 Fed. Cas. No. 14,251; *Klauber v. Higgins*, 117 Cal. 451; *Fredericks v. Zumwalt*, 134 Cal. 44; *Herrington v. Clark*, 56 Kan. 644; *Litchfield v. Scituate*, 136 Mass. 39; *Sterling v. Jackson*, 69 Mich. 488; *Jackson v. Seaman*, 3 Johns. (N. Y.) 495; *Wilkins v. Alenton*, 3 Yeates (Pa.) 272; *Sherwood v. Fleming*, 25 Tex. Supp. 408; *Todd v. Fisher*, 26 Tex. 239; *Gammage v. Powell*, 61 Tex. 629; *French v. Bankhead*, 11 Gratt. (Va.) 136; *Garrison v. Hall*, 75 Va. 150.

can be passed by it by specific grant notwithstanding the reservation; but a sale by executive officers contrary to the reservation, if not confirmed by subsequent legislation, is void.¹

b. WITHDRAWALS.—Tracts of land are also frequently withdrawn from sale either expressly or by implication of law until private rights claimed therein have been adjudicated and rejected or confirmed, or until grants which may include them have been definitely located and satisfied. The withdrawal, if authorized, has the same effect as a reservation. So long as it continues in force it segregates the lands and excludes them from the operation of general land laws and legislative grants, even without any express exception to that effect.²

1. *State v. Ham*, 19 Mo. 592. See also *Litchfield v. Webster County*, 101 U. S. 773; *Litchfield v. Hamilton County*, 101 U. S. 781, note.

It has been repeatedly decided that patents issued under general land laws for lands which have been previously granted, reserved from sale, or appropriated are void. *Best v. Polk*, 18 Wall. (U. S.) 112; *Morton v. Nebraska*, 21 Wall. (U. S.) 660, cited *Silver Bow Min.*, etc., Co. v. *Clark*, 5 Mont. 378. See generally cases cited in second preceding note. Compare as to reserved lands *Bryan v. Shirley*, 53 Tex. 440, cited *McLeary v. Dawson*, 87 Tex. 524.

Land Appropriated No Longer Vacant.—Land appropriated by the legislature is not vacant, be that appropriation what it may; to individuals, to public purposes, or to Indians. *Thomas v. Daniel*, 2 McCord L. (S. Car.) 354.

2. **Withdrawals and Reservations.**—There can be no doubt as to the fact that lands lawfully withdrawn from sale are considered as within the terms of the rule relating to lands which have been reserved. *Wisconsin Cent. R. Co. v. Forsythe*, 159 U. S. 46, reversing 43 Fed. Rep. 867, approving *Northern Pac. R. Co. v. Musser Sauntry*, etc., Co., (C. C. A.) 68 Fed. Rep. 993, which was affirmed 168 U. S. 604.

Railroad Land Grants.—See *infra*, this title, *Grants in Aid of Railroads*. See also *Nelson*, etc., R. Co. v. *Parker*, 6 British Columbia 1; *Hall v. Reg.*, 7 British Columbia 89, affirmed 7 British Columbia 480; *Hamblin v. Western Land Co.*, 147 U. S. 531, affirming 79 Iowa 539; *Wood v. Beach*, 156 U. S. 548, affirming 43 Kan. 427; *Wisconsin Cent. R. Co. v. Forsythe*, 159 U. S. 46, reversing 43 Fed. Rep. 867; *Spencer v. McDougal*, 159 U. S. 62; *Hewitt v. Schultz*, 180 U. S. 139, reversing 7 N. Dak. 601, two parties dissenting; *Moore v. Cormode*, 180 U. S. 167, affirming 20 Wash. 305; *Powers v. Slaght*, 180 U. S. 173, affirming 20 Wash. 712; *Moore v. Stone*, 180 U. S. 180, affirming *Southern Pac. R. Co. v. Bell*, 183 U. S. 675, affirming 124 Cal. 475; *Groeck v. Southern Pac. R. Co.*, 183 U. S. 690, reversing (C. C. A.) 87 Fed. Rep. 970, 74 Fed. Rep. 585; *Nelson v. Northern Pac. R. Co.*, 188 U. S. 112, three justices dissenting, reversing 22 Wash. 521; *Southern Pac. R. Co. v. Tilley*, 41 Fed. Rep. 729, appeal dismissed 163 U. S. 705; *Northern Pac. R. Co. v. Musser Sauntry Land*, etc., Co., (C. C. A.) 68 Fed. Rep. 993, affirmed 168 U. S. 604; *Holmes v. U. S.*, (C. C. A.) 118 Fed. Rep. 995, reversing 105 Fed. Rep. 41; *Northern Pac. R. Co. v. Peronto*, 3 Dak. 217; *O'Connor v. Gertgens*, 85 Minn. 481; *Howard v. Hibbs*, 22 Wash. 513.

Lands Claimed under Spanish, Mexican, or Other Foreign Grants.—See the title *TREATIES*, and the

following cases: *Stoddard v. Chambers*, 2 How. (U. S.) 284; *Barry v. Gamble*, 3 How. (U. S.) 32, affirming 8 Mo. 88; *Mills v. Stoddard*, 8 How. (U. S.) 345; *Dalauriere v. Emison*, 15 How. (U. S.) 525; *Easton v. Salisbury*, 21 How. (U. S.) 426, affirming 23 Mo. 100, 19 Wall. (U. S.) 619, affirming 2 Dill. (U. S.) 41, 16 Fed. Cas. No. 8,843; *Shepley v. Cowan*, 91 U. S. 330, reversing 52 Mo. 559; *Newhall v. Sanger*, 92 U. S. 761; *Huff v. Doyle*, 93 U. S. 558, reversing 50 Cal. 16; *Van Reynegan v. Bolton*, 95 U. S. 33; *Hosmer v. Wallace*, 97 U. S. 575, affirmed 47 Cal. 461; *Ryan v. Central Pac. R. Co.*, 99 U. S. 382, affirming 5 Sawy. (U. S.) 260, 21 Fed. Cas. No. 12,185; *Trenouth v. San Francisco*, 100 U. S. 251; *Quinn v. Chapman*, 111 U. S. 445; *Aurrecochea v. Bangs*, 114 U. S. 381; *Fraser v. O'Connor*, 115 U. S. 102; *Mower v. Fletcher*, 116 U. S. 380; *Durand v. Martin*, 120 U. S. 366; *Doolan v. Carr*, 125 U. S. 618; *Cameron v. U. S.*, 148 U. S. 301, reversing (Ariz. 1889) 21 Pac. Rep. 177; *Southern Pac. R. Co. v. Dull*, 10 Sawy. (U. S.) 506, 22 Fed. Rep. 489; *U. S. v. Central Pac. R. Co.*, 26 Fed. Rep. 479, appeal dismissed without opinion 140 U. S. 702; *Southern Pac. R. Co. v. Brown*, (C. C. A.) 75 Fed. Rep. 85, affirming 68 Fed. Rep. 333, rehearing denied (C. C. A.) 77 Fed. Rep. 271; *Page v. Fowler*, 37 Cal. 100; *Rush v. Casey*, 39 Cal. 339; *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456; *McLaughlin v. Fowler*, 52 Cal. 203, overruling early *California* cases to the contrary; *Pratt v. Crane*, 58 Cal. 533; *Crane v. Carr*, 59 Cal. 103; *Aurrecochea v. Sinclair*, 60 Cal. 532, affirmed 114 U. S. 387; *Hays v. Steiger*, 76 Cal. 555, affirmed 156 U. S. 387; *Foss v. Hinkell*, 78 Cal. 158, 91 Cal. 194; *Grand Gulf R.*, etc., Co. v. *Bryan*, 8 Smed. & M. (Miss.) 234; *Perry v. O'Hanlon*, 11 Mo. 585, 49 Am. Dec. 100; *McCabe v. Worthington*, 16 Mo. 514. *Contra Sanger v. Sargent*, 8 Sawy. (U. S.) 93, 21 Fed. Cas. No. 12,319.

The rule does not apply in its entirety where a specific tract is not claimed, but merely the right to locate a certain quantity of land within a larger territory named or described. In such a case the surplus land within the territory remains at the disposal of the government as a part of the public domain; and may be granted from any part of it so long as sufficient is left to satisfy the claim if it should be confirmed. *U. S. v. McLaughlin*, 127 U. S. 428, affirming 12 Sawy. (U. S.) 179, 30 Fed. Rep. 147; *Carr v. Quigley*, 149 U. S. 652, reversing 79 Cal. 130, 57 Cal. 394; *Grant v. Oliver*, 91 Cal. 158.

There have been no public lands of the United States withdrawn from sale on account of the existence of such claims since the repeal

c. **POWER TO RESERVE OR WITHDRAW LANDS.** — The power to reserve and specially appropriate tracts of public land, or to withdraw them from sale, rests primarily with the law-making body, subject to constitutional provisions relating thereto, if any.¹ The power may be delegated, however, and by implication of law as well as by express provision; and it is frequently exercised by the executive or by the land department and other government officers.² No set form of words or phrases is necessary to the exercise of power. The sovereign is not parting with the title, but only setting the land apart for a specific purpose. It is enough if it is sufficiently indicated that those having the power intended to use it.³

4. **Lands Reverted to Government.** — Lands which have been once segregated by grant from the undefined public domain and become private property, on reverting to the state or other sovereignty by escheat, forfeiture, or otherwise, are not within the purview of general land laws relating to the disposal of public, vacant, or unappropriated lands, but require special authority for their disposition.⁴ Otherwise, in the absence of a statute to the contrary, of

of Act Cong. July 22, 1854, § 8 (10 U. S. Stat. at L. 309, c. 103). *Lockhart v. Johnson*, 181 U. S. 516.

Des Moines River Improvement Grant. — *Dubuque, etc., R. Co. v. Litchfield*, 23 How. (U. S.) 66; *Wolcott v. Des Moines Nav. Co.*, 5 Wall. (U. S.) 681; *Williams v. Baker*, 17 Wall. (U. S.) 144; *Iowa Homestead Co. v. Des Moines Valley R. Co.*, 17 Wall. (U. S.) 153; *Wolsey v. Chapman*, 101 U. S. 755; *Litchfield v. Webster County*, 101 U. S. 773; *Litchfield v. Hamilton County*, 101 U. S. 781, note; *Dubuque, etc., R. Co. v. Des Moines Valley R. Co.*, 109 U. S. 329, *affirming* 54 Iowa 89; *Bullard v. Des Moines, etc., R. Co.*, 122 U. S. 167; *U. S. v. Des Moines Nav., etc., Co.*, 142 U. S. 510, *affirming* 43 Fed. Rep. 1; *Riley v. Welles*, 154 U. S. 578; *Crilley v. Burrows*, 21 U. S. (L. ed.) 624, 17 Wall. (U. S.) 167; *Bellows v. Todd*, 34 Iowa 18, 39 Iowa 209; *Bullard v. Des Moines, etc., R. Co.*, 62 Iowa 382; *Whitehead v. Plummer*, 76 Iowa 181; *Cole v. Des Moines Valley R. Co.*, 76 Iowa 185.

State Road Grants — Michigan. — *People v. Pritchard*, 17 Mich. 260; *People v. State Land Office*, 23 Mich. 270; *Newcombe v. Chesebrough*, 33 Mich. 322; *French v. Christy*, 37 Mich. 279; *Chadbourne v. State Land Office*, 59 Mich. 113; *Davis v. Ontonagon County*, 64 Mich. 404.

Miscellaneous Illustrations. — *Chicago, etc., R. Co. v. Jackson*, 68 Iowa 301; *Gustin v. State Land Office*, 126 Mich. 269, 8 Detroit Leg. N. 26; *O'Connor v. Gertgens*, 85 Minn. 481; *Kentucky Cattle Raising Co. v. Bruce*, 78 Tex. 269.

1. **Power to Withdraw or Reserve Tracts of Public Land.** — *U. S. v. Fitzgerald*, 15 Pet. (U. S.) 407; *U. S. v. Tichenor*, 8 Sawy. (U. S.) 142, 12 Fed. Rep. 415; *Day Land, etc., Co. v. State*, 68 Tex. 526.

Reservation by Treaty. — The treaty-making power of the United States government, as well as Congress, can reserve a part of the national domain for a specific purpose. *U. S. v. Payne*, 2 McCrary (U. S.) 289, 8 Fed. Rep. 883.

Constitutional Provisions. — See, for example, *In re Canal Certificates*, 19 Colo. 63; *State v. Cunningham*, 88 Wis. 81.

2. **Exercise of Power by Executive and Public Officers.** — See generally cases cited in this subdivision and particularly *Wilcox v. Jackson*, 13 Pet. (U. S.) 498, *reversing* 2 Ill. 344; *Du-*

buque, etc., R. Co. v. Litchfield, 23 How. (U. S.) 66; *Wolcott v. Des Moines Nav. Co.*, 5 Wall. (U. S.) 681; *Grisar v. McDowell*, 6 Wall. (U. S.) 363; *Wolsey v. Chapman*, 101 U. S. 755; *Hamblin v. Western Land Co.*, 147 U. S. 531, *affirming* 79 Iowa 539; *Wood v. Beach*, 156 U. S. 548, *affirming* 43 Kan. 427; *U. S. v. Payne*, 2 McCrary (U. S.) 289, 8 Fed. Rep. 883; *U. S. v. Tichenor*, 8 Sawy. (U. S.) 142, 12 Fed. Rep. 415; *Northern Pac. R. Co. v. Nusser Sauntry Land, etc., Co.*, 68 Fed. Rep. 993, *affirmed* 168 U. S. 604; *Northern Pac. R. Co. v. Dudley*, 85 Fed. Rep. 82; *U. S. v. Blendauer*, 122 Fed. Rep. 703; *Behrends v. Goldsteen*, 1 Alaska 518; *Florida Town Imp. Co. v. Bigalsky*, (Fla. 1902) 33 So. Rep. 450; *Bellows v. Todd*, 34 Iowa 18, 39 Iowa 209; *Culliver v. Berge*, 1 Rob. (La.) 427; *O'Connor v. Gertgens*, 85 Minn. 481; *Nevada Ditch Co. v. Bennett*, 30 Oregon 59, 60 Am. St. Rep. 777; *Kentucky Cattle Raising Co. v. Bruce*, 78 Tex. 269.

A sale is prohibited by a law of Congress when to allow it would defeat the object of that law, as much as though the inhibition were in direct terms declared. The general rule of the land department is, and from the commencement of the government has been, to hold as excluded from sale or pre-emption lands which might, in the execution of the laws of Congress, fall within grants to others. *Shepley v. Cowan*, 91 U. S. 330.

3. **How Power Exercised.** — *U. S. v. Payne*, 2 McCrary (U. S.) 289, 8 Fed. Rep. 883; *Wolsey v. Chapman*, 101 U. S. 755; *Wood v. Beach*, 156 U. S. 548, *affirming* 43 Kan. 427; *Spalding v. Chandler*, 160 U. S. 394, *affirming* 84 Mich. 140; *Minnesota v. Hitchcock*, 185 U. S. 373.

4. **Lands Reverted to Government — United States.** — *Gouverneur v. Robertson*, 11 Wheat. (U. S.) 332.

Kentucky. — *Stith v. Hart*, 6 T. B. Mon. (Ky.) 624; *Jones v. Chiles*, 4 J. J. Marsh. (Ky.) 610; *Elmondorff v. Carmichael*, 3 Litt. (Ky.) 473.

Maryland. — *Smith v. Baker*, 4 Md. Ch. 29. See also *Jones v. Badlev*, 4 Md. Ch. 167; *Armstrong v. Bittinger*, 47 Md. 103.

North Carolina. — *University v. Sawyer*, Tayl. (1 N. Car.) 114, 2 Hayw. (3 N. Car.) 98; *Hoover v. Thomas*, Phil. L. (61 N. Car.) 184; *State v. Bevers*, 86 N. Car. 588.

a reverter due merely to the lapse of an inchoate right, no grant having ever passed.¹

5. Tide Lands and Lands under Navigable Waters.—Tide lands and lands under navigable waters are held by the government subject to a public right of passage and navigation, and have been generally considered as exempt from the operation of general land laws.²

6. Islands.—Islands have sometimes been expressly withheld from sale under general land laws, and subjected to different rules as to the acquisition of title from those applied to the mainland.³

7. Lands Occupied or Claimed by Indians—*a. IN GENERAL.*—The European discoverers of America and their successors in government and interest have always been considered as holding the soil by an absolute title, paramount to the possessory and other claims of the native Indian population. At the same time it has been the general policy of the different governments to recognize the claims of the Indians as something not to be taken from them except with their consent and upon an agreed consideration.⁴ In pursuance of this policy the acquisition of public land under general land laws before the Indian claims covering it have been extinguished by the government has often been expressly prohibited by law;⁵ and while the power exists to transfer such lands by direct grant or, if not actually occupied by Indians and

Pennsylvania.—Bagley *v.* Wallace, 16 S. & R. (Pa.) 245; Straub *v.* Dimm, 27 Pa. St. 36; Wolfe *v.* Reynolds, 80 Pa. St. 204; Wolfe *v.* Reynolds, 2 W. N. C. (Pa.) 338. See also Smith *v.* Crawford, 1 Yeates (Pa.) 287.

Virginia.—Alexander *v.* Greenup, 1 Munf. (Va.) 134, 4 Am. Dec. 541, cited French *v.* Loyal Co., 5 Leigh (Va.) 675; Whittington *v.* Christian, 2 Rand. (Va.) 353; Warwick *v.* Norvell, 1 Rob. (Va.) 326; Hannon *v.* Hannah, 9 Gratt. (Va.) 146; Levasser *v.* Washburn, 11 Gratt. (Va.) 572; Atkins *v.* Lewis, 14 Gratt. (Va.) 30.

In Kentucky it is expressly provided by statute (Stat. Ky. 1894, § 4704), that no land shall be subject to appropriation under the land laws "which has been once patented and the title of the same has in any way become again vested in the commonwealth." Kirk *v.* Williamson, 82 Ky. 161; Eastern Kentucky Land Co. *v.* Ferguson, (Ky. 1901) 65 S. W. Rep. 830.

1. See *supra*, this section, *Lands to Which Inchoate Rights Have Attached.* And see Jones *v.* Chiles, 4 J. J. Marsh. (Ky.) 610.

2. Tide Lands and Lands under Navigable Waters.—See the title NAVIGABLE WATERS, vol. 21, p. 436. See also the following cases: Stockley *v.* Cissna, (C. C. A.) 119 Fed. Rep. 812; Den *v.* Sawyer, 2 Hawks (9 N. Car.) 226; Ward *v.* Willis, 6 Jones L. (51 N. Car.) 183, 72 Am. Dec. 570; Skinner *v.* Hettrick, 73 N. Car. 53; Holley *v.* Smith, 130 N. Car. 85; Freytag *v.* Powell, 1 Whart. (Pa.) 536; Poor *v.* McClure, 77 Pa. St. 214; Fulmer *v.* Williams, 122 Pa. St. 191; Barton *v.* Bouvier, 1 Phila. (Pa.) 523; Goodwin *v.* Thompson, 15 Lea (Tenn.) 209, 54 Am. Rep. 410; Home *v.* Richards, 4 Call (Va.) 441, 2 Am. Dec. 574; Hayes *v.* Bowman, 1 Rand. (Va.) 417; Mead *v.* Haynes, 3 Rand. (Va.) 33; Norfolk City *v.* Cooke, 27 Gratt. (Va.) 430. *Contra* McKenzie *v.* Hulet, Term (4 N. Car.) 181.

Change in Character of Land.—Where the cause of the exemption ceases to operate, as where the land is left above ordinary highwater mark by the recession of the waters, the exemption itself ceases; and like other vacant lands of the state, it then becomes subject to acquisition

under general land laws. Den *v.* Sawyer, 2 Hawks (9 N. Car.) 226.

Confirmation of Titles Acquired under General Land Laws—Washington.—The state of Washington, by a disclaimer in its constitution, waived its right to assert title to such of the tide lands within its borders as had been conveyed by the United States under general land laws prior to the admission of the state into the Union. Mann *v.* Tacoma Land Co., 153 U. S. 273, affirming 44 Fed. Rep. 27; Scurry *v.* Jones, 4 Wash. 468; Cogswell *v.* Forrest, 14 Wash. 1. See also State *v.* Forrest, 11 Wash. 227; Denny *v.* Northern Pac. R. Co., 19 Wash. 298; Washougal, etc., Transp. Co. *v.* Dalles, etc., Nav. Co., 27 Wash. 490.

3. Islands—*Pennsylvania.*—Hunter *v.* Howard, 10 S. & R. (Pa.) 243; Shrunk *v.* Schuylkill Nav. Co., 14 S. & R. (Pa.) 70; Johns *v.* Davidson, 16 Pa. St. 512; Stover *v.* Jack, 60 Pa. St. 339, 100 Am. Dec. 566; Wainwright *v.* McCullough, 63 Pa. St. 66; Fisher *v.* Haldeman, 20 How. (U. S.) 186; Fisher *v.* Carter, 1 Wall. Jr. (C. C.) 69, 9 Fed. Cas. No. 4,815.

Texas.—State *v.* Delesdenier, 7 Tex. 76; Tabor *v.* General Land Office Com'r, 29 Tex. 508; Franklin *v.* Tiernan, 56 Tex. 618.

For the acquisition of private rights of property in insular public lands where no such distinction is made, see the title ISLANDS, vol. 17, p. 534 *et seq.*, and see Jones *v.* Jones, 1 Hayw. (2 N. Car.) 489.

4. See generally the cases cited in this subdivision; title INDIANS, vol. 16, p. 229 *et seq.*; Minnesota *v.* Hitchcock, 185 U. S. 373.

5. Prohibition of Grants under General Land Laws.—Preston *v.* Browder, 1 Wheat. (U. S.) 116; Danforth *v.* Thomas, 1 Wheat. (U. S.) 155; M'Iver *v.* Ragan, 2 Wheat. (U. S.) 25; Danforth *v.* Wear, 9 Wheat. (U. S.) 673; Patterson *v.* Jenks, 2 Pet. (U. S.) 217; Mitchel *v.* U. S., 9 Pet. (U. S.) 711, 15 Pet. (U. S.) 52; Latimer *v.* Poteet, 14 Pet. (U. S.) 4; Thredgill *v.* Pintard, 12 How. (U. S.) 24, affirming *sub nom.* Pintard *v.* Goodloe, Hempst. (U. S.) 502, 19 Fed. Cas. No. 11,171; Hot Springs Cases, 92

there is no positive law to the contrary, under general land laws, in either case the grantee takes subject to the Indian title, and, it seems, at the risk of its subsequent confirmation by the government,¹ unless it is expressly or by necessary implication provided otherwise.²

b. INDIAN RESERVATIONS.—Large tracts of land have been from time to time reserved and set apart for the exclusive use and occupation of tribes of Indians. As is the case with other lands reserved or appropriated for special purposes,³ no lands thus reserved can be acquired under general land laws, or will pass under a legislative grant which does not necessarily include them, so long as the reservation continues in force.⁴

U. S. 698, *affirming* 10 Ct. Cl. 289, 433; Chinn v. Darnell, 4 McLean (U. S.) 440, 5 Fed. Cas. No. 2,684; Gaines v. Hale, 26 Ark. 168; Avery v. Strother, Conf. Rep. (1 N. Car.) 434; Brown v. Brown, 103 N. Car. 213, *overruling* Den v. Cathey, 1 Murph. (5 N. Car.) 162, 3 Am. Dec. 683; Weiser v. Moody, 2 Yeates (Pa.) 127; Drinker v. Hunter, 4 Yeates (Pa.) 129; Sherer v. M'Farland, 2 Yeates (Pa.) 225; Hurden v. Chaffen, 2 Yeates (Pa.) 439; Buchanan v. McClure, 1 Binn. (Pa.) 385; White v. Kyle, 5 Binn. (Pa.) 162, 1 S. & R. (Pa.) 515, 1 Binn. (Pa.) 246; Thompson v. Johnston, 6 Binn. (Pa.) 68; Jackson v. Honeycut, 1 Overt. (Tenn.) 30; Calloway v. Hopkins, 11 Heisk. (Tenn.) 349; Cobb v. Conway, 3 Hayw. (Tenn.) 22; Profit v. Williams, 1 Yerg. (Tenn.) 89.

1. General Grants of Indian Country.—Clark v. Smith, 13 Pet. (U. S.) 195; Kinney v. Clark, 2 How. (U. S.) 76; Gaines v. Nicholson, 9 How. (U. S.) 356; Beecher v. Wetherby, 95 U. S. 517; Buttz v. Northern Pac. R. Co., 119 U. S. 55; St. Paul, etc., R. Co. v. Phelps, 137 U. S. 528, *reversing* on other grounds 26 Fed. Rep. 569; U. S. v. Thomas, 151 U. S. 577; Missouri, etc., R. Co. v. Roberts, 152 U. S. 114, *reversing* 43 Kan. 102; Minnesota v. Hitchcock, 185 U. S. 373; Langford's Case, 12 Ct. Cl. 338, *affirmed* on jurisdictional grounds 101 U. S. 341; St. Paul, etc., R. Co. v. Greenhalgh, 26 Fed. Rep. 563, *affirmed* 139 U. S. 19; Northern Pac. R. Co. v. Dudley, 85 Fed. Rep. 82; California, etc., Land Co. v. Worden, 85 Fed. Rep. 94; U. S. v. Oregon Cent. Military Road Co., 103 Fed. Rep. 549; Snell v. Dubuque, etc., R. Co., 78 Iowa 88; Marshall v. Clark, Hughes (Ky.) 77, 4 Call (Va.) 268; Rollins v. Clark, 8 Dana (Ky.) 15; George v. Gamble, 2 Overt. (Tenn.) 170. See also Dubuque, etc., R. Co. v. Des Moines Valley R. Co., 109 U. S. 329, *affirming* 54 Iowa 89; Weiser v. Moody, 2 Yeates (Pa.) 127; Thompson v. Johnston, 6 Binn. (Pa.) 68; Calloway v. Hopkins, 11 Heisk. (Tenn.) 349. Compare on the last proposition Caldwell v. Robinson, 59 Fed. Rep. 653, *affirmed* on other grounds 67 Fed. Rep. 391, *appeal dismissed* 165 U. S. 359.

2. Grants Specifically Extinguishing Indian Claims.—Maricopa, etc., R. Co. v. Arizona, 156 U. S. 347; Spalding v. Chandler, 160 U. S. 394, *affirming* 84 Mich. 140, *citing* Missouri, etc., R. Co. v. Roberts, 152 U. S. 114, which *reversed* 43 Kan. 102.

Unless the Grant Is of a Specific Character, it must be presumed that Congress does not intend to dispose of such portions of the public domain as it may be necessary, in treating with the Indian tribes, to concede to their permanent use. U. S. v. Oregon Cent. Military Road Co., 103 Fed. Rep. 549.

Lands in Actual Occupancy of Indians.—Congress has the power to dispose of the lands in the possession of the Indians without their consent. But without authority expressly conferred by act of Congress, officers of the land department cannot dispose of lands while the Indians are in actual possession and their right of occupancy has not been extinguished. U. S. v. La Chappelle, 81 Fed. Rep. 152.

3. See *supra*, this section, *Lands Withdrawn from Sale or Reserved*.

4. Indian Reservations.—Marsh v. Brooks, 8 How. (U. S.) 223; Best v. Polk, 18 Wall. (U. S.) 112; Leavenworth, etc., R. Co. v. U. S., 92 U. S. 733, *affirming* 1 McCrary (U. S.) 610, 1 Cent. L. J. 425, 26 Fed. Cas. No. 15,582, three justices *dissenting*; Missouri, etc., R. Co. v. U. S., 92 U. S. 760, note, *affirming* 1 McCrary (U. S.) 624, 1 Cent. L. J. 428, 26 Fed. Cas. No. 15,786; U. S. v. Carpenter, 111 U. S. 347; Beecher v. Wetherby, 95 U. S. 517; Missouri, etc., R. Co. v. Roberts, 152 U. S. 114, *reversing* 43 Kan. 102; Spalding v. Chandler, 160 U. S. 394, *affirming* 84 Mich. 140; Atlantic, etc., R. Co. v. Mings, 165 U. S. 413, *affirming* 7 N. Mex. 360; Minnesota v. Hitchcock, 185 U. S. 373; U. S. v. Payne, 2 McCrary (U. S.) 289, 8 Fed. Rep. 883; Shepard v. Northwestern L. Ins. Co., 40 Fed. Rep. 341; Northern Pac. R. Co. v. MacLay, (C. C. A.) 61 Fed. Rep. 554; U. S. v. La Chappelle, 81 Fed. Rep. 152; Northern Pac. R. Co. v. Dudley, 85 Fed. Rep. 82; King v. McAndrews, (C. C. A.) 111 Fed. Rep. 860, *reversing* 104 Fed. Rep. 430; U. S. v. Blendauer, 122 Fed. Rep. 703; Saltmarsh v. Crommelin, 39 Ala. 54; Ruggles v. Marsilliot, 19 Wis. 159; St. Catherine's Milling, etc., Co. v. Reg., 14 App. Cas. 46, *affirming* 13 Can. Sup. Ct. 577, 10 Ont. 196. Compare Ballou v. O'Brien, 20 Mich. 304; Veeder v. Guppy, 3 Wis. 502, *criticised* in Spaulding v. Martin, 11 Wis. 262.

State Reservations.—See the cases cited *supra*, this subsection, *In General*, note *Prohibition of Grants under General Land Laws*; and see Thomas v. Daniel, 2 McCord L. (S. Car.) 354.

On the Extinction of the Indian Claim, the land becomes a part of the public domain without further legislation, unless by the treaty by which the Indians parted with their title or by some law a different rule is made applicable to the case. U. S. v. Payne, 2 McCrary (U. S.) 289, 8 Fed. Rep. 883, *citing* Bates v. Clark, 95 U. S. 204, which *affirmed* 1 Dak. 40. See also Thredgill v. Pintard, 12 How. (U. S.) 24, *affirming sub nom.* Pintard v. Goodloe, Hempst. (U. S.) 502, 19 Fed. Cas. No. 11,171. *Contra*, Danforth v. Thomas, 1 Wheat. (U. S.) 155; Brown v. Brown, 103 N. Car. 221.

VI. POSSESSORY RIGHTS IN PUBLIC LAND — 1. As Against Government and Its Grantees — a. GENERAL RULE. — A person who enters upon public land without license from the government is a mere trespasser against whom it may invoke all the remedies available to individual owners of real estate. By express statutory provision the occupation of public land pursuant to such illegal entries is also frequently prohibited and the summary removal of the trespassers is authorized.¹ Bare possession and occupancy of public land will not, therefore, confer any rights whatever as against the government, and as a consequence none against persons to whom the government grants the specific land or who obtain vested rights therein under the land laws;² and this irrespective of the duration of the possession and occupancy prior to the passing of the grant, since the doctrines of prescription, presumption of grant, and the law of adverse possession do not, as a general rule, have any application to government ownership.³

1. Trespass on Public Lands. — *U. S. v. Gear*, 3 How. (U. S.) 121; *Jourdan v. Barrett*, 4 How. (U. S.) 169; *U. S. v. Hughes*, 11 How. (U. S.) 552; *U. S. v. Tygh Valley Land, etc.*, Co., 76 Fed. Rep. 693; *U. S. v. Holmes*, 105 Fed. Rep. 41, reversed on other grounds (C. C. A.) 118 Fed. Rep. 995; *Wagon v. Fairbanks*, 105 Ala. 527; *Carson v. Clark*, 2 Ill. 113, 25 Am. Dec. 79; *Jenkins v. Gibson*, 3 La. Ann. 203; *Vansickle v. Haines*, 7 Nev. 249; *Morris v. Gilliam*, 3 Hayw. (Tenn.) 165; *Atty.-Gen. v. Ryan*, 5 Manitoba 81. See also *infra*, this title, *Depredations on Public Lands*.

2. Bare Possession and Occupancy Give No Rights as Against Government or Its Grantees. — *Sparks v. Pierce*, 115 U. S. 408; *Washington, etc., R. Co. v. Osborn*, 160 U. S. 103; *Fremont v. Seals*, 18 Cal. 434; *Doran v. Central Pac. R. Co.*, 24 Cal. 246; *Southern Pac. R. Co. v. Purcell*, 77 Cal. 69; *Labish v. Hardy*, 77 Cal. 327; *Blachley v. Coles*, 6 Colo. 349; *Farmer's High Line Canal, etc., Co. v. Moon*, 22 Colo. 560, followed in *Farmer's High Line Canal, etc., Co. v. Steppe*, 23 Colo. 17; *Switzer v. Skiles*, 8 Ill. 529, 44 Am. Dec. 723; *Hamilton v. Walters*, 3 Greene (Iowa) 556; *Anselm v. Brashear*, 2 La. Ann. 403; *Bendich v. Scobel*, 107 La. 242; *Vansickle v. Haines*, 7 Nev. 249; *Archibald v. New York Cent., etc., R. Co.*, 157 N. Y. 574, affirming 1 N. Y. App. Div. 251; *Long Bell Lumber Co. v. Martin*, 11 Okla. 192; *Ferry v. Street*, 4 Utah 521; *Doe v. Seymour*, 9 U. C. Q. B. 47.

"Vacant or Unoccupied" Land. — The possession and occupancy of public land by a squatter do not take the land thus occupied out of the operation of land laws providing for the sale of "vacant or unoccupied" land. *Tigh v. Chouquette*, 21 Mo. 233. To the same effect is *Myers v. Hite*, 2 A. K. Marsh. (Ky.) 393.

Right of Action by Grantee for Injury to Premises Done Prior to Inception of His Title. — *Gale v. Davis*, 7 Mo. 544, explained in *Keeton v. Audsley*, 19 Mo. 362, 61 Am. Dec. 560; *Courchaine v. Bullion Min. Co.*, 4 Nev. 369.

Title to Timber Cut and Goods and Chattels Left upon Premises as Between Grantee and Trespasser. — *Carpenter v. Lewis*, 6 Ala. 682; *Brock v. Smith*, 14 Ark. 431; *Wincher v. Shrewsbury*, 3 Ill. 283, 35 Am. Dec. 108; *Brown v. Throckmorton*, 11 Ill. 529; *Robertson v. Phillips*, 3 Greene (Iowa) 220; *James v. Snelson*, 3 Mo. 393; *Turley v. Tucker*, 6 Mo. 583, 35 Am. Dec.

449, distinguished *Keeton v. Audsley*, 19 Mo. 362, 61 Am. Dec. 560, approved *McDonald v. Mangold*, 61 Mo. App. 291; *Bower v. Higbee*, 9 Mo. 259; *Peck v. Brown*, 5 Nev. 81; *Paine v. White*, 21 Wis. 423; *Conklin v. Hawthorn*, 29 Wis. 476; *Warren v. Putnam*, 68 Wis. 481, distinguished in *Befay v. Wheeler*, 84 Wis. 135; *Nicholson v. Page*, 27 U. C. Q. B. 318; *Langmaid v. Mickle*, 16 Ont. 111. See also *Wilson v. Petty*, 21 Mo. 417.

Rights of Timber Licensee. — Under a timber license which gives the licensee the right to take and keep the exclusive possession of the land described in the license, a mere intruder upon the timber limits who has cut and stacked the natural grass growing thereon cannot maintain trover for its conversion against the owner of such timber license. *McDonald v. Bonfield*, 20 U. C. C. P. 73.

Res Judicata. — Judgments upon the mere possessory right to public land have no binding force and effect as *res judicata* in subsequent actions between them based upon a title acquired from the government. *Downsdale v. Portland, Deady* (U. S.) 1, 1 Oregon 381, 15 Fed. Cas. No. 8,578, citing *Downsdale v. Parrish*, 21 How. (U. S.) 290; *Montgomery v. Whiting*, 40 Cal. 294; *Thrifty v. Delaney*, 69 Cal. 188; *Merriam v. Bacioni*, 112 Cal. 191.

A State Statute regulating the possessory rights of settlers upon public land belonging to the United States has no application to land after it has been filed upon and is held under the pre-emption and homestead laws of the federal government. Upon such filing it becomes the property of the applicant as against all persons except the United States. *Brown v. Kennedy*, 12 Colo. 235.

3. Prescription, Presumption of Grant, and Adverse Possession. — *United States* — *Oaksmith v. Johnston*, 92 U. S. 343; *Stokes v. Dawes*, 4 Mason (U. S.) 268, 23 Fed. Cas. No. 13,477; *Jourdan v. Barrett*, 4 How. (U. S.) 169.

Alaska. — *Lewis v. Johnson*, 1 Alaska 529.
California. — *Doran v. Central Pac. R. Co.*, 24 Cal. 246.
Iowa. — *Young v. Charnquist*, 114 Iowa 116; *Schlosser v. Hemphill*, (Iowa 1902) 90 N. W. Rep. 842, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 875.

Louisiana. — *Pepper v. Dunlap*, 9 Rob. (La.) 283, citing *Sanchez v. Gonzales*, 11 Martin (La.) 207; *Bres v. Louviere*, 37 La. Ann. 736;

Emblements and Betterments. — The purchaser from the government is entitled to crops growing on the land and improvements situated thereon at the time when his right accrued, as against persons who have no other title than that of possession and occupancy, unless the government owning the land has declared otherwise. The law of emblements and betterments has no application in such cases.¹ A promise by the purchaser to pay the occupant for his improve-

State v. Buck, 46 La. Ann. 656, *citing* *McCastle v. Chaney*, 28 La. Ann. 720, *disapproving* *Pepper v. Dunlap*, 9 La. Ann. 137.

Pennsylvania. — *Morris v. Thomas*, 5 Binn. (Pa.) 77; *Henry v. Henry*, 5 Pa. St. 247.

Texas. — *Austin v. Dungan*, 46 Tex. 236; *Texas Land, etc., Co. v. State*, 1 Tex. Civ. App. 616; *Dooley v. Maywald*, 18 Tex. Civ. App. 386; *Sheppard v. Avery*, 28 Tex. Civ. App. 479.

Contra in some jurisdictions of presumption of grant, *Gwathney v. Stump*, 2 Overt. (Tenn.) 313, *approved* *Hanes v. Peck*, Mart. & Y. (Tenn.) 228; *Chilton v. Wilson*, 9 Humph. (Tenn.) 399; *Williams v. Donell*, 2 Head (Tenn.) 695; *Scales v. Cockrill*, 3 Head (Tenn.) 432; *Cannon v. Phillips*, 2 Sneed (Tenn.) 211; *Ferrell v. Ferrell*, 1 Baxt. (Tenn.) 329; *King v. Coleman*, 98 Tenn. 561; *Archer v. Saddler*, 2 Hen. & M. (Va.) 370. See generally on this subject the titles ADVERSE POSSESSION, vol. 1, p. 875 *et seq.*; PRESCRIPTION, vol. 22, pp. 1189, 1190.

Statute 21 Jac. I., c. 14. — *Doe v. Finn*, 1 U. C. Q. B. 70, *explaining* *Doe v. Morris*, 2 Bing. N. Cas. 189, 29 E. C. L. 304; *McDonald v. Prentiss*, 14 U. C. Q. B. 79. *Contra*, *Smyth v. McDonald*, 5 Nova Scotia 274, *citing* *Scott v. Henderson*, 3 Nova Scotia 115; *Murray v. Duff*, 33 N. Bruns. 351.

Title Founded on Bare Possession for a period of years may sometimes be obtained against the government by virtue of express statutory provisions to that effect. *Gaston v. State*, 88 Ala. 459; *Tennessee Coal, etc., Co. v. Linn*, 123 Ala. 112; *Tubbs v. Lynch*, 4 Harr. (Del.) 521; *Hoye v. Swan*, 5 Md. 237; *Dorothy v. Hillert*, 9 Md. 570; *Jay v. Van Bibber*, 94 Md. 688; *Ambrose v. Huntington*, 34 Oregon 484. See also the title ADVERSE POSSESSION, vol. 1, pp. 877, 878.

Maintenance. — The law of maintenance has no application to the government, and it may convey its lands notwithstanding intrusion of others upon the premises without right. *Allen v. Hoyt*, Kirby (Conn.) 221; *Haskell v. Knox*, 3 Me. 445; *Fisk v. Briggs*, 12 Me. 373; *Jackson v. Gumaer*, 2 Cow. (N. Y.) 552; *Candee v. Haywood*, 34 Barb. (N. Y.) 349, *affirmed* 37 N. Y. 653; *Austin v. Dungan*, 46 Tex. 236.

1. Emblements and Improvements — *United States*. — *Deffebach v. Hawke*, 115 U. S. 392; *Sparks v. Pierce*, 115 U. S. 408; *Vilas v. Prince*, 88 Fed. Rep. 682.

Arkansas. — *Floyd v. Ricks*, 14 Ark. 286, 58 Am. Dec. 374; *Ashley v. Cunningham*, 16 Ark. 168; *Wynn v. Morris*, 16 Ark. 414, *appeal dismissed* 20 How. (U. S.) 3; *Graham v. Roark*, 23 Ark. 20.

Illinois. — *Cook v. Foster*, 7 Ill. 652; *Attridge v. Billings*, 57 Ill. 489.

Indiana. — *Razor v. Qualls*, 4 Blackf. (Ind.) 286, 30 Am. Dec. 658; *Seymour v. Watson*, 5 Blackf. (Ind.) 556.

Iowa. — *Burlerson v. Teeple*, 2 Greene (Iowa) 542.

Kansas. — *Central Branch Union Pac. R. Co. v. Hardenbrook*, 21 Kan. 440.

Louisiana. — *Herriot v. Broussard*, 4 Mart. N. S. (La.) 260; *Jenkins v. Gibson*, 3 La. Ann. 204, *followed* in *Wood v. Lyle*, 4 La. Ann. 145; *Hollon v. Sapp*, 4 La. Ann. 519, *cited* in *Doles v. Cockrell*, 10 La. Ann. 540; *Jones v. Wheelis*, 4 La. Ann. 541; *Gibson v. Hutchins*, 12 La. Ann. 545, *overruling* *Pearce v. Frantum*, 16 La. 414; *Brown v. Frantum*, 6 La. 39; *Kellam v. Rippey*, 3 Rob. (La.) 138; and *Williams v. Booker*, 12 Rob. (La.) 253.

Mississippi. — *Welborn v. Spears*, 32 Miss. 138.

Missouri. — *Boyer v. Williams*, 5 Mo. 335, 32 Am. Dec. 324.

Nebraska. — *Hiatt v. Brooks*, 17 Neb. 33; *Hill v. Pitt*, (Neb. 1901) 96 N. W. Rep. 339.

South Dakota. — *Reservation State Bank v. Holst*, (S. Dak. 1903) 95 N. W. Rep. 931.

Texas. — *Swetman v. Sanders*, 85 Tex. 294; *Horne v. Grambrell*, 1 Tex. App. Civ. Cas., § 998.

Washington. — *Sullivan v. Callvert*, 27 Wash. 600.

See also the title IMPROVEMENTS, vol. 16, pp. 93, 101.

Possession under Invalid Entry. — The rule does not apply where the occupant holds in good faith under an entry accepted by the land officers although the entry is subsequently canceled as invalid because of prior vested rights in another. *Rathbone v. Boyd*, 30 Kan. 485, *distinguished* in *State v. Salisbury*, 49 Kan. 160; *Winans v. Beidler*, 6 Okla. 603, *citing* *Crocker v. Donovan*, 1 Okla. 165. See also *Bingham County Agricultural Assoc. v. Rogers*, (Idaho 1900) 59 Pac. Rep. 931.

Statutes Requiring Compensation to Be Made for Improvements. — *Fisk v. Briggs*, 12 Me. 373; *Harvey v. Jones*, 3 Humph. (Tenn.) 157; *Peck v. Eakin*, 7 Humph. (Tenn.) 22; *Coffee v. Tucker*, 7 Humph. (Tenn.) 49; *Sullivan v. Callvert*, 27 Wash. 600; *Samish Boom Co. v. Callvert*, 27 Wash. 611; *Brummett v. Campbell*, (Wash. 1903) 73 Pac. Rep. 403. The state may treat an occupant as a trespasser, or give him a preference right to purchase the land improved, or it may provide for paying him for his improvements. *Sullivan v. Callvert*, 27 Wash. 600.

State Statutes requiring the purchaser of public lands of the United States to pay for improvements placed thereon by one having no other right than that of possession and occupancy, or giving the latter the right to remove his improvements after the purchase of the land by another, interfere with the primary disposal by the United States of its public lands, and are unconstitutional. *Billings v. Hall*, 7 Cal. 1; *Collins v. Bartlett*, 44 Cal. 371; *Pennybecker v. McDougal*, 48 Cal. 160; *McKiernan v. Hesse*, 51 Cal. 594. A statute enabling persons

ments, made after the purchase, is, therefore, without consideration and void.¹

b. EXCEPTIONS TO RULE — (1) In General. — Although the possession and occupancy of public land without any license constitute a trespass, the policy of the different governments towards actual settlers has been a liberal one, and occupation of land has been often recognized or sanctioned as initiating a right to acquire it. Thus, statutes have been enacted from time to time giving to settlers a preference right to purchase land occupied and improved by them² or confirming the possession and occupancy and perfecting it by grant;³ and it is not uncommon for general grants of public land to except from location thereunder land in the occupancy of persons who have settled

to remove fences erected by mistake upon the lands of other persons has no application to public lands, and the right cannot be exercised against the government or its successors in title or interest. *Blair v. Worley*, 2 Ill. 178.

1. Promise to Pay for Improvements Made After Purchase. — *Duncan v. Hall*, 9 Ala. 129; *Shaw v. Boyd*, 1 Stew. & P. (Ala.) 83; *McFarland v. Mathis*, 10 Ark. 560; *Carson v. Clark*, 2 Ill. 113, 25 Am. Dec. 79; *Hutson v. Overturf*, 2 Ill. 170; *Blair v. Worley*, 2 Ill. 178; *Roberts v. Garen*, 2 Ill. 396; *Townsend v. Briggs*, 2 Ill. 473; *Burns v. Hayden*, 24 Mo. 215; *Welch v. Bryan*, 28 Mo. 30.

Promise Declared Valid and Binding by Statute. — *Taylor v. Davis*, 11 Ill. 11; *Blankenship v. Cutrell*, 16 Ill. 62.

2. Policy of Governments Towards Actual Settlers — Preference Right. — See generally the discussion of pre-emption, homestead, and other settlement rights, *infra*, this title, and the following cases: *Lytle v. State*, 9 How. (U. S.) 314, 12 Ark. 26, *reversing* 12 Ark. 9; *Clements v. Warner*, 24 How. (U. S.) 394; *Barney v. Dolph*, 97 U. S. 652; *Hall v. Russell*, 101 U. S. 503, 3 Sawy. (U. S.) 506, 11 Fed. Cas. No. 5,943; *Catholic Bishop v. Gibbon*, 158 U. S. 155, *affirming* 44 Fed. Rep. 321; *Hot Springs Cases*, 10 Ct. Cl. 289, *affirmed* 92 U. S. 698; *U. S. v. Railroad Bridge Co.*, 6 McLean (U. S.) 517, 27 Fed. Cas. No. 16,114; *Root v. Shields*, *Woolw.* (U. S.) 340, 20 Fed. Cas. No. 12,038; *Seymour v. Sanders*, 3 Dill. (U. S.) 437, 21 Fed. Cas. No. 12,690; *Lownsdale v. Portland*, *Deady* (U. S.) 1, 1 Oregon 381, 15 Fed. Cas. No. 8,578; *Lamb v. Davenport*, 1 Sawy. (U. S.) 609, 14 Fed. Cas. No. 8,015, *affirmed* 18 Wall. (U. S.) 307; *Town v. De Haven*, 5 Sawy. (U. S.) 146, 24 Fed. Cas. No. 14,113; *Bennett v. Harkrader*, 158 U. S. 441; *Malony v. Adsit*, 175 U. S. 281; *Miller v. Blackett*, 47 Fed. Rep. 547; *Carroll v. Price*, 81 Fed. Rep. 137; *Young v. Goldsteen*, 97 Fed. Rep. 303; *Heckman v. Sutter*, (C. C. A.) 119 Fed. Rep. 83; *Sutter v. Heckman*, 1 Alaska 188; *Price v. Brockway*, 1 Alaska 233; *Casselberry v. Fletcher*, 27 Ark. 385; *Sumner v. Coleman*, 23 Ind. 91; *Kellar v. Belleandean*, 6 La. Ann. 643; *Camp v. Smith*, 2 Minn. 155; *Hasler v. Schumacher*, 10 Wis. 419, *citing* *Veeder v. Guppy*, 3 Wis. 526; *Doe v. Seymour*, 9 U. C. Q. B. 47; *Cosgrove v. Corbett*, 14 Grant Ch. (U. C.) 617; *Parker v. Maxwell*, 14 Ont. 239.

State Lands. — *Stephens v. M'Cargo*, 9 Wheat. (U. S.) 502; *Bonnet v. Devebaugh*, 3 Binn. (Pa.) 175; *Morris v. Gilliam*, 3 Hayw. (Tenn.) 165.

It is very clear that the general policy of the land laws, both national and state, has been and

is to favor the actual settler, to prefer those who, with their families, push forward to clear up the forests. *Casselberry v. Fletcher*, 27 Ark. 385.

The Letter of the Law does allow any man to take exclusive possession of the public domain, but the lenient spirit in which it has been administered has universally tolerated it. *Miller v. Lelan*, 19 La. 206.

A Settler Without Title upon Lands of the United States is within the Act of Congress of March 3, 1891, providing for the payment of damages caused by the depredations of Indians. *Osborn v. U. S.*, 33 Ct. Cl. 304.

Status of Preference Right as Against Government. — See *infra*, this subsection, *Under United States Settlement Laws*, and see *American Dock*, etc., Co. v. Public Schools, 39 N. J. Eq. 409; *Towle v. Palmer*, 1 Robt. (N. Y.) 437, 1 Abb. Pr. N. S. (N. Y.) 81; *Buford v. Bostick*, 58 Tex. 63.

3. Possessory Rights Confirmed and Perfected by Grant. — *Forsyth v. Reynolds*, 15 How. (U. S.) 358; *Natoma Water*, etc., Co. v. Bugbey, 96 U. S. 165, *discussed* in *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 629; *Broder v. Natoma Water*, etc., Co., 101 U. S. 274, *affirming* 50 Cal. 621; *Missionary Soc. v. Dalles*, 107 U. S. 336, *affirming* 6 Sawy. (U. S.) 126, 6 Fed. Rep. 356; *Catholic Bishop v. Gibbon*, 158 U. S. 155, *affirming* 44 Fed. Rep. 321; *Union Mill*, etc., Co. v. Ferris, 2 Sawy. (U. S.) 176, 24 Fed. Cas. No. 14,371; *Union Mill*, etc., Co. v. Dangberg, 2 Sawy. (U. S.) 450, 24 Fed. Cas. No. 14,370; *Farmer's High Line Canal*, etc., Co. v. Moon, 22 Colo. 560; *Chene v. State Bank*, *Walk.* (Mich.) 511; *May v. Specht*, 1 Mich. 187; *May v. Tillman*, 1 Mich. 262; *Catholic Bishop v. Gibbon*, 1 Wash. 592; *Challefoux v. Ducharme*, 4 Wis. 554. See also *Le Roy v. Cunningham*, 44 Cal. 599; *Palmer v. Galvin*, 72 Cal. 183; *Galvin v. Palmer*, 113 Cal. 46.

Hot Springs Reservation Claimants — Arkansas. — *Rector v. Gibbon*, 111 U. S. 276, *reversing sub nom.* *Rector's Case*, 9 Fed. Rep. 16; *Lawrence v. Rector*, 137 U. S. 139; *Goode v. Gaines*, 145 U. S. 141.

The Term "Confirmation" is often used in the various acts of Congress with reference to claims which have no other foundation than possession. *Forsyth v. Reynolds*, 15 How. (U. S.) 358.

Confirmation and Pre-emption. — A confirmation by act of Congress is not at all analogous to the privilege granted by a pre-emption law. The former conveys the title of the United States as effectually as a patent; the latter professes to give no title, not even the lowest order of title, not merely a priority of right in the

upon it without right.¹ In pursuance of this policy it has been also held by some courts that statutes conferring a right to acquire public land by settlement or improvement, such as pre-emption and homestead laws, do not authorize an entry upon land already in the actual possession and occupancy of settlers, even though the latter are and continue to be mere trespassers as against the government.²

acquisition of title. The first is a title, the latter a mere privilege. *O'Hanlon v. Perry*, 9 Mo. 805.

Term "Occupied" Defined.—*Missionary Soc. v. Dalles*, 107 U. S. 336, *affirming* 6 Sawy. (U. S.) 126, 6 Fed. Rep. 356; *Catholic Bishop v. Gibbon*, 158 U. S. 155, *affirming* 44 Fed. Rep. 321; *Catholic Bishop v. Gibbon*, 1 Wash. 592. See also *McSorley v. Hill*, 2 Wash. 638, and see generally *OCCUPANCY*, etc., vol. 21, p. 765.

1. Grants Excepting Occupied Lands from Location.—United States.—*Cunningham v. Ashley*, 14 How. (U. S.) 377, 13 Ark. 654, *reversing* 12 Ark. 296; *Barnard v. Ashley*, 18 How. (U. S.) 43, *Hempst.* (U. S.) 669, 3 Fed. Cas. No. 1,346; *Minnesota v. Bachelder*, 1 Wall. (U. S.) 109 *reversing* on other grounds 5 Minn. 223; *Sherman v. Buick*, 93 U. S. 209, *reversing* 45 Cal. 656; *Hosmer v. Wallace*, 97 U. S. 575, *affirming* 47 Cal. 461; *Myrick v. Thompson*, 99 U. S. 291, *affirming* 20 Minn. 205; *Durand v. Martin*, 120 U. S. 366; *Washington, etc., R. Co. v. Osborn*, 160 U. S. 103; *Johnson v. Drew*, 171 U. S. 93, *affirming* 34 Fla. 130, 43 Am. St. Rep. 172; U. S. v. *Chapman*, 5 Sawy. (U. S.) 528, 25 Fed. Cas. No. 14,785; *Drew v. Valentine*, 18 Fed. Rep. 712, *appeal dismissed* without opinion 131 U. S. 449; U. S. v. *Budd*, 43 Fed. Rep. 630, *affirmed* on other grounds 144 U. S. 154; *Garrard v. Silver Peak Mines*, 94 Fed. Rep. 983, *affirming* 82 Fed. Rep. 578; *Cormor Exploration Co. v. Gray Eagle Oil Co.*, (C. C. A.) 112 Fed. Rep. 4, *affirming* 104 Fed. Rep. 20, *affirmed* 190 U. S. 301; *Holmes v. U. S.*, (C. C. A.) 118 Fed. Rep. 995, *reversing* 105 Fed. Rep. 41.

Alabama.—*Cruise v. Riddle*, 21 Ala. 791.

Arkansas.—*Nicks v. Rector*, 4 Ark. 251.

California.—*Keeran v. Allen*, 33 Cal. 542; *Keeran v. Griffith*, 34 Cal. 580; *Chapman v. Polack*, 58 Cal. 553.

Indiana.—*Sumner v. Coleman*, 23 Ind. 91.

Louisiana.—*Landry v. Gautreau*, 1 Rob. (La.) 372.

Maine.—*Tilton v. Hunter*, 24 Me. 29.

Minnesota.—*Peterson v. First Div. St. Paul, etc., R. Co.*, 27 Minn. 218; *Sharpe v. Rogers*, 12 Minn. 174.

Tennessee.—*Crisp v. Kimble*, 6 Yerg. (Tenn.) 446.

Utah.—*Rio Grande Western R. Co. v. Telluride Power Transmission Co.*, 23 Utah 22. See also *infra*, this title, *Grants in Aid of Railroads*.

"Vacant" Lands, as used in a statute confining a location of public land to "vacant lands open to settlement," are such as are absolutely free, unclaimed, and unoccupied. *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, (C. C. A.) 112 Fed. Rep. 4, *affirming* 104 Fed. Rep. 20, *affirmed* 190 U. S. 301.

2. United States Public Lands.—United States.—*Atherton v. Fowler*, 96 U. S. 513, *reversing sub nom.* *Page v. Fowler*, 39 Cal. 412, 2 Am. Rep. 462, 37 Cal. 100, 28 Cal. 605, 2 Am. Rep. 462,

Waite, C. J., and Clifford, J., dissenting; *Hosmer v. Wallace*, 97 U. S. 575, *affirming* 47 Cal. 461; *Trenouth v. San Francisco*, 100 U. S. 251; *Quinby v. Conlan*, 104 U. S. 420, *affirming* 51 Cal. 412; *Fletcher v. Mower*, 116 U. S. 380, *affirming* 56 Cal. 421; *Durand v. Martin*, 120 U. S. 366; *Cahalan v. McTague*, 46 Fed. Rep. 251; *Tustin v. Adams*, 87 Fed. Rep. 377. See also *Russell v. Beebe, Hempst.* (U. S.) 704, 21 Fed. Cas. No. 12,153, *appeal dismissed* 19 How. (U. S.) 283. *Compare* *Savage v. Worsham*, 66 Fed. Rep. 852, 72 Fed. Rep. 601.

California.—*Davis v. Scott*, 56 Cal. 165; *Hosmer v. Duggan*, 56 Cal. 257; *McBrown v. Morris*, 59 Cal. 64; *McBrown v. Wilson*, 59 Cal. 318; *McBrown v. Emerson*, 59 Cal. 319; *Hambleton v. Dunhin*, 71 Cal. 136; *Peterson v. Kinkead*, 92 Cal. 372; *Rourke v. McNally*, 98 Cal. 291; *Bishop v. Glassen*, (Cal. 1886) 12 Pac. Rep. 258. *Compare* *Townsend v. Little*, 45 Cal. 672; *Iburg v. Suanet*, 47 Cal. 265.

Louisiana.—*Kellar v. Belleandean*, 6 La. Ann. 643.

Minnesota.—*Michaelis v. Michaelis*, 43 Minn. 123.

Nevada.—*Harden v. Cullins*, 8 Nev. 49; *Nicks v. Winn*, 17 Nev. 188; *Reinhart v. Bradshaw*, 19 Nev. 255, 3 Am. St. Rep. 886; *Brown v. Killbrew*, 21 Nev. 437. See also *Gonder v. Miller*, 21 Nev. 183. *Compare* *McFarland v. Culbert*, 2 Nev. 280.

Oklahoma.—*Downman v. Saunders*, 3 Okla. 227.

Washington.—*Laurendeau v. Fugelli*, 1 Wash. 559, 5 Wash. 94, 632.

Compare *Wynn v. Morris*, 16 Ark. 414, writ of error dismissed on jurisdictional grounds 20 How. (U. S.) 3; *Wynn v. Garland*, 16 Ark. 440, *affirmed* on other grounds 20 How. (U. S.) 6; *Porter v. Bishop*, 25 Fla. 749; *Spaulding v. Wood*, 8 Wis. 195, *Cole, J., dissenting*; *Dunn v. Schneider*, 20 Wis. 509.

Contra — Texas Lands.—*Yochum v. McCurdy*, (Tex. Civ. App. 1897) 39 S. W. Rep. 210, *citing* *Busk v. Lowrie*, 86 Tex. 128, which *reversed* (Tex. Civ. App. 1893) 22 S. W. Rep. 414.

Actual and Constructive Possession — Peaceable Entries.—*Haven v. Haws*, 63 Cal. 514; *Goodwin v. McCabe*, 75 Cal. 584; *Whittaker v. Pendola*, 78 Cal. 296; *Bullock v. Rouse*, 81 Cal. 590; *Kitts v. Austin*, 83 Cal. 169; *Buckley v. Howe*, 86 Cal. 596; *Wormouth v. Gardner*, 105 Cal. 149; *Forbes v. Driscoll*, 4 Dak. 336, *citing* *Atherton v. Fowler*, 96 U. S. 513; *Reservation State Bank v. Holst*, (S. Dak. 1903) 95 N. W. Rep. 931; *Caldwell v. Bush*, 6 Wyo. 342.

A Forceful Entry is good against every one except the occupant rightfully in possession at the time when it was made; and if the latter abandons the premises and settles upon other lands, the right perfected by patent cannot be questioned. *U. S. v. Stanley*, 6 McLean (U. S.) 409, 27 Fed. Cas. No. 16,376.

(2) *Under United States Settlement Laws.*—The pre-emption, homestead, and other settlement laws of the United States giving to settlers on public land a right to acquire the land settled upon and improved do not convert the possession and occupancy into a vested right as against the government or its grantees by direct grant until the settler has fully complied with the law and become entitled to a patent. As between persons claiming adversely under the general land laws, however, settlement and occupation may initiate a vested right if the further steps necessary to perfect the title are duly taken.¹

(3) *Occupancy as Ground for Equitable Relief Against Grants to Others.*—While as a general rule a right in public land which has no other foundation than that of actual possession and the placing of improvements thereon is insufficient to sustain an action to avoid a grant issued to another, the liberal policy of the government towards settlers may under some circumstances give rise to equitable considerations constituting a good cause of action.²

2. As Between Strangers to Government Title—*a. IN GENERAL.*—The general rule of law that actual possession of land is a sufficient estate to support actions for injuries to the possession against wrongdoers who are strangers to the title has been held to apply as well to intruders in possession of land belonging to the crown or other sovereignty as to persons wrongfully in possession of private property.³ Possessory rights in public lands and improve-

Corporation as Prior Occupant.—*Pacific Livestock Co. v. Gentry*, 38 Oregon 275, *distinguishing* *Tidwell v. Chiricahua Cattle Co.*, (Ariz. 1898) 53 Pac. Rep. 192.

1. Rights under United States Settlement Laws—In General—*Pre-emptions*—*United States.*—*Frisbie v. Whitney*, 9 Wall. (U. S.) 187, *reversing* 6 D. C. 262; *Yosemite Valley Case*, 15 Wall. (U. S.) 77, *affirming* 41 Cal. 634; *Hosmer v. Wallace*, 97 U. S. 575; *Shepley v. Cowan*, 91 U. S. 330, *reversing* 52 Mo. 559; *Whitney v. Taylor*, 158 U. S. 85, *affirming* 45 Fed. Rep. 616; *Gonzales v. French*, 164 U. S. 338, *affirming* (Ariz. 1893) 33 Pac. Rep. 501; *Northern Pac. R. Co. v. Colburn*, 164 U. S. 383, *reversing* 13 Mont. 476; *Tarpey v. Madsen*, 178 U. S. 215, *reversing* 17 Utah 352; *Hot Springs Cases*, 10 Ct. Cl. 289, *affirmed* on other grounds 92 U. S. 698; *Cahalan v. McTague*, 46 Fed. Rep. 251; *U. S. v. Holmes*, 105 Fed. Rep. 41, *reversed* on other grounds (C. C. A.) 118 Fed. Rep. 995.

Alabama.—*Doe v. Beck*, 108 Ala. 71.

California.—*Hasting v. McGoogin*, 27 Cal. 85; *Page v. Hobbs*, 27 Cal. 484, 28 Cal. 605; *People v. Shearer*, 30 Cal. 645; *Hutton v. Frisbie*, 37 Cal. 475, *citing* *Page v. Fowler*, 28 Cal. 605; *Western Pac. R. Co. v. Tevis*, 41 Cal. 489; *Southern Pac. R. Co. v. Burr*, 86 Cal. 279. See also *Mott v. Hawthorn*, 17 Cal. 59.

Iowa.—*Kitteringham v. Blair Town Lot, etc.*, Co., 73 Iowa 421.

Kansas.—*Atchinson, etc., R. Co. v. Mecklim*, 23 Kan. 167; *Burnham v. Starkey*, 41 Kan. 604.

Louisiana.—*Villey v. Jarreau*, 35 La. Ann. 542.

Michigan.—*Busch v. Donohue*, 31 Mich. 482.

Nevada.—*Springer v. Clopath*, 26 Nev. 183.

Oklahoma.—*Guthrie v. Beamer*, 3 Okla. 652.

Compare *Denver v. Mullen*, 7 Colo. 345; *Denver, etc., R. Co. v. Wilson*, 28 Colo. 6.

Homesteads.—*Wagstaff v. Collins*, (C. C. A.) 97 Fed. Rep. 3; *Flint, etc., R. Co. v. Gordon*, 41 Mich. 420. See also *Whitney v. Taylor*, 158 U. S. 85, *affirming* 45 Fed. Rep. 616; *Norton v.*

Evans, (C. C. A.) 82 Fed. Rep. 804. *Contra*, *Red River, etc., R. Co. v. Sture*, 32 Minn. 95; *Larsen v. Oregon, R., etc., Co.*, 19 Oregon 240; *Johnson v. Bridal Veil Lumbering Co.*, 24 Oregon 182.

Town-site Laws.—*Northern Pac. R. Co. v. Smith*, 17 U. S. 260, *affirming* (C. C. A.) 69 Fed. Rep. 579; *King v. McAndrews*, (C. C. A.) 111 Fed. Rep. 860, *reversing* 104 Fed. Rep. 430.

Private Entries and Pre-emption Rights.—*Isaacs v. Steel*, 4 Ill. 97; *Bruner v. Manlove*, 4 Ill. 339, 36 An. Dec. 551; *McGhee v. Wright*, 16 Ill. 555; *Smith v. Mosier*, 5 Blackf. (Ind.) 51; *Carter v. Spencer*, 4 How. (Miss.) 42; *Pettigrew v. Shirley*, 9 Mo. 683; *Woodward v. McReynolds*, 2 Pin. (Wis.) 268, 1 Chand. (Wis.) 241.

2. General Rule.—*Burgess v. Gray*, 16 How. (U. S.) 48, *cited in* *Oaksmith v. Johnston*, 92 U. S. 343; *Foss v. Hinkell*, 78 Cal. 158; *Buckley v. Howe*, 86 Cal. 596; *Charlton v. Southern Pac. R. Co.*, (Cal. 1893) 33 Pac. Rep. 1119; *Sarpy v. Papin*, 7 Mo. 503, *citing* *Hunter v. Hemphill*, 6 Mo. 106; *Farmer v. Livingstone*, 5 Can. Sup. Ct. 221, *reversing* 8 Can. Sup. Ct. 140; *Fonseca v. Atty.-Gen.*, 17 Can. Sup. Ct. 612, *reversing* 5 Manitoba 173; *Atty.-Gen. v. Ryan*, 5 Manitoba 81. See also *infra*, this title, *Land Department Officials and Proceedings—Effect and Conclusiveness of Proceedings*.

Exceptions to Rule.—*Williams v. U. S.*, 138 U. S. 514, *affirming* 30 Fed. Rep. 309; *Atty.-Gen. v. McNulty*, 8 Grant Ch. (U. C.) 324, 11 Grant Ch. (U. C.) 281; *Proctor v. Grant*, 9 Grant Ch. (U. C.) 26, *reversed* on rehearing on other grounds 9 Grant Ch. (U. C.) 224; *Westbrooke v. Atty.-Gen.*, 11 Grant Ch. (U. C.) 264; *Cosgrove v. Corbett*, 14 Grant Ch. (U. C.) 617. See also *Cannon v. White*, 16 La. Ann. 85.

3. Possessory Rights as Between Strangers to Title—**General Rule.**—*Johnson v. Barret*, *Aleyn* 10; *Nichols v. Nichols*, *Plowd.* 489; *Harper v. Charlesworth*, 4 B. & C. 574, 10 E. C. L. 412, 6 D. & R. 572, 28 Rev. Rep. 405; *Gilmour v. Buck*, 24 U. C. C. P. 187; *West v. Smith*, 52 Cal. 322; *American Guano Co. v.*

ments placed on the soil are, by the liberal policy of the government towards settlers, generally protected by the courts and treated as valid and subsistent titles, sufficient to support actions of ejectment, to quiet title, trespass, forcible entry and detainer, and the like, as against every one but the government and its grantees. Many of the states and territories of the United States have enacted statutes providing how possessory claims to the public land of the general government within their respective boundaries may be established, and expressly authorizing various actions to be brought for their protection.¹ The possess-

U. S. Guano Co., 44 Barb. (N. Y.) 23; Mathews v. Great Northern R. Co., 7 N. Dak. 81; Graham v. Moore, 4 S. & R. (Pa.) 468; McElear v. Elliott, 14 S. & R. (Pa.) 242, citing Woods v. Lane, 2 S. & R. (Pa.) 53. See also Glover v. Walker, 5 U. C. C. P. 478; Graham v. Heenan, 20 U. C. C. P. 340; Ledyard v. Ten Eyck, 36 Barb. (N. Y.) 102. *Contra*, Anonymous, Godb. 133; Englefields Case, 4 Leon. 174; Paramour v. Yardley, Plowd. 546, cited in Henderson v. McLean, 8 U. C. C. P. 42; Killichan v. Robertson, 6 U. C. Q. B. O. S. 468; Tubbs v. Lynch, 4 Harr. (Del.) 521; Collyns v. Cain, 9 Tex. Civ. App. 193.

Scope of Doctrine.—Trespass is not maintainable by one intruder against the other to recover the profits of the land, because each of them is liable to account to the crown for all profits arising during the period of his occupation, but the action is maintainable by the first intruder against the second to recover compensation for an injury to the possession, not in any way affecting the profits of the land. Harper v. Charlesworth, 4 B. & C. 574, 10 E. C. L. 412, 6 D. & R. 572, 28 Rev. Rep. 405. See also Nichols v. Nichols, Plowd. 489.

1. United States Public Lands — Possessory Rights Generally.—*United States.*—Fields v. Squires. Deady (U. S.) 366, 9 Fed. Cas. No. 4776; Gimmy v. Culverson, 5 Sawy. (U. S.) 605, 10 Fed. Cas. No. 5454; Carroll v. Price, 81 Fed. Rep. 137; Ritter v. Lynch, 123 Fed. Rep. 930.

Alabama.—Duncan v. Potts, 5 Stew. & P. (Ala.) 82, citing McDonald v. Gayle, Minor (Ala.) 98.

Alaska.—Walsh v. Ford, 1 Alaska 146; Price v. Brockway, 1 Alaska 235; Foss v. Dam, 1 Alaska 346.

Arizona.—Davis v. Simmons, 1 Ariz. 25.

Arkansas.—Gaines v. Hale, 26 Ark. 168, affirmed on other grounds 93 U. S. 3; Earle v. Hale, 31 Ark. 470.

California.—O'Conner v. Corbitt, 3 Cal. 370; Plume v. Seward, 4 Cal. 95, 60 Am. Dec. 599; Stark v. Barnes, 4 Cal. 412; Winans v. Christy, 4 Cal. 70, 60 Am. Dec. 597; Sweetland v. Froe, 6 Cal. 144; Bradshaw v. Treat, 6 Cal. 172; Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528; Murphy v. Wallingford, 6 Cal. 648; Bird v. Dennison, 7 Cal. 297; Crandall v. Woods, 8 Cal. 136, followed in Leigh Co. v. Independent Ditch Co., 8 Cal. 323; Bird v. Lisbros, 9 Cal. 1, 70 Am. Dec. 617; Piercy v. Sabin, 10 Cal. 22, 70 Am. Dec. 692; Taylor v. Woodward, 10 Cal. 90; Whitney v. Buckman, 13 Cal. 536; Wright v. Whitesides, 15 Cal. 47; Garrison v. Sampson, 15 Cal. 93; Preston v. Kehoe, 15 Cal. 315, 10 Cal. 445; Coryell v. Cain, 16 Cal. 567; English v. Johnson, 17 Cal. 107, 76 Am. Dec. 574; Gird v. Ray, 17 Cal. 352; Fremont v. Seals, 18

Cal. 434; Cummins v. Scott, 20 Cal. 84; Hubbard v. Barry, 21 Cal. 321; Hicks v. Whiteside, 23 Cal. 405, 35 Cal. 152; Kile v. Tubbs, 23 Cal. 432; Dyson v. Bradshaw, 23 Cal. 528; People v. Batchelder, 27 Cal. 70, 85 Am. Dec. 231; Hawthurst v. Lander, 28 Cal. 331; Gibson v. Puchta, 33 Cal. 310; Levaroni v. Miller, 34 Cal. 231, 91 Am. Dec. 692; Cannon v. Union Lumber Co., 38 Cal. 672; Wolfskill v. Malajowich, 39 Cal. 276; Hughes v. Hazard, 42 Cal. 149; Crowell v. Lanfranco, 42 Cal. 654; Slaughter v. Fowler, 44 Cal. 195; Le Roy v. Cunningham, 44 Cal. 599; Iburg v. Suanet, 47 Cal. 265; Kelly v. Mack, 49 Cal. 523; Brandt v. Wheaton, 52 Cal. 430; Keller v. Berry, 62 Cal. 488; Lux v. Haggin, 69 Cal. 255; People v. Wheeler, 73 Cal. 252; Gray v. Dixon, 74 Cal. 508; Goodwin v. McCabe, 75 Cal. 584; Dodge v. Yates, 76 Cal. 251; Bullock v. Rouse, 81 Cal. 590; Daubenbiss v. White, (Cal. 1892) 31 Pac. Rep. 360.

Colorado.—Sears v. Taylor, 4 Colo. 38; Riddell v. Animas Canon Toll Road Co., 5 Colo. 230; Kelley v. Andrew, 3 Colo. App. 122; Martin v. Pittman, 3 Colo. App. 220.

Idaho.—Feirbaugh v. Masterson, 1 Idaho 135; Maydole v. Watson, (Idaho 1900) 60 Pac. Rep. 86.

Illinois.—Turney v. Saunders, 5 Ill. 527; Sargeant v. Kellogg, 10 Ill. 273.

Iowa.—Doolittle v. Harrington, Morr. (Iowa) 226; Hughell v. Wilson, Morr. (Iowa) 383; Trimble v. Shaffer, 3 Greene (Iowa) 233.

Kansas.—Jordan v. Updegraff, McCahon (Kan.) 103.

Louisiana.—Miller v. Lelen, 19 La. 206, cited in Griffin v. Cotten, 1 Rob. (La.) 142; Millard v. Richard, 13 La. Ann. 572.

Montana.—Parks v. Barkley, 1 Mont. 514, cited in Brand v. Servoss, 11 Mont. 86; McDonald v. Lannen, 19 Mont. 78.

Nevada.—Sankey v. Noyes, 1 Nev. 69; Alford v. Dewin, 1 Nev. 208; Desmond v. Stone, 1 Nev. 378; Brown v. Roberts, 1 Nev. 402; McFarland v. Culbert, 2 Nev. 280; Staininger v. Andrews, 4 Nev. 59; Courchaine v. Bullion Min. Co., 4 Nev. 369; Robinson v. Imperial Silver Min. Co., 5 Nev. 44; Eureka Min., etc., Co., 20 Way, 11 Nev. 171; Courtney v. Turner, 12 Nev. 345; Rivers v. Burbank, 13 Nev. 398; Comaita v. Kyle, 19 Nev. 38; State v. Central Pac. R. Co., 21 Nev. 247.

New Mexico.—New Mexico, etc., R. Co. v. Crouch, 4 N. Mex. 141.

Oklahoma.—Oklahoma City v. Hill, 6 Okla. 114.

Oregon.—Hindman v. Rizer, 21 Oregon 112; Browning v. Lewis, 39 Oregon 11.

Tennessee.—Edwards v. Batts, 5 Yerg. (Tenn.) 441; Pettyjohn v. Akers, 6 Yerg. (Tenn.) 448; Brown v. Massey, 3 Humph.

ory right can be acquired only by actual as distinguished from constructive possession, by which is meant a subjection of the land to the will and dominion of the claimant, usually evidenced by a substantial inclosure, by occupation, cultivation, or some other appropriate use, according to the particular locality or quality of the property; or by compliance with the terms of the statute if any such exists in the particular jurisdiction.¹ Under the *California* statute the possessory right to land used for agricultural and grazing purposes is subject to a right in miners to enter upon the claim and work such land within its boundaries as may contain minerals.²

b. SALES AND INCUMBRANCES.—Although these possessory rights or claims rest on no statute or positive promise, the general recognition of them in the end by the government and its disposition to protect meritorious actual settlers have given a decided and well-understood value to them. Contracts of sale, incumbrance, and the like are valid and binding among parties and privies, even to the extent of subjecting an after-acquired title obtained by one of them from the government contrary to the terms or ordinary effect of the agreement. They may be the subjects of involuntary alienation also.³ The right of the government to dispose of its lands and in

(Tenn.) 470; *Barnhart v. Neisler*, 6 Humph. (Tenn.) 493.

See also *Packwood v. Thorp*, 8 Mo. 637, and the cases cited *infra*, this subsection, *Sales and Incumbrances*.

Pasturing Stock and Cutting Native Grasses on Unclosed Land.—*Buford v. Houtz*, 133 U. S. 320, *affirming* 5 Utah 591; *Buel v. Frazier*, 38 Cal. 693; *McGinnis v. Friedman*, 2 Idaho 362; *Mathews v. Great Northern R. Co.*, 7 N. Dak. 81.

Wrongfully Cutting, Destroying, or Removing Timber.—*Rogers v. Soggs*, 22 Cal. 444; *Adkinson v. Hardwick*, 12 Colo. 581; *Hughell v. Wilson, Morr.* (Iowa) 383. See also *O'Hanlon v. Denvir*, 81 Cal. 60, 15 Am. St. Rep. 19.

The Word "Claim," when used in connection with the public lands, has a known and definite signification. It refers and relates to a settler's right or improvement on a tract of land the fee of which is in the government. *Bowman v. Torr*, 3 Iowa 571; *Doolittle v. Harrington, Morr.* (Iowa) 226.

1. See the cases cited in the preceding note.

The Theory under Which These Titles Are Sustained is that the first appropriator does acquire title to the land he appropriates as against all persons but the government of the United States. *Parks v. Barkley*, 1 Mont. 514.

Such a Possessory Right is always carefully protected by the court. Of course it is subservient to the United States government, or an actual or inchoate grantee of the government. But as against all others, such a right, based though it be upon mere possession, is absolute. *McDonald v. Lannen*, 19 Mont. 78.

The Whole Doctrine of Possession, if not created, must necessarily be controlled and modified, by the peculiar nature of the subject and by surrounding circumstances. *English v. Johnson*, 17 Cal. 107, 76 Am. Dec. 574.

Actual Possession Question of Fact.—Burden of Proof.—Whether one who claims possession of a particular piece of public land has actual possession of it is a question of fact, and the burden is upon him to establish the fact by competent evidence. *Goodwin v. McCabe*, 75 Cal. 584; *Dodge v. Yates*, 76 Cal. 251; *Bullock v. Rouse*, 81 Cal. 590.

Abandonment of Possession.—*Carroll v. Price*,

81 Fed. Rep. 137; *Haines Wharf Co. v. Dalton*, 1 Alaska 555; *Gluckauf v. Reed*, 22 Cal. 469; *Roberts v. Unger*, 30 Cal. 676; *Daubenbiss v. White*, (Cal. 1892) 31 Pac. Rep. 360; *Weisberger v. Tenny*, 8 Minn. 456.

2. Reservation in Favor of Miners—*California Statute.*—*Stokes v. Barrett*, 5 Cal. 37; *McClintock v. Bryden*, 5 Cal. 97, 63 Am. Dec. 87; *Fitzgerald v. Urton*, 5 Cal. 308; *Tartar v. Spring Creek Water, etc., Co.*, 5 Cal. 396; *Sweetland v. Froe*, 6 Cal. 144; *Burdge v. Underwood*, 6 Cal. 45; *Martin v. Browner*, 11 Cal. 12; *Weimer v. Lowery*, 11 Cal. 104; *State v. Moore*, 12 Cal. 56; *Burdge v. Smith*, 14 Cal. 380; *Clark v. Duval*, 15 Cal. 86; *Smith v. Doe*, 15 Cal. 100; *Gillan v. Hutchinson*, 16 Cal. 153; *Rogers v. Soggs*, 22 Cal. 444; *Rupley v. Welch*, 23 Cal. 453.

Presumption that Land Is Public Land under California Statute.—*Burdge v. Smith*, 14 Cal. 380; *Smith v. Doe*, 15 Cal. 100. See also *Santa Cruz v. Enright*, 95 Cal. 105; *Natoma Water, etc., Min. Co. v. Hancock*, 101 Cal. 42.

Mineral Lands.—For possessory rights generally in mineral lands, see the title *MINES AND MINING CLAIMS*, vol. 20, p. 677, and see *Ritter v. Lynch*, 123 Fed. Rep. 930.

3. Sales of Possessory Rights—*United States.*—*Lytle v. Arkansas*, 22 How. (U. S.) 193, *affirming* on other grounds 17 Ark. 608; *Davenport v. Lamb*, 13 Wall. (U. S.) 418, *affirmed sub nom.* *Lamb v. Starr*, *Deady* (U. S.) 447, 14 Fed. Cas. No. 8,022; *Lamb v. Davenport*, 18 Wall. (U. S.) 307, *affirming*. 1 *Sawyer* (U. S.) 609, 14 Fed. Cas. No. 8,015; *Tarpey v. Madsen*, 178 U. S. 215, *reversing* 17 Utah 352; *Lownsdale v. Portland*, *Deady* (U. S.) 1, 1 Oregon 381, 15 Fed. Cas. No. 8,578, *Deady* (U. S.) 39, 1 Oregon 397, 15 Fed. Cas. No. 8,579; *Chapman v. School Dist. No. 1*, *Deady* (U. S.) 139, 5 Fed. Cas. No. 2,608; *Fields v. Squires*, *Deady* (U. S.) 366, 9 Fed. Cas. No. 4,776; *Lamb v. Wakefield*, 1 *Sawyer* (U. S.) 251, 14 Fed. Cas. No. 8,024; *Lamb v. Vaughn*, 2 *Sawyer* (U. S.) 161, 14 Fed. Cas. No. 8,023; *Mizner v. Vaughn*, 2 *Sawyer* (U. S.) 269, 17 Fed. Cas. No. 9,678; *Shuffleton v. Nelson*, 2 *Sawyer* (U. S.) 540, 22 Fed. Cas. No. 12,822; *Starr v. Stark*, 2 *Sawyer* (U. S.) 603, 22 Fed. Cas. No. 13,317,

doing so to determine how they shall be disposed of is undisputed; but, subject to this right, parties in possession may make valid contracts, even concerning the title, predicated upon the hypothesis that they may thereafter lawfully acquire it, except in cases where the government has imposed restrictions upon such contracts.¹

c. CHARACTER OF RIGHT AS PROPERTY. — As a general rule the possess-

reversing 1 Sawy. (U. S.) 270, 22 Fed. Cas. No. 13,316, *affirmed* 94 U. S. 477, *followed in* *Starr v. Stark*, 2 Sawy. (U. S.) 641, 22 Fed. Cas. No. 13,318, *affirmed* without opinion 94 U. S. 492; *Bacon v. Stark*, 2 Sawy. (U. S.) 644, 2 Fed. Cas. No. 715, *affirmed* without opinion 94 U. S. 492; and *Failing v. Stark*, 2 Sawy. (U. S.) 642, 8 Fed. Cas. No. 4,606; *Meyers v. Reed*, 17 Fed. Rep. 401; *Carroll v. Price*, 81 Fed. Rep. 137; *Tustin v. Adams*, 87 Fed. Rep. 377.

Alaska. — *Price v. Brockway*, 1 *Alaska* 233.

Arkansas. — *Southerland v. Whittington*, 46 *Ark.* 285, *citing* *Gaines v. Molen*, 41 *Ark.* 232; *Hughes v. Sloan*, 8 *Ark.* 147; *Cain v. Leslie*, 15 *Ark.* 312; *Glanton v. Anthony*, 15 *Ark.* 543; *Sherrer v. Bullock*, 23 *Ark.* 729.

California. — *Hildreth v. Shelton*, 46 *Cal.* 383; *O'Hanlon v. Denvir*, 81 *Cal.* 60, 15 *Am. St. Rep.* 19; *Daubenbiss v. White*, (*Cal.* 1892) 31 *Pac. Rep.* 360.

Colorado. — *Sears v. Taylor*, 4 *Colo.* 38; *Kelley v. Andrew*, 3 *Colo. App.* 122; *Cooper v. Hunter*, 8 *Colo. App.* 101.

Illinois. — *Johnson v. Moulton*, 2 *Ill.* 532; *Sargeant v. Kellogg*, 10 *Ill.* 273; *Phelps v. Kellogg*, 15 *Ill.* 131.

Iowa. — *Hill v. Smith*, *Morr.* (*Iowa*) 70; *Freeman v. Holliday*, *Morr.* (*Iowa*) 80; *Wilson v. Webster*, *Morr.* (*Iowa*) 312, 41 *Am. Dec.* 230; *Starr v. Wilson*, *Morr.* (*Iowa*) 438; *Pierson v. David*, 1 *Iowa* 23; *Bowman v. Torr*, 3 *Iowa* 571; *Spry v. Sleepy*, 15 *Iowa* 409.

Louisiana. — *Ratcliff v. Bridger*, 1 *Rob. (La.)* 57; *Noulen v. Perkins*, 3 *Rob. (La.)* 233; *Price v. Curran*, 5 *La. Ann.* 686; *Norman v. Ellis*, 5 *La. Ann.* 694; *Bryan v. Glass*, 6 *La. Ann.* 740; *Dean v. Wade*, 15 *La. Ann.* 230. *Contra*, *Spurlin v. Millikin*, 16 *La. Ann.* 217, *citing* *Wood v. Lyle*, 4 *La. Ann.* 145.

Minnesota. — *Carson v. Smith*, 5 *Minn.* 78, 12 *Minn.* 546, *citing* *Davis v. Murphy*, 3 *Minn.* 119; *Maxfield v. Bierbauer*, 8 *Minn.* 413; *Cole v. Maxfield*, 13 *Minn.* 235; *Mankato v. Meagher*, 17 *Minn.* 265.

Missouri. — *Stubblefield v. Branson*, 20 *Mo.* 302.

Nebraska. — *McWilliams v. Bridges*, 7 *Neb.* 419; *Brooks v. Hiatt*, 13 *Neb.* 503. See also *State v. Tucker*, 38 *Neb.* 56.

Nevada. — *Crosier v. McLaughlin*, 1 *Nev.* 348.

Oklahoma. — *McKennon v. Winn*, 1 *Okla.* 327.

Oregon. — *Baker v. Woodward*, 12 *Oregon* 3, *citing* *Bohlman v. Coffin*, 4 *Oregon* 314.

Canada. — See *Bown v. West*, 1 *U. C. Err. & App.* 117, 2 *U. C. Jur.* 675, *affirming* 1 *U. C. Jur.* 641.

Contra, *Stafford v. Anders*, 8 *Fla.* 34; *Carr v. Allison*, 5 *Blackf. (Ind.)* 64; *Merrell v. LeGrand*, 1 *How. (Miss.)* 150, *cited in* *Lindsey v. Sellers*, 26 *Miss.* 169; *Smith v. Rankin*, 4 *Yerg.*

(*Tenn.*) 1, 26 *Am. Dec.* 213; *Edwards v. Batts*, 5 *Yerg. (Tenn.)* 441; *Reese v. Crockett*, 8 *Yerg. (Tenn.)* 129; *Barnhart v. Neisler*, 6 *Humph. (Tenn.)* 493; *Wheeler v. Styles*, 28 *Tex.* 240; *Rodgers v. Daily*, 46 *Tex.* 578; *Palmer v. Chandler*, 47 *Tex.* 332, *cited in* *Houston v. Dickson*, 66 *Tex.* 79; *Howard v. McKenzie*, 54 *Tex.* 188; *Lamb v. James*, 87 *Tex.* 485, *reversing* (*Tex. Civ. App.* 1894) 27 *S. W. Rep.* 178, and in effect 2 *Tex. Civ. App.* 185, *cited in* *Bedford v. Rayner Cattle Co.*, 13 *Tex. Civ. App.* 618; *Rayner Cattle Co. v. Bedford*, 91 *Tex.* 642.

Incumbrance of Possessory Rights. — *Bush v. Marshall*, 6 *How. (U. S.)* 284, *affirming* *Morr.* (*Iowa*) 275; *Malone v. Hoxsie*, 1 *Alaska* 267; *Houseman v. Chase*, 12 *Cal.* 290; *Haffley v. Maier*, 13 *Cal.* 13; *Kirkaldie v. Larabee*, 31 *Cal.* 456, 89 *Am. Dec.* 205; *Christy v. Dana*, 34 *Cal.* 548; *Hemphill v. Davies*, 38 *Cal.* 577; *Christy v. Dana*, 42 *Cal.* 174; *Kelly v. Mack*, 49 *Cal.* 523; *Camp v. Grider*, 62 *Cal.* 20; *Orr v. Stewart*, 67 *Cal.* 275; *Wells v. Francis*, 7 *Colo.* 396; *Turney v. Saunders*, 5 *Ill.* 527; *Warburton v. Mattox*, *Morr.* (*Iowa*) 368; *Pierson v. David*, 1 *Iowa* 23; *Blanchard v. Jamison*, 14 *Neb.* 244; *Weber v. Laidler*, 26 *Wash.* 144. *Compare* as to vendor's lien *Holden v. Andrews*, 38 *Cal.* 119, two judges dissenting.

Involuntary Sales of Possessory Rights. — *Emerson v. Sansome*, 41 *Cal.* 552; *Wilson v. Madison*, 55 *Cal.* 5; *Maydole v. Watson*, (*Idaho* 1900) 60 *Pac. Rep.* 86; *French v. Carr*, 7 *Ill.* 664; *Switzer v. Skiles*, 8 *Ill.* 529, 44 *Am. Dec.* 723. See also *Roseville Alta Min. Co. v. Iowa Gulch Min. Co.*, 15 *Colo.* 29; *Hatfield v. Wallace*, 7 *Mo.* 112. *Contra*, *Brown v. Massey*, 3 *Humph. (Tenn.)* 470.

1. *Lamb v. Davenport*, 18 *Wall. (U. S.)* 307, *affirming* 1 *Sawy. (U. S.)* 609, 14 *Fed. Cas.* No. 8,015.

Statutory Restrictions. — See *infra*, this title, *Inchoate Right or Title and Grant—Assignment, Incumbrance, and Alienation of Inchoate Right*; also *Dupas v. Wassell*, 1 *Dill. (U. S.)* 213, 8 *Fed. Cas.* No. 4,182; *Jarvis v. Campbell*, 23 *Kan.* 370.

Although it is not very obvious, a distinction exists between a transfer of a statutory right of pre-emption and the transfer of the occupancy and improvement upon which the right is based. *Arbour v. Nettles*, 12 *La. Ann.* 217. See also *O'Hanlon v. Denvir*, 81 *Cal.* 60, 15 *Am. St. Rep.* 19.

Actual Possession Necessary—Abandonment. — *Missionary Soc. v. Dalles*, 107 *U. S.* 336, *affirming* 6 *Sawy. (U. S.)* 126, 6 *Fed. Rep.* 356; *Bird v. Dennison*, 7 *Cal.* 298; *Bird v. Lisbros*, 9 *Cal.* 1, 70 *Am. Dec.* 617; *Stephens v. Mansfield*, 11 *Cal.* 363; *Daubenbiss v. White*, (*Cal.* 1892) 31 *Pac. Rep.* 36; *Harden v. Cullins*, 8 *Nev.* 49; *Messenger v. Miller*, 2 *Pin. (Wis.)* 60. See also *Bull v. Shaw*, 48 *Cal.* 455.

ory right or claim is in the nature of personal rather than real property, and is not such an estate in land as will support an action of partition or of dower. On the death of the possessor it vests in his personal representatives.¹

VII. DISPOSAL OF UNITED STATES AND CANADIAN LANDS — 1. Surveys. — As part of the general plan and system for the sale and disposition of the lands of the United States, the laws provide for surveys to be made, and officers specially qualified to do that work and charged with official responsibility are assigned to the duty of subdividing the land and locating and establishing boundaries.²

The Public Lands Are Divided by north and south lines running according to the true meridian, and by others crossing them at right angles, so as to form townships of six miles square. The townships are divided into sections, containing, as nearly as may be, six hundred and forty acres each, by running through the same, each way, parallel lines at the end of every two miles; and by making a corner on each of such lines, at the end of every mile. The sections are numbered respectively, beginning with the number one in the northeast section and proceeding west and east alternately through the township with progressive numbers till the thirty-six are completed.³

Provision Is Made for Ascertaining the Boundaries and contents of the several sections, half-sections, and quarter-sections of the public lands according to certain principles expressed in the statute.⁴

1. Character of Right as Property. — *Tustin v. Adams*, 87 Fed. Rep. 377; *Town v. De Haven*, 5 Sawy. (U. S.) 146, 24 Fed. Cas. No. 14,113; *Pelham v. Wilson*, 4 Ark. 289; *Grover v. Hawley*, 5 Cal. 486; *Blachley v. Coles*, 6 Colo. 349; *Davenport v. Farrar*, 2 Ill. 315; *Bowman v. Torr*, 3 Iowa 571; *Stewart v. Chadwick*, 8 Iowa 463; *Bowers v. Keesecker*, 14 Iowa 301, *overruling* *Davis v. O'Ferrall*, 4 Greene (Iowa) 358; *Corbett v. Berryhill*, 29 Iowa 157; *Langworthy v. Heeb*, 46 Iowa 64; *Jenkins v. Martin*, 20 Grant Ch. (U. C.) 613. See also *Hatfield v. Wallace*, 7 Mo. 112. In some jurisdictions possessory rights in land are declared by statute to be real estate. *Gillett v. Gaffney*, 3 Colo. 351; *Sears v. Taylor*, 4 Colo. 38; *Filmore v. Reithman*, 6 Colo. 120; *Roseville Alta Min. Co. v. Iowa Gulch Min. Co.*, 15 Colo. 29; *Hall v. Blackman*, (Idaho 1902) 68 Pac. Rep. 19.

Contract for Sale of Possessory Right Need Not Be in Writing. — *Zickafosse v. Hulick*, *Morr.* (Iowa) 175, 39 Am. Dec. 458; *Clark v. Shultz*, 4 Mo. 235; *Packwood v. Thorp*, 8 Mo. 637; *McDonald v. Lannen*, 19 Mont. 78; *Wood v. Lowmyer*, 20 Mont. 273; *McKennon v. Winn*, 1 Okla. 327; *Hindman v. Rizer*, 21 Oregon 112; *Low v. Rizer*, 25 Oregon 551; *Nevada Ditch Co. v. Bennett*, 30 Oregon 59, 60 Am. St. Rep. 777, *distinguished* *Mattis v. Hosmer*, 37 Oregon 523.

2. See Rev. Stat. U. S., §§ 2395-2413 and amendments. *Mann v. Tacoma Land Co.*, 44 Fed. Rep. 27.

The Survey of the Public Lands of the United States into sections and subdivisions of sections can be made only under the authority of Congress and is beyond state control. *Grogan v. Knight*, 27 Cal. 516.

3. Townships and Sections. — Rev. Stat. U. S., § 2395. See *Tolleston Club v. State*, 141 Ind. 197; *Kean v. Roby*, 145 Ind. 221. See the title **BOUNDARIES**, vol. 4, p. 759.

The Act of May 18, 1796, the first to author-

ize a sale of the domain ceded by Virginia, is the basis of our present rectangular system of surveys. *Morton v. Nebraska*, 21 Wall. (U. S.) 660.

It Has Been the Settled Land Policy of the Government, so far as titles acquired by purchase and sale are involved, that the public lands shall be first surveyed upon a strict mathematical system of ranges and sections, which is founded upon astronomical observations, and which almost entirely disregards the irregular formations of natural boundaries. *Hot Springs Cases*, 10 Ct. Cl. 289, 92 U. S. 698.

In Ohio, in *McKinney v. McKinney*, 8 Ohio St. 423, the court stated: "In this state two meridians have been adopted in the survey of the public lands. In the Virginia military district the original surveys were made by the magnetic meridian. Most of the Congress lands were surveyed by the true meridian. In contracts and private surveys the magnetic meridian has been generally adopted."

Meaning of Words "West" or "Due West" in Respect to Surveys in Ohio. — *McKinney v. McKinney*, 8 Ohio St. 423.

Surveys Not Extended to Tide Lands. — *Mann v. Tacoma Land Co.*, 153 U. S. 273.

Contracts for Surveys of Public Lands, When Binding. — Contracts for the survey of the public lands shall not become binding upon the United States until approved by the commissioner of the general land office, except in such cases as the commissioner may otherwise specially order. Rev. Stat. U. S., § 2398; *McKee's Case*, 1 Ct. Cl. 336.

What Instructions Deemed Part of Contract for Surveying. — Rev. Stat. U. S., § 2399, *amended* 26 Stat. L. 650, 28 Stat. L. 285. See *McKee's Case*, 1 Ct. Cl. 336; *Bowles' Case*, 7 Ct. Cl. 454.

4. Rev. Stat. U. S., § 2396. See *Kean v. Roby*, 145 Ind. 221; *Tolleston Club v. State*, 141 Ind. 197; *Goltermann v. Schiermeyer*, 111 Mo. 404.

Generally No Portion of the Public Domain Is Open to Sale until It Has Been Surveyed and an approved plat of the township embracing the land has been returned to the local land office.¹ When the work of the surveyors has been approved, it is, as to all matters relating to the sale and disposition of the lands of the United States, conclusive and binding upon all persons having to deal with the United States, as well as upon the government itself.²

The Power to Make and Correct Surveys of the public lands belongs to the political department of the government,³ and the decisions of the general land office, like those of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the courts, except by a direct proceeding.⁴

When Lands Are Granted According to an Official Plat of the Survey, it is a well-settled principle that the plat itself, with all the notes, lines, descriptions, and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and controls, so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or the grant itself.⁵

It is provided that all the corners marked in the surveys returned by the surveyor-general shall be established as the proper corners of sections, or subdivisions of sections, which they were intended to designate; and the corners of half and quarter sections, not marked on the surveys, shall be placed as nearly as possible equidistant from two corners which stand on the same line. Rev. Stat. U. S., § 2396. See *Goltermann v. Schiermeyer*, 111 Mo. 404.

Construction of Words "Marked in the Surveys Returned" in Rev. Stat. U. S., § 2396. — *Goltermann v. Schiermeyer*, 111 Mo. 404.

Under Rev. Stat. U. S., § 2396, which declares that "each section or subdivision of section, the contents whereof have been returned by the surveyor-general, shall be held and considered as containing the exact quantity expressed in such return," it is held that it was the purpose to fix the exact quantity at which the general government should dispose of the tract. *Heald v. Yumisko*, 7 N. Dak. 422.

The Rules and Principles Applicable to the Laying Out of Townships by government surveys must be taken into consideration in tracing and interpreting a government survey, for the purpose of locating the exterior of lines of a section. *Holler v. Emerson*, 112 Cal. 573.

Lines of Division of Half Quarter-section, How Run. — Rev. Stat. U. S., § 2397. See *Gazzam v. Phillips*, 20 How. (U. S.) 372.

1. *Buxton v. Traver*, 130 U. S. 232. See *Hot Spring Cases*, 10 Ct. Cl. 289.

When Public Lands Are Considered Surveyed. — U. S. v. *Curtner*, 38 Fed. Rep. 1; *Bullock v. Rouse*, 81 Cal. 590.

In *Oakley v. Stuart*, 52 Cal. 521, the court said that "under the public land system and practice of the land department of the United States, lands have always been treated as surveyed when the lines were run in the field, and monuments or marks established by the proper surveyor."

The above dictum was overruled in *Medley v. Robertson*, 55 Cal. 396, wherein it was held that the approval of the surveyor-general is necessary to constitute a survey.

Whether Unsurveyed Lands May Be Reserved. — In *Dubuque, etc., R. Co. v. Des Moines Valley R. Co.*, 54 Iowa 89, the court stated that it knew of no reason why lands may not be reserved by Congress before they are surveyed.

Settlement upon Public Lands in Advance of Surveys. — *Buxton v. Traver*, 130 U. S. 232; *Washington, etc., R. Co. v. Osborn*, 160 U. S. 103. See *Hot Springs Cases*, 10 Ct. Cl. 289.

Grant of Land Not Segregated. — *Puget Sound Agricultural Co. v. Pierce County*, 1 Wash. Ter. 159.

Canada. — In *Horne v. Munro*, 7 U. C. C. P. 433, the court stated that the crown may grant a tract of land, although the township within the limits of which it lies has not been surveyed.

2. *Mann v. Tacoma Land Co.*, 44 Fed. Rep. 27 citing *Bates v. Illinois Cent. R. Co.*, 1 Black (U. S.) 204. See *Craig v. Powell*, 128 U. S. 691; *Hot Springs Cases*, 10 Ct. Cl. 289; *Hunt v. Rowley*, 87 Ill. 491; *Tolleston Club v. State*, 141 Ind. 197.

Approval of Commissioner Not Required by Land Department until 1879. — *Tubbs v. Wilhoit*, 138 U. S. 134.

A Survey of a Private Claim Need Not Be Sent to the General Land Office and Be Approved by the Commissioner before it can be considered as an authoritative survey under the construction of the laws previous to 1836. Such a survey, when made and approved by the surveyor-general, stood as the authorized governmental survey until it was set aside by some authority having supervision over the surveyor's office. *Dent v. Sigerson*, 29 Mo. 489.

Agreement to Abide by Unapproved Government Survey Binding on Parties. — *Dugas v. Truxillo*, 15 La. Ann. 116.

Private Survey Not Evidence of Facts It Purports to Contain. — A United States surveyor is not an officer generally empowered to make surveys of private lands, which shall be evidence of title of boundaries. He may have special authority by orders of court, or of the political department for that purpose, in which case the orders or authority given him are his warrant for the act; and this must be shown before his acts are effectual for any purpose of proof. *Rose v. Davis*, 11 Cal. 133. See the title *BOUNDARIES*, vol. 4, p. 856.

3. *Craig v. Powell*, 128 U. S. 691. See *Greer v. Squire*, 9 Wash. 359.

4. *Craig v. Powell*, 128 U. S. 691. See *Hot Springs Cases*, 10 Ct. Cl. 289; *Greer v. Squire*, 9 Wash. 359.

5. *Craig v. Powell*, 128 U. S. 691; *Goltermann v. Schiermeyer*, 111 Mo. 404. See the title *BOUNDARIES*, vol. 4, p. 855.

2. Public and Private Sales.—Certain of the public lands may be exposed to public sale by a proclamation of the President.¹

All Executive Proclamations Relating to the Sales of Public Lands are required to be published in only one newspaper, to be printed and published in the state or territory where the lands are situated, and to be designated by the secretary of the interior,² and the lands which are exposed to public sale by order of the President shall be advertised for a period of not less than three nor more than six months prior to the day of sale, unless otherwise specially provided.³ It is provided that such sales shall be kept open for two weeks, and no longer, unless otherwise provided by law.⁴

Penalty for Preventing Bids.—Every person who, before or at the time of the public sale, contracts, or attempts to contract, with any other person, that such person shall not bid upon or purchase the land so offered or any parcel thereof, or who in any way hinders, or attempts to hinder, any person from bidding or purchasing at a sale, may be fined or imprisoned, or both.⁵

Agreements to Pay Premiums to Purchasers Declared Void.—If any person enters into any contract or secret understanding with any other person, proposing to purchase such land, to pay or give to such purchaser for it a sum of money or other article of property, over and above the price at which the land is bid off by such purchaser, every such contract shall be utterly null and void.⁶

1. Land Subject to Public Sale.—No public lands of the United States, except abandoned military or other reservations, isolated and disconnected fractional tracts authorized to be sold by section twenty-four hundred and fifty-five of the Revised Statutes, and mineral and other lands the sale of which at public auction has been authorized by acts of Congress of a special nature having local application, shall be sold at public sale. 26 U. S. Stat. at L. 1099.

How Offered.—All the public lands, the sale of which is authorized by law, shall, when offered at public sale to the highest bidder, be offered in half quarter-sections. Rev. Stat. U. S., § 2353.

Whenever the President Is Authorized to Cause the Public Lands in Any Land District to Be Offered for Sale, he may offer for sale at first, only a part of the lands contained in such district, and at any subsequent time or times he may offer for sale in the same manner any other part or the remainder of the lands contained in the same. Rev. Stat. U. S., § 2358.

2. 19 U. S. Stat. at L. 221.

3. Rev. Stat. U. S., § 2359.

4. Rev. Stat. U. S., § 2360. See *Eldred v. Sexton*, 19 Wall. (U. S.) 189.

5. Rev. Stat. U. S., § 2373. See *infra*, this title, *Offenses Against Land Laws*.

Agreements Held Not to Violate Statute.—*Wright v. Shumway*, 1 Biss. (U. S.) 23; *Fackler v. Ford*, 24 How. (U. S.) 322; *U. S. v. Budd*, 144 U. S. 154, *affirming* 43 Fed. Rep. 630; *Switzer v. Skiles*, 8 Ill. 529, 44 Am. Dec. 723; *Stannard v. McCarty*, Morr. (Iowa) 124; *Treadway v. Wilder*, 8 Nev. 91.

Purpose of Law.—*Fackler v. Ford*, 24 How. (U. S.) 322; *Ellis v. Mosier*, 2 Green (Iowa) 246. See generally the title *ILLEGAL CONTRACTS*, vol. 15, p. 950.

Objection to Agreement Preventing Bidding Can Only Be Taken by Government.—*Easley v. Kel-lom*, 14 Wall. (U. S.) 279; *Root v. Shields*, Woolw. (U. S.) 340, 20 Fed. Cas. No. 12,038. See *Houck v. Kelsey*, 17 Kan. 333.

Agreement Need Not Be Direct and Positive.—*Stannard v. McCarty*, Morr. (Iowa) 124.

Agreement Whereby One Purchases for Benefit of Others Not Prohibited.—*Switzer v. Skiles*, 8 Ill. 529, 44 Am. Dec. 723.

Employment of Agent to Purchase at Stipulated Price Not Unlawful.—*Pearsons v. Lee*, 2 Ill. 193.

Traffic in Public Lands Not Prohibited.—*Stannard v. McCarty*, Morr. (Iowa) 125.

It Is Not Against Public Policy if parties arrange for one to bid in the whole of a block of crown land and then divide it. *Laughlan v. Prescott*, 1 N. Bruns. Eq. Rep. 406; *Irving v. McWilliams*, 1 N. Bruns. Eq. Rep. 217.

6. U. S. Rev. Stat., § 2374.

Object of Statute.—The purpose of this law is to protect those who propose to purchase lands at the public sales, from extortions. *Fackler v. Ford*, 24 How. (U. S.) 322.

The statute is intended to prevent the acquisition of land from the United States at a wholesale rate by individuals or corporations, by using individual persons who do not acquire it of their personal volition, but simply as mediums for the transmission of titles from the government to land-grabbers. *U. S. v. Budd*, 43 Fed. Rep. 630.

The object of this law is to protect parties from the exactions of the speculator and money lender. *Ferguson v. Sutphen*, 8 Ill. 547.

Contract Held Not Void.—*Ellis v. Mosier*, 2 Greene (Iowa) 246.

Contract Not Void Against Both Parties.—*Ferguson v. Sutphen*, 8 Ill. 547.

Contract Does Not Obligate Purchasers to Keep Land or Control Right of Disposition.—*U. S. v. Budd*, 43 Fed. Rep. 630, *affirmed* 144 U. S. 154.

Recovery of Premium Paid.—Every person being a party to such contract or secret understanding, who pays to such purchaser any sum of money or other article of value over and above the purchase-money of such land, may sue for and recover such excess from such purchaser in any court having jurisdiction of the

Applicants for the Purchase at Private Sale of a Tract of Land shall produce to the register a memorandum in writing, describing the tract, which he shall enter by the proper number of the section or part thereof, as the case may be, and of the township and range, subscribing his name thereto, which memorandum the register shall file and preserve in his office.¹

The Price at Which the Public Lands Are Offered for Sale Is One Dollar and Twenty-five Cents an Acre, and it is declared that at every public sale the highest bidder who makes lawful payment shall be the purchaser. However, the price of alternate reserved lands, along the line of railroads within the limits granted by any Act of Congress, is two dollars and fifty cents per acre.²

same. Rev. Stat. U. S., § 2375. See *Ferguson v. Sutphen*, 8 Ill. 547.

Discovery of Agreements to Pay Premiums by Bill in Equity.—Rev. Stat. U. S., § 2376. See *Ferguson v. Sutphen*, 8 Ill. 547.

1. Rev. Stat. U. S., § 2355.

It Has Been the Practice Not to Allow Private Entries until the land has been previously offered at public sale. *U. S. v. Railroad Bridge Co.*, 6 McLean (U. S.) 517; *Chotard v. Pope*, 12 Wheat. (U. S.) 587; *Eldred v. Sexton*, 19 Wall. (U. S.) 189, *affirming* 30 Vis. 193.

Title Void if Patented Land Was Not Previously Offered at Public Sale According to U. S. Rev. Stat., § 2303.—*U. S. v. Pratt Coal, etc., Co.*, 18 Fed. Rep. 708.

Presumption that Land Was Offered at Public Sale According to U. S. Rev. Stat., § 2303.—*U. S. v. Pratt Coal, etc., Co.*, 18 Fed. Rep. 708.

Certificate of Entry Defined.—*Simmons v. Ogle*, 105 U. S. 271.

Desert Land Entered under Act of March 3, 1877, upon Which Twenty-five Cents per Acre Is Paid, Reserved from Entry under Other Laws.—*Sallee v. Corder*, 67 Cal. 174.

A Corporation cannot make an entry under the Act of March 3, 1877, as the act limits entries to citizens. *Salina Stock Co. v. U. S.*, 85 Fed. Rep. 339, 56 U. S. App. 494.

Reclamation Held Sufficient Within Act of March 3, 1877.—*U. S. v. Mackintosh*, 85 Fed. Rep. 333, 56 U. S. App. 483.

How Purchased.—All public lands, when offered at private sale, may be purchased, at the option of the purchaser, in entire sections, half-sections, quarter-sections, half quarter-sections, or quarter quarter-sections. Rev. Stat. U. S., § 2354.

Wherever Lands in California Subject to Private Entry Have Been or Are Hereafter Withdrawn from market for any cause, such lands shall not thereafter be held subject to private entry until they have first been open for at least ninety days to homestead and pre-emption settlers, and again offered at public sale. Rev. Stat. U. S., § 2367.

Public Lands Within the State of Missouri Shall Hereafter Be Subject to Disposal at Private Sale in the manner now provided by law for the sale of lands which have been publicly offered for sale, whether such lands have ever been offered at public sale or not: provided, that the actual settlers shall have a preference right, under such rules and regulations as the secretary of the interior may prescribe. 30 U. S. Stat. at L. 418.

Entries Forbidden Except in Missouri.—By the Act of March 2, 1889, 25 U. S. Stat. at L. 854,

it was provided that no public lands of the United States, except those in the state of Missouri, shall be subject to private entry.

Where Two or More Persons Apply for the Purchase, at private sale, of the same tract, at the same time, the register shall determine the preference, by forthwith offering the tract to the highest bidder. Rev. Stat. U. S., § 2365.

Provision Where Several Certificates Are Issued to Two or More Purchasers of Same Section.—Rev. Stat. U. S., § 2361.

Immaterial Statement in Application for Purchase of Timber Land under Act of June 3, 1878, Does Not Invalidate Entry.—*Lewis v. Shaw*, 70 Fed. Rep. 289.

An Applicant for the Purchase of Timber Lands under the Act of June 3, 1878, as extended by Act of August 4, 1892, may make the statutory initial statement upon knowledge or information other than that of personal observation. *Hoover v. Salling*, (C. C. A.) 110 Fed. Rep. 43.

Act of June 3, 1878, Includes Land Covered with Timber Which Might Be Cultivated.—*U. S. v. Budd*, 144 U. S. 154. See *Thayer v. Spratt*, 189 U. S. 346, *affirming* 25 Wash. 62.

Lands Held to Belong to Class of Unoffered Lands Within Act of June 3, 1878.—*U. S. v. Budd*, 43 Fed. Rep. 630.

Distinction Between Offered and Unoffered Lands Abolished.—30 U. S. Stat. at L. 418.

2. Rev. Stat. U. S., § 2357. See *U. S. v. Healey*, 160 U. S. 136; *Baldwin v. Boyd*, 18 Neb. 444; *Creps v. Wilkinson*, 9 Ohio 200.

Act of March 3, 1877, Providing for Sale of Desert Lands Did Not Supersede Proviso of Rev. Stat. U. S., § 2357.—*U. S. v. Healey*, 160 U. S. 136, *reversing* 29 Ct. Cl. 115. See *U. S. v. Ingram*, 172 U. S. 327.

Minimum Price of Reservations.—Whenever any reservation of public lands is brought into market, the commissioner of the general land-office shall fix a minimum price, not less than one dollar and twenty-five cents per acre, below which such lands shall not be disposed of. Rev. Stat. U. S., § 2364.

Price of Railroad Lands Reduced.—By Act of June 15, 1880, § 3, c. 227, 21 U. S. Stat. at L. 238, it is provided that the price of lands now subject to entry which were raised to two dollars and fifty cents per acre, and put in market prior to January, 1861, by reason of the grant of alternate sections for railroad purposes, is hereby reduced to one dollar and twenty-five cents per acre.

Party Paying More than Required by Law Without Protest Held Not Entitled to Recover in Court of Claims.—*U. S. v. Edmondston*, 181 U. S. 500. See *Shang v. U. S.*, 36 Ct. Cl. 466.

In No Case Can Credit Be Allowed for the Purchase Money on the Sale of Any of the Public Lands, but every purchaser of land sold at public sale shall, on the day of purchase, make complete payment therefor; and the purchaser at private sale shall produce to the register of the land office a receipt from the treasurer of the United States, or from the receiver of public moneys of the district, for the amount of the purchase-money on any tract, before he enters the same at the land office; and if any person, being the highest bidder at public sale for a tract of land, fails to make payment therefor on the day on which the same was purchased, the tract shall be again offered at public sale on the next day of sale, and such person shall not be capable of becoming the purchaser of that or any other tract offered at such public sales.¹

In Case Any Tract of Land Has Been Erroneously Sold, so that from any cause the sale cannot be confirmed, the secretary of the interior is authorized, upon proof being made to his satisfaction, to repay to the purchaser or his legal representatives or assignees, the sum of money which was paid therefor out of any money in the treasury not otherwise appropriated.²

Where a Purchaser at Private Sale Has Entered a Tract Different from That He Intended to Purchase, certain relief is provided which he may have upon a sufficient showing that certain errors were committed, and the secretary of the interior is authorized to direct that the purchaser is at liberty to withdraw the entry so erroneously made, and that the moneys which have been paid shall apply in the purchase of other lands in the same district, or be credited in the payment for the lands which have been purchased at the same office.³ Also relief is pro-

The Court of Claims Was Held to Have Jurisdiction under the Act of June 16, 1880, 21 U. S. Stat. at L. 287, requiring the repayment to the purchaser of the excess of one dollar and twenty-five cents per acre, where the land purchased has afterwards been found not to be within the limits of a railroad land grant. *Medbury v. U. S.*, 173 U. S. 492.

Price of Forfeited Railroad Lands and Lands Adjacent to Railroad Lands Fixed at One Dollar and Twenty-five Cents Per Acre.— 25 U. S. Stat. at L. 854.

Repayment to Settlers Within the Tucson Land District in Arizona of Excess of Fees or Price.— 27 U. S. Stat. at L. 456.

Coins Receivable in Payment.— The gold coins of Great Britain and other foreign coins shall be received in all payments on account of public lands, at the value estimated annually by the director of the mint, and proclaimed by the secretary of the treasury, in accordance with the provisions of section 3564, title "The Coinage." 3 U. S. Stat. at L. 779.

1. *Rev. Stat. U. S.*, § 2356. See *Kirkby v. Fogleman*, 16 La. 277.

The Public Lands Were Formerly Sold on Credit at not less than two dollars an acre, but as the credit system worked badly it was abandoned in 1820 and the price was reduced to one dollar and twenty-five cents per acre. *Eldred v. Sexton*, 19 Wall. (U. S.) 189.

Act Forbidding Sale on Credit Makes No Exception in Favor of Officers.— *U. S. v. Boyd*, 5 How. (U. S.) 29.

The Register Was Authorized to Resell Lands Purchased on Credit if the Purchase Money Was Not Paid, under the Act of May 10, 1800, which provided for the sale of public lands on credit northwest of the Ohio river. *Russell v. White-side*, 5 Ill. 7.

Purchasers Who Had Not Paid the Whole Purchase Money Were Authorized to Relinquish Their

Purchases by the Act of March 2, 1821, 3 U. S. Stat. at L. 1612. See *Keene v. Barnes*, 29 Mo. 377.

2. *Rev. Stat. U. S.*, § 2362.

The Above Law Is Not Supplementary or amendatory of any previous act, but is substantive and independent, and provides for a class of cases not embraced by any other law. *Carman v. Johnson*, 29 Mo. 84.

Where Any Tract of Land Has Been Erroneously Sold, as Described Above, and the money which was paid for the same has been invested in any stocks held in trust, or has been paid into the treasury to the credit of any trust fund, it is lawful, by the sale of such portion of the stocks as may be necessary for the purpose, or out of such trust fund, to repay the purchase money to the parties entitled thereto. *Rev. Stat. U. S.*, § 2363.

The Act of June 16, 1880, 21 U. S. Stat. at L. 287, Requiring the Excess of One Dollar and Twenty-five Cents to Be Repaid to Purchasers where the land purchased is afterwards found not to be within the limits of a railroad land grant, refers to cases of a mistake in location at the time when the entry was made. *Medbury v. U. S.*, 173 U. S. 492.

3. *Rev. Stat. U. S.*, § 2369.

The above provisions extend to all cases where patents have issued or may hereafter issue; upon condition, however, that the party concerned surrenders his patent to the commissioner of the general land office, with a relinquishment of title thereon, executed in a form to be prescribed by the secretary of the interior. *Rev. Stat. U. S.*, § 2370.

The provisions of the text and of the above paragraph are made applicable in all respects to errors in the location of land-warrants. *Rev. Stat. U. S.*, § 2371.

No Authority under This Law to Refund Purchase Money for Land Erroneously Entered.— *Carman v. Johnson*, 29 Mo. 84.

vided in cases of an entry hereafter made where a mistake has been made in the true number of the tract intended to be entered.¹

3. Pre-emption.—*a. INTRODUCTORY.*—Beginning at an early period in the history of the United States, Congress, having in view the securing of the actual settlement and improvement of the public lands for agricultural purposes,² has passed various statutes giving to persons possessed of particular qualifications, who have settled on and improved public lands, the right to a pre-emption or preference³ in purchasing the same when they are offered for sale by the government. But a comparatively late Act of Congress has repealed all that portion of the United States Revised Statutes relating to pre-emption, except a few sections, and all other laws allowing pre-emption of the public lands of the United States.⁴

b NATURE OF RIGHT.—The right of pre-emption was this right acquired, under the land laws, by a person who had settled upon, cultivated, and improved a portion of the public lands, to have the first opportunity of purchasing the land at the minimum price fixed by the government, when it became subject to sale.⁵ This right was not a title⁶ nor an estate within any definition known

1. Rev. Stat. U. S., § 2372.

The Distinguishing Feature of This Law is that it provides for errors not occasioned by any act of the surveyor or land officers. *Carman v. Johnson*, 29 Mo. 84.

Another Distinction Between This Law and Other Acts is that upon the correction of the erroneous entry being made, the payment is to be transferred to the tract intended to have been entered, so that, under this act, if an erroneous entry has been made without any agency of the officers, the purchaser, if he wishes it to be corrected, may have it done by transferring the payment as before stated, but is not entitled to have the money refunded. *Carman v. Johnson*, 29 Mo. 84.

2. Object of Pre-emption Laws.—See *Carson v. Smith*, 12 Minn. 546.

As the tide of emigration was greatly in advance of public sales, and indeed of the surveys, it was found that settlers who had made meritorious improvements were unable to secure the land on which they had settled, without bidding at public auction against parties who took into consideration the value of the improvements so made and who would get them by the purchase. To remedy this evil several of the earlier pre-emption laws were passed, and they only included settlements made prior to the passage of those laws. The Act of 1841, however, provided a general system of pre-emption, and authorized pre-emption of lands surveyed but not open to private entry, as well as land which could be bought at private sale. It protected settlements already made, and allowed future settlements to be made with a right to pre-emption, which was a new feature in the pre-emption system. *Johnson v. Towsley*, 13 Wall. (U. S.) 72, 2 Neb. 484, *affirming* 1 Neb. 95.

3. Pre-emption and Preference Synonymous.—*Shields v. Walker*, 2 Overt. (Tenn.) 118, note; *Patterson v. McCutchen*, 5 Humph. (Tenn.) 328.

4. Act of March 3, 1891, c. 561, § 4; 26 U. S. Stat. at L. 1097.

5. Nature of Pre-emption Right.—*United States*.—*Hot Springs Cases*, 10 Ct. Cl. 289, *affirmed* 92 U. S. 608; *Aiken v. Ferry*, 6 Sawy. (U. S.) 79, 1 Fed. Cas. No. 112.

Alabama.—*Doe v. Beck*, 108 Ala. 71.

California.—*Megerle v. Ashe*, 33 Cal. 74.

Illinois.—*Delauney v. Burnett*, 9 Ill. 454;

Davenport v. Farrar, 2 Ill. 315; *Byrne v. Morehouse*, 22 Ill. 602.

Iowa.—*Bowers v. Keesecker*, 14 Iowa 301.

Kansas.—*Emslie v. Young*, 24 Kan. 733.

Kentucky.—*Alstods v. Miller*, Hard. (Ky.) 202.

Minnesota.—*Camp v. Smith*, 2 Minn. 155.

Mississippi.—*McAfee v. Keirn*, 7 Smed. & M. (Miss.) 780; *Grand Gulf R., etc., Co. v. Bryan*, 8 Smed. & M. (Miss.) 234.

Nebraska.—*Franklin v. Kelley*, 2 Neb. 79.

New York.—*Garcia v. Callender*, 125 N. Y. 307, *affirming* 53 Hun (N. Y.) 12; *New York v. Hart*, 95 N. Y. 456; *Furman v. New York*, 5 Sandf. (N. Y.) 43; *Towle v. Palmer*, 1 Robt. (N. Y.) 437.

Wisconsin.—*Dillingham v. Fisher*, 5 Wis. 475; *Woodward v. McReynolds*, 1 Chand. (Wis.) 244, 2 Pin. (Wis.) 268.

The General Land Office Has Defined Pre-emption as "the exercise of a right by a person possessing the qualifications required by statute, who has made settlement in person on public land subject to pre-emption not exceeding one hundred and sixty acres, inhabited and improved it, and erected a dwelling thereon, to obtain title in preference to any other, by entry and purchase at the price at which the land is held." 2 Copps Pub. Land Laws 640.

A Pre-emption Right Was a Mere Privilege conferred, so far as the rights of the pre-emptor are concerned, in case the land should ever be offered for sale. *Hutton v. Frisbie*, 37 Cal. 475; *Frisbie v. Whitney*, 9 Wall. (U. S.) 187, *reversing* 6 D. C. 262.

A Pre-emption Was Nothing but an Offer by the government to an individual settled upon the public lands, which he might or might not accept. The circumstance that the period had not arrived when the acceptance could be signified made no difference. That he would accept might be presumed, but still an absolute certainty that he would accept when the time for acceptance came would not confer any right until an acceptance was actually signified in the manner prescribed by law. *Bower v. Higbee*, 6 Mo. 259; *Bray v. Ragsdale*, 53 Mo. 170.

A Right of Pre-emption Was a Bounty extended to settlers and occupants of the public domain. *Wilcox v. Jackson*, 13 Pet. (U. S.) 498.

6. Not a Title.—*Grand Gulf R., etc., Co. v.*

to the common law,¹ nor was it an interest in the legal title² or in the land;³ neither could it properly be denominated an option, for the government was under no obligation to sell to the occupant at any time.⁴ It was merely a right of occupancy for the time being, with the privilege of purchasing in preference to any one else when the government should elect to sell.⁵

The Distinction Between Homestead and Pre-emption is this: that when a person entitled to a homestead has complied with the statutes on the subject, he acquires title as a gift from the government, whereas one who acquired title under the pre-emption laws was a purchaser of the land, having paid the government its price for the same.⁶

c. LANDS SUBJECT TO PRE-EMPTION—(1) In General.—Of course, whether or not particular lands were subject to pre-emption was a matter governed entirely by the determination of the question whether those lands were within the contemplation of the act under which the pre-emptor claimed his rights.⁷ The general rule, however, established by the United States Revised Statutes was that all public lands of the United States, with certain exceptions which will be hereafter discussed, were subject to the right of pre-emption.⁸

(2) Lands Excepted from Pre-emption—(a) Indian Lands.—Under the United States statutes no pre-emption right could be obtained upon lands to which the Indian title or right of occupancy had not been extinguished.⁹

Bryan, 8 Smed. & M. (Miss.) 234. See also Orillion v. Deslonde, 9 La. 53; Kellam v. Rippey, 3 Rob. (La.) 138; Milligan v. Hargrove, 6 Mart. N. S. (La.) 337.

1. Not an Estate.—Wittenbrock v. Wheadon, 128 Cal. 150; Delauney v. Burnett, 9 Ill. 454.

No Dower in Pre-emption Right.—Davenport v. Farrar, 2 Ill. 314; Craig v. Tappin, 2 Sandf. Cn. (N. Y.) 79.

Pre-emption Rights Could Not Be Sold on Execution.—Bray v. Ragsdale, 53 Mo. 170; Cravens v. Moore, 61 Mo. 178.

2. Not an Interest in Legal Title.—Delauney v. Burnett, 9 Ill. 454.

3. Not an Interest in the Land.—Aiken v. Ferry, 6 Sawy. (U. S.) 79, 1 Fed. Cas. No. 112.

4. Government under No Obligation to Sell.—See Doe v. Beck, 108 Ala. 71. And see also cases cited in first note to this paragraph.

5. Right of Occupancy with Preference as to Purchasing.—Delauney v. Burnett, 9 Ill. 454; Brown v. Throckmorton, 11 Ill. 529; Orillion v. Deslonde, 9 La. 53. See also Wittenbrock v. Wheadon, 128 Cal. 150.

The Interest that a Person Had in an Improvement on the public land was of a peculiar kind known only to our laws. It was a possessory right against all the world but the United States. Pelham v. Wilson, 4 Ark. 289; Gaines v. Hale, 26 Ark. 168, affirmed 93 U. S. 3; Cain v. Leslie, 15 Ark. 312. See also Hughes v. Sloan, 8 Ark. 146; McFarland v. Mathis, 10 Ark. 560.

A Specific Claim.—A pre-emption right, when not a float, constituted a specific claim to the particular tract from the very first inception of the claim. It grew out of the particular tract of land cultivated and occupied at the time contemplated by the Act of Congress which created it, and inhered in that tract. Rector v. Gaines 10 Ark. 70.

No Vested Right Was Acquired, as against the government, by the filing of the declaratory

statement in a pre-emption case. Whitney v. Taylor, 158 U. S. 85, affirming 45 Fed. Rep. 616.

Rights of Settler on Unsurveyed Land.—See Buxton v. Traver, 130 U. S. 232; Northern Pac. R. Co. v. McCormick, 89 Fed. Rep. 659.

6. Distinction Between Homestead and Pre-emption.—McCollum v. Edmonds, 109 Ala. 322.

But see Slaughter v. Fowler, 44 Cal. 195, in which case the court said: "The word 'pre-empt' is sometimes used to express the acquisition of the title or possession of public lands by other methods than by purchase from the United States. In this case one of the briefs speaks of the book in which possessory claims taken under the Act of April 20, 1852, are recorded, as the 'Pre-emption Book.'"

7. Land Subject to Pre-emption under Particular Statutes.—See the following cases:

United States.—Surgett v. Lapice, 8 How. (U. S.) 48; Hot Springs Cases, 92 U. S. 698, affirming 10 Ct. Cl. 289, 433; Stark v. Starrs, 6 Wall. (U. S.) 402; Lonsdale v. Portland, Deady (U. S.) 1; Lytle v. State, 9 How. (U. S.) 314, 12 Ark. 26, reversing 12 Ark. 9; Ferguson v. McLaughlin, 96 U. S. 174; Warren v. Van Brunt, 19 Wall. (U. S.) 646, affirming 12 Minn. 70; Hosmer v. Wallace, 97 U. S. 575, affirming 47 Cal. 461.

Alabama.—Saltmarsh v. Crommelin, 39 Ala. 54.

California.—O'Connor v. Corbitt, 3 Cal. 370. *Illinois.*—Isaacs v. Steel, 4 Ill. 97; Bruner v. Manlove, 4 Ill. 339, 36 Am. Dec. 551; Walker v. Hedrick, 18 Ill. 570.

Indiana.—Smith v. Mosier, 5 Blackf. (Ind.) 51.

Mississippi.—Grand Gulf R., etc., Co. v. Bryan, 8 Smed. & M. (Miss.) 234.

8. U. S. Rev. Stat., § 2257. See also McAfee v. Keirn, 7 Smed. & M. (Miss.) 780.

9. Indian Lands.—Thredgill v. Pintard, 12 How. (U. S.) 37; Spalding v. Chandler, 160 U. S. 394, affirming 84 Mich. 140; Root v. Shields, Woolw. (U. S.) 340; Buttz v. North-

(b) **Reservations.** — The general pre-emption law also excluded from pre-emption land included in any reservation by any treaty, law, or proclamation of the President for any purpose.¹ But an exception was made in favor of settlers on public lands which after their settlement were withdrawn from the market in consequence of proposed railroads.²

(c) **Town Sites and Lands Within Limits of Town** — *aa. NOT SUBJECT TO PRE-EMPTION.* — Another customary exception from the class of lands subject to pre-emption was that of lands included within the limits of any incorporated town, or selected as the site of a city or town.³

bb. ACTUAL OCCUPANCY NECESSARY. — It has been held that actual settlement and occupancy as a town site were necessary to bring lands under the excepted class, and the mere selection of a portion of land as a town site without occupancy was not sufficient to prevent its pre-emption.⁴

cc. JUDICIAL NOTICE OF SITUATION OF LANDS. — It has been held that the court could take judicial notice of the fact that certain lands, at the time a pre-emption claimant offered to file his declaratory statement for a pre-emption, were and continued to be within the corporate limits of a city, which city then existed as a duly incorporated city under the laws of the state, and that being so such lands were not subject to be taken under the pre-emption laws of the United States.⁵

dd. SETTLEMENT UPON LAND "AFTERWARDS ASCERTAINED" TO BE WITHIN CORPORATE LIMITS. — An Act of Congress validating pre-emption entries upon land "afterward ascertained" to have been embraced in the corporate limits of any town, but which entries included only vacant unoccupied land of the United States

ern Pac. R. Co., 119 U. S. 55; *Russell v. Beebe*, Hempst. (U. S.) 704, *appeal dismissed* 19 How. (U. S.) 283, 21 Fed. Cas. No. 12,153; *Gaines v. Hale*, 26 Ark. 168; *Ware v. Hitchcock*, 65 Kan. 328. See also *Hot Springs Cases*, 92 U. S. 698, *affirming* 10 Ct. Cl. 289, 433. And see the title *INDIANS*, vol. 16, p. 212.

1. **Reservations.** — U. S. Rev. Stat., § 2258. See *Burfenning v. Chicago*, etc., R. Co., 163 U. S. 321, *affirming* 46 Minn. 20; *Smelting Co. v. Kemp*, 104 U. S. 636; *Wright v. Roseberry*, 121 U. S. 488; *Doolan v. Carr*, 125 U. S. 618; *Davis v. Weibbold*, 139 U. S. 507; *Knight v. U. S. Land Assoc.*, 142 U. S. 161; *Hot Springs Cases*, 92 U. S. 698, *affirming* 10 Ct. Cl. 289, 433; *Gaines v. Hale*, 93 U. S. 3, *affirming* 26 Ark. 168.

School Lands. — See *Kissell v. St. Louis Public Schools*, 18 How. (U. S.) 19, *affirming* 16 Mo. 553; *Frasher v. O'Connor*, 115 U. S. 102; *McCreery v. Haskell*, 119 U. S. 327; *Durand v. Martin*, 120 U. S. 366; *Campbell v. Doe*, 13 How. (U. S.) 244; *Cooper v. Roberts*, 18 How. (U. S.) 173, 20 How. (U. S.) 467; *Mower v. Fletcher*, 116 U. S. 380; *Howell v. Slauson*, 83 Cal. 539; *Peerin v. Griffith*, 13 Iowa 151; *State v. Stringfellow*, 2 Kan. 263; *Minnesota Min. Co. v. National Min. Co.*, 11 Mich. 186, *affirmed* 3 Wall. (U. S.) 332; *Cummings v. Powell*, 97 Mo. 524; *O'Neale v. Cleveland*, 3 Nev. 485; *State v. Blasdel*, 4 Nev. 241; *Wheeler v. Smith*, 5 Wash. 704.

Lands Reserved for Schools Held Subject to Pre-emption Before Survey. — *Ferry v. Street*, 4 Utah 521.

While the Title Remains in the United States, it is within the power of Congress with the consent of the territorial legislature to bring the lands within the pre-emption laws and give them to settlers who upon the faith of such laws had settled on such lands and improved

them. *State v. Bachelder*, 1 Wall. (U. S.) 109.

2. **Lands Withdrawn — Effect of Saving of Existing Rights.** — Section 2281 of the United States Revised Statutes provided that: "All settlers on public lands which have been or may be withdrawn from market in consequence of proposed railroads, and who had settled thereon prior to such withdrawal, shall be entitled to pre-emption at the ordinary minimum to the lands settled on and cultivated by them; but they shall file the proper notices of their claims and make proof and payment as in other cases." But under this section land settled upon did not cease to be public land until the proper papers were filed and the proper steps taken. *Northern Pac. R. Co. v. McCormick*, 89 Fed. Rep. 659.

3. **Town Sites.** — U. S. Rev. Stat., § 2258. See also *Kissell v. St. Louis Public Schools*, 18 How. (U. S.) 19; *Root v. Shields*, Woolw. (U. S.) 340, 20 Fed. Cas. No. 12,038; *Ballance v. Underhill*, 6 Ill. 113; *Carson v. Smith*, 12 Minn. 546; *Burfenning v. Chicago*, etc., R. Co., 46 Minn. 20, *affirmed* 163 U. S. 321; *Houlton v. Chicago*, etc., R. Co., 86 Wis. 59.

4. **Actual Occupancy Necessary.** — *Carson v. Smith*, 12 Minn. 546; *Carroll v. Patrick*, 23 Neb. 834.

Abandonment of Town Site. — Land was not selected as a town site so as to exclude pre-emptors from it within the exception contained in the pre-emption act of 1841 by being laid out into lots by a land company and built upon, where the enterprise was afterwards abandoned. *Smiley v. Sampson*, 1 Neb. 56, *affirmed* on other grounds 13 Wall. (U. S.) 91; *Towsley v. Johnson*, 1 Neb. 95, *affirmed* on other grounds 13 Wall. (U. S.) 72, 2 Neb. 484.

5. **Judicial Notice.** — *Houlton v. Chicago*, etc., R. Co., 86 Wis. 59.

not settled upon for use for municipal purposes nor devoted to any public use of such town,¹ has been held not to make its benefits depend upon the pre-emptor's knowledge or lack of knowledge that the land was within the corporate limits.²

(d) **Lands Occupied for Purposes of Trade and Business.** — Lands which were actually settled and occupied for purposes of trade and business and not for agriculture were also withheld from pre-emption.³

(e) **Saline or Mining Lands.** — The last expressed exception from lands subject to pre-emption in the United States Revised Statutes was that of lands on which were situated any known salines or mines.⁴

d. AMOUNT OF LAND WHICH MIGHT BE PRE-EMPTED. — The pre-emption laws allowed each pre-emptor to enter with the register of the land office for the district in which the land lay, by legal subdivision, any number of acres not exceeding one hundred and sixty, or a quarter-section of land, to include the residence of such claimant.⁵ This, of course, precluded any person from pre-empting more than a quarter-section, but it did not invariably entitle the settler to pre-empt so much land as that, it being usually considered that he was only entitled to pre-empt those subdivisions which he had cultivated or improved;⁶ and the statute was also construed to mean that no settler could enter and purchase less than the smallest legal subdivision of a section, which was a quarter of a quarter-section, or forty acres.⁷

e. WHO MIGHT ACQUIRE PRE-EMPTION RIGHTS — (1) *Qualifications.* — The usual qualifications of a pre-emptor under the United States statutes⁸ were that such person must be the head of a family,⁹ or a widow,¹⁰ or a single person over the age of twenty-one years,¹¹ and must also be a citizen of the United States;¹² or if an alien¹³ must have filed a declaration of intention to

1. Act of March 3, 1877 (19 U. S. Stat. at L. 392).

2. *Vilas v. Algar*, 109 Fed. Rep. 519, 48 C. C. A. 524; *Alger v. Hill*, 2 Wash. 344, 6 Wash. 358.

3. U. S. Rev. Stat., § 2258. See *Carson v. Smith*, 12 Minn. 546.

4. **Saline or Mining Lands.** — U. S. Rev. Stat., § 2258.

Character of Land a Question for Determination by Land Department. — *Burfenning v. Chicago*, etc., R. Co., 163 U. S. 321, *affirming* 46 Minn. 20; *Johnson v. Towsley*, 13 Wall. (U. S.) 72; *Smelting Co. v. Kemp*, 104 U. S. 636; *Steel v. Smelting Co.*, 106 U. S. 447; *Wright v. Roseberry*, 121 U. S. 488; *Heath v. Wallace*, 138 U. S. 573; *McCormick v. Hayes*, 159 U. S. 332. U. S. Rev. Stat., § 2259.

6. **Right Limited to Subdivisions Cultivated and Improved.** — A person who had by settlement and cultivation obtained a pre-emption right upon one-half of a quarter-section containing eighty acres did not obtain a right to an adjoining one-half of a quarter-section of another section merely because such land, in addition to what he had occupied and cultivated, would make up the one hundred and sixty acres to which he was entitled to pre-empt. U. S. v. *Central Pac. R. Co.*, 84 Fed. Rep. 88, *affirmed* (C. C. A.) 94 Fed. Rep. 906. See also *Arms-worthy v. Missouri River, etc., R. Co.*, 5 Dill. (U. S.) 491, 1 Fed. Cas. No. 550.

A Settler Seated on a Fractional Section containing less than one hundred and sixty acres could not, under the Act of May 29, 1830, make up the deficiency out of the adjacent lands or any other lands. *Brown v. Clements*, 3 How.

(U. S.) 650; *Lytle v. Arkansas*, 9 How. (U. S.) 314, 12 Ark. 26, *reversing* 12 Ark. 9.

7. *Lytle v. Arkansas*, 9 How. (U. S.) 314, 12 Ark. 26, *reversing* 12 Ark. 9.

8. See U. S. Rev. Stat., § 2259, where the qualifications required were exactly those stated in the text.

9. **Head of Family.** — *Grand Gulf R., etc., Co. v. Bryan*, 8 Smed. & M. (Miss.) 234; *Ely v. Ellington*, 7 Mo. 302; *Brown v. Corson*, 16 Oregon 388.

10. **Widow.** — *Brown v. Corson*, 16 Oregon 388. 11. **Person Over Twenty-one Years of Age.** — *Cunningham v. Ashley*, 14 How. (U. S.) 377, 13 Ark. 654, *reversing* on other grounds 12 Ark. 296; *Nix v. Allen*, 112 U. S. 129; *Tatro v. French*, 33 Kan. 49; *Grand Gulf R., etc., Co. v. Bryan*, 8 Smed. & M. (Miss.) 234; *Ely v. Ellington*, 7 Mo. 302; *Brown v. Corson*, 16 Oregon 388.

Effect of Premature Claim. — The filing of a declaratory statement for a pre-emption right by a person under twenty-one years of age would not prevent such person from obtaining a pre-emption right upon the same land or other land after he had become twenty-one years of age. *Tatro v. French*, 33 Kan. 49.

12. **Citizen of United States.** — *Boyce v. Danz*, 29 Mich. 146; *Brown v. Corson*, 16 Oregon 388.

13. **Aliens.** — The policy of the government of the United States has been to encourage the immigration of foreigners; and to this extent a system of pre-emption was adopted in all the territories and new states, in which there was no discrimination between foreigners and native citizens. *People v. Folsom*, 5 Cal. 373.

become a citizen as required by the naturalization laws.¹

(2) *Disqualifications.*—The United States Revised Statutes² rendered incapable of acquiring any right of pre-emption under the laws of the United States any person who was the proprietor of three hundred and twenty acres of land in any state or territory,³ or any person who quitted or abandoned his residence on his own land to reside on public lands in the same state or territory.⁴

An Officer of the United States was not by reason of his office deprived of the benefit of the pre-emption laws.⁵

f. SETTLEMENT BY TWO OR MORE PERSONS.—The United States Revised Statutes made provision for the contingency of two or more persons settling on the same tract of land, giving the right of pre-emption to the one who made the first settlement,⁶ or where settlements had been made upon agricultural public lands prior to the survey and it was afterwards ascertained that two or more settlers had improvements upon the same legal subdivision, they were allowed to make a joint entry or otherwise avail themselves of the joint occupation.⁷ Some of the other statutes, however, made provision for the division of the land settled upon and improved, between the settlers and claimants.⁸

Agreement to Divide.—The court of *California* has refused to enforce an agreement between two persons, by which it was stipulated that if either should succeed in establishing a pre-emption claim to a tract of land, he should divide the land with the other, where such agreement was in direct contravention of the express provision of the pre-emption act.⁹

The Words "Every Settler or Occupant of the Public Lands" in a pre-emption statute were sufficiently broad to embrace aliens as well as citizens. And in administering such a statute the land department made no discrimination and even extended the right to free negroes when the laws of the state in which they claimed pre-emptions allowed them to buy lands. *Wynn v. Morris*, 16 Ark. 414, *appeal dismissed* 20 How. (U. S.) 3.

1. *Declaration of Intention.*—*Boyce v. Danz*, 29 Mich. 146; *Brown v. Corson*, 16 Oregon 388.

Occupation of Land as Homestead Before Declaration of Intention.—In the absence of an adverse claim a qualified pre-emptor was not deprived of his right to enter and purchase land as such by the fact that he made an application for and occupied the land as a homestead before he declared his intention to become a citizen. *Bogan v. Edinburgh American Land Mortg. Co.*, 63 Fed. Rep. 192, 27 U. S. App. 346.

2. See U. S. Rev. Stat., § 2260, which declared the disqualifications set forth in the text.

3. *Proprietorship of Other Lands.*—*Gimmy v. Culverson*, 5 Sawy. (U. S.) 605, 10 Fed. Cas. No. 5,454; *Aiken v. Ferry*, 6 Sawy. (U. S.) 79, 1 Fed. Cas. No. 112; *Schieffery v. Tapia*, 68 Cal. 184; *Brown v. Corson*, 16 Oregon 388.

The Proprietorship Contemplated by the Pre-emption Act was a legal and absolute one, and not the mere equity of a land office entry which might or might not ripen into such ownership. *Aiken v. Ferry*, 6 Sawy. (U. S.) 79, 1 Fed. Cas. No. 112.

Pre-emptor Not Disqualified by Acquiring Other Lands After Filing Statement.—*Aiken v. Ferry*, 6 Sawy. (U. S.) 79, 1 Fed. Cas. No. 112.

4. *Quitting Residence to Reside on Public Lands.*—*Schieffery v. Tapia*, 68 Cal. 184; *Brown v. Corson*, 16 Oregon 388.

5. *Federal Officer.*—*U. S. v. Fitzgerald*, 15 Pet. (U. S.) 407.

6. Rev. Stat. U. S., § 2273.

7. Rev. Stat. U. S., § 2274.

8. *The Act of May 29, 1830*, provided that if two or more persons were settled upon the same quarter section, it should be divided between the two first actual settlers, if by a north and south or an east and west line, the settlement and improvement of each could be included in a half quarter section. *Cunningham v. Ashley*, 14 How. (U. S.) 377, 13 Ark. 654, *reversing* 12 Ark. 296. This provision referred only to a quarter of a section, which contained one hundred and sixty acres. A tract which was less than a quarter did not come within the law. *Downes v. Scott*, 4 How. (U. S.) 500, *distinguishing* writ of error from 3 Rob. (La.) 84.

Under the Act of August 4, 1854, extending the provisions of the pre-emption act to unsurveyed land in the territory of Minnesota, which provided that if when the lands were surveyed it should appear that two or more persons had settled upon the same quarter section, they should be permitted to enter their improvements, as near as might be, by legal subdivision, where two persons had settled upon the same quarter of a quarter section, or forty acres, the land could not be subdivided for the purpose of entry and purchase. There being no smaller legal subdivision, except in the case of fractional sections, the forty acres must have been taken as a whole or not at all. *Warren v. Van Brunt*, 19 Wall. (U. S.) 646, *affirming* 12 Minn. 70.

9. *Agreement to Divide.*—*Damrell v. Meyer*, 40 Cal. 166.

g. DEATH OF PRE-EMPTOR — (1) *Entry in Favor of Heirs.* — In the absence of any statute upon the subject a pre-emptor's privilege of purchasing the land would have lapsed with his death and the land would have been again open to entry by any one.¹ But it was provided by statute that "where a party entitled to claim the benefits of the pre-emption laws dies before consummating his claim, by filing in due time all the papers essential to the establishment of the same, it shall be competent for the executor or administrator of the estate of such party, or one of the heirs, to file the necessary papers to complete the same; but the entry in such cases shall be made in favor of the heirs of the deceased pre-emptor, and a patent thereon shall cause the title to inure to such heirs, as if their names had been specially mentioned."²

(2) *Who Entitled as Heirs.* — It was considered that the provision giving the benefits of the pre-emption law to "the heirs of the deceased pre-emptor," in case of the pre-emptor's death before consummating his claim,³ should not be construed as meaning only those persons who would be heirs at common law, but it was rather to be understood that Congress meant those who might be heirs according to the *lex rei sitæ*, by which, generally speaking, the question of the descent and heirship of real estate is exclusively governed.⁴ But as they took the land not by inheritance but by direct conveyance from the United States, the portion taken by each heir was not determined by the state law of inheritance but by the terms of the conveyance, and the statute vested the land in them equally.⁵

(3) *Land Not Subject to Debts of Pre-emptor or Expenses of Administration.* — Where a patent for land was issued to the heirs of a deceased pre-emptor, such land did not become a part of the decedent's estate and could not be sold to pay the debts of the decedent⁶ or the expenses of administration,⁷ or even to reimburse the estate for moneys used by the administrator to consummate the pre-emption.⁸

(4) *Heirs Tenants in Common.* — The interest of the heirs of a pre-emptor, after proof, adjudication, payment, and the issuance of the patent certificate, was a tenancy in common.⁹

(5) *Land Could Not Be Devised by Pre-emptor.* — Land subject to a pre-emption right but which had not been paid for was not subject to devise by the pre-emptor.¹⁰

h. SETTLEMENT, OCCUPATION, AND IMPROVEMENT. — It was ordinarily required, in order to entitle a person to acquire the right of pre-emption, that he should make a settlement in person on the lands which he desired to pre-empt.¹¹

1. *Lapse of Privilege in Absence of Statute.* — Elliott v. Figg, 59 Cal. 117; Wittenbrock v. Wheadon, 128 Cal. 150.

2. *Entry in Favor of Heirs.* — U. S. Rev. Stat., § 2269; Wittenbrock v. Wheadon, 128 Cal. 150; Elliott v. Figg, 59 Cal. 117. See also Grant v. Cromwell, 15 Ind. 315.

3. *Right Survived Only for Benefit of Heirs.* — Elliott v. Figg, 59 Cal. 117. See also Johnson v. Collins, 12 Ala. 322; Cothran v. McCoy, 33 Ala. 65.

3. Rev. Stat. U. S., § 2269.

4. *Who Entitled as Heirs.* — Wittenbrock v. Wheadon, 128 Cal. 150; Hutchinson Invest. Co. v. Caldwell, 152 U. S. 65, affirming 44 Kan. 12.

Illegitimate Children. — Hence, in a state where the laws permitted illegitimate children who had been recognized by the father in his lifetime to inherit from him, such children were heirs within the meaning of the statute. Hutchinson Invest. Co. v. Caldwell, 152 U. S. 65, affirming 44 Kan. 12.

5. Wittenbrock v. Wheadon, 128 Cal. 150.

6. Not Subject to Debts. — Wittenbrock v.

Wheadon, 128 Cal. 150; Rogers v. Clemans, 26 Kan. 522; Coulson v. Wing, 42 Kan. 507.

7. *Could Not Be Sold for Expenses of Administration.* — Wittenbrock v. Wheadon, 128 Cal. 150; Rogers v. Clemmans, 26 Kan. 522.

8. Rogers v. Clemmans, 26 Kan. 522.

9. *Heirs Tenants in Common.* — Lytle v. State, 17 Ark. 608, affirmed 22 How. (U. S.) 193.

10. *Land Could Not Be Devised by Pre-emptor.* — Wittenbrock v. Wheadon, 128 Cal. 150; Rogers v. Clemmans, 26 Kan. 522.

11. *Settlement.* — Aiken v. Ferry, 6 Sawy. (U. S.) 79, 1 Fed. Cas. No. 112; Whitney v. Taylor, 158 U. S. 85, affirming 45 Fed. Rep. 616; Hosmer v. Duggan, 56 Cal. 257; Walker v. Stone, 48 Iowa 92; Freese v. Scouten, 53 Kan. 347; Kelley v. Wallace, 14 Minn. 236; Brown v. Corson, 16 Oregon 388; Dillingham v. Fisher, 5 Wis. 475.

Settlement Could Not Be Made by Agent or Proxy. — Walker v. Stone, 48 Iowa 92.

Circumstances Showing Bona Fide Settlement and Occupancy of Land. — Kelley v. Wallace, 14 Minn. 236.

should inhabit,¹ improve,² or cultivate the same,³ and erect a dwelling thereon.⁴ Settlement, habitation, and improvement of one piece of land could confer no rights to another adjacent to it which at the commencement of the settlement was in the possession and use of others, though upon a subsequent survey by the government it proved to be a part of the same sectional subdivision.⁵

i. PROCEEDINGS TO ACQUIRE RIGHT — (1) *Necessity for Compliance with Statute.* — The right of pre-emption being a favor bestowed only on the terms prescribed by the statutes,⁶ it was necessary that a person desiring to avail himself of the benefits of the pre-emption laws should comply with the conditions they imposed.⁷

Substantial Compliance. — It was not necessary, in order to acquire a pre-emption right, that there should have been an exact and technical compliance with the statute, but there must have been a substantial compliance, one that showed that the conditions existed which would enable a pre-emptor to acquire the land under the law, and that he had performed at least enough on his part to

Circumstances Not Amounting to Actual Settlement. — See *Walker v. Stone*, 48 Iowa 92.

Married Man Might Make Original Settlement Without Presence of Family. — *Kelley v. Wallace*, 14 Minn. 236.

A Settlement on a Portion of a Quarter Section and making the improvements required by law would sustain a pre-emptive claim to the whole quarter section, that amount being allowed as a pre-emption under the land laws, as against subsequent settlers. *Quinby v. Conlan*, 104 U. S. 420.

1. Inhabitation. — *Aiken v. Ferry*, 6 Sawy. (U. S.) 79, 1 Fed. Cas. No. 112; *Hot Springs Cases*, 92 U. S. 698, *affirming* 10 Ct. Cl. 289, 433; *Hosmer v. Duggan*, 56 Cal. 257; *Kelley v. Wallace*, 14 Minn. 236; *Grand Gulf R., etc., Co. v. Bryan*, 8 Smed. & M. (Miss.) 234; *Brown v. Corson*, 16 Oregon 388.

Residence Both Continuous and Personal Was Necessary to show compliance with the pre-emption laws. It was only under special circumstances that residence away from the land was permissible. *Bohall v. Dilla*, 114 U. S. 47, *affirming* 53 Cal. 711, 62 Cal. 610.

Claim Extending into Two Sections. — Where a person who resided on a portion of one section desired to include a portion of another section to make up the one hundred and sixty acres which he was entitled to pre-empt, he was not required to move his residence on such other section; but he was required at least to place some improvement on it in the way of clearing, fencing, or cultivation in order to indicate that it was a part of his claim, where the land was unsurveyed. *U. S. v. Central Pac. R. Co.*, 84 Fed. Rep. 88, *affirmed* (C. C. A.) 94 Fed. Rep. 906.

Under the Acts of 1830 and 1834, a person to be entitled to a pre-emption right must have been in possession of it at the time the act passed. *Stewart v. Haynes*, 5 Blackf. (Ind.) 163; *Fulton v. Doe*, 5 How. (Miss.) 751.

Where the House of a Pre-emptor Was Built on the Dividing Line between two quarter sections, he was, so far as personal residence was concerned, resident upon either quarter section and was entitled to enter whichever quarter section contained his improvement as a whole, where the qualification required by the statute

under which he claimed (Act June 22, 1838) was that a pre-emptor should be one "who was in possession * * * by personal residence thereon." *Lindsey v. Hawes*, 2 Black (U. S.) 554.

2. Improvement. — *Aiken v. Ferry*, 6 Sawy. (U. S.) 79, 1 Fed. Cas. No. 112; *U. S. v. Central Pac. R. Co.*, 84 Fed. Rep. 88, *affirmed* (C. C. A.) 94 Fed. Rep. 906; *Whitney v. Taylor*, 158 U. S. 85, *affirming* 45 Fed. Rep. 616; *Quinby v. Conlan*, 104 U. S. 420; *Ferguson v. McLaughlin*, 96 U. S. 174; *Hosmer v. Duggan*, 56 Cal. 257; *Kelley v. Wallace*, 14 Minn. 236; *Brown v. Corson*, 16 Oregon 388.

Improvement Need Not Have Been Made by Claimant. — *Langdon v. Joy*, 4 Dill. (U. S.) 391, 14 Fed. Cas. No. 8,062.

3. Cultivation. — *Kelley v. Wallace*, 14 Minn. 236; *Grand Gulf R., etc., Co. v. Bryan*, 8 Smed. & M. (Miss.) 234; *Dillingham v. Fisher*, 5 Wis. 475.

Residence Without Cultivation Not Sufficient. — *Grand Gulf R., etc., Co. v. Bryan*, 8 Smed. & M. (Miss.) 234.

Under the Acts of 1830 and 1834, a person to be entitled to a pre-emption right must have cultivated the land in the preceding year. *Stewart v. Haynes*, 5 Blackf. (Ind.) 163; *Fulton v. Doe*, 5 How. (Miss.) 751.

4. Erection of Dwelling. — *Aiken v. Ferry*, 6 Sawy. (U. S.) 79, 1 Fed. Cas. No. 112; *Ferguson v. McLaughlin*, 96 U. S. 174; *Kelley v. Wallace*, 14 Minn. 236; *Brown v. Corson*, 16 Oregon 388.

House Need Not Have Been Built by Claimant. — *Lansdale v. Daniels*, 100 U. S. 113, *affirming* 43 Cal. 41.

5. Hosmer v. Wallace, 97 U. S. 575, *affirming* 47 Cal. 461; *Hosmer v. Duggan*, 56 Cal. 257.

6. Baty v. Sale, 43 Ill. 351, 92 Am. Dec. 128.

7. Compliance with Statutes. — *Northern Pac. R. Co. v. McCormick*, 89 Fed. Rep. 659; *Baty v. Sale*, 43 Ill. 351, 92 Am. Dec. 128; *Ard v. Pratt*, 43 Kan. 419; *Ludeling v. Vester*, 20 La. Ann. 433. See also *Orillion v. Deslonde*, 9 La. 53.

Under the Pre-emption Act of Congress of 1841, a person forfeited his claim to a pre-emption if he failed to establish it before the public land sales occurred. *Ludeling v. Vester*, 20 La. Ann. 433.

give to him some inchoate right to the land.¹

(2) *Declaratory Statement* — (a) *In General.* — The most usual and necessary proceeding in the acquisition of a pre-emption right was the filing in the land office of the proper district of a statement or notice of claim or intention to pre-empt the property, usually termed the declaratory statement. This statement in a pre-emption claim bore substantially the same relation to a purchase under the pre-emption law that the original entry in a homestead case does to the final acquisition of title, the purpose of each being to place on record an assertion of an intention to obtain title under the respective statutes.² Where a declaratory statement was required by the pre-emption statute, its filing was indispensably necessary to give to the claimant any standing whatever as a pre-emptor,³ but there have been statutes which have dispensed with the requirement of such a statement.⁴

(b) *Lands Must Have Been Subject to Pre-emption.* — A declaratory statement made while the lands were not subject to pre-emption was of no validity,⁵ but where, after an application for pre-emption had been filed, the lands were withdrawn from the market for a short period, the officers of the land office had no right to require a new application in order to entitle one who had previously made an application to complete his purchase, there being no such requirement in the statute.⁶

(c) *Statement in Assumed Name.* — Declaratory statements under assumed names would have been purely fictitious and could have been set aside as absolutely void.⁷

(d) *Defective Statement — Second Filing.* — The provision of the Revised Statutes that "no person shall be entitled to more than one pre-emptive right, * * * nor where a party has filed his declaration of intention to claim the benefits of such provisions for one tract of land shall he file, at any future time, a second declaration for another tract,"⁸ did not prohibit the filing of a second declaratory statement for the same land when, by reason of defects or for any other reason, the first declaratory statement had become unavailing, but no rights of any third person had intervened.⁹

(e) *Time for Filing Statement* — *aa. LAND SUBJECT TO PRIVATE ENTRY.* — Under the *United States* statutes a person who settled upon and improved a tract of land subject at the time of settlement to private entry, and intended to purchase such tract under the pre-emption law, was required to file his declaratory statement with the register of the proper district within thirty days after the date of such settlement.¹⁰

bb. LAND NOT PROCLAIMED FOR SALE. — The statutes required that settlers on lands not yet proclaimed for sale must file their declaratory statements within three months from the time of settlement.¹¹

cc. UNSURVEYED LAND. — With regard to settlements which were authorized on unsurveyed lands, the pre-emption claimant was required to file his declaratory statement within three months from the date of the receipt in the district land office of the approved plat of the township embracing such pre-emption settlements.¹²

1. *Substantial Compliance.* — *Brown v. Corson*, 16 Oregon 388.

2. *Purpose of Requiring Statement.* — *Whitney v. Taylor*, 158 U. S. 85, *affirming* 45 Fed. Rep. 616.

3. *Statement Indispensable.* — *Whitney v. Taylor*, 158 U. S. 85, *affirming* 45 Fed. Rep. 616.

4. *The Act of March 27, 1854*, for the relief of settlers on lands reserved for railroad purposes, and the rules and regulations prescribed by the secretary of the interior in pursuance of that act, dispensed with the declaratory statement. *Collins v. Bartlett*, 44 Cal. 371.

5. *Lands Must Have Been Subject to Pre-emption.* — *Page v. Hobbs*, 27 Cal. 483.

6. *Baty v. Sale*, 43 Ill. 351, 92 Am. Dec. 128.

7. *Whitney v. Taylor*, 158 U. S. 85, *affirming* 45 Fed. Rep. 616.

8. Rev. Stat. U. S., § 2261.

9. *Second Statement.* — *Cumens v. Cyphers*, 56 Cal. 383.

10. *Land Subject to Private Entry.* — Rev. Stat. U. S., § 2264. See *Rush v. Valentine*, 12 Neb. 513.

11. *Land Not Proclaimed for Sale.* — Rev. Stat. U. S., § 2265. See *Johnson v. Towsley*, 13 Wall. (U. S.) 72, 2 Neb. 484, *affirming* 1 Neb. 95.

12. *Unsurveyed Land.* — Rev. Stat. U. S., § 2266; *Osborne v. Altschul*, 101 Fed. Rep. 739;

dd. EFFECT OF FAILURE TO FILE WITHIN REQUIRED TIME. — Where the statute fixing the time within which a declaratory statement must be filed provided merely that a failure to file within such time should result in a forfeiture of the pre-emption right in favor of the next actual settler, it was held that a declaratory statement filed after the expiration of the time allowed was nevertheless valid if it was filed before any other claim had been asserted to the land.¹

(*f*) **Acceptance and Approval.** — The acceptance of the declaratory statement by the local land officers was *prima facie* evidence that they had approved it as a *bona fide* application, and such acceptance and noting thereof on the books of the local land office was the official recognition of the pre-emption claim.²

j. **JURISDICTION TO PASS ON PRE-EMPTION CLAIMS.** — The jurisdiction to pass on the proof of the right to pre-emption was usually vested in the register and receiver of the land office,³ who acted judicially in passing upon the proofs⁴ and whose decision as to the facts of settlement, cultivation, etc., was final between the parties⁵ and could not be reviewed, revised, or annulled by the court,⁶ the only remedy for an error in these matters being by an appeal from an officer to another of the department, and perhaps, under special circumstances, to the President.⁷ But when the land officers misconceived or misconstrued the law governing the facts as found by themselves, their decision with respect to the law was not considered as final or conclusive, but the courts might afterwards grant the proper relief.⁸

Effect of Fraud in Establishing Pre-emption. — Where a pre-emption claimant applied to a court of equity to enforce his pre-emption claim against parties in possession, claiming under a legal title, they might well set up the fraud of the complainant in establishing the pre-emption right, though their interest was acquired subsequent to the fraud; and in such case the court would look to the finding of the register and receiver, not to determine whether there was sufficient evidence before them to authorize their finding, but whether their finding was not superinduced by fraud on the part of the pre-emption claimant. Where the representations made to the register and receiver by the person claiming the pre-emption, and sustained by his other witnesses, were clearly calculated to deceive them as to occupation and cultivation, a court of chancery might with propriety have disregarded the finding of the register and receiver, and considered the pre-emption right at large upon the allegations and proof, and in doing so have held those seeking to set it up against rights fairly and openly obtained to the *onus probandi*. And if upon the whole testimony the court of chancery found the claim to a pre-emption colorable, and fraudulent in law, and that it was found in favor of the claimant by the register and receiver upon false testimony, the court would not enforce it against the parties holding under a legal title subsequently acquired from the government.⁹

Megerle v. Ashe, 47 Cal. 632; *Damrell v. Meyer*, 40 Cal. 166; *Poppe v. Athearn*, 42 Cal. 606; *Schieffery v. Tapia*, 68 Cal. 184.

Courts Had No Authority to Dispense with This Requirement. — *Megerle v. Ashe*, 33 Cal. 74.

Statement Filed Before Plat Returned Nullity. — *Lansdale v. Daniels*, 100 U. S. 113, *affirming* 43 Cal. 41. But see *Collins v. Bartlett*, 44 Cal. 371.

1. *Johnson v. Towsley*, 13 Wall. (U. S.) 72, 2 Neb. 484, *affirming* 1 Neb. 95; *Lansdale v. Daniels*, 100 U. S. 113, *affirming* 43 Cal. 41. See also *Osborne v. Altschul*, 101 Fed. Rep. 739.

2. **Acceptance and Approval.** — *Whitney v. Taylor*, 158 U. S. 85, *affirming* 45 Fed. Rep. 616.

3. **Jurisdiction of Register and Receiver.** — *Kellam v. Rippey*, 3 Rob. (La.) 138; *Boyce v. Danz*, 29 Mich. 146.

Officers Need Not Act Together. — *Lytle v. State*, 9 How. (U. S.) 314, 12 Ark. 26, *reversing* 12 Ark. 9 (decided under Act of 1830). See

also *Potter v. U. S.*, 107 U. S. 126. *Contra*, *Fulton v. Doe*, 5 How. (Miss.) 751, (decided under Act of 1834).

4. **Officers Act Judicially.** — *Boyce v. Danz*, 29 Mich. 146.

5. **Finality of Decision.** — *Elliott v. Peirsol*, 1 Pet. (U. S.) 340; *Walker v. Hendrick*, 18 Ill. 570; *Tatro v. French*, 33 Kan. 49; *Henry v. Welsh*, 4 La. 547.

6. **Not Reviewable by Courts.** — *Henry v. Welsh*, 4 La. 547.

7. **Appeal to Other Officers.** — *Ard v. Pratt*, 43 Kan. 419.

8. **Review by Courts of Decisions as to Law.** — *Elliott v. Peirsol*, 1 Pet. (U. S.) 340; *Walker v. Hendrick*, 18 Ill. 570; *Tatro v. French*, 33 Kan. 49.

9. **Effect of Fraud in Establishing Pre-emption.** — *Lytle v. State*, 17 Ark. 608, *affirmed* 22 How. (U. S.) 193.

k. RIGHT COULD BE EXERCISED BUT ONCE. — Under the pre-emption statutes no person was entitled to more than one pre-emptive right,¹ and consequently it has been held that where a person who had settled upon and built a residence upon a quarter of a quarter-section, entered and purchased as a pre-emption only that quarter, he could not afterwards pre-empt the remainder of the quarter-section, although his improvements had extended over such remainder and he would have been entitled at the time of making his original pre-emption to enter the whole quarter-section.²

l. RIGHTS OF PRE-EMPTOR DURING OCCUPANCY AND BEFORE PURCHASE. — The state courts had jurisdiction to protect, by injunction, the possession of a pre-emptor of lands against the interference of an adverse claimant, pending the determination of the question of title by the department of the interior,³ and the pre-emptor's claim by open and notorious possession and occupancy was notice to all the world of his equitable title to all the benefits designed to be conferred by the provisions of the pre-emption law, and until the expiration of the time limited by it he had an unquestionable right to avail himself of these benefits, and no third person could interfere to defeat them.⁴

m. ASSIGNMENT OF RIGHT. — The assignability of a pre-emption right was a matter depending upon statutes which differed considerably from time to time.⁵

n. FINAL PROOF AND PAYMENT. — The pre-emption statutes allowed the pre-emptor a specified time after his settlement on the land and the filing of his declaratory statement, within which he was required to make proof and affidavit of his right to the benefit of the pre-emption law and to pay for the land.⁶ And a failure to make such proofs and payment within the time limited operated a forfeiture of his rights.⁷

Computation of Time. — Under these statutes it has been held that where land subject to pre-emption was temporarily withdrawn from sale, the time during which it was so withdrawn should not be counted in computing the time allowed a person who had filed an application for pre-emption to make his final proof and payment,⁸ and it has also been held that it was not the intention of the law wholly to exclude a person from its benefits merely because he had already been for the specified time in possession of the land, where he was not during that time qualified to take the benefit of the pre-emption law, but that where an alien settled on land before declaring his intention to become a citizen, but subsequently declared such intention and on the same day filed his claim, and made his proofs and paid for the land within the time allowed from such date, he obtained a good title notwithstanding the fact that the

1. Rev. Stat. U. S., § 2261. See *Sanford v. Sanford*, 139 U. S. 642, *affirming* 19 Oregon 3; *Baldwin v. Stark*, 107 U. S. 463, *reversing* 7 Neb. 114, *distinguishing* *Johnson v. Towsley*, 13 Wall. (U. S.) 72, 2 Neb. 484, *affirming* 1 Neb. 95.

Second Declaratory Statement for Same Land Not Prohibited Where First Defective. — See *supra*, this subsection, i. (2) (d) *Defective Statement — Second Filing*.

2. *Nix v. Allen*, 112 U. S. 129. See also *Landry v. Gautreau*, 1 Rob. (La.) 372. But compare *Kittridge v. Breaud*, 2 Rob. (La.) 40.

3. **Right to Possession.** — *Wood v. Murray*, 85 Iowa 505.

4. **Possession as Notice.** — *Bruner v. Manlove*, 4 Ill. 339, 36 Am. Dec. 551.

5. **Assignability of Pre-emption Right.** — See *McElyea v. Hayter*, 2 Port. (Ala.) 148; *Wynn v. Morris*, 16 Ark. 414, *appeal dismissed* 20

How. (U. S.) 3; *Stout v. Hyatt*, 13 Kan. 232; *Cravens v. Moore*, 61 Mo. 178.

6. **Time Allowed for Payment.** — Rev. Stat. U. S., §§ 2264, 2267; *Moore v. Robbins*, 96 U. S. 530, *reversing* *Robbins v. Bunn*, 54 Ill. 48, 5 Am. Rep. 75; *Morrison v. Stalnaker*, 104 U. S. 213, *affirming* 6 Neb. 363.

7. **Necessity for Payment.** — *Wynn v. Morris*, 16 Ark. 414, *appeal dismissed* 20 *How. (U. S.)* 3; *Grand Gulf R., etc., Co. v. Bryan*, 8 Smed. & M. (Miss.) 234; *Combs v. Dodd*, 4 Rob. (La.) 58; *Thompson v. Schlater*, 13 La. 119.

Where Another Person Has Subsequently Entered and Purchased, such person acquires a vested right which cannot be affected by a subsequent statute reviving the original pre-emption law and extending the time for pre-emptioners to complete their purchase. *Thompson v. Schlater*, 13 La. 119; *Combs v. Dodd*, 4 Rob. (La.) 58.

8. **Temporary Withdrawal of Land from Sale.** — *Baty v. Sale*, 43 Ill. 351, 92 Am. Dec. 128.

proofs and payment were made more than the specified time after the date of his first settlement.¹

Evidence of Payment. — The certificate of the receiver of public moneys, that a sum of money was paid him on a pre-emption by the pre-emptor, is not conclusive; it is susceptible of explanation, and it may be shown to be a mistake or that the payment was made by a different person.²

o. ABANDONMENT OF RIGHT. — The only abandonment or forfeiture which was contemplated by the earlier pre-emption laws was that which was evidenced by a failure to make proof and payment within the time prescribed by the law. Even in cases where the pre-emptor had equal right by virtue of cultivation and possession to several tracts of the public land, he was not held to have abandoned either until he had made a selection, although at the last moment.³

p. TITLE ACQUIRED BY COMPLETING PURCHASE. — The acts of Congress conferring pre-emption rights on the settlers on the public lands vested a legal title in the purchaser as soon as the purchase was made and the price paid; and the United States could not take back the land nor sell it to another.⁴

q. ACTIONS BY AND AGAINST PRE-EMPTORS — (1) *Presumption of Legality of Entry.* — It was held that a court must presume in favor of the legality of an entry, and is not authorized to pronounce it invalid when it appears that it might have been consistent with the law.⁵

(2) *Limitation of Actions.* — The statute of limitations did not commence to run against a pre-emptor until payment of the money according to law and the issuance of the patent certificate.⁶

(3) *Who Might Attack Title of Pre-emptor.* — Before any claimant could question the sufficiency of the title of a pre-emptor of the public lands of the United States to whom a patent had been issued by the government, he must have shown such title in himself as, but for the interference of such pre-emption, would have entitled him to the land in controversy.⁷

r. RETROSPECTIVE EFFECT OF PRE-EMPTION LAWS. — A California statute which protected the possession of settlers of public lands to the extent of one hundred and sixty acres has been held not applicable to a case where the settlement had occurred and a suit with reference to the land had been commenced between two claimants prior to the passage of the act.⁸

4. Homesteads and Free Grants. — *a. INTRODUCTORY — NATURE OF RIGHT.* — The homestead or free grant laws are those under which a settler who possesses certain qualifications, goes through certain formalities, and occupies and improves a particular tract of public land for a specific time, becomes entitled to receive a patent therefor from the government without any charge save the payment of certain fees to the land officers. The provisions of the United States Revised Statutes with regard to homesteads are in many respects similar to those with regard to pre-emptions, and hence it is advisable to read

1. *Settlement by Unqualified Person.* — Boyce v. Danz, 29 Mich. 146.

2. *Evidence of Payment.* — Grand Gulf R., etc., Co. v. Bryan, 8 Smed. & M. (Miss.) 234.

3. *Abandonment of Right.* — Wynn v. Morris, 16 Ark. 414, *appeal dismissed* 20 How. (U. S.) 3.

4. *Purchaser Acquires Legal Title.* — Kittridge v. Breaud, 4 Rob. (La.) 79. See also Godeau v. Phillips, 3 La. 59.

The Omission of the Register of the Land Office to Mark the Sale on the township plat in his office did not affect the title of a purchaser from the United States of a portion of the public domain, nor was it affected by a subsequent sale of the same lands, through error,

to another. Kittridge v. Breaud, 4 Rob. (La.) 79.

The Act of Adjudication or Decision of the register and receiver acting as land commissioners, in favor of a claimant of a pre-emption right to a tract of land, passed to such claimant all the right and title of the United States to the land claimed. Henry v. Welsh, 4 La. 547.

5. *Presumption of Legality of Entry.* — Saltmarsh v. Crommelin, 39 Ala. 54.

6. *Limitation of Actions.* — Lytle v. State, 17 Ark. 608, *affirmed* 22 How. (U. S.) 193.

7. *Who May Attack Title of Pre-emptor.* — Wynn v. Morris, 16 Ark. 414, *appeal dismissed* 20 How. (U. S.) 3.

8. *Retrospective Effect of Pre-emption Laws.* — O'Conner v. Corbitt, 3 Cal. 370.

this subsection in connection with the subsection on pre-emptions, which precedes it.

b. LAND SUBJECT TO HOMESTEAD ENTRY. — As a general rule the states have made all unappropriated public lands subject to homestead entry,¹ but lands to which the Indian title has not been extinguished are not subject to such entries.² The rule has been laid down by the land department that "lands subject to homestead entry are such as, under existing laws, are subject to pre-emption."³

c. AMOUNT OF LAND WHICH MAY BE ACQUIRED. — Under the United States Revised Statutes a homesteader is entitled to enter one quarter-section (one hundred and sixty acres) or less of lands which are subject to pre-emption at one dollar and twenty-five cents per acre, or eighty acres or less of lands subject to pre-emption at two dollars and fifty cents per acre.⁴

Additional Homestead Entry. — The statute further provides that every person owning and residing on land may enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres.⁵

Under the Ontario Free Grant and Homestead Act no person can be located for a free grant for a greater quantity of land than two hundred acres.⁶

d. HOW HOMESTEAD LAID OFF. — A homestead must be located in a body in conformity to the legal subdivisions of the public lands.⁷

e. WHO MAY ACQUIRE HOMESTEAD RIGHTS. — The United States Revised Statutes extend the homestead right to "every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws."⁸

Right to Acquire Adjoining Homestead. — In *California* it has been held that as the Code of Civil Procedure provides that whenever it appears in an action for partition that one or more of the tenants in common has sold to another person a specific tract by metes and bounds out of the common land, such tract shall be allotted and set apart to the purchaser if this can be done without

1. Under Rev. Stat. U. S., § 2289, all unappropriated public lands are subject to homestead entry. *Stewart v. McHarry*, 159 U. S. 643, *affirming* (Cal. 1893) 35 Pac. Rep. 141.

The Fact that Land Is Such as Might Be Acquired under the Timber Act (Act June 3, 1878, 20 U. S. Stat. at L. 89) does not preclude any person from acquiring the title under the homestead law if his entry was made before any person had applied to purchase under the Timber Act. *Johnson v. Bridal Veil Lumbering Co.*, 24 Oregon 182.

The Ontario Free Grant and Homestead Act (Rev. Stat. Ont., c. 24) empowers the lieutenant-governor in council to appropriate any public lands, not being mineral lands or fine timber lands, as free grants to actual settlers under such regulations as may be made by orders in council. *Canada Permanent Loan, etc., Co. v. Taylor*, 31 U. C. C. P. 41.

Entry Cannot Be Made on Land in Actual Possession of Another. — *Goodwin v. McCabe*, 75 Cal. 584.

2. Indian Lands. — *U. S. v. La Chappelle*, 81 Fed. Rep. 152.

3. General Circular of Jan. 1, 1889, set forth in *Copp's Public Land Laws*, vol. 1, p. 339 *et seq.*

For a treatment of this subject, see *supra*, this section, 3. *c. Lands Subject to Pre-emption.*

4. Amount of Land Which May Be Acquired. — *Stewart v. McHarry*, 159 U. S. 643, *affirming* (Cal. 1893) 35 Pac. Rep. 141; Rev. Stat. U. S., § 2289.

Entry of More than One Hundred and Sixty Acres. — The uniform custom of the land department to allow the entry of a technical quarter-section to be made under the provisions of the homestead laws regardless of its actual area, the claimant being entitled to purchase any excess over the one hundred and sixty acres which the law allowed as a homestead, at the rate provided by law, is not erroneous. *Tictin v. U. S.*, 36 Ct. Cl. 1.

5. Additional Homestead Entry. — *Stewart v. McHarry*, 159 U. S. 643, *affirming* (Cal. 1893) 35 Pac. Rep. 141; Rev. Stat. U. S., § 2289.

6. Ontario Statute. — Rev. Stat. Ontario, c. 24; *Canada Permanent Loan, etc., Co. v. Taylor*, 31 U. C. C. P. 41.

The Public Lands Act of 1860 limited the area of free grants to one hundred acres. *Canada Permanent Loan, etc., Co. v. Taylor*, 31 U. C. C. P. 41.

7. How Homestead Laid Off. — Rev. Stat. U. S., § 2289; *Stewart v. McHarry*, 159 U. S. 643, *affirming* (Cal. 1893) 35 Pac. Rep. 141.

8. Who May Acquire Homestead Rights. — Rev. Stat. U. S., § 2289; *Stewart v. McHarry*, 159 U. S. 643, *affirming* (Cal. 1893) 35 Pac. Rep. 141.

material injury to the rights and interests of the other cotenants; such a purchaser has before partition such an ownership in the specific tract sold to him as will entitle him to file a claim upon adjoining premises as an "adjoining farm homestead." The contingency that the land purchased might not be allotted to the purchaser on partition does not destroy or affect his ownership for the purposes of the homestead right.¹

Oklahoma Lands — Entry Before Opening. — Under the acts of Congress and the proclamation of the President for the opening up for settlement of lands in Oklahoma, any person who was within the prohibited territory at the time when the land was opened by law for settlement was precluded from acquiring any homestead,² but the mere fact that a person was within the territory prior to the time fixed for its opening did not preclude him from obtaining a homestead where he retired without the limits of the territory and at the time of the opening made the race with the others, and obtained no advantage by reason of his entry.³

The Ontario Revised Statutes extend the privilege of homesteads or free grants only to men, and exclude women.⁴

f. PRELIMINARY AFFIDAVIT AND PAYMENT — ENTRY. — A person desiring to take advantage of the homestead law must, upon application to the register of the land office in which he is about to make his entry, make affidavit before the register or receiver that he is the head of a family, or is twenty-one years or more of age, or has performed service in the army or navy of the United States, and that such application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person; and upon filing such affidavit with the register or receiver, on payment of five dollars when the entry is of not more than eighty acres, and of ten dollars when the entry is for more than eighty acres, he will thereupon be permitted to enter the amount of land specified.⁵

g. CHANGE FROM PRE-EMPTION TO HOMESTEAD ENTRY. — A person who had filed a pre-emption claim and become entitled to the benefit of the law governing pre-emptions could avail himself of the rights given by the homestead act.⁶ But where a person having the qualifications of a pre-emptor attempted to secure title to a tract of land under the pre-emption law by filing thereon, and his pre-emption filing was subsequently canceled on account of

1. **Right to Acquire Adjoining Homestead.** — *Stewart v. McHarry*, (Cal. 1893) 35 Pac. Rep. 141, *affirmed* 159 U. S. 643.

2. **Presence in Prohibited Territory at Time of Opening.** — *Smith v. Townsend*, 148 U. S. 490, *affirming* 1 Okla. 117; *Payne v. Robertson*, 169 U. S. 323, *affirming* *Payne v. Foster*, (Okla. 1893) 33 Pac. Rep. 424; *Calhoun v. Violet*, 173 U. S. 60, *affirming* 4 Okla. 321.

The Provision with Regard to Honorably Discharged Union Sailors and Soldiers was intended only to give them an equal right with others to acquire a homestead within the territory, and in no way operated to relieve them from the general restrictions as to going into the territory. *Calhoun v. Violet*, 173 U. S. 60.

3. **Entry and Exit Before Time of Opening.** — *Potter v. Hall*, 189 U. S. 292, *reversing* 11 Okla. 173; *McClung v. Penny*, (Okla. 1902) 70 Pac. Rep. 404; *Winebrenner v. Forney*, 11 Okla. 565, *affirmed* 189 U. S. 148.

It would appear that these cases necessarily overrule *Patterson v. Wilson*, 11 Okla. 75, in so far as that case held that the mere entry before the opening of the territory defeated the right of homestead, but in this last case it was also

considered that the claimant had by his entry gained a decided advantage over those who had remained without the limits of the country to be opened.

4. Rev. Stat. Ont., c. 24; *Rogers v. Lowthian*, 27 Grant Ch. (U. C.) 559.

The Act of 31 Vict., c. 8, permitted such grants to be made to a woman, but the peculiar privileges of the estate were only applicable where the locatee was a man. *Rogers v. Lowthian*, 27 Grant Ch. (U. C.) 559.

5. **Preliminary Affidavit and Payment — Entry.** — Rev. Stat. U. S., § 2290; *Stewart v. McHarry*, 159 U. S. 643, *affirming* (Cal. 1893) 35 Pac. Rep. 141.

Not Necessary that Entry Be Made Before Settlement. — A settler, claiming a homestead in good faith, can, for the purpose of improving the land, cut down the necessary timber before he files his entry in the land office. There is nothing in the homestead act requiring that an entry should be made in the land office before settlement. *U. S. v. Yoder*, 5 McCrary (U. S.) 615.

6. **Change from Pre-emption to Homestead Entry.** — *U. S. v. Yoder*, 5 McCrary (U. S.) 615.

his noncompliance with the provisions of the statute and the regulations of the United States land department concerning residence and improvements, he could not afterward claim the land as a settler under the homestead law, if an adverse claimant had in the meantime intervened and obtained a legal right thereto.¹

h. RESIDENCE AND CULTIVATION. — A homesteader, in order to perfect his rights, must, if not settled upon the land at the time of making his entry at the land office, within six months thereafter establish his actual residence, in a house, upon the land,² and must continuously reside upon, cultivate, and improve the land for five years.³

i. FINAL PROOFS. — In order to obtain a patent the homesteader must, within two years after the completion of his five years' residence, make final proofs of his compliance with the law, and also make an affidavit that no part of the land has been alienated except as provided by law, establish his citizenship, and take the oath of allegiance.⁴

j. INTEREST AND RIGHTS OF HOMESTEADER AFTER ENTRY AND BEFORE RIGHT TO PATENT COMPLETE. — The original entry of a homesteader practically amounts to nothing more than a declaration of intention,⁵ and while he thereby obtains an inchoate title⁶ he does not acquire any vested right against the government⁷ or any ownership in the land.⁸

Right of Possession. — He does, however, obtain the right to possession of the land.⁹

Right to Cut Timber. — A homestead claimant, in occupancy of lands which he has entered but which he has not paid for, has no right to cut the timber growing thereon, except for the purpose of improving the land so that it may be profitably used for agricultural purposes or may be better adapted to convenient occupation. If the timber is severed for the purposes of sale alone,

1. *Ard v. Pratt*, 43 Kan. 419.

2. *Residence Must Be Established Within Six Months.* — General Circular of Jan. 1, 1889, set forth in Copp's Public Land Laws, vol. 1, p. 339 *et seq.*

Mistake as to Location of House. — Where the house in which a homestead claimant was living at the date of the homestead entry was not upon the lands so entered but was a short distance therefrom, but he believed at the time of the entry that his house was on the lands entered by him as a homestead, and the mistake in the location thereof was corrected by him by the removal of his actual residence to the land covered by his entry as soon as the true boundaries were discovered, the original homestead entry was valid under the laws of the United States. *Wormouth v. Gardner*, 105 Cal. 149.

3. *Five Years' Residence and Cultivation.* — *Long v. Culp*, 14 Kan. 412; *Hayes v. Carroll*, 74 Minn. 134.

Where a person makes a pre-emption filing upon eighty acres of public land, and claims the same under the pre-emption law, he cannot, before final proof, claim another eighty acres of land under a homestead entry, as residence is essential both under the pre-emption and homestead laws. *Ard v. Brandon*, 43 Kan. 425.

Service in Army or Navy Equivalent to Residence. — See *Hastings, etc., R. Co. v. Whitney*, 132 U. S. 357, *affirming* 34 Minn. 538.

A Residence for Voting Purposes in Another Precinct from the land precludes an entryman from claiming residence at the same time on the land for homestead purposes. *Small v. Rakestraw*, (Mont. 1903) 72 Pac. Rep. 746.

The Act of March 2, 1889, confirmed the rights of persons who in good faith were on May 1, 1888, in the "actual possession" of the lands forfeited by said act. The words "actual occupation" as there used mean residence. *Edwards v. Begole*, (C. C. A.) 121 Fed. Rep. 1.

4. *Final Proofs.* — *Hayes v. Carroll*, 74 Minn. 134.

5. *Whitney v. Taylor*, 158 U. S. 85, *affirming* 45 Fed. Rep. 616.

6. *Schoolfield v. Houle*, 13 Colo. 394; *Hayes v. Carroll*, 74 Minn. 134.

Segregation of Lands Settled upon. — A settlement made by a homestead claimant upon the public lands of the United States and compliance with Act of Congress on the subject segregated the same from the public lands and cut off intervening claims, and such is the ruling of the land department of the United States. *Faull v. Cooke*, 19 Oregon 455, 20 Am. St. Rep. 836.

7. *Whitney v. Taylor*, 158 U. S. 85, *affirming* 45 Fed. Rep. 616; *Wagstaff v. Collins*, 97 Fed. Rep. 3, 38 C. C. A. 19.

8. *Schoolfield v. Houle*, 13 Colo. 394.

A Contract for the Sale of Land held under a homestead entry is void if entered into prior to the time of acquiring title thereto by the homesteader. *Brake v. Ballou*, 19 Kan. 397; *Mellison v. Allen*, 30 Kan. 382; *Weeks v. White*, 41 Kan. 569.

9. *Right of Possession.* — *U. S. v. Turner*, 54 Fed. Rep. 228; *Kitts v. Austin*, 83 Cal. 167; *Goodwin v. McCabe*, 75 Cal. 584; *Whittaker v. Pendola*, 78 Cal. 296; *Hastay v. Bonness*, 84 Minn. 120; *French v. Cresswell*, 13 Oregon 418.

then the cutting is wrongful, and the timber when cut becomes the absolute property of the United States. In such case the cutting becomes waste, and in accordance with well-settled principles the owner of the fee may seize the timber cut, arrest it by replevin, or proceed in trover for its conversion.¹

Removal of Improvements on Cancellation of Entry. — A homestead settler who makes improvements upon a tract of government land and whose entry is afterwards canceled may remove the same after the land has been awarded to an adverse settler.²

k. DEATH OF HOMESTEADER. — It has been said that a homestead settler has no devisable interest in the land until he has completed the term of residence required to entitle him to make final proof.³ In case of his death before such time, but after entry, the right to complete the term of residence and receive a patent for the land passes, under the United States statutes, to his widow, if he leaves one surviving him, to the complete exclusion of his heirs.⁴ If he leaves no widow, this right passes to his heirs.⁵

If There Are Infant Heirs, provision is made by statute for a sale of the land for their benefit,⁶ but this provision applies only where all the heirs are infants,⁷ and does not have the effect, in case some of the heirs are adults and some minors, of giving the property to the latter to the complete exclusion of the former.⁸

l. JURISDICTION TO PASS ON HOMESTEAD CLAIMS. — The land department has exclusive jurisdiction to examine into and pass upon the facts with relation to the sufficiency of a homestead entry, and its conclusion upon such facts cannot be examined in the courts in the absence of a clear showing that it was procured by fraud or imposition,⁹ but the courts may examine and correct if necessary the conclusions of law reached by the land department upon such facts.¹⁰

m. RELATION BACK OF PATENT. — A homestead claimant's riparian rights attached from the date of his settlement, provided he complied with the law and obtained a patent for the land, and that when such patent was issued it related to the date of settlement and cut off the right to divert a stream of water running through such homestead.¹¹

n. TAXATION OF HOMESTEAD. — Lands taken under the homestead act are not liable to taxation until the right to a patent exists, and it is questionable

1. **Right to Cut Timber.** — *U. S. v. Freyberg*, 32 Fed. Rep. 195; *U. S. v. Stores*, 14 Fed. Rep. 824; *Timber Cases*, 11 Fed. Rep. 81. See also *U. S. v. Smith*, 11 Fed. Rep. 487.

2. **Removal of Improvements on Cancellation of Entry.** — *Winans v. Beidler*, 6 Okla. 603.

3. *McCune v. Essig*, (C. C. A.) 122 Fed. Rep. 588, *affirming* 118 Fed. Rep. 273; *Chapman v. Price*, 32 Kan. 446. See also *Gjerstadengen v. Van Duzen*, 7 N. Dak. 612, 66 Am. St. Rep. 679. But see *Rev. Stat. U. S.*, § 2291.

4. **Right of Widow.** — *Rev. Stat. U. S.*, § 2291; *McCune v. Essig*, (C. C. A.) 122 Fed. Rep. 588, *affirming* 118 Fed. Rep. 273; *Jarvis v. Hoffman*, 43 Cal. 314; *Chapman v. Price*, 32 Kan. 446; *Bernier v. Bernier*, 72 Mich. 43, *reversed* on other grounds 147 U. S. 242; *Hayes v. Carroll*, 74 Minn. 134; *Perry v. Ashby*, 5 Neb. 291; *Crist v. Cosby*, 11 Okla. 635.

Where a Patent Was Issued to the Heirs Through Mistake. the widow of the homesteader being entitled to make the final proofs and receive a patent, it was held that upon compliance by her with the law she became the equitable owner of the land and that the patentees held the legal title in trust for her. *Hayes v. Carroll*, 74 Minn. 134.

5. **Right of Heirs.** — *Rev. Stat. U. S.*, § 2291; *Bernier v. Bernier*, 147 U. S. 242; *Chant v. Reynolds*, 49 Cal. 213; *Chapman v. Price*, 32 Kan. 446; *Hayes v. Carroll*, 74 Minn. 134.

6. *Rev. Stat. U. S.*, § 2292. See *Anderson v. Peterson*, 36 Minn. 547.

7. **Provision Applies Only When All Heirs Infants.** — *Crumb v. Hambleton*, 86 Mo. 501.

8. **Adult Heirs Not Excluded.** — *Bernier v. Bernier*, 147 U. S. 242, *reversing* 72 Mich. 43; *Holloman v. Bullock*, (Miss. 1903) 34 So. Rep. 355; *Crumb v. Hambleton*, 86 Mo. 501.

9. **Decision of Land Department on Question of Fact Final.** — *Stewart v. McHarry*, 159 U. S. 643, *affirming* (Cal. 1893) 35 Pac. Rep. 141; *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94; *Edwards v. Begole*, (C. C. A.) 121 Fed. Rep. 1. See also *Burfenning v. Chicago, etc., R. Co.*, 163 U. S. 321; *Johnson v. Drow*, 171 U. S. 93; *Gardner v. Bonestell*, 180 U. S. 362.

10. **Courts May Review Conclusions of Law.** — *Stewart v. McHarry*, 159 U. S. 643, *affirming* (Cal. 1893) 35 Pac. Rep. 141.

11. **Relation Back of Patent.** — *Sturr v. Beck*, 133 U. S. 541; *Faull v. Cooke*, 19 Oregon 455, 20 Am. St. Rep. 836.

whether they are liable until the issue of the patent.¹

o. HOMESTEAD NOT LIABLE FOR DEBTS CONTRACTED BEFORE ISSUANCE OF PATENT. — A homestead is exempt from liability for debts contracted prior to the issuing of the patent,² and for the purpose of this exemption ditches and the water in them flowing over the homestead and used for the purpose of irrigating it, and without the use of which water upon the land it would be of but little value and could probably not have been occupied as a homestead, should be treated as a part of the land itself and not severable therefrom.³

p. RESTRICTIONS ON ALIENATION. — The Ontario statute⁴ provides that no alienation or mortgage of free grant lands made by the locatee after the issue of the patent, and within twenty years from the date of such location and during the lifetime of the wife of the locatee, shall be valid or of any effect unless made by a deed in which the wife of the locatee is one of the grantors with her husband and executes the same.⁵ But this restriction does not apply where, although a patent for crown lands describes the patentee as a "free grant settler," the patent on its face grants the land absolutely and unconditionally and does not conform to the statutory requirements with reference to a patent for a free grant, as such patent must be considered as an absolute and unconditional grant.⁶

5. New Madrid Locations — *a. PURPOSE AND PROVISIONS OF ACT OF 1815* — (1) *In General.* — In 1815 an act was passed for the relief of those persons whose lands in the county of New Madrid, Missouri, had been materially injured by earthquakes. The act provided that such owners might locate certain amounts of the public lands of that territory in lieu of the lands injured, provided, however, that their injured lands should thereupon revert to the United States.⁷ The act was not a direct grant of land, but merely an offer on the part of the government to exchange other land for that which had been injured.⁸

(2) *Procedure for Acquiring Land under Act.* — Under the procedure provided by the act, the recorder of land titles issued to the claimant upon proof of his ownership of injured land a certificate showing his right to locate. The deputy surveyor then made, upon the claimant's application, a location of the land, and returned to the recorder a plat of the survey and a notice in writing designating the tract located and the name of the claimant. This return was recorded by the recorder, who transmitted to the general land office a report of the claims allowed, and issued to the claimant a certificate showing his right to a patent, which certificate on being transmitted to the commissioner of the general land office entitled the claimant to a patent to be issued in like manner as provided by law for other public lands of the United States.⁹

(3) *Persons Entitled to Benefit of Act.* — Certificates of right to locate were issued in the name of the original confirmee or grantee of the New Madrid lands "or his legal representatives."¹⁰ The legal representatives, or persons entitled to the benefit of the act, could not be other than the owners of the

1. *Taxation of Homestead.* — Long v. Culp, 14 Kan. 412.

2. *Homestead Not Liable for Debts Contracted Before Issuance of Patent.* — Struby Estabrook Mercantile Co. v. Davis, 18 Colo. 93; Faull v. Cooke, 19 Oregon 455, 20 Am. St. Rep. 836.

Voluntary Mortgage in Fee of Land Entered as Homestead Valid. — Orr v. Stewart, 67 Cal. 275.

3. Faull v. Cooke, 19 Oregon 455, 20 Am. St. Rep. 836.

4. Rev. Stat. Ontario, c. 24, § 15.

5. Rogers v. Lowthian, 27 Grant Ch. (U. C.) 559; Canada Permanent Loan, etc., Co. v. Taylor, 31 U. C. C. P. 41.

6. Canada Permanent Loan, etc., Co. v. Taylor, 31 U. C. C. P. 41.

7. *The New Madrid Act.* — Act of April 17, 1815, 3 U. S. Stat. at L. 211. And see cases cited in following notes.

8. *Act Merely an Offer to Exchange Land.* — Rector v. Gaines, 19 Ark. 70; Holme v. Strautman, 35 Mo. 293; Lessieur v. Price, 12 Mo. 14, affirmed 12 How. (U. S.) 59.

9. *Procedure for Acquiring Land under Act.* — Hot Springs Cases, 92 U. S. 698; Lessieur v. Price, 12 How. (U. S.) 59; Bagnell v. Broderick, 13 Pet. (U. S.) 436; Gaines v. Hale, 20 Ark. 168; Ashley v. Rector, 20 Ark. 359; Holme v. Strautman, 35 Mo. 293.

10. *Certificate to A "or His Legal Representatives" Not Void for Uncertainty.* — Bryan v. Wear, 4 Mo. 106.

injured land at the time of the passage of the act or persons claiming under them.¹ The act conferred no rights whatever upon former owners who had parted with their interests prior to the passage of the act.² Who are legal representatives is a question of fact to be determined by the laws of the state where the property is situated, and it has been held that under the laws of Missouri a legal representative may be created by adverse possession under claim of ownership as well as by descent or purchase.³ Certificates issued through fraud or mistake are not void but voidable, and until avoided by the United States cannot be impeached by third parties.⁴ Persons entitled to locate under this act were preferred claimants and might locate upon lands before they were offered at public sale under a proclamation of the President.⁵

(4) *Lands Subject to Location.* — The act provided that locations might be made upon any of the public lands of the territory of Missouri which were authorized by law to be sold, and any location made upon lands expressly reserved from sale at the time of the location is void.⁶ A location made upon land reserved from sale would be validated if after the expiration of the reservation, and while the land was subject to sale, a patent were issued to the claimant, but if the patent is not issued until after the lands are again reserved from sale it confers no title.⁷

(5) *When Location Complete.* — In controversies over land claimed under New Madrid locations it is important to determine at what time a valid appropriation of the land takes place. It has been settled that the locator acquires no vested interest in the land located until the survey of the land is returned and recorded in the recorder's office. At this time the land located is severed from the public domain so as to exempt it from further sale or disposition by the government, the injured land reverting to the United States, and the locator acquiring an equitable title to the land located.⁸ The strictly legal title to the land located remains in the United States until the issuance of the patent.⁹ Although as against the United States the claimant acquires no vested right to the property, until the return and record of the survey, yet as against third parties he acquires by the acts preceding such return and record an equitable interest which the courts will recognize and uphold, and which may be sold under execution.¹⁰

(6) *Relinquishment of Injured Lands.* — The act provided that the title to the injured lands of those persons availing themselves of the provisions of the act should revert to the United States. No formal relinquishment, however,

1. Act Applicable Only to Owners of Injured Land at Time of Act or Persons Claiming under Them. — *McCamant v. Patterson*, 39 Mo. 100; *Holme v. Strautman*, 35 Mo. 293; *Wear v. Bryant*, 5 Mo. 147; *Bryan v. Wear*, 4 Mo. 106.

2. *McCamant v. Patterson*, 39 Mo. 100.

3. Legal Representative Created by Adverse Possession. — *Hammond v. Coleman*, 4 Mo. App. 307.

4. Certificates Issued Through Fraud or Mistake. — *Mitchell v. Parker*, 25 Mo. 31; *Stuart v. Rector*, 1 Mo. 361. See also *Holme v. Strautman*, 35 Mo. 293.

5. *Barry v. Gamble*, 3 How. (U. S.) 32, affirming 8 Mo. 88.

6. Locations Could Be Made Only on Public Lands Authorized by Law to Be Sold. — *Hot Springs Cases*, 92 U. S. 698, affirming 10 Ct. Cl. 289; *Easton v. Salisbury*, 21 How. (U. S.) 426; *Bissell v. Penrose*, 8 How. (U. S.) 317; *Mills v. Stoddard*, 8 How. (U. S.) 345; *Stoddard v. Chambers*, 2 How. (U. S.) 284; *Hale v. Gaines*, 22 How. (U. S.) 144, affirming 19 Ark. 94; *Rector v. Gaines*, 19 Ark. 70; *Cummings v. Powell*, 116 Mo. 473, 38 Am. St. Rep. 610,

affirming 97 Mo. 524; *Wright v. Rutgers*, 14 Mo. 585; *Kennett v. Cole County Ct.*, 13 Mo. 139.

7. *Mills v. Stoddard*, 8 How. (U. S.) 345; *Stoddard v. Chambers*, 2 How. (U. S.) 284.

8. Location Complete on Return and Record of Survey. — *Hot Springs Cases*, 92 U. S. 698, affirming 10 Ct. Cl. 289; *Mackay v. Easton*, 19 Wall. (U. S.) 619; *Barry v. Gamble*, 3 How. (U. S.) 32; *Bagnell v. Broderick*, 13 Pet. (U. S.) 436; *Hale v. Gaines*, 22 How. (U. S.) 144, affirming 19 Ark. 94; *Rector v. Ashley*, 6 Wall. (U. S.) 142, affirming 20 Ark. 359; *Lessieur v. Price*, 12 How. (U. S.) 59, affirming 12 Mo. 14; *Gaines v. Hale*, 26 Ark. 168; *Rector v. Gaines*, 19 Ark. 70; *Hammond v. Johnston*, 93 Mo. 198; *Gibson v. Chouteau*, 39 Mo. 536; *Holme v. Strautman*, 35 Mo. 293; *Gray v. Givens*, 26 Mo. 291.

9. Legal Title in United States until Issuance of Patent. — *Fenn v. Holme*, 21 How. (U. S.) 481; *Rector v. Ashley*, 6 Wall. (U. S.) 142; *Mackay v. Easton*, 19 Wall. (U. S.) 619.

10. *Kingman v. Holthaus*, 59 Fed. Rep. 305; *Hammond v. Johnston*, 93 Mo. 198.

was necessary, it being effected by operation of law upon the return and record of the survey of the lands located.¹

(7) *Actions of Ejectment — Missouri Statute.* — A statute of Missouri provided that actions of ejectment might be maintained upon the New Madrid locations, and such actions could be brought in the state courts prior to the issuance of the patent;² but in the United States courts a plaintiff in ejectment could recover only by proving in himself the legal title, which remained in the United States until the issuance of the patent.³

The Statute of Limitations does not begin to run on a New Madrid location in favor of an adverse possession until the legal title has passed out of the United States.⁴

b. PROVISIONS OF ACT OF 1822. — In 1822, the attorney-general being of the opinion that locations made before the sectional and quarter-sectional lines of the public surveys had been run and which did not conform to such lines were invalid, an act was passed providing that all such locations should be perfected into grants provided they had been made in other respects in conformity with the provisions of the Act of 1815.⁵ The act, however, did not validate locations the surveys of which had not been returned and recorded prior to the passage of the act.⁶ The same act provided further that locations not made within one year after its passage should be null and void;⁷ but this provision was held to apply only to those acts required to be done by the locator, and so a location was not void by reason of a failure on the part of the officers of the government to perform the subsequent acts required of them within the time limited.⁸

c. PROVISIONS OF ACT OF 1864. — In 1864 an act was passed by which the United States relinquished all title to certain lands located under New Madrid certificates, to the representatives of the persons in whose names the locations were made.⁹ But this act did not validate locations made on land which was not at the time of the location authorized to be sold and which prior to the passage of this act the government had otherwise disposed of.¹⁰

6. *Timber Culture.* — The timber culture laws of the United States were passed to encourage the growth of timber on the western prairies. The acquisition of title was conditional upon the planting of a part of the claim with timber and keeping it in a good state of cultivation for a term of years after the entry of the land.¹¹ By the Act of Congress of March 3, 1891, the laws

1. *Formal Relinquishment of Injured Lands Unnecessary.* — See *Hot Springs Cases*, 92 U. S. 698; *Holme v. Strautman*, 35 Mo. 293; *Wear v. Bryant*, 5 Mo. 147; *Dunn v. Miller*, 8 Mo. App. 467.

2. *In State Courts Ejectment Maintained upon Locations Prior to Issuance of Patent.* — *Gray v. Givens*, 26 Mo. 291; *Holme v. Strautman*, 35 Mo. 293.

3. *In United States Courts Plaintiff in Ejectment Must Show Legal Title.* — *Fenn v. Holme*, 21 How. (U. S.) 481.

4. *Statute of Limitations Does Not Run on Location until Legal Title Has Passed out of United States.* — *Gibson v. Chouteau*, 13 Wall. (U. S.) 92; *Miller v. Dunn*, 62 Mo. 216; *Dunn v. Miller*, 75 Mo. 260.

Earlier Missouri Cases Held Statute to Run from Return of Survey. — *Cabanne v. Lindell*, 12 Mo. 184; *Gray v. Givens*, 26 Mo. 291; *Gibson v. Chouteau*, 39 Mo. 536, *reversed* in 13 Wall. (U. S.) 92.

5. *Locations Made Prior to Public Surveys Validated* — Act of April 26, 1822, 3 U. S. Stat. at L. 668; *Mackay v. Easton*, 19 Wall. (U. S.) 619, *affirming* 2 Dill. (U. S.) 41; *Barry*

v. Gamble, 3 How. (U. S.) 32, *affirming* 8 Mo. 88.

6. *Locations Not Validated unless Surveys Returned and Recorded.* — *Hot Springs Cases*, 92 U. S. 698, *affirming* 10 Ct. Cl. 289.

7. *Locations Void unless Made Within One Year After Passage of Act.* — Act of April 26, 1822, 3 U. S. Stat. at L. 668, § 2; *Easton v. Salisbury*, 21 How. (U. S.) 426; *Hale v. Gaines*, 22 How. (U. S.) 144, *affirming* 19 Ark. 94.

8. *Provision Applicable only to Acts to Be Done by Locator.* — *Gibson v. Chouteau*, 39 Mo. 536; *Cabanne v. Lindell*, 12 Mo. 184; *Hammond v. Coleman*, 4 Mo. App. 307.

9. Act of June 30, 1864, 13 U. S. Stat. at L. 581. See *Cummings v. Powell*, 116 Mo. 473, 38 Am. St. Rep. 610, *affirming* 97 Mo. 524; *Dunn v. Miller*, 75 Mo. 260.

10. *Cummings v. Powell*, 116 Mo. 473, 38 Am. St. Rep. 610, *affirming* 97 Mo. 524.

11. *Timber Culture Lands* — 17 Stat. at L. 605; 18 Stat. at L. 21; 19 Stat. at L. 54; 20 Stat. at L. 133; U. S. v. Shinn, 14 Fed. Rep. 448; *Cooper v. Wilder*, 111 Cal. 191, 52 Am. St. Rep. 163; other cases cited *infra*, this note.

Status of Inchoate Right — As Against Tres-

were repealed with a proviso saving all *bona fide* claims lawfully initiated before the passage of the repealing statute.¹

7. Licenses to Cut Timber — *a.* IN CANADA. — The Canadian Public Lands Act² requires a license of occupation to be under the hand and seal of the commissioner of crown lands, but it has been held that the words of the statute do not make it necessary that a license to cut timber should be under seal.³

In New Brunswick a license to cut trees on crown lands may be issued in the name and under the official seal of the lieutenant-governor instead of in the name of the sovereign and under the great seal of the province.⁴

Validity of Survey. — Where a survey has been adopted and acted upon by the government it must stand until changed by competent authority, and although an authorized survey locates the line differently, no action for trespass will lie thereunder where such survey has not been acted upon by the department.⁵

Nature of License. — It was formerly held that a licensee to cut timber had not such an interest in the land as would enable him to maintain trespass *quare clausum fregit*.⁶ These decisions led to the passage of an act⁷ which provided that during the continuance of a license the licensee should be deemed to be in possession of the land and could maintain an action of trespass, trover, or replevin against any person for cutting or carrying away any trees, timber, or lumber from such land. This act gave to the licensee no greater interest in the land than he had before, but simply furnished a remedy against trespasses upon his rights.⁸ The license given by the Public Lands Act of 1869 conferred upon the grantee a right to take possession of and occupy the land therein comprised and to maintain suits in law or equity against any wrongdoer or trespasser as effectually as he could do under a patent from the crown.⁹ A license issued under authority of the Public Lands Act vests in the holder thereof all rights of property whatsoever in all trees, timber, and lumber cut within the limits of the license during the term thereof, whether cut by the holder of the license or by any other person with or without his consent, and entitles the holder thereof to seize such lumber where found in the possession of any unauthorized person, to institute actions against wrongful possessors or trespassers, and to prosecute all trespassers and other offenders and recover damages.¹⁰ Such license, if for less than one year, is personalty, and not an estate in the land itself.¹¹

Rights of Licensee Superior to Those of Vendee. — The title of a vendee of public land is subject to the rights of a prior licensee to cut timber, and he is not entitled to an injunction to restrain such licensee from cutting timber upon the land sold.¹²

Under the Free Grants and Homestead Act of 1868, it was held that a license to cut timber on land comprised within the act did not enable the licensee to cut after the issue of a patent to another person, although issued during the currency of the license year, the act expressly declaring that all trees remain-

passers. — Carner v. Chicago, etc., R. Co., 43 Minn. 375; Lee v. Watson, 15 Mont. 228; Hastings, etc., R. Co. v. Ingalls, 15 Neb. 123; Olson v. Huntamer, 6 S. Dak. 364.

On Death of Entryman. — Cooper v. Wilder, 111 Cal. 191, 52 Am. St. Rep. 163; Aspey v. Barry, 13 S. Dak. 220.

1. Repealing Act. — 26 Stat. at L. 1095.

2. Canadian Timber License. — 23 Vict., c. 2.

3. McMullen v. Macdonell, 27 U. C. Q. B. 36.

4. Beckwith v. M'Phelim, 7 N. Bruns. 501.

5. Validity of Survey. — White v. Dunlop, 27 U. C. Q. B. 237.

6. Nature of License. — Kerr v. Connell, 2 N. Bruns. 133; Breckenridge v. Woolner, 8 N. Bruns. 303; Monahan v. Foley, 4 U. C. Q. B.

129; McLaren v. Rice, 5 U. C. Q. B. 151; Sinnott v. Scoble, 11 Can. Sup. Ct. 571.

7. 22 Vict., c. 23 (Con. Stat. 1059).

8. Laughlan v. Prescott, 1 N. Bruns. Eq. Rep. 406. See also New Brunswick, etc., Land Co. v. Kirk, 6 N. Bruns. 443.

9. Gilmour v. Mauroit, 14 App. Cas. 645; Gilmour v. Paradis, 3 Montreal Q. B. 449.

10. McMullen v. Macdonell, 27 U. C. Q. B. 36.

11. Bennet v. O'Meara, 15 Grant Ch. (U. C.) 396.

12. Rights of Licensee Superior to Those of Vendee. — Hall v. Dominion of Canada Land, etc., Co., 8 Can. Sup. Ct. 631; Farquharson v. Knight, 25 U. C. Q. B. 413; Price v. Leblanc, 11 Quebec Super. Ct. 30.

ing on the land at the time when the patent issued should pass to the patentee.¹

Construction of License. — On the principle that all crown grants are to be construed most favorably for the crown, it seems that no covenant or stipulation not expressed will be implied in such licenses.²

Renewal of License. — It has been held that the regulation made by the Act of 1879 that a license to cut timber "may be renewed for another year" meant that the right of renewal was optional with the crown, depended upon the judgment of the minister of the interior, and was to be on such terms as the governor-general in council prescribed, and therefore necessarily in his discretion; and hence that there was no breach of contract in the government's refusal to renew such license.³ A renewable license is not a continual license, and does not entitle the licensee to maintain trespass against wrongdoers who cut timber upon the land in the interval between the termination of the license and its renewal.⁴ Even a license which may be renewed yearly upon payment of certain charges is simply an annual license, although renewable for a long period of years.⁵

Rights and Duties of Locatee. — The Free Grant and Homestead Act of 1868 provided that all pine trees growing upon any land located as a free grant should be considered as reserved as the property of the crown, but granted permission to the locatee to cut and use such timber as might be necessary for the purpose of building and fencing on the location, and to cut and dispose of all trees required to be removed in actually clearing the land for cultivation.⁶ And where a locatee allows the trees not needed for building and not necessary to be removed for cultivation to stand, such trees are the property of the crown.⁷

Where a Locatee Sells the Timber upon the land located, he may allow a definite length of time for its removal, and a patentee of the land before the expiration of the time allowed has no right to an action of trespass against the locatee's vendee for removing timber after the issuance of the patent.⁸

Should Verify Description in License. — It is the duty of a timber licensee to verify the correctness of the description of the lands covered by the license, and the government is not liable to him for losses sustained through having cut timber on lands not covered by his license, although he relied upon government plans showing the timber limits prepared for the use of the licensee.⁹

Failure of Consideration. — Where a licensee has paid dues and rents in advance, and the government during the year is judicially declared to have no rights in the land licensed, there is a failure of consideration which entitles the licensee to recover the rent paid.¹⁰

A Licensee Will Not Forfeit His License by Laches where part of the delay is attributable to the crown office, and where the notice was not received because the applicant had removed to the United States, especially where the crown has taken no steps to forfeit the claim for nonpayment.¹¹

Not Subject to Easements. — A patentee of land is entitled to it free from all reservations and exceptions, except those specially contained in the patent, and from the burden of an easement of having roads made upon his land and tim-

1. Under Act of 1868. — *Anderson v. Muskoka Mills, etc., Co.*, 27 U. C. C. P. 180.

2. **Construction of License.** — *Bulmer v. Reg.*, 23 Can. Sup. Ct. 488.

3. **Renewal of License.** — *Bulmer v. Reg.*, 23 Can. Sup. Ct. 488.

4. *Muskoka Mill, etc., Co. v. McDermott*, 21 Ont. App. 129.

5. *Laughlan v. Prescott*, 1 N. Bruns. Eq. Rep. 406; *Lakefield Lumber, etc., Co. v. Shairp*, 19 Can. Sup. Ct. 657, affirmed 17 Ont. App. 322.

6. **Rights and Duties of Locatee.** — *Cockburn*

v. Muskoka Mills, etc., Co., 13 Ont. 343; *Parker v. Maxwell*, 14 Ont. 239; *Langmaid v. Mickle*, 16 Ont. 111; *Dunkin v. Cockburn*, 15 Ont. App. 493; *McArthur Bros. Co. v. Deans*, 21 Ont. 380.

7. *Parker v. Maxwell*, 14 Ont. 239.

8. **Where Locatee Sells Timber.** — *Hutchinson v. Beatty*, 40 U. C. Q. B. 135.

9. **Should Verify Description in License.** — *Grant v. Reg.*, 20 Can. Sup. Ct. 297.

10. **Failure of Consideration.** — *St. Catharines Milling, etc., Co. v. Reg.*, 2 Can. Exch. 202.

11. **Forfeiture of License.** — *McArthur v. Reg.*, 10 Ont. 191.

ber and logs hauled over it by a licensee of the timber limit.¹

Power of Land Agent. — A crown land agent is authorized to seize timber wrongfully cut from crown lands.² But he may not seize such timber after it has been manufactured or so used as to lose its simple character; then a trespasser is liable only to the penalty of fifteen shillings per tree.³

b. IN UNITED STATES. — The right of individuals to cut timber on the public lands of the United States is considered in another part of this article.⁴

VIII. DISPOSAL OF STATE LANDS — 1. California — a. TITLE AND POWER OF DISPOSAL — (1) In General. — Where the state owns lands under a congressional grant it may dispose of them on any terms it pleases, provided that such terms are not inconsistent with the grant or with the organic law of the state.⁵

(2) *Necessity for Survey.* — It is generally held that the title to lands granted by the general government to the state of California did not vest in the state until the lands were surveyed under the authority of the general government and the survey was duly approved. Hence, before the proceedings had been completed, the state could not pass title to a purchaser, and any prior selection, location, or sale of the lands by the state was void.⁶

(3) *Act of Congress "to Quiet Land Titles."* — In view of the unsettled condition of land titles in California which was due to unauthorized selections, locations, and sales of public lands by the state authorities, Congress in 1866 passed an act entitled "an act to quiet land titles in California." By this act public lands which had been selected by the state in part satisfaction of any grant made to the state by any act of Congress, and which the state had disposed of to purchasers in good faith under her laws, were confirmed to the state.⁷

b. POLICY OF STATE DECLARED BY CONSTITUTION. — The California Constitution provides that "the holding of large tracts of land, uncultivated and unimproved, by individuals or corporations, is against the public interest and should be discontinued by all means not inconsistent with the rights of private property." ⁸

1. Not Subject to Easements. — *Dunkin v. Cockburn*, 13 Ont. 254.

Cannot Sell License. — A licensee cannot, without the minister's consent, sell or assign his license. *St. Catharines Milling, etc., Co. v. Reg.*, 2 Can. Exch. 202.

2. Power of Land Agent. — 12 Vict., c. 30; *Edseall v. Hamell*, 16 U. C. C. P. 93.

3. Miller v. Clark, 10 U. C. Q. B. 9.

4. See infra, this title, *Depredations on Public Lands*.

5. State's Power of Disposal. — *Taylor v. Weston*, 77 Cal. 535.

Purchase of Public Land by Land-office Officials. — *Yoakum v. Brower*, 52 Cal. 373; *Miller v. Byrd*, 90 Cal. 150.

Undivided Interest in Land. — The state was not empowered by *California Act March 28, 1868*, to sell an undivided interest in public land held by it. *Leet v. Black*, 50 Cal. 84.

6. Before Survey State Without Title or Power of Disposal. — *Grogan v. Knight*, 27 Cal. 515; *Smith v. Athern*, 34 Cal. 506; *Hastings v. Devlin*, 40 Cal. 358; *Young v. Shinn*, 48 Cal. 26; *Rooker v. Johnston*, 49 Cal. 5; *Chant v. Reynolds*, 49 Cal. 213. *Contra*, *Van Valkenburg v. McCloud*, 21 Cal. 330. *Compare* *Rush v. Casey*, 39 Cal. 339.

This appears in the discussion of the several particular grants made by Congress to the state of California. See *infra*, this title, *School and*

University Grants — By Federal Government — Vesting of Title; and Grants for Internal Improvements — Time of Making Location.

7. Act Cong. July 23, 1866, 14 U. S. Stat. at L. 218, c. 219.

For a discussion of the conditions which necessitated the enactment of this statute and for construction of its various provisions, see *Huff v. Doyle*, 93 U. S. 558, *reversing* 50 Cal. 16; *Aurrecoechea v. Bangs*, 114 U. S. 781; *McNee v. Donahue*, 142 U. S. 587, *affirming* 76 Cal. 499; *Keeran v. Griffith*, 34 Cal. 580; *Toland v. Mandell*, 38 Cal. 30; *Hodapp v. Sharp*, 40 Cal. 69; *Collins v. Bartlett*, 44 Cal. 371; *Foscalina v. Doyle*, 47 Cal. 437; *Buhne v. Chism*, 48 Cal. 467; *Chant v. Reynolds*, 49 Cal. 213; *Central Pac. R. Co. v. Robinson*, 49 Cal. 446; *Mastick v. Cave*, 52 Cal. 67; *Wilkinson v. Merrill*, 56 Cal. 559; *Tewksbury v. Derosier*, 59 Cal. 100; *Aurrecoechea v. Sinclair*, 60 Cal. 532, *affirmed* 114 U. S. 387; *People v. Jackson*, 62 Cal. 548; *Hays v. Steiger*, 76 Cal. 555, *affirmed* 156 U. S. 387.

For cases involving title to school lands under this statute, see *infra*, this title, *School and University Grants — Legislative Confirmation of Irregular or Unauthorized Selections, Locations, and Sales — Acts of Congress Relating to California Lands*.

8. Holding of Large Tracts of Land Contrary to Public Interests. — Const. Cal., art. 17, § 2; *Fulton v. Brannan*, 88 Cal. 454.

c. SALE OF LANDS SUITABLE FOR CULTIVATION RESTRICTED TO ACTUAL SETTLERS. — It is further provided by the constitution that "lands belonging to this state which are suitable for cultivation shall be granted only to actual settlers, and in quantities not exceeding three hundred and twenty acres to each settler, under such conditions as shall be prescribed by law."¹

d. CONSTRUCTION OF CONSTITUTIONAL PROVISIONS — (1) *In General.* — In view of the foregoing declarations concerning the policy of the state in selling lands, it is manifest that it was intended by the framers of the constitution that all land within the state should be held in small tracts and should constitute homes for its owners so far as this could be accomplished by governmental action without violating private rights.²

Operation of Provision. — The constitutional provision restricting sales to actual settlers operates as well on applications for purchase made before, as upon those made after, the constitution took effect,³ and of course applies solely to lands suitable for cultivation,⁴ and therefore does not prevent the state legislature from annexing a similar condition to the sale of lands not suitable for cultivation.⁵

(2) *What Lands Are "Suitable for Cultivation."* — The constitution classes all lands as suitable or not suitable for cultivation, and for the purposes of this provision neither the legislature nor the courts can classify the lands otherwise. The courts cannot exclude from the effect of this constitutional restriction any class of lands except lands in fact unsuitable for cultivation. Neither can a court declare any class of lands as a class unsuitable for cultivation unless it knows judicially that no tract of this class amounting to three hundred and twenty acres in extent is suitable for cultivation. The policy of the state as declared in its constitution should not be limited by any narrow construction of the words "suitable for cultivation." On the contrary, the effort should be rather to extend than to restrict, for it is plain that the policy thus expressed was that the constitutional provision relating to lands suitable for cultivation should include all, so far as possible.⁶ Whether particular lands are "suitable for cultivation" within the meaning of this provision is a question of fact,⁷ and lands suitable for cultivation are those which are ready for occupation and which by ordinary farming processes are fit for agricultural purposes.⁸

(3) *Meaning of "Actual Settler."* — The term "actual settler" as used in the constitutional provision recited above has been defined to mean a person who establishes himself upon the land, or fixes his residence upon it, to take

1. *Sale of Arable Lands Restricted to Actual Settlers.* — Const. Cal., art. 17, § 3; *Johnson v. Squires*, 55 Cal. 103; *Gavitt v. Mohr*, 68 Cal. 506; *Manley v. Cunningham*, 72 Cal. 236; *Davidson v. Cucamonga Fruit, etc., Co.*, 78 Cal. 4; *Fulton v. Brannan*, 88 Cal. 454; *McDonald v. Taylor*, 89 Cal. 42; *Jacobs v. Walker*, 90 Cal. 43.

2. *State's Policy Defined.* — *Fulton v. Brannan*, 88 Cal. 454.

3. *Application Made Before Constitution Took Effect.* — *Johnson v. Squires*, 55 Cal. 103; *Urton v. Wilson*, 65 Cal. 11 [*distinguishing* *Laugenour v. Shanklin*, 57 Cal. 76]; *Dillon v. Saloude*, 68 Cal. 267; *Mosely v. Torrence*, 71 Cal. 318; *Manley v. Cunningham*, 72 Cal. 236.

4. *Lands Unsuitable for Cultivation Not Within Constitutional Restriction.* — *Dillon v. Saloude*, 68 Cal. 267; *Taylor v. Weston*, 77 Cal. 534.

5. *Legislature May Restrict Sale of Lands Unsuitable for Cultivation.* — *Taylor v. Weston*, 77 Cal. 534, *construing* Pol. Code Cal., § 3500.

6. *Constitution Makes Sole and Exclusive Clas-*

sification of Lands — Narrow Construction Not to Be Given. — *Fulton v. Brannan*, 88 Cal. 454.

7. *Whether Lands Are "Suitable for Cultivation" Question of Fact.* — *Dillon v. Saloude*, 68 Cal. 267; *Fulton v. Brannan*, 88 Cal. 456; *Albert v. Hobler*, 111 Cal. 398. See also *Belcher v. Farren*, 89 Cal. 73.

8. *Ready for Occupation and Fit for Agricultural Purposes.* — *Manley v. Cunningham*, 72 Cal. 236; *Fulton v. Brannan*, 88 Cal. 454; *McDonald v. Taylor*, 89 Cal. 42; *Albert v. Hobler*, 111 Cal. 398. See also *Jacobs v. Walker*, 90 Cal. 43.

For decisions determining whether particular lands were "suitable for cultivation," see *Manley v. Cunningham*, 72 Cal. 236; *Jacobs v. Walker*, 90 Cal. 43; *Albert v. Hobler*, 111 Cal. 398.

The Production of Ordinary Agricultural Crops in Average Quantities is not requisite to suitability for cultivation. *Jacobs v. Walker*, 90 Cal. 43; *Albert v. Hobler*, 111 Cal. 398.

As to *Swamp Lands*, see *Fulton v. Brannan*, 88

possession for his exclusive occupancy and use, with a view to acquire title to it by purchase from the state. For that purpose, an actual entry upon the land, followed by the making of improvements, or building a house thereon in which to reside, and occupation of the land while doing such acts, are evidence of such a settlement as gives to the occupant, if he possesses the qualifications prescribed by law, an inchoate right to purchase the land, and operates as notice of that right to all the world.¹ But to be "an actual settler" within the meaning of the constitutional provision the person must actually reside on the land.² Occupation and management by servants and employees is not sufficient;³ neither are casual acts and occasional visits to the land, done, not in good faith to secure a home, but simply to acquire the land for a small price.⁴ Yet if the settler actually establishes a home upon the land his motives cannot be questioned.⁵

e. APPLICATION TO PURCHASE—(1) *Necessity for Compliance with Statutory Requirements.*—The California statutes as amended from time to time have required that an applicant to purchase state lands should accompany his application with an affidavit setting forth certain facts with respect to his settlement upon the land, the absence or existence of any other settlement, adverse possession, or claim, the suitability of the land for cultivation, a description of the premises desired to be purchased, etc., so as to show that he is a qualified purchaser under the constitution and statutes of the state.⁶ The requirements of these statutes must be strictly complied with,⁷ and if material statements in the applicant's affidavit are false, his proceedings to become a purchaser are void and afford to him no rights whatever.⁸

(2) *Curative Statutes.*—But to remedy defective applications to purchase state lands and to validate the title of the purchasers, curative statutes have been passed by the legislature of California. These statutes have been construed in a number of cases.⁹

Cal. 454; *McDonald v. Taylor*, 89 Cal. 42; *Belcher v. Farren*, 89 Cal. 73.

1. *Actual Settler Defined.*—*Gavitt v. Mohr*, 68 Cal. 506. See also *McDonald v. Taylor*, 89 Cal. 42. For the construction of this term as used in the statutes of other states, see ACTUAL—ACTUALLY, vol. 1, p. 606, and see *infra*, this section, the subdivisions dealing with particular states.

Abandonment of Settlement is not shown by the settler's temporary residence elsewhere for the purpose of obtaining relief for a sick member of his family. *Greenwade v. Decamp*, 79 Cal. 1.

2. *Actual Residence on Land Essential to Right to Purchase.*—*Mosely v. Torrence*, 71 Cal. 318. See also *Belcher v. Farren*, 89 Cal. 73.

3. *Occupation by Servants and Employees.*—*Mosely v. Torrence*, 71 Cal. 318.

4. *Casual Acts Not Done in Good Faith.*—*Belcher v. Farren*, 89 Cal. 73.

5. *Motives in Establishing Home Immaterial.*—*Belcher v. Farren*, 89 Cal. 73.

6. See the various provisions of the *California* statutes and *Political Code* with reference to applications to purchase state lands, and the cases in the notes to this subdivision, *infra*.

7. *Necessity for Strict Compliance with Statutes*—*Hildebrand v. Stewart*, 41 Cal. 387; *Woods v. Sawtelle*, 46 Cal. 389; *Cunningham v. Crowley*, 51 Cal. 128; *Vance v. Evans*, 52 Cal. 93; *Johnson v. Squires*, 55 Cal. 103; *Rowell v. Perkins*, 56 Cal. 219; *McCoy v. Byrd*, 65 Cal. 92; *Millidge v. Hyde*, 67 Cal. 5; *Gilson v. Rob-*

inson, 68 Cal. 539; *McKenzie v. Brandon*, 71 Cal. 209; *Plummer v. Woodruff*, 72 Cal. 29; *Harbin v. Burghart*, 76 Cal. 119; *McEntee v. Cook*, 76 Cal. 187; *Davidson v. Cucamonga Fruit, etc., Co.*, 78 Cal. 4; *Cucamonga Fruit-Land Co. v. Moir*, 83 Cal. 101; *Jacobs v. Walker*, 90 Cal. 43. Compare *Rogers v. Shannon*, 52 Cal. 99.

Sufficiency of Description in Application to Purchase Tide Lands.—*Hinckley v. Fowler*, 43 Cal. 56.

Unintelligible Description in Application to Purchase Tide Lands.—*Miller v. Taylor*, 45 Cal. 219.

Surveyor-General's Approval Not Conclusive as to Regularity of Application.—*Woods v. Sawtelle*, 46 Cal. 389.

Affidavit Not Required in Application to Purchase by Location of School-land Warrant under Act of April 27, 1863.—*Wright v. Laugenour*, 55 Cal. 280.

8. *Falsity of Statements in Affidavit.*—*McKenzie v. Brandon*, 71 Cal. 209; *Mosely v. Torrence*, 71 Cal. 318; *Plummer v. Woodruff*, 72 Cal. 29; *Harbin v. Burghart*, 76 Cal. 119; *Taylor v. Weston*, 77 Cal. 534; *Davidson v. Cucamonga Fruit, etc., Co.*, 78 Cal. 4; *McIntyre v. Sherwood*, 82 Cal. 139; *Jacobs v. Walker*, 90 Cal. 43.

9. *Curative Acts.*—*Copp v. Harrington*, 47 Cal. 236; *Rooker v. Johnston*, 49 Cal. 3; *Yoakum v. Brower*, 52 Cal. 373; *Somo v. Oliver*, 52 Cal. 378; *Wanzer v. Somers*, 53 Cal. 90; *Johnson v. Squires*, 55 Cal. 103; *Rowell v. Perkins*, 56 Cal. 219; *Muller v. Carey*, 58 Cal.

(3) *Defective or Irregular Application Cured by Patent.* — It has been held that although an application to purchase state lands is defective or irregular in that it does not conform to the statutory requirements, it is cured by the issuance of a patent to the applicant in so far as concerns the right of attack by a person not seeking to obtain the state's title.¹

f. TERMS OF PAYMENT AND FORFEITURE FOR NONPAYMENT. — Under the statutes providing terms of payment for state lands, the applicant to purchase must pay twenty per cent. of the required purchase money within a certain time or his right to purchase becomes forfeited.²

2. Virginia and Kentucky — *a. IN GENERAL.* — Since Kentucky was originally part of Virginia, the land systems of the two states are practically the same, except as modified by statutes passed since the separation. The mode of acquiring title to waste and unappropriated land in Virginia was originally introduced into her laws by the Act of May, 1779. In construing this statute, the courts have laid down several general propositions.

b. ENTRIES — (1) *Certainty and Precision.* — In order that an entry upon lands included within the Act of 1779 may be valid, there must be such a reasonable degree of certainty and precision in the description as will enable a subsequent locator, by the exercise of due care and reasonable diligence, to appropriate the adjacent residuum. If under this test the calls of an entry are repugnant or vague, it is invalid and will not be sustained by the court. This proposition has been laid down and reaffirmed in a great number of cases.³

538; *Gilson v. Robinson*, 68 Cal. 539; *Cucamonga Fruit-Land Co. v. Moir*, 83 Cal. 101 [*distinguishing* *Rowell v. Perkins*, 56 Cal. 226; *People v. Noyo Lumber Co.*, 99 Cal. 456, *disapproving* opinion of Thornton, J., in *Cucamonga Fruit-Land Co. v. Moir*, 83 Cal. 105]; *People v. Harrison*, 107 Cal. 541 [*disapproving* statements in *Cucamonga Fruit-Land Co. v. Moir*, 83 Cal. 101, and *approving* *Rowell v. Perkins*, 56 Cal. 219, and *People v. Noyo Lumber Co.*, 99 Cal. 456]; *Klauber v. Higgins*, 117 Cal. 451.

1. Defects and Irregularities in Application Cured by Patent. — *Green v. Hayes*, 70 Cal. 276.

2. Payment and Forfeiture. — Act Cal. March 28, 1868, as amended by Act Cal. April 4, 1870; Pol. Code Cal., § 3494. For construction see *Eckart v. Campbell*, 39 Cal. 256; *Rowell v. Perkins*, 56 Cal. 219; *Batchelder v. Willey*, 64 Cal. 44.

Notice of the Issuance of the Certificate of Location to the applicant is not required. *Batchelder v. Willey*, 64 Cal. 44.

Payment Unnecessary Pending Appeal from Decision of United States Land Register. — *Dolhequy v. Tabor*, 22 Cal. 279.

As to the effect of the curative act of March 27, 1872, and the amendatory act of April 1, 1878, see *Rowell v. Perkins*, 56 Cal. 219.

3. Entries Must Be Certain and Precise — *United States.* — *Marshall v. Currie*, 4 Cranch (U. S.) 172; *Bodley v. Taylor*, 5 Cranch (U. S.) 191; *Finley v. Williams*, 9 Cranch (U. S.) 165; *Matson v. Hord*, 1 Wheat. (U. S.) 131; *Johnson v. Pannel*, 2 Wheat. (U. S.) 206; *Shipp v. Miller*, 2 Wheat. (U. S.) 316; *M'Arthur v. Browder*, 4 Wheat. (U. S.) 488; *Perkins v. Ramsey*, 5 Wheat. (U. S.) 270; *Watts v. Lindsey*, 7 Wheat. (U. S.) 158; *M'Dowell v. Peyton*, 10 Wheat. (U. S.) 454; *Littlepage v. Fowler*, 11 Wheat. (U. S.) 215; *Taylor v. Owning*, 11 Wheat. (U. S.) 226; *Holmes v. Trout*,

7 Pet. (U. S.) 172, *affirmed* 1 McLean (U. S.) 1, 12 Fed. Cas. No. 6,645; *Garnett v. Jenkins*, 8 Pet. (U. S.) 76; *Liggett v. Marshall*, 15 Fed. Cas. No. 8,342.

Kentucky. — *Smith v. Evans*, Hughes (Ky.) 169; *McClanahan v. Berry*, Hughes (Ky.) 323; *Carter v. Oldham*, Hughes (Ky.) 345; *South v. Bowles*, Sneed (Ky.) 23; *Woods v. Patrick*, Sneed (Ky.) 54; *Speed v. Wilson*, Sneed (Ky.) 81; *Kenney v. Clinkinbeard*, Sneed (Ky.) 86; *Bruce v. Estill*, Sneed (Ky.) 109; *Aiken v. Irvine*, Sneed (Ky.) 197; *Tandy v. Bledsoe*, Sneed (Ky.) 199; *Hites v. McClanahan*, Sneed (Ky.) 205; *Robinson v. Morgan*, Sneed (Ky.) 234; *Morriso v. Coghill*, Sneed (Ky.) 322; *Miller v. Haw*, Hard. (Ky.) 33; *Key v. Matson*, Hard. (Ky.) 76; *Moore v. Whitledge*, Hard. (Ky.) 95; *Hart v. Bodley*, Hard. (Ky.) 104; *Cartright v. Collier*, Hard. (Ky.) 187; *Smith v. Smith*, Hard. (Ky.) 199; *Markham v. McGee*, Hard. (Ky.) 382; *Speed v. Lewis*, Hard. (Ky.) 480; *Evans v. Manson*, 1 Bibb (Ky.) 4; *Ward v. Lee*, 1 Bibb (Ky.) 17; *Wilson v. M'Ghee*, 1 Bibb (Ky.) 34; *Cleland v. Gray*, 1 Bibb (Ky.) 35; *Hogland v. Shepherd*, 1 Bibb (Ky.) 121; *Smith v. Turley*, 1 Bibb (Ky.) 125; *M'Gee v. Thompson*, 1 Bibb (Ky.) 131; *Galloway v. Neale*, 1 Bibb (Ky.) 137; *Hendricks v. Bell*, 1 Bibb (Ky.) 138; *Wooley v. Bruce*, 2 Bibb (Ky.) 105; *Davis v. Davis*, 2 Bibb (Ky.) 134; *Buckner v. Feagins*, 2 Bibb (Ky.) 138; *Walker v. Montgomery*, 2 Bibb (Ky.) 253; *Hornbeck v. Stansbury*, 2 Bibb (Ky.) 476; *M'Kee v. Bodley*, 2 Bibb (Ky.) 481; *Brooks v. Clay*, 2 Bibb (Ky.) 499; *Greenup v. Sneed*, 2 Bibb (Ky.) 527; *Manifee v. Conn*, 2 Bibb (Ky.) 623; *Bush v. Jameson*, 3 Bibb (Ky.) 118; *Allen v. Craig*, 3 Bibb (Ky.) 156; *Hardin v. Hargis*, 3 Bibb (Ky.) 163; *Hughes v. Collier*, 3 Bibb (Ky.) 381; *Fowler v. Halbert*, 3 Bibb (Ky.) 384; *Bowman v. Brewer*, 3 Bibb (Ky.) 411; *Tandy v. Smith*, 3 Bibb (Ky.) 418; *Hanson v. Lashbrooke*, 3

(2) *Notoriety*. — The object called for must have a reasonable notoriety in the community, and such notoriety may render valid a location which would otherwise be defectively described.¹

(3) *Repugnancy and Surplusage*. — Repugnant or impossible calls or mere surplusage may be rejected without destroying the entry, if the location can be identified without such calls.²

Bibb (Ky.) 543; May v. Mason, 4 Bibb (Ky.) 128; Cullum v. Walton, 4 Bibb (Ky.) 132; Smith v. Dobbins, 4 Bibb (Ky.) 139; Ashley v. Moore, 4 Bibb (Ky.) 147; Crockett v. Greenup, 4 Bibb (Ky.) 158; Clay v. Reed, 4 Bibb (Ky.) 162; Woolfolk v. Trotter, 4 Bibb (Ky.) 378; Millar v. Frame, 1 A. K. Marsh. (Ky.) 284; Coleman v. Henderson, 1 A. K. Marsh. (Ky.) 412; Register v. Haggin, 1 A. K. Marsh. (Ky.) 446; Young v. Wilson, 1 A. K. Marsh. (Ky.) 609; Techenor v. Turnham, 2 A. K. Marsh. (Ky.) 163; Steele v. M'Dowell, 2 A. K. Marsh. (Ky.) 184; Banta v. Clay, 2 A. K. Marsh. (Ky.) 409; Findlay v. Harlan, 3 A. K. Marsh. (Ky.) 188; Pope v. Garret, 3 A. K. Marsh. (Ky.) 194; Parker v. Stephens, 3 A. K. Marsh. (Ky.) 197; Campbell v. Beatty, 3 A. K. Marsh. (Ky.) 213; Clay v. M'Kinney, 3 A. K. Marsh. (Ky.) 568; Helm v. Crawford, 3 A. K. Marsh. (Ky.) 570; Smith v. Crow, 3 A. K. Marsh. (Ky.) 603; Winslow v. Holder, 2 Litt. (Ky.) 33; Jones v. Plummer, 2 Litt. (Ky.) 161; Powers v. Marshall, 3 Litt. (Ky.) 438; Meriwether v. Phillips, 5 Litt. (Ky.) 182; Cole v. Damron, 5 Litt. (Ky.) 192; Gray v. Wells, Litt. Sel. Cas. (Ky.) 221; Cates v. Raleigh, 1 T. B. Mon. (Ky.) 164; Perry v. Hogg, 2 T. B. Mon. (Ky.) 112; Hawkins v. Marshall, 4 T. B. Mon. (Ky.) 285; Moore v. Smith, 6 T. B. Mon. (Ky.) 62; Buford v. Cox, 5 J. J. Marsh. (Ky.) 582; Downing v. Pigman, 6 J. J. Marsh. (Ky.) 253; May v. Sanders, 6 J. J. Marsh. (Ky.) 350; Cardwell v. Strother, 2 Dana (Ky.) 441; Camp v. Prather, 7 B. Mon. (Ky.) 599.

Virginia. — Hunter v. Hall, 1 Call (Va.) 206; Currie v. Martin, 3 Call (Va.) 28; Miller v. Page, 6 Call (Va.) 28; Harper v. Baugh, 9 Gratt. (Va.) 508; McNeel v. Herold, 11 Gratt. (Va.) 309.

The Code of Virginia provides a way by which settlers may obtain title to lands by making proof before the County Court of settlements for a given length of time, and payment of taxes. Code Va. (1887), § 2339; Brown v. Charles, 85 Fed. Rep. 172.

1. *Notoriety* — *United States*. — Johnson v. Pannel, 2 Wheat. (U. S.) 206; Littlepage v. Fowler, 11 Wheat. (U. S.) 216; Liggett v. Marshall, 15 Fed. Cas. No. 8,342.

Kentucky. — Keys v. Matson, Hard. (Ky.) 78; Speed v. Wilson, Sneed (Ky.) 81; Taylor v. Kincaid, Hard. (Ky.) 89; Couchman v. Thomas, Hard. (Ky.) 277; Craig v. Baker, Hard. (Ky.) 293; M'Clure v. Winlock, 1 Bibb (Ky.) 80; Hathaway v. Forbes, 1 Bibb (Ky.) 90; Swearingen v. Smith, 1 Bibb (Ky.) 92; Davis v. Bryant, 2 Bibb (Ky.) 110; Harrison v. Deremiah, 2 Bibb (Ky.) 349; Kennedy v. Bruice, 2 Bibb (Ky.) 371; Mercer v. Quinn, 2 Bibb (Ky.) 476; Allen v. Crocket, 2 Bibb (Ky.) 618; Bowen v. Forbes, 3 Bibb (Ky.) 122; Carson v. Hanway, 3 Bibb (Ky.) 160; Harris v. Johnson, 3 Bibb (Ky.) 165; Roberts v. Hardin, 3 Bibb (Ky.) 416; Oldham v. Rowan, 3 Bibb (Ky.) 534; Todd

v. Fry, 4 Bibb (Ky.) 110; Johnson v. Marshall, 4 Bibb (Ky.) 133; Wolscafe v. Meriwether, 4 Bibb (Ky.) 138; Trabue v. Holt, 4 Bibb (Ky.) 150; Clay v. Harris, 4 Bibb (Ky.) 153; Fowler v. Lynch, 4 Bibb (Ky.) 163; Kincaid v. Thompson, 4 Bibb (Ky.) 361; Briscoe v. Prewett, 4 Bibb (Ky.) 370; Fowler v. Caldwell, 4 Bibb (Ky.) 573; Hanley v. Hardin, 4 Bibb (Ky.) 576; Galloway v. Webb, 1 A. K. Marsh. (Ky.) 129; Moore v. Dodd, 1 A. K. Marsh. (Ky.) 140; Smith v. Reed, 1 A. K. Marsh. (Ky.) 259; Howard v. Todd, 1 A. K. Marsh. (Ky.) 275; Spurr v. Trimble, 1 A. K. Marsh. (Ky.) 278; Scroggs v. Bodley, 1 A. K. Marsh. (Ky.) 605; Ray v. M'Ilroy, 1 A. K. Marsh. (Ky.) 612; Banta v. Calhoun, 2 A. K. Marsh. (Ky.) 166; Barbour v. Foster, 2 A. K. Marsh. (Ky.) 400; Clay v. M'Kinney, 3 A. K. Marsh. (Ky.) 568; Theobalds v. Fowler, 3 A. K. Marsh. (Ky.) 577; Horine v. Craig, 3 A. K. Marsh. (Ky.) 587; Loftus v. Mitchell, 3 A. K. Marsh. (Ky.) 594; Ball v. Young, 1 Litt. (Ky.) 114; M'Clung v. Overton, 1 Litt. (Ky.) 186; Knox v. Gaines, 2 Litt. (Ky.) 238; Fowler v. Combs, 2 Litt. (Ky.) 271; Jackman v. Walker, 3 Litt. (Ky.) 100; M'Ilhenny v. Biggerstaff, 3 Litt. (Ky.) 155; Powers v. Marshall, 3 Litt. (Ky.) 438; Davis v. Gray, 3 Litt. (Ky.) 450; Shortridge v. Voorhies, 5 Litt. (Ky.) 54; Hunter v. Lynch, Litt. Sel. Cas. (Ky.) 35; Marshall v. Campbell, Litt. Sel. Cas. (Ky.) 496; Skinner v. Ingram, 2 J. J. Marsh. (Ky.) 210; Taylor v. Hawkins, 2 J. J. Marsh. (Ky.) 344; Trabue v. Smeltzer, 3 J. J. Marsh. (Ky.) 333; Boone v. Helm, 4 Dana (Ky.) 403; Cardwell v. Payne, 1 B. Mon. (Ky.) 85. But see Helm v. Crawford, 3 A. K. Marsh. (Ky.) 570.

It has been held that a survey, not notorious, but which might be found by reasonable diligence, may be a sufficiently definite object of location provided it is of sufficient age to have been recorded so that any one might demand a copy. Ward v. Lee, 1 Bibb (Ky.) 17; Jackman v. Walker, 3 Litt. (Ky.) 100. See also Bulor v. M'Cawley, 3 A. K. Marsh. (Ky.) 573. But see M'Ilhenny v. Biggerstaff, 3 Litt. (Ky.) 155.

But an entry which called for land adjoining a specified town was held to be invalid, no survey of the town having been made at the date of the entry. Thompson v. Daugherty, 4 T. B. Mon. (Ky.) 69.

A Valid Entry Must Be Open and Notorious; and what is open and notorious will be determined largely by the circumstances and the condition of the country. Buford v. Cox, 5 J. J. Marsh. (Ky.) 582.

The Construction of an Entry Is for the Court, although evidence may be submitted in relation to the notoriety and names of places contained therein. Meredith v. Pickett, 9 Wheat. (U. S.) 572.

2. *Repugnancy and Surplusage* — *United States*. — Marshall v. Currie, 4 Cranch (U. S.) 172;

(4) *Ambiguity.* — Where the meaning of the description is ambiguous, the court will adopt that meaning which the parties presumably intended to give to it.¹ And where a description is so worded that the entry might assume several shapes, each covering a given portion of land, it may be sustained as to such portion and rejected as to other portions outside thereof.²

(5) *Conflicting Entries.* — Where a pre-emptioner makes a location with the commissioners which differs materially from a later location with the surveyor, the later must prevail.³

(6) *Right Conferred by Entry.* — One who has made a valid entry obtains thereby an inchoate right which he may perfect by patent, and the legislature cannot by a subsequent statute destroy this right and prevent the perfecting of title by patent.⁴

(7) *Vacant Lands Only May Be Entered.* — Under the statutes none but vacant lands can be entered, and every entry, survey, or patent embracing land previously entered, surveyed, or patented is absolutely void to that extent.⁵

(8) *Several Entries by One Person.* — The statute of *Kentucky* which permits any one to obtain an order of the County Court for the entry of vacant lands has been construed to mean that the same person might obtain several orders, each for two hundred acres or any smaller number not less than twenty-five.⁶

(9) *Withdrawal of Entry.* — A locator may withdraw any part of his entry, whereupon a memorandum must be made on the margin of the original entry, showing which part of it is withdrawn; but a withdrawal which does not appear of record may be established by other evidence.⁷ A withdrawal in one county may be located in another.⁸

(10) *Calls.* — The calls of an entry are of two kinds, general or descriptive,

Massie v. Watts, 6 Cranch U. S. 148, *sub nom.* *Kerr v. Watts*, 6 Wheat. (U. S.) 550; *M'Iver v. Walker*, 9 Cranch (U. S.) 173; *Taylor v. Walton*, 1 Wheat. (U. S.) 142; *Shipp v. Miller*, 2 Wheat. (U. S.) 316; *Perkins v. Ramsey*, 5 Wheat. (U. S.) 270; *Garnett v. Jenkins*, 8 Pet. (U. S.) 75; *M'Dowell v. Peyton*, *10 Wheat. (U. S.) 454; *Holmes v. Trout*, 7 Pet. (U. S.) 172, *affirming* 1 McLean (U. S.) 1, 12 Fed. Cas. No. 6,645; *Croghan v. Nelson*, 3 How. (U. S.) 187.

Kentucky. — *Pawling v. Merewether*, Hughes (Ky.) 26; *Consilla v. Briscoe*, Hughes (Ky.) 84; *McConnell v. Kenton*, Hughes (Ky.) 257; *Patterson v. Bradford*, Hard. (Ky.) 108; *Bosworth v. Maxwell*, Hard. (Ky.) 214; *Evans v. Manson*, 1 Bibb (Ky.) 4; *McCrackin v. Steele*, 1 Bibb (Ky.) 46; *Grubbs v. Rice*, 2 Bibb (Ky.) 107; *Speed v. Severe*, 2 Bibb (Ky.) 131; *Clinkingbeard v. Kenny*, 2 Bibb (Ky.) 512; *Merry v. Swearingen*, 4 Bibb (Ky.) 141; *Ashley v. Moore*, 4 Bibb (Ky.) 147; *Overton v. Roberts*, 4 Bibb (Ky.) 154; *Morrison v. Coghill*, 4 Bibb (Ky.) 379; *Bradford v. Patterson*, 4 Bibb (Ky.) 584; *Smith v. Norvell*, 2 A. K. Marsh. (Ky.) 161; *Clarke v. Markham*, 2 A. K. Marsh. (Ky.) 164; *Yocum v. Renfroe*, 2 A. K. Marsh. (Ky.) 395; *Haws v. Marshall*, 2 A. K. Marsh. (Ky.) 413; *Morgan v. Mullins*, 3 A. K. Marsh. (Ky.) 580; *Meredith v. Kennedy*, 6 Litt. Sel. Cas. (Ky.) 516. But see *Kincaid v. Blythe*, 2 Bibb (Ky.) 479.

Virginia. — *McNeel v. Herold*, 11 Gratt. (Va.) 315.

1. *Ambiguity.* — *Morgan v. Robinson*, Sneed (Ky.) 228; *Young v. Borton*, Sneed (Ky.) 277;

Word v. Lee, 1 Bibb (Ky.) 18; *Speed v. Severe*, 2 Bibb (Ky.) 131.

2. *Craig v. Rogers*, Hard. (Ky.) 144; *Stewart v. Clark*, 5 T. B. Mon. (Ky.) 366; *Parker v. Marshall*, 1 J. J. Marsh. (Ky.) 353.

3. *Conflicting Entries — Later Prevails.* — *McClanahan v. Litton*, Hughes (Ky.) 337; *Green v. Watson*, 1 Bibb (Ky.) 105; *Chinoworth v. Williamson*, 2 Bibb (Ky.) 36.

An entry cannot attach itself by relation to a former void entry. *Norvell v. Bodley*, 1 A. K. Marsh. (Ky.) 606; *Jones v. Chiles*, 4 J. J. Marsh. (Ky.) 610.

4. *Inchoate Right Conferred by Entry.* — *Kirksey v. Turner*, 95 Ky. 226; *American Assoc. v. Innis*, 60 S. W. Rep. 388, 22 Ky. L. Rep. 1196.

5. *Vacant Lands Only May Be Entered.* — *Fitch v. Bullock*, 1 Bibb (Ky.) 228; *M'Comb v. Sharp*, 5 Litt. (Ky.) 16; *Hamilton v. Fugett*, 81 Ky. 366; *Terry v. Johnson*, 96 Ky. 95; *Gibson v. Board*, 102 Ky. 505; *American Assoc. v. Innis*, (Ky. 1901) 60 S. W. Rep. 388; *Uhl v. Reynolds*, (Ky. 1901) 64 S. W. Rep. 498; *Kentucky Union Co. v. Cornett*, (Ky. 1902) 66 S. W. Rep. 728.

6. *Several Entries by One Person.* — *Register v. Reid*, 9 Bush (Ky.) 103; *American Assoc. v. Innis*, (Ky. 1901) 60 S. W. Rep. 388; *Nickels v. Com.*, (Ky. 1901) 64 S. W. Rep. 448; *Uhl v. Reynolds*, (Ky. 1901) 64 S. W. Rep. 498.

7. *Withdrawal of Entry.* — *Holmes v. Trout*, 7 Pet. (U. S.) 172; *Massie v. Watts*, 6 Cranch (U. S.) 148, *affirmed* *Kerr v. Watts*, 6 Wheat. (U. S.) 550; *Nichols v. Covey*, 4 Rand. (Va.) 365.

8. *Location After Withdrawal.* — *White v.*
Volume XXVI.

and particular or locative. The former refers to some prominent object that may direct attention to the neighborhood in which the land lies, the latter to some particular object which may serve more exactly to locate and describe the land. A reasonable certainty is required in both, and both must be found unless one is of so little value or notoriety that it may be deemed immaterial.¹

When the Calls Include an Improvement, the land is generally surveyed so as to have the improvement in the centre of a square with the lines running to the cardinal points.²

(11) *Evidence* — (a). *Presumptions*. — The court will presume that an object bearing a particular name at the date of the suit is identical with an object of the same name referred to in the entry;³ that a tree marked was marked before entry;⁴ that the lines from one corner to another are marked, and that, one corner being found, the other may likewise be found;⁵ that an entry and a survey were made in the proper county;⁶ and that a patent has issued upon competent evidence of right thereto.⁷ So it will be presumed that the surveyor has complied with the statute as to the establishment of marks and boundaries, lines, and corners, and a mistake in the certificate may be corrected, since the survey and not the certificate is the essential fact.⁸ But it will be not presumed that a court gave the privilege to remove a certificate when the court had no such authority;⁹ nor, where an entry and a survey correspond in calls, will the court presume that there are other surveys answering the same description.¹⁰ The notoriety of an old military survey will not be presumed.¹¹

(b) *Parol Evidence*. — Parol evidence may be received to support an entry, but not to amend or explain it¹² or to alter a survey in a way inconsistent with the title papers.¹³

(c) *Surveyor's Report*. — A surveyor's report is evidence of the existence of an object described on the ground, whether artificial or natural.¹⁴

c. *SURVEYS* — (1) *Must Conform to Entries*. — It is a fundamental principle of surveys that they must conform to entries,¹⁵ and if such conformity is

Nicholson, 9 B. Mon. (Ky.) 268; Ogden v. Sprigg, 1 A. K. Marsh. (Ky.) 610.

1. *Calls Either General or Particular*. — Johnson v. Pannel, 2 Wheat. (U. S.) 206; M'Dowell v. Peyton, 10 Wheat. (U. S.) 454; Johnson v. Brown, 3 Call (Va.) 267; Lewis v. Billips, 1 Leigh (Va.) 353. See also Croghan v. Nelson, 3 How. (U. S.) 187.

2. *Calls Including Improvements*. — Hite v. Harrison, Hughes (Ky.) 29; Hite v. Stevenson, Hughes (Ky.) 31; Sinclair v. Singleton, Hughes (Ky.) 176; Crow v. Brown, Sneed (Ky.) 102; Smith v. Reed, 1 A. K. Marsh. (Ky.) 259; Washington v. Arnold, 3 A. K. Marsh. (Ky.) 606.

3. *Evidence — Presumptions*. — Hart v. Bodley, Hard. (Ky.) 104.

4. Cardwell v. Strother, 2 Dana (Ky.) 439.

5. *Presumption as to Marking Lines*. — Johnson v. Marshall, 4 Bibb (Ky.) 133.

6. *Presumption that Entry Was in Proper County*. — Sutton v. Menser, 6 B. Mon. (Ky.) 433.

7. *Right to Patent*. — Hardin v. Cain, 2 B. Mon. (Ky.) 56.

8. *Presumption that Duty Has Been Performed by Surveyor*. — Bekley v. Bryan, Sneed (Ky.) 91; Wallace v. Maxwell, 1 J. J. Marsh. (Ky.) 451.

9. *Court Presumed Not to Have Exceeded Authority*. — White v. Nicholson, 9 B. Mon. (Ky.) 269.

10. Markham v. McGee, Hard. (Ky.) 382.

11. *Notoriety of Old Military Survey*. — Winslow v. Holder, 2 Litt. (Ky.) 34.

12. *Parol Evidence*. — Consilla v. Briscoe, Hughes (Ky.) 84; Craig v. Pelham, Sneed (Ky.) 243.

13. *Contradiction of Title Papers*. — Cowan v. Harrod, Litt. Sel. Cas. (Ky.) 4.

14. *Surveyor's Report*. — Heffington v. White, 1 Bibb (Ky.) 115; Carland v. Rowland, 3 Bibb (Ky.) 125; Crockett v. Greenup, 4 Bibb (Ky.) 158. But see Finlay v. Granger, 2 A. K. Marsh. (Ky.) 180.

The Execution and Return of a Survey by a deputy surveyor are not, unless examined and recorded by a surveyor in chief, competent evidence against another entry. Meredith v. Kennedy, Litt. Sel. Cas. (Ky.) 516.

15. *Survey Must Conform to Entry*. — Reed v. Laurence, Hughes (Ky.) 19; Neal v. Holt, Sneed (Ky.) 6; South v. Bowles, Sneed (Ky.) 23; Porter v. Gass, Sneed (Ky.) 177; Morgan v. Robinson, Sneed (Ky.) 228; Key v. Matson, Hard. (Ky.) 76; Jasper v. Quarles, Hard. (Ky.) 469; Estill v. Hart, Hard. (Ky.) 577; M'Gee v. Thompson, 1 Bibb (Ky.) 134; Hall v. Pearl, 7 J. J. Marsh. (Ky.) 573.

It has been held, however, that the act which requires surveys below the Tennessee river to conform to the entry does not require absolute certainty. Ray v. Woods, 2 B. Mon. (Ky.) 217; Taylor v. Fletcher, 7 B. Mon. (Ky.) 86; Ashbrook v. Quarles, 15 B. Mon. (Ky.) 24.

wanting the survey is voidable, though it is not void.¹

(2) *Must Be Within Prescribed Time.* — The statutes prescribe a period of time within which a survey must be made after entry, and a survey made after the lapse of such time is void unless the claimant can bring himself within some of the exceptions and extensions allowed by statute.² Such statutes extending the time are not in conflict with the compact made between Virginia and Kentucky.³

(3) *Lines Must Approximate Square.* — In making surveys to accord with entries it is a general rule that the lines should be as nearly parallel to each other and as nearly at right angles as the call of the entry will admit, thus constituting a square body of land. When not controlled by such calls as evidently show the locator's intention to be otherwise, the court will give to the calls a construction in accordance with this rule as being the most reasonable and the least subject to exception.⁴

(4) *Title Dates from Survey.* — The date of the survey determines the date of the beginning of the title;⁵ hence a junior patent founded upon an older survey will at law prevail over an older patent founded upon a junior survey.⁶

In Virginia a patent is the completion of title and establishes the performance of every prerequisite. The regularity of the preliminary proceedings may not be impeached at law except for actual and positive fraud committed by the person who obtained the patent.⁷

(5) *Conflicting Patents.* — Where two patents of different dates cover the same land, the older, of course, is the only valid one, provided it has been legally and regularly issued.⁸

1. *Estill v. Hart*, Hard. (Ky.) 577.

But a survey is not voidable because it includes more land than should have been surveyed under the warrant. *Taylor v. Brown*, 5 Cranch (U. S.) 234.

2. *Must Be Within Prescribed Time.* — *Shipp v. Miller*, 2 Wheat. (U. S.) 316; *Miller v. M'Intire*, 11 Wheat. (U. S.) 442; *Wilson v. M'Dowell*, 1 Bibb (Ky.) 110; *Hart v. Benton*, 3 Bibb (Ky.) 420; *Badger v. Chiles*, 4 Bibb (Ky.) 111; *Morgan v. Fox*, 4 Bibb (Ky.) 565; *Shackelford v. Kennedy*, 1 A. K. Marsh. (Ky.) 435; *Pitman v. Caldwell*, 2 A. K. Marsh. (Ky.) 263; *Atchley v. Latham*, 2 Litt. (Ky.) 363; *Breckinridge v. Hite*, 1 T. B. Mon. (Ky.) 60; *Estill v. Patrick*, 4 T. B. Mon. (Ky.) 306; *Redd v. Martin*, 9 Dana (Ky.) 420; *Cummins v. Latham*, 4 T. B. Mon. (Ky.) 101; *Waller v. Logan*, 5 B. Mon. (Ky.) 515; *Whitley v. Bramble*, 9 B. Mon. (Ky.) 143.

3. *Botts v. Chiles*, 2 T. B. Mon. (Ky.) 36; *Robinson v. Neal*, 5 T. B. Mon. (Ky.) 213; *Beard v. Smith*, 6 T. B. Mon. (Ky.) 461; *Boone v. Helm*, 4 Dana (Ky.) 403.

4. *Lines Must Approximate Square* — *United States.* — *Bodley v. Taylor*, 5 Cranch (U. S.) 191; *Shipp v. Miller*, 2 Wheat. (U. S.) 316; *Peyton v. Stith*, 5 Pet. (U. S.) 487; *Holmes v. Trout*, 7 Pet. (U. S.) 172; *Croghan v. Nelson*, 3 How. (U. S.) 187.

Kentucky. — *Hite v. Stevenson*, Hughes (Ky.) 31; *Jackman v. Merewether*, Hughes (Ky.) 32; *Smith v. Grimes*, Hughes (Ky.) 36; *Walker v. Orr*, Hughes (Ky.) 38; *Cleland v. Thorpe*, Hughes (Ky.) 192; *Bradford v. McClelland*, Hughes (Ky.) 195; *Moore v. Harris*, Sneed (Ky.) 18; *Lillard v. Taylor*, Sneed (Ky.) 210; *Kennedy v. Payne*, Hard. (Ky.) 12; *Craig v. Cogar*, Hard. (Ky.) 392; *Craig v. Hawkins*,

1 Bibb (Ky.) 53; *Grubbs v. Rice*, 2 Bibb (Ky.) 107; *Speed v. Patton*, 3 Bibb (Ky.) 426; *Young v. Withers*, 4 Bibb (Ky.) 160; *Handley v. Young*, 4 Bibb (Ky.) 376; *Church v. Macey*, 1 A. K. Marsh. (Ky.) 274; *Millar v. Frame*, 1 A. K. Marsh. (Ky.) 284; *Smith v. Norvel*, 2 A. K. Marsh. (Ky.) 161; *Reid v. Corbin*, 2 A. K. Marsh. (Ky.) 185; *Johnson v. Gresham*, 5 Dana (Ky.) 542; *Thruston v. Masterson*, 9 Dana (Ky.) 228; *Miller v. Fox*, Hughes (Ky.) 100; *Bradford v. McCracken*, Sneed (Ky.) 41.

5. *Title Dates from Survey.* — *Eagan v. Bowdry*, Hughes (Ky.) 13; *Hickman v. Boffman*, Hard. (Ky.) 356; *Reed v. Glenn*, Litt. Sel. Cas. (Ky.) 510, 12 Am. Dec. 345; *Pearl v. Davis*, 4 Dana (Ky.) 443; *Gray v. Gray*, 2 B. Mon. (Ky.) 200; *Parker v. Patrick*, 16 B. Mon. (Ky.) 567; *Goosling v. Smith*, 90 Ky. 157, 11 Ky. L. Rep. 991; *Rains v. King*, 19 S. W. Rep. 329, 14 Ky. L. Rep. 49; *Miracle v. Arnett*, 44 S. W. Rep. 641, 19 Ky. L. Rep. 1854.

6. *Payne v. Riley*, 4 Dana (Ky.) 38; *Pearson v. Baker*, 4 Dana (Ky.) 321.

7. *Conclusiveness of Patent.* — *Stringer v. Young*, 3 Pet. (U. S.) 319; *Boardman v. Reed*, 6 Pet. (U. S.) 328; *Ringo v. Binns*, 10 Pet. (U. S.) 270; *Patterson v. Bradford*, Hard. (Ky.) 108; *Johnson v. Brown*, 3 Call (Va.) 259.

8. *Conflicting Patents.* — *Greenup v. Kenton*, Hard. (Ky.) 14; *Bryant v. Wood*, 90 Ky. 530; *Ohio, etc., R. Co. v. Wooten*, 46 S. W. Rep. 681, 20 Ky. L. Rep. 383; *Allen v. Pulliam*, (Ky. 1902) 66 S. W. Rep. 722. See also *Clark v. Jones*, 16 B. Mon. (Ky.) 126.

A later patent and survey are void as to so much of the land as is covered by a prior patent and survey, but good as to the residue. *Cornett v. Combs*, 53 S. W. Rep. 32, 21 Ky. L. Rep. 837.

A junior patentee of the same land does not

Older Survey Incorrect. — But where the older entry has not been surveyed in conformance with its terms, the equity of the holder thereof is inferior to that of a junior interfering entry or junior patent issued upon a proper survey of a junior entry.¹

Neither Survey Correct. — Where neither of two conflicting surveys is made in accordance with the entries, that must prevail upon which the older legal title is obtained.²

(6) *Magnetic Meridian Used.* — Surveys are to be begun by reference to the magnetic and not the true meridian, and the presumption is that they were so made.³ Allowance must be made, however, for the variation of the magnet since the original survey was made.⁴

(7) *Mode of Measurement.* — It is the general rule in construing entries that where distances are indicated they are to be measured in a straight line or by the usually traveled way, and not by the meandering of watercourses, unless such latter intention clearly appears;⁵ and where the distance is prescribed by such words as "about" or "nearly," and the like, the court will generally discard such words and adopt the distance indicated as positive and exact.⁶

(8) *Record.* — Under the statute requiring that surveys be returned and recorded within a certain number of months from their making, a survey will be presumed to have been recorded within the time required.⁷ But the omission by the surveyor to enter within the specified time a copy of the survey made by him does not invalidate the title to the land. The statute is merely directory, and though the omission may subject the surveyor to a penalty, his performance or omission to perform is unimportant as to the rights of those for whom surveys are made.⁸

(9) *Duty of Surveyor.* — When a warrant has been lodged in the office of a surveyor, it is his duty to make a corresponding entry and to make surveys in the order in which entries are made; and his failure to make the entry does not affect the locator's rights.⁹

(10) *Survey Without Warrant.* — Although the legislature has declared void all surveys made without a warrant, it has been held that where the warrant issued after the survey, the title was nevertheless valid as against the junior patentee.¹⁰

d. CAVEATS. — The legislature, foreseeing that there would be interfering

have such possession thereof as will support an action of trespass. Greer v. Bowling, 55 S. W. Rep. 1081, 21 Ky. L. Rep. 1648.

1. **Older Survey Incorrect.** — Ammons v. Spears, Hughes (Ky.) 10; Morgan v. Dryden, Hughes (Ky.) 15; Neal v. Holt, Sneed (Ky.) 6; Brown v. Crow, Sneed (Ky.) 107; Porter v. Gass, Sneed (Ky.) 177.

2. **Neither Survey Correct.** — Frazier v. Steel, Sneed (Ky.) 334.

3. **Magnetic Meridian Used.** — Vance v. Marshall, 3 Bibb (Ky.) 148; Finnie v. Clay, 2 Bibb (Ky.) 351; Burgin v. Chenault, 9 B. Mon. (Ky.) 290.

4. **Bryan v. Beckley.** Litt. Sel. Cas. (Ky.) 93, 12 Am. Dec. 276; Eubank v. Hampton, 1 Dana (Ky.) 343.

5. **Mode of Measurement.** — Johnson v. Brown, Sneed (Ky.) 50; Morrison v. Coghill, 4 Bibb (Ky.) 379; Landrum v. Hite, 1 A. K. Marsh. (Ky.) 419; Lillard v. Henderson, 3 A. K. Marsh. (Ky.) 585; Sanders v. Morrison, 2 T. B. Mon. (Ky.) 109, 15 Am. Dec. 140; Gore v. Steele, 4 T. B. Mon. (Ky.) 505; Taylor v. Watkins, 7 J. J. Marsh. (Ky.) 363. See also the title **BOUNDARIES**, vol. 4, p. 805.

6. Johnson v. Pannel, 2 Wheat. (U. S.) 206.

7. **Recording Surveys.** — Elmendorf v. Taylor, 10 Wheat. (U. S.) 152; Simpson v. Register, Sneed (Ky.) 223; Carson v. Hanway, 3 Bibb (Ky.) 161. But see Com. v. Clark, 1 Bibb (Ky.) 531.

8. Taylor v. Brown, 5 Cranch (U. S.) 234; Craig v. Radford, 3 Wheat. (U. S.) 594. See also Stringer v. Young, 3 Pet. (U. S.) 319. But see Adams v. Frazier, 20 S. W. Rep. 268, 14 Ky. L. Rep. 311.

9. **Duty of Surveyor.** — Jones v. Taylor, Sneed (Ky.) 71; Roberts v. Davidson, 83 Ky. 279. See also Clay v. Ballenger, 1 A. K. Marsh. (Ky.) 462; Uhl v. Reynolds, 64 S. W. Rep. 498, 23 Ky. L. Rep. 759.

It is permissible for a deputy surveyor to appropriate land to himself by entering warrants held by him, although others holding warrants have applied for the survey of the same land. Rice v. Williams, 1 Dana (Ky.) 192.

10. **Survey Before Issuance of Warrant.** — Craig v. Transylvania, Sneed (Ky.) 155; Hardin v. Cain, 2 B. Mon. (Ky.) 57; Slusher v. Simpson, (Ky. 1902) 67 S. W. Rep. 380. See also Rollins v. Clark, 8 Dana (Ky.) 15.

entries and surveys, provided the caveat as a remedy for settling all such disputes arising prior to the patent. A caveat may be filed under the statute in two cases. first, of attempted fraud upon the commonwealth; second, of conflicting rights or claims between parties.¹ The caveator cannot recover upon the ground of the weakness of his adversary's claim, but must show a better right to the land in controversy. The law requires a caveator to express the nature of the right upon which he claims the land.²

Interlocks — The equitable title of a settler who obtained a patent in 1799, without having protected his claim by filing a caveat, is inferior to a patent granted in 1796, covering a part of the same land, the latter patentee not knowing of the conflict and having been guilty of no fraud.³

e. PRE-EMPTION RIGHTS — (1) *In General*. — The right to pre-empt lands in *Kentucky* exists by virtue of several early statutes. The Act of 1831 allowed to actual settlers a pre-emptive right to such land as had been improved, cultivated, or inclosed by them, or was in their actual use or occupation. The Act of 1835 vested in the County Courts of the respective counties all lands that were vacant and unappropriated on the first day of August of that year, making no reservation, however, in favor of mere settlers on vacant land without any claim or color of title. In 1839 an act was passed amending the Act of 1831, and providing that an actual settler on any vacant and unappropriated land should have a pre-emption right, subject to the limitations and conditions of the law then in force, to any number of acres of such land, not exceeding one hundred, which should be laid off so as to include his improvement, and as nearly as might be in a square. Construing these statutes together, it has been held that there are two classes of actual settlers who are entitled to pre-emption rights on vacant land; one embracing such persons as have settled there under color of title, the other, such persons as are mere settlers without any color of title whatever.⁴

(2) *Calls*. — As in the case of other entries, the calls in an entry of a pre-emption claim must be sufficiently certain and definite to identify the land.⁵

(3) *Improvements*. — A settler must have made improvements on the land settled, and a County Court certificate which does not state that he has made such improvements is deficient.⁶ The pre-emption right is not restricted, however, to the quarter section on which the settler's dwelling may stand, but will include the whole farm with all its appurtenances.⁷ As between conflicting claimants, prior improvements will hold the land although the certificate, the entry, the survey, and the patent all be subsequent in point of time to those obtained by one making later improvements.⁸ But the owner of a pre-emption claim must in such case be able to identify his improvements.⁹ The intention with which the improvement is made is not material.¹⁰

1 Caveats. — *Noland v. Cromwell*, 4 Munf. (Va.) 155; *McClung v. Hughes*, 5 Rand. (Va.) 453; *French v. Assessors*, 5 Leigh (Va.) 627.

2 Hendricks v. Bell, 1 Bibb (Ky.) 138; *Allen County v. Allen*, 2 A. K. Marsh. (Ky.) 31; *Whitley v. Shirley*, 3 A. K. Marsh. (Ky.) 131; *Hunter v. Hall*, 1 Call (Va.) 206; *Walton v. Hale*, 9 Gratt. (Va.) 194; *Harper v. Baugh*, 9 Gratt. (Va.) 519.

3. Interlocks. — *Cline v. Catron*, 22 Gratt. (Va.) 378.

4. Pre-emption Rights — In General. — *Parker v. Patrick*, 16 B. Mon. (Ky.) 567.

5. Calls. — *Hunt v. Wickliffe*, 2 Pet. (U. S.) 202; *Whitledge v. Kenny*, *Hughes* (Ky.) 211; *Bryan v. Wallace*, *Sneed* (Ky.) 7; *Johnson v. Nall*, *Sneed* (Ky.) 331; *Moore v. Green*, *Hard*. (Ky.) 35; *Ward v. Lee*, 1 Bibb (Ky.) 18; *Fitch v. Bullock*, 1 Bibb (Ky.) 228; *Doolin v. Farrow*, 2 Bibb (Ky.) 362; *M'Min v. Stafford*,

2 Bibb (Ky.) 487; *Allen v. Crockett*, 2 Bibb (Ky.) 618; *Marshall v. Rough*, 2 Bibb (Ky.) 628; *Vance v. Marshall*, 3 Bibb (Ky.) 148; *Fowler v. Halbert*, 3 Bibb (Ky.) 384; *Findlay v. Harlan*, 3 A. K. Marsh. (Ky.) 188; *Horine v. Craig*, 3 A. K. Marsh. (Ky.) 587; *Loftis v. Mitchel*, 3 A. K. Marsh. (Ky.) 595; *Crist v. Brashears*, 3 Litt. (Ky.) 17; *M'Ilhenny v. Biggerstaff*, 3 Litt. (Ky.) 156; *Hardin v. Register*, *Litt. Sel. Cas.* (Ky.) 28; *Gossom v. Sharp*, 7 Dana (Ky.) 140.

6. Improvements. — *Bryant v. Wallace*, *Hughes* (Ky.) 369; *Greenup v. Kenton*, *Hard*. (Ky.) 14.

7. Johnson v. Gresham, 5 Dana (Ky.) 545.

8. Finley v. Williams, 9 Cranch (U. S.) 165.

9. Crawford v. Logan, *Hughes* (Ky.) 51; *Young v. McKee*, *Hughes* (Ky.) 68; *Davis v. Gray*, 3 Litt. (Ky.) 450.

10. Johnson v. Gresham, 5 Dana (Ky.) 548.

If an improvement is designated by a wrong name, and there is no other evidence, the pre-emption is invalidated.¹

(4) *Time*. — A pre-emption warrant is good if made within the period first limited or within the time as extended by subsequent acts.²

(5) *Notice*. — Under the *Kentucky* statute, no one can appropriate vacant land occupied by another without giving to him three months' notice of an intention to appropriate it.³ It is the policy of the legislature to give by this notice to the actual occupant the preference of pre-emption to the land occupied, in order that he may himself procure a patent if he so desires.⁴

3. Pennsylvania — *a. ORIGIN OF TITLE OF STATE*. — At the time of the Declaration of Independence the title to a large part of the land within the limits of the original grant made by Charles II. to William Penn was still vested in Penn's heirs, as proprietaries of the province of Pennsylvania. In 1779, after the state government had been organized, a statute was passed declaring that all the right, title, and interest of such proprietaries in such land should be and were thereby vested in the commonwealth for the use and benefit of its citizens, to be disposed of as the legislature of the commonwealth should thereafter from time to time direct; and provision was made for compensating the proprietaries for the rights of which they were thus deprived. The statute also confirmed all grants theretofore made by the proprietaries and all private estates held by the proprietaries as individuals.⁵

b. LAND OFFICE. — Since the earliest colonial times there has been a "land office" for the sale of unappropriated lands to such as might wish to purchase. This office was first established by William Penn, the original proprietary, in 1681.⁶ After the organization of the state government, a "land office" was established by Act of April 9, 1781, to consist of three officers, namely, the secretary of the land office, the receiver-general, and the surveyor-general.⁷

c. POLICY OF LAND LAWS. — The land laws of the commonwealth were enacted for the accomplishment of two objects, namely, to attract immigration so as to increase the population, and to obtain revenue.⁸ And the policy of the proprietary government was the same.⁹

d. MODES OF OBTAINING TITLE — (1) *Proceedings in Land Office* — (a) *Application and Warrant or Location* — *aa. IN GENERAL* — *Application*. — The statutes

1. *Clark v. Markham*, 2 A. K. Marsh. (Ky.) 164.

2. *Alstods v. Miller*, Hard. (Ky.) 203. But see *Fishback v. Major*, 1 A. K. Marsh. (Ky.) 150.

The right of pre-emption given by the Act of 1779 to those who had settled and improved the land before the year 1778 dates from the time when the improvement was made, and not from the time when the claim founded upon that improvement was made to the Court of Commissioners. *Simms v. Guthrie*, 9 Cranch (U. S.) 19.

3. *Notice*. — Stat. Ky. (1894), § 4703; *Aulick v. Colvin*, 6 B. Mon. (Ky.) 290; *McQuady v. Mattingly*, (Ky. 1889) 12 S. W. Rep. 758; *Slusher v. Simpson*, (Ky. 1902) 67 S. W. Rep. 380. See also *Kennedy v. Kennedy*, 4 B. Mon. (Ky.) 396.

4. *Trabue v. Ramage*, 80 Ky. 323.

5. Act Pa. Nov. 27, 1779, Bright. Purd. Dig. Laws Pa. (1894), p. 1733.

6. *Land Office Established by Proprietary Government*. — Conn. v. Penn, Pet. (C. C.) 496, 6 Fed. Cas. No. 3,104, 5 Wheat. (U. S.) 424; *Penn v. Klyne*, 1 Wash. (U. S.) 207, 4 Dall. (U. S.) 402, Pet. (C. C.) 497, note, 19 Fed. Cas. No. 10,935.

7. *Land Office under State Government*. — *Urket v. Coryell*, 5 W. & S. (Pa.) 60, in which case the court pointed out that not only was the "land office" established under that name, but that it was so designated and spoken of by every act of the legislature relating to the disposition of lands by the commonwealth.

By Subsequent Legislation the offices of receiver-general and secretary of the land office were abolished, and the secretary of internal affairs became the head of the land office. Act March 29, 1809; Act April 17, 1843; Const. 1874, art. 4, § 19; Bright. Purd. Dig. Laws Pa. (1894), p. 1173, note.

8. *Policy of State Land Laws*. — The preamble of the first statute authorizing land grants by the commonwealth declared that the time had come "when it appears necessary, not only to increase the population of this state, but to enable government to draw every possible advantage from the estates [of the late proprietaries] so vested in them." Act Pa. April 1, 1784, § 1, Bright. Purd. Laws Pa. (1894), p. 1177. And see *Huidekoper v. McClean*, 1 Wash. (U. S.) 136, 12 Fed. Cas. No. 6,852.

9. *Object of Proprietary Land Grants*. — *Line-weaver v. Crawford*, 26 Pa. St. 420.

provide for the issuance of a warrant for a certain quantity of land to any person who may make application therefor to the land office, and such an application is the inception of title,¹ operating, however, only from the time when it is actually filed and payment of office fees and purchase money is made as the statute requires.²

Warrant. — A warrant is a contract between the commonwealth and the warrantee, by which the commonwealth agrees to permit the warrantee to have laid off by survey a designated quantity of unappropriated land, which land may be described in the warrant or may be left to the subsequent selection of the warrantee.³ A warrant is dated as of the date of the application, and has its inception at and takes effect from that date.⁴

Necessity of Warrant. — Under the land laws of the commonwealth no title can be acquired by a survey without a warrant, except in the case of an actual settler, who is permitted to have a survey of the land occupied by him.⁵

Warrant of Acceptance. — The act providing for the sale of land north and west of the Ohio and Allegheny rivers requires a settlement on the land within a space of two years next after the date of the warrant, and a residence thereon for the space of five years next following the settlement;⁶ and a warrant issued under this act is known as a warrant of acceptance — that is, the warrant must be accepted by performance of the conditions of settlement and residence.⁷

bb. DESCRIPTIVE APPLICATIONS AND WARRANTS — (*aa*) *Definition.* — A descriptive warrant, or, as it is sometimes designated, a special warrant, is one that is sufficiently descriptive of the land applied for to enable other persons to make adjoining locations.⁸

(*bb*) *Operation and Effect.* — A descriptive warrant operates as an immediate location, and when the purchase money is paid an inceptive title commences against the state and against third parties who may afterwards derive a right to the same land from the state.⁹ In this respect it differs from an indiscriminate warrant,¹⁰ over which it is entitled to priority before survey without regard to the order of issuance.¹¹ The title so acquired is only inceptive,

1. **Application as Inception of Title.** — *Mix v. Smith*, 7 Pa. St. 75.

2. **When Application Is Complete.** — *Baker v. King*, 18 Pa. St. 138.

The Mere Preparation of an Application does not create any title; and if another person actually makes an application and receives a warrant for the same land, he obtains a superior right, in the absence of fraud, though he knew of such prior preparation. *Shoenberger v. Baker*, 22 Pa. St. 398.

3. **Nature and Effect of Warrants in General.** — *Tryon v. Munson*, 77 Pa. St. 250.

4. **Warrant Dated as of Date of Application.** — *Brown v. Galloway, Pet.* (C. C.) 291, 4 Fed. Cas. No. 2,006; *Browne v. Arbuckle*, 1 Wash. (U. S.) 484, 4 Fed. Cas. No. 1,990.

5. **Necessity of Warrant.** — *Manhattan Coal Co. v. Green*, 73 Pa. St. 310. And see *infra*, this subsection, *Pre-emption Rights*.

6. Act Pa. April 3, 1792, § 9, *Bright. Purd. Dig. Laws Pa.* (1894), pp. 1186, 1187.

7. **Warrant of Acceptance.** — *Balfour v. Meade*, 4 Dall. (Pa.) 363, 1 Wash. (U. S.) 18, 3 Cranch (U. S.) 52, note.

The Time for Settlement Begins to Run from the date of the warrant, and not from the date of the payment of the purchase money or from the date of the survey. *Brown v. Galloway, Pet.* (C. C.) 291, 4 Fed. Cas. No. 2,006; *Browne v. Arbuckle*, 1 Wash. (U. S.) 484, 4 Fed. Cas. No. 1,990.

8. **Descriptive Warrants Defined.** — *Dubois v. Newman*, 4 Wash. (U. S.) 74, 7 Fed. Cas. No. 4,108; *Lanning v. London*, 4 Wash. (U. S.) 159, 14 Fed. Cas. No. 8,074; *Lewis v. Meredith*, 3 Wash. (U. S.) 81, 15 Fed. Cas. No. 8,328. See also *Elliott v. Laidig*, 8 Pa. Super. Ct. 147.

9. **Title Commences at Date of Descriptive Warrant.** — *Conn v. Penn.*, 4 Wash. (U. S.) 430, 6 Fed. Cas. No. 3,105; *Brown v. Galloway, Pet.* (C. C.) 291, 4 Fed. Cas. No. 2,006; *Armstrong v. Morgan*, 3 Yeates (Pa.) 529; *Lauman v. Thomas*, 4 Binn. (Pa.) 51; *Lilly v. Paschal*, 2 S. & R. (Pa.) 394; *Phillips v. Shaffer*, 5 S. & R. (Pa.) 215; *Hubley v. Vanhorne*, 7 S. & R. (Pa.) 185; *McCullough v. Elder*, 8 S. & R. (Pa.) 181; *Chambers v. Mifflin*, 1 P. & W. (Pa.) 74; *Star v. Bradford*, 2 P. & W. (Pa.) 384; *Acre v. Gilbert*, 3 P. & W. (Pa.) 299; *Fox v. Lyon*, 27 Pa. St. 9, 33 Pa. St. 474; *Washabaugh v. Entriken*, 34 Pa. St. 74; *Hughes v. Stevens*, 43 Pa. St. 197; *Keller v. Powell*, 142 Pa. St. 96.

Preference over Subsequent Improver. — *Magens v. Smith*, 4 Binn. (Pa.) 73.

When the Purchase Money Is Paid a descriptive warrant binds the commonwealth though it names the wrong county in describing the land. *Grant v. Eddy*, 2 Yeates (Pa.) 148; *Mitchell v. Mitchell*, 4 Binn. (Pa.) 180.

10. See *infra*, this subdivision, *Loose or Indescriptive Warrants, Etc.*

11. **Priority over Indescriptive Warrant.** — *Duncan v. Curry*, 3 Binn. (Pa.) 14; *Irwin v. Moore*,

however, and the warrantee, unless he is an actual settler, must follow it up by having his location actually surveyed within a reasonable time, else he may lose his priority by the superior diligence of a subsequent locator who has paid his purchase money and had his location surveyed.¹ But if a descriptive warrant loses its priority of location on the land described, it may be located on any unappropriated land.²

cc. LOOSE OR INDESCRIPTIVE WARRANTS, ETC. — An indescriptive warrant, sometimes called a loose or vague warrant, as distinguished from one that is descriptive, is one that does not describe the land for which application is made,³ and therefore the title of the warrantee commences from the time when the land is ascertained by making the survey and having it returned into the land office.⁴

Priority as Between Surveys Returned on Same Day. — Where several surveys under indescriptive warrants issued on different days are returned on the same day, the question of priority in case of a conflict is to be determined according to the order in which the surveys were actually made, and this must be proved as any other fact. There is no presumption that the surveys were made in the order in which the warrants were received by the surveyor.⁵ And the rule is the same in the case of several warrants issued on the same day. Priority is always accorded to the elder survey.⁶

dd. SHIFTED WARRANTS AND APPLICATIONS. — Where a warrant is shifted from the particular tract which it describes or from the locality which it calls for, and is located on another tract or in another locality, a survey made thereon will hold the land surveyed where there are no intervening rights,⁷ though it operates as against persons without notice only from the time when a survey under it was returned and accepted.⁸

But a Person with Notice of a Shifted Location before his title commenced will be postponed though the survey on the shifted location was not returned.⁹

Conflict with Subsequent Warrant. — A subsequent descriptive warrant will give a

2 Yeates (Pa.) 223; Meade *v.* Haymaker, 3 Yeates (Pa.) 67.

1. Necessity of Survey Within Reasonable Time. — Dubois *v.* Newman, 4 Wash. (U. S.) 74, 7 Fed. Cas. No. 4,108; Lanning *v.* London, 4 Wash. (U. S.) 159, 14 Fed. Cas. No. 8,074; Lewis *v.* Meredith, 3 Wash. (U. S.) 81, 15 Fed. Cas. No. 8,328; Lowrey *v.* Gibson, 2 Yeates (Pa.) 81; Drinker *v.* Holliday, 2 Yeates (Pa.) 87; Blaine *v.* Johnson, 3 Binn. (Pa.) 103.

Even the Payment of the Purchase Money will not protect the warrantee as against intervening rights where he has not fully pursued his right. McGowan *v.* Ahl, 53 Pa. St. 84.

Accounting for Delay. — If a prior warrantee has failed to place his warrant in the hands of the surveyor, and in the meantime a survey has been made on a junior warrant, the prior warrantee may, before the return of the survey so made, account for his delay and have the land returned to him. Duncan *v.* Curry, 3 Binn. (Pa.) 14.

2. Location After Loss of Priority. — Bell *v.* Levers, 4 Dall. (Pa.) 210; Hepburn *v.* Levy, 4 Dall. (Pa.) 218; Torrey *v.* Beardsly, 4 Wash. (U. S.) 242. And see *infra*, this subdivision, *Shifted Warrants and Applications*.

3. See *infra*, this subdivision, *Descriptive Applications and Warrants — Definition*.

4. Indescriptive Warrant — Title Commences with Return of Survey. — Huidekoper *v.* Burrus, 1 Wash. (U. S.) 109, 12 Fed. Cas. No. 6,848; Browne *v.* Arbuckle, 1 Wash. (U. S.) 484, 4 Fed. Cas. No. 1,990; Funston *v.* McMahon, 2

Yeates (Pa.) 245; Lilly *v.* Paschal, 2 S. & R. (Pa.) 394; Philips *v.* Shaffer, 5 S. & R. (Pa.) 215; Moore *v.* Shaver, 6 S. & R. (Pa.) 130; Hubley *v.* Vanhorne, 7 S. & R. (Pa.) 185; Star *v.* Bradford, 2 P. & W. (Pa.) 384; Hagerty *v.* Mathers, 31 Pa. St. 348; Hughes *v.* Stevens, 43 Pa. St. 197; Manhattan Coal Co. *v.* Green, 73 Pa. St. 310; Elliott *v.* Laidig, 8 Pa. Super. Ct. 147.

5. Priority of Surveys Returned on Same Day. — Hughes *v.* Stevens, 43 Pa. St. 197.

6. Indescriptive Warrants Issued on Same Day. — Hagerty *v.* Mathers, 31 Pa. St. 348.

7. Shifted Warrants and Applications. — Bond *v.* Stroup, 3 Binn. (Pa.) 66; Irwin *v.* Moore, 2 Yeates (Pa.) 223; Bell *v.* Levers, 4 Dall. (Pa.) 210, 3 Yeates (Pa.) 23; Stephens *v.* Cowan, 6 Watts (Pa.) 511.

What Constitutes Shifting. — An application for land on a certain side of a designated stream does not necessarily mean that the parcel called for is to touch the waters of the stream, and therefore it is not a shifted location because the survey does not abut on the stream. Boyles *v.* Kelly, 10 S. & R. (Pa.) 214. See also Lauman *v.* Thomas, 4 Binn. (Pa.) 51; Star *v.* Bradford, 2 P. & W. (Pa.) 399, note.

8. Return and Acceptance of Survey. — Armstrong *v.* Morgan, 3 Yeates (Pa.) 529; Smith *v.* Walker, 68 Pa. St. 122.

9. Effect of Notice of Shifted Location. — Kyle *v.* White, 1 Binn. (Pa.) 246.

Purchaser Without Notice. — A purchaser of a junior survey without notice of the prior sur-

superior right to a shifted location though the warrantee knew that the prior survey had been made; but if the subsequent warrant is indescriptive, and the owner knew of the prior survey, he will be postponed to the shifted location.¹

cc. WARRANTS FOR IMPROVEMENTS. — In pursuance of the policy of encouraging the development of the resources of the state by the settlement and cultivation of unappropriated land,² a superior equity has always been recognized in persons who had become actual settlers,³ and accordingly the owner of an improvement is the only person who can obtain a warrant founded on it.⁴ Special provision is made by the statutes for the issuing of warrants based on improvements. Such a warrant must specify the improvement and designate the person by whom it was made⁵ and the time thereof;⁶ and the title goes back no further than the time when the improvement was made.⁷

Rights Lost by Fraud. — The owner of an improvement will lose his priority as to intervening rights where he causes the warrant based on the improvement to be returned unsatisfied and, with intent to defraud the commonwealth, obtains a new warrant for the land as unimproved.⁸

(b) **Survey** — *aa. NECESSITY.* — A survey by a duly authorized surveyor is an essential step in the acquisition of title to vacant state lands, and without such survey no title is acquired.⁹ In the case of a descriptive warrant, though the title commences with the date of the warrant,¹⁰ yet a survey must be made and returned within a reasonable time, else the warrantee will lose his priority of right to the land described in the warrant,¹¹ unless the delay was not the fault of the warrantee.¹² But under a loose or indescriptive warrant, no title commences until a survey has been made.¹³

bb. AUTHORITY TO MAKE. — In order that a survey may be valid and effectual as evidence of title in the person claiming under it, it is generally essential that it should have been made by a duly authorized surveyor¹⁴ to whom the warrant is

vey under a shifted location acquires a good title though his vendor knew of the prior survey. *Bond v. Stroup*, 3 Binn. (Pa.) 66.

1. **Conflict with Subsequent Warrant.** — *Phillips v. Shaffer*, 5 S. & R. (Pa.) 215.

2. See *supra*, this subsection, *Policy of Land Laws*.

3. See *infra*, this subsection, *Pre-emption Rights*.

4. **Owner of Improvement Exclusively Entitled to Warrant.** — *Schall v. Miller*, 3 Whart. (Pa.) 250.

5. **Description of Improvement.** — *White v. Kyle*, 5 Binn. (Pa.) 162.

6. **Statement of Time of Improvement.** — *Humes v. McFarlane*, 4 S. & R. (Pa.) 427, holding, however, that the improvement may be proved to have been made at any time before the warrant issued.

7. **Title Commences from Date of Improvement.** — *Ewing v. McKnight*, 1 S. & R. (Pa.) 128; *Humes v. McFarlane*, 4 S. & R. (Pa.) 427; *Mickle v. Lucas*, 10 S. & R. (Pa.) 293.

8. **Improvement Rights Lost by Fraud.** — *Carroll v. Andrews*, 3 Yeates (Pa.) 59.

9. **No Title Acquired Without Survey.** — *McKinzie v. Crow*, 2 Binn. (Pa.) 105; *Chambers v. Mifflin*, 1 P. & W. (Pa.) 74; *Addleman v. Masterson*, 1 P. & W. (Pa.) 454; *Star v. Bradford*, 2 P. & W. (Pa.) 393; *Strauch v. Shoemaker*, 1 W. & S. (Pa.) 166.

A warrant without a survey does not give a legal right of entry. *Hurst v. Durnell*, 1 Wash. (U. S.) 262, 12 Fed. Cas. No. 6,927.

10. See *supra*, this subsection, *Descriptive Applications and Warrants*.

11. **Survey under Descriptive Warrant Within Reasonable Time.** — *Gordon v. Kerr*, 1 Wash. (U. S.) 322, 10 Fed. Cas. No. 5,611; *Dunning v. Caruthers*, 4 Yeates (Pa.) 13; *Blaine v. Johnson*, 3 Binn. (Pa.) 103; *Goddard v. Gloninger*, 5 Watts (Pa.) 209. And see the cases cited *supra*, this subsection, *Descriptive Applications and Warrants*.

But if There Are No Intervening Rights, the rights of the holder of a descriptive warrant are not lost by delay in making a survey. His rights have been recognized even after a delay of thirty-seven years. *McDonald v. Mulhollan*, 5 Watts (Pa.) 173. See also *Steinmetz v. Logan*, 5 Watts (Pa.) 518.

12. **Warrantee Not Responsible for Delay.** — *War.* — *Gordon v. Kerr*, 1 Wash. (U. S.) 322, 10 Fed. Cas. No. 5,611.

13. See *supra*, this subsection, *Loose or Indescriptive Warrants, Etc.*

14. **Survey Must Be by Authorized Surveyor.** — *Hurst v. Durnell*, 1 Wash. (U. S.) 262, 12 Fed. Cas. No. 6,927; *James v. Stookey*, 1 Wash. (U. S.) 330, 13 Fed. Cas. No. 7,184; *Hubley v. Vanhorne*, 7 S. & R. (Pa.) 185; *Schuylkill, etc., Imp. Co. v. Munson*, 14 Wall. (U. S.) 442; *Paxton v. Griswold*, 122 U. S. 441.

Proof of Appointment of Deputy Surveyor. — *Vastbinder v. Wager*, 6 Pa. St. 339.

Assistant of Deputy Surveyor. — *Smay v. Smith*, 1 P. & W. (Pa.) 1.

Parol Evidence of Authority of Assistant Surveyor. — *Smay v. Smith*, 1 P. & W. (Pa.) 1.

Acceptance of Survey Not Made by Legally Authorized Surveyor. — *Burd v. Seabold*, 6 S. & R. (Pa.) 137.

directed,¹ or by his successor in office;² but a survey which has been adopted by the land office is valid and operative even though it was not made by the regular surveyor.³

Surveyor Acting for Himself. — A survey by a deputy surveyor acting for himself is not an official act, because it is not within his commission. To give validity to such survey it must be approved by the surveyor-general by being received in his office or otherwise.⁴ And in the case of an assistant deputy surveyor, a survey made by him for himself is of no validity until it is recognized by his principal.⁵

Surveyor Acting Out of Proper District. — There is an early statute which declares void any survey made by a deputy surveyor out of his proper district,⁶ but the provision is applicable only to lands within what is known as the "new purchase," that is, the lands purchased at Fort McIntosh and Fort Stanwix in 1784 and 1785,⁷ and is also subject to the presumption of regularity arising from lapse of time.⁸

cc. REQUISITES, VALIDITY, AND EFFECT — (aa) *In General.* — Since the object of a survey is to ascertain with exactness the area and limits of the tract intended, every survey must give the boundaries by courses and distances and state the exact quantity of land contained in the tract; and if these requirements are not observed, the survey is not admissible in evidence.⁹

Surveyor Must Go on and Measure Ground. — At one time the practice prevailed of making what were known as "chamber" surveys, that is, obtaining the courses and distances from maps in the office of the surveyor, but at an early period a statute was passed providing that every survey should be made "by actual going upon and measuring the land and marking the lines."¹⁰ A

1. Survey Must Be in Execution of Warrant. — *Wells v. Wright*, 3 Wash. (U. S.) 250, 29 Fed. Cas. No. 17,405.

And if the warrant is invalid, the survey is invalid also, unless the purchase money has been paid. *Gripe v. Baird*, 3 Yeates (Pa.) 528.

The Deputy Surveyor to Whom the Warrant Is Directed must make the survey, unless he authorizes another to act for him. *Nicholas v. Holliday*, 3 Yeates (Pa.) 399.

Where a warrant was not directed to the deputy surveyor of any particular district, the surveyor-general may refuse to accept the survey because the forms of law have not been strictly complied with, but if he does accept it, and it does not conflict with any other survey, it is good evidence of title. *Reynolds v. Dougherty*, 3 S. & R. (Pa.) 325.

Proof of Authority Presumed After Thirty Years. — *Burchfield v. McCauley*, 3 Watts (Pa.) 9.

Possession of Warrant. — The surveyor need not have the warrant in his hand at the time the survey is made. It is sufficient if he has entered the warrant in his book. *Stockman v. Blair*, 5 Binn. (Pa.) 211.

2. Successor of Surveyor to Whom Warrant Is Directed. — *Gripe v. Baird*, 3 Yeates (Pa.) 528; *Harris v. Monks*, 2 S. & R. (Pa.) 557.

3. Unauthorized Survey Adopted by Land Office. — *Harris v. Monks*, 2 S. & R. (Pa.) 557.

4. Surveyor Acting for Himself. — *McKinzie v. Crow*, 2 Binn. (Pa.) 105.

5. Survey by Assistant Deputy Surveyor for Himself. — *McKinzie v. Crow*, 2 Binn. (Pa.) 105.

6. Surveyor Acting Out of District. — Act Pa. April 8, 1785, § 15, *Bright. Purd. Dig. Laws Pa.* (1894), p. 1183.

7. Griffith v. Tunckhouser, Pet. (C. C.) 418, 11 Fed. Cas. No. 5,823; *Gordon v. Kerr*, 1 Wash. (U. S.) 322, 10 Fed. Cas. No. 5,611; *Smith v. Wells*, 1 Yeates (Pa.) 286; *Hubley v. White*, 2 Yeates (Pa.) 147; *Harris v. Monks*, 2 S. & R. (Pa.) 557; *Mock v. Astley*, 13 S. & R. (Pa.) 384; *McNamara v. Shorb*, 2 Watts (Pa.) 292; *Marcy v. Gardinier*, 7 Watts (Pa.) 242; *Prout v. Bard*, 10 Watts (Pa.) 375.

Evidence of Boundaries of Surveyor's Jurisdiction. — *Evans v. Beatty*, 1 P. & W. (Pa.) 489.

Lines of District Not Marked on Ground. — *Vastbinder v. Wager*, 6 Pa. St. 339.

Consolidation of Districts. — The line which formerly divided two districts which have been consolidated may be disregarded by the surveyor. *Darrah v. Bryant*, 56 Pa. St. 69.

8. See infra, this subdivision, *Requisites, Validity, and Effect* — *Presumption of Regularity*.

9. Survey Must Show Boundaries and Area. — *McClemens v. Graham*, 2 S. & R. (Pa.) 460.

10. Actual Survey Required — "Chamber" Surveys Forbidden. — Act Pa. April 8, 1785, § 9, *Bright. Purd. Dig. Laws Pa.* (1894), p. 1182; *Woods v. Ingersoll*, 1 Binn. (Pa.) 146.

What Constitutes Chamber Survey. — A location of a warrant by the lines of previous or contemporaneous surveys is not deemed a chamber survey. *Parshall v. Jones*, 55 Pa. St. 153; *Packer v. Schrader Min., etc., Co.*, 97 Pa. St. 379.

Actual Marking of Lines Not Essential. — It has been held that while the statute is mandatory as to the surveyor going on and measuring the land, the provision for marking the lands is directory only, and the owner of a warrant is not to be prejudiced by the omission of the surveyor in this respect. *Mock v. Astley*, 13 S. & R. (Pa.) 382.

chamber survey, however, is only voidable, and not void, and therefore if it is returned by the surveyor, the authority given by the warrant is exhausted, and a further survey cannot be made without a new order.¹

Survey Before Receipt of Warrant. — Ordinarily, surveys are not made before the surveyor receives the warrant, but if a tract has once been legally surveyed for any purpose, the survey may be applied to a warrant afterwards coming into the surveyor's hands. It is not necessary to run and mark the lines anew.² A survey made before the issuance of a warrant, however, is void notwithstanding its acceptance and the receipt of the purchase money.³

Block Surveys. — In its legal sense a "block survey" is a survey of several contiguous tracts by exterior lines, without separating the several tracts from each other by interior lines.⁴ This method is valid and constitutes an appropriation of the whole body and the several tracts composing it if all the exterior lines are marked.⁵

Survey of Appropriated Land. — If a survey covers in part land which had previously been appropriated it is void to that extent, but as to the residue it is valid.⁶

bb. Effect as Evidence of Title. — A survey made by a duly authorized surveyor pursuant to a valid warrant and returned to the office of the surveyor-general operates as a transfer of the title of the commonwealth⁷ and concludes the party as to the lines so laid down.⁸

(cc) Presumption of Regularity. — Where a survey has been made by the proper officer, it will be presumed that he went on and measured the ground and marked the lines, as the statute requires and directs;⁹ that the survey was

If the Lines Were Marked on a Former Survey, they need not be marked anew on a new survey of the same tract, even if actual marking were an absolute requirement. *Covert v. Irwin*, 3 S. & R. (Pa.) 283.

Proof that Any Part of the Survey Was Made on the Ground is sufficient to show compliance with the statute. *Lambourn v. Hartswick*, 13 S. & R. (Pa.) 113; *Glass v. Gilbert*, 58 Pa. St. 266.

1. Chamber Surveys Not Void. — *Oyster v. Bellas*, 2 Watts (Pa.) 397; *Glass v. Gilbert*, 58 Pa. St. 266; *Griffith v. Tunckhouser*, Pet. (C. C.) 418, 11 Fed. Cas. No. 5,823; *Schuyllkill*, etc., Imp. Co. v. Munson, 14 Wall. (U. S.) 442; *Schraeder Min., etc., Co. v. Packer*, 129 U. S. 688, *distinguishing* *Clement v. Packer*, 125 U. S. 309.

Chamber Survey Based on Admitted Corner of Adjoining Survey. — *Dreer v. Carskadden*, 48 Pa. St. 38.

Presumption of Regularity. — See *infra*, this subdivision, *Presumption of Regularity*.

2. Survey Before Receipt of Warrant. — *M'Rhea v. Plummer*, 1 Binn. (Pa.) 227.

3. Survey Before Issuance of Warrant. — *Barton v. Smith*, 1 Rawle (Pa.) 403; *Manhattan Coal Co. v. Green*, 73 Pa. St. 310; *Balfour v. Meade*, 4 Dall. (Pa.) 363, 1 Wash. (U. S.) 18, 3 Cranch (U. S.) 52, note.

4. Block Survey Defined. — *Morrison v. Seaman*, 183 Pa. St. 74.

5. Validity of Block Surveys. — *Philips v. Wilson*, 1 Wash. (U. S.) 470, 19 Fed. Cas. No. 11,109; *Browne v. Arbuckle*, 1 Wash. (U. S.) 484, 4 Fed. Cas. No. 1,990; *Huidekoper v. McClean*, 1 Wash. (U. S.) 136, 12 Fed. Cas. No. 6,852; *Woods v. Ingersoll*, 1 Binn. (Pa.) 146; *McDowell v. Ingersoll*, 5 S. & R. (Pa.) 101; *Morris v. Travis*, 7 S. & R. (Pa.) 220; *Mock v. Astley*, 13 S. & R. (Pa.) 382; *Ross v. McJunkin*, 14 S. & R. (Pa.) 364; *Stevens v.*

Hughes, 3 W. & S. (Pa.) 465; *Schnable v. Doughty*, 3 Pa. St. 392; *Hagerty v. Mathers*, 31 Pa. St. 348; *Mathers v. Hegarty*, 37 Pa. St. 64; *Malone v. Sallada*, 48 Pa. St. 419; *Eister v. Paul*, 54 Pa. St. 196; *Darrah v. Bryant*, 56 Pa. St. 69; *Glass v. Gilbert*, 58 Pa. St. 266; *Fritz v. Brandon*, 78 Pa. St. 342; *Sugar Valley Lumbering Co. v. Barber*, 87 Pa. St. 313; *Northumberland Coal Co. v. Clement*, 95 Pa. St. 126; *Pruner v. Brisbin*, 98 Pa. St. 202; *Parks v. Boynton*, 98 Pa. St. 370; *Bloom v. Ferguson*, 128 Pa. St. 362; *Ferguson v. Bloom*, 144 Pa. St. 549; *Fisher v. Kaufman*, 170 Pa. St. 444.

6. Including Appropriated Land. — *Marcy v. Gardinier*, 7 Watts (Pa.) 240.

7. Effect of Survey — Transfer of Title. — *M'Kinzie v. Crow*, 2 Binn. (Pa.) 105; *Troutman v. May*, 33 Pa. St. 455; *Conkling v. Westbrook*, 81* Pa. St. 81; *Midland Min. Co. v. Lehigh Valley Coal Co.*, 136 Pa. St. 444; *Herron v. Dater*, 120 U. S. 464.

8. Survey Conclusive as to Lines Laid Down. — *M'Teer v. Buttorff*, 4 Yeates (Pa.) 300; *Hunter v. Meason*, 4 Yeates (Pa.) 107.

Survey Presumed to Have Been Made for Warrantee. — Every survey is presumed to have been made with the assent of the owner of the warrant, and will conclude him unless he objects to it within a reasonable time. *Drinker v. Holliday*, 2 Yeates (Pa.) 87; *Porter v. Ferguson*, 3 Yeates (Pa.) 60; *Steel v. Finley*, 3 Yeates (Pa.) 169; *Urket v. Coryell*, 5 W. & S. (Pa.) 60. This presumption, however, is subjected to be rebutted. *Merchant v. Millison*, 3 Yeates (Pa.) 73.

9. Presumption that Survey Was Made on Ground. — The presumption that there was a compliance with the statutory requirement that the surveyor shall go on and measure the ground and mark the lines is not rebutted by the fact that no marks are to be found on the ground.

within the boundaries of the surveyor's district;¹ and that the survey was in all respects regularly made according to law.² The presumption in favor of a survey may always be rebutted within twenty-one years after the survey was returned,³ but after twenty-one years from the return of the survey to the land office, the presumption of regularity becomes conclusive.⁴ This presumption, however, is only to the effect that the surveyor did run the lines as he has stated in his return; and the location of the lines so run is a question of fact to which the legal presumption cannot apply until some mark of the surveyor has actually been discovered that may serve as a starting point. If the lines called for at any corner can be found on the ground, the legal presumption fixes itself on this corner, and will inclose the entire tract by running the courses and distances laid down in the official return.⁵

(*dd*) *Return of Survey—Resurvey.*—A survey does not become a complete official act of the surveyor until he has made a return thereof to the office of the surveyor-general. Until such return is made the survey is subject to be changed by the surveyor, and he may extend it or otherwise correct mistakes that may have occurred,⁶ as long as mesne rights of third persons are not affected.⁷ But after the return the surveyor is *functus officio*, and cannot afterwards make any change in the survey,⁸ nor can he make a new survey

Ormsby v. Ihmsen, 34 Pa. St. 462. But it may be rebutted before the lapse of twenty-one years by showing that there are marks, monuments, etc., indicating that the actual location on the ground differs from the courses and distances shown by the survey. Bellas v. Cleaver, 40 Pa. St. 260.

1. Presumption that Surveyor Acted Within District.—A survey cannot be impeached forty years after its return by evidence that the lines ran outside the surveyor's district. Goddard v. Gloninger, 5 Watts (Pa.) 209; Vastbinder v. Wager, 6 Pa. St. 339.

2. Presumption of Regularity in General.—Willink v. Miles, Pet. (C. C.) 429, 30 Fed. Cas. No. 17,768; Harris v. Burchan, 1 Wash. (U. S.) 191, 11 Fed. Cas. No. 6,117; Griffith v. Bradshaw, 4 Wash. (U. S.) 171, 11 Fed. Cas. No. 5,821; Lewis v. Meredith, 3 Wash. (U. S.) 81, 15 Fed. Cas. No. 8,328; Clement v. Packer, 125 U. S. 309; Schraeder Min., etc., Co. v. Packer, 129 U. S. 688; Meade v. Haymaker, 3 Yeates (Pa.) 67; Writ v. Stevenson, 3 Binn. (Pa.) 35; Renn v. Pennsylvania Hospital, 2 S. & R. (Pa.) 413; Tyrone Min., etc., Co. v. Cross, 128 Pa. St. 636.

The rule stated in the text is only a particular application of the doctrine as to the presumption in favor of the validity of official acts, as to which see the title PRESUMPTIONS, vol. 22, p. 1266 *et seq.*

A Survey Found in a Book of Original Surveys of a deputy surveyor, whether in his handwriting or not, is taken to have been done under his authority, and is his act. Stevens v. Wylie, 1 Pa. St. 458.

3. Rebutting Presumptions.—Bellas v. Cleaver, 40 Pa. St. 260.

4. Presumption Conclusive by Lapse of Time.—Mock v. Astley, 13 S. & R. (Pa.) 382; Caul v. Spring, 2 Watts (Pa.) 390; Norris v. Hamilton, 7 Watts (Pa.) 91; Nieman v. Ward, 1 W. & S. (Pa.) 68; Schnable v. Doughty, 3 Pa. St. 392; Collins v. Barclay, 7 Pa. St. 67; Ormsby v. Ihmsen, 34 Pa. St. 462; Packer v. Schrader Min., etc., Co., 97 Pa. St. 379; Grier v. Pennsylvania Coal Co., 128 Pa. St. 79.

Chamber Surveys Presumed to Be Regular After Twenty-one Years from Return.—McBarron v. Gilbert, 42 Pa. St. 268.

5. Extent of Presumption—Location of Lines. Bushey v. South Mountain Min., etc., Co., 136 Pa. St. 541.

6. Change or Correction of Survey Before Return.—Evans v. Nargong, 2 Binn. (Pa.) 55; Nicholas v. Holliday, 3 Yeates (Pa.) 399; Gray v. McCreary, 4 Yeates (Pa.) 494; Acre v. Gilbert, 3 P. & W. (Pa.) 299; Maris v. Hanna, 4 W. & S. (Pa.) 348; Healy v. Moul, 5 S. & R. (Pa.) 181; Nickroy v. Skelley, 14 S. & R. (Pa.) 372; Hughes v. Stevens, 43 Pa. St. 197; Mineral R., etc., Co. v. Auten, 188 Pa. St. 568, 43 W. N. C. (Pa.) 158.

Return by Successor of Surveyor.—Hilling v. Wilson, 11 Grant Cas. (Pa.) 121.

Land Excluded on Resurvey.—Where a part of the land originally surveyed is excluded on a resurvey made at the instance of the owner, he thereby loses his right to the part excluded. Layton v. Paull, 5 Watts (Pa.) 465.

7. Protection of Intervening Rights of Third Persons.—Biddle v. Dougall, 2 Binn. (Pa.) 37; Diggs v. Downing, 4 S. & R. (Pa.) 348; Healy v. Moul, 5 S. & R. (Pa.) 181; Nickroy v. Skelley, 14 S. & R. (Pa.) 372; Acre v. Gilbert, 3 P. & W. (Pa.) 299; McCormick v. McMurtrie, 4 Watts (Pa.) 192; Addleman v. Way, 4 Yeates (Pa.) 218.

Descriptive Warrant Surveyed by Mistake on Other Land.—Waddell v. Gray, Add. (Pa.) 248.

8. Surveyor Cannot Change Survey After Return.—Schuyllkill, etc., Imp. Co. v. Munson, 14 Wall. (U. S.) 442; Harris v. Burchan, 1 Wash. (U. S.) 191, 11 Fed. Cas. No. 6,117; Drinker v. Holliday, 2 Yeates (Pa.) 87; Porter v. Ferguson, 3 Yeates (Pa.) 60; Hunter v. Meason, 4 Yeates (Pa.) 107; Cecil v. Amberson, Add. (Pa.) 359; Adams v. Jackson, 4 W. & S. (Pa.) 55; Healy v. Moul, 5 S. & R. (Pa.) 181; Phillips v. Shaffer, 5 S. & R. (Pa.) 215; Nickroy v. Skelley, 14 S. & R. (Pa.) 372; Hughes v. Stevens, 43 Pa. St. 197; Fritz v. Brandon, 78 Pa. St. 342; Mineral R., etc., Co. v. Auten, 188 Pa. St. 568, 43 W. N. C. (Pa.) 158.

without a new order,¹ and it is immaterial in this respect whether the first return had been accepted by the land office.²

Time for Return. — No definite time is prescribed by statute for the return of surveys, but reasonable diligence in this respect has always been required. In several cases a delay of more than seven years was held to be unreasonable,³ and finally the court, regarding it as necessary to establish a definite rule on the subject, fixed the period at seven years.⁴

Failure to Return Survey. — A survey, however, is not wholly without effect because it has not been returned. It is still admissible in evidence where it appears to have been made by a duly authorized deputy surveyor,⁵ and a patent issued on such survey is valid.⁶

Duty to Make Return. — It is not the duty of the deputy surveyor to return a survey unless he is requested to do so and his fees are paid;⁷ but it is the duty of a warrant holder to cause his survey to be returned within a reasonable time, in order to prevent rights of third persons from intervening.⁸

dd. **EXCESS OR DEFICIENCY IN QUANTITY.** — If a survey includes more land than the party is entitled to under his warrant he may, before the return, throw out the excess,⁹ but if he does not object to the quantity, the state only can make the objection,¹⁰ unless the improvement right of a third person is prejudiced.¹¹ Provision is made by law for an addition of ten per cent. of the amount of the warrant on account of highways, etc.,¹² and if a survey exceeds this total, the state may accept it and the title will pass to the warrantee on his payment of the proportionate amount for the excess.¹³

Even a Chamber Survey returned exhausts the authority given by the warrant to the surveyor who makes the survey, and a further survey cannot be made without a new order. *Oyster v. Bellas*, 2 Watts (Pa.) 397.

1. No Power to Make New Survey Without New Order. — *Deal v. McCormick*, 3 S. & R. (Pa.) 343; *McKeiry v. Gilleland*, 3 Watts (Pa.) 312; *Robeson v. Gibbons*, 2 Rawle (Pa.) 45.

Order for Resurvey. — *Eddy v. Faulkner*, 3 Yeates (Pa.) 580; *Deal v. McCormick*, 3 S. & R. (Pa.) 343.

The authority of the surveyor-general is not exhausted by the mere return of his deputy, but he can always grant new authority to make a survey until he accepts it. *Fritz v. Brandon*, 2 W. N. C. (Pa.) 164.

The board of property may order a resurvey, even after a patent has issued, to correct a mistake in the first survey by including land omitted from the first survey, but paid for at the time when the patent issued, and such resurvey is good as against a subsequent warrant, survey, and patent. *Huntley v. Barclay*, 149 Pa. St. 299.

New Survey Ratified by Acceptance of Return. — *Light v. Woodside*, 10 S. & R. (Pa.) 23.

Assent of Owner to Resurvey. — A new survey will not be ordered by the board of property without the assent of the owner. *Cassidy v. Conway*, 25 Pa. St. 240. See also *Hole v. Ritzenhouse*, 25 Pa. St. 491.

2. Acceptance of Return Immaterial. — *Hughes v. Stevens*, 43 Pa. St. 197.

3. More than Seven Years' Delay Held to Be Unreasonable. — *Star v. Bradford*, 2 P. & W. (Pa.) 397; *Brentlinger v. Hutchinson*, 1 Watts (Pa.) 52. See also *Zerbe v. Schall*, 4 Watts (Pa.) 138.

4. Period Definitely Fixed at Seven Years. — *Strauch v. Shoemaker*, 1 W. & S. (Pa.) 166.

Subsequent Recognition of Seven-year Rule. — *Wilhelm v. Shoop*, 6 Pa. St. 21; *Emery v. Spencer*, 23 Pa. St. 271; *Kirkpatrick v. Vanhorn*, 32 Pa. St. 131; *Paxton v. Griswold*, 122 U. S. 441.

5. Survey Admissible in Evidence though Not Returned. — *Leazure v. Hillegas*, 7 S. & R. (Pa.) 313.

6. Patent Issued on Unreturned Survey. — *Creek v. Moon*, 7 S. & R. (Pa.) 330.

7. Duty to Return Survey. — *Stevens v. Wylie*, 1 Pa. St. 458.

8. Duty of Warrant Holder to Have Survey Returned. — *Kirkpatrick v. Vanhorn*, 32 Pa. St. 131; *McGowan v. Ahl*, 53 Pa. St. 84; *Boynton v. Urian*, 55 Pa. St. 142; *Garver v. McNulty*, 39 Pa. St. 473; *Steinmetz v. Logan*, 5 Watts (Pa.) 518; *Stevens v. Wylie*, 1 Pa. St. 458, 7 Pa. St. 114.

Rights of Owner as Affected by Failure to Make Return. — *Zerbe v. Schall*, 4 Watts (Pa.) 138.

9. Excess in Survey — Rejection by Warrantee. — *Higgs v. Stimmel*, 3 P. & W. (Pa.) 115; *Hagerty v. Mathers*, 31 Pa. St. 348.

10. State Alone May Object to Excessive Survey Accepted by Warrantee. — *Steinmetz v. Young*, 2 Binn. (Pa.) 520; *Darrah v. Bryant*, 56 Pa. St. 69.

11. Creek v. Moon, 7 S. & R. (Pa.) 330; *Simpson v. Wray*, 7 S. & R. (Pa.) 336; *Raush v. Miller*, 24 Pa. St. 277.

12. Allowance of Ten per Cent. in Addition to Warrant. — *Merchant v. Millison*, 3 Yeates (Pa.) 73; *Elliot v. Bonnet*, 3 Yeates (Pa.) 287; *Gripe v. Baird*, 4 Yeates (Pa.) 215; *Kyle v. White*, 1 Binn. (Pa.) 246; *Steinmetz v. Young*, 2 Binn. (Pa.) 520; *White v. Kyle*, 6 S. & R. (Pa.) 107; *Dixon v. Crist*, 17 S. & R. (Pa.) 54; *Layton v. Paull*, 5 Watts (Pa.) 465.

13. Proportionate Amount for Excess. — *Conn v. Penn. Pet. (C. C.)* 496, 6 Fed. Cas. No. 3,104, 5 Wheat. (U. S.) 424, 4 Wash. (U. S.) 430, 6

A Deficiency in quantity may be corrected at the instance of the owner at any time before the survey is returned,¹ but after the return a new order from the land office is necessary.²

cc. COMPENSATION OF SURVEYORS. — A surveyor is entitled to certain fees, fixed by law, for each survey made by him, and for this purpose each warrant requires a complete survey of the land called for by it. Therefore, where several warrants belonging to one person are in the hands of a surveyor, the lines of each tract called for by the several warrants must be run, though they are located contiguously; and if the surveyor treats the several surveys as one, and merely runs exterior lines of a tract aggregating all the warrants, without interior lines dividing the several tracts from each other, he cannot recover any compensation unless the survey was made in that manner by agreement with the owner.³ And a usage among surveyors to make such surveys will not alter the case, unless the person employing the surveyor knew of the usage at the time.⁴

(a) *Patents* — *aa. AUTHORITY TO ISSUE.* — Formerly the authority to issue patents was vested in the secretary of the land office, and it was held that in a proper case mandamus would lie to compel him to issue a patent to the person entitled thereto.⁵ Afterwards the office of secretary of the land office was abolished,⁶ and it was provided that all patents and other papers theretofore signed by such secretary should be signed by the governor and countersigned by the surveyor-general.⁷

bb. OWNERSHIP. — A patent is merely a formal relinquishment by the commonwealth of all its rights of ownership, and therefore belongs of right to the person who is entitled to the land.⁸ Hence, if a patent is issued to one person when another has acquired the ownership of the land by warrant and survey, purchase, or otherwise, the person to whom the patent is issued becomes a trustee for the person entitled.⁹

Evidence of Ownership. — *Prima facie* evidence of ownership is afforded by superintending the survey and paying the fees therefor.¹⁰

Payment of the Purchase Money vests the ownership of the land in the person making the payment though he is not named in the warrant, and his rights cannot be affected by the subsequent issuance of a warrant to another.¹¹

cc. VALIDITY AND EFFECT — (*aa*) *In General.* — A patent is merely the deed of the commonwealth to its grantee, the execution and delivery of which constitute an admission that all formalities have been complied with.¹² It is, therefore,

Fed. Cas. No. 3,105; *Wells v. Wright*, 3 Wash. (U. S.) 250, 29 Fed. Cas. No. 17,405; *Hagerty v. Mathers*, 31 Pa. St. 348; *Smith v. Walker*, 98 Pa. St. 133.

1. *Correction of Deficiency Before Return.* — *Maris v. Hanna*, 4 W. & S. (Pa.) 348.

2. See *supra*, this subsection, *Return of Survey* — *Resurvey*.

3. *Compensation of Surveyor.* — *McDowell v. Ingersoll*, 5 S. & R. (Pa.) 101; *Woods v. Ingersoll*, 1 Binn. (Pa.) 146.

4. *Usage of Surveyors.* — *McDowell v. Ingersoll*, 5 S. & R. (Pa.) 101. And see generally the title *USAGES AND CUSTOMS*.

5. *Patents Formerly Issued by Secretary of Land Office.* — *Com. v. Cochran*, 1 S. & R. (Pa.) 473. See also *Com. v. Cox*, 4 Dall. (Pa.) 170.

6. See *supra*, this subsection, *Land Office*.

7. Act Pa. April 29, 1844, *Bright. Purd. Dig. Laws Pa.* (1894), p. 1196, par. 125.

8. *Ownership of Patent in General.* — *Duer v. Boyd*, 1 S. & R. (Pa.) 203; *Urket v. Coryell*, 5 W. & S. (Pa.) 60; *Brock v. Savage*, 31 Pa. St. 470, 46 Pa. St. 83.

9. *Patentee as Trustee for True Owner.* — *Gon-*

zalus v. Hoover, 6 S. & R. (Pa.) 118; *Urket v. Coryell*, 5 W. & S. (Pa.) 60; *Stockwell v. Robinson*, 1 Pa. St. 477; *Broad Top Coal, etc., Co. v. Riddlesburg Coal, etc., Co.*, 65 Pa. St. 435; *Bachop v. Critchlow*, 142 Pa. St. 518; *Taylor v. Lyon Lumber Co.*, 13 Pa. Co. Ct. 235.

10. *Evidence of Ownership* — *Superintending Survey and Paying Fees.* — *Turner v. Waterson*, 4 W. & S. (Pa.) 171.

But this may be rebutted by proof of the actual ownership. *Orr v. Cunningham*, 4 W. & S. (Pa.) 294.

11. *Payment of Purchase Money.* — *Herron v. Dater*, 120 U. S. 464; *Murphy v. Packer*, 152 U. S. 398.

By the common practice in Pennsylvania, where more than one warrant issues to one person he uses the name of a third person, who is considered merely as a nominal person, the title being in him who pays the money to the office and obtains the warrant. *James v. Gordon*, 1 Wash. (U. S.) 333.

12. *General Nature and Effect of Patent.* — *Bushey v. South Mountain Min., etc., Co.*, 136 Pa. St. 552.

prima facie evidence of title and of survey,¹ and operates to convey the full legal title of the state, merging all the prior proceedings and waiving all formalities.² It is also full and express notice to every person that the land has been granted and is not vacant.³

(bb) *Fraud in Procurement*.—The commonwealth may on scire facias procure the revocation of a patent where it was procured by fraud;⁴ and a claimant, also, of land which has been patented may avoid the patent by showing that it was procured by fraud.⁵

(cc) *Land Not Included in Survey*.—A patent may not lawfully include any land not covered by the survey, and if it purports to do so, it is void as to the excess.⁶

(2) *Settlement and Improvement*—(a) *Settlement as Mode of Acquiring Title*.—A second mode by which an individual may acquire a complete title to unappropriated land in *Pennsylvania* is by settlement, improvement, and occupation, though without any warrant and survey or other office right. This mode of acquisition of title has existed since early colonial times, and titles so acquired have frequently been recognized as superior to titles based on proceedings in the land office.⁷ It seems to have originated with settlements made during the minority of the heirs of the first proprietary when the land office was temporarily closed, and rests on the favor with which actual settlers have always been regarded.⁸

(b) *Who May Be Settler*.—As a general rule, any person may acquire a title by settlement. The privilege was never confined to any particular nation or color, and therefore it was held, during the existence of slavery, that a free negro, though without political rights, might acquire property.⁹ Though a father is entitled to the proceeds of the labor of his minor children, they still have the capacity to acquire property in certain ways, as by gift from the father or from a stranger; and if a father permits his infant son to improve land for his own use he will acquire a title thereto the same as if he had been of age.¹⁰

Husband and Wife.—In the case of a settlement by a husband and wife, there is a presumption that the husband, as the head of the family, becomes the

1. *Patent Prima Facie Evidence of Title*.—*James v. Betz*, 2 Binn. (Pa.) 12; *Whitmire v. Napier*, 4 S. & R. (Pa.) 290; *Smith v. Vasbinder*, 77 Pa. St. 127; *Olewine v. Messmore*, 128 Pa. St. 470.

A patent, though *prima facie* evidence of title, is not conclusive, and a defendant claiming against it has the right to controvert the effect of its recitals. *Burd v. Seabold*, 6 S. & R. (Pa.) 137; *Bushey v. South Mountain Min., etc., Co.*, 136 Pa. St. 552. See also *Payne v. Howard*, 107 Pa. St. 579.

In *Kelly v. Graham*, 9 Watts (Pa.) 116, the plaintiff put his patent in evidence. The defendant, in order to overcome this *prima facie* case, put in the warrant and survey on which the plaintiff's patent was based, and showed that the land in controversy, though covered by the patent, was not embraced in the survey. He then showed a prior right in himself by actual settlement on the land. This showing overcame the *prima facie* case made by the patent, and enabled the defendant to hold the land thus improperly included in the plaintiff's patent.

2. *Conveyance of Legal Title*.—*Balliot v. Bauman*, 5 W. & S. (Pa.) 150; *Fritz v. Brandon*, 78 Pa. St. 342; *Hines v. Kingston Coal Co.*, 186 Pa. St. 43; *Mineral R., etc., Co. v. Auten*, 188 Pa. St. 568.

3. *Notice that Land Is Not Vacant*.—*Bushey*

v. South Mountain Min., etc., Co., 136 Pa. St. 552.

After patent, a subsequent warrant and survey are merely void. *Drinker v. Hunter*, 2 Yeates (Pa.) 129.

4. *Fraud in Procurement—Revocation*.—*Com. v. Boley*, 1 W. N. C. (Pa.) 303.

5. *Patent Avoided by Adverse Claimant*.—*Burd v. Seabold*, 6 S. & R. (Pa.) 137; *Smith v. Vasbinder*, 77 Pa. St. 127.

6. *Patent Including Land Not Covered by Survey*.—*Kelly v. Graham*, 9 Watts (Pa.) 116; *Ormsby v. Ihmsen*, 34 Pa. St. 462; *Delaware, etc., Canal Co. v. Dimock*, 47 Pa. St. 393; *Payne v. Howard*, 107 Pa. St. 579.

7. *Settlement as Recognized Mode of Acquiring Title*.—*Howard v. Pollock*, 1 Yeates (Pa.) 509; *Smith v. Brown*, 1 Yeates (Pa.) 513; *Cecil v. Korbman*, cited in *Frazer v. Halliwell*, 1 Binn. (Pa.) 134; *Bonnet v. Devebaugh*, 3 Binn. (Pa.) 175; *Senser v. Bower*, 1 P. & W. (Pa.) 450; *Wood v. Jones*, 7 Pa. St. 478; *Emery v. Spencer*, 23 Pa. St. 271.

8. *Origin of Title by Settlement*.—*Smith v. Brown*, 1 Yeates (Pa.) 513. See also *Bonnet v. Devebaugh*, 3 Binn. (Pa.) 175.

9. *Settlement by Free Negro*.—*Foremans v. Tamm*, 1 Grant Cas. (Pa.) 23.

10. *Settlement by Infant*.—*M'Laughlin v. Maybury*, 4 Yeates (Pa.) 534; *Galbraith v. Black*, 4 S. & R. (Pa.) 207.

owner of the settlement claim, and this presumption is not rebutted by the fact that he was absent the greater part of the time.¹

(e) **Validity and Requisites of Settlement** — *aa. IN GENERAL.* — In order to acquire a title by settlement there must be an actual residence on the land, either by the claimant in person or by a tenant or agent, using it as the means of supporting a family,² unless there is such danger in remaining as would deter a man of reasonable courage, and even then an intention to return after the danger should have passed must appear.³ Without actual residence, improvement or even cultivation is not sufficient.⁴

Residence of Tenant or Agent. — It is not necessary that the claimant should reside on the land in person. It is sufficient if his tenant or agent resides on the land and cultivates it.⁵

Warrant Not Necessary. — The owner of an improvement right is not required by statute to take out a warrant. Continued residence and cultivation either by himself or by a tenant are all that is required.⁶

bb. PURPOSE OF OCCUPATION. — The settlement within the rule under discussion must be for the purpose of supporting a family by means of the cultivation of the soil and raising grain.⁷ An intent to use the land for the purpose of making charcoal or cutting and selling the timber, though as the means of supporting a family, will not suffice.⁸ It is not necessary, however, that the settler should rely entirely on the raising of grain as the means of supporting his family. He may also cut and sell timber, and may even make that the principal purpose for which he uses the land.⁹

(a) **Lands Subject to Settlement.** — A settler did not merely by virtue of his settlement and improvement acquire the right to land which had not theretofore been purchased from the Indians,¹⁰ and it was immaterial that he remained in possession of the land and continued his improvements after such a purchase.¹¹ But a settler's right under such a settlement could be secured by a special promise on the part of the proprietaries,¹² provided that he obtained a confirmation within a reasonable time after the opening of the land office for the disposal of the land after its purchase.¹³

1. **Settlement by Husband and Wife.** — *Stockwell v. Robinson*, 1 Pa. St. 477.

2. **Actual Residence Required.** — *Ewalt v. Highlands*, 4 Dall. (Pa.) 161; *McLaughlin v. Dawson*, 4 Dall. (Pa.) 221, 3 Yeates (Pa.) 61; *Balfour v. Meade*, 4 Dall. (Pa.) 363; *State v. Huston*, Add. (Pa.) 334; *Dick v. Cameron*, Add. (Pa.) 337; *Stevens v. Tracey*, 3 Yeates (Pa.) 77; *Meade v. Haymaker*, 3 Yeates (Pa.) 67; *Clemmins v. Gottshall*, 4 Yeates (Pa.) 330; *Wright v. Small*, 4 Yeates (Pa.) 562; *Gilday v. Watson*, 5 S. & R. (Pa.) 267; *Hoak v. Long*, 10 S. & R. (Pa.) 9; *Pfoutz v. Steel*, 2 Watts (Pa.) 409; *Goodman v. Losey*, 3 W. & S. (Pa.) 526; *Stephens v. Leach*, 19 Pa. St. 262; *Emery v. Spencer*, 23 Pa. St. 271; *Smith v. Beck*, 25 Pa. St. 106; *Broad Top Coal, etc., Co. v. Riddlesburg Coal, etc., Co.*, 65 Pa. St. 435.

3. **Danger Excusing Personal Residence.** — *Ewalt v. Highlands*, 4 Dall. (Pa.) 161; *McLaughlin v. Dawson*, 4 Dall. (Pa.) 221; *Hindekoper v. Douglass*, 4 Dall. (Pa.) 392.

4. **Cultivation Without Residence Not Sufficient.** — *Dixon v. Morehead*, Add. (Pa.) 216; *Bixler v. Baker*, 4 Binn. (Pa.) 213; *Morris v. Thomas*, 5 Binn. (Pa.) 77; *Wood v. Jones*, 7 Pa. St. 478.

5. **Residence of Tenant or Agent.** — *Dick v. Cameron*, Add. (Pa.) 337; *Smith v. Oliver*, 11 S. & R. (Pa.) 257; *Kelly v. Abers*, 16 S. & R. (Pa.) 281; *Rush v. Barr*, 1 Watts (Pa.) 110; *Reed v. Dickey*, 2 Watts (Pa.) 459; *Myers*

v. Myers, 8 Watts (Pa.) 430; *Cleavinger v. Reimar*, 3 W. & S. (Pa.) 486; *Stockwell v. Robinson*, 1 Pa. St. 477; *Sample v. Robb*, 16 Pa. St. 305; *Emery v. Spencer*, 23 Pa. St. 271; *Smith v. Beck*, 25 Pa. St. 106; *Whitcomb v. Hoyt*, 30 Pa. St. 403.

6. **Warrant Not Necessary.** — *Schall v. Miller*, 3 Whart. (Pa.) 250.

7. **Cultivation of Soil.** — *Gardinier v. Marcy*, 5 Watts (Pa.) 337; *Wyncoop v. Heath*, 10 Watts (Pa.) 428.

Raising Grain. — *Goodman v. Losey*, 3 W. & S. (Pa.) 526.

8. **Cutting Timber or Making Charcoal.** — *Jones v. Brownfield*, 2 Pa. St. 55. See also the cases cited in the next preceding note.

9. **Exclusive Use for Cultivation Not Required.** — *Goodman v. Losey*, 3 W. & S. (Pa.) 526; *Wilson v. Watterson*, 4 Pa. St. 214.

10. **Lands Not Purchased from Indians.** — *Drinker v. Hunter*, 2 Yeates (Pa.) 129; *Sherer v. M'Farland*, 2 Yeates (Pa.) 224; *Hurden v. Chaffin*, 2 Yeates (Pa.) 439; *Wilkins v. Allenton*, 3 Yeates (Pa.) 273; *Kyle v. White*, 1 Binn. (Pa.) 246.

11. **Possession After Purchase.** — *White v. Kyle*, 1 S. & R. (Pa.) 515.

12. **Special Promise of Proprietaries.** — *White v. Kyle*, 5 Binn. (Pa.) 162.

13. **Confirmation of Promise After Purchase.** — *White v. Kyle*, 5 Binn. (Pa.) 162, 1 S. & R. (Pa.) 515.

(e) **Nature and Extent of Settler's Rights** — *aa.* **CHARACTER OF PROPERTY RIGHTS ACQUIRED** — The interest acquired by a settlement is real estate and is subject to all the incidents of realty. Thus, it may be transferred only in the mode prescribed for real estate,¹ it descends to the heir at law,² and it is subject to the widow's right of dower.³

bb. **DESIGNATION AND EXTENT OF CLAIM.** — The Quantity of Land which may be acquired by settlement is subject to the same limitation as in cases of appropriation by warrant and survey;⁴ but it is optional with the settler to take less than the full amount which the law allows, and if he limits his claim to such smaller quantity he cannot afterwards claim a greater quantity as against intervening rights of third persons.⁵ And such a limitation may be effected by an agreement with adjoining owners as to boundary lines.⁶

Defining Claim. — It is the duty of a settler to define the limits of his claim in order that the adjacent lands which are subject to appropriation may be taken up without involving interference with his rights,⁷ and a subsequent warrantee or settler may require this to be done at the peril of the loss to the earlier settler of so much of his claim as may be appropriated by the later survey or settlement.⁸ It is also the duty of a subsequent warrantee or settler to require a prior settler to define his boundaries, and if the later survey or settlement is made without such request, it is at the peril of losing so much of the claim as interferes with the earlier settlement.⁹ If a settler neglects for seven years to define his claim, he will be postponed in case of interference with a later survey.¹⁰

Mode of Defining Claim. — A settler may define his claim by marking the boundary lines thereof without a survey,¹¹ or he may have a survey made,¹² or he may agree on lines dividing his claim from adjoining tracts,¹³ and a parol agreement to this effect is good.¹⁴

cc. **PRIORITIES** — **Commencement of Title.** — A title by settlement has its inception at the very commencement of the improvement, provided the work of making the settlement has been prosecuted with diligence.¹⁵ A delay, however, in

1. **Settlement Rights Constitute Real Estate** — **Transfers.** — *Zubler v. Schrack*, 46 Pa. St. 67. See also *Gilday v. Watson*, 2 S. & R. (Pa.) 407.

Application of Recording Acts. — *Waller v. Hill*, Add. (Pa.) 43.

2. **Descends to Heir.** — *Duncan v. Walker*, 2 Dall. (Pa.) 205; *Yeates (Pa.)* 213; *Workman v. Gillespie*, 3 *Yeates (Pa.)* 571; *Senser v. Bower*, 1 P. & W. (Pa.) 450; *Zubler v. Schrack*, 46 Pa. St. 67.

3. **Right of Dower.** — *Dodson v. Davis*, 2 *Yeates (Pa.)* 168; *Kelly v. Mahan*, 2 *Yeates (Pa.)* 515; *Myers v. Myers*, 8 *Watts (Pa.)* 430.

4. **Quantity of Land Acquired by Settlement.** — *Gilday v. Watson*, 2 S. & R. (Pa.) 407; *Kissinger v. Thompson*, 12 S. & R. (Pa.) 44; *Atchison v. McCulloch*, 5 *Watts (Pa.)* 13; *Burford v. McCue*, 53 Pa. St. 427.

5. **Taking Less than Amount Allowed by Law.** — *Hamilton v. McCulloch*, Add. (Pa.) 272; *Holmes v. Hay*, 3 *Yeates (Pa.)* 588; *Davis v. Keefer*, 4 *Binn. (Pa.)* 161; *Houston v. Sims*, 12 Pa. St. 195.

6. **Agreement as to Boundaries.** — *Gilday v. Watson*, 5 S. & R. (Pa.) 267; *Kirkpatrick v. Vanhorn*, 32 Pa. St. 131.

7. **Duty of Settler to Define Boundaries.** — *State v. Huston*, Add. (Pa.) 334; *Kissinger v. Thompson*, 12 S. & R. (Pa.) 44; *Kirkpatrick v. Vanhorn*, 32 Pa. St. 131; *Burke v. Mock*, 58 Pa. St. 489.

But Even if the Claim Is Not Defined, the settler may nevertheless recover the number of

acres to which he is entitled around his improvement, if other rights have not intervened. *Jones v. Brownfield*, 2 Pa. St. 55.

8. **Settler Compelled to Define Claim.** — *Kirkpatrick v. Vanhorn*, 32 Pa. St. 131.

9. **Duty of Subsequent Warrantee or Settler.** — *Barton v. Glasgo*, 12 S. & R. (Pa.) 149.

10. **Time for Defining Claim.** — *Farmers', etc., Bank v. Woods*, 11 Pa. St. 99; *Ross v. Pleasants*, 19 Pa. St. 157.

11. **Lines Marked by Settler.** — *Gander v. Burns*, 4 Dall. (Pa.) 122; *Gordon v. Moore*, 5 *Binn. (Pa.)* 136; *McMutrie v. McCormick*, 3 P. & W. (Pa.) 428; *Atchison v. McCulloch*, 5 *Watts (Pa.)* 13; *Luck v. Duff*, 6 S. & R. (Pa.) 189; *Mickle v. Lucas*, 10 S. & R. (Pa.) 293; *Barton v. Glasgo*, 12 S. & R. (Pa.) 149; *Schall v. Miller*, 3 *Whart. (Pa.)* 250; *Mitchell v. Bratton*, 5 W. & S. (Pa.) 451.

12. **Boundaries Fixed by Survey.** — *Holmes v. Hay*, 3 *Yeates (Pa.)* 588; *Davis v. Keefer*, 4 *Binn. (Pa.)* 161; *Houston v. Sims*, 12 Pa. St. 195.

13. **Boundaries Fixed by Agreement.** — *Syphers v. Meighen*, 22 Pa. St. 125; *Kirkpatrick v. Vanhorn*, 32 Pa. St. 131.

14. **Parol Agreement.** — *Gilday v. Watson*, 5 S. & R. (Pa.) 267.

15. **Commencement of Title by Settlement.** — *Branyan v. Flickenger*, 4 S. & R. (Pa.) 501; *Dixon v. Crist*, 17 S. & R. (Pa.) 54; *McMutrie v. McCormick*, 3 P. & W. (Pa.) 428; *Wallace v. Scott*, 7 W. & S. (Pa.) 248; *Emery v.*

completing the settlement will not necessarily defeat the inception of the title so as to let in subsequent rights. The settler may explain his delay, and it is a question of fact whether his explanation is reasonable.¹

A Subsequent Office Right is ordinarily postponed to a title acquired by a prior settlement and improvement, because, as already noticed, the title of the settler relates back to the time of the entry by him;² but under some circumstances the later office right has priority over the earlier settlement claim, as where the settler, at the time when he began his settlement, knew that application had been made for the land, though such application had not been filed in the land office,³ or where the settlement was made before the land office was opened for the sale of the land in question, and a descriptive application for the land was entered on the same day that the office was so opened.⁴

A Prior Office Right may, under some circumstances, be postponed to a later settlement claim. This is the case where the office right rests on a warrant fraudulently obtained, if the settlement was begun before the issuance of a patent to the warrantee.⁵

e. PRE-EMPTION RIGHTS — (1) *Under Proprietary Government.* — It was the practice under the proprietary government to recognize in persons who had made settlements on unappropriated land a prior right to obtain grants thereof.⁶

(2) *Under State Government.* — By a statute passed in 1784 it was provided that a right of pre-emption to their respective possessions should be allowed to all persons who had theretofore settled on lands within a certain region.⁷ This statute applied only to persons who remained on the land after the beginning of the Revolutionary war⁸ or up to the time when the war began and then went into the army,⁹ and who had paid or tendered the purchase money on or before November 1, 1785.¹⁰ Later statutes gave a pre-emption right to settlers on any land, such right to continue from the date of the act (1786) until April 10, 1793,¹¹ but this was held to be merely declaratory of the old law.¹² The Act of 1786 defined a "settlement" as "an actual personal resident settlement, with a manifest intention of making it a place of abode and the means of supporting a family,"¹³ and continued from time to time, unless interrupted

Spencer, 23 Pa. St. 271; McCombs v. Rowan, 59 Pa. St. 414.

1. **Explanation of Delay.** — Wright v. Small, 4 Yeates (Pa.) 562.

2. **Priority over Title Founded on Office Right.** — Neave v. Edwards, 2 Yeates (Pa.) 463; Nicholls v. Lafferty, 3 Yeates (Pa.) 272; Elliot v. Bonnet, 3 Yeates (Pa.) 287; Schall v. Miller, 3 Whart. (Pa.) 250.

Improvement Without Settlement. — Since the title of a settler depends on a settlement and improvement, a mere improvement without settlement does not give priority over a warrant title. Dixon v. Morehead, Add. (Pa.) 216; Hepburn v. Hutchinson, 2 Yeates (Pa.) 329.

Priority over Patent. — A claim under a settlement with actual personal residence is superior to a later patent. Elliot v. Bonnet, 3 Yeates (Pa.) 287.

3. **Settlement with Notice of Pending Application.** — Mix v. Smith, 7 Pa. St. 75.

4. Buchanan v. McClure, 1 Binn. (Pa.) 385.

5. **Priority over Earlier Office Right.** — Bixler v. Baker, 4 Binn. (Pa.) 213.

6. **Pre-emption Rights under Proprietary Government.** — Bonnet v. Devebaugh, 3 Binn. (Pa.) 175.

7. Act Pa. Dec. 21, 1784, Bright. Purd. Dig. Laws Pa. (1894), p. 1180, par. 41.

A Pre-emption Right Is Real Estate and is

transmissible according to the rules governing that species of property. Zubler v. Schrack, 46 Pa. St. 67.

8. **Occupancy After Beginning of War.** — Hughes v. Dougherty, 1 Yeates (Pa.) 497.

9. **Pre-emption Rights Not Lost by Going into Army.** — Sweeny v. Toner, 2 Dall. (Pa.) 129, 1 Yeates (Pa.) 499.

10. **Payment or Tender of Purchase Money.** — Cook v. Epple, 1 Yeates (Pa.) 324; M'Connel v. Porter, 1 Yeates (Pa.) 405.

11. Act Pa. Dec. 30, 1786 (Bright. Purd. Dig. Laws Pa. 1894, p. 1178, § 31); Act Pa. March 21, 1792 (Bright. Purd. Dig. Laws Pa. 1894, p. 1179, § 34).

The right was afterwards extended to the year 1811. Bright. Purd. Dig. Laws Pa. (1894), p. 1179, note *h*.

Extent of Claim. — The settler's claim was limited to the extent of actual occupancy and improvement, unless within seven years he designated the extent of it by survey or otherwise. Ross v. Pleasants, 19 Pa. St. 157.

12. **Statute Declaratory of Old Law.** — Stevens v. Tracey, 3 Yeates (Pa.) 77.

13. **Place of Abode and Means of Supporting Family.** — This provision has been construed as meaning that the use of the land for agricultural purposes was necessary to constitute such a settlement as would create a pre-emption right.

by the enemy or by going into the military service of this country during the war."¹

4. Texas — a. LAND CERTIFICATES DEFINED AND CHARACTERIZED —

(1) *Unlocated Certificates.* — As the transfer of title to public lands from the state to individuals, both before and since the annexation of Texas to the United States, has been largely through the medium of land certificates, a knowledge of the nature and characteristics of such certificates is essential to an understanding of the land laws of the country. An unlocated land certificate is merely the obligation of the government entitling the owner of it to secure the designated quantity of land by following the requirements of the law.² It gives the owner no right to any particular land until those requirements are complied with.³ It is personal property,⁴ and may be assigned or sold by parol agreement and delivery,⁵ whereby the purchaser acquires a right to locate it and procure a patent in the name of the grantee, but for his own use, he becoming thereby the equitable owner of the land located.⁶

(2) *Located Certificates.* — But when a land certificate has been located it attaches to the land and becomes a chattel real, and cannot be assigned and transferred by parol.⁷ The sale of a located certificate operates the equitable transfer of the land located under it.⁸

b. ACQUISITION OF PUBLIC LANDS PRIOR TO ANNEXATION BY UNITED STATES — (1) *General Colonization Laws.* — Prior to the establishment of the republic of Texas, the national colonization law of Mexico required the several states of the Mexican republic to pass colonization laws. Accordingly the congress of Coahuila and Texas framed a law under which persons coming into the state and becoming domiciled there were entitled to grants of public land, a certain amount for each family and a smaller amount for each single man.⁹ The rights acquired under this statute were recognized by the laws of the republic of Texas.¹⁰ The laws of that republic also provided

Gardinier v. Marcy, 5 Watts (Pa.) 341; *Wyncoop v. Heath*, 10 Watts (Pa.) 428; *Goodman v. Losey*, 3 W. & S. (Pa.) 526.

Cutting Timber. — And therefore no right was acquired where the land was used only for the purpose of cutting and selling the timber. *Stevens v. Tracey*, 3 Yeates (Pa.) 77; *Clemmins v. Gottshall*, 4 Yeates (Pa.) 333; *Brentlinger v. Hutchinson*, 1 Watts (Pa.) 51; *Overton v. Gibson*, 2 Watts (Pa.) 384; *Atchison v. McCulloch*, 5 Watts (Pa.) 13; *Gardinier v. Marcy*, 5 Watts (Pa.) 337; *Wyncoop v. Heath*, 10 Watts (Pa.) 428; *Adams v. Jackson*, 4 W. & S. (Pa.) 55.

1. **Continuous Occupancy.** — It was essential that the occupancy should be continuous. If it was not, no pre-emption right could be claimed. *Smith v. Brown*, 1 Yeates (Pa.) 515; *Neave v. Edwards*, 2 Yeates (Pa.) 463; *Magens v. Smith*, 4 Binn. (Pa.) 73; *White v. Kyle*, 1 S. & R. (Pa.) 515; *Lilly v. Paschal*, 2 S. & R. (Pa.) 394; *Gilday v. Watson*, 2 S. & R. (Pa.) 407; *Fisher v. Larick*, 3 S. & R. (Pa.) 319; *Phillips v. Shaffer*, 5 S. & R. (Pa.) 215; *Watson v. Gilday*, 11 S. & R. (Pa.) 340; *Senser v. Bower*, 1 P. & W. (Pa.) 450; *Pfoutz v. Steel*, 2 Watts (Pa.) 409; *Atchinson v. McCulloch*, 5 Watts (Pa.) 13; *Farmers', etc., Bank v. Woods*, 11 Pa. St. 99; *Jacobs v. Figard*, 25 Pa. St. 47; *Arthurs v. King*, 84 Pa. St. 525.

Interruptions in the occupancy must be accounted for. *Cosby v. Brown*, 2 Binn. (Pa.) 127; *Cluggage v. Duncan*, 1 S. & R. (Pa.) 111; *Brentlinger v. Hutchinson*, 1 Watts (Pa.) 49; *Sherwood v. Summe*, 5 W. N. C. (Pa.) 357.

If the settler was driven off by the enemy or if he left on business, he was under obligation to return as soon as reasonably convenient. *Pfoutz v. Steel*, 2 Watts (Pa.) 412; *Witcomb v. Hoyt*, 30 Pa. St. 403.

2. **Unlocated Certificate Defined.** — *Cox v. Bray*, 28 Tex. 261; *New York, etc., Land Co. v. Thomson*, 83 Tex. 169.

3. *Linn v. Scott*, 3 Tex. 67.

4. **Unlocated Certificate Is Personal Property.** — *Miller v. Texas, etc., R. Co.*, 132 U. S. 662; *Gullett v. O'Connor*, 54 Tex. 408; *Glasscock v. Hughes*, 55 Tex. 479; *Hereford v. House*, 16 Tex. Civ. App. 356.

5. **Assignable by Parol Agreement and Delivery.** — *Miller v. Texas, etc., R. Co.*, 132 U. S. 662; *Gullett v. O'Connor*, 54 Tex. 408.

6. *Miller v. Texas, etc., R. Co.*, 132 U. S. 662.

7. **A Located Certificate Is a Chattel Real.** — *Adams v. Houston, etc., R. Co.*, 70 Tex. 252.

8. **Sale of Located Certificate.** — *Thompson v. Langdon*, 87 Tex. 254.

9. **Mexican Colonization Law.** — *Kennedy v. State*, 11 Tex. 108; *Chadoin v. Magee*, 20 Tex. 476; *Magee v. Chadoin*, 30 Tex. 644; *Gould v. West*, 32 Tex. 338; *Boone v. Hulsey*, 71 Tex. 176; *Hill v. Moore*, 85 Tex. 336. But see *Howard v. Republic*, 1 Tex. 83; *Land Com'rs v. Bell, Dall. (Tex.)* 366; *Republic v. English, Dall. (Tex.)* 608.

10. **Recognition by Republic of Rights Acquired under Mexican Law.** — *Howard v. Republic*, 1 Tex. 83; *Chadoin v. Magee*, 20 Tex. 476; *Magee v. Chadoin*, 30 Tex. 644; *Gould v. West*, 32 Tex. 338; *Hill v. Moore*, 85 Tex. 336.

that citizens of Texas who had not received their portion of land in like manner as colonists should be entitled to land, every head of a family a certain amount, and every single man a certain amount.¹ Provision was also made by the laws of the republic for the issuance of headright land certificates to settlers.² In 1837 a statute was enacted authorizing a board of land commissioners to grant persons claiming land of the government a certificate of their claims, upon proof being made of their right.³

It Would Seem that the Word "Family" as used in these laws meant a collection of persons having association by reason of marriage;⁴ though perhaps grants might lawfully have been made to men or women who were heads of families composed of themselves and servants.⁵

The Actual Presence of the Family in the country was an indispensable prerequisite to the grant.⁶

In Whom Title Vested. — Land granted under these laws to a family composed of husband and wife was community property.⁷ But a certificate issued to one whose family consisted solely of children was the separate estate of the grantee.⁸

Decisions under Former Government as to Qualifications of Grantee. — Where before the annexation of Texas by the United States a headright certificate, or a patent based on such a certificate, was issued under the laws of Mexico or of the

Provision in the Constitution of the Republic in Favor of Orphan Children whose parents were entitled to land under the colonization law of Mexico, construed. *Kennedy v. State*, 11 Tex. 108; *Fishback v. Young*, 19 Tex. 515.

1. Provision for Citizens of Texas Who Had Not Received Land under Mexican Law. — *Republic v. Young*, Dall. (Tex.) 464; *Republic v. Skidmore*, Dall. (Tex.) 581; *Republic v. Inglish*, Dall. (Tex.) 608; *Howard v. Republic*, 1 Tex. 83; *Republic v. Skidmore*, 2 Tex. 261; *Tichner v. State*, 2 Tex. 270; *Russell v. Randolph*, 11 Tex. 460; *Edwards v. Beavers*, 19 Tex. 506; *Patton v. Skidmore*, 19 Tex. 533; *Walters v. Jewett*, 28 Tex. 192; *Sanders v. Duval*, 39 Tex. 182; *Boone v. Hulsey*, 71 Tex. 176; *Hill v. Moore*, 85 Tex. 335.

2. Act Relating to the Issuance of Headright Land Certificates (Act of Jan. 4, 1839) construed. *Cannon v. Vaughan*, 12 Tex. 399; *Marks v. Hill*, 46 Tex. 345.

Law Declaring that Officers and Soldiers who had arrived in Texas during a certain period and had received an honorable discharge should be entitled to the same quantity of land as original colonists (Land Law of 1837, § 39) construed. *Grooms v. State*, 1 Tex. 567; *Land Com'r's v. Bell*, Dall. (Tex.) 366.

3. Power of the Board of Land Commissioners under the Land Law of 1837. Norton's Succession v. General Land Office Com'r, 2 Tex. 357; *State v. Sullivan*, 9 Tex. 156; *Karnes v. Butler*, (Tex. Civ. App. 1901) 62 S. W. Rep. 950.

Prerequisites to the Issuance of a Certificate under the Land Law of 1837. *Land Com'r's v. Reily*, Dall. (Tex.) 381; *Land Com'r's v. Raguet*, 2 Tex. 98.

Certificates Not Obtained in Strict Accordance with Law, Validated by Act of Jan. 19, 1841. — *Whitehead v. Foley*, 28 Tex. 1; *Spofford v. Bennett*, 55 Tex. 293.

Essential Prerequisites to Issuance of Headright Certificate under Act of Feb. 4, 1841. — *State v. Casinova*, 1 Tex. 401; *State v. Mason*, 2 Tex. 315; *Linn v. State*, 2 Tex. 317; *Tichner v. State*,

2 Tex. 270; *European-American Colonization Soc. v. Reed*, 25 Tex. Supp. 343.

As to the Conditions Essential to Be Performed to Perfect Title to land under a land certificate issued under the colonization laws, see *Chadoin v. Magee*, 20 Tex. 476; *Magee v. Chadoin*, 30 Tex. 644.

4. The Word "Family" Defined. — *Hill v. Moore*, 85 Tex. 335, explaining *Marsh v. Weir*, 21 Tex. 97, and *Hardiman v. Herbert*, 11 Tex. 656. See also *Bonne v. Hulsey*, 71 Tex. 176. See generally FAMILY, vol. 12, p. 866.

But the Fact that a Widow Was Living in a State of Concubinage would not have defeated her claim based upon a family composed of herself and her children born in lawful wedlock. *Cunningham v. State*, 1 Tex. 532. But see *Langford v. Republic*, Dall. (Tex.) 588.

5. *State v. Sullivan*, 9 Tex. 156; *Hatch v. Dunn*, 11 Tex. 708; *Hill v. Moore*, 85 Tex. 335.

6. Actual Presence of Family in Country Essential. — *Grooms v. State*, 1 Tex. 568; *Republic v. Skidmore*, 2 Tex. 261.

7. When the Land Granted Was Community Property. — *Edwards v. Beavers*, 19 Tex. 506; *Fishback v. Young*, 19 Tex. 515; *Babb v. Carroll*, 21 Tex. 765; *Walters v. Jewett*, 28 Tex. 192; *Boone v. Hulsey*, 71 Tex. 176; *Hill v. Moore*, 85 Tex. 335. See generally the title COMMUNITY PROPERTY, vol. 6, p. 313 *et seq.* See also *Hodge v. Donald*, 55 Tex. 344. But see *Langford v. Republic*, Dall. (Tex.) 588.

Rights of Purchaser of Certificate — Notice that Certificate Is Community Property. — *Hill v. Moore*, 85 Tex. 335.

Rights of Wife's Heirs Where Certificate Was Issued to Assignee of Husband, the assignment being made after wife's death. *Walters v. Jewett*, 28 Tex. 192, distinguishing *Webb v. Webb*, 15 Tex. 274.

Rights under Certificate Issued to Wife in Her Own Name After Husband's Death. — *Scott v. Rhea*, 5 Tex. 258.

8. When Certificate Was the Separate Estate of the Grantee. — *Webb v. Webb*, 15 Tex. 274; *Edwards v. Beavers*, 19 Tex. 506; *Boone v.*

republic of Texas, the decision of the officers of the former government, empowered by law to pass upon the matter, are conclusive as to the qualifications of the grantee to receive the certificate or patent.¹

(2) *Colonization or Empresario Contracts.* — Colonization or empresario contracts were a class of contracts well known in the history of Mexico, resting on a policy which was continued by the republic of Texas.² Such contracts were entered into between the government and individuals or companies, and in substance provided that the individual or company should bring into the country immigrants to be settled on vacant lands set apart for the purpose, and should receive as compensation therefor an amount of land proportioned to the number of immigrants introduced. Such contracts were founded on the idea that the government was abundantly rich in lands and deficient in population; that it owned large bodies of vacant lands which were rather a trouble than a profit, as resorts of Indians and beasts of prey, while it was much in need of an active and industrious agricultural population. In the case of Texas it was desirable also that this population should be fighting men, as the republic was in a state of smouldering war with Mexico, which might break out at any moment.³ Some of these contracts have received the interpretation of the courts.⁴

c. ACQUISITION OF PUBLIC LANDS SINCE ANNEXATION — (1) *Under Homestead Donation Laws* — (a) *In General.* — The constitution of Texas provides that "to every head of a family without a homestead there shall be donated one hundred and sixty acres of public land, upon condition that he will select and locate said land, and occupy the same three years," and "to all single men of eighteen years of age and upwards shall be donated eighty acres of public land," upon the same terms and conditions.⁵ This provision does not confer an absolute right to a homestead donation, but merely requires the legislature to provide a means by which homesteads may be acquired from any part of the public domain not appropriated or devoted to any other purpose.⁶ In pursuance of this requirement the legislature has enacted laws embodying the constitutional provision and prescribing the conditions upon which the persons entitled⁷ can acquire the amount of land designated.⁸

(b) *Prerequisites to Acquisition of Title* — *aa. SETTLEMENT AND APPLICATION.* — Under these laws a person entitled and who desires to acquire a homestead is required to present to the surveyor of the county his application in writing, containing a statement under oath that he has actually settled upon the land

Hulsey, 71 Tex. 176. See also *Marks v. Hill*, 46 Tex. 346.

1. *Conclusiveness of Decisions of Officers of Former Government.* — *Hardiman v. Herbert*, 11 Tex. 656; *Hatch v. Dunn*, 11 Tex. 708; *Babb v. Carroll*, 21 Tex. 765; *Walters v. Jewett*, 28 Tex. 192; *Burkett v. Scarborough*, 59 Tex. 495; *Hill v. Moore*, 85 Tex. 335.

2. In 1844 the law authorizing such contracts was repealed. *Walsh v. Preston*, 109 U. S. 297.

3. *Walsh v. Preston*, 109 U. S. 297, reversing 10 Fed. Rep. 315; *Hill v. Moore*, 85 Tex. 335.

4. *Construction of Colonization Contracts.* — *Walsh v. Preston*, 109 U. S. 297, reversing 10 Fed. Rep. 315; *Houston v. Perry*, 2 Tex. 37; *Bissell v. Haynes*, 9 Tex. 556; *Hamilton v. Avery*, 20 Tex. 612.

Qualifications Essential. — *Bissell v. Haynes*, 9 Tex. 556; *Webb v. Webb*, 15 Tex. 274.

Act Authorizing Empresarios under Mexican Contracts to Institute Suits Against the President of Texas (Act of Dec. 14, 1837) construed. *Houston v. Perry*, 2 Tex. 37.

5. *Constitutional Provision.* — Const. of Texas, art. 14, § 6.

6. *Yocham v. McCurdy*, 95 Tex. 336.

7. *A Person Who Has Already Acquired One Homestead Donation Cannot Acquire Another.* — *Gambrell v. Steele*, 55 Tex. 582; *Daughy v. Hall*, 59 Tex. 518.

One Whose Wife Owns a Homestead which is occupied as such by the family cannot acquire by pre-emption another homestead. *Garrison v. Grant*, 57 Tex. 602.

What Is Competent Evidence that Claimant Has No Other Homestead. — *Jones v. Hart*, (Tex. Civ. App. 1894) 25 S. W. Rep. 704.

8. Rev. Stat. Tex. 1895, art. 4160 *et seq.*

To Entitle a Person to Acquire a Homestead Donation of One Hundred and Sixty Acres, proof of the fact that he is head of a family is essential. *Gammage v. Powell*, 61 Tex. 629. See also *Garrison v. Grant*, 57 Tex. 602.

Amount of Land Acquirable by Pre-emptor under Act of Feb. 14, 1854. — *Wheeler v. Styles*, 28 Tex. 240.

which he claims, and that he believes the same to be vacant and unappropriated public domain.¹ This application must be made at the time of settlement or within thirty days thereafter.² Under these provisions there must be an actual settlement, and such settlement must precede the application.³

bb. SURVEY. — The applicant after making his application must have the land surveyed, and he has a preference right over all subsequent locations or settlements to have it surveyed, for a period of twelve months from the date of his application.⁴

cc. RETURN OF FIELD NOTES TO GENERAL LAND OFFICE. — The field notes of the survey must be returned to the general land office within twelve months after the date thereof.⁵

1. Written Application Containing Affidavit of Settlement. — Rev. Stat. Tex. 1895, art. 4162, 4163; *Prideaux v. Glasgow*, 2 Tex. Civ. App. 182; *Miller v. Moss*, 65 Tex. 179; *Busk v. Lowrie*, 86 Tex. 128; *Yochum v. McCurdy*, (Tex. Civ. App. 1897) 39 S. W. Rep. 210. See also *Bledsoe v. Caines*, 10 Tex. 455.

Sufficiency of Applicant's Affidavit. — *Spier v. Laman*, 27 Tex. 205.

Application for Homestead Donation in Name of Wife. — *Allen v. Harper*, 19 Tex. 501; *McCarthy v. Gomez*, 85 Tex. 10.

2. Time of Making Application. — Rev. Stat. Tex. 1895, art. 4163; *Busk v. Lowrie*, 86 Tex. 128; *Trueheart v. Simpson*, (Tex. Civ. App. 1894) 24 S. W. Rep. 842; *Jones v. Hart*, (Tex. Civ. App. 1894) 25 S. W. Rep. 704. See also *Yochum v. McCurdy*, (Tex. Civ. App. 1897) 39 S. W. Rep. 210.

But the Fact that a Settler Does Not Make His Application Within Thirty Days After Settlement will not defeat his right to acquire the land, if the right of no other person intervenes before he does make his application. *Gammage v. Powell*, 61 Tex. 629; *McCarthy v. Gomez*, 85 Tex. 10; *Trueheart v. Simpson*, (Tex. Civ. App. 1894) 24 S. W. Rep. 842. See *Teel v. Huffman*, 21 Tex. 781.

Ignorance of the Fact that Land Is Vacant will not exempt the settler thereon from the requirement that in order to preserve his priority of right, he shall file his application within thirty days after settlement. *Jones v. Hart*, (Tex. Civ. App. 1894) 25 S. W. Rep. 704.

3. Actual Settlement Preceding Application Essential. — *Mills v. Brown*, 69 Tex. 244; *McCarty v. Gomez*, 85 Tex. 10; *Swetman v. Sanders*, 85 Tex. 294; *Busk v. Lowrie*, 86 Tex. 128; *Brinkley v. Smith*, 12 Tex. Civ. App. 641; *Jones v. Hart*, (Tex. Civ. App. 1894) 25 S. W. Rep. 704. See also *Jennings v. De Cordova*, 20 Tex. 508; *Spier v. Laman*, 27 Tex. 205.

As to What Constitutes an Actual Settlement, see *De Montel v. Speed*, 53 Tex. 339; *Thomas v. Porter*, 57 Tex. 59; *Turner v. Ferguson*, 58 Tex. 6; *Busk v. Lowrie*, 86 Tex. 128, *reversing* (Tex. Civ. App. 1893) 22 S. W. Rep. 414; *Traylor v. Hubbard*, (Tex. Civ. App. 1893) 22 S. W. Rep. 241; *Jones v. Hart*, (Tex. Civ. App. 1894) 25 S. W. Rep. 704; *Brinkley v. Smith*, 12 Tex. Civ. App. 641; *Horne v. Gambrell*, 1 Tex. App. Civ. Cas., § 998. See also *Burleson v. Durham*, 46 Tex. 152.

To Obtain a Hundred and Sixty Acres the settlement must be made by a family. *Mills v. Brown*, 69 Tex. 244.

Right Acquired Merely by Settlement and Improvement under a Former Law. — Act of 1845 (Hart. Dig., art. 2130). *Cravens v. Brooke*, 17 Tex. 268.

4. Survey. — Rev. Stat. Tex. 1895, art. 4165; *Mills v. Brown*, 69 Tex. 244.

For the Construction of This Provision, see *Wood v. Collins*, 23 U. S. App. 224. See also *Allen v. Harper*, 19 Tex. 501; *Jennings v. De Cordova*, 20 Tex. 508; *Teel v. Huffman*, 21 Tex. 781; *Kohlhass v. Linney*, 26 Tex. 332; *Young v. O'Neal*, 54 Tex. 544; *Vance v. Lindsey*, 60 Tex. 286.

Failure to Procure Survey Within Twelve Months Prevented by Subsequent Conflicting Location. — *Thomas v. Porter*, 57 Tex. 59.

Effect of Surveyor's Wrongful Refusal to Make Survey. — *Taylor v. Criswell*, 4 Tex. Civ. App. 106.

Statutes Waiving Default in Making Survey. — The Act of May 26, 1873, extended the benefit of occupancy to the settler's right, so as to waive his default in not having the survey made within the time prescribed by the previous law under which the settlement was made. *Perry v. Coleman*, 1 Tex. Unrep. Cas. 312; *Thomas v. Porter*, 57 Tex. 59; *Vance v. Lindsey*, 60 Tex. 286, *distinguishing* *Teel v. Huffman*, 21 Tex. 781. See also *Young v. O'Neal*, 54 Tex. 544.

The Act of August 16, 1856, had the same effect. *Jennings v. De Cordova*, 20 Tex. 508.

5. Return of Field Notes. — Act of May 26, 1873, Rev. Stat. Tex. 1895, art. 4166; *Wood v. Collins*, 23 U. S. App. 224; *Mills v. Brown*, 69 Tex. 244.

Law as to Return of Field Notes Prior to Act of 1873. — *Perry v. Coleman*, 1 Tex. Unrep. Cas. 312; *Parish v. Weatherford*, 19 Tex. 209.

Effect of Failure to Return Field Notes Within Time Prescribed. — *O'Neil v. Lockhart*, 2 Tex. Unrep. Cas. 597; *Thornton v. Murray*, 50 Tex. 161; *Young v. O'Neal*, 54 Tex. 544; *Vance v. Lindsey*, 60 Tex. 286; *Kinsey v. Sasse*, 3 Tex. Civ. App. 216; *Taylor v. Criswell*, 4 Tex. Civ. App. 106.

Fraudulent Procurement and Appropriation of Field Notes by Another Person. — *Kohlhass v. Linney*, 26 Tex. 332.

It Will Not Be Presumed, Without Proof, that the Field Notes Were Not Returned within the time prescribed. *Yochum v. McCurdy*, (Tex. Civ. App. 1897) 39 S. W. Rep. 210.

Mandamus to Compel Filing of Field Notes. — The commissioner of the general land office may be compelled by mandamus to receive and file the field notes. *Hogue v. Baker*, 92 Tex. 58.

dd. RESIDENCE FOR THREE CONSECUTIVE YEARS. — Before a patent can issue upon a homestead claim, proof must be lodged in the general land office that the applicant by himself has, or, in case the claim has been transferred, that he and his assignee have together, resided upon, occupied, and improved the land for three consecutive years from the date of the application.¹ Under this provision an assignee of the claim may complete the three years' residence of the original settler and obtain a patent for the land.²

(c) *Validity of Patent.* — A patent issued under these provisions is not void by reason of the fact simply that the grantee was not the head of the family³ or had not settled on the land.⁴ In the absence of fraud the judgment of the commissioner of the land office upon these qualifications is conclusive.⁵ But if the patent was obtained by fraud it may be set aside at the suit of the state. It cannot, however, be collaterally avoided.⁶

(d) *When Land Acquired Is Community Property.* — Where a family that makes a settlement to obtain a homestead donation has for its head a husband and wife, the right to land is acquired by their joint settlement and is the community property of the marriage;⁷ and this whether the grant be taken in the name of the wife or in that of the husband.⁸

(e) *What Land Open to Acquisition.* — A homestead cannot be acquired "upon any land titled or equitably owned under color of title from the sovereignty of the state, evidence of the appropriation of which is on the county records or in the general land office, or when the appropriation is evidenced by the occupation of the owner or of some person holding for him."⁹

1. Residence for Three Years from Date of Application. — *Wood v. Collins*, 23 U. S. App. 224; *Rev. Stat. Tex.* 1895, art. 4167, 4168; *Mitchell v. Nix*, 1 Tex. Unrep. Cas. 126; *De Montel v. Speed*, 53 Tex. 339, *distinguishing* *Palmer v. Chandler*, 47 Tex. 334; *Mills v. Brown*, 69 Tex. 244; *Garrett v. Weaver*, 70 Tex. 463; *Palmer v. Bennett*, 81 Tex. 451; *Busk v. Lowrie*, 86 Tex. 128; *Kinsey v. Sasse*, 3 Tex. Civ. App. 216; *Roberts v. Trout*, 13 Tex. Civ. App. 70; *Votaw v. Pettigrew*, 15 Tex. Civ. App. 87; *Wise County Coal Co. v. Phillips*, 21 Tex. Civ. App. 293. See also *Jennings v. De Cordova*, 20 Tex. 508; *Spier v. Laman*, 27 Tex. 205.

Rights of Person Driven from Land by Hostile Indians. — See Act of March 13, 1875, p. 107 (*Rev. Stat. Tex.* 1895, art. 4173); *Swetman v. Sanders*, 85 Tex. 294.

2. Right of Assignee to Complete the Three Years' Residence. — *Mitchell v. Nix*, 1 Tex. Unrep. Cas. 140; *Johnson v. Townsend*, 77 Tex. 639; *Palmer v. Bennett*, 81 Tex. 451; *Kinsey v. Sasse*, 3 Tex. Civ. App. 216; *Wise County Coal Co. v. Phillips*, 21 Tex. Civ. App. 293.

Right of Widow and Heirs to Complete Period of Residence. — It would seem that the term "assignee" as used in the statute is sufficiently comprehensive to include the widow and heirs of a deceased homesteader, and that they may, therefore, upon the death of the homesteader before the completion of his three years' residence, complete that period and acquire a patent for the land. *Wise County Coal Co. v. Phillips*, 21 Tex. Civ. App. 293.

3. Validity of Patent. — *Styles v. Gray*, 10 Tex. 503; *Decourt v. Sproul*, 66 Tex. 368; *McCarthy v. Gomez*, 85 Tex. 10.

4. Decourt v. Sproul, 66 Tex. 368.

5. Decourt v. Sproul, 66 Tex. 368.

6. Patent Obtained by Fraud. — *Decourt v. Sproul*, 66 Tex. 368, *limiting* *Mason v. Russel*,

1 Tex. 724, and *Russell v. Randolph*, 11 Tex. 461, and *explaining* *De Leon v. White*, 9 Tex. 599.

7. Allen v. Harper, 19 Tex. 501; *Mills v. Brown*, 69 Tex. 244. And see the title *COMMUNITY PROPERTY*, vol. 6, p. 313 *et seq.*

8. Allen v. Harper, 19 Tex. 501.

Effect of Wife's Filing Pre-emption Claim and Paying Survey Fees Before Marriage. — Where the settlement is made by husband and wife the mere fact that the wife had, before marriage, filed a pre-emption claim to the land and paid the survey fees out of her own money, will not affect the right of the husband to a community interest in the homestead. By the payment of such fees the wife becomes a creditor of the community to the extent of the money advanced, and her claim a charge upon the property saved to the marital partnership. *Mills v. Brown*, 69 Tex. 244.

Homestead Acquired by Husband Before Marriage. — Where a man had done everything that the law required to secure a homestead prior to his marriage, the land thus secured is not the community property of the marriage, and the fact that the husband, prior to the marriage, voluntarily divided the land with another person, and after marriage filed application, as the head of a family, for an additional tract of land, will not have the effect of vesting, the previously acquired land in the community estate. *Gardner v. Burkhart*, 4 Tex. Civ. App. 590.

Rights of Husband and Wife Before Completion of Three Years' Residence. — *Mitchell v. Nix*, 1 Tex. Unrep. Cas. 126; *Roberts v. Trout*, 13 Tex. Civ. App. 70; *Votaw v. Pettigrew*, 15 Tex. Civ. App. 87.

9. Rev. Stat. Tex. 1895, art. 4174.

Generally as to the Construction of This Provision, see *Paston v. Blanks*, 77 Tex. 330. See also *Woods v. Durrett*, 28 Tex. 429.

(2) **What Constitutes Abandonment of Claim.** — Where the applicant's claim has been perfected by designation and survey, actual residence for the time prescribed, and return of the field notes, with affidavits as to residence, a subsequent abandonment of the place is not an abandonment of the claim nor any evidence of it.¹ But if the applicant abandons the land before he has substantially complied with the requirements of the statutes he loses his right to the land as against a subsequent locator in good faith.²

A Mere Temporary Absence, however, will not work a forfeiture of the claim.³

(2) **Through Medium of Land Certificates** — (a) **In General.** — From time to time provision has been made by the laws of Texas for granting various kinds of land certificates. Some of these provisions, enacted when the state was much richer in land than it is at present, or applicable especially to the conditions existing at the time, have since been repealed. Important classes of certificates for the issuance of which provision has been made are headright certificates,⁴ donation and bounty certificates,⁵ and certificates granted to persons erecting certain machinery.⁶

(b) **To Whom Certificates May Be Issued.** — The present constitution of Texas provides that "no certificate for land shall be sold at the land office except to actual settlers upon the same, and in lots not to exceed one hundred and sixty acres."⁷

For the Construction of the Words "Titled or Equitably Owned under Color of Title from the Sovereignty of the State," see *infra*, this subsection, (2) (c) **Upon What Lands Certificates May Be Located.**

When an Equitable Title to Land Has Been Lost by the failure of the holder of such title to comply with the requisitions of the law for the perfection thereof, another person may acquire a homestead upon such land upon the performance of the necessary conditions. *Spier v. Laman*, 27 Tex. 205. But see *Bohannon v. Hemby*, 23 Tex. 475.

1. **What Constitutes an Abandonment.** — *O'Neal v. Manning*, 48 Tex. 403.

2. *Wood v. Collins*, 23 U. S. App. 224; *Horne v. Gambrell*, 1 Tex. App. Civ. Cas., § 998; *Turner v. Ferguson*, 39 Tex. 505; *Daughy v. Hall*, 59 Tex. 518; *Prideaux v. Glasgow*, 2 Tex. Civ. App. 182; *Wise County Coal Co. v. Phillips*, 21 Tex. Civ. App. 293.

Obtaining a Patent upon Corrected Field Notes that exclude a tract of land included in the original survey, which was claimed by another, and include other land in its stead, constitutes an abandonment of such disputed tract. *Wise County Coal Co. v. Phillips*, 21 Tex. Civ. App. 293. See *Gardner v. Burkhart*, 4 Tex. Civ. App. 590.

3. *Prideaux v. Glasgow*, 2 Tex. Civ. App. 182. **Effect of Location by Pre-emptor of Land Certificate on Land Pre-empted.** — *Johnson v. Eldridge*, 49 Tex. 507.

Statement of Commissioner No Evidence of Abandonment. — The statement of the commissioner of the general land office, made to a subsequent locator, that a pre-emption claim has been abandoned, is no evidence of such abandonment. *O'Neil v. Manning*, 48 Tex. 403.

4. **Act Relating to the Issue of Headright Certificates** (1 Pasch. Dig., arts. 4309, 4310) construed. *Gullett v. O'Connor*, 54 Tex. 408; *Clark v. Smith*, 59 Tex. 275, *distinguishing* *Durrett v. Crosby*, 28 Tex. 688.

Act Donating Lands in Peters Colony to Immigrants, (Act of Jan. 21, 1850) construed.

Crockett v. Robinson, 20 Tex. 487; *Stover v. Garvin*, 22 Tex. 9; *Hodge v. Donald*, 55 Tex. 344; *Norton v. Cantagrel*, 60 Tex. 538; *European-American Colonization Soc. v. Reed*, 25 Tex. Supp. 343.

Act to ascertain what land certificates have been illegally issued by the county courts of counties in Peters colony, and to provide for issuing patents on such of said certificates as are legal (Act of Feb. 4, 1858), construed. *Hendricks v. Wilson*, 53 Tex. 463.

5. **Donation and Bounty Certificates** are certificates granted for military services; they are distinct from headright certificates granted to immigrant heads of families. *Hill v. Kerr*, 78 Tex. 213.

Act Confirming Headrights and Bounty Warrants Issued under Former Special Laws (Act of March 31, 1883) construed. *Leon v. Looney*, 69 Tex. 1; *Russell v. Bates*, 1 Tex. Civ. App. 609; *Ralston v. Skerrett*, 82 Tex. 486, *reversing* on rehearing (Tex. 1891) 17 S. W. Rep. 238.

6. **Act Providing for Issuances of Certificates to Persons Erecting Certain Machinery** (Act of Dec. 15, 1863) construed. *Maxwell v. Bastrop Mfg. Co.*, 77 Tex. 233; *McLeary v. Dawson*, 87 Tex. 524.

Laws Relating to the Detection of Fraudulent Land Certificates, and providing for the appointment of boards for that purpose, construed. *Land Com'r v. Raguet*, 2 Tex. 98; *Linn v. State*, 2 Tex. 317; *Norton's Succession v. General Land Office Com'r*, 2 Tex. 357; *League v. De Young*, 2 Tex. 497; *Morris v. Byers*, 14 Tex. 278; *Gould v. West*, 32 Tex. 338; *Miller v. Brownson*, 50 Tex. 583; *White v. Martin*, 66 Tex. 340; *Pope v. Anthony*, (Tex. Civ. App. 1902) 68 S. W. Rep. 521; *Land Com'r v. Reily*, *Dall.* (Tex.) 381.

7. Const. of Texas, art. 14, § 4.

This Provision Relates Exclusively to the Sale of Land Certificates at the Land Office and does not affect the validity of the Act of July 14, 1879, amended March 11, 1881, providing for the sale of a portion of the unappropriated public lands of the state. *Sanborn, etc., Cent. R. Co. v.*

(c) **Upon What Lands Certificates May Be Located.** — The laws of the state provide that all genuine land certificates "shall be located, surveyed, or patented only upon vacant and unappropriated public domain, and not upon any land titled or equitably owned under color of title from the sovereignty of the state, evidence of the appropriation of which is on the county records or in the general land office; or when the appropriation is evidenced by the occupation of the owner or of some person holding for him."¹ This rule or prohibition can only be invoked in favor of those who have either a legal or equitable title or claim.²

The Words "Land Titled" in this provision embrace all land covered by that evidence of right which the state gives through a patent, though for reasons not appearing on the face of the patent the grant may be void or voidable,³ and when a location and survey is made upon land titled, the subsequent cancellation of the patent under which the land is held will not validate the illegal location.⁴ But after land once patented has been recovered by the state and the patent canceled, a location upon it is no longer prohibited. Indeed, a valid location may be made upon land the status of which a court of competent jurisdiction has fixed as not titled, even pending an appeal from such court's decision, subject, of course, to the contingency of the judgment being set aside by some legal proceeding.⁵

Location on Land Titled in Part. — Where a land certificate is located upon land part of which is titled or equitably owned, but the remainder still unappropriated public domain, the location is invalid only so far as it is made on land of the former description.⁶

Withdrawal from Location of Certain Lands in Organized Counties. — By the Act of July 14, 1879, all bodies of unappropriated public domain in organized counties of the state which consisted of six hundred and forty acres or less were withdrawn from location.⁷

(d) **When Duplicate Certificates May Be Issued.** — Whenever a land certificate is lost or destroyed a duplicate thereof may be issued by the commissioner of the

Gunter, 84 Tex. 273; *Looney v. Bagley*, (Tex. 1887) 7 S. W. Rep. 360.

Provision of Former Constitution (Const. of 1870, art. 10, § 6) construed. *Bacon v. Russell*, 57 Tex. 409; *Holmes v. Anderson*, 59 Tex. 481; *White v. Martin*, 66 Tex. 340; *Ralston v. Skerrett*, 82 Tex. 486, *reversing* on other grounds on rehearing (Tex. 1891). 17 S. W. Rep. 238; *Galveston, etc., R. Co. v. State*, 89 Tex. 340, *affirmed* 170 U. S. 226; *Quinlan v. Houston, etc., Cent. R. Co.*, 89 Tex. 356, *reversing* on other grounds (Tex. Civ. App. 1893) 24 S. W. Rep. 693; *Houston, etc., R. Co. v. State*, 90 Tex. 607, *affirming* (Tex. Civ. App. 1896) 36 S. W. Rep. 189, *reversed* 170 U. S. 243.

1. What Land Open to Location. — Const. of Texas, art. 14, § 2; Rev. Stat. Tex. 1895, art. 4208. And see *Miller v. Texas, etc., R. Co.*, 132 U. S. 662; *Hollinsworth v. Holshousen*, 17 Tex. 41; *Hall v. Rushing*, 21 Tex. Civ. App. 631; *Kimmell v. Wheeler*, 22 Tex. 77; *Besson v. Richards*, 24 Tex. Civ. App. 64; *Sherwood v. Fleming*, 25 Tex. Supp. 408; *Woods v. Durrett*, 28 Tex. 429; *Wright v. Hawkins*, 28 Tex. 452; *Smith v. Taylor*, 34 Tex. 589; *Johnson v. Eldridge*, 49 Tex. 507; *Gullett v. O'Connor*, 54 Tex. 408; *Atkinson v. Ward*, 61 Tex. 383; *Cassin v. O'Sullivan*, 61 Tex. 594; *Stewart v. Cook*, 62 Tex. 522; *Looney v. Bagley*, (Tex. 1887) 7 S. W. Rep. 360; *Berger v. Arnold*, (Tex. Civ. App. 1893) 24 S. W. Rep. 527.

Land Held Not to Be "Vacant and Unappro-

priated Public Domain." — *Besson v. Richards*, 24 Tex. Civ. App. 64; *Wright v. Nelson*, (Tex. Civ. App. 1898) 46 S. W. Rep. 261.

2. Hanrick v. Dodd, 62 Tex. 75.

The Words "Equitably Owned under Color of Title from the Sovereignty of the State" Construed — *Adams v. Houston, etc., R. Co.*, 70 Tex. 252; *Gunter v. Meade*, 78 Tex. 634; *Groesbeck v. Harris*, 82 Tex. 411; *McLeary v. Dawson*, 87 Tex. 524; *Massey v. Galveston, etc., R. Co.*, 7 Tex. Civ. App. 650; *Creswell Rancho, etc., Co. v. Waldstein*, (Tex. Civ. App. 1894) 28 S. W. Rep. 260; *Yochum v. McCurdy*, (Tex. Civ. App. 1897) 39 S. W. Rep. 210.

3. Words "Land Titled" Construed. — *Winsor v. O'Connor*, 69 Tex. 571; *Adams v. Houston, etc., R. Co.*, 70 Tex. 252; *Faulk v. Sanderson*, 89 Tex. 692; *Wright v. Nelson*, (Tex. Civ. App. 1898) 46 S. W. Rep. 261. See also *Truehart v. Babcock*, 51 Tex. 169; *Gunter v. Meade*, 78 Tex. 634; *Maddox v. Fenner*, 79 Tex. 279; *Texas Land, etc., Co. v. State*, 1 Tex. Civ. App. 616; *Massey v. Galveston, etc., R. Co.*, 7 Tex. Civ. App. 650; *Yochum v. McCurdy*, (Tex. Civ. App. 1897) 39 S. W. Rep. 210.

4. Winsor v. O'Connor, 69 Tex. 571.

5. Faulk v. Sanderson, 89 Tex. 692, *reversing* (Tex. Civ. App. 1896) 35 S. W. Rep. 409.

6. Berger v. Arnold, (Tex. Civ. App. 1893) 24 S. W. Rep. 527.

7. Gammage v. Powell, 61 Tex. 629; *Thompson v. Langdon*, 87 Tex. 254.

general land office, upon oath being taken by the owner of the certificate of the fact of his ownership and of the loss or destruction, and upon proof of publication of notice of the loss or destruction and of the intention of the owner to apply for a duplicate.¹

(e) **Essential Conditions to Be Performed Before Patent Will Issue** — *aa. GENERAL CONSTITUTIONAL REQUIREMENT.* — Under the constitution of the state all genuine land certificates are required to be surveyed and returned to the general land office within five years after issuance, otherwise they will be forever barred.²

bb. ENTRY OR APPLICATION AND FILE — (*aa*) *Entry or Application — Requisites.* — Prior to the passage of the Act of August 30, 1856, the law had prescribed no precise form for making locations on the unappropriated public domain. The whole matter previous to that time was in a great measure controlled by instructions issued by the commissioner of the general land office. These instructions were binding both upon the surveyors and persons for whom surveys were made.³ But under the act referred to an entry or application for land is required to be in writing and to be dated and signed by the applicant, and it must particularly describe the claim to be surveyed and the land applied for.⁴

bb. Filing Application and Certificate in Surveyor's Office — *aaa. Rule Stated.* — The entry or application, together with the certificate, must be filed in the office of the surveyor of the county or district in which the land is situated, there to remain until returned together with the field notes to the general land office.⁵

bbb. Who May Make and File Application. — It is not essential that the application shall be made by the owner of the certificate. The possession of a certificate and the ability to deliver it to the surveyor with the application for its survey are sufficient authority to the surveyor for him to receive and file the application and certificate and make the survey. If the possession of the certificate is wrongful, and its location unauthorized, the rightful owner alone can complain,⁶ and if he sees fit to adopt the location and ratify all proceedings leading to the acquisition of the land he may do so, and in such case he will be the owner of the land located.⁷

(*cc*) *Rights of Location Where Certificate Entitles Two or More Persons to Land.* — Where two or more persons are entitled to land under the same headright certificate, each person is entitled to locate his land for himself, without the consent of the others.⁸ A survey located by one of the several owners, without the authority of the others, is not binding upon the latter, and they have the

1. **Duplicate Certificates.** — Rev. Stat. Tex. 1895, arts. 4119-4121.

For a Construction of This Provision see the following cases: *Gunter v. Meade*, 78 Tex. 634; *Texas Land, etc., Co. v. State*, 1 Tex. Civ. App. 616; *Seibert v. Richardson*, 5 Tex. Civ. App. 504. See also *Holmes v. Anderson*, 59 Tex. 481.

2. **Constitutional Requirement.** — Const. of Texas, art. 14, § 2; *Von Rosenberg v. Cuellar*, 80 Tex. 249; *New York, etc., Land Co. v. Thompson*, 83 Tex. 169.

3. **Former Rule as to Making Locations.** — *Horton v. Pace*, 9 Tex. 81; *Lewis v. Durst*, 10 Tex. 398; *Frederick v. Hamilton*, 38 Tex. 321.

4. **Essential Requisites of Entry or Application.** — Act of Aug. 30, 1856 (Rev. Stat. Tex. 1895, § 4131); *Evitts v. Roth*, 61 Tex. 81; *Beatty v. Masterson*, 77 Tex. 168; *Von Rosenberg v. Cuellar*, 80 Tex. 249. See also *Wyllie v. Wynne*, 26 Tex. 42; *Weir v. Van Bibber*, 34 Tex. 226.

Right to Correct Error in Call under Act of Feb. 1, 1854. *Loving v. Corcoran*, 26 Tex. 92.

5. **Filing of Application and Certificate.** — Act of Aug. 30, 1856 (Rev. Stat. Tex. 1895, §

4131); *Clark v. Smith*, 59 Tex. 275; *Evitts v. Roth*, 61 Tex. 81; *Beatty v. Masterson*, 77 Tex. 168; *Von Rosenberg v. Cuellar*, 80 Tex. 249; *Houston, etc., R. Co. v. State*, (Tex. Civ. App. 1901) 62 S. W. Rep. 114. See also *Jennings v. De Cordova*, 20 Tex. 508; *Fowler v. Hilburn*, 21 Tex. 489; *Houston, etc., R. Co. v. McGehee*, 49 Tex. 481.

Effect of Withdrawal of Files and Substitution of Other Certificates. — Where a party who has filed land certificates or scrip in the office of the county or district surveyor afterwards withdraws such files and substitutes other certificates in their stead, it would seem that he loses the benefit of his original entries, and that his new file will only date from the time of the substitution. *Booth v. Upshur*, 26 Tex. 64.

6. **Who Is Entitled to Make the Application.** — *Beatty v. Masterson*, 77 Tex. 168.

7. **Adoption of Location by Owner of Certificate.** — *Beatty v. Masterson*, 77 Tex. 168; *Seibert v. Richardson*, 86 Tex. 295.

8. **Rights of Location Where Two or More Are Entitled under Same Certificate.** — *Glasscock v. Hughes*, 55 Tex. 461; *Smith v. Estill*, 87 Tex. 264.

right to disregard it and to locate their part of the certificate for themselves. They may, however, adopt the survey and claim the land so located.¹

(*dd*) *When Certificates May Be Lifted or Floated.* — By statute the holder of a land certificate is forbidden, after location, to lift or float it when the location is not made upon land previously appropriated. But when a conflict of locations occurs, the person making the later location is permitted to lift so much of it as is affected by the conflict. Where, however, a person makes an entry on land which appears of record to be appropriated or patented, he must abide by the same, and if final judgment is entered against his right to hold the land, his certificate will be forfeited.² The purpose of these provisions is to prevent persons from holding at the same time, by virtue of the same certificate, several tracts of land with apparent rights to each, when but one could ultimately be held.³

(*ee*) *Effect of Application and File.* — The right to the land attaches at the date of the file and cannot be defeated by the refusal of the surveyor to accept the location or the subsequent issuance of a patent to another person.⁴ But this rule applies only to the lands covered by the file, and any change made therefrom in the survey which appropriates land not covered by the file will have force against subsequent locators, without notice, only from the time of the record of the field notes in the surveyor's office.⁵

cc. SURVEY — (*aa*) *In General.* — Prior to the passage of the Act of February 10, 1852, it was the practice to a considerable extent, and one which was recognized by the courts, and was in conformity with the law as it then existed, to hold lands by files merely without actual surveys.⁶ But since the enactment of that law, all lands located by entry or application must be surveyed within twelve months from the date of entry,⁷ otherwise the entry will be null and void and the lands be subject to relocation and survey. But until the expiration of the twelve months the land is severed from the public domain and is not subject to location under any other certificate nor liable to

1. *Smith v. Estill*, 87 Tex. 264.

What Amounts to an Adoption or Ratification of a Survey. — *Smith v. Estill*, 87 Tex. 264.

2. Act of Aug. 30, 1856 (Rev. Stat. 1895, arts. 4134, 4135).

3. **Purpose of Provisions.** — *Seibert v. Richardson*, 86 Tex. 295, affirming 5 Tex. Civ. App. 504.

Survey Made in Contravention of Foregoing Provisions Not Validated by Recognition of It as Valid by Commissioner. — *Adams v. Houston, etc., R. Co.*, 70 Tex. 252.

Further as to the Construction of These Provisions, see the following cases: *Miller v. Texas, etc., R. Co.*, 132 U. S. 662; *Ward v. Conner*, 33 Tex. 549; *Adams v. Houston, etc., R. Co.*, 70 Tex. 252; *New York, etc., Land Co. v. Thomson*, 83 Tex. 169; *Seibert v. Richardson*, 86 Tex. 295, affirming 5 Tex. Civ. App. 504; *Gillespie v. Feris*, 3 Tex. App. Civ. Cas., § 124; *Houston, etc., R. Co. v. Carter*, (Tex. Civ. App. 1894) 24 S. W. Rep. 1102.

As to the Rule in Regard to Conflicting Locations and Locations upon Lands Reserved from Location prior to the Act of Aug. 30, 1856, see *Hollingsworth v. Holshousen*, 17 Tex. 41; *Duren v. Houston, etc., R. Co.*, 86 Tex. 287.

As to the Right to Float Certificates Located on Unappropriated Land prior to the Act of 1856, see *Miller v. Texas, etc., R. Co.*, 132 U. S. 662; *McGimpsey v. Ramsdale*, 3 Tex. 344; *Poor v. Boyce*, 12 Tex. 440; *Sanders v. Duval*, 39 Tex. 182.

Estoppel to Question Floating and Relocation of Certificate. — Where one in possession and control of a certificate causes it to be floated from one survey and located upon another, he cannot question the validity of such floating and location. *Lockhart v. Keller*, (Tex. 1888) 9 S. W. Rep. 179.

The Opinions of the Commissioner of the general land office cannot change the effect of facts which determine the priority of locations, and such opinions are not admissible in evidence. *Houston, etc., R. Co. v. McGehee*, 49 Tex. 481.

4. **Right to Land Attaches at Date of File.** — *De Montel v. Speed*, 53 Tex. 339. And see *infra*, this subsection, (*i*) *Right Acquired by Patentee.*

5. *Groesbeck v. Harris*, 82 Tex. 411.

6. **Formerly Lands Could Be Held by Files Merely.** — *Wyllie v. Wynne*, 26 Tex. 42, distinguishing *Lewis v. Durst*, 10 Tex. 398, and overruling *Williams v. Craig*, 10 Tex. 437.

7. **Survey Cannot Be Made until After Application and File.** — The survey cannot be made until after entry or application, Rev. Stat. Tex. 1895, art. 4132; *Beatty v. Masterson*, 77 Tex. 168; and after the certificate has been filed in the surveyor's office, Rev. Stat. Tex. 1895, art. 4142 *et seq.* See also *Blum v. Houston, etc., R. Co.*, 10 Tex. Civ. App. 312.

The rule in this regard was formerly not so strict. *Lake v. Wafer*, 16 Tex. 570; *Stewart v. Cook*, 62 Tex. 522; *Thomson v. Houston, etc., R. Co.*, 68 Tex. 392.

be appropriated by a pre-emptor;¹ nor will the right acquired by the entry and file be defeated by a subsequent reservation of the land by the state for other purposes if the survey be made within the time specified.² The rule just stated must, however, be taken with this qualification, that where there are legal impediments to the survey that can only be removed by an adjudication of the locator's right to have it made, he will not lose his priority while such adjudication is pending.³

(bb) *By Whom Made.* — The proper person to make the survey is the surveyor of the county or district in which the lands are located, or his deputy.⁴ A survey made by the surveyor of any other county or district is a nullity.⁵ But a survey made by the locator himself or his agent is valid if subsequently approved and adopted by the county or district surveyor.⁶

(cc) *How Made.* — The survey must be made by a copy of the entry or application, and strictly in accordance with the same.⁷ It must be made in the field.⁸

(dd) *Surveyor's Certificate.* — The surveyor who made the survey is required to certify officially to the correctness thereof, and to the fact that it was made according to law, and also to the fact that the field notes have been duly recorded. When the survey has been made by a deputy, the county or district surveyor is required to certify officially that he has examined the field notes, has found them correct, and that they are duly recorded.⁹ But if the surveyor's certificate does not on its face show that all the requisites of the law had been complied with in making the survey, this may be proved by

1. Necessity for and Time of Making Survey. — Rev. Stat. Tex. 1895, art. 4138; *Thompson v. Johnson*, 2 Tex. Unrep. Cas. 258; *Wyllie v. Wynne*, 26 Tex. 42; *McKinney v. Grassmeyer*, 51 Tex. 376; *House v. Talbot*, 51 Tex. 462; *Vance v. Lindsey*, 60 Tex. 286; *Cassin v. O'Sullivan*, 61 Tex. 594; *Garza v. Cassin*, 72 Tex. 440; *Von Rosenberg v. Cuellar*, 80 Tex. 249; *Seibert v. Richardson*, 86 Tex. 295, *affirming* 5 Tex. Civ. App. 504. See also *Stewart v. Lapsley*, 11 Tex. 41; *Holloway v. Holloway*, 30 Tex. 164; *Frederick v. Hamilton*, 38 Tex. 321; *Adams v. Houston, etc., R. Co.*, 70 Tex. 252.

2. Houston, etc., R. Co. v. State, (Tex. Civ. App. 1901) 62 S. W. Rep. 114.

Relocation of Same Certificate on Same Land Forbidden. — After failure to have survey made within twelve months after entry the same certificate cannot be relocated on the same land. Rev. Stat. 1895, art. 4138; *Garza v. Cassin*, 72 Tex. 440.

3. Edwards v. James, 13 Tex. 52.

4. Proper Person to Make Survey. — *Snider v. Methvin*, 60 Tex. 487; *Duren v. Houston, etc., Cent. R. Co.*, 86 Tex. 287; *Marsalis v. Creager*, 2 Tex. Civ. App. 368; *Pardee v. Adamson*, 19 Tex. Civ. App. 263.

Surveyor's Right to Compensation. — *James v. Wilson*, 7 Tex. 230; *Hays v. Stewart*, 8 Tex. 358; *McCulloch v. Twitty*, 22 Tex. 70.

5. Survey by Surveyor of Another County or District a Nullity. — *Linn v. Scott*, 3 Tex. 67; *Blum v. Houston, etc., R. Co.*, 10 Tex. Civ. App. 312.

A Location and Survey of Land in an Unorganized Territory, made by the surveyor of a land district who has no legal authority to survey land in the unorganized territory, is of no effect whatever. As between the locator and the state such a location may be validated by an act of

the legislature, but not as against any right of a third party lawfully acquired by appropriation before the passage of the act. *Duren v. Houston, etc., Cent. R. Co.*, 86 Tex. 287. See also *Marsalis v. Creager*, 2 Tex. Civ. App. 368.

Act Validating Surveys Made in Certain Counties by Unauthorized Surveyors (Act of April 4, 1881; 2 Sayles Civ. Stat., art. 3906a) construed. *Blum v. Houston, etc., R. Co.*, 10 Tex. Civ. App. 312.

6. Adoption of Locator's Survey by Authorized Surveyor. — *Howard v. Perry*, 7 Tex. 259; *Duren v. Houston, etc., Cent. R. Co.*, 86 Tex. 287. See also *Horton v. Pace*, 9 Tex. 81; *Gould v. West*, 32 Tex. 338.

7. Rev. Stat. Tex. 1895, art. 4132.

But Prior to the Act of 1879 the law required no written application to be made. The delivery of the certificate to the surveyor was sufficient to authorize him to make the survey. *Hollingsworth v. Holshousen*, 17 Tex. 41; *Seibert v. Richardson*, 5 Tex. Civ. App. 504.

8. Survey Must Be Made in the Field. — *Holmes v. Anderson*, 59 Tex. 481. See also *Bacon v. State*, 2 Tex. Civ. App. 692.

9. Rev. Stat. Tex. 1895, art. 4144.

The Omission of the County Surveyor to Annex His Official Title to his name in signing his examination and approval of the field notes is immaterial. *Snider v. International, etc., R. Co.*, 52 Tex. 306.

When Survey Is Presumed to Be Made for Grantee of Certificate. — It will be presumed, in the absence of evidence to the contrary, that a survey properly certified by the surveyor authorized to make it, and which is stated in his recorded field notes as having been made by virtue of a certificate, the grantee of which is mentioned, was made for the grantee of the certificate. *Snider v. International, etc., R. Co.*, 52 Tex. 306.

other evidence, in a contest with a subsequent locator who had actual notice.¹ Thus, as against a junior locator, having notice that a survey under a prior location was actually made in the field, it is not essential that the surveyor's certificate should show that fact, but it may be shown by other evidence.²

(cc) *When Certified Copy of Record of Field Notes May Be Obtained.* — When the original field notes of any survey are lost or destroyed the owner thereof may, on filing affidavit of the loss or destruction in the office of the district or county surveyor, obtain from the surveyor a certified copy of the record of the field notes, and such copy, it is declared, "shall be as valid and efficient in law as the original was."³

dd. *RETURN OF FIELD NOTES AND CERTIFICATE TO GENERAL LAND OFFICE* — (aa) *In General.* — The field notes of all surveys, together with the certificates, must be returned to and filed in the general land office within twelve months from the date of survey.⁴ A violation of this requirement will deprive the locator of any right to the particular land and render it subject to appropriation by any other person;⁵ but the certificate in such case can be used to acquire the same or any other land.⁶

Relocation of Certificate on Same Land. — The holder of the certificate may relocate

1. *Olcott v. Ferris*, (Tex. Civ. App. 1894) 24 S. W. Rep. 848.

2. *Holmes v. Anderson*, 59 Tex. 481.

3. Rev. Stat. Tex. 1895, art. 4146.

For a Construction of This Provision, see *Breckenridge v. Neill*, 26 Tex. 101.

4. *Time Within Which Field Notes and Certificate Must Be Returned.* — Act of Feb. 10, 1852 (Rev. Stat. Tex. 1895, art. 4145); *Miller v. Texas*, etc., R. Co., 132 U. S. 662; *Clark v. Smith*, 59 Tex. 275; *Snider v. Methvin*, 60 Tex. 487; *Tucker v. Murphy*, 66 Tex. 355; *Adams v. Houston*, etc., R. Co., 70 Tex. 252; *Garza v. Cassin*, 72 Tex. 440; *Von Rosenberg v. Cuellar*, 80 Tex. 249; *New York*, etc., Land Co. v. *Thompson*, 83 Tex. 169; *Seibert v. Richardson*, 86 Tex. 295, *affirming* 5 Tex. Civ. App. 504; *Houston*, etc., R. Co. v. *State*, (Tex. Civ. App. 1901) 62 S. W. Rep. 114. See also *Stewart v. Lapsley*, 11 Tex. 41; *Snider v. International*, etc., R. Co., 52 Tex. 306.

Prior to the Act of August 30, 1856, certificates were not required to be returned with the field notes. *Von Rosenberg v. Cuellar*, 80 Tex. 249, *distinguishing* *House v. Talbot*, 51 Tex. 467, and *Snider v. Methvin*, 60 Tex. 487.

Surveys of Pre-emption Claims are not within this provision of the Act of 1852. *Parish v. Weatherford*, 19 Tex. 209.

When Papers Deemed Returned to and Filed in General Land Office. — *Snider v. Methvin*, 60 Tex. 487.

Presumption as to Return of Field Notes and Certificate Within Time Prescribed. — *Groesbeck v. Harris*, 82 Tex. 411; *Harmon v. Landers*, (Tex. Civ. App. 1897) 41 S. W. Rep. 378.

Presumption that Land Was Located Before Certificate Was Filed. — Where a land certificate has been filed in the general land office it will be presumed, in the absence of evidence on the subject, that the land called for was located before the certificate was filed. *Timmony v. Burns*, (Tex. Civ. App. 1897) 42 S. W. Rep. 133.

5. *Effect of Failure to Comply with Requirement.* — *Frederick v. Hamilton*, 38 Tex. 321; *Garza v. Cassin*, 72 Tex. 440; *Von Rosenberg v. Cuellar*, 80 Tex. 249; *New York*, etc., Land Co. v. *Thomson*, 83 Tex. 169; *Musselman v. Strohl*, 83 Tex. 473; *Jones v. Lee*, 86 Tex. 25; *Seibert*

v. Richardson, 86 Tex. 295, 5 Tex. Civ. App. 504; *Harmon v. Landers*, (Tex. Civ. App. 1897) 41 S. W. Rep. 378. See also *Stewart v. Lapsley*, 11 Tex. 41; *Upshur v. Pace*, 15 Tex. 531; *Sanders v. Duval*, 39 Tex. 182; *Snider v. International*, etc., R. Co., 52 Tex. 306; *Crow v. Reed*, 25 Tex. Supp. 392; *Houston*, etc., R. Co. v. *Carter*, (Tex. Civ. App. 1894) 24 S. W. Rep. 1102. But see *Moreland v. Barnhart*, 44 Tex. 275; *New York*, etc., Land Co. v. *Gardner*, 11 Tex. Civ. App. 404.

Where the Surveyor Refuses to Record the Field Notes, and the locator suffers the period prescribed by law for returning them to the general land office to elapse without instituting proceedings to compel the surveyor to perform his duty, he thereby loses his right to the land, and cannot impeach a patent issued under a subsequent survey of the same land. *Patrick v. Nance*, 26 Tex. 298.

Where Return of Field Notes Is Prevented by an Injunction. — But it would seem that if the locator is prevented by an injunction from returning the field notes to the general land office within the time prescribed by law, he will not lose his priority as against one who, with knowledge of the prior location and survey and of the pendency of the injunction, makes a location upon the land after the time limited for the return of the field notes, but while the injunction is still pending. *Ellis v. Batts*, 26 Tex. 703. But see *White v. Holliday*, 20 Tex. 670.

No Exception in Favor of Minors. — *Upshur v. Pace*, 15 Tex. 531.

What Constitutes Notice to Subsequent Locators. — Until the issuance of a patent subsequent locators are only required to look to the records of the surveyor's office; and the mere fact that field notes are deposited in the general land office is not constructive notice of an appropriation of the land. *Evitts v. Roth*, 61 Tex. 81.

6. *Vitality of Certificate That Was Not Filed Within Time Prescribed.* — *Garza v. Cassin*, 72 Tex. 440; *Jones v. Lee*, 86 Tex. 25; *Seibert v. Richardson*, 86 Tex. 295, *affirming* 5 Tex. Civ. App. 504. See also *Houston*, etc., R. Co. v. *Carter*, (Tex. Civ. App. 1894) 24 S. W. Rep. 1102. See *Musselman v. Strohl*, 83 Tex. 473.

it upon the same survey, without having a resurvey made, provided the survey has not been previously located by some other person. A person wishing to avail himself of this privilege must present his claim to the county or district surveyor, who is required to record the relocation in his office, and to duly certify the same to the commissioner of the general land office, which will be sufficient authority for him to issue a patent for the land as in other cases.¹

(bb) *Waiver of Neglect to Return Field Notes Within Time Prescribed.* — The state may waive the locator's neglect of duty in not returning the field notes within the time prescribed and allow further time within which to return them; and if he should comply with this requisition, his original incipient right to the land is preserved in its full vigor, if between the time he should have returned the field notes and the time of the act of relief the government has not granted the land by perfect title to another.²

(cc) *Withdrawal of Certificate Not Permissible.* — When the survey, with the certificate by virtue of which it was made, has been filed in the land office, such certificate should not be permitted to go out again for any purpose.³ But the withdrawal of the certificate by one not authorized by the owner does not make void the location. The most that can be required of the owner in such case is, that when informed of the withdrawal he shall use reasonable diligence to return it.⁴

(dd) *Certified Copy of Certificate as Evidence.* — The commissioner of the general land office is required to furnish a certified copy of a certificate to any one applying therefor,⁵ and such a copy made by the commissioner, the original being on file in his office, as a link in the chain of title to a survey of land which has been properly returned to that office, is admissible in evidence, and is subject only to such objections as could be made to the original were it produced.⁶

(ee) *Issuance of Certificate for Unlocated Balance.* — The mere fact that a certificate has been located in part only will not warrant its withdrawal, but in such case the commissioner of the general land office is required to deliver to the interested party a certificate for the unlocated balance.⁷ An unlocated balance certificate is only the certificate of the commissioner that there remains unlocated of the original certificate a certain number of acres which the owner may still locate.⁸

A Genuine Land Certificate Can Be Said to Be Satisfied only when the obligation imposed by it is discharged in the manner contemplated when it issued, and this does not occur until the quantity of land for which it issued has been secured to its owner.⁹

(ff) *Return of Field Notes After Withdrawal.* — Where the field notes are withdrawn from the general land office they must be returned thereto within

1. **Mode of Relocating Certificate on Same Land.** — Rev. Stat. Tex. 1895, arts. 4136, 4137; Texas, etc., R. Co. v. Thompson, 65 Tex. 186.

2. **Waiver of Neglect to Return Field Notes.** — Hart v. Gibbons, 14 Tex. 213; Hamilton v. Avery, 20 Tex. 612. See also Warren v. Shuman, 5 Tex. 441; Lewis v. Mixon, 11 Tex. 564.

3. **Withdrawal of Certificate Not Permissible.** — Johnson v. Eldridge, 49 Tex. 507; Von Rosenberg v. Cuellar, 80 Tex. 249; New York, etc., Land Co. v. Thomson, 83 Tex. 169. See also Snider v. International, etc., R. Co., 52 Tex. 306.

4. **Effect of Unauthorized Withdrawal.** — Snider v. Methvin, 60 Tex. 487; Musselman v. Strohl, 83 Tex. 473. See also Booth v. Strippleman, 61 Tex. 378.

5. **Commissioner Required to Furnish Certified**

Copy of Certificate. — Rev. Stat. Tex. 1895, art. 2308; Holmes v. Anderson, 59 Tex. 481.

6. **Certified Copy as Evidence.** — Rev. Stat. 1895, arts. 2315, 4053; Holmes v. Anderson, 59 Tex. 481.

The reasons for the rule excluding such evidence laid down in Short v. Wade, 25 Tex. 510, do not apply under the changed condition of the law. Holmes v. Anderson, 59 Tex. 481.

7. **Unlocated Balance Certificate.** — Rev. Stat. Tex. 1895, arts. 4055, 4123, 4126; Von Rosenberg v. Cuellar, 80 Tex. 249; New York, etc., Land Co. v. Thomson, 83 Tex. 169. See also Thompson v. Dumas, (C. C. A.) 85 Fed. Rep. 517.

8. Cox v. Bray, 28 Tex. 261; New York, etc., Land Co. v. Thomson, 83 Tex. 169.

9. **When Certificate Is Satisfied.** — Seibert v. Richardson, 86 Tex. 295. See also Adams v. Houston, etc., R. Co., 70 Tex. 252.

twelve months from the date of the withdrawal, or the survey will be null and void.¹

cc. CONDITIONS ESSENTIAL TO ACQUISITION OF TITLE UNDER CONFEDERATE CERTIFICATES.— Under the Act of April 9, 1881, granting certificates for land to persons permanently disabled in the service of the Confederate States, a certificate properly located, surveyed, and returned with field notes to the land office conferred a good title upon the holder.² But it was a requirement of the statute that the holder of the certificate should locate an amount of land equal to the amount to which he was entitled for the benefit of the permanent school fund.³

ff. EFFECT OF VOID SURVEY.— A void survey under a land certificate does not constitute an appropriation of any part of the certificate.⁴ When a survey has become forfeited and void from any cause the commissioner of the general land office is required to notify the party interested, and it is provided that no new file or location shall be made upon the land by any other person for a period of ninety days after the mailing of such notice.⁵ This provision does not require notice to one whose title was forfeited by decree in a judicial proceeding by the state to which he was a party.⁶

(f) Nature of Right Acquired by Performance of Conditions.— The right of a person who has located a valid land certificate upon vacant public land, and has caused such land to be surveyed and the survey and certificate to be returned to the general land office within the time prescribed by law, is a vested legal right, and is entitled to the protection of all the constitutional guaranties with which such rights are hedged.⁷

(g) Abandonment of Location and Survey— *aa. RIGHT TO ABANDON.*— A person may abandon his location and survey at any time before his certificate is merged in a patent, provided he does not thereby interfere with the rights of any other person.⁸

bb. WHAT CONSTITUTES ABANDONMENT.— The question of abandonment is one of fact to be decided by the jury under all the circumstances of the case.⁹ Evidence of any unequivocal act indicating an intention to abandon a location and survey is sufficient to authorize the jury to find the fact of abandonment.¹⁰

1. Requirement as to Return of Field Notes After Withdrawal.— Rev. Stat. Tex., art. 4158; *Snider v. Methvin*, 60 Tex. 487; *Atkinson v. Ward*, 61 Tex. 383. See *Snider v. International*, etc., R. Co., 52 Tex. 306.

The Word "Withdrawn" in this provision refers to the act of the owner or some one acting under his authority. *Snider v. Methvin*, 60 Tex. 487.

Meaning of the Word "Returned" as used in this section. *Snider v. Methvin*, 60 Tex. 487. See also *Snider v. International*, etc., R. Co., 52 Tex. 306.

2. Acquisition of Title under Confederate Certificates.— *Von Rosenberg v. Cuellar*, 80 Tex. 249; *Smith v. McGaughey*, 87 Tex. 61; *Brackenridge v. Claridge*, 91 Tex. 527.

Constitutionality of Act Upheld.— *McLeary v. Dawson*, 87 Tex. 524.

3. Location of Land for Benefit of School Fund.— *Von Rosenberg v. Cuellar*, 80 Tex. 249; *Smith v. McGaughey*, 87 Tex. 61; *Maurice v. Upton*, (Tex. Civ. App. 1897) 41 S. W. Rep. 504.

4. Void Survey.— *Smith v. Estill*, 87 Tex. 264.

5. Rev. Stat. Tex., art. 4057.

6. Faulk v. Sanderson, 89 Tex. 692.

7. Character of Right Acquired by Performance of Conditions.— *Howard v. Perry*, 7 Tex. 259;

Hamilton v. Avery, 20 Tex. 612; *Milam County v. Bateman*, 54 Tex. 153; *Gullett v. O'Connor*, 54 Tex. 408; *Snider v. Methvin*, 60 Tex. 487 [*limiting Smith v. Taylor*, 34 Tex. 607]; *Jones v. Lee*, 86 Tex. 25; *Threadgill v. Bickerstaff*, 87 Tex. 520; *Olcott v. Ferris*, (Tex. Civ. App. 1894) 24 S. W. Rep. 848; *Sherwood v. Fleming*, 25 Tex. Supp. 408, *distinguishing Hart v. Gibbons*, 14 Tex. 213. See also *Thompson v. Dumas*, (C. C. A.) 85 Fed. Rep. 517.

8. Right to Abandon Location and Survey.— *Hollingsworth v. Holshousen*, 17 Tex. 41; *Johns v. Pace*, 26 Tex. 270.

Abandonment After Sale of Portions of Land Surveyed.— One cannot, after selling and conveying portions of the land which he has procured to be surveyed by virtue of his certificate, abandon his location, and sell or otherwise dispose of the certificate, in prejudice of the rights of his former vendee. *Smith v. Tucker*, 25 Tex. 594.

When Vendee of Part Interest in Located Certificate Can Abandon.— *Johns v. Pace*, 26 Tex. 270.

9. Question of Abandonment Is for Jury.— *Hollingsworth v. Holshousen*, 17 Tex. 41; *Pohns v. Pace*, 26 Tex. 270.

10. Hollingsworth v. Holshousen, 17 Tex. 41. The Withdrawal of a Land Certificate shortly after its location, and of all evidence of the

(h) **Issuance of Patent.** — When the field notes and certificates are returned to the general land office within the time prescribed, and it appears after due examination that the survey was correctly and legally made, and that the land certificate is genuine and unsatisfied, the commissioner of the general land office is required to issue a patent for the land described in the survey.¹ This is a ministerial act, involving no exercise of judgment, and one which the commissioner has no discretion to refuse.² Its performance, therefore, may be compelled by mandamus.³

Land in Two or More Counties. — It is no objection to the issuance of the patent that the land surveyed lies in two or more counties or districts, if no conflict between the survey and others exists, provided the field notes shall have been recorded in the office of the county or district surveyor of both counties or districts.⁴ A failure, however, so to record the field notes, if in other respects due diligence has been used to procure a patent, will not invalidate the claim as against a subsequent locator with notice of the prior appropriation.⁵

(i) **Right Acquired by Patentee.** — When a patent has been issued, though all the preliminary steps authorizing its issuance have not been observed, it is nevertheless valid as against all persons except the state and those holding under it by superior equities.⁶ But a prior valid and subsisting location, or location and survey, will prevail over a subsequent location and patent.⁷ The patent, however, carries with it, at least, a *prima facie* right to the land thereby granted by the state to the patentee,⁸ and to rebut this presumption it devolves upon the adverse claimant to establish clearly a prior or superior equitable right; for if both parties have equities, unless there is a decided preponderance between them, the legal title must turn the scale, taking for granted that it was not obtained through fraud or against equity.⁹

(3) **By Purchase or Lease** — (a) **Unappropriated Lands Situated in Organized Counties** — *aa. IN GENERAL.* — Provision is made by statute¹⁰ for the sale of tracts of unappropriated land containing not more than six hundred and forty acres, situated

location, from the surveyor's office, and the failure to return the same for over ten years, and until the land has been relocated by another party, are facts from which it may be presumed that the location had been abandoned. *Frederick v. Hamilton*, 38 Tex. 321. See also *Wyllie v. Wynne*, 26 Tex. 42.

Covering a Part of a Survey with Two Certificates and accepting a patent under one of them, in the absence of some further fact tending to show an intention not to claim that part of the survey not covered by the patent, cannot operate as an abandonment of the location and survey in so far as the land contained in it and not covered by the patent is concerned. *Texas, etc., R. Co. v. Thompson*, 65 Tex. 186.

As to What Constitutes an Abandonment of a Location, see also *Thompson v. Dumas*, (C. C. A.) 85 Fed. Rep. 517; *Poor v. Boyce*, 12 Tex. 440; *Morris v. Byers*, 14 Tex. 278; *Morris v. Brinlee*, 14 Tex. 285; *Hollingsworth v. Hols-housen*, 17 Tex. 41; *Sanders v. Duval*, 39 Tex. 182; *House v. Talbot*, 51 Tex. 462; *Blum v. Houston, etc., R. Co.*, 10 Tex. Civ. App. 312; *Montgomery County v. Angier*, (Tex. Civ. App. 1903) 74 S. W. Rep. 957.

Invalid and Abandoned Survey Cannot Be Connected with Subsequent Valid Survey. — A survey not made in accordance with law and which has been abandoned cannot be connected with a subsequent valid survey so as to defeat the claim of an intervening appropriator. *Hughes v. Perry*, 21 Tex. 778.

1. **When Patent Required to Be Issued.** — *Rev. Stat. Tex.*, art. 4176; *Adams v. Houston, etc., R. Co.*, 70 Tex. 252. See also *Milam County v. Bateman*, 54 Tex. 153.

2. *General Land Office Com'r v. Smith*, 5 Tex. 471; *Pardee v. Adamson*, 19 Tex. Civ. App. 263.

3. **Issuance of Patent May Be Compelled by Mandamus.** — *General Land Office Com'r v. Smith*, 5 Tex. 471. See also *Hamilton v. Avery*, 20 Tex. 612. See generally the title *MANDAMUS*, vol. 19, p. 740.

4. Act May 9, 1846 (*Rev. Stat. Tex.*, art. 4179); *Bohannon v. Hemby*, 23 Tex. 475.

5. *Bohannon v. Hemby*, 23 Tex. 475. See also *Thompson v. Ford*, 14 Tex. Civ. App. 32.

6. **Noncompliance with Preliminary Requirements.** — *New York, etc., Land Co. v. Gardner*, 11 Tex. Civ. App. 404. See also *Tarilton v. Kirkpatrick*, 1 Tex. Civ. App. 107; *Taylor v. Criswell*, 4 Tex. Civ. App. 106; *O'Neal v. Lockhart*, 2 Tex. Unrep. Cas. 597.

7. **Right of Patentee Subservient to That of Prior Locator.** — *Johnson v. Eldridge*, 49 Tex. 507; *De Montel v. Speed*, 53 Tex. 339; *Gullett v. O'Connor*, 54 Tex. 408.

8. **Patent Carries Prima Facie Right to Land.** — *Johnson v. Eldridge*, 49 Tex. 507; *Gullett v. O'Connor*, 54 Tex. 408; *Garrett v. Weaver*, 70 Tex. 463.

9. *Johnson v. Eldridge*, 49 Tex. 507.

10. *Rev. Stat. Tex.*, art. 4201 *et seq.*

in organized counties, to any one desiring to purchase, upon his causing the tract he desires to purchase to be surveyed.¹

bb. LANDS SITUATED WITHIN INCLOSURES OF ACTUAL BONA FIDE SETTLERS. — It is provided that where any of such lands are situated within the inclosed lands of any actual *bona fide* settler and resident of the state, such settler shall have the preference for six months from the time such lands shall have been officially declared to be vacant and subject to sale, to purchase as much of the land as may be embraced within his inclosure.² The preference given by this provision is not to any settler in the state, but to a settler within the inclosure which embraces the land to be purchased.³

cc. ACQUISITION OF LANDS UNDER HOMESTEAD DONATION LAWS NOT PROHIBITED. — The unchanging policy of the state has been not to permit applications to purchase to interfere with the appropriation of land by the actual settler,⁴ and it is expressly provided that the foregoing provisions shall not be so construed as to prohibit the right of acquiring any of the lands specified under the homestead donation law.⁵

(b) *Construction of Former Laws Relating to Purchase of Unappropriated Lands.* — Some former laws, now repealed or amended, relating to the purchase of unappropriated public lands, received the interpretation of the courts. Cases construing these statutes will be found in the notes.⁶

(c) *School and Asylum Lands* — *aa. ACQUISITION BY PURCHASE* — (*aa*) *In General.* — By the laws of Texas certain public lands have been set apart for the benefit of public free schools and asylums.⁷ The constitution of the state provides that the lands so set apart shall be sold under such regulations, at such times, and on such terms as may be prescribed by law.⁸ In pursuance of this provision the legislature has prescribed the terms and conditions upon which such lands may be acquired.

1. Land Already Patented is not subject to purchase under these provisions. *Taylor v. Lewelyn*, 79 Tex. 96.

As to the Requirements to Be Fulfilled Before a Patent Will Issue, see *Telfener v. Russ*, 145 U. S. 522. See also *Telfener v. Russ*, 162 U. S. 170, 163 U. S. 100, *reversing* (C. C. A.) 60 Fed. Rep. 228, which *affirmed* 57 Fed. Rep. 973; *White v. Martin*, 66 Tex. 340.

2. Preference of Actual Bona Fide Settlers. — *Rev. Stat. Tex.*, art. 4201. See *Kentucky Cattle Raising Co. v. Bruce*, 78 Tex. 269.

Constitutionality of Provision. — This provision is not in conflict with *Const. Tex.*, art. 14, § 6. *Yocham v. McCurdy*, 95 Tex. 336, *reversing* 27 Tex. Civ. App. 183.

3. *Hume v. Gracy*, 86 Tex. 671.

4. *Kentucky Cattle Raising Co. v. Bruce*, 78 Tex. 269.

5. *Rev. Stat. Tex.*, art. 4201.

6. *Act Relating to Sale of Unappropriated Public Lands* (Act July 14, 1879, as amended by Act March 11, 1881) construed. *Campbell v. Wade*, 132 U. S. 34; *Telfener v. Russ*, 162 U. S. 170, 163 U. S. 100, *reversing* (C. C. A.) 60 Fed. Rep. 228, which *affirmed* 57 Fed. Rep. 973; *State v. Work*, 63 Tex. 148; *White v. Martin*, 66 Tex. 340; *Jumbo Cattle Co. v. Bacon*, 79 Tex. 5; *Bacon v. State*, 2 Tex. Civ. App. 692; *Campbell v. Blanchard*, 2 Tex. Unrep. Cas. 321.

These acts were repealed by Act Jan. 22, 1883. As to the effect of the repeal, see *Campbell v. Blanchard*, 2 Tex. Unrep. Cas. 321; *State v. Work*, 63 Tex. 148; *White v. Martin*, 66 Tex. 340; *Jumbo Cattle Co. v. Bacon*, 79 Tex. 5.

Act Relating to the Purchase of Land by Heads of Families settling on public domain (Act Feb. 1, 1861) construed in connection with Acts Aug. 12, 1870, and March 24, 1871, requiring the performance of certain conditions as prerequisite to the acquisition of a vested right. *Pope v. Anthony*, (Tex. Civ. App. 1902) 68 S. W. Rep. 521.

"Act to Regulate the Disposal of the Public Lands" (Act Aug. 12, 1870, amended May 16, 1871) construed. *Burleson v. Durham*, 46 Tex. 152.

Act Authorizing the Sale and Settlement of the Mississippi and Pacific Railway Reservation (Act Aug. 26, 1856) construed. *Woods v. Durrett*, 28 Tex. 429; *Wright v. Hawkins*, 28 Tex. 452.

7. *Lands Set Apart for Benefit of Schools and Asylums.* — *Const. Tex.*, art. 7, §§ 2, 9; *Rev. Stat.*, arts. 4254, 4264 *et seq.* And see *Hogue v. Baker*, 92 Tex. 58; *Cameron v. State*, 7 Tex. Civ. App. 35; *Frisbie v. Smith*, 13 Tex. Civ. App. 384.

Act Providing for the Survey and Incorporation in the School Fund of certain unsurveyed public lands, Act 1900 (Acts 26th Leg., First Called Sess., p. 29, c. 11) construed. *West v. Terrell*, (Tex. 1903) 74 S. W. Rep. 903; *Burkhead v. Bush*, (Tex. Civ. App. 1903) 75 S. W. Rep. 67.

8. *Constitutional Provision Relating to Sale of Lands.* — *Const. Tex.*, art. 7, §§ 4, 9. The following cases construe this provision: *Swenson v. Taylor*, 80 Tex. 584; *Brown v. Shiner*, 84 Tex. 505; *Chancey v. State*, 84 Tex. 529; *Island City Sav. Bank v. Dowlearn*, 94 Tex. 383; *Reed v. Rogan*, 94 Tex. 177; *Cameron v. State*, 7 Tex. Civ. App. 35; *Ketner v. Rogan*, 95 Tex. 559.

(bb) *Classification and Valuation.* — It is provided that the commissioner of the general land office may classify such lands, designating them as agricultural, grazing, or timbered land, according to the fact in the particular case.¹ The commissioner is also required to notify in writing the county clerk of each county of the valuation fixed upon each section of land in his county, and in each county attached to it for judicial purposes, which he offers for sale.² After the commissioner has thus classified the lands and given the required notice, but not before, the lands are subject to sale.³

(cc) *Who May Purchase.* — As a general rule the lands can be sold only to actual settlers thereon⁴ or to *bona fide* owners of and residents upon other lands contiguous thereto, or within a radius of five miles thereof.⁵

One Taking Actual Possession of School Land cannot thereby deprive all others of the right to settle thereon in such manner as will enable them to accept the proposition to sell made by statute.⁶

(dd) *Quantity That May Be Purchased.* — The land must be sold in quantities of not less than eighty acres or multiples thereof, nor more than four sections, containing six hundred and forty acres, more or less;⁷ provided, however, that the purchaser shall not include in his purchase more than two sections of agricultural land,⁸ and that where there is a fraction less than eighty acres of

1. **Classification.** — Rev. Stat., art. 4218e. For a construction of this provision see the following cases: Schendell v. Rogan, 94 Tex. 585; Harper v. Terrell, (Tex. 1903) 73 S. W. Rep. 949; Thompson v. Gallagher, (Tex. Civ. App. 1903) 75 S. W. Rep. 567. See also Thomson v. Hubbard, 22 Tex. Civ. App. 101; Hobert v. Wilson, (Tex. Civ. App. 1895) 31 S. W. Rep. 710.

2. **Valuation.** — Rev. Stat., art. 4218g; Wiloughby v. Townsend, 93 Tex. 80; Hardman v. Crawford, 95 Tex. 193, affirming (Tex. Civ. App. 1901) 63 S. W. Rep. 659; Ford v. Brown, (Tex. Civ. App. 1903) 75 S. W. Rep. 893; Thompson v. Gallagher (Tex. Civ. App. 1903) 75 S. W. Rep. 567.

3. **When Lands Become Subject to Sale.** — Rev. Stat., art. 4218f; Wiloughby v. Townsend, 93 Tex. 80; Davis v. Tillar, (Tex. Civ. App. 1903) 74 S. W. Rep. 921; Ford v. Brown, (Tex. 1903) 74 S. W. Rep. 535; Thompson v. Gallagher, (Tex. Civ. App. 1903) 75 S. W. Rep. 567. See also Brown v. Shiner, 84 Tex. 505; Thomson v. Hubbard, 22 Tex. Civ. App. 101; Hobert v. Wilson, (Tex. Civ. App. 1895) 31 S. W. Rep. 710.

Effect of Notice by Commissioner to Intending Purchaser of Time Land Is to Be Placed on Market. — Hobert v. Wilson, (Tex. Civ. App. 1895) 31 S. W. Rep. 710.

4. **As a General Rule Only Settlers Can Purchase.** — Rev. Stat., art. 4218f; Wiloughby v. Townsend, 93 Tex. 80; Hardman v. Crawford, 95 Tex. 193; Weatherford v. McFadden, 21 Tex. Civ. App. 260; Thomson v. Hubbard, 22 Tex. Civ. App. 101; Wilgus v. Arnold, (Tex. Civ. App. 1895) 29 S. W. Rep. 823; Hobert v. Wilson, (Tex. Civ. App. 1895) 31 S. W. Rep. 710; Schwarz v. McCall, 94 Tex. 10; Nowlin v. Hall, (Tex. Civ. App. 1902) 66 S. W. Rep. 116; Ford v. Brown, (Tex. Civ. App. 1903) 75 S. W. Rep. 893; Spence v. Dawson, (Tex. Civ. App. 1902) 67 S. W. Rep. 180.

Rule under Former Laws. — Luckie v. Watt, 77 Tex. 262; Joyner v. Johnson, 84 Tex. 465; Chancey v. State, 84 Tex. 529; Harris v. Byrd, 3 Tex. Civ. App. 677; State v. Palin, (Tex. Civ. App. 1894) 25 S. W. Rep. 820.

A Minor Could Not Purchase under the Act of July 8, 1879, as amended by the Act of April 6, 1881. Walker v. Rogan, 93 Tex. 248. But see Weatherford v. McFadden, 21 Tex. Civ. App. 260.

Law Authorizing Sale of Isolated and Detached Sections in Certain Counties Without Actual Settlement. Rev. Stat., art. 4218y, construed — Tompkins v. McKinney, 93 Tex. 629; Weber v. Rogan, 94 Tex. 62; Schwarz v. McCall, 94 Tex. 10. See also Cameron v. State, 7 Tex. Civ. App. 35; Faulk v. Byerly, 14 Tex. Civ. App. 388; Thomas v. Wolfe, 16 Tex. Civ. App. 22; Wilgus v. Arnold, (Tex. Civ. App. 1895) 29 S. W. Rep. 823; Briscoe v. Cune, (Tex. Civ. App. 1896) 38 S. W. Rep. 399.

Who Are Actual Settlers in Good Faith. — Luckie v. Watt, 77 Tex. 262; Joyner v. Johnson, 84 Tex. 465; Brown v. Shiner, 84 Tex. 505; Wilgus v. Arnold, (Tex. Civ. App. 1895) 29 S. W. Rep. 823; Wiloughby v. Townsend, (Tex. Civ. App. 1899) 51 S. W. Rep. 335; Nowlin v. Hall, (Tex. Civ. App. 1902) 66 S. W. Rep. 116.

Restriction of Sale to Actual Settlers Not Unconstitutional. — Cameron v. State, 7 Tex. Civ. App. 35.

5. **Purchase by Owners of Neighboring Lands.** — Rev. Stat., art. 4218fff; Nowlin v. Hall, (Tex. Civ. App. 1902) 66 S. W. Rep. 116, 851; Spence v. Dawson, (Tex. Civ. App. 1902) 67 S. W. Rep. 180; Nesting v. Terrell, (Tex. 1903) 75 S. W. Rep. 485; Roddy v. White, (Tex. Civ. App. 1903) 75 S. W. Rep. 358.

Right of Married Woman to Purchase. — Neighbors v. Anderson, 94 Tex. 487, affirming 25 Tex. Civ. App. 504.

6. Hobert v. Wilson, (Tex. Civ. App. 1895) 31 S. W. Rep. 710.

7. **Quantities in Which Land Must Be Sold.** — Rev. Stat., art. 4218f, and Act of April 19, 1901.

For a construction of these provisions, see the following cases: Hazelwood v. Rogan, 95 Tex. 295; Nowlin v. Hall, (Tex. Civ. App. 1902) 66 S. W. Rep. 116.

8. Rev. Stat., art. 4218f; Schwarz v. McCall, 94 Tex. 10.

any section left unsold, such fraction may be sold.¹

Purchaser of Home Section May Purchase Additional Land. — A purchase of less than four sections does not exhaust the right to purchase. A *bona fide* settler who has purchased the section upon which he resides may purchase additional lands, provided that the total of his purchases shall not exceed four sections. But he cannot do this unless he is actually residing upon the section originally purchased at the time when he makes application for the additional land.²

(*ee*) **Provision as to Situation of Lands Purchased.** — Where a settler purchases more than one section, the lands in excess of one section so purchased must be situated within a radius of five miles of the land occupied by him.³

(*ff*) **Price of Lands.** — It is provided in reference to lands of each class that they shall be sold at not less than a certain sum per acre.⁴

(*gg*) **Conditions Essential to Acquisition** — *aaa. Application and Affidavit.* — A person desiring to purchase any of this land is required to forward his application to the commissioner of the general land office, describing the land which he seeks to purchase; and this application must, as a general rule, be accompanied by the affidavit of the applicant, in effect that he desires to purchase the land for a home and has in good faith settled thereon.⁵ The applicant is also required to swear that he is not acting in collusion with others for the purpose of buying the land for any other person or corporation, and that no other person or corporation is interested in the purchase thereof.⁶

bbb. Cash Payment and Obligation. — The applicant must transmit to the treasurer of the state one-fortieth of the aggregate purchase money for the particular tract of land, and send to the commissioner his obligation to the state binding him to pay on the first day of November of each year thereafter, until the whole purchase money is paid, one-fortieth of the aggregate price, with interest at the rate of three per cent. per annum on the whole unpaid purchase money.⁷

1. Rev. Stat., art. 4218f.

2. Schwarz v. McCall, 94 Tex. 10; Ford v. Brown, (Tex. Civ. App. 1903) 75 S. W. Rep. 893; Faucett v. Sheppard, (Tex. Civ. App. 1903) 75 S. W. Rep. 538; Roddy v. White, (Tex. Civ. App. 1903) 75 S. W. Rep. 358.

3. **Location of Lands Purchased.** — Rev. Stat., art. 4218f; Schwarz v. McCall, 94 Tex. 10.

4. **Price of Lands.** — Rev. Stat., art. 4218h; Gracey v. Hendrix, 93 Tex. 26; Weber v. Rogan, 94 Tex. 62.

Price of Isolated and Detached Sections in Certain Counties. — Rev. Stat., art. 4218y; Weber v. Rogan, 94 Tex. 62.

5. **Application and Affidavit of Settlement.** — Rev. Stat., art. 4218j; Willoughby v. Townsend, 93 Tex. 80, reversing (Tex. Civ. App. 1899) 51 S. W. Rep. 335; Schendell v. Rogan, 94 Tex. 585; Hardman v. Crawford, 95 Tex. 193; Ford v. Brown, (Tex. Civ. App. 1903) 75 S. W. Rep. 893. See also Brown v. Shiner, 84 Tex. 505.

Application Need Not Show Price of Lands. — Faucett v. Sheppard, (Tex. Civ. App. 1903) 75 S. W. Rep. 538.

Requisites of Application and Affidavit under Former Law. — Gen. Laws 1883, p. 87, § 8; Chancey v. State, 84 Tex. 529; State v. Palin, (Tex. Civ. App. 1894) 25 S. W. Rep. 820.

Right to Correct Mistake in Description of Land upon Which Purchaser Bases His Right to Purchase. — Nesting v. Terrell, (Tex. 1903) 75 S. W. Rep. 485. See also Short v. Seymour, (Tex. Civ. App. 1893) 22 S. W. Rep. 925.

Settlement by Mistake on Land Near That Applied For — Correction of Mistake. — Chancey v. State, 84 Tex. 529; Hall v. White, 94 Tex. 452,

affirming (Tex. Civ. App. 1900) 59 S. W. Rep. 810.

6. Rev. Stat., art. 4218j; Thomson v. Hubbard, 22 Tex. Civ. App. 101. See also Wichita Land, etc., Co. v. State, 80 Tex. 684.

Time of Making Application. — Nowlin v. Hall, (Tex. Civ. App. 1902) 66 S. W. Rep. 116; Ford v. Brown, (Tex. 1903) 74 S. W. Rep. 535; Willoughby v. Townsend, 93 Tex. 80; Hazelwood v. Rogan, 95 Tex. 295; Patterson v. Terrell, (Tex. 1903) 74 S. W. Rep. 19.

Validity of Application for Leased Lands Made Before Expiration of Lease. — Hazelwood v. Rogan, 95 Tex. 295.

Effect of Application Made Before Appraisement of Land. — Ford v. Brown, (Tex. Civ. App. 1903) 75 S. W. Rep. 893.

Affidavit Made on Sunday. — Willoughby v. Townsend, (Tex. Civ. App. 1899) 51 S. W. Rep. 335. See generally the title SUNDAYS AND HOLIDAYS.

Priority Between Two Applications for Same Land. — Hazelwood v. Rogan, 95 Tex. 295.

Verified Application as Evidence. — Nowlin v. Hall, (Tex. Civ. App. 1902) 66 S. W. Rep. 851.

7. **Mode of Payment.** — Rev. Stat., art. 4218j; Hardman v. Crawford, 95 Tex. 193.

For the Interpretation of these provisions, see the following cases: Gracey v. Hendrix, 93 Tex. 26; Weatherford v. McFadden, 21 Tex. Civ. App. 260; Spence v. Dawson, (Tex. Civ. App. 1902) 67 S. W. Rep. 180; Faucett v. Sheppard, (Tex. Civ. App. 1903) 75 S. W. Rep. 538.

Provisions of Former Laws Construed. — Monroe Cattle Co. v. Becker, 147 U. S. 47; Walker v. Rogan, 93 Tex. 248; Berrendo Stock Co. v.

But provision is made for the sale of timber land for cash.¹

ccc. Residence and Proof Thereof. — As a general rule all purchasers are required to reside upon the land purchased by them as a home for three consecutive years next succeeding the date of their purchase, and to make proper proof of such residence to the commissioner of the general land office within two years next after the expiration of such three years residence.² Upon such proof being made the commissioner is required to issue a certificate showing that fact.³

(hh) When Sale Deemed Effective. — Upon receipt of one-fortieth of the purchase money by the treasurer and the required affidavit and obligation by the commissioner, the sale will be deemed and held effective from the date on which the affidavit and obligation were filed in the general land office.⁴

Patent upon Payment in Full After Three Years Occupancy. — Purchasers have the option of paying the purchase money for their lands in full at any time after they have occupied them for three consecutive years; and upon such payment, and proof of such occupancy, and payment of the prescribed patent fee, they are entitled to patents for the land.⁵

(ii) Powers of Commissioner of General Land Office. — All sales are required to be made by the commissioner of the general land office or under his direction.⁶ The commissioner has no power to make a sale except to that class of persons to whom a sale is authorized.⁷ If any applicant does not belong to that class the application must be rejected.⁸ The action of the commissioner in determining whether an applicant does or does not belong to that class is not final.⁹

(jj) Remedies of Applicants from Whom Lands Are Wrongfully Withheld — *aaa. In General.* — Where a person entitled to purchase and who has not exhausted his right to

McCarty, (Tex. Civ. App. 1892) 20 S. W. Rep. 933; *Perez v. Canales*, 69 Tex. 674.

Obligation Given by Married Woman a Community Debt. — *Neighbors v. Anderson*, 94 Tex. 487, *affirming* 25 Tex. Civ. App. 504.

Act of May 27, 1899, to Validate Titles of purchasers who failed to settle on the land sought to be purchased, and to make the first payment at the time of the application, but who have settled and made such payment within six months thereafter, construed. *Spence v. Dawson*, (Tex. 1902) 70 S. W. Rep. 73.

1. *Sale of Timber Land for Cash.* — Rev. Stat., art. 4218g.

For the construction of this provision, see *Weber v. Rogan*, 94 Tex. 62.

2. *Residence.* — Rev. Stat., art. 4218j; *Witcher v. Wiles*, (Tex. Civ. App. 1903) 75 S. W. Rep. 889.

Rule under a Former Law, Act of 1883. *State v. Palin*, (Tex. Civ. App. 1894) 25 S. W. Rep. 820.

Residence Required Where Purchaser of Home Section Purchases Additional School Lands. — Rev. Stat., art. 4218ff; *Hazelwood v. Rogan*, 95 Tex. 295; *Schwarz v. McCall*, 94 Tex. 10; *Roberson v. Sterrett*, (Tex. 1903) 71 S. W. Rep. 385, 73 S. W. Rep. 2.

School Lands Purchased by Owner of Neighboring Lands. — Rev. Stat., art. 4218fff; *Roberson v. Sterrett*, (Tex. 1903) 71 S. W. Rep. 385, 73 S. W. Rep. 2; *Nesting v. Terrell*, (Tex. 1903) 75 S. W. Rep. 485.

3. *Conclusiveness of Commissioner's Certificate.* — *Logan v. Curry*, 95 Tex. 664; *Ford v. Brown*, (Tex. Civ. App. 1903) 75 S. W. Rep. 893.

4. *When Sale Becomes Effective.* — Rev. Stat. art. 4218j; *Gracey v. Hendrix*, 93 Tex. 26. See also *Willoughby v. Townsend*, (Tex. Civ.

App. 1899) 51 S. W. Rep. 335; *Canales v. Perez*, 65 Tex. 291.

Right Secured Free from Claim of State for Minerals. — *Schendell v. Rogan*, 94 Tex. 585; *Chappell v. Rogan*, 94 Tex. 650, 63 S. W. Rep. 1006.

Act Validating Certain Sales made prior to January 1, 1899 (Gen. Laws 1899, p. 259, c. 150), construed. *Johnson v. Bibb*, (Tex. Civ. App. 1903) 75 S. W. Rep. 71.

5. *Effect of Payment in Full After Three Years, Occupancy.* — Rev. Stat., art. 4218k.

This provision is construed in *Schendell v. Rogan*, 94 Tex. 585. See also *Chancey v. State*, 84 Tex. 529.

6. Rev. Stat., art. 4218j.

7. See *supra*, this subdivision, (cc) *Who May Purchase.*

8. *Application of One Not Authorized to Purchase Must Be Rejected.* — *Willoughby v. Townsend*, 93 Tex. 80; *Wilgus v. Arnold*, (Tex. Civ. App. 1895) 29 S. W. Rep. 823; *Nowlin v. Hall*, (Tex. Civ. App. 1902) 66 S. W. Rep. 116; *Ford v. Brown*, (Tex. Civ. App. 1903) 75 S. W. Rep. 893.

Assignment of Reason for Rejecting Application Not Essential. — *Willoughby v. Townsend*, 93 Tex. 80.

9. *Action of Commissioner Not Final.* — *Nowlin v. Hall*, (Tex. Civ. App. 1902) 66 S. W. Rep. 116; *Ford v. Brown*, (Tex. Civ. App. 1903) 75 S. W. Rep. 893. See *infra*, this section, *Remedies of Applicants from Whom Lands Are Wrongfully Withheld.*

Power of Land Board to Determine Applicant's Right to Purchase under a former law, Act of April 12, 1883. *King v. Jones*, 78 Tex. 285. See also *Harris v. Byrd*, 3 Tex. Civ. App. 677, *limiting* *Luckie v. Watt*, 77 Tex. 262.

do so, has complied with all the statutory requirements,¹ he acquires such right to the land or equitable title as will enable him to maintain an action to recover it, although his application has been rejected by the commissioner.²

One Holding under a Subsequent Application may show that the former applicant, whose application was granted, did not belong to the class of persons entitled to purchase,³ or that he had never completed his purchase, or that he had in some manner forfeited his right before the subsequent applicant's application was made.⁴ But a defect in his opponent's title will not help the plaintiff if he fails to establish his own right.⁵

bbb. When Mandamus Will Issue. — Where land has been awarded to an applicant, and subsequently the award is canceled and his application rejected, such applicant, upon establishing his right, is entitled to a writ of mandamus to compel the commissioner to reinstate him as a purchaser.⁶

(kk) Sale of Lands by Purchaser — aaa. Right to Sell. — Purchasers may sell their lands, or a part of them, in quantities of forty acres or multiples thereof, at any time after the sale is effected.⁷

bbb. Conditions to Be Performed by Vendee. — In such case the vendee, or any subsequent vendee, is required to file his own obligation with the commissioner of the general land office, together with the duly authenticated conveyance or transfer from the original purchaser, and in case of a subsequent sale by the vendee such intermediate vendee's conveyance or transfer, together with an affidavit, in case three years residence has not already been had upon the land, similar to that required to be filed by the original applicant.⁸ Thereupon the original obligation will be surrendered or canceled or properly credited, as the case may be, and the vendee will become the purchaser direct from the state, and the original purchaser will be absolved, in whole or in part, from further liability.⁹ Under these provisions, if the vendor has not completed the required three years residence, the sale must be made to one who is an actual settler on the land sold, and he will be required to complete the three years

1. See *supra*, this subdivision, (gg) *Conditions Essential to Acquisition*.

2. When Rejected Applicant May Maintain Action to Recover Land. — *Willoughby v. Townsend*, 93 Tex. 80; *Hazlewood v. Rogan*, 95 Tex. 295; *Nowlin v. Hall*, (Tex. Civ. App. 1902) 66 S. W. Rep. 116, 851; *Boaz v. Powell*, (Tex. 1902) 69 S. W. Rep. 976; *Ford v. Brown*, (Tex. Civ. App. 1903) 75 S. W. Rep. 893. See also *Monroe Cattle Co. v. Becker*, 147 U. S. 47.

But in Such Case the Burden Rests upon Him to show every fact necessary to establish his equitable right. *Nowlin v. Hall*, (Tex. Civ. App. 1902) 66 S. W. Rep. 116, 851; *Spence v. Dawson*, (Tex. Civ. App. 1902) 67 S. W. Rep. 180; *Willoughby v. Townsend*, 93 Tex. 80; *Thompson v. Gallagher*, (Tex. Civ. App. 1903) 75 S. W. Rep. 567. But see *Walker v. Marchbanks*, (Tex. Civ. App. 1903) 74 S. W. Rep. 929.

3. Right to Show Defect in a Former Applicant's Title. — *Willoughby v. Townsend*, 93 Tex. 80; *Wilgus v. Arnold*, (Tex. Civ. App. 1895) 29 S. W. Rep. 823; *Nowlin v. Hall*, (Tex. Civ. App. 1902) 66 S. W. Rep. 116. See also *Harris v. Byrd*, 3 Tex. Civ. App. 677.

4. *Boaz v. Powell*, (Tex. 1902) 69 S. W. Rep. 976.

5. Defect in Opponent's Title. — *Willoughby v. Townsend*, 93 Tex. 80.

6. Mandamus to Reinstate Purchaser. — *Hazlewood v. Rogan*, 95 Tex. 295. And see generally the title *MANDAMUS*, vol. 19, p. 709.

7. Right of Purchasers to Sell. — Rev. Stat.,

art. 4218k; *Chancey v. State*, 84 Tex. 529; *Hardman v. Crawford*, 95 Tex. 193, affirming (Tex. Civ. App. 1901) 63 S. W. Rep. 659; *Spence v. Dawson*, (Tex. 1902) 70 S. W. Rep. 73; *Johnson v. Bibb*, (Tex. Civ. App. 1903) 75 S. W. Rep. 71. See also *Walker v. Rogan*, 93 Tex. 248.

Actual Settlement Not Essential Prerequisite to Sale under Former Law. — *Chancey v. State*, 84 Tex. 529, limiting *King v. Jones*, 78 Tex. 285; *State v. Palin*, (Tex. Civ. App. 1894) 25 S. W. Rep. 820.

8. See *supra*, this subdivision, (gg) *Conditions Essential to Acquisition — Application and Affidavit*.

9. Conditions to Be Performed by Vendee — Effect of Performance. — Rev. Stat., art. 4218k; *Robertson v. Sterrett*, (Tex. 1903) 73 S. W. Rep. 2.

The following cases construe this provision: *Hardman v. Crawford*, 95 Tex. 193, affirming (Tex. Civ. App. 1901) 63 S. W. Rep. 659; *Spence v. Dawson*, (Tex. 1902) 70 S. W. Rep. 73, affirming (Tex. Civ. App. 1902) 67 S. W. Rep. 180; *Johnson v. Bibb*, (Tex. Civ. App. 1903) 75 S. W. Rep. 71. See also *Chancey v. State*, 84 Tex. 529; *Walker v. Rogan*, 93 Tex. 248.

When Vendee May Purchase Additional Land. — *Schwarz v. McCall*, 04 Tex. 10, in effect overruling *Thomson v. Hubbard*, 22 Tex. Civ. App. 101.

Sale of School Lands Purchased by Owner of Neighboring Land. — *Nesting v. Terrell*, (Tex. 1903) 75 S. W. Rep. 485.

residence commenced by his vendor.¹ It is expressly provided, however, that the vendee may compute the time of the occupancy of the vendor as a part of his own occupancy,² and the vendee, or, if he refuses to do so, the vendor himself, may make proof of occupancy in the required manner.³

(ll) *Forfeiture of Lands* — *aaa. For Nonpayment of Interest* — (*aaa*) *Rule Stated.* — If upon the first day of November of any year any portion of the interest due for lands has not been paid, the land commissioner is required to indorse on the obligation for said lands, "Lands forfeited," and to cause an entry to that effect to be made on the account kept with the purchaser, and thereupon the land will be forfeited to the state without the necessity of re-entry or judicial ascertainment and will revert to the particular fund to which it originally belonged. But the purchaser may, at any time within six months after such indorsement, institute suit for the purpose of setting aside the forfeiture upon the ground of nonexistence of facts authorizing it. If no such suit is instituted as provided, the forfeiture will become fixed and conclusive.⁴ The constitutionality of this provision has been upheld.⁵

(*bbb*) *When Claim Will Be Reinstated.* — But it is provided that where lands have been forfeited for nonpayment of interest, the purchaser or his vendee may have his claim reinstated on his written request, by paying into the treasury the full amount of interest due up to the date of reinstatement, provided the right of no third person has intervened.⁶

bbb. For Nonresidence. — If the purchaser or his vendee fails to reside upon the land in the manner required by law, he will forfeit it in the same manner as for nonpayment of interest.⁷

ccc. Mistake in Classification Does Not Authorize Cancellation of Sale. — The fact that the commissioner has made a mistake in the classification of lands does not authorize him to cancel a sale subsequently made of such lands.⁸

bb. ACQUISITION BY LEASE — (*aa*) *In General.* — Provision is made for the lease of school and asylum lands by the commissioner of the general land office under the conditions hereafter enumerated.⁹

1. *Hardman v. Crawford*, 95 Tex. 193, *affirming* (Tex. Civ. App. 1901) 63 S. W. Rep. 659.

2. Rev. Stat., art. 4218j; *Hardman v. Crawford*, 95 Tex. 193, *affirming* (Tex. Civ. App. 1901) 63 S. W. Rep. 659.

3. Rev. Stat., art. 4218j.

4. *Forfeiture for Nonpayment of Interest.* — Rev. Stat., art. 4218l, and Act of March 25, 1897.

For the construction of these provisions, see the following cases: *Waggoner v. Flack*, 92 Tex. 633; *Brightman v. Comanche County*, 94 Tex. 599, *reversing* (Tex. Civ. App. 1901) 62 S. W. Rep. 973; *Capps v. Garvey*, (Tex. Civ. App. 1897) 41 S. W. Rep. 379; *Scott v. Blackburn*, (Tex. Civ. App. 1898) 47 S. W. Rep. 480; *Bates v. Bratton*, (Tex. 1903) 72 S. W. Rep. 157; *Harper v. Terrell*, (Tex. 1903) 73 S. W. Rep. 949.

Rule under Former Laws. — *Monroe Cattle Co. v. Becker*, 147 U. S. 47; *Walker v. Rogan*, 93 Tex. 248; *Anderson v. Waco State Bank*, 86 Tex. 618, *explaining* *Berrendo Stock Co. v. McCarty*, 85 Tex. 412; *Island City Sav. Bank v. Dowlearn*, 94 Tex. 383, *reversing* (Tex. Civ. App. 1900) 59 S. W. Rep. 308; *Canales v. Perez*, 65 Tex. 291; *Perez v. Canales*, 60 Tex. 674.

Act Waiving Forfeiture (Act of Feb. 23, 1885) held not to be unconstitutional. *Capps v. Garvey*, (Tex. Civ. App. 1897) 41 S. W. Rep. 379.

5. *Constitutionality of Provision.* — *Wilson v. Standefer*, 184 U. S. 399, *affirming* 93 Tex. 232, 55 S. W. Rep. 1135.

6. *Reinstatement of Claim.* — Rev. Stat., art. 4218f. This provision is construed in *Anderson v. Neighbors*, 94 Tex. 236.

7. *Forfeiture for Nonresidence.* — Rev. Stat., arts. 4218ff, 4218fff, 4218h.

This provision is construed in the following cases: *Hardman v. Crawford*, (Tex. Civ. App. 1901) 63 S. W. Rep. 659; *Roberson v. Sterrett*, (Tex. 1903) 71 S. W. Rep. 385, 73 S. W. Rep. 2; *Bates v. Bratton*, (Tex. 1903) 72 S. W. Rep. 157, *reversing* (Tex. Civ. App. 1902) 71 S. W. Rep. 38; *Nesting v. Terrell*, (Tex. 1903) 75 S. W. Rep. 485; *Johnson v. Bibb*, (Tex. Civ. App. 1903) 75 S. W. Rep. 71.

As to Forfeiture for Nonresidence under a Former Law, Act of April 12, 1883, see *King v. Jones*, 78 Tex. 285.

8. *Mistake in Classification.* — *Harper v. Terrell*, (Tex. 1903) 73 S. W. Rep. 949. The court in this case left open the question whether the state could avoid the sale on this ground.

Act Validating Certain Purchases from the Land Board notwithstanding its failure to comply with the law (Act of 1891, p. 130, c. 87, § 1), construed. *Collins v. Cain*, 87 Tex. 612.

9. *Lease of School and Asylum Lands.* — Rev. Stat., art. 4218r. And see *Anderson v. Neighbors*, 94 Tex. 236.

Rules and Regulations by Commissioner Not Essential. — *West v. Terrell*, (Tex. 1903) 74 S. W. Rep. 903. See also *Brown v. Shiner*, 84 Tex. 505.

(bb) *Length of Lease.* — The letting must be for fixed periods of time, not to exceed certain maximum terms prescribed by statute for different classes of lands.¹

(cc) *Amount of Rent.* — The lands must be leased at not less than three cents per acre.² It is within the discretion of the commissioner to advertise leases, and to let to the highest responsible bidder in such quantities and under such regulations as he may think to the best interest of the state not inconsistent with the equities of the occupant.³

(dd) *Application for Lease.* — Any person desiring to lease any of such lands must make application in writing to the commissioner of the general land office, specifying and describing the particular lands he desires to lease.⁴

(ee) *Acceptance of Application — Execution and Delivery of Lease.* — Thereupon the commissioner, if satisfied that the lands applied for are not in immediate demand for purposes of actual settlement, is required to notify the applicant in writing that his proposition to lease is accepted, and to execute to the lessee a lease of such land for such time as may be agreed upon, and when satisfied that the lessee has paid to the treasurer of the state the rent for one year in advance, he must deliver the lease to the proper officer to be recorded.⁵ But the commissioner may reject any bid or offer to lease prior to signing the lease contract for fraud or collusion or other good and sufficient cause.⁶ After the lease has been recorded the recording officer, upon the payment of his fee, must deliver it to the lessee.⁷

(ff) *Payment of Rent.* — The lessee is required to pay the rent yearly in advance, the first payment to be made at the time the lease contract is entered into.⁸

(gg) *Cancellation of Lease for Nonpayment of Rent.* — If the lessee fails to pay the annual rent due in advance for any year within sixty days after such rent becomes due, the commissioner of the general land office may declare the lease canceled by a writing under his hand and seal, which must be filed with the other papers relating to the lease, and thereupon the lease will immediately terminate and the land become subject to purchase or lease in the same manner as before the lease was made.⁹ But in such case a new lease will not be made to the original lessee until all arrears are fully paid.¹⁰

Nonpayment of Rent Only Cause for Which Commissioner Can Cancel. — It would seem that the commissioner is not authorized to cancel a lease for any cause other than the nonpayment of rent. He cannot cancel an existing lease which is in good standing and at the same time execute another to the lessee.¹¹

(hh) *Right of Lessee on Expiration of Lease to Purchase or Re-lease — Right to Purchase.* — After the expiration of his lease the lessee has for sixty days the prior right to purchase lands as an actual settler.¹² This right is conferred upon the

1. **Length of Lease.** — Rev. Stat. Tex., 1895, art. 4218r; *Ketner v. Rogan*, 95 Tex. 559.

Computation of Time for Which Lease Will Run. — *Patterson v. Terrell*, (Tex. 1903) 74 S. W. Rep. 19; *Hazlewood v. Rogan*, 95 Tex. 295.

2. Rev. Stat. Tex., 1895, art. 4218r.

3. Rev. Stat. Tex., 1895, art. 4218r; *West v. Terrell*, (Tex. 1903) 74 S. W. Rep. 903.

4. **Application for Lease.** — Rev. Stat. Tex. 1895, art. 4218r; *Ketney v. Rogan*, 95 Tex. 559.

5. **Execution of Lease and Delivery for Recording.** — Rev. Stat. Tex., art. 4218s.

For a construction of this provision, see *Brown v. Shiner*, 84 Tex. 505; *Ketner v. Rogan*, 95 Tex. 559.

6. **Authority of Commissioner to Reject Offer.** — Rev. Stat. Tex., 1895, art. 4218r.

This provision is construed in *Anderson v. Neighbors*, 94 Tex. 236.

7. **Delivery of Lease to Lessee.** — Rev. Stat. Tex., art. 4218s.

8. **Payment of Rent.** — Rev. Stat. Tex. 1895, art. 4218r.

9. **Cancellation for Nonpayment of Rent.** — Rev. Stat. Tex. 1895, art. 4218v.

For the construction of this provision see the following cases: *Ketner v. Rogan*, 95 Tex. 559; *Kitchens v. Terrell*, (Tex. 1903) 74 S. W. Rep. 306; *West v. Terrell*, (Tex. 1903) 74 S. W. Rep. 903.

Informal Cancellation Acquiesced in by All Parties Concerned. — *West v. Terrell*, (Tex. 1903) 74 S. W. Rep. 903.

10. **Lessee Cannot Re-lease until All Arrears Are Paid.** — Rev. Stat. Tex. 1895, art. 4218v; *Kitchens v. Terrell*, (Tex. 1903) 74 S. W. Rep. 306; *West v. Terrell*, (Tex. 1903) 74 S. W. Rep. 903.

11. *Ketner v. Rogan*, 95 Tex. 559; *Blevins v. Terrell*, (Tex. 1903) 73 S. W. Rep. 515.

12. **Right of Lessee to Purchase on Expiration of Lease.** — Act of April 19, 1901, § 6.

original lessee only and not upon assignees of the lease.¹

Right to Lease. — If at the expiration of the lease the lands covered thereby are still for lease, the lessee has the preference right to lease the lands again upon the terms and at the price then fixed by law.² By this provision the lessee is given the preference over others seeking to lease, but not over purchasers.³

(ii) *When Leased Lands May Be Sold.* — All lands leased are subject to sale at any time except where otherwise provided by statute.⁴ But it is provided that in certain specified cases or under certain conditions none of the lands leased shall be sold during the term of the lease,⁵ and that no leased lands lying within certain prescribed bounds shall be sold during such term.⁶ Lessees themselves, however, may at any time purchase their leased lands, subject to the limitations as to quantity provided by law, and at the price and on the conditions which the law prescribes, and without reference to any improvements made by them.⁷

5. Other States. — In several of the original states, and in some of the states erected out of other territory which was never a part of the federal domain, the great body of the public lands had been disposed of at an early date; and the reported cases involving the primary acquisition of private rights therein are few in number.⁸ The states formed out of the federal domain have

1. *Hazelwood v. Rogan*, 95 Tex. 295.

2. **Right of Lessee to Lease.** — Rev. Stat. Tex. 1895, art. 4218r; *Ketner v. Rogan*, 95 Tex. 559.

3. *Ketner v. Rogan*, 95 Tex. 559.

Act Providing that "on the Expiration of Any Lease in the Absolute Lease District the land shall remain subject to sale for a period of sixty days, except where there are improvements" of a certain value on the section (Act of April 19, 1901, § 5) construed. *Hazelwood v. Rogan*, 95 Tex. 295.

4. **Leased Lands Subject to Sale.** — Rev. Stat. Tex., art. 4218s, and Act of April 19, 1901, § 4. For a construction of this provision see *Hazelwood v. Rogan*, 95 Tex. 295; *West v. Terrell*, (Tex. 1903) 74 S. W. Rep. 903.

5. **When Leased Lands Cannot Be Sold.** — Rev. Stat. 4218s and Act of April 19, 1901, § 4. *Hazelwood v. Rogan*, 95 Tex. 295, construes this provision.

Act Providing that Grazing Lands Leased for Five Years should be withdrawn from sale until the expiration of such lease (Gen. Laws 1889, p. 88, § 15) was constitutional. *Brown v. Shiner*, 84 Tex. 505.

6. **Absolute Lease District.** — Rev. Stat., art. 4218s, and Act of April 19, 1901, § 5.

For the construction of this provision see the following cases: *Reed v. Rogan*, 94 Tex. 177; *Hazelwood v. Rogan*, 95 Tex. 295; *Carothers v. Rogan*, (Tex. 1902) 70 S. W. Rep. 18; *Tolleson v. Rogan*, (Tex. 1903) 73 S. W. Rep. 520; *Smith v. McClain*, (Tex. 1903) 74 S. W. Rep. 754; *West v. Terrell*, (Tex. 1903) 74 S. W. Rep. 903.

Constitutionality of Provision Upheld. — *Reed v. Rogan*, 94 Tex. 177.

7. **Right of Lessees to Purchase.** — Rev. Stat. Tex. 1895, art. 4218w. See also *Carothers v. Rogan*, (Tex. 1902) 70 S. W. Rep. 18; *Walker v. Marchbanks*, (Tex. Civ. App. 1903) 74 S. W. Rep. 929.

8. **Sales — Georgia.** — *Doe v. Winn*, 11 Wheat. (U. S.) 381; *Robert v. Palmer*, 14 Ga. 349; *Miller v. Woodward*, 29 Ga. 753; *Doe*

v. Roe, 31 Ga. 593; *Jackson v. Moye*, 33 Ga. 296; *Pritchett v. Ballard*, 102 Ga. 20.

Maine. — *State v. Patten*, 49 Me. 383; *Stratton v. Cole*, 78 Me. 553. See also *Machias v. Whitney*, 16 Me. 343.

Maryland. — *Stone v. Boreman*, 1 Har. & M. (Md.) 1; *Hath v. Polk*, 1 Har. & M. (Md.) 363; *Peter v. Mains*, 4 Har. & M. (Md.) 423; *West v. Hughes*, 1 Har. & J. (Md.) 6; *Howard v. Cromwell*, 1 Har. & J. (Md.) 115; *Atty-Gen. v. Snowden*, 1 Har. & J. (Md.) 332; *Hammond v. Warfield*, 2 Har. & J. (Md.) 151; *Steuart v. Mason*, 3 Har. & J. (Md.) 507; *Buckingham v. Dorsey*, 1 Md. Ch. 31; *Chapman v. Hoskins*, 2 Md. Ch. 485; *Baker v. Naylor*, 4 Md. Ch. 542; *Twigg v. Jacobs*, 4 Md. Ch. 541; *Wilson v. Markle*, 4 Md. Ch. 534; *Smith v. Devconon*, 30 Md. 473; *Jay v. Van Bibber*, 94 Md. 688.

New Jersey. — *Arnold v. Mundy*, 6 N. J. L. 67; *Lippincott v. Souder*, 8 N. J. L. 161; *Estell v. Bricksburg Land, etc., Co.*, 35 N. J. L. 235; *Jennings v. Burnham*, 56 N. J. L. 291; *Ocean Beach Assoc. v. Brinley*, 34 N. J. Eq. 438; *Scott v. Yard*, 46 N. J. Eq. 79; *McCullough v. Absecon Beach Land, etc., Co.*, 48 N. J. Eq. 170; *Yard v. Ocean Beach Assoc.*, 49 N. J. Eq. 306; *Den v. Sharp*, 4 Wash. (U. S.) 609, 9 Fed. Cas. No. 5,236; *Baeder v. Jennings*, 40 Fed. Rep. 199, writ of error dismissed 154 U. S. 506.

New York. — *Candee v. Hayward*, 37 N. Y. 653, affirming 34 Barb. (N. Y.) 349; *Allen v. Land Office Com'rs*, 38 N. Y. 312.

South Carolina. — *Degraffinreid v. Gregory*, Harp. L. (S. Car.) 443; *Huggins v. Brewer*, 2 Bailey L. (S. Car.) 25; *Kent v. Carwell*, 1 Brev. (S. Car.) 30; *Nicklin v. Morrow*, 3 Brev. (S. Car.) 405; *Guignard v. Felder*, 2 Hill L. (S. Car.) 401; *Fulwood v. Graham*, 1 Rich. L. (S. Car.) 491; *Thornhill v. Sansbury*, 1 Nott & M. (S. Car.) 345.

Tennessee. — *Henegar v. Seymour*, 93 Tenn. 253; *Shaefer v. Mitchell*, (Tenn. 1902) 71 S. W. Rep. 863; *Christian v. Gernt*, (Tenn. Ch. 1900) 64 S. W. Rep. 399; *Gass v. Waterhouse*,

at their disposal only such lands as are granted to them by Congress.¹ The lands belonging to these states are for the most part disposed of under special laws relating to swamp and overflowed lands and lands appropriated for the use of schools and other educational institutions.²

Maryland. — Under the proprietary's government there were five several kinds of warrants by which an applicant might obtain a patent for land, as follows: common warrants, directed to the surveyor commanding him to lay out the specified quantity of land, where one proposed in general to obtain a certain quantity of vacant land anywhere, without regard to any particular space, or tract, and making the required payment; special warrants, where the register inserted a particular description of the land aimed at in the warrant itself; warrants of resurveys, in certain cases and where an applicant had already obtained a title to a tract of land by having had it surveyed, and a certificate returned, or by having obtained a patent for it, and only wished to add to it some contiguous vacancy; proclamation warrants, authorizing the applicant to take up certain lands again upon certain conditions; and escheat warrants, which any one by an application setting forth that a certain designated tract of land had actually escheated by the death of the last individual owner intestate and without heirs, might obtain immediately from the register of the land office.³

North Carolina. — The legislature of this state provided that any citizen

(Tenn. Ch. 1900) 61 S. W. Rep. 450; *State v. Cooper*, (Tenn. Ch. 1899) 53 S. W. Rep. 391; *Duffield v. Spence*, (Tenn. Ch. 1897) 51 S. W. Rep. 492; *Elk Valley Coal, etc., Co. v. Douglass*, (Tenn. 1898) 48 S. W. Rep. 365; *Cowan v. Hatcher*, (Tenn. Ch. 1898) 48 S. W. Rep. 328; *Riseden v. Harrison*, (Tenn. Ch. 1897) 42 S. W. Rep. 884; *Calloway v. Sanford*, (Tenn. Ch. 1895) 35 S. W. Rep. 776; *Walker v. Phillips*, 92 Tenn. 495; *Bleidorn v. Pilot Mountain Coal, etc., Co.*, 89 Tenn. 166; *Henegar v. Mathews*, 88 Tenn. 132; *Graham v. Gunn*, 87 Tenn. 458; *Phillips v. Robertson*, 2 Overt. (Tenn.) 399; *Carter v. Ward*, 2 Overt. (Tenn.) 340; *Kendrick v. Dillum*, 1 Overt. (Tenn.) 489; *Weakly v. Wilson*, 1 Overt. (Tenn.) 370; *Smith v. Lee*, 1 Coldw. (Tenn.) 549; *Lester v. Craig*, *Cooke* (Tenn.) 482; *Huntsman v. Randolph*, 5 Hayw. (Tenn.) 263; *M'Millan v. Claxton*, 4 Hayw. (Tenn.) 274; *Malone v. DeBoe*, 4 Hayw. (Tenn.) 259; *Clinton v. McClarin*, 3 Hayw. (Tenn.) 288; *Lipton v. Sanders*, 2 Head (Tenn.) 690.

Settlement Rights — *Maine*. — *Bussey v. Luce*, 2 Me. 367; *Lapish v. Bangor Bank*, 8 Me. 85; *Hovey v. Deane*, 13 Me. 31, 15 Me. 216; *Stearns v. Godfrey*, 16 Me. 158; *Bussey v. Grant*, 20 Me. 281; *Stevens v. Bragdon*, 45 Me. 31; *Hinckley v. Haines*, 69 Me. 76; *Lambert v. Carr*, 9 Mass. 185; *Harlow v. French*, 9 Mass. 193; *Mayo v. Libby*, 12 Mass. 340; *Dunlap v. Stetson*, 4 Mason (U. S.) 349.

1. See *supra*, III. 3. b. *National Government and New States*; and *infra*, this title, *Swamp-Land Grants*; *School and University Grants*; and for Texas school land, *supra*, this section, 4. *Texas*.

2. **Sales** — *Arkansas*. — *State v. Nichols*, 22 Ark. 61; *Crofton v. State*, 34 Ark. 271; *Woodward v. Campbell*, 39 Ark. 580; *Cochran v. Cobb*, 43 Ark. 180.

Colorado. — *In re Canal Certificates*, 19 Colo. 63; *People v. Tynon*, 2 Colo. App. 131; *People v. Clough*, 16 Colo. App. 120.

Kansas. — *In re Cunningham*, 14 Kan. 416; *Crans v. Francis*, 24 Kan. 751.

Michigan. — *Potter v. State Land Office Com'r*, 55 Mich. 485.

Nevada. — *State v. Hatch*, 15 Nev. 304; *State v. Preble*, 20 Nev. 38, 44.

Utah. — *Miles v. Wells*, 22 Utah 55.

Wisconsin. — *U. S. v. Hatch*, 1 Pin. (Wis.) 182; *Zemlock v. U. S.*, 73 Wis. 363; *State v. Cunningham*, 88 Wis. 81.

Pre-emptions — *Arkansas*. — *Nix v. Allen*, 112 U. S. 129; *Simpson v. Robinson*, 37 Ark. 132.

Louisiana. — *Beridon v. Barbin*, 13 La. Ann. 458; *Saje v. Cain*, 14 La. Ann. 189; *Munday v. Muse*, 15 La. Ann. 237.

Minnesota. — *Peterson v. St. Paul, etc., R. Co.*, 27 Minn. 218.

Missouri. — *Baker v. Gee*, 1 Wall. (U. S.) 333; *Craven v. Moore*, 61 Mo. 178.

Wisconsin. — *Matter of Veeder*, 3 Wis. 502; *State v. Collins*, 5 Wis. 339.

Leasing of Public Land. — *In re Leasing of State Lands*, 18 Colo. 359, 27 Colo. 99; *Colorado Fuel, etc., Co. v. Land Com'rs*, 14 Colo. App. 84; *Whiteman v. Severance*, 46 Minn. 495; *Cooper v. McCormick*, (Wyo. 1902) 69 Pac. Rep. 301; *State v. State Board of Land Com'rs*, (Wyo. 1902) 69 Pac. Rep. 562.

Purchases of Public Land by Land Officers. — *Bres v. Louviere*, 37 La. Ann. 736; *Massey v. Smith*, 64 Mo. 347; *Wills v. Abbey*, 27 Tex. 202, *approved* *Keith v. Fountain*, 3 Tex. Civ. App. 391, *distinguished* *Ellis v. Stone*, 4 Tex. Civ. App. 157; *Cotulla v. Laxson*, 60 Tex. 443; *State v. Thompson*, 64 Tex. 690.

3. **Statement and History of Maryland Land System.** — *Cunningham v. Browning*, 1 Bland (Md.) 299; Extract from a Report of Daniel Dulany, Esquire, concerning the Lord Proprietary's Revenue, 1 Har. & M. (Md.) 552; *Ringgold v. Malott*, 1 Har. & J. (Md.) 299; *Atty.-Gen. v. Snowden*, 1 Har. & J. (Md.) 332; *Hammond v. Norris*, 2 Har. & J. (Md.) 130;

thereof might enter any vacant and unappropriated lands belonging to the state, with certain exceptions,¹ and that entries by persons who have or may come into the state with the *bona fide* intent of becoming residents and citizens thereof, shall be as good as if made by citizens, provided that such enterer complies with the laws concerning entries.² After prescribing what lands are subject to entry and grant, the statutes direct how entries shall be made and grants issued. An entry-taker for each county is provided, and his duties are prescribed. He is required to record entries of claims of land within his county. A surveyor for each county is also provided. The party claiming land is required to make application in writing to the entry-taker in a way designated, and a copy of the application must be entered in a permanent entry book. The entry is then advertised and may be contested by any one claiming the land or any part of it. If the right of the claimant to make the entry is sustained a copy of the entry with the order of the survey must be sent to the county surveyor, who is required to survey the land, and make thereof two fair plats, the scale whereof shall be mentioned on such plats, and to set down in words the beginning, angles, distances, marks, and water-courses, and other remarkable places crossed or touched by or near to the lines of such lands, and also the quantity of acres. These plats are required to be transmitted to the secretary of state, or delivered to the claimant, within one year, together with the warrant or order of survey, one of which, with the warrant, shall be filed by the secretary of state and another annexed to the grant. The secretary of state, on application of claimants, shall make out grants for all surveys returned to his office, which grants shall be authenticated by the governor, countersigned by the secretary of state, and recorded in his office. The date of the entry is required to be inserted in every grant, and no grant shall issue upon any survey unless it is signed by the surveyor of the county. These and other like provisions in detail are intended to establish a system of entries and grants, the leading and essential features of which are the entry-taker's office, and the office of surveyor in each county and the method of procedure therein, as to the grantable lands of the state in the county. The purpose is to establish intelligent order, certainty, and uniformity in granting lands, and to prevent confusion, frauds upon the state, and injustice to individuals.³ The statutes direct that security shall be given

Koch v. Maryland Coal Co., 68 Md. 125. See *Shoemaker v. U. S.*, 147 U. S. 307, note, and *Garretson v. Cole*, 2 Har. & M. (Md.) 459.

1. Code N. Car., § 2751. See *Hall v. Hollifield*, 76 N. Car. 476.

2. Code N. Car., § 2754. See *Mockridge v. Howerton*, 72 N. Car. 221.

3. Code N. Car., §§ 2751-2788; *Harris v. Norman*, 96 N. Car. 59.

History and Statement of North Carolina System of Entries and Grants.—*Harris v. Norman*, 96 N. Car. 59. See *Webb & Meigs' Tenn. Dig.*, p. 2116; *Polk v. Wendal*, 9 Cranch (U. S.) 87; *State v. Cooper*, (Tenn. Ch. 1899) 53 S. W. Rep. 391.

Act of 1783 Directory Concerning Setting Forth Landmarks in Entry.—*Harris v. Ewing*, 1 Dev. & B. Eq. (21 N. Car.) 369.

An Entry Is Made with the Entry-taker Before a Warrant Issues; the warrant describes the land specified in the entry; and the special and locative calls for appropriation of the land can be seen and examined as well from a view of the warrant as from the entry. *Ross v. Reed*, 1 Wheat. (U. S.) 483.

Statute Does Not Authorize Entry-taker to Appoint Deputy.—*Pearson v. Powell*, 100 N. Car.

86; *Maxwell v. Wallace*, 3 Ired. Eq. (38 N. Car.) 593.

Void Entry Not Constructive Notice.—*Pearson v. Powell*, 100 N. Car. 86.

No Estate Acquired in Lands by Mere Entry.—*Hall v. Hollifield*, 76 N. Car. 476; *Byran v. Hodges*, 107 N. Car. 492.

The Entry Creates an Equity, which, upon payment of the purchase money, entitles the party to a grant. *Kimsey v. Munday*, 112 N. Car. 816; *Plemmons v. Fore*, 2 Ired. Eq. (37 N. Car.) 312.

Vagueness of Entry—Notice to Other Enterers.—*Grayson v. English*, 115 N. Car. 358. See *Harris v. Ewing*, 1 Dev. & B. Eq. (21 N. Car.) 369; *Johnston v. Shelton*, 4 Ired. Eq. (39 N. Car.) 85; *Munroe v. McCormick*, 6 Ired. Eq. (41 N. Car.) 85; *Allen v. Gilreath*, 6 Ired. Eq. (41 N. Car.) 252; *Fuller v. Williams*, *Bush*, Eq. (45 N. Car.) 162; *Horton v. Cook*, 1 Jones Eq. (54 N. Car.) 270; *Currie v. Gibson*, 4 Jones Eq. (57 N. Car.) 25; *Ashley v. Sumner*, 4 Jones Eq. (57 N. Car.) 121; *McDiarmid v. McMillan*, 5 Jones Eq. (58 N. Car.) 29; *Merrill v. Sloan*, 1 Murph. (5 N. Car.) 121.

Entry Made in Different County from Which Land Lies Is Void.—*Lunsford v. Boston*, 1 Dev.

by the surveyor for the faithful discharge of his duties, that every surveyor may appoint deputies, the manner in which special surveyors shall be appointed, and how surveys are to be made and returned. It is declared that no surveys shall be made without chain-carriers, who shall actually measure the land surveyed, and shall be sworn to measure justly and truly, and to deliver a true account thereof to the surveyor, who is authorized to administer such oath.¹ Every entry made, and every grant issued, for any lands not authorized to be entered or granted, is void.² All entries of land made in the course of any one year shall, in every event, be paid for on or before the thirty-first day of December which shall happen in the second year thereafter; and all entries of land not then paid for shall become null and void and may be entered by any other person.³

IX. TOWN SITES — 1. Acts of Congress — a. GENERAL LEGISLATION —

(1) *Provisions of Statutes.* — The federal statutes now in force⁴ as to town sites provide (first) for the reservation of town sites by the President from the public lands on the shores of harbors, etc.;⁵ (second) for the entry of public lands by parties who have already founded or hereafter desire to found a city or town, and for the sale of such lands under prescribed regulations, and at a prescribed price;⁶ (third) and for the entry of public lands not subject to entry under the agricultural pre-emption laws by the corporate authorities of an incorporated town, or by the judge of the county court for the county in which such town is situated, if it is not incorporated in trust for the several use and benefit of the occupants thereof.⁷

Eq. (16 N. Car.) 487; *Avery v. Strother*, 1 Conf. Rep. (1 N. Car.) 434.

An Entry Was Held Invalid because the required oath of allegiance was not taken by the claimant. *Thompson v. England*, 1 Hawks (8 N. Car.) 137.

Grant Taken Out on Lapsed Entry Because of Efflux of Time Not Void. — *Wilson v. Western North Carolina Land Co.*, 77 N. Car. 445.

Formation of County Held Not to Have Destroyed Validity of Entry. — *McMillan v. Gambill*, 106 N. Car. 359.

An Intervening Entry Was Not Set Aside where a party made an entry in his own name and afterwards had the entry altered so as to stand in his son's name. *Russ v. Hawes*, 5 Ired. Eq. (40 N. Car.) 18.

Irregular Entries Validated. — *Code N. Car.*, § 2761. See *Wyman v. Taylor*, 124 N. Car. 426.

1. *Code N. Car.*, §§ 2762, 2763, 2769. See *Avery v. Walker*, 1 Hawks (8 N. Car.) 140.

Survey Made Not under Oath and by Enterer Who Was Deputy Surveyor Held Invalid. — *Avery v. Walker*, 1 Hawks (8 N. Car.) 140.

2. *Code N. Car.*, § 2755.

3. *Code N. Car.*, § 2766. See *Kimsey v. Munday*, 112 N. Car. 816.

Payment Held Voluntary, Unauthorized, and Not Entitled to Grant. — *Buchanan v. Fitzgerald*, 6 Ired. Eq. (41 N. Car.) 121.

Construction of Act of 1842 Which Extended Time for Making Payments on Entries. — *Bryson v. Dobson*, 3 Ired. Eq. (38 N. Car.) 138.

Land Acquired from Cherokee Indians Governed by Cherokee Land Laws, Code N. Car. (1883), c. 11, p. 62. See *Kimsey v. Munday*, 112 N. Car. 816.

Entries Held Valid under the acts of 1854 and 1855, which provided that not more than six hundred and forty acres should be included in one entry. *Wyman v. Taylor*, 124 N. Car. 426.

4. **The Original Town Site Act** of May 23, 1844, was repealed by the act of July 1, 1864. The subsequent acts are practically amendments of this act. *Murray v. Hobson*, 10 Colo. 66.

Act Construed. — *Doll v. Meador*, 16 Cal. 295; *Matter of Selby*, 6 Mich. 193.

Not Originally Applicable in Oregon. — The act of 1844 was not extended to Oregon until July 14, 1854. *Stark v. Starrs*, 6 Wall. (U. S.) 402; *Whitlow v. Reese*, 4 Oregon 335. See also *Marlin v. T'Vault*, 1 Oregon 77.

5. *U. S. Rev. Stat.*, § 2380.

6. *U. S. Rev. Stat.*, § 2382.

Object of Statute. — *Jones v. Petaluma*, 38 Cal. 397; *Aleman v. Petaluma*, 38 Cal. 553.

7. *U. S. Rev. Stat.*, § 2387.

Unsurveyed Land. — The Federal Town Site Act applies to unsurveyed lands. *Carson v. Smith*, 5 Minn. 78, 77 Am. Dec. 539; *Wood v. Cullen*, 13 Minn. 394; *Mankato v. Meagher*, 17 Minn. 265.

Meaning of "Corporate Authorities." — *Clarke v. Roy*, 20 Wis. 478; *Perry v. Superior City*, 26 Wis. 56, 7 Am. Rep. 39.

When Duty of Probate Judge to Enter Town Site. — *McTaggart v. Harrison*, 12 Kan. 62.

Expenses of Entering Not a Lien on the Land. — *Emmert v. De Long*, 12 Kan. 67.

Method of Collecting Expenses of Entering in Kansas. — Where one pays money in defraying the expenses of entering a town site, he has no cause of action directly against the occupants of such site; he can only collect for such expenses under the provisions of Kansas Gen. Stat. 1889, par. 7044, providing for the levying of a tax for that purpose. *Morgan v. Van Wyck*, 5 Kan. App. 520.

Employment of Counsel. — It is competent for corporate authorities to employ counsel to assist them in obtaining a town site, and pay them a reasonable compensation. *Hayward v. Red Cliff*, 20 Colo. 33.

(2) *Title and Interest Acquired by Trustees* — (a) *In General.* — When a town site is entered, the person or persons entering it become invested with a trust. This trust is manifestly a double one; the first a trust for the occupants of the town as individuals, the other a trust for them collectively as a community.¹ The estate and trust powers are vested, not in the municipality itself, but in the trustee or trustees.² It has been held, however, that a corporation may maintain its bill to prevent or correct an abuse of the trust which affects the common interest of all the beneficiaries.³

Occupied Lots. — The trustee takes the legal title of the occupied lots in trust for those who are the occupants of them respectively. Simultaneously with such entry, and as the immediate result thereof, each occupant takes a vested equitable interest in the lot or lots of which he is the occupant.⁴

Unoccupied Lots. — Those lots to which no valid claims exist in favor of individuals are held in trust for the occupants collectively as a community.⁵ The trustee continues to hold the title in fee to the unclaimed and unsold lots until they are finally sold in the manner provided by law. His trust continues in full force until all the lots and parcels embraced within the town site and subject to the town site acts are sold and disposed of; and, having the title in fee, he has the right to defend and protect his title, like an owner, until, in pursuance of the law, his trust shall cease.⁶ It has been said that after the entry of a town site, vacant and unoccupied lots are subject to location and occupancy by any person at any time prior to the issuance of a patent.⁷ Under the statute, as to *Oklahoma* town sites, a municipality may acquire lots not disposed of for public building sites and parks.⁸

(b) *Title Passes to Successor.* — The purpose of the statute is to confer the estate upon the trustee in his official and public capacity, and to limit it to his successors in office until the trust shall be finally exhausted. The trust estate must be deemed to be limited to his successors and not to his heirs.⁹ If a new county is organized from a part of an old one, the judge of such new county, as the official successor of the original trustee, becomes the trustee of town sites in the new county, and is the proper officer to execute and administer the trust.¹⁰ Conveyances of town site lots must be made by the person holding the legal title, and so when a town site lot is entered by a county judge, before incorporation, he and his successors in office alone can convey the legal

Trustee Not Required to Keep Record of Town-site Claims. — *Downing v. Brown*, 3 Colo. 571.

Deed of Trustee. — The trustee is required, under the statute, to execute deeds to occupants of the town site to the lots to which they are entitled upon their compliance with the local rules and regulations. *Aspen v. Rucker*, 10 Colo. 184; *Mankato v. Meagher*, 17 Minn. 265.

Deed Not Invalidated by Failure to Recite Authority. — *Burbank v. Ellis*, 7 Neb. 156.

Witnesses to Deed Not Required by Utah Statute. — *Townsend v. Little*, 109 U. S. 504.

1. Double Trust. — *Martin v. Hoff*, (Ariz. 1901) 64 Pac. Rep. 445; *Denver v. Kent*, 1 Colo. 336; *Clark v. Titus*, (Ariz. 1886) 11 Pac. Rep. 312; *Lockwitz v. Larson*, 16 Utah 275; *Newhouse v. Simino*, 3 Wash. 648. See also *Aspen v. Rucker*, 10 Colo. 184; *Ruud v. Jensen*, 3 Wash. 785.

Right to Protect Title by Suit. — *Hartman v. Smith*, 6 Mont. 297.

2. Estate Not Vested in Municipality. — *Smith v. Pipe*, 3 Colo. 187; *Georgetown v. Glaze*, 3 Colo. 234; *Aspen v. Rucker*, 10 Colo. 184; *Burbank v. Ellis*, 7 Neb. 156.

3. Right of Corporation to Prevent or Correct Abuse. — *Denver v. Kent*, 1 Colo. 336; *George-*

town v. Glaze, 3 Colo. 234; *Aspen v. Rucker*, 10 Colo. 184.

4. Title to Occupied Lots. — *Jones v. Eureka Imp. Co.*, 53 Ark. 191; *Winfield Town Co. v. Maris*, 11 Kan. 128; *Sherry v. Sampson*, 11 Kan. 611; *Mankato v. Meagher*, 17 Minn. 265; *Goldberg v. Kidd*, 5 S. Dak. 169; *Eakin v. McCraith*, 2 Wash. Ter. 112. See also *Stringfellow v. Cain*, 99 U. S. 610; *Mallard v. Anderson*, 36 La. Ann. 834.

5. Title to Unoccupied Lots. — *Denver v. Kent*, 1 Colo. 336; *Aspen v. Rucker*, 10 Colo. 184.

6. Rights of Trustee. — *Hartman v. Smith*, 6 Mont. 295.

7. Occupancy After Entry. — *Lechler v. Chapin*, 12 Nev. 71, *per* Hawley, C. J. *Compare* *Winfield Town Co. v. Maris*, 11 Kan. 128; *Leech v. Rauch*, 3 Minn. 454; *Castner v. Gunther*, 6 Minn. 119; *Lockwitz v. Larson*, 16 Utah 275.

8. Acquisition for Public Purposes. — 26 U. S. Stat. at L. 109; *Oklahoma City v. Hill*, 6 Okla. 114.

9. Title in Successor. — *Smith v. Hill*, 89 Cal. 122; *Smith v. Pipe*, 3 Colo. 187; *Georgetown v. Glaze*, 3 Colo. 230; *Aspen v. Rucker*, 10 Colo. 184.

10. Judge of New County. — *Whittlesey v. Hop-*
Volume XXVI.

title. After incorporation the corporate authorities are not the official successors of such judge and cannot execute a valid conveyance.¹

(3) *Validity and Conclusiveness of Acts and Conveyances of Trustees.* — As is the case with officers of the land department, the presumption is in favor of the regularity and validity of acts and conveyances of town-site trustees.² In executing the provisions of the congressional and legislative acts relating to town sites, such trustees are called upon to exercise judicial discretion and powers.³ Their findings as to questions of fact are conclusive.⁴

Conveyances executed by them cannot, as a general rule, be attacked collaterally.⁵ No one who is not a beneficiary of the trust, but who is a mere stranger to the title, can call in question the validity or regularity of a conveyance executed by a town-site trustee, or by subsequent entry or intrusion upon the premises put parties claiming under such conveyance to the proof whether all steps prescribed by law have been taken, or whether the party to whom the deed was executed was the person rightly entitled thereto. These questions can be litigated only by some one interested in the trust and by direct proceedings for that purpose.⁶

(4) *Who Are Beneficiaries under Town-site Law* — (a) *In General.* — The only beneficiaries of the trust, under the town-site law, are the occupants of the town.⁷ The assigns of actual occupants are entitled to demand deeds from the trustees.⁸ Purchasers of vacant or forfeited lots and parcels in a town site, at sales regularly made, pursuant to the statute, are likewise entitled to conveyances from the trustee, or persons invested with the title thereto.⁹

(b) *Conflicting Claims.* — In cases where more than one person claims the same lot under the town-site law, the person having the prior claim by settlement or occupancy is authorized to acquire the title.¹⁰

penyan, 72 Wis. 140; *Tucker v. Whittlesey*, 74 Wis. 74.

1. *Corporate Authorities Not Successors of Judge* — *Wheeler v. Wade*, 1 Colo. App. 66; *Webber v. Petty*, 2 Colo. App. 63; *Rice v. Goodwin*, 2 Colo. App. 267.

2. *Presumption as to Acts and Conveyances.* — *Poire v. Wells*, 6 Colo. 406; *Anderson v. Bartels*, 7 Colo. 256; *Setter v. Alvey*, 15 Kan. 157; *Marysville Invest. Co. v. Munson*, 44 Kan. 491; *Green v. Barker*, 47 Neb. 934. See also *Matthews v. Buckingham*, 22 Kan. 166.

3. *Judicial Nature of Acts.* — *Anderson v. Bartels*, 7 Colo. 256; *Ming v. Foote*, 9 Mont. 201, *overruling Ming v. Truett*, 1 Mont. 325, *reviewing and distinguishing Edwards v. Tracy*, 2 Mont. 49; *Schnepel v. Mellen*, 3 Mont. 118; *Helena v. Albertose*, 8 Mont. 499; *Mills v. Paynter*, 7 Neb. 440; *Tierney v. Cornell*, 3 Neb. 267. Compare *Rahbone v. Sterling*, 25 Kan. 448.

4. *Conclusiveness of Findings of Fact.* — *Twine v. Carey*, 2 Okla. 249; *Bassett v. Mitchell*, 3 Okla. 177; *Myers v. Berry*, 3 Okla. 612; *King v. Thompson*, 3 Okla. 644; *Cummings v. McDermid*, 4 Okla. 272. See also *Carter v. Thompson*, 65 Fed. Rep. 329.

5. *Not Subject to Collateral Attack.* — *Poire v. Wells*, 6 Colo. 406; *Aspen v. Aspen Town, etc.*, Co., 10 Colo. 191; *Chever v. Horner*, 11 Colo. 68; *Horsky v. Moran*, 21 Mont. 345; *Green v. Barker*, 47 Neb. 934.

When Deed Subject to Collateral Attack. — *Poire v. Wells*, 6 Colo. 406; *Treadway v. Wilder*, 9 Nev. 67.

6. *Stranger Cannot Attack.* — *Anderson v. Bartels*, 7 Colo. 256; *Murray v. Hobson*, 10 Colo. 66; *Chever v. Horner*, 11 Colo. 68; *Hanlon v.*

Hobson, 24 Colo. 284; *Laughlin v. Denver*, 24 Colo. 260; *Sherry v. Sampson*, 11 Kan. 611; *Marysville Invest. Co. v. Munson*, 44 Kan. 491; *Taylor v. Winona, etc.*, R. Co., 45 Minn. 66; *Ming v. Foote*, 9 Mont. 201; *Holland v. Buchanan*, 19 Utah 11; *Tucker v. Chicago, etc.*, R. Co., 91 Wis. 576. See also *Jackson v. Winfield Town Co.*, 23 Kan. 542; *Ready v. Kearsley*, 14 Mich. 215.

7. *Occupants Entitled to Town-site Lots* — *Arizona.* — *Clark v. Titus*, (Ariz. 1886) 11 Pac. Rep. 312.

California. — *Ricks v. Reed*, 19 Cal. 551; *Bid-dick v. Kobler*, 110 Cal. 191. See also *Callahan v. James*, (Cal. 1902) 71 Pac. Rep. 104.

Colorado. — *Cook v. Rice*, 2 Colo. 131; *Clay-ton v. Spencer*, 2 Colo. 378; *Adams v. Binkley*, 4 Colo. 247; *Aspen v. Rucker*, 10 Colo. 184; *Aspen v. Aspen Town, etc.*, Co., 10 Colo. 191; *Mitchell v. Arkell*, 3 Colo. App. 253.

Kansas. — *Winfield Town Co. v. Maris*, 11 Kan. 148; *Sherry v. Sampson*, 11 Kan. 615; *Guffin v. Linney*, 26 Kan. 717.

Michigan. — *Matter of Selby*, 6 Mich. 213.

Minnesota. — *Leech v. Rauch*, 3 Minn. 451; *Carson v. Smith*, 12 Minn. 560. See also *Morris v. Watson*, 15 Minn. 212.

Nevada. — *Treadway v. Wilder*, 8 Nev. 98, 9 Nev. 67; *Lechler v. Chapin*, 12 Nev. 72.

Utah. — *Lockwitz v. Larson*, 16 Utah 275.

8. *Rights of Assigns.* — *Aspen v. Rucker*, 10 Colo. 184. See also *Aspen v. Aspen Town, etc.*, Co., 10 Colo. 191; *Lechler v. Chapin*, 12 Nev. 72.

9. *Purchasers of Vacant Lots.* — *Aspen v. Rucker*, 10 Colo. 184.

10. *Prior Occupant Entitled.* — *Sawyer v. Van Hook*, 1 Alaska 108; *Webber v. Petty*, 2 Colo. App. 63.

(c) **Who May Be Occupants.** — There is nothing in the act of Congress that requires that a claimant shall be a resident of the town site. It is only necessary that he be an occupant of the land to which he claims title.¹ A county or other municipal corporation may be an occupant under this act.² A town company may be an occupant. If such company is really an occupant, to the extent of its occupancy it is protected by the law. The company stands as any other individual, and holds no other or better relation.³ A town site cannot, however, be entered solely for the benefit of a corporation, the occupants holding merely for the benefit of the corporation, without having *bona fide* individual claims. This is not in accordance with a sound interpretation of the law governing the entry of town sites. They are not entered primarily for speculative individuals or corporations, but for actual settlers engaged in building a town.⁴

(d) **What Constitutes Occupancy.** — To be an occupant, the party must have the actual use or possession of the land. The acts necessary to constitute possession must, in a great measure, always depend upon the character of the land, the locality, and the object for which it is taken up. But in all cases where a party relies solely upon possession, there must be a subjection of the land to the will and control of the claimant. The occupant must assert an exclusive ownership over the land, and his acts must at all times be in harmony with his title. His possession must, in the language of the authorities, be apparent, open, notorious, unequivocal *pedis possessio*, carrying with it the evidences and marks of ownership.⁵

(5) **Rights of Occupants** — (a) **In General.** — Occupancy is certainly an interest in the land, inchoate, it is true, yet nevertheless valuable. It is authorized by law, and laws are made to provide the means of perfecting it into a title in fee. It may be defended against all encroachments of persons not having a paramount right. It is more than a mere right to the possession; it is a germ which will expand and ripen into a perfect title.⁶ Except as against the United States, and subject to defeat by abandonment, the *bona fide* occupant will hold this land by a tenure as secure against attack as the owner of the fee at common law. There is nothing in the law which obliterates its legal

Liability for Malicious Intermeddling. — One who intermeddles and resists his neighbor's application for a grant of public lands, out of mere malice, and without cause, is liable over for the wrong. *Hoyt v. Macon*, 2 Colo. 113.

1. **Nonresident an Occupant.** — *Greiner v. Fulton*, 46 Kan. 405; *Hagar v. Wikoff*, 2 Okla. 580; *Downman v. Saunders*, 3 Okla. 227.

2. **County an Occupant.** — *Blue Earth County v. St. Paul, etc., R. Co.*, 28 Minn. 503. But see *Setter v. Alvey*, 15 Kan. 157.

3. **Town Company an Occupant.** — *Winfield Town Co. v. Maris*, 11 Kan. 128; *Marysville Invest. Co. v. Munson*, 44 Kan. 491; *Greiner v. Fulton*, 46 Kan. 405; *Mankato v. Meagher*, 17 Minn. 265.

4. *Marysville Invest. Co. v. Holle*, 58 Kan. 773, reversing 5 Kan. App. 408. See also *Clark v. Titus*, (Ariz. 1886) 11 Pac. Rep. 312; *Pascoe v. Green*, 18 Colo. 326; *Lechler v. Chapin*, 12 Nev. 71.

Illegal Contract. — An agreement to secure large tracts of land in a manner unauthorized by statute, being a contract in contravention of the design and policy of the law, will not be enforced in equity. The parties being *in pari delicto*, the court will leave them where it finds them. *Kreamer v. Earl*, 91 Cal. 112.

5. **Occupancy Defined.** — *Sawyer v. Van Hook*,

1 Alaska 108; *Price v. Brockway*, 1 Alaska 233; *Singer Mfg. Co. v. Tillman*, (Ariz. 1889) 21 Pac. Rep. 818; *Martin v. Hoff*, (Ariz. 1901) 64 Pac. Rep. 445; *Mankato v. Meagher*, 17 Minn. 265; *Schnepel v. Mellen*, 3 Mont. 118; *Eureka Min., etc., Co. v. Way*, 11 Nev. 171; *Lechler v. Chapin*, 12 Nev. 72; *Jackson v. Thornton*, 8 Okla. 331. And see *OCCUPANCY*, etc., vol. 21, p. 765.

"Occupied" also means taken and held in possession, and one who uses a lot and occupies it in good faith with buildings or other improvements of property which show his intention to possess and claim it under the town-site law, although he may not reside upon it, can acquire title thereto. *Sawyer v. Van Hook*, 1 Alaska 108. See also *Hussey v. Smith*, 99 U. S. 20; *Stringfellow v. Cain*, 99 U. S. 610.

Settlement in Person or Cultivation of Soil Unnecessary. — *Greiner v. Fulton*, 46 Kan. 405; *Leech v. Rauch*, 3 Minn. 448.

Mere Selection by surveying and platting the ground into blocks, lots, streets, etc., is not a sufficient occupancy. *Carson v. Smith*, 12 Minn. 546. See also *Weisberger v. Tenny*, 8 Minn. 450.

6. **Interest Acquired by Occupancy.** — *Davis v. Murphy*, 3 Minn. 119.

character upon demise, and there is nothing that invests it with a different character upon transmission to the heir.¹

Right of Possession. — The law gives a settler upon and occupier of lots on a government town site the right to hold possession of his occupancy against the forcible intrusion of all other persons, and although he may, by reason of his disqualification as an entryman, never be able to acquire any right to the lots beyond that which his mere naked possession gives him, this is sufficient to protect him from forcible intrusion from any and all other persons, and to give him a right of action for damages against any person who may exclude him therefrom without title or right paramount to that which the naked and peaceable possession gives to the occupant.²

Alienable Interest. — An occupant of a town-site lot has an interest which he may sell, convey, or encumber.³

Descendible Interest. — The inchoate right of a *bona fide* occupant to a town-site lot is a descendible interest.⁴ This right will be lost if the persons to whom it has descended do not keep control of the land until a proper entry is made.⁵

(b) **When Rights Vest.** — The moment the land is entered, the trust vests an absolute right in the beneficiaries. The rights of the parties occupying the land, under the law, relate back to the time of the entry of the land, and are to be determined as of that date.⁶ No delay on the part of the government in allowing an entry can affect the rights of those who were *bona fide* occupants at the time of the filing of the application and proof, or of those claiming through such occupants, provided that the entry is ultimately made on the proof submitted with the application; for if the entry were allowed on other proofs submitted at a subsequent day, question might be made whether the conditions imposed upon the act had actually been performed on the prior day. Nor can the rights of the *cestuis que trustent* be jeopardized by any delay on the part of the government to recognize them by proper evidence of title. The issuing of the final certificate and patent is not made a prerequisite to the establishment of the equitable rights of the occupants. Such certificate and patent do not confer the rights, although convenient, and probably necessary, to enforce them. They constitute the effect, but not the cause, and therefore a person who claims to have become an occupant of land on a town site after the date of filing the application, but before the issuance of the certificate and patent, is not a beneficiary under the act, unless his right of occupancy was acquired through one who was a rightful occupant on the date of filing the application.⁷

(c) **When Legal Title Vests.** — When a trustee in whom is vested, under the law of Congress and by patent from the United States, the land comprising a town site, to be held in trust for the use and benefit of the occupants thereof, has executed a deed of a parcel of such land to one claiming to be a bene-

1. *Gillett v. Gaffney*, 3 Colo. 351.

2. **Right to Resist Intrusion.** — *Oklahoma City v. Hill*, 6 Okla. 114.

3. **Right to Sell.** — *Hussey v. Smith*, 99 U. S. 20, reversing 1 Utah 129; *Stringfellow v. Cain*, 99 U. S. 610, reversing 1 Utah 361; *Cannon v. Pratt*, 99 U. S. 619, affirming 1 Utah 347; *Hagar v. Wikoff*, 2 Okla. 580; *Guthrie v. Beamer*, 3 Okla. 662; *Clawson v. Wallace*, 16 Utah 300.

Conveyance of Interest May Be Recorded. — *Davis v. Murphy*, 3 Minn. 119; *Carson v. Smith*, 5 Minn. 78, 77 Am. Dec. 539.

4. **Right Descendible.** — *Stringfellow v. Cain*, 99 U. S. 610; *Eversdon v. Mayhew*, 65 Cal. 163, 85 Cal. 1; *Gillett v. Gaffney*, 3 Colo. 351; *West v. Child*, 8 Utah 223; *West v. Utah Nat. Bank*,

8 Utah 374. See also *Coy v. Coy*, 15 Minn. 119.

Descendible as Realty under Colorado Statute. — *Gillett v. Gaffney*, 3 Colo. 351; *Filmore v. Reithman*, 6 Colo. 125.

5. **Lost by Abandonment.** — *Stringfellow v. Cain*, 99 U. S. 610; *West v. Childs*, 8 Utah 223; *West v. Utah Nat. Bank*, 8 Utah 374.

6. **Rights at Date of Entry.** — *Cook v. Rice*, 2 Colo. 131; *Clayton v. Spencer*, 2 Colo. 378; *Adams v. Binkley*, 4 Colo. 247; *Pascoe v. Green*, 18 Colo. 326; *Pueblo v. Budd*, 19 Colo. 587; *Winfield Town Co. v. Maris*, 11 Kan. 128; *Rathbone v. Sterling*, 25 Kan. 444; *Leech v. Rauch*, 3 Minn. 448; *Castner v. Gunther*, 6 Minn. 119; *Castner v. Echard*, 6 Minn. 149.

7. *Lockwitz v. Larson*, 16 Utah 275.

fiary of the trust, the legal title of such parcel passes out of the trustee and vests in the grantee.¹

(6) *Streets and Public Squares* — (a) *Dedication by Congress*. — Before an entry has been made under some law of the United States, or the rights of settlers or occupants have attached, Congress may dedicate any part of the public land for use as streets, alleys, or public squares.² Occupants of town-site lots are entitled to have their rights and easements in streets, alleys, and public squares, as well as in the lots occupied by them, protected. Grants of lots by Congress to the occupants according to their respective interests necessarily recognize the existence of the streets, alleys, and public squares as then laid out and used, and such grants are a dedication of the same to the public use. The rights of occupants accrue before the entry of the town site by the trustee, and the mere fact that his plat and survey fail to designate the street, alley, or square as it existed before his entry and survey does not thereby destroy such street, alley, or square and change the ground occupied by the same into a lot that can be sold.³ The streets, alleys, and squares contemplated by the United States Town-site Act, and as to which, on the entry of the lands, the interest of the public attaches, are those which exist as a fact at the time of the entry, either by actual use or by consent and acquiescence of the occupants affected.⁴

(b) *Dedication by Trustee*. — A town-site trustee is not, however, authorized to designate any of the town site in possession of an actual occupant as a street, alley, or public square. Any act of such trustee attempting to deprive occupants of their interest in lands occupied by them is void and gives to the public no title to the premises as against the will of the true occupants.⁵

(c) *Dedication by Occupant or Owner*. — A person who has no title may estop himself by a common-law dedication; and so a claimant under the town-site law may, before his right to a deed is established, make a valid dedication of a part of the land occupied by him for a street or other public purpose.⁶ When a proprietor of land has platted it into a town site, but not so as to effect a legal dedication, and sold land to individuals in accordance with the plat, as between individuals so purchasing and the proprietor they are entitled to have the streets necessary or convenient for their use and enjoyment of the property purchased by them kept open for their own and the public's use. But such proprietor is not estopped from reclaiming or shutting up any street or portion thereof delineated on his plat where private rights are not directly affected; and as against the municipality claiming the streets, where the public has not acquired rights by user or acceptance of the offer to dedicate indicated by the platting, the owner is not estopped. He may revoke or recall his offer to dedicate before actual acceptance at any time, when the

1. *Effect of Trustee's Deed*. — *Murray v. Hobson*, 10 Colo. 66. See also *Mills v. Hobson*, 10 Colo. 78.

When Subject to Taxation. — A town-site lot is not subject to taxation until it has been conveyed to the occupant by the town-site trustee. *Topeka Commercial Security Co. v. McPherson*, 7 Okla. 332.

2. *Right of Congress to Dedicate for Public Use*. — *Guthrie v. Beamer*, 3 Okla. 652.

3. *Public Rights to Streets and Squares*. — *Parchen v. Ashby*, 5 Mont. 68. See also *Ashby v. Hall*, 119 U. S. 526, *affirming* 2 Mont. 489; *Dooly Block v. Salt Lake Rapid Transit Co.*, 9 Utah 31.

California Statute as to Streets. — *Amador County v. Gilbert*, 133 Cal. 51.

4. *Bingham v. Walla Walla*, 1 Wash. Ter. 68. See also *Mills v. Hobson*, 10 Colo. 78.

5. *Trustee Without Power to Dedicate* — *California*. — *Aleman v. Petaluma*, 38 Cal. 553.

Colorado. — *Aspen v. Rucker*, 10 Colo. 184; *Pueblo v. Budd*, 19 Colo. 579; *Laughlin v. Denver*, 24 Colo. 255.

Kansas. — *Winfield Town Co. v. Maris*, 11 Kan. 128.

Minnesota. — *Buffalo v. Harling*, 50 Minn. 551.

Montana. — *Edwards v. Tracy*, 2 Mont. 49; *Hall v. Ashby*, 2 Mont. 489, *affirmed* 119 U. S. 526; *Parchen v. Ashby*, 5 Mont. 68; *Helena v. Albertose*, 8 Mont. 499.

Oklahoma. — *Guthrie v. Beamer*, 3 Okla. 652. *Washington*. — *Bingham v. Walla Walla*, 3 Wash. Ter. 68.

6. *Dedication by Occupant*. — *Mankato v. Willard*, 13 Minn. 13, 97 Am. Dec. 208; *Mankato v. Meagher*, 17 Minn. 265; *Mankato v. Warren*, 20 Minn. 144.

plat has not been executed in accordance with the statute and placed on record.¹

(d) *Title to Streets*. — A deed to a lot made by a trustee under the town-site law passes to the grantee the title both to such lot and to the adjoining street up to its centre, subject to the public easement in the latter.²

(7) *Mineral Lands*. — The exemption of mineral lands from the operation of town-site patents is fully discussed in a previous article.³

(8) *Abandonment*. — A town-site occupant may lose by abandonment whatever right he has acquired by prior occupancy and possession, and such abandonment may be inferred from his acts and declarations and from the declarations of such occupant's grantee.⁴ A town-site occupant must comply with the law in regard to improvements, occupancy, etc., and make application for a deed in accordance with the law, and pay the price for such land, before he is entitled to a deed; and until he performs these acts and pays such price he may lose the land claimed by abandonment.⁵ The question as to whether a lot has been abandoned by the claimant is a question of fact, and the findings of the proper officers of the land department are, in the absence of fraud, imposition, or mistake, final on that question.⁶

(9) *Evidence*. — Plats of town sites are admissible in evidence.⁷ Oral testimony is admissible to identify the land included in a town-site lot.⁸

(10) *State Acts Giving Effect to Act of Congress*. — In order to give effect to that part of the federal statute which provides that the execution of the trust as to the disposal of the lots in such town sites and the proceeds of the sale thereof shall be conducted under such regulations as may be prescribed by the legislative authority of the state or territory in which such lots may be situated, appropriate legislation has been enacted in several states and territories.⁹ The act of Congress is, however, the paramount law, and the legislature of a state, in prescribing the rules and regulations for the execution of the trust arising under this act of Congress, cannot limit or extend the rights of claimants or dispose of the trust in any other manner than is prescribed

1. *Revocation of Dedication*. — *Diamond Match Co. v. Ontonagon*, 72 Mich. 249.

2. *Title in Abutting Owners*. — *Mankato v. Willard*, 13 Minn. 13, 97 Am. Dec. 208; *Harrington v. St. Paul, etc., R. Co.*, 17 Minn. 215; *Mankato v. Meagher*, 17 Minn. 265.

3. See the title MINES AND MINING CLAIMS, vol. 20, p. 691. And see the following cases: *Barden v. Northern Pac. R. Co.*, 154 U. S. 322; *Carter v. Thompson*, 65 Fed. Rep. 329; *Smith v. Hill*, 89 Cal. 122; *McCormick v. Sutton*, 97 Cal. 373; *Poire v. Wells*, 6 Colo. 406; *Moyle v. Bullene*, 7 Colo. App. 308; *Hartman v. Smith*, 7 Mont. 19.

Land Known to Be Valuable for Minerals at Time of Its Sale Exempted. — *Deffebach v. Hawke*, 115 U. S. 392, *affirming* 4 Dak. 20.

4. *Loss of Town Lot by Abandonment*. — *Boise City v. Flanagan*, (Idaho 1898) 53 Pac. Rep. 453; *Weisberger v. Tenny*, 8 Minn. 456; *Brown v. Parker*, 2 Okla. 264.

5. *Thompson v. Holbrook*, 1 Idaho 609; *Young v. Tiner*, (Idaho 1894) 38 Pac. Rep. 697.

6. *Abandonment Question of Fact*. — *Cook v. McCord*, 9 Okla. 200.

7. *Admissibility of Plats*. — *Wilder v. St. Paul*, 12 Minn. 192; *Mankato v. Meagher*, 17 Minn. 265.

8. *Identification by Oral Evidence*. — *Murray v. Hobson*, 10 Colo. 66; *Hanlon v. Hobson*, 24 Colo. 284.

9. *State Acts in Pursuance of Act of Congress — United States*. — *Hussey v. Smith*, 99 U. S. 20, *reversing* 1 Utah 129; *Hussey v. Merritt*, 99 U. S. 25, note (construing *Utah* statute).

California. — *Ricks v. Reed*, 19 Cal. 551; *Ryan v. Tomlinson*, 31 Cal. 11; *Cerf v. Pflieger*, 94 Cal. 131; *Amador County v. Gilbert*, 133 Cal. 51.

Colorado. — *Cofield v. McClellan*, 1 Colo. 370, *affirmed* 16 Wall. (U. S.) 331; *Tucker v. McCoy*, 8 Colo. 368; *Aspen v. Rucker*, 10 Colo. 184.

Iowa. — *Graves v. Steel*, 4 Greene (Iowa) 377.

Kansas. — *Winfield Town Co. v. Maris*, 11 Kan. 128; *Independence Town Co. v. De Long*, 11 Kan. 152; *Allen v. Houston*, 21 Kan. 194.

Minnesota. — *Remillard v. Blackarr*, 49 Minn. 490.

Montana. — *Schnepel v. Mellen*, 3 Mont. 118; *Helena v. Albertose*, 8 Mont. 499; *Ming v. Foote*, 9 Mont. 201; *State v. Webster*, (Mont. 1903) 72 Pac. Rep. 295.

Nebraska. — *Tierney v. Cornell*, 3 Neb. 267.

Nevada. — *Lechler v. Chapin*, 12 Nev. 65.

South Dakota. — *Goldberg v. Kidd*, 5 S. Dak. 169.

Utah. — *Linck v. Salt Lake City*, 6 Utah 109.

Washington. — *Newhouse v. Simino*, 3 Wash. 648; *Kellogg v. Sessions*, 4 Wash. 814.

by the act of Congress; if there is any provision to that effect in a state statute it is clearly inoperative and void.¹

Filing Claim. — Such state statutes generally require the occupant to file a statement of his claim within a prescribed time.²

b. SPECIAL LEGISLATION — (1) *For Particular Municipalities.* — In addition to this general legislation, Congress has, from time to time, enacted special laws on the subject for particular municipalities.³

(2) *For Oklahoma and Alaska.* — Congress has provided, by special legislation, for the entry of town sites in Oklahoma⁴ and Alaska.⁵

2. Acts of State Legislatures. — In some instances state legislatures have passed acts as to the disposition of lands in certain municipalities, such lands not being public lands of the general government.⁶

X. BOUNTY AND DONATION LANDS — 1. **Technical Terms Unnecessary.** — The validity of a legislative act granting bounty lands does not depend on its containing the technical terms used in a conveyance. All that is necessary is the presence of words that show the intent of the legislature.⁷

2. Construction of Grants. — Legislative acts should never be so construed as to subvert the rights of property, unless the intention so to do shall be expressed in such terms as to admit of no doubt and to show a clear design to effect the object; hence a general permission to enter land within a given

1. **Limitation on State Legislation.** — *Lechler v. Chapin*, 12 Nev. 71. See also *Aspen v. Rucker*, 10 Colo. 184; *Winfield Town Co. v. Maris*, 11 Kan. 128.

2. **Statement of Claim Required.** — *Cofield v. McClelland*, 16 Wall. (U. S.) 331, *affirming* 1 Colo. 370; *Denver v. Pearce*, 13 Colo. 383; *Pueblo v. Budd*, 19 Colo. 591; *Schnepel v. Mellen*, 3 Mont. 118; *Rogers v. Thompson*, 9 Utah 46; *Drake v. Reggel*, 10 Utah 376; *Matter of Amy*, 12 Utah 278; *Clark v. Kirby*, 18 Utah 258.

Form and Contents of Statement of Claim. — *Greathouse v. Heed*, 1 Idaho 482.

Minors Not Barred by Failure to File Within Prescribed Time. — *Coy v. Coy*, 15 Minn. 119.

3. **Local Town-site Acts** — *United States.* — *Forsyth v. Reynolds*, 15 How. (U. S.) 358; *Morehouse v. Phelps*, 21 How. (U. S.) 294, *reversing* 18 Ill. 473; *Hall v. Papin*, 24 How. (U. S.) 132; *Les Bois v. Bramell*, 4 How. (U. S.) 449; *Carondelet v. St. Louis*, 1 Black (U. S.) 179; *Morrow v. Whitney*, 95 U. S. 551, *reversing* 36 Wis. 438; *Burlington Gas Light Co. v. Burlington, etc., R. Co.*, 165 U. S. 370, *affirming* 91 Iowa 470; *Forsythe v. Ballance*, 6 McLean (U. S.) 562, 9 Fed. Cas. No. 4,951.

Alabama. — *Tuscumbia v. Lindsay*, 46 Ala. 581.

California. — *Fischer v. Benicia*, 36 Cal. 562; *Aleman v. Peteluma*, 38 Cal. 553; *Black v. Galindo*, 40 Cal. 171; *Le Roy v. Cunningham*, 44 Cal. 599; *Dupond v. Barstow*, 45 Cal. 446; *McCreery v. Sawyer*, 52 Cal. 257; *McCreery v. Duane*, 52 Cal. 293.

Colorado. — *Denver v. Kent*, 1 Colo. 336; *Cook v. Rice*, 2 Colo. 131; *Schwenke v. Union Depot, etc., Co.*, 7 Colo. 512. See also *Denver v. Mullen*, 7 Colo. 345.

Illinois. — *Balance v. McFadden*, 12 Ill. 317; *Gray v. McFadden*, 12 Ill. 325; *Ballance v. Tesson*, 12 Ill. 326; *Rankin v. Curtenius*, 12 Ill. 334.

Iowa. — *Leffler v. Burlington*, 18 Iowa 361; *Cook v. Burlington*, 30 Iowa 94, 6 Am. Rep. 649.

Michigan. — *Scott v. Detroit Young Men's Soc.*, 1 Dougl. (Mich.) 119; *People v. Jones*, 6 Mich. 176; *Farmers', etc., Bank v. Detroit*, 12 Mich. 445; *Ready v. Kearsley*, 14 Mich. 215.

4. **Oklahoma Town-site Law.** — 26 U. S. Stat. at L. 91, 109; 28 U. S. Stat. at L. 11; 29 U. S. Stat. at L. 116; *Bockfinger v. Foster*, 190 U. S. 116, *affirming* 10 Okla. 488; *Fitzgerald v. Foster*, 11 Okla. 558.

Kansas Town-site Regulations in Force in Oklahoma. — *Brown v. Parker*, 2 Okla. 258; *Chisolm v. Weisse*, 2 Okla. 611.

Deposit for Expenses of Contest Required. — *Twine v. Carey*, 2 Okla. 249.

Poverty No Excuse for Not Making Deposit. — *Twine v. Carey*, 2 Okla. 249; *Baldwin v. Mason*, 3 Okla. 237; *Shultz v. Jones*, 3 Okla. 504; *Matthews v. Young*, 3 Okla. 649.

Right to Appeal to Officers of Land Department. — *McDaid v. Oklahoma*, 150 U. S. 209; *Bockfinger v. Foster*, 190 U. S. 116, *affirming* 10 Okla. 488; *Herbien v. Warren*, 2 Okla. 4; *Oklahoma City v. Hill*, 6 Okla. 114; *Hammer v. Hermann*, 11 Okla. 127.

Abolition of Town-site Trustees. — Act of Congress, July 7, 1898; *Hammer v. Hermann*, 11 Okla. 127.

5. **Alaska Town-site Law.** — 26 U. S. Stat. at L. 1099.

6. **State Legislation.** — *Dunlap v. Stetson*, 4 Mason (U. S.) 349, 8 Fed. Cas. No. 4,164 (*Massachusetts* statute); *Patton v. Easton*, 1 Wheat. (U. S.) 477 (*Tennessee* statute); *Bingaman v. Phillips*, 1 How. (Miss.) 285; *Tigh v. Chouquette*, 21 Mo. 233; *Farr v. Swan*, 2 Pa. St. 245; *Moultrieville v. Patterson*, 7 Rich. Eq. (S. Car.) 344; *McConnell v. Madisonville*, 2 Humph. (Tenn.) 53; *Taylor v. Hoya*, 9 Tex. Civ. App. 312. See also *Dean v. State*, 34 Tex. Crim. 474.

Colonial Patents. — *Denton v. Jackson*, 2 Johns. Ch. (N. Y.) 320; *Lawrence v. Hempstead*, 155 N. Y. 207.

7. **Technical Terms Unnecessary.** — *Rutherford v. Greene*, 2 Wheat. (U. S.) 196.

part of the country must of necessity be limited to land not previously appropriated.¹

3. Oregon Donation Act — *a.* IN GENERAL. — The Oregon Donation Act of Congress of September 27, 1850, granted to every white settler upon land within the specified domain one half section if a single man, and a whole section if married. It was the evident policy of the law, by such provision, to give the husband and wife each an equal quantity of land, imposing upon the husband as head of the family the burden of performing the services of residence and cultivation upon which the grant was conditioned.² The act applied to those lands lying east of the Cascade mountains as well as to those lying west thereof.³

b. GRANT NOT ONE IN PRÆSENTI. — For many years after the passage of the Donation Act, it was held by the courts of Oregon and by the inferior federal courts, that the act was a grant *in præsent*i and vested in the settler an estate in fee from the filing of his notification, subject to be defeated by his noncompliance with the requirements of the act.⁴ But this view was not accepted by the Supreme Court of the United States. It was there held that the grant did not take effect so as to pass anything more than a possessory right in the lands occupied, until the completion of the four years' residence and cultivation and full compliance with all the other conditions of the act. Such construction has been since adopted in Oregon.⁵

c. INTEREST BEFORE PATENT NOT LIABLE FOR DEBTS. — It follows that, having only a possessory right and not a complete title, a settler before grant of the patent has no interest in the land which may be liable for his debts or subject to sale by his administrator.⁶

d. CONSIDERATION FOR GRANT. — It has been held that the Donation Act was only an advance on the same line of national policy manifested in the Pre-emption Acts, and that the patent which it promised was not a naked gift but a grant upon a present consideration received and accepted by the grantor. But whereas the consideration in the case of the Pre-emption Acts was money, residence, and cultivation, the consideration in the case of the Donation Act was residence and cultivation only; such services being as capable of supporting the grant as money or services and money.⁷

e. CONDITIONS PRECEDENT. — The act required for the completion of the settler's right to a patent not only that he should reside upon the land and cultivate it for four years, but that he should notify the surveyor-general of the precise land claimed. Without the residence and cultivation required, the notice would be of no efficacy. By the original act such notice might have been given after residence and cultivation, provided public surveys had not been extended over the land. By the Amendatory Act of 1853 it was required that notice should be given in advance of the public surveys.⁸

f. MEANING OF "RESIDENCE." — The requirement as to residence and cultivation is not complied with by building a log cabin, occupying it as

1. Construction of Grant. — Rutherford v. Greene, 2 Wheat. (U. S.) 196.

2. Oregon Donation Act. — Fields v. Squires, Deady (U. S.) 366.

3. Lands East of Cascade Range. — Caldwell v. Robinson, 59 Fed. Rep. 653.

4. Grant Once Held to Be in Præsent. — Adams v. Burke, 3 Sawy. (U. S.) 415, 1 Fed. Cas. No. 49; Hall v. Russell, 3 Sawy. (U. S.) 506, 11 Fed. Cas. No. 5,943; Alexander v. Knox, 6 Sawy. (U. S.) 54, 1 Fed. Cas. No. 170; Chapman v. School Dist. No. 1, Deady (U. S.) 108, 5 Fed. Cas. No. 2,607; Lee v. Summers, 2 Oregon 260; Delay v. Chapman, 3 Oregon 459;

Dolph v. Barney, 5 Oregon 191; Love v. Love, 8 Oregon 23.

5. Grant Confers Only a Possessory Right. — Hall v. Russell, 101 U. S. 503; Caldwell v. Robinson, 59 Fed. Rep. 659; Farris v. Hayes, 9 Oregon 81; Quinn v. Ladd, 37 Oregon 261.

6. Interest Before Patent Not Liable for Debts. — Cutting v. Cutting, 6 Sawy. (U. S.) 396.

7. Consideration for the Grant. — Johnson's Case, 2 Ct. Cl. 391, following U. S. v. Fitzgerald, 15 Pet. (U. S.) 407.

8. Conditions Precedent. — Fitzpatrick v. Du-bois, 2 Sawy. (U. S.) 434; Brazee v. Schofield,

a dwelling, and cultivating a garden spot not exceeding in area ten feet square.¹ Nor is the requirement of a survey complied with merely by setting a stake for an initial point, which stake was never recognized by the surveyor-general for any purpose.²

No One Can, by Proxy, Make and Continue Such a Residence upon the public lands as the Donation Act contemplates; and whether he resides upon the claim or not, is a question of fact to be decided from the declarations, acts, and circumstances of the person concerned, made and existing prior to and at the time of the controversy about his residence.³

g. PERFORMANCE OF CONDITIONS VESTS TITLE. — Where a settler complied fully with the conditions of the Donation Act, his right became vested and passed beyond the control of Congress.⁴

h. AFFIDAVIT REQUIRED AS TO USE. — The Donation Act requires that all persons claiming under any of the provisions of this act, by virtue of settlement and cultivation, shall first make affidavit that the land claimed by them is for their own use and cultivation, and that they are not acting directly or indirectly as agents for others, and that they have made no sale or alienation of the same.⁵

i. DETERMINATION OF BOUNDARY LINES. — A donation claimant under the act was entitled to have the exterior boundary lines of his patent run to suit himself, without reference to section lines, and when the exterior boundaries of such claim had been so run and approved by the proper authority, the fact that a reference to certain sections was made in the patent could not control courses and distances thus established for the purpose of furnishing a proper description to be set forth in the patent.⁶

j. SUFFICIENCY OF DESCRIPTION. — The word "claim" in surveys under the Donation Act is used to designate a tract of land claimed by a settler under such act, and a description of the premises which gives the number of the claim in the township and range is as certain as a description by reference to a certain section in said township and range.⁷

k. RESIDENCE ON EITHER OF TWO SECTIONS. — If a settler resides in a house on a section of land divided by a quarter-section line, he is held to reside on either, and consequently is entitled to enter the quarter upon which he has made the necessary cultivation.⁸

l. WHERE HUSBAND WAS DIVORCED. — Where a married man before the four years' residence and occupation were completed was divorced from his wife, he was not entitled to claim the three hundred and twenty acres to which she would have been entitled if not divorced; and the second wife of such husband might not claim any rights through the wife whom she had supplanted.⁹

m. RESERVATION FOR MILITARY PURPOSES. — The act gave to the

124 U. S. 495, *distinguishing* Hall v. Russell, 101 U. S. 503.

1. **Meaning of Residence.** — Henry v. Lilliwaup Falls Land Co., 83 Fed. Rep. 747.

2. Henry v. Lilliwaup Falls Land Co., 83 Fed. Rep. 747.

3. **No Residence by Proxy.** — Lee v. Simonds, 1 Oregon 158.

4. **Performance of Conditions Vests Title.** — Stark v. Starrs, 6 Wall. (U. S.) 413; Traver v. Tribou, 8 Sawy. (U. S.) 511; Barney v. Dolph, 97 U. S. 656; Caldwell v. Robinson, 59 Fed. Rep. 653.

5. **Affidavit Required as to Use.** — Shockley v. Brown, 1 Wash. Ter. 463.

6. **Determination of Boundary Lines.** — State v. Tide Land Appraisers, 5 Wash. 425.

May Include Town Sites. — The federal Act of May 23, 1844, was never in force in Oregon; hence lands upon which there had been the required settlement and cultivation under the provisional government, although held as town-sites when the Donation Act was passed, may be held as donations under that act. Bear v. Luse, 6 Sawy. (U. S.) 148; Stark v. Starrs, 6 Wall. (U. S.) 402; Lowndsdale v. Portland, Deady (U. S.) 14; Marlin v. T'Vault, 1 Oregon 77. See *supra*, this title, *Town Sites*.

7. **Sufficiency of Description.** — Alexander v. Knox, 6 Sawy. (U. S.) 54.

8. **Residence on Either of Two Sections.** — Silver v. Ladd, 7 Wall. (U. S.) 219.

9. McSorley v. Hill, 2 Wash. 638, *following* Maynard v. Hill, 125 U. S. 216.

President the right to reserve a portion of the domain for military forts, etc., subject to the prior rights of settlers.¹

n. DAMAGES FOR OCCUPATION. — And where the government took possession, for temporary purposes, of land occupied by a settler, it has been held that the measure of damages was limited to the value of the rental of the land occupied.²

o. ABANDONMENT OF LOCATION. — A settler upon public lands might, under the act, change his location of settlement as often as he chose before he filed his notification of selection in the land office. In such case his first location was abandoned and the land was open to any other settler who might choose to take it up.³

p. EVIDENCE. — A donation certificate issued from the office of the register and receiver is properly admissible to show possession of the premises in dispute.⁴

q. RIGHTS OF WOMEN UNDER ACT — (1) *Married Women.* — A married woman took under this act on account of her wifeship and not as a settler; hence the wife of one who had died before the act was passed could take nothing, since the act was a grant only to settlers on the public land "now residing in said territory."⁵

(2) *Nature of Wife's Interest.* — The wife's share of land under the Donation Act was not a separate estate in her; but under the law of Oregon then existing, as soon as she became seized, by reason of her marriage, her estate in the premises for their joint lives was cast upon the husband, and the territorial legislature had no right to declare her interest to be separate estate.⁶

(3) *Where Husband Failed to Make Proof.* — Since the acts necessary to prove up a claim must be performed by the husband, his failure to make such proof deprived his wife and her heirs of any right under the grant.⁷

(4) *Where Husband Died Before Proof.* — If upon the death of a settler the wife became entitled to take one-half of the land upon which he died, pending the performance of the condition of residence and cultivation, she might then abandon that right, and by becoming the wife of another be qualified to take her share in the donation of the latter husband; in such case she would receive a patent for only one donation.⁸

(5) *Where Wife Was Divorced.* — Where, during residence but before the necessary notice was given, the wife was divorced from her husband, she acquired no rights to which she could lay claim in the settlement of her husband, thereafter completed.⁹

(6) *Widow Entitled to Dower.* — By legislation of the state of Oregon a

1. *Reservation for Military Purposes.* — U. S. v. Tichenor, 8 Sawy. (U. S.) 142; Kelly v. Dalles, 19 Oregon 299.

2. *Damages for Occupation.* — Johnson's Case, 2 Ct. Cl. 391.

3. *Abandonment of Location.* — Lamb v. Starr, Deady (U. S.) 350; U. S. v. Tichenor, 8 Sawy. (U. S.) 142; Fields v. Squires, Deady (U. S.) 366; Vance v. Burbank, 101 U. S. 514; Hall v. Russell, 101 U. S. 509.

4. *Evidence.* — Keith v. Cheeny, 1 Oregon 285.

Presumption of Abandonment. — Oregon, etc., R. Co. v. U. S., 190 U. S. 186. See *infra*, this title, *Grants in Aid of Railroads — Rights as Against Settlers.*

5. *Rights of Women under the Act.* — Lamb v. Starr, Deady (U. S.) 350; Vandolf v. Otis, 1 Oregon 156; Ford v. Kennedy, 1 Oregon 166; White v. Allen, 3 Oregon 103; Murray v. Murray, 6 Oregon 26.

An Indian Woman Married to a Settler is a wife

within the meaning of the Donation Act, and entitled to one-half of her husband's claim. Vandolf v. Otis, 1 Oregon 153.

6. *Nature of Wife's Interest.* — Wythe v. Smith, 4 Sawy. (U. S.) 17; Linnville v. Smith, 6 Oregon 202.

The wife's right to one-half of the claim proved by her husband is independent of the number of acres therein. She had a clear right to half of whatever quantity of land he took. Jette v. Picard, 4 Oregon 296.

7. *Where Husband Failed to Make Proof.* — Vance v. Burbank, 101 U. S. 514.

8. *Where Husband Died Before Proof.* — Lamb v. Starr, Deady (U. S.) 350.

And Where the Husband Died Without Giving Notice, the required notice might have been given by the widow. Brazee v. Schofield, 124 U. S. 495, *distinguishing* Hall v. Russell, 101 U. S. 503.

9. *Where Wife Was Divorced.* — Fitzpatrick v. Dubois, 2 Sawy. (U. S.) 434.

donee under the donation law is deemed to have the legal estate in fee in such property, out of which his widow is entitled to dower.¹

(7) *Rights of Unmarried Women.* — The act does not require a settler to be the head of the family, and a grant to every white settler or occupant of the public land has been held to include unmarried women.²

7. *RIGHTS OF CHILDREN AND HEIRS.* — It was provided by the act that the possessory rights of a deceased settler should go to his heirs and that they might get the land on making requisite proof, without further residence and cultivation of their own. When such ancestor died before such proof he had nothing in the land which he could transmit to such heirs, and the interest that they took upon his death came, not from such deceased ancestor but from the United States.³

Where the Wife Died Before the Completion of the Residence and cultivation required by the act, her share of the donation being her separate property descended by common law, upon her death, to her heirs, unaffected by any claim of the husband on account of the marriage.⁴

8. *DEVOLUTION BY LOCAL LAW.* — Where a married donee, after compliance with the act and before the issue of a patent, died, the share of the deceased in the donation descended to his or her heirs under the local law of descent, and was not affected by the provision of said act giving the share of a married donee, dying under like circumstances, to the survivor and children or the heirs of the deceased in equal parts.⁵

9. *PROVISO AGAINST SALE BEFORE PATENT.* — The Donation Act contained a proviso declaring void "all future contracts for the sale of land" to which any person "may be entitled under this act, before he or they shall receive a patent therefor." This proviso was repealed by the Act of 1855, with the following qualification: "Provided that no sale shall be deemed valid unless the vendor shall have resided for four years upon the land." It has been held that this repeal of the prohibition to sell was equivalent to an express grant or power to sell after the right to a patent had been fully secured; and that the power to sell by necessary implication repealed the provision giving the interest of the settler in the donation, in cases of death before patent, to his devisee, or wife and children, or heirs.⁶

4. *Virginia Military District.* — In 1784 Virginia ceded to the United States an extensive territory northwest of the Ohio river, reserving the right to supply deficiencies in grants to officers and soldiers for military services in the war of the Revolution.⁷

Act of March 23, 1804. — In order to ascertain the boundaries of the Virginia

1. *Widow Entitled to Dower.* — McKay v. Freeman, 6 Oregon 449; Love v. Love, 8 Oregon 23. See generally the title DOWER, vol. 10, p. 122.

2. *Rights of Unmarried Women.* — Silver v. Ladd, 7 Wall. (U. S.) 219.

3. *Rights of Children and Heirs.* — Fields v. Squires, Deady (U. S.) 366, 9 Fed. Cas. No. 4,776; Lamb v. Starr, Deady (U. S.) 447, 14 Fed. Cas. No. 8,022, affirmed on other grounds 13 Wall. (U. S.) 418; Lamb v. Wakefield, 1 Sawy. (U. S.) 251, 14 Fed. Cas. No. 8,024; Mizner v. Vaughn, 2 Sawy. (U. S.) 269, 17 Fed. Cas. No. 9,678; Cutting v. Cutting, 6 Sawy. (U. S.) 396; Hall v. Russell, 101 U. S. 503; Hershberger v. Blewett, 55 Fed. Rep. 170; Delay v. Chapman, 3 Oregon 459; Cowenia v. Hannah, 3 Oregon 465; Newton v. Spencer, 3 Oregon 548.

A Grant to Children of a Named Woman includes all her children, those by a former husband as well as those by her husband at the time the grant was made. The act does not

prescribe who shall be considered the heirs of a deceased settler any more than it prescribes who shall be considered the wife of a settler; both of these are left to the determination of the local law. Lamb v. Starr, Deady (U. S.) 350.

"Children" Includes Grandchildren. — Cutting v. Cutting, 6 Sawy. (U. S.) 396.

4. *Death of Wife Before Proof Made.* — Wythe v. Smith, 4 Sawy. (U. S.) 21; Alexander v. Knox, 6 Sawy. (U. S.) 54; Fields v. Squires, Deady (U. S.) 377.

5. *Devolution by Local Law.* — Proebstel v. Hogue, 8 Sawy. (U. S.) 592; Chambers v. Chambers, 4 Oregon 153.

6. *Proviso Against Sale Before Patent.* — Barney v. Dolph, 97 U. S. 652.

7. *Virginia Military District.* — Doddridge v. Thompson, 9 Wheat. (U. S.) 469; Reynolds v. M'Arthur, 2 Pet. (U. S.) 417; Lindsey v. Miller, 6 Pet. (U. S.) 666. See also Bonner v. U. S., 9 Wall. (U. S.) 156; Jackson v. Clark, 1 Pet. (U. S.) 629.

military district in Ohio, an Act of Congress of March 23, 1804, required the officers and soldiers entitled to bounty lands therein to complete their location within three years and to make a return of their surveys to the secretary of the department of war within five years after the passage of the act, otherwise all rights previously acquired would be extinguished.¹ This period was subsequently extended from time to time by federal statutes coming down as late as 1880.²

Act of March 2, 1807. — In order to quiet the uncertain titles and the almost perpetual litigations to which the uncertainty led, the Act of March 2, 1807, was passed, intended for the protection of defective entries and surveys liable to be defeated by entries made in more quiet times.³ Such act, however, was no protection to a void survey executed without a previous location or entry,⁴ nor was it intended to protect an entry made in the name of a dead man,⁵ nor to protect the title of one who acted merely as attorney in fact for a soldier,⁶ nor one whose warrant was issued by mistake.⁷ An entry was not, however, unlawful because made on land covered by a previous but unsurveyed and void entry; the proviso referring only to lands which "had been previously surveyed."⁸

Act of February 18, 1871. — By Act of February 18, 1871, Congress granted to the state of Ohio all the land remaining unsurveyed and unsold within the military district; such grant was held to be *in presenti*,⁹ and to have confirmed title to any land sold by the Ohio Agricultural and Mechanical College, whether or not such institution had, prior thereto, an unassailable title.¹⁰

5. Five Per Cent. Bounty. — Construing the clause in those statutes by which Congress agreed to give to the states five per cent. of the net proceeds of the public lands lying therein and sold by Congress, it has been held that the states are not entitled to a percentage on the value of lands not sold by the United States for cash but disposed of in satisfaction of military land warrants.¹¹

6. Mississippi Donation. — Under the Act of Congress of March 3, 1803, donating land in the state of Mississippi, where the donation claim has been recognized by a certificate to the heirs and legal representatives of the patentee, and confirmed by a patent, the surviving widow is entitled to dower in such land, and his heirs take by descent and not by purchase.¹²

7. North Carolina Grants. — North Carolina, in 1780 and 1782, passed acts making provision for the officers and soldiers of that state in the Continental line in the war of the Revolution, and it has been held that upon proof of

1. **Act of March 23, 1804.** — 2 Stat. at L. 274, § 2; *Jackson v. Clark*, 1 Pet. (U. S.) 629; *Fussell v. Gregg*, 113 U. S. 550.

2. *Fussell v. Gregg*, 113 U. S. 550; *Coan v. Flagg*, 123 U. S. 117; *Board of Trustees v. Cuppett*, 52 Ohio St. 567.

3. **Act of March 2, 1807.** — *Miller v. Kerr*, 7 Wheat. (U. S.) 1; *Doddridge v. Thompson*, 9 Wheat. (U. S.) 469; *Jackson v. Clark*, 1 Pet. (U. S.) 628; *Reynolds v. McArthur*, 2 Pet. (U. S.) 417; *Lindsey v. Miller*, 6 Pet. (U. S.) 666; *Wallace v. Saunders*, 7 Ohio (pt. i.) 173; *Harlan v. Thatcher*, 18 Ohio 48; *Price v. Johnston*, 1 Ohio St. 390.

4. **Void Survey Not Protected.** — *Latham v. Oppy*, 18 Ohio 104.

5. **Entry in Name of Dead Person.** — *Galt v. Galloway*, 4 Pet. (U. S.) 323; *McDonald v. Smalley*, 6 Pet. (U. S.) 261; *Wallace v. Saunders*, 7 Ohio (pt. i.) 174; *Price v. Johnston*, 1 Ohio St. 390, *distinguishing* *Galloway v. Finley*, 12 Pet. (U. S.) 264, and *McArthur v. Dun*, 7 How. (U. S.) 262.

6. *Wallace v. Saunders*, 7 Ohio (pt. i.) 173.

The administrators of a deceased soldier of the *Pennsylvania* line might draw a tract of donation land and receive a patent therefor which would inure to the benefit of the persons legally entitled. *De France v. Stricker*, 4 Watts (Pa.) 327.

7. **Warrant Issued by Mistake.** — *Miller v. Kerr*, 7 Wheat. (U. S.) 1; *Price v. Johnston*, 1 Ohio St. 390; *Porter v. Robb*, 7 Ohio (pt. i.) 206; *McArthur v. Gallaher*, 8 Ohio 512.

8. *Stubblefield v. Boggs*, 2 Ohio St. 216. See also *Jackson v. Clark*, 1 Pet. (U. S.) 638; *Lindsey v. Miller*, 6 Pet. (U. S.) 675; *McArthur v. Dun*, 7 How. (U. S.) 262.

9. **Act of Feb. 18, 1871.** — *Board of Trustees v. Cuppett*, 52 Ohio St. 567.

See also *infra*, this title, *Grants in Aid of Railroads*.

10. *Coan v. Flagg*, 123 U. S. 117.

11. **The Five Per Cent Bounty.** — *Five Per Cent Cases* 110 U. S. 471.

12. **Mississippi Donation.** — *Hackler v. Cabel*, Walk. (Miss.) 91.

The Title under the Act vests in the grantee

service a title in fee-simple vests in the officer or soldier to the land to which he is entitled, and establishes a lien in his favor to the quantity of land therein stipulated as a reward of his services, not only on the lands included in the military boundary, but on all the lands which the state had the right to grant at the time of the passage of the acts.¹

8. Lovely Claim. — The Lovely claim was a donation made by the general government of two quarter-sections of the public lands, according to the legal subdivisions of the public surveys, to a particular class of persons who were embraced by the Act of Congress of May 24, 1828, and who had complied with the conditions therein imposed, and also with the stipulations of the treaty ratified between the United States and the Cherokee Nation of Indians on the 28th of May, 1828.²

9. Louisiana Grants. — Construing the grant of lands in Louisiana by the Act of May 8, 1822, it has been held that the act of Congress does not recognize titles, but confers gifts; and that the donees must take them subject to all the burdens, conditions, and limitations which the donee has thought proper to affix to his gift.³

10. Oklahoma Grant. — The qualification imposed by the Act of March 2, 1889, upon those who entered upon lands in Oklahoma after the passage of such act and prior to noon of April 22 following, includes honorably discharged Union soldiers to the same extent as other citizens.⁴

11. Miscellaneous. — The additional homestead granted to Union soldiers under section 2306 of the Revised Statutes is not in the nature of an application for a homestead under the homestead laws, but is in the nature of a bounty or gift extended by the government to its soldiers in the war of the Rebellion.⁵

XI. LOCATIONS OF PUBLIC LAND BY AGENTS — **1. Claim as Locator.** — In early times, many contracts were made between warrant holders and others, by which the latter agreed to locate the warrants for a portion of the land secured by location; in many other cases, one man located the warrants of another without any special agreement as to compensation, but with an expectation of receiving as compensation the portion of land usually given for such services. The phrase "claim as locator" grew out of this state of things, and has been universally understood to signify the compensation of a portion of the land located agreed to be given by the owner of the warrant to the locator of it for his services.⁶

2. Contract for Location — *a.* **MUST BE EXPRESS.** — In order to sustain

by virtue of the act of Congress, and the patent is only evidence of such title. *Hackler v. Cabel*, Walk. (Miss.) 91.

1. North Carolina Grants. — *Pinson v. Ivey*, 1 Yerg. (Tenn.) 296.

Recognition by Tennessee. — The validity of these land claims was recognized by the constitution of Tennessee, and the latter state stands in the relation of trustee to owners of North Carolina land warrants or other claims, and cannot divest such claimants of their rights nor annex subsequent conditions working a forfeiture of such rights. *Fogg v. Williams*, 2 Head (Tenn.) 474; *Buck v. Williams*, 10 Heisk. (Tenn.) 264.

2. The Lovely Claim. — *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338.

Right to Enter. — A claimant had no right to enter any particular land under the act until the register and receiver had recited that he was entitled to the benefit of the act. *Finley v. Woodruff*, 8 Ark. 328.

3. Louisiana Grants. — *Ross v. Doe*, 1 Pet. (U. S.) 556; *Boatner v. Ventress*, 8 Mart. N. S.

26 C. of L., 21

(La.) 644, 20 Am. Dec. 266; *Higgins v. McMicken*, 1 La. 53.

4. Oklahoma Grant. — *Calhoun v. Violet*, 4 Okla. 321.

5. Additional Homestead Grant. — U. S. v. *Lair*, 118 Fed. Rep. 98.

6. Claim as Locator. — *Hollingsworth v. Barbour*, 4 Pet. (U. S.) 467; *Rhodes v. Gunn*, 35 Ohio St. 387.

Under the Pennsylvania Act of 1792, the actual settlement upon land by one who would acquire title must be in person, and could not be by agent. *Dick v. Cameron*, Add. (Pa.) 337.

An Additional Soldier's Homestead, under U. S. Rev. Stat., § 2306, may be located by an agent or assignee under a power of attorney from the soldier. *Montgomery v. Pacific Coast Land Bureau*, 94 Cal. 284, 28 Am. St. Rep. 122; *Rose v. Nevada*, etc., Wood, etc., Co., 73 Cal. 385.

Public Surveyor Cannot Be Locator. — Public policy requires that the officers chosen to locate and survey the public lands should not be permitted to speculate in them, or to acquire loca-

Volume XXVI.

a claim to an interest in the land as compensation for locating it, an express contract to that effect must be established by satisfactory proof.¹ No such contract can arise by implication from the fact that the services were performed, nor will the custom of the country to give what is called a locative interest in the land to the person who locates it create or furnish the terms of a contract to bind the owner of the certificate.² At most, the law will imply a contract for pecuniary compensation for the reasonable value of the services rendered,³ which is not enforceable as a lien upon the land.⁴ Where one locates lands for another without the latter's knowledge, the law will not imply the assent of the principal;⁵ though, upon his ratification thereof, the location will inure to his benefit.⁶

b. POWER TO MAKE. — Mere possession of a land certificate gives no implied power to the holder to employ another person to locate under the same, and the fact that there is no assignment to the holder is sufficient to put the locator on his guard.⁷

Contract by Executor or Administrator. — An independent executor may make a contract for the location of a certificate forming part of the estate, and the estate will be bound thereby, unless want of care, or of good faith, or of diligence be shown,⁸ but such a contract cannot be made by an administrator without the approval of the court.⁹

c. BY WHOM SIGNED. — A locative contract signed by the obligor is sufficient without the signature of the obligee, when accepted by him.¹⁰

d. NEED NOT BE WRITTEN. — An agreement for the location of land is not a contract for the sale thereof¹¹ so as to require the same to be in writing under the statute of frauds.¹²

e. DEATH OF PARTY. — A location of public land made by the agent after the death of his principal is without authority and void,¹³ unless the power of attorney is coupled with an interest in the agent,¹⁴ or unless the location is ratified by the successor in interest of the principal.¹⁵ Similarly, the administrator or personal representatives of a locator have no authority to fulfil and perform the contract, unless with the express consent of the principal of the deceased agent.¹⁶

tive interests in them. *Edwards v. Estell*, 48 Cal. 194; *Wills v. Abbey*, 27 Tex. 202.

1. Express Contract Must Be Shown. — *Byrnes v. Sampson*, 74 Tex. 79.

After Lapse of Time Contract May Be Established by Circumstances. — *Boone v. Hulse*, 71 Tex. 176.

2. Contract Cannot Be Implied. — *Sypert v. McCowen*, 28 Tex. 635; *Ross v. Mitchell*, 28 Tex. 152; *Branch v. Jones*, 2 Tex. Civ. App. 550; *Morris v. Hall*, 2 Tex. Unrep. Cas. 72; *Branch v. Payne*, (Tex. Civ. App. 1893) 22 S. W. Rep. 285. Compare *Ware v. Brush*, 1 McLean (U. S.) 533, affirmed 15 Pet. (U. S.) 93; *Smith v. Brooks*, 3 Hayw. (Tenn.) 248.

No Implied Contract Against Minors. — The fact that a party pays the patent fees to the land office will not give him any claim against the interest of the minor children of a deceased person. The latter can only be deprived of their interest by a contract made by a duly qualified guardian. *Ellis v. Le Bow*, (Tex. Civ. App. 1902) 71 S. W. Rep. 576.

3. Locator Entitled to Value of Services. — *Barnett v. Bell*, 4 Bibb (Ky.) 447; *House v. Brent*, 69 Tex. 27; *Powell v. Thompson*, 66 Tex. 230; *Ross v. Mitchell*, 28 Tex. 150.

4. Claim for Services Not Enforceable as Lien. — *Grimes v. Smith*, 70 Tex. 217.

5. Assent of Principal Not Implied. — *Lessieur v. Price*, 12 How. (U. S.) 59.

6. Ratification of Location by Principal. — *Wear v. Bryant*, 5 Mo. 147; *Tindall v. Johnson*, 5 Mo. 179. But see *Allen v. Dake*, 50 Cal. 80; *Holme v. Strautman*, 35 Mo. 293.

7. Power to Contract Not Implied. — *Smith v. Sublett*, 28 Tex. 163.

8. Contract by Independent Executor. — *Murrell v. Wright*, 78 Tex. 519.

9. Contract by Administrator. — *Halbert v. Carroll*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1102.

10. Signature by Obligor Sufficient. — *Hill v. Smith*, 6 Tex. Civ. App. 312.

11. Location Agreement Not a Contract of Sale. — *Ross v. Armstrong*, 25 Tex. Supp. 354, 78 Am. Dec. 574. And see the title VERBAL AGREEMENTS (STATUTE OF FRAUDS).

12. Location Agreement Need Not Be Written. — *Smith v. Crosby*, 47 Tex. 121; *Smock v. Tandy*, 28 Tex. 130.

13. Location After Death of Principal Void. — *Wallace v. Saunders*, 7 Ohio (pt. i.) 173.

14. When Power of Attorney Coupled with Interest in Agent. — *Moore v. Maxwell*, 18 Ark. 469, affirmed 22 How. (U. S.) 185.

15. Ratification by Successor in Interest. — *Galt v. Galloway*, 4 Pet. (U. S.) 333; *Drennen v. Walker*, 21 Ark. 539; *McClairn v. Wicker*, 8 Ark. 192.

16. Location by Representative of Deceased Agent. — *McLamore v. Heffner*, 33 Tex. 514.

f. ACTION UPON. — The cause of action for the performance of locative services matures with the procuring of the patent,¹ and, as against an innocent purchaser, the claim of the locator will be barred by lapse of time and the statute of limitations.² Where the statute commences to run against the locator in his lifetime, it is unaffected by the coverture or other disabilities of his heirs.³ There is no limitation as to the time within which an action may be brought against a locator for a breach of contract, where he has never repudiated the same.⁴ An action by or against a locator, under a locative contract, may be brought in any court within whose jurisdiction the defendant may be found.⁵

3. Locator — *a. EVIDENCE OF AUTHORITY.* — The authority of the agent to locate for his principal must be evidenced by a power of attorney⁶ or by possession of the warrant.⁷

b. DUTIES UNDER CONTRACT. — A locator will be held to good faith, ordinary skill, and diligence in the execution of his trust.⁸ He is bound not only to locate the lands but to show them to the surveyor.⁹ He is not responsible for a refusal of the proper official to accept a tender by him of the government dues on the land located,¹⁰ nor for a delay in issuing the patent caused by the refusal of such official to issue the same on the supposition that the land was covered by another grant.¹¹

c. POWERS UNDER CONTRACT. — The locator has no power, in the absence of express authority, to assign his contract to locate.¹² Where he is authorized to locate anywhere in the limits of the state, he is not limited to any particular county.¹³ He may amend or change the location, if he has sufficient reason to believe that it is for the interest of his employer so to do,¹⁴ and such authority may be established by evidence of the custom of persons similarly employed.¹⁵ If his first attempt to locate is abandoned, he may make a second location and recover for the same, provided it is accepted by his principal.¹⁶ He has no power to sell warrants issued to him for location, unless such power is expressly given, and the right of property continues in the owner of the warrants and through them attaches to the land.¹⁷ Nor has he any right or authority to sell the land when located.¹⁸

d. RIGHTS ON PERFORMANCE. — A contract to locate a certificate is one for the joint acquisition of land, which, when performed, is analogous to a joint purchase of the land thus acquired. The locator is the equitable owner of that portion of the land to which he is entitled under the contract,

1. When Cause of Action Accrues. — Shortridge v. Allen, 2 Tex. Civ. App. 193.

2. Claim May Be Barred by Lapse of Time. — Robertson v. Auld, 6 Yerg. (Tenn.) 406; Campbell v. McFadin, 71 Tex. 28; Little v. Weatherford, 63 Tex. 638.

3. Disabilities of Heirs. — Shortridge v. Allen, 2 Tex. Civ. App. 193.

4. No Limitation as to Action Against Locator. — White v. Affleck, 1 Tex. Unrep. Cas. 78.

5. Where Action Brought. — Massie v. Watts, 6 Cranch (U. S.) 148.

6. Power of Attorney. — U. S. v. Chapman, 5 Sawy. (U. S.) 528; Chapman v. Polack, 58 Cal. 553.

7. Possession of Warrant. — Galt v. Galloway, 4 Pet. (U. S.) 333.

8. Duties of Locator. — Withers v. Thompson, 4 T. B. Mon. (Ky.) 323.

9. Must Show Lands to Surveyor. — Massie v. Watts, 6 Cranch (U. S.) 148.

10. Not Responsible for Refusal by Official to Accept Fees. — Murrell v. Wright, 78 Tex. 519.

11. Not Responsible for Refusal by Official to Issue Patent. — Campbell v. McFadin, 71 Tex. 28.

12. No Power to Assign Contract. — Hudson v. Farris, 30 Tex. 574; Smith v. Sublett, 28 Tex. 163.

13. Power to Locate Anywhere. — Moore v. Anderson, 30 Tex. 224.

14. Power to Change Location. — Massie v. Watts, 6 Cranch (U. S.) 148; Galt v. Galloway, 4 Pet. (U. S.) 333. But see Doe v. McMillan, 3 McLean (U. S.) 20, and Walcott v. Swan, 4 Call (Va.) 462, 2 Call (Va.) 298, holding that a change of location may not be made without the consent of the owner, and if so made, the owner may elect which of the two locations he will take.

15. Authority to Change Location Established by Custom. — Hollingsworth v. Holshausen, 25 Tex. 628.

16. Power to Make Second Location. — Halbert v. Carroll, (Tex. Civ. App. 1894) 25 S. W. Rep. 1102.

17. Power to Sell Warrants. — Barnett v. Bell, 4 Bibb (Ky.) 447.

18. Power to Sell Land. — Galt v. Galloway, 4 Pet. (U. S.) 333. Compare Rose v. Nevada, etc., Wood, etc., Co., 73 Cal. 385.

and, if the patent is issued to the principal, the latter is deemed to hold the land in trust for the locator.¹ Likewise, if the locator receives the patent, he is in equity a trustee for his principal.² The rule, however, does not apply when a separate location has been made by the locator for himself as his compensation. In such case, each particular joint owner is entitled to the land so separately located for him under a sole and exclusive ownership.³ Where the certificate is located in more than one survey, the locator is entitled to his interest in each survey;⁴ and if only a part of the certificate has been located, the locator's interest attaches to such part.⁵ If, after a partition of the lands located between the owner and the locator, the part set off to the former is found to be covered by an older and superior title, the locator is not entitled to retain his part of the property to the exclusion of the owner.⁶ The locator has a claim in equity only as against the interest in the certificate of the party with whom he contracted.⁷ If the certificate is invalid, and the location therefore fails, the locator may recover from the owner his actual costs and expenses in locating.⁸ If the locator has no contract for a share in the lands, his claim for compensation is, nevertheless, a charge thereon;⁹ but an innocent purchaser without notice is protected against such claim.¹⁰ Proof by the locator that he caused the patent to be issued and paid for the same will entitle the jury to presume that he performed his contract by making the selection and survey.¹¹

XII. GRANTS IN AID OF RAILROADS — 1. In General. — The Congress of the United States and the state legislatures have made numerous grants of land to aid in the construction of railroads; some directly to incorporated companies, others to the different states, the land to be by them transferred to companies by whom the construction of the roads might be undertaken. The different acts making these grants are in the main similar in their general provisions.

2. Construction of Railroad Grants. — In accordance with the general principle that statutes granting privileges or relinquishing rights of the public are to be strictly construed against the grantee,¹² if the terms of an Act of Congress granting public lands admit of different meanings, one of extension and the other of limitation, they must be accepted in the sense favorable to the grantor; and if rights claimed under the government be set up against it, they must be so clearly defined that there can be no question of the purpose of Congress to confer them.¹³ Furthermore, in case of ambiguity, the judiciary will lean in

1. Owner Holds in Trust for Locator. — *Rhodes v. Gunn*, 35 Ohio St. 387; *Terrell v. Murray*, 2 Yerg. (Tenn.) 384; *Stieler v. Hooper*, 66 Tex. 353; *Doss v. Slaughter*, 53 Tex. 235; *Smock v. Tandy*, 28 Tex. 130; *Ross v. Armstrong*, 25 Tex. Supp. 366, 78 Am. Dec. 574.

2. Locator Holds in Trust for Owner. — *Felix v. Patrick*, 145 U. S. 317; *Massie v. Watts*, 6 Cranch (U. S.) 148; *Ringo v. Binns*, 10 Pet. (U. S.) 270.

3. Effect of Separate Location. — *Roller v. Ried*, 87 Tex. 69; *Pool v. Greer*, 23 Tex. Civ. App. 423.

4. Location in Several Surveys. — *Doss v. Slaughter*, 53 Tex. 235; *Smith v. Crosby*, 47 Tex. 121.

5. When Certificate Located in Part Only. — *Doss v. Slaughter*, 53 Tex. 235.

6. When Title to Part Set Off to Owner Fails. — *Ross v. Armstrong*, 25 Tex. Supp. 354, 78 Am. Dec. 574.

7. Locator's Claim Only Against His Principal's Interest. — *Burris v. Wideman*, 6 Tex. 231.

8. When Certificate Invalid. — *Smith v. Crosby*, 47 Tex. 121.

9. Locator's Claim Is Charge on Land. — *Breck-enridge v. Neill*, 26 Tex. 101; *Read v. Long*, 4 Yerg. (Tenn.) 68.

Mitigation of Damages. — In an action by a locator to recover compensation for locating a claim, the completion of which he claims to have been prevented by the act of the owner, the latter may prove in mitigation of damages that the plaintiff located another certificate upon the land. *King v. Gray*, 17 Tex. 62.

10. Innocent Purchaser Protected. — *Emmons v. Oldham*, 12 Tex. 18; *Robertson v. Auld*, 6 Yerg. (Tenn.) 406.

11. Proof of Performance. — *Emmons v. Oldham*, 12 Tex. 18.

12. See the title STATUTES.

13. Strict Construction of Railroad Grants. — *Leavenworth, etc., R. Co. v. U. S.*, 92 U. S. 733; *Winona, etc., R. Co. v. Barney*, 113 U. S. 618; *Lau Ow Bew v. U. S.*, 144 U. S. 47; *Wisconsin Cent. R. Co. v. U. S.*, 164 U. S. 190; *U. S. v. Oregon, etc., R. Co.*, 164 U. S. 526 [*citing* *Dubuque, etc., R. Co. v. Litchfield*, 23 How. (U. S.) 66; *Slidell v. Grandjean*, 111 U. S. 412]; *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550.

favor of a construction given to a statute by the department charged with the execution of such statute; and if such construction has been acted upon for a number of years, will look with disfavor upon any sudden change whereby the parties who have contracted with the government upon the faith of such construction may be prejudiced.¹

Place and Indemnity Lands. — In the construction of land-grant acts in aid of railroads, the distinction between granted or place lands and indemnity lands must be observed. Place lands are those falling within the limits specially designated; indemnity lands are those selected in lieu of parcels lost by previous disposition or reservation for other purposes.²

3. Title of Railroads — a. NATURE OF TITLE. — It has been held that where land is granted to a state in aid of railroad construction the state takes the legal title to the land, but the equitable right vests in the railroad company. The state cannot dispose of the lands; she simply holds them for the use and benefit of the company, the Act of Congress providing how the trust shall be discharged and the legal title conveyed to the company; nor is this operation of the grant affected by the fact that patents of the United States are to be issued by the secretary of the interior direct to the company, and not to the state.³ Where, however, land is granted directly to the railroad company with the provision that it is to be subject to the disposal of the company for construction and equipment purposes, the relation of trustee and *cestui que trust* is not created between the railroad company and the government, but the patents when issued vest the complete title in the company.⁴

Act Both Grant and Law. — An Act of Congress granting lands to a railroad has been held to be a grant as well as a law, and to have all the force of a patent, so that when the condition of definite location is performed the title becomes absolute and the company cannot be prejudiced by the misconduct or neglect of the public officer to perform his duty of withdrawing the land.⁵

Railroad May Bring Ejectment. — A railroad company having exclusive right to sell such lands and deliver possession may protect its possession by an action of ejectment.⁶

When State Grant Precedes Congressional Action. — Where a state statute conferred upon a certain railroad lands to be thereafter granted by Congress, it was held that the company took a good title by virtue of such act although it was passed before the grant by Congress was made.⁷

b. TIME OF VESTING — (1) As to Place Lands. — It is a well-recognized rule that by the words "there is hereby granted," used in an Act of Congress, a grant *in presenti* and not one *in futuro* is imported. Such grant, however, is not at first absolute, but is in the nature of a float, and, as regards land within the place limits, the title becomes completely vested in the grantee only when the route of the road is definitely fixed by the location and adoption of its line and by filing a map thereof with the secretary of the interior. But when such conditions precedent have been performed, the title vests by relation as

1. **Departmental Construction.** — *U. S. v. Alabama G. S. R. Co.*, 142 U. S. 615; *Hewitt v. Schultz*, 180 U. S. 139. And see the title *STARE DECISIS*, *ante*, p. 158.

For the construction of the grant to the Union Pacific Railroad Company, see *U. S. v. Burlington, etc.*, R. Co., 98 U. S. 334.

2. **Place and Indemnity Lands Distinguished.** — See *INDEMNITY*, vol. 16, p. 166, note.

3. **Nature of Title of Railroads — Grant to State in Aid of Railroad.** — *Van Wyck v. Knevals*, 106 U. S. 360; *Knevals v. Hyde*, 5 Dill. (U. S.) 469; *Rice v. Minnesota, etc.*, R. Co., 1 Black (U. S.) 358.

4. **Direct Grant to Railroad.** — *U. S. v. Union*

Pac. R. Co., 11 Blatchf. (U. S.) 385, 8 Am. L. Rev. 356; *North Wisconsin R. Co. v. Barron County*, 8 Biss. (U. S.) 414; *McLaughlin v. Menotti*, 89 Cal. 354; *Elling v. Thexton*, 7 Mont. 340; *U. S. v. Godwin*, 7 Mont. 406. But see *Southern Pac. R. Co. v. Stanley*, 49 Fed. Rep. 263.

5. **Act Both Grant and Law.** — *Taboreck v. Burlington, etc.*, R. Co., 2 McCrary (U. S.) 407; *Jackson, etc.*, R. Co. *v. Davison*, 65 Mich. 417.

6. **Railroad May Bring Ejectment.** — *Northern Pac. R. Co. v. Lilly*, 6 Mont. 65.

7. **When State Grant Precedes Congressional.** — *Nash v. Sullivan*, 29 Minn. 206.

of the date of the act, so as to exclude the acquirement of any right by pre-emption or settlement after the date of the act.¹

Grant to State. — The same meaning and effect have been given to such words when used in a grant by Congress to a state or territory of lands to be used by the grantee to aid in the construction of railroads.²

(2) *As to Indemnity Lands.* — The rule just stated as to when title vests applies only to lands within the place limits. It is well settled that as regards indemnity or lien lands the right of the railroad is likewise in the nature of a float which attaches, not by relation as of the date of the act, but only when a selection of specific sections is actually made in the manner prescribed. Until such selection the lands are within the disposing power of Congress, and adverse rights thereto may be acquired by any mode prescribed by statute.³

1. Vesting of Title as to Lands Within Place Limits — *United States.* — Iowa R. Land Co.

v. Courtright, 21 Wall. (U. S.) 310; *Knevals v. Hyde*, 5 Dill. (U. S.) 469; *Taboreck v. Burlington, etc.*, R. Co., 2 McCrary (U. S.) 407; *Southern Pac. R. Co. v. Orton*, 6 Sawy. (U. S.) 158; *Sanger v. Sargent*, 8 Sawy. (U. S.) 93; *Southern Pacific R. Co. v. Dull*, 10 Sawy. (U. S.) 506; *Denny v. Dodson*, 13 Sawy. (U. S.) 68; *Missouri, etc., R. Co. v. Kansas Pac. R. Co.*, 97 U. S. 491; *Wood v. Burlington, etc., R. Co.*, 104 U. S. 329; *Van Wyck v. Knevals*, 106 U. S. 360; *Wisconsin Cent. R. Co. v. Price County*, 133 U. S. 496; *Leavenworth, etc., R. Co. v. U. S.*, 92 U. S. 733; *St. Paul, etc., R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1; *St. Paul, etc., R. Co. v. Greenalgh*, 139 U. S. 19; *Deseret Salt Co. v. Tarpey*, 142 U. S. 241; *U. S. v. Southern Pac. R. Co.*, 146 U. S. 570; *U. S. v. California, etc., Land Co.*, 148 U. S. 31; *U. S. v. Union Pac. R. Co.*, 148 U. S. 562; *Curtner v. U. S.*, 149 U. S. 662; *Lake Superior Ship Canal R., etc., Co. v. Cunningham*, 155 U. S. 354; *Southern Pac. R. Co. v. U. S.*, 168 U. S. 1; *Northern Pac. R. Co. v. Amacker*, 175 U. S. 564; *St. Paul, etc., R. Co. v. Sage*, (C. C. A.) 71 Fed. Rep. 40; *Northern Pac. R. Co. v. Cannon*, 46 Fed. Rep. 224; *Burlington, etc., R. Co. v. Fremont County*, 9 Wall. (U. S.) 89; *Sioux City, etc., Town Lot, etc., Co. v. Griffey*, 143 U. S. 32; *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 629; *Menotti v. Dillon*, 167 U. S. 703; *Northern Pac. R. Co. v. Hinchman*, 53 Fed. Rep. 523; *Southern Pac. R. Co. v. U. S.*, (C. C. A.) 109 Fed. Rep. 913; *U. S. v. Mullan Fuel Co.*, 118 Fed. Rep. 663; *Barden v. Northern Pac. R. Co.*, 154 U. S. 288.

California. — *McLaughlin v. Menotti*, 89 Cal. 354; *Jatunn v. Smith*, 95 Cal. 154; *Southern Pac. R. Co. v. Wood*, 124 Cal. 475.

Colorado. — *Howell v. Killie*, 17 Colo. 88.

Idaho. — *Washington, etc., R. Co. v. Northern Pac. R. Co.*, 2 Idaho 513.

Iowa. — *Burlington, etc., R. Co. v. Lawson*, 58 Iowa 145; *Iowa Falls, etc., R. Co. v. Beck*, 67 Iowa 421.

Kansas. — *Atchison, etc., R. Co. v. Pracht*, 30 Kan. 72.

Michigan. — *Johnson v. Ballou*, 28 Mich. 379; *Jackson, etc., R. Co. v. Davison*, 65 Mich. 437.

Minnesota. — *Winona, etc., R. Co. v. Randall*, 29 Minn. 283; *Minneapolis, etc., R. Co. v. Duluth, etc., R. Co.*, 45 Minn. 204.

Montana. — *Northern Pac. R. Co. v. Majors*, 5 Mont. 111; *Northern Pac. R. Co. v. Lilly*, 6 Mont. 65.

Nebraska. — *Vance v. Burlington, etc., R. Co.*, 12 Neb. 285.

Nevada. — *State v. Central Pac. R. Co.*, 20 Nev. 372; *Stanton v. Crane*, 25 Nev. 114.

New Mexico. — *Southern Pac. R. Co. v. Esquibel*, 5 N. Mex. 123; *Atlantic, etc., R. Co. v. Mingus*, 7 N. Mex. 360.

Oregon. — *Stewart v. Alstock*, 22 Oregon 182.

Texas. — *Kuechler v. Wright*, 40 Tex. 600.

2. Grant to State — *United States.* — *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44; *Iowa R. Land Co. v. Courtright*, 21 Wall. (U. S.) 310; *Leavenworth, etc., R. Co. v. U. S.*, 92 U. S. 733; *Grinnell v. Chicago, etc., R. Co.*, 103 U. S. 739; *St. Paul, etc., R. Co. v. Phelps*, 137 U. S. 528; *Shepard v. Northwestern L. Ins. Co.*, 40 Fed. Rep. 341; *Lake Superior Ship Canal R., etc., Co. v. Cunningham*, 155 U. S. 354.

Alabama. — *Swann v. Lindsey*, 70 Ala. 507; *Swann v. Larmore*, 70 Ala. 555; *Swann v. Gaston*, 87 Ala. 569; *McCarver v. Herzberg*, 120 Ala. 523.

Iowa. — *Iowa R. Land Co. v. Davis*, 102 Iowa 128.

Minnesota. — *U. S. v. Minnesota, etc., R. Co.*, 1 Minn. 127; *Weeks v. Bridgman*, 46 Minn. 390.

Missouri. — *Clarkson v. Buchanan*, 53 Mo. 563; *Campbell v. Wortman*, 58 Mo. 258; *Wright v. Gish*, 94 Mo. 110; *Wilson v. Beckwith*, 140 Mo. 359.

Wisconsin. — *Paige v. Kolman*, 93 Wis. 435.

3. Indemnity Lands — *United States.* — *Ryan v. Central Pac. R. Co.*, 99 U. S. 382; *Grinnell v. Chicago, etc., Co.*, 103 U. S. 739; *Cedar Rapids, etc., R. Co. v. Herring*, 110 U. S. 27; *Kansas Pac. R. Co. v. Atchison, etc., R. Co.*, 112 U. S. 414; *St. Paul, etc., R. Co. v. Winona, etc., R. Co.*, 112 U. S. 720; *Barney v. Winona, etc., R. Co.*, 117 U. S. 228; *Sioux City, etc., R. Co. v. Chicago, etc., R. Co.*, 117 U. S. 406; *U. S. v. McLaughlin*, 127 U. S. 428; *Wisconsin Cent. R. Co. v. Price County*, 133 U. S. 496; *U. S. v. Missouri, etc., R. Co.*, 141 U. S. 358; *U. S. v. Colton Marble, etc., Co.*, 146 U. S. 615; *Hewitt v. Schultz*, 180 U. S. 139; *Southern Pac. R. Co. v. Bell*, 183 U. S. 675; *Wisconsin Cent. R. Co. v. Forsythe*, 43 Fed. Rep. 867; *St. Paul, etc., R. Co. v. Sage*, (C. C. A.) 71 Fed. Rep. 40; *St. Paul, etc., R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1; *St. Paul, etc., R. Co. v. Greenalgh*, 139 U. S. 19; *Oregon, etc., R. Co. v. U. S.*, 189 U. S. 103; *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 629, *affirming* 24 Kan. 725; *Nelson v. Northern Pac. R. Co.*, 188 U. S.

c. CONDITIONS PRECEDENT TO VESTING OF TITLE — (1) *Location of Line and Filing of Map*. — The cases cited above to the proposition that the title of a railroad to lands granted becomes vested when the line of the road is definitely fixed and a map thereof is filed with the secretary of the interior are likewise authority for the converse proposition that the title does not vest until such definite location and filing of map.¹ The requirement as to definite location of the road applies with respect to lands lying near points designated as determining the general route of the road.²

Entire Map Not Required. — It has been held, however, that where the act gave to the railroad the right to select the lands granted opposite a specified portion of the completed road, the filing of a map of the entire road was not a condition precedent to the company's right to select lands opposite to the portion of the line completed.³

(2) *Construction of Road*. — It has sometimes been provided in acts granting lands to a state in aid of the construction of a railroad that the completion of a specified portion of the road shall be a condition precedent to the conveyance by the state of any lands to such railroad, and no conveyance in violation of such provision vests any title in the company.⁴ A provision that the road must be completed within a specified time is likewise a condition precedent.⁵

The Question When a Road Is Completed has been discussed elsewhere.⁶

Paying Cost of Survey. — Where it is provided that no conveyance shall be made until there shall have been paid into the treasury of the United States the cost of surveying the land, no right to a patent exists and no title passes from the United States until such condition has been complied with.⁷

d. FORFEITURE — (1) *In General*. — Many of the land-grant acts have declared that lands granted to railroads shall be forfeited for the nonperformance of conditions precedent or subsequent, such as failure to complete the road within a certain time or to complete a certain number of miles per year.⁸

108; *U. S. v. Oregon, etc., R. Co.*, 101 Fed. Rep. 316.

California. — *Southern Pac. R. Co. v. Wood*, 124 Cal. 475.

Iowa. — *Cedar Rapids, etc., R. Co. v. Jewell*, 61 Iowa 410; *Iowa Falls, etc., R. Co. v. Beck*, 67 Iowa 421; *Young v. Charnquist*, 114 Iowa 116.

Kansas. — *Missouri, etc., R. Co. v. Noyes*, 25 Kan. 340; *Herrington v. Clark*, 56 Kan. 644.

Minnesota. — *Musser v. McRae*, 38 Minn. 409.

North Dakota. — *Grandin v. La Bar*, 3 N. Dak. 446; *Jackson v. La Moure County*, 1 N. Dak. 238.

Washington. — *Moore v. Cormode*, 20 Wash. 305; *Howard v. Hibbs*, 22 Wash. 513.

1. **Location of Line and Filing of Map**. — See *supra*, this subsection, *b. Time of Vesting*.

In *Wunderlich v. Spradling*, 121 Mo. 364, it was held that under a state act requiring a road to file a map, such filing was not a condition precedent to the transfer of title to such railroad.

2. *Weeks v. Bridgman*, 46 Minn. 390.

3. **Entire Map Not Required**. — *Groeck v. Southern Pac. R. Co.*, (C. C. A.) 102 Fed. Rep. 32.

4. **Construction of Road as Condition Precedent** — *United States*. — *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44; *Farnsworth v. Minnesota, etc., R. Co.*, 92 U. S. 49; *Chamberlain v. St. Paul, etc., R. Co.*, 92 U. S. 299; *Shepard v. Northwestern L. Ins. Co.*, 40 Fed. Rep. 341. See also *Sioux City, etc., R. Co. v. Countryman*, 159 U. S. 377.

Iowa. — *Sioux City, etc., R. Co. v. Osceola County*, 43 Iowa 318; *State v. Kirkwood*, 14 Iowa 162.

Nebraska. — *White v. Burlington, etc., R. Co.*, 5 Neb. 393.

5. **Construction Within Prescribed Time**. — *Bowne v. Bilsland*, 83 Iowa 162; *Ayres v. Kalstrom*, 85 Iowa 709.

6. **When Railroad Is "Completed"**. — See COMPLETE, vol. 6, p. 374, note. See also the title MUNICIPAL AID, vol. 20, p. 1121.

In *Broder v. Natoma Water, etc., Co.*, 50 Cal. 621, affirmed 101 U. S. 274, it was held that the Pacific Railroad Company did not acquire an equity in lands granted which the state courts were bound to respect until commissioners provided for by the act had certified the completion of a definite portion of the road.

7. **Paying Cost of Survey**. — The provision recited in the text was contained in the Act of Congress of 1862, as amended by the Act of 1864, in aid of the Kansas Pacific Railroad Company. *Kansas Pac. R. Co. v. Prescott*, 16 Wall. (U. S.) 603; *Union Pac. R. Co. v. McShane*, 22 Wall. (U. S.) 444; *Northern Pac. R. Co. v. Trail County*, 115 U. S. 600. See also *Hunnewell v. Cass County*, 22 Wall. (U. S.) 464; *White v. Burlington, etc., R. Co.*, 5 Neb. 393.

8. **Forfeiture for Nonperformance of Conditions**. — *St. Paul, etc., R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1; *Atlantic, etc., R. Co. v. Mingus*, 165 U. S. 413, 7 N. Mex. 360; *Madison, etc., R. Co. v. Wisconsin*, 16 Fed. Cas. No. 8,938; *St. Paul, etc., R. Co. v. Greenhalgh*, 26 Fed. Rep. 563, affirmed 139 U. S. 19; *Southern Pac.*

Forfeiture Not Self-executing. — Such a grant is not forfeited by a mere breach of the conditions, but only by some affirmative action on the part of the state.¹

(2) *How Declared.* — No express words are necessary to authorize the grantor to re-enter in case of a breach of such conditions, and the forfeiture by the government may be declared without judicial proceedings. Any public assertion by legislative act of the ownership of the lands on default of the grantee, such as an act resuming control of and appropriating the lands to particular uses or granting them to others to carry out the original object, will be equally effectual and operative.²

Forfeiture by Legislation. — But legislation intended to effect such a forfeiture must manifest an intention by the legislative body to reassert the title and to resume possession; and as it is to take the place of a suit by the government to enforce a forfeiture, it should be direct, positive, and free from all doubt and ambiguity.³

(3) *Reverter.* — Where land is forfeited for breach of condition it reverts to the United States, and the government becomes reinvested with the title for its own benefit exclusively; and such forfeiture does not operate in favor of any other company claiming such forfeited lands under any claim whatever.⁴ Nor can the state legislature or any other state authority confer the forfeited lands upon another company in derogation of the right of the United States.⁵ But reverter does not take place by reason of a change in the location of the road if such change is authorized by Act of Congress.⁶

(4) *Prior Grants Not Affected.* — A grant of lands which has become effective by the completion of a specified portion of the road is not affected by a subsequent forfeiture of other lands by reason of failure to complete the entire road.⁷

Debts Not Transferred. — And where a railroad company fails to comply with the conditions under which land was originally bestowed upon it, and because of such failure the legislature transfers the land to another railroad company, such act of the legislature does not, either in terms or by implication, burden

R. Co. v. Orton, 6 Sawy. (U. S.) 157; San Pedro v. Southern Pac. R. Co., 101 Cal. 333; Minneapolis, etc., R. Co. v. Duluth, etc., R. Co., 45 Minn. 104; State v. International, etc., R. Co., 57 Tex. 534.

1. **Forfeiture Not Self-executing** — *United States.* — Baker v. Gee, 1 Wall. (U. S.) 333; U. S. v. Repentigny, 5 Wall. (U. S.) 211; Schulenberg v. Harriman, 21 Wall. (U. S.) 44; Farnsworth v. Minnesota, etc., R. Co., 92 U. S. 49; McMicken v. U. S., 97 U. S. 217; Van Wyck v. Knevals, 106 U. S. 360; St. Louis, etc., R. Co. v. McGee, 115 U. S. 469; Doe v. Larmore, 116 U. S. 198; Sioux City, etc., Town Lot, etc., Co. v. Grifley, 143 U. S. 32.

Alabama. — Swann v. Lindsey, 70 Ala. 507.

California. — San Pedro v. Southern Pac. R. Co., 101 Cal. 333.

Louisiana. — Vicksburg, etc., R. Co. v. Elmore, 46 La. Ann. 1237.

Michigan. — Jackson, etc., R. Co. v. Davison, 65 Mich. 437.

Texas. — Russell v. Texas, etc., R. Co., 68 Tex. 646; Galveston, etc., R. Co. v. State, 81 Tex. 572.

See also FORFEIT — FORFEITURE, vol. 13, pp. 1077, 1078.

2. **Declaration of Forfeiture.** — New Orleans Pac. R. Co. v. U. S., 124 U. S. 124; Atlantic, etc., R. Co. v. Mingus, 165 U. S. 413; U. S. v. Repentigny, 5 Wall. (U. S.) 211; Schulenberg

v. Harriman, 21 Wall. (U. S.) 44; Farnsworth v. Minnesota, etc., R. Co., 92 U. S. 66; McMicken v. U. S., 97 U. S. 204; Van Wyck v. Knevals, 106 U. S. 360. See also New Orleans Pac. R. Co. v. Parker, 143 U. S. 42.

3. **Forfeiture by Legislation.** — St. Louis, etc., R. Co. v. McGee, 115 U. S. 469.

4. **Reverter to Government.** — U. S. v. Northern Pac. R. Co., 152 U. S. 284; Sioux City, etc., R. Co. v. U. S., 159 U. S. 349; Chicago, etc., R. Co. v. U. S., 159 U. S. 372; Southern Pac. R. Co. v. U. S., 168 U. S. 1; U. S. v. Oregon, etc., R. Co., 176 U. S. 48; Johnston v. Morris, (C. C. A.) 72 Fed. Rep. 890; Doe v. Pugh, (Ala. 1903) 34 So. Rep. 377; U. S. v. Southern Pac. R. Co., 117 Fed. Rep. 544.

5. **No Right or Interest in State.** — Chicago, etc., R. Co. v. U. S., 159 U. S. 372; Bowes v. Haywood, 35 Mich. 241; Fenn v. Kinsey, 45 Mich. 446.

6. **Change in Location of Road.** — Grinnell v. Chicago, etc., R. Co., 103 U. S. 739.

7. **Prior Grants Not Affected.** — U. S. v. Tennessee, etc., R. Co., 176 U. S. 242; St. Paul, etc., R. Co. v. St. Paul, etc., R. Co., 18 U. S. Sup. Ct. Rep. 946; Swann v. Lindsey, 70 Ala. 507; Swann v. Larmore, 70 Ala. 555, *affirmed* Doe v. Larmore, 116 U. S. 198; Ware v. Swann, 79 Ala. 330; Miller v. Swann, 89 Ala. 631; Mathis v. Tennessee, etc., R. Co., 83 Ala. 411; Swann v. Gaston, 87 Ala. 569; State v. International, etc., R. Co., 57 Tex. 534.

the transfer with a continuing obligation for the debts of the first company, and no creditor of such company has any legal or equitable rights to the land transferred.¹

(5) *Defenses*. — Where a railroad company has done that which under the terms of the grant operates as a forfeiture, it cannot defeat such forfeiture by setting up the fact that it has done a large amount of work and expended a large sum of money,² or that the government has reserved the right to complete the road,³ or that the government has made an Indian reservation in the region through which the road was to pass, where such reservation does not seriously interfere with the prosecution of the work.⁴

(6) *Application of Equitable Rule*. — In a few cases, where good and sufficient reasons appeared for the non-performance of the conditions imposed, the court has declined to apply the legal rules of forfeiture, but has applied the equitable rule that the conditions might still be complied with within a reasonable time.⁵

4. Withdrawal of Lands Granted — *a*. BY SECRETARY OF INTERIOR. — When a definite route has been adopted by a railroad company and a map is filed with the secretary of the interior and accepted by that officer, the route is established. It then becomes the duty of the secretary of the interior to withdraw from sale or entry the lands granted along the line of such road.⁶

Mode of Withdrawing. — The land is withdrawn from sale in such case by a communication to that effect made by the commissioner of the general land office to the land officers of the district in which the land lies; and although the act may not require the commissioner to give notice to the local land officers of such withdrawal, it has usually been the practice of the interior department to issue such formal withdrawal.⁷ But it is not necessary that the act of withdrawal should be made personally by the secretary. The law is complied with if it is made by his department, that is, through the officers acting under his general supervision and control.⁸ Where the statute provides for the withdrawal of lands upon the filing of maps by the governor of the state, such maps must be filed by the governor before the lands are withdrawn.⁹

Withdrawal by Commissioner of General Land Office. — Where lands are withdrawn by an order of the commissioner of the general land office, his acts being within the scope of his powers, it will be assumed that the withdrawal was made by direction of the secretary of the interior, and the withdrawal is itself a recognition of the fact that the map was filed in the office of the secretary.¹⁰

If the Commissioner Should Withdraw Too Much Land in the district, or should withdraw land beyond the terminus of a grant, such withdrawal, nevertheless, is valid and sufficient to protect the land so withdrawn from pre-emption or other claims than those of the railroad company in whose favor such withdrawal is made.¹¹

When to Be Withdrawn. — It is not necessary that there should be a general designation of the whole route of the railroad before any land may be withdrawn or any rights of the company shall attach. It is sufficient if such

1. *Debts Not Transferred*. — *Farmers' L. & T. Co. v. Chicago, etc.*, R. Co., 163 U. S. 31; *distinguishing* *Angle v. Chicago, etc.*, R. Co., 151 U. S. 1.

2. *Performance of Work and Expenditure of Money No Defense*. — *Madison, etc.*, R. Co. v. *Wisconsin*, 16 Fed. Cas. No. 8,938; *State v. International, etc.*, R. Co., 57 Tex. 534.

3. *Reservation by Government of Right to Complete Road*. — *Southern Pac. R. Co. v. Esquibel*, 4 N. Mex. 337.

4. *Indian Reservations*. — *Atlantic, etc.*, R. Co. v. *Mingus*, 165 U. S. 413.

5. *Davis v. Gray*, 16 Wall. (U. S.) 203; *Sage*

v. Crowley, 83 Minn. 314; *Quinlan v. Houston, etc.*, R. Co., 89 Tex. 356.

6. *Withdrawal of Lands by Secretary of Interior*. — *Van Wyck v. Knevals*, 106 U. C. 360; *Walden v. Knevals*, 114 U. S. 373.

7. *Mode of Withdrawing — Notice to Local Land Officers*. — *St. Paul, etc.*, R. Co. v. *Northern Pac. R. Co.*, 139 U. S. 1.

8. *Patterson v. Tatum*, 3 Sawy. (U. S.) 164.

9. *St. Paul, etc.*, R. Co. v. *Sage*, (C. C. A.) 71 Fed. Rep. 40.

10. *Withdrawal by Commissioner of General Land Office*. — *Weaver v. Fairchild*, 50 Cal. 360.

11. *Excessive Withdrawal*. — *Wolcott v. Des*

reasonable portions are located as will intelligently guide the officers of the land department with reference to the patents to be issued for lands intended for the company. The withdrawal in any case will extend only along the route fixed, a map of which has been filed with the department.¹

Reservation from Sale Does Not Exclude Pre-emption. — An act which provides that upon the filing of the map the lands along the entire route "shall be reserved from sale" does not reserve such lands from entry under the pre-emption and homestead laws, but only from sale.² But a general reservation made by the department operates to withdraw the land from homestead entries even if afterwards found not to come within the limits of the railroad grant.³

b. BY OPERATION OF LAW. — In construing certain land-grant acts it has been held that when the general route of the road has been fixed in good faith, and information thereof has been given to the land department by filing a map thereof with the commissioner or with the secretary of the interior, the land specified in the grant is withdrawn by operation of law from sale or pre-emption.⁴

c. REVOCATION OF WITHDRAWAL. — The secretary of the interior may revoke his order of withdrawal, and such revocation has the effect of allowing unselected indemnity lands to be pre-empted and title thereto secured by private individuals.⁵ But if after such revocation the secretary directs local officers to suspend pre-emption entries, the lands are again withdrawn from settlement.⁶

Effect of Withdrawal. — While a land-grant railroad company has no vested right in a mere executive withdrawal of land for its benefit, yet so long as the withdrawal continues in force, the lands are not open to settlement and entry, and no lawful settlement on them can be acquired.⁷

d. WITHDRAWAL OF INDEMNITY LANDS. — The secretary of the interior or the commissioner of the general land office has no authority, upon the filing of a plat, to withdraw from sale or pre-emption lands lying within the indemnity limits, and such withdrawal, if made, does not affect the rights which without it would have been acquired by pre-emption or by other private claimants.⁸

5. Rights as Against Settlers — **a. WITHIN PLACE LIMITS.** — Acts granting lands to railroad companies have usually been construed as granting only public lands to which the United States has full title not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time when the line of road is definitely fixed and a plat thereof is filed in the office of the commissioner of the general land office.⁹

Moines Co., 5 Wall. (U. S.) 681; Spencer v. McDougal, 159 U. S. 62.

1. When to Be Withdrawn. — St. Paul, etc., R. Co. v. Northern Pac. R. Co., 139 U. S. 1; U. S. v. Southern Pac. R. Co., 146 U. S. 570.

2. Reservation from Sale Does Not Exclude Pre-emption. — Kansas Pac. R. Co. v. Dunmeyer, 113 U. S. 629.

3. General Reservation. — Hamblin v. Western Land Co., 147 U. S. 531.

4. Withdrawal by Operation of Law. — Buttz v. Northern Pac. R. Co., 119 U. S. 55; St. Paul, etc., R. Co. v. Northern Pac. R. Co., 139 U. S. 1; U. S. v. Southern Pac. R. Co., 146 U. S. 570; Southern Pac. R. Co. v. Orton, 6 Sawy. (U. S.) 157; Southern Pac. R. Co. v. Groeck, 68 Fed. Rep. 609; Pratt v. Crane, 58 Cal. 533; Carr v. Crane, 59 Cal. 302; Northern Pac. R. Co. v. Nelson, 22 Wash. 521.

It has been held, however, that where a map was rejected because it was too indefinite and not properly authenticated it did not withdraw

any public lands along the proposed route of the road. U. S. v. Oregon, etc., R. Co., 176 U. S. 28.

5. Revocation of Withdrawal. — Southern Pac. R. Co. v. Tilley, 41 Fed. Rep. 729, 163 U. S. 705; Southern Pac. R. Co. v. Wood, 124 Cal. 475; Prince Invest. Co. v. Eheim, 55 Minn. 36.

6. Suspension of Pre-emption. — Merrill v. Chicago, etc., R. Co., (C. C. A.) 70 Fed. Rep. 464.

7. Effect of Withdrawal. — Thompson v. St. Paul, etc., R. Co., 83 Fed. Rep. 546; Sage v. Swenson, 64 Minn. 517.

8. Withdrawal of Indemnity Lands Not Authorized. — Southern Pac. R. Co. v. Bell, 183 U. S. 675; Kansas Pac. R. Co. v. Atchison, etc., R. Co., 112 U. S. 414; Oregon, etc., R. Co. v. U. S., 189 U. S. 103; Moore v. Stone, 180 U. S. 180; Southern Pac. R. Co. v. Wood, 124 Cal. 475; St. Paul, etc., R. Co. v. Ward, 47 Minn. 40.

9. Rights as Against Settlers in Place Limits. — Leavenworth, etc., R. Co. v. U. S., 92 U. S.

But when such map has been filed, a grant of lands within place limits becomes specific and attaches to all the odd sections situated within such limits on each side of the designated line, and thereafter the lands included cannot be applied to any other purpose by the government, or appropriated to claims of private parties.¹

License by State to Purchase. — And it has been held that a state, in granting such lands to railroads, has power to provide that those who at a designated date resided upon or cultivated any improvement upon any of it shall be allowed to purchase a designated number of acres to include the improvement, at a specified price per acre.²

Meaning of "Claims" and "Rights." — The favor shown to settlers upon public lands has led to a broad and liberal construction of the word "claims" or "rights" in such acts. Thus, it has been held that when on the records of the local land office there is an existing claim on the part of an individual under the homestead or pre-emption law which has been recognized by the officers of the government and has not been canceled or set aside, the tract in respect of which that claim exists is excepted from the operations of a railroad land grant containing the ordinary exception clauses, and this notwithstanding the fact that such claim may not be enforceable by the claimant and is subject to cancellation by the government at its own suggestion or upon the application of other parties.³ But such exception does not operate in favor of a sham or fraudulent homestead claim or erroneous entry, and the lands covered by such pretended rights will pass by the grant to the railroad company.⁴

Meaning of "Attached." — It is held that the word "attached," in grants excepting lands to which homestead or pre-emption rights have attached, does not mean mere settlement, residence, or cultivation of the land, but imports a proceeding in the proper land office by which an inchoate right to the land is initiated — a right which may ripen into a perfect title by future residence and cultivation. And where such a right has attached, the land is excluded

733; *Newhall v. Sanger*, 92 U. S. 761; *Doolan v. Carr*, 125 U. S. 618; *U. S. v. McLaughlin*, 127 U. S. 428; *Cameron v. U. S.*, 148 U. S. 301; *Carr v. Quigley*, 149 U. S. 652; *U. S. v. Northern Pac. R. Co.*, 152 U. S. 284; *Northern Pac. R. Co. v. Sanders*, 166 U. S. 620; *U. S. v. Oregon*, etc., R. Co., 176 U. S. 28; *Hewitt v. Schultz*, 180 U. S. 139; *Northern Pac. R. Co. v. Hinchman*, 53 Fed. Rep. 523.

1. Grant to Railroad Excludes Private Claims — United States. — *Platt v. Union Pac. R. Co.*, 99 U. S. 48; *Wood v. Burlington*, etc., R. Co., 104 U. S. 329; *Wood v. Beach*, 156 U. S. 548; *Southern Pac. R. Co. v. Orton*, 6 Sawy. (U. S.) 158; *Sanger v. Sargent*, 8 Sawy. (U. S.) 93, 21 Fed. Cas. No. 12,319.

California. — *Southern Pac. R. Co. v. Garcia*, 64 Cal. 515; *McLaughlin v. Menotti*, 89 Cal. 354; *Sousa v. Pereira*, 132 Cal. 77.

Dakota. — *Northern Pac. R. Co. v. Peronto*, 3 Dak. 217.

Iowa. — *Blair Town Lot*, etc., *Co. v. Kitteringham*, 43 Iowa 462; *Burlington*, etc., R. Co. v. *Lawson*, 58 Iowa 145.

Kansas. — *Atchison*, etc., R. Co. v. *Bobb*, 24 Kan. 673; *Atchison*, etc., R. Co. v. *Rockwood*, 25 Kan. 292; *Wood v. Beach*, 43 Kan. 427.

Minnesota. — *Winona*, etc., R. Co. v. *Randall*, 39 Minn. 283; *Weeks v. Bridgman*, 46 Minn. 290, *affirming* 41 Minn. 352.

Nebraska. — *Vance v. Burlington*, etc., R. Co., 12 Neb. 285.

New Mexico. — *Atlantic*, etc., R. Co. v. *Mingus*, 7 N. Mex. 360.

Texas. — *Kuechler v. Wright*, 40 Tex. 600.

The history of reservation clauses in land-grant acts was discussed in *U. S. v. Missouri*, etc., R. Co., 141 U. S. 358, where it was said that the manifest object of such general reservations was to exclude from a particular grant all lands previously reserved to the United States for any specific object whatever, thereby enabling the government to accomplish that object without confusion or conflict in the administration of the public domain and thus to keep faith with those for whose benefit prior grants were made.

2. License by State to Purchase. — *Little Rock*, etc., R. Co. v. *Howell*, 31 Ark. 119.

3. Meaning of "Claims" and "Rights" — United States. — *Sioux City*, etc., *Town Lot*, etc., *Co. v. Griffey*, 143 U. S. 32; *Whitney v. Taylor*, 158 U. S. 92; *Northern Pac. R. Co. v. McCormick*, (C. C. A.) 94 Fed. Rep. 932, *affirming* 89 Fed. Rep. 659. But see *De Lacey v. Northern Pac. R. Co.*, (C. C. A.) 72 Fed. Rep. 726, *reversing* *Northern Pac. R. Co. v. De Lacey*, 174 U. S. 622.

Kansas. — *Fearns v. Atchison*, etc., R. Co., 33 Kan. 275.

Minnesota. — *St. Paul*, etc., R. Co. v. *Ward*, 47 Minn. 40.

Nebraska. — *Burlington*, etc., R. Co. v. *Abink*, 14 Neb. 95 (fully stated under CLAIM, vol. 6, p. 104, note).

4. Sham Claims and Erroneous Entries. — *Union Pac. R. Co. v. Watts*, 2 Dill. (U. S.) 310; *Wright v. Gish*, 94 Mo. 110.

from the grant although the claimant subsequently fails to perform the conditions and to perfect his title, but abandons the premises,¹ or the entry is canceled.²

Extension of Time for Completing Road. — Where railroad companies have failed to complete their railroads within the time originally allowed, and Congress has extended the time, the rights of settlers and other grantees acquired during the intervening period have been protected, sometimes by the act of extension and sometimes by judicial construction.³

Canal and Ditch Claims. — The rights of those who have constructed canals and ditches over public lands to be used in mining or for irrigation purposes are within the claims designated by such acts.⁴

Indian Reservations. — And lands which have been withdrawn from sale awaiting the President's decision as to whether they should be set aside as an Indian reservation are not within a grant of public lands to a railroad.⁵

b. WITHIN INDEMNITY LIMITS. — As hereinbefore shown, the rights of a settler on indemnity lands are superior to those of the railroad until the latter has made a selection from the indemnity limits.⁶ Such settler, however, in order further to protect his title, must comply with all the requirements of a *bona fide* settlement.⁷

What Indemnity Clause Covers. — The encouragement of settlement by aid in the construction of railways is not intended to interfere with the policy of encouraging such settlement by sales of the land or grants of pre-emption rights. It has been held, therefore, that the indemnity clause in a land-grant act covered losses from the grant by reason of sales and the attachment of pre-emption rights prior to the date of the act as well as by reason of sales and the attachment of pre-emption rights between that date and the final determination of the route of the road.⁸

Entry Prior to Survey. — If a qualified entryman has made a settlement upon indemnity lands prior to their survey, he may subsequently, when a survey has been made, enter the lands under the homestead laws, and his rights are then superior to those acquired by the railroad company under any selection by it made after the date of such settlement;⁹ and this although it may be subsequently ascertained that all the lands within the indemnity limits are

1. **Meaning of "Attached."** — *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 629; *McIntyre v. Roeschlaub*, 37 Fed. Rep. 556; *Nelson v. Northern Pac. R. Co.*, 188 U. S. 108; *McLaughlin v. Menotti*, 89 Cal. 354; *Brown v. Corson*, 16 Oregon 388. See also **ATTACH**, vol. 3, p. 180, note. But see *U. S. v. Northern Pac. R. Co.*, 103 Fed. Rep. 389; *Chicago, etc., R. Co. v. U. S.*, (C. C. A.) 108 Fed. Rep. 311; *Southern Pac. R. Co. v. Purcell*, 77 Cal. 69; *Central Pac. R. Co. v. McCann*, 126 Cal. 553; *Winona, etc., Land Co. v. Ebelcisor*, 52 Minn. 312; *Tarpey v. Madsen*, 17 Utah 352.

2. *Hastings, etc., R. Co. v. Whitney*, 132 U. S. 357; *Bardon v. Northern Pac. R. Co.*, 145 U. S. 535; *McIntyre v. Roeschlaub*, 37 Fed. Rep. 556. See also *Sioux City, etc., Town Lot, etc.*, 55 U. S. Griffee, 143 U. S. 32.

It has been held, however, that under the second section of the Act of July 14, 1870, requiring claimants of pre-emption rights to make proper proof and payment within eighteen months after filing their declaratory notices, and under the joint resolution of March 3, 1871, allowing twelve months additional for the purpose, if proof and payment were not made within the thirty months, the original claim was canceled by operation of law and required

no cancellation on the records of the land office to carry the forfeiture into effect. *Northern Pac. R. Co. v. De Lacey*, 174 U. S. 622, distinguishing *Whitney v. Taylor*, 158 U. S. 85. See also *Oregon, etc., R. Co. v. U. S.*, 190 U. S. 192. And see *supra*, this title, *Bounty and Donation Lands — Oregon Donation Act*.

3. **Extension of Time.** — *St. Paul, etc., R. Co. v. Greenalgh*, 139 U. S. 19; *South, etc., Alabama R. Co. v. Gilliam*, 85 Ala. 171.

4. **Canal and Ditch Claims.** — *Broder v. Natoma Water, etc., Co.*, 101 U. S. 274. And see the title **MINES AND MINING CLAIMS**, vol. 20, p. 700, note 1.

5. **Indian Reservations.** — *Northern Pac. R. Co. v. Maclay*, (C. C. A.) 61 Fed. Rep. 554.

6. **Within Indemnity Limits.** — See *supra*, this section, *Title of Railroads — Time of Vesting — As to Indemnity Lands*.

7. **Duty of Settler.** — *McHenry v. Nygaard*, 72 Minn. 2; *Sjoli v. Dreschel*, (Minn. 1903) 95 N. W. Rep. 763.

8. **What Indemnity Clause Covers.** — *Winona, etc., R. Co. v. Barney*, 113 U. S. 618; *Wisconsin Cent. R. Co. v. Price County*, 133 U. S. 496.

9. **Entry Prior to Survey.** — *Nelson v. Northern Pac. R. Co.*, 188 U. S. 108; *Oregon, etc., R. Co. v. U. S.*, 189 U. S. 103.

required to supply the deficit in place limits.¹

No Entry While Deficit Exists. — But the secretary cannot allow such entry so long as a deficit in such lands exists.²

Railroad Must Favor Settler. — It has been held, however, where there was a conflict between the railroad and the settler, that if there were other lands from which the railroad could secure its indemnity, it could not in equity hold the land in dispute against such settler.³

6. Selection of Lands by Railroad — *a. IN PLACE LIMITS* — (1) *Location.* — As soon as the railroad company has earned lands by the construction of its road, the right of selection of such lands vests in the company.⁴

One-half to Be Taken on Each Side. — It is usually contemplated by the act making the grant that one-half of the land shall be selected on either side of the road, and the department cannot enlarge the quantity on one side to make up a deficiency on the other.⁵

Within Given Distance. — Ordinarily it is provided that the selection shall be made from certain specified sections within a given distance of the line of the road as constructed, and where there is no such express limitation of the distance from the road, it is implied that the selection shall be made of alternate sections nearest the road. But the company is not at liberty to pass beyond land open to appropriation and to take lands further removed from the road.⁶

Selection by Numbers. — No specific selection of the sections by numbers is requisite where it is otherwise certain that a grant of specified land was intended, the definite location of the line of the road being sufficient to render a grant effective against subsequently acquired interests.⁷

Where, However, the Grant Is One of Quantity, and there is no limitation of distance within which the selection is to be made, the court can make none, and the grantee may, it seems, in such a case select its land at any distance from and at right angles to the line.⁸

Selection When Road Is Completed. — It has been held, moreover, that the railroad company is not bound to apply for its patents by sections, but may await the final completion of the road and occupy all the lands to which it is entitled at the same time.⁹

At Right Angle to Road. — Neither is the road restricted to sections situated on lines at right angles to the general line of the road, where in consequence of turns or changes of construction, such a mode of selection would cause an overlapping on one side and leave a vacancy on the other.¹⁰

(2) *Quantity.* — In determining the quantity of land to which a railroad is entitled Congress has usually measured the amount by the length of the road as actually constructed, and not by its length as originally located.¹¹

Where Grant Is Enlarged. — Where Congress by a subsequent grant enlarges an original grant, the former acts must then be read as though the larger numbers had been originally inserted in it.¹² Sometimes the grant is of land in place, and not in quantity; ¹³ but where the grant is of quantity, the grantee

1. Oregon, etc., R. Co. v. U. S., 189 U. S. 103. But see Southern Pac. R. Co. v. Araiza, 57 Fed. Rep. 98.

2. **No Entry While Deficit Exists.** — Southern Pac. R. Co. v. Wiggs, 14 Sawy. (U. S.) 568, 159 U. S. 269.

3. **Railroad Must Favor Settler.** — Cedar Rapids, etc., R. Co. v. Jewell, 61 Iowa 415.

4. **Selection of Lands in Place Limits.** — Johnson v. Ballou, 28 Mich. 379; Jackson, etc., R. Co. v. Davison, 65 Mich. 416.

5. **One-half to Be Taken on Each Side.** — U. S. v. Burlington, etc., R. Co., 98 U. S. 334; Southern Pac. R. Co. v. Smith, 74 Fed. Rep. 588.

6. **Within Given Distance.** — Wood v. Burlington, etc., R. Co., 104 U. S. 329; Wisconsin Cent. R. Co. v. Forsythe, 159 U. S. 55.

7. **Selection by Numbers.** — Vance v. Burlington, etc., R. Co., 12 Neb. 285.

8. **Grant of Quantity.** — U. S. v. Burlington, etc., R. Co., 98 U. S. 334; Wood v. Burlington, etc., R. Co., 104 U. S. 329.

9. **Selection When Road Is Completed.** — U. S. v. Burlington, etc., R. Co., 98 U. S. 334; Wood v. Burlington, etc., R. Co., 104 U. S. 329.

10. **At Right Angle to Road.** — U. S. v. Union Pac. R. Co., 148 U. S. 562.

11. **Quantity.** — Cedar Rapids, etc., R. Co. v. Herring, 110 U. S. 27.

12. **Where Grant Is Enlarged.** — U. S. v. Burlington, etc., R. Co., 98 U. S. 334; Kansas Pac. R. Co. v. Atchison, etc., R. Co., 112 U. S. 414.

13. Winona, etc., R. Co. v. Barney, 113 U. S. 618.

is entitled to the full complement of the designated number of sections per mile, provided such sections can be found within either the place limits or the indemnity limits.¹

No Guaranty of Quantity. — Where lands are granted by sections the United States does not undertake that such sections shall contain any given number of acres, and where the statute confers new lands in place of those sold or reserved, the selection to be made from other public lands is limited to the quantity of land actually in the sections so sold or reserved.²

Mode of Measurement. — Where a question arises between the United States and the railroad as to the quantity, the latest official measurement of the area may be accepted by the court as the best, if not conclusive, evidence of the quantity.³

(3) *Sidetracks, Branches, and Extensions.* — The question whether, in the selection of the quantity of land to which a railroad is entitled, sidetracks may be counted as a part of such road depends on the construction of the particular statute.⁴ An act extending the lateral limitations of selection from ten to twenty miles has been held to apply as well to the branches which were authorized by the former act as to the main line of the road.⁵ In the construction of other acts, switches and sidetracks have not been counted.⁶

(4) *Lands in Another State.* — It seems to be conceded that Congress has power to grant to a state lands in another state or territory to aid in the construction of a railroad within the limits of the former.⁷ But it has been held that an act granting alternate sections of public lands in the state of Alabama did not apply to that part of the road constructed in the state of Georgia, although the Alabama lands were located within the prescribed distance of such portion of the road.⁸

(5) *Mineral Lands.* — It has been held that the grant which excluded from its operation and reserved to the United States all mineral lands other than iron or coal operated to exclude all such mineral lands, whether known or not known to be such at the time of location of the road.⁹

b. IN INDEMNITY LIMITS. — Some of the acts granting lands to railroads have restricted the selection of indemnity lands to alternate sections or parts of sections contiguous to the tier of sections in the place limitations. Others have restricted the selection of such lands to the odd-numbered sections.¹⁰

1. *Southern Pac. R. Co. v. Wiggs*, 14 Sawy. (U. S.) 568.

2. **No Guaranty of Quantity.** — *Sioux City, etc., R. Co. v. U. S.*, 159 U. S. 349.

Where a grant to a railroad company was of twenty alternate sections per mile in a territory and of ten alternate sections per mile in a state, it was held that if the road was located within the territory, but so near the border thereof that part of the twenty alternate sections would extend into an adjoining state, the company was nevertheless entitled to the full width of twenty sections. *Denny v. Dodson*, 13 Sawy. (U. S.) 68, 32 Fed. Rep. 899.

3. **Mode of Measurement.** — *Sioux City, etc., R. Co. v. U. S.*, 159 U. S. 349.

4. **Sidetracks, Branches, and Extensions.** — *Houston, etc., R. Co. v. Texas*, 170 U. S. 243; *State v. Houston, etc., R. Co.*, (Tex. 1902) 68 S. W. Rep. 777.

5. **Branches Included in Grant.** — *Sioux City, etc., R. Co. v. Union Pac. R. Co.*, 4 Dill. (U. S.) 307; *Kansas Pac. R. Co. v. Prescott*, 16 Wall. (U. S.) 603.

It has been held that a branch road and a completed portion of the main road were to be taken separately and the limits of the grant

measured at right angles from each of these separate lines. *U. S. v. Oregon, etc., R. Co.*, 164 U. S. 526.

6. **Branches, etc., Excluded.** — *Galveston, etc., R. Co. v. State*, 81 Tex. 572.

7. **Lands in Another State.** — *St. Paul, etc., R. Co. v. Phelps*, 137 U. S. 528.

8. *Anderson v. Howard*, (C. C. A.) 69 Fed. Rep. 84; *Swann v. Jenkins*, 82 Ala. 478.

9. **Mineral Lands.** — *Barden v. Northern Pac. R. Co.*, 154 U. S. 288. As to the reservation of mineral lands from railroad grants, see generally the title MINES AND MINING CLAIMS, vol. 20, p. 690.

10. **In Indemnity Limits.** — *U. S. v. Missouri, etc., R. Co.*, 141 U. S. 358.

Must Be Coterminous. — It has been held, however, that the selection of indemnity lands must be made on the coterminous principle and that the company constructing any given section of the road could not supply deficiencies from the indemnity lands along some other part constructed by a different company, unless the right had been given by some prior act. *Madison, etc., R. Co. v. Wisconsin*, 16 Fed. Cas. No. 8,938.

When Selection Is Unnecessary. — Where a de-

Approval by Secretary.—The necessity of approval by the secretary of the interior of the selections as made by the railroad company depends on the language of the statute under which the land is claimed. Some of the statutes have been construed to make the approval of the secretary of the interior a condition precedent to the passing of the title to the railroad company,¹ while under other statutes it has been held that the title to the selected lands would vest in the railroad without the approval of the secretary.²

If the Railroad Selects More Land than it is properly entitled to it seems that the excess will revert to the state.³

c. SWAMP LANDS.—The Act of Congress of September 28, 1850, granting to the several states swamp and overflowed lands provided that all legal subdivisions the greater part of which was wet and unfit for cultivation should be included, but excluded all subdivisions the greater part of which was not of that character. Such grant was a grant *in presenti*, and although the land has not been selected and reported to the land department, it is excluded from railroad grants which except from their operation lands reserved by competent authority for any other purpose whatever.⁴

7. Conflicting Grants — Priority.—It has happened not infrequently that the grants to two distinct railroad companies overlap, or that two companies claim the same land by two distinct grants of different dates. The rights of contesting corporations to disputed tracts in the latter case are determined by the dates of their respective grants, and not by the dates of the location of the routes of their respective roads.⁵

deficiency within the granted limits was so great that all the indemnity lands would not make good the loss, it was held, in a contest between two railroad companies, that no formal selection was necessary to give such indemnity lands to the one having the older grant. *St. Paul, etc., R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1; *U. S. v. Colton Marble, etc., Co.*, 146 U. S. 615.

1. Approval by Secretary.—*Davis v. Capitol Phosphate Co.*, (C. C. A.) 57 Fed. Rep. 118; *Resser v. Carney*, 52 Minn. 397; *Grandin v. La Bar*, 3 N. Dak. 447.

The secretary is not authorized to approve a selection of indemnity lands until evidence is furnished that there is a deficiency in the place limits. *Southern Pac. R. Co. v. Wood*, 124 Cal. 475; *Elling v. Thexton*, 7 Mont. 330; *Moore v. Cormode*, 20 Wash. 305.

Secretary Acts Judicially in Approving Selection.—*Southern Pac. R. Co. v. Wood*, 124 Cal. 475. *Wisconsin Cent. R. Co. v. Price County*, 133 U. S. 496.

And his decision, when made, is presumed to be correct and must be relied upon in a collateral attack upon the title of the road to the lands selected. *Northern Pac. R. Co. v. Colburn*, 164 U. S. 383, 13 Mont. 476; *Howell v. Killie*, 17 Colo. 88; *Rierson v. St. Louis, etc., R. Co.*, 59 Kan. 32; *Tillotson v. Webber*, 96 Mich. 144; *Quinlan v. Houston, etc., R. Co.*, 89 Tex. 356.

2. Approval of Secretary Not Necessary.—*Groeck v. Southern Pac. R. Co.*, (C. C. A.) 102 Fed. Rep. 32; *Chicago, etc., R. Co. v. Lewis*, 53 Iowa 101; *McHenry v. Nygaard*, 72 Minn. 2; *Northern Pac. R. Co. v. Barnes*, 2 N. Dak. 310.

3. Excessive Selection.—*Galveston, etc., R. Co. v. State*, 81 Tex. 572.

4. Swamp Lands.—*Burlington, etc., R. Co. v. Fremont County*, 6 Wall. (U. S.) 80; *Hannibal, etc., R. Co. v. Smith*, 9 Wall. (U. S.) 95, *Clifford, J., dissenting*; *Buena Vista County v. Iowa*

Falls, etc., R. Co., 112 U. S. 165; *Chism v. Price*, 54 Ark. 251; *Hannibal, etc., R. Co. v. Snead*, 65 Mo. 239.

In *St. Paul, etc., R. Co. v. Brown*, 24 Minn. 518, it was held that whether a grant of swamp lands to a railroad was or was not a present grant, it was good as an executory contract to convey, even though it might have been at first without mutuality of consideration.

Selection May Be from Any State Lands.—*St. Paul, etc., R. Co. v. Brown*, 24 Minn. 517.

In Case of Conflict.—Where the state granted swamp lands to two railroad companies, in the one case to be selected from lands anywhere in the state, in the other to be selected from swamp lands in three counties named, it was held that if there was not enough swamp land in the three counties to fill the latter grant, and there was enough outside those three counties to fill the former grant, the state might not appropriate to the latter lands in those counties to the diminution of the former grant. *Minneapolis, etc., R. Co. v. Duluth, etc., R. Co.*, 45 Minn. 104.

5. Priority Between Conflicting Grants — United States.—*Missouri, etc., R. Co. v. Kansas Pac. R. Co.*, 97 U. S. 491; *St. Paul, etc., R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1; *U. S. v. Southern Pac. R. Co.*, 146 U. S. 570; *U. S. v. Colton Marble, etc., Co.*, 146 U. S. 615; *U. S. v. Northern Pac. R. Co.*, 152 U. S. 284; *Wisconsin Cent. R. Co. v. Forsythe*, 159 U. S. 46; *U. S. v. Oregon, etc., R. Co.*, 176 U. S. 28; *Wilcox v. Eastern Oregon Land Co.*, 176 U. S. 51; *Messinger v. Eastern Oregon Land Co.*, 176 U. S. 58; *Madison, etc., R. Co. v. Wisconsin*, 16 Fed. Cas. No. 8,938.

California.—*Forrester v. Scott*, 92 Cal. 398; *San Jose Land, etc., Co. v. San Jose Ranch Co.*, 129 Cal. 673; *Owen v. Pomona Land, etc., Co.*, 131 Cal. 530.

Kansas.—*Herrington v. Clark*, 56 Kan. 644.

Overlapping Grants. — It is well settled that when by the same statute several grants are made for the benefit of different railroads, neither priority of location nor priority of construction gives priority of right; but where two or more roads legally located in pursuance of the act cross each other or approach each other so nearly that the limits of the primary grant for the benefit of each overlap, the grant is of equal undivided shares for the benefit of each road.¹ Where rights acquired under prior grants have been transferred to another company for whose benefit subsequent grants were made, such grants have been construed together as constituting a single grant, and not as overlapping grants.²

8. Right of Railroad to Mortgage Lands Granted. — A railroad company may mortgage land granted to it by the state to secure the state for guaranteeing bonds.³ But a company to which Congress has made a grant of lands has no title to lands within the place limits which it can mortgage before the line is definitely fixed, and none to lands within the indemnity limits until its specific parcels have been selected and the selections have been approved by the secretary of the interior.⁴

Power to Sell Not Included. — Where a grant of land includes power to mortgage it to aid in the construction of the road, power to sell such land is not implied in the power to mortgage.⁵ A railroad cannot sell land located beyond the limits to which the road has been constructed, but where the vendee takes possession and holds it undisturbed, the burden is on him, in a suit by the railroad to enforce a vendor's lien on the land, to show want of power in the railroad to sell.⁶

9. Right of Way over Public Lands — *a.* **MEANING OF RIGHT OF WAY.** — As applied to a railroad, the phrase "right of way" does not generally mean the mere intangible right to cross some one else's land, but signifies that strip which the railroad company appropriates for its use and upon which it builds its roadbed. It is used to specify not an incorporeal, but a corporeal, hereditament.⁷ Where, however, a statute granted "ground adjacent to such right of way for station buildings, etc.," the distinction between the right of way and such buildings seems to have been in mind; and it was held that no ground for station buildings, etc., attached until the right of way was secured by the performance by the railroad of all conditions precedent, such as filing with the land office a profile of its road, etc.⁸

Minnesota. — Minneapolis, etc., R. Co. v. Duluth, etc., R. Co., 45 Minn. 104.

Texas. — Houston, etc., R. Co. v. State, 24 Tex. Civ. App. 117; Jumbo Cattle Co. v. Bacon, 79 Tex. 5.

1. Overlapping Grants. — Sioux City, etc., R. Co. v. U. S., 159 U. S. 349; Chicago, etc., R. Co. v. U. S., 159 U. S. 372; Sioux City, etc., R. Co. v. Countryman, 159 U. S. 377; Madison, etc., R. Co. v. Wisconsin, 16 Fed. Cas. No. 8,938; St. Paul, etc., R. Co. v. Winona, etc., R. Co., 112 U. S. 720; Sioux City, etc., R. Co. v. Chicago, etc., R. Co., 117 U. S. 406; Sioux City, etc., R. Co. v. Union Pac. R. Co., 4 Dill. (U. S.) 307; Southern Pac. R. Co. v. U. S., 183 U. S. 519; Donahue v. Lake Superior Ship Canal R., etc., Co., 155 U. S. 386; McCarver v. Herzberg, 120 Ala. 523.

2. Kansas City, etc., R. Co. v. Atty.-Gen., 118 U. S. 682.

3. Right of Railroad to Mortgage Lands Granted. — Wilson v. Beckwith, 140 Mo. 359.

4. New Orleans Pac. R. Co. v. Parker, 143 U. S. 42.

5. Power to Sell Not Included. — Southern Pac. R. Co. v. Esquibel, 5 N. Mex. 123. See also

Atlantic, etc., R. Co. v. Mingus, 7 N. Mex. 360.

6. Mathis v. Tennessee, etc., R. Co., 83 Ala. 411.

7. Meaning of "Right of Way." — Joy v. St. Louis, 138 U. S. 1; New Mexico v. U. S. Trust Co., 172 U. S. 171; Keener v. Union Pac. R. Co., 31 Fed. Rep. 126; Southern Pac. R. Co. v. Burr, 86 Cal. 279; Smith v. Hall, 103 Iowa 95; Hazen v. Boston, etc., R. Co., 2 Gray (Mass.) 574; New York, etc., R. Co. v. Trimmer, 53 N. J. L. 1. See also Jamaica Pond Aqueduct Corp. v. Chandler, 9 Allen (Mass.) 159. And see RIGHT OF WAY, vol. 24, p. 968.

What Included in Exemption of Right of Way from Taxation. — See the title EXEMPTIONS (FROM TAXATION), vol. 12, p. 366.

Statutes Granting a Right of Way for the Construction of "Highways" across public land have been held to include railways. Tennessee, etc., R. Co. v. Taylor, 102 Ala. 224; Flint, etc., R. Co. v. Gordon, 41 Mich. 420. But see Burlington, etc., R. Co. v. Johnson, 38 Kan. 142.

8. Lilienthal v. Southern California R. Co., 56 Fed. Rep. 701, construing Act Cong. March 3. 1875.

b. NATURE OF GRANT — (1) *In General*. — Grants of rights of way to railroads are conferred either by a special statute granting rights to a specific railroad by name or by general statutes conferring rights upon any and all railroads which shall thereafter elect to take advantage thereof; and this classification serves to indicate the nature of the grant in each case.

(2) *Grant to Named Railroad*. — It is the general rule that the grant of a right of way to a specially named railroad is a grant *in presenti* and imports an immediate transfer of interest, so that when precision is acquired by the location of the line of road and the lands are indicated by the proper certificate, such indication and certification relate back to the date of the original grant, and the beneficiary company takes title as of that date. It follows that all persons acquiring any interests in public land after the passage of the act in question take them subject to the right of way conferred by it upon the proposed road.¹

(3) *Grant by General Statute*. — The chief general statute granting a right of way to railroads is that of March 3, 1875.² In view of the doctrine that an existing grantee is essential to the creation of a present grant, it has been held that the Act of 1875 was not in the nature of an absolute grant *in presenti*, but was rather an offer to all railroad companies, and took effect as a grant to any particular company only when the latter had complied with the provisions of the act by locating its road and filing a profile thereof in the land office.³

Right of State over United States Lands. — It has been held that the states have the power to grant rights of way over public lands of the United States lying within their domain.⁴

c. NATURE OF TITLE. — While some doubt upon the subject seems to be indicated in some of the cases, it appears to be the well-settled rule that Congress, in the various acts granting a right of way, intended to confer upon the grantee not a fee of the land included within the right of way, but only an easement therein.⁵

Right Is Exclusive. — The right acquired is, however, exclusive in its character, and a railroad may recover in ejectment the possession of a portion of a right of way from one who has wrongfully entered thereupon.⁶

1. Grants to Named Railroad — *United States*. — *Hannibal, etc., R. Co. v. Smith*, 9 Wall. (U. S.) 95; *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44; *Central Pac. R. Co. v. Dyer*, 1 Sawy. (U. S.) 641; *Leavenworth, etc., R. Co. v. U. S.*, 92 U. S. 733; *Missouri, etc., R. Co. v. Kansas Pac. R. Co.*, 97 U. S. 491; *Denver, etc., R. Co. v. Alling*, 99 U. S. 463; *St. Joseph, etc., R. Co. v. Baldwin*, 103 U. S. 426; *Winona, etc., R. Co. v. Barney*, 113 U. S. 626; *Bybee v. Oregon, etc., R. Co.*, 139 U. S. 663; *Noble v. Union River Logging R. Co.*, 147 U. S. 165; *Missouri, etc., R. Co. v. Cook*, 163 U. S. 491; *Jamestown, etc., R. Co. v. Jones*, 177 U. S. 125; *Union Pac. R. Co. v. Douglas County*, 31 Fed. Rep. 540.

Minnesota. — *Simonson v. Thompson*, 25 Minn. 450; *Tuttle v. Chicago, etc., R. Co.*, 61 Minn. 190.

Montana. — *Wilkinson v. Northern Pac. R. Co.*, 5 Mont. 538.

Nebraska. — *Rider v. Burlington, etc., R. Co.*, 14 Neb. 120.

Oklahoma. — *Churchill v. Choctaw R. Co.*, 4 Okla. 462.

2. Grant by General Statute. — 18 U. S. Stat. at L. 482, c. 152.

3. St. Joseph, etc., R. Co. v. Baldwin, 103 U. S. 426; *Spokane Falls, etc., R. Co. v. Ziegler*, 15 U. S. App. 472; *Denver, etc., R. Co. v. Wil-*

son, 28 Colo. 6; *Chicago, etc., R. Co. v. Van Cleave*, 52 Kan. 666; *Red River, etc., R. Co. v. Sture*, 32 Minn. 95; *Radke v. Winona, etc., R. Co.*, 39 Minn. 262.

The Act of 1866, granting a right of way for the construction of highways over public lands, has been held to be a grant *in presenti* which, when accepted by the territory of *Dakota*, took effect as of the date of the grant. *Walcott Tp. v. Skauge*, 6 N. Dak. 382.

4. Right of State over United States Lands. — *U. S. v. Railroad Bridge Co.*, 6 McLean (U. S.) 517, 27 Fed. Cas. No. 16,114, cited with apparent approval in *Flint, etc., R. Co. v. Gordon*, 41 Mich. 420. But see *Pratt v. Brown*, 3 Wis. 620.

5. Nature of Title. — *Northern Pac. R. Co. v. Townsend*, 190 U. S. 267, reversing 84 Minn. 152, followed in *McLucas v. St. Joseph, etc., R. Co.*, (Neb. 1903) 97 N. W. Rep. 312; *Missouri, etc., R. Co. v. Roberts*, 152 U. S. 114, explained in *Mercantile Trust Co. v. Atlantic, etc., R. Co.*, 63 Fed. Rep. 910; *Bell v. Atlantic, etc., R. Co.*, (C. C. A.) 63 Fed. Rep. 417; *Atlantic, etc., R. Co. v. Lesueur*, (Ariz. 1888) 19 Pac. Rep. 157; *Southern Pac. R. Co. v. Burr*, 86 Cal. 279; *Williams v. Western Union R. Co.*, 50 Wis. 71.

6. Right Exclusive. — *Central Pac. R. Co. v. Benity*, 5 Sawy. (U. S.) 118; *Denver, etc., R. Co. v. Alling*, 99 U. S. 463.

Title by Estoppel. — Where a claimant of lands within a right of way has stood by for years and permitted the company to construct its road at a great expense, he is estopped from interfering with the possession of the railroad company.¹

d. CONDITIONS PRECEDENT TO VESTING OF TITLE. — It is usually provided in grants of right of way that the right shall become perfect upon the filing of a profile of the road and its approval by the secretary of the interior.²

The Duty of Filing the Profile with the register of the land office is one which the act imposes upon the railroad company, and not upon the contractor who builds it. The Act of 1875 provides further that there shall be filed with the secretary of the interior a copy of the company's articles of incorporation and due proofs of its organization.³

e. RIGHT OF WAY THROUGH CANYONS. — Construing the Act of March 3, 1875, granting to all railroads in common a right of way through canyons and narrow defiles and passes,⁴ it has been held that two conflicting claimants to such right of way should be allowed to proceed with the construction of railroads through the canyons where broad enough; and where not, that both the plaintiff and the defendant should use the same roadbed and track.⁵

f. OVER SCHOOL LANDS. — Although Congress has authorized the future state government to reserve certain sections for school purposes, Congress may, before the state makes such reservation, grant a right of way over those sections.⁶

g. RIGHTS AS AGAINST SETTLERS. — Since the title of the road does not vest until the conditions specified have been complied with, it follows that the railroad takes title subject to any rights of settlers which have attached prior to the full performance of such conditions, and must purchase its right of way from the owners of such rights.⁷ But a settler who claims rights superior to a railroad must himself have performed everything necessary to perfect his rights under the homestead and pre-emption laws.⁸

h. CHANGE OF LOCATION. — A railroad company is at liberty to change

1. **Title by Estoppel.** — *Roberts v. Northern Pac. R. Co.*, 158 U. S. 1; *South, etc., Alabama R. Co. v. Alabama G. S. R. Co.*, 102 Ala. 236; *Louisville, etc., R. Co. v. Beck*, 119 Ind. 124; *State v. New Orleans, etc., R. Co.*, 104 La. 685; *Scarritt v. Kansas City, etc., R. Co.*, 127 Mo. 298; *Chicago, etc., R. Co. v. Englehart*, 57 Neb. 444; *Taylor v. Chicago, etc., R. Co.*, 63 Wis. 327. See also *Seattle v. Columbia, etc., R. Co.*, 6 Wash. 379. Such a case does not rest upon the ordinary doctrine of estoppel, however, but the great principle of public policy enters as an important factor and controls the judgment of the court. *Indiana, etc., R. Co. v. Allen*, 113 Ind. 581.

2. **Filing Profile as Condition Precedent to Vesting of Title.** — *Northern Pac. R. Co. v. Murray*, (C. C. A.) 87 Fed. Rep. 648; *Western Pac. R. Co. v. Tevis*, 41 Cal. 489; *Kinion v. Kansas City, etc., R. Co.*, 118 Mo. 577; *Larsen v. Oregon R., etc., Co.*, 19 Oregon 240; *Rio Grande Western R. Co. v. Telluride Power, etc., Co.*, 16 Utah 136.

Contractor Not Required to File Map. — *Fitzgerald v. Missouri Pac. R. Co.*, 45 Fed. Rep. 812.

3. **Filing Articles of Incorporation.** — *Washington, etc., R. Co. v. Coeur D'Alene R., etc., Co.*, 160 U. S. 77; *Denver, etc., R. Co. v. Hanoum*, 19 Colo. 162; *Kinion v. Kansas City, etc., R. Co.*, 118 Mo. 577; *Larsen v. Oregon R., etc., Co.*, 19 Oregon 240.

4. **Right of Way through Canyons.** — 18 U. S. Stat. at L. 482, c. 152.

5. *Denver, etc., R. Co. v. Alling*, 99 U. S. 463.

6. **Over School Lands.** — *Union Pac. R. Co. v. Douglas County*, 31 Fed. Rep. 540; *Coleman v. St. Paul, etc., R. Co.*, 38 Minn. 260; *Radke v. Winona, etc., R. Co.*, 39 Minn. 262. But see *Texas Cent. R. Co. v. Bowman*, (Tex. Civ. App. 1903) 75 S. W. Rep. 556.

7. **Rights as Against Settlers.** — *Alabama.* — *Alabama, etc., R. Co. v. Burkett*, 46 Ala. 569.

California. — *California Northern R. Co. v. Gould*, 21 Cal. 255; *Western Pac. R. Co. v. Tevis*, 41 Cal. 489.

Colorado. — *Denver, etc., R. Co. v. Wilson*, 28 Colo. 6.

Kansas. — *Chicago, etc., R. Co. v. Van Cleave*, 52 Kan. 666; *Rierson v. St. Louis, etc., R. Co.*, 59 Kan. 32.

Minnesota. — *Red River, etc., R. Co. v. Sture*, 32 Minn. 95.

Missouri. — *Alexander v. Kansas City, etc., R. Co.*, 138 Mo. 464.

North Dakota. — *Jamestown, etc., R. Co. v. Jones*, 7 N. Dak. 619.

Washington. — *Pennsylvania Min., etc., Co. v. Everett, etc., R. Co.*, 29 Wash. 102.

8. **Settler Must Complete Title.** — *Western Pac. R. Co. v. Tevis*, 41 Cal. 489; *Hamilton v. Spokane, etc., R. Co.*, 2 Idaho 898; *Lewis v. Rio Grande Western R. Co.*, 17 Utah 504;

the location of its line and to appropriate a new right of way if it may do so without infringing upon private rights.¹

i. FORFEITURE. — The principle above stated as to forfeiture of land granted² applies equally to the forfeiture of a right of way. The failure to perform conditions subsequent does not operate as a revocation of the grant, but merely authorizes the government to take advantage of it and forfeit it by judicial proceedings or by an Act of Congress resuming title to the land.³

10. Transportation of Troops and Mails. — It has been held that under a clause in a land grant to a railroad company providing that the railroad shall be a public highway for the use of the government of the United States, free from all toll or other charge for the transportation of any property or troops of the United States, the railroad grantee is not bound to transport troops and property of the government free of charge, but has a right to a reasonable compensation for such services. The word "railroad" is construed to apply only to the roadbed, which the government is entitled to use free of toll, and not to locomotives and cars.⁴

XIII. GRANTS FOR INTERNAL IMPROVEMENTS — 1. Grant of 1841 — a. IN GENERAL. — In 1841 Congress passed an act granting to each of the several states specified therein and to each of such new states as should thereafter be admitted into the Union five hundred thousand acres of land for purposes of internal improvement.⁵

b. CHARACTER OF GRANT. — The words "there shall be granted" used with reference to the old states were held not to pass a present title from the general government to the state, but to import a grant to be made in the future.⁶ The words "there shall be and hereby is granted," used with reference to the new states, were held to import a present grant to such states upon their admission to the Union. The act did not convey, however, to the states a title to any specific land, but merely a present interest of the designated quantity. After the selection and location were once made, pursuant to the state's direction, of land not reserved, but subject to location, the general gift of the quantity became a particular gift of the specific lands located, vesting in the state a perfect and absolute title to them, which title passed by her patent.⁷ The state patent to these lands took effect by relation as of the date of the selection.⁸

c. LANDS SUBJECT TO LOCATION. — The state could not make a valid selection of lands which at the time of the selection were expressly reserved from sale⁹ or which were held under a valid pre-emption right.¹⁰

d. TIME OF MAKING LOCATION. — With regard to the old states the act

Oregon Short Line R. Co. v. Fisher, (Utah 1903) 72 Pac. Rep. 931.

1. Change of Location. — Smith v. Northern Pac. R. Co., (C. C. A.) 58 Fed. Rep. 513; Washington, etc., R. Co. v. Coeur d'Alene R., etc., Co., (C. C. A.) 60 Fed. Rep. 981; Northern Pac. R. Co. v. Murray, (C. C. A.) 87 Fed. Rep. 648; Missouri, etc., R. Co. v. Cook, 47 Kan. 216.

2. Forfeiture. — See *supra*, this section, *Title of Railroads — Forfeiture*.

3. Utah, etc., R. Co. v. Utah, etc., R. Co., 110 Fed. Rep. 879.

In Southern R. Co. v. Choate, 119 Ala. 358, it was held that an act of Congress forfeiting lands theretofore granted to the state, but containing an exception in favor of railroads, did not forfeit the lands of a corporation which acquired its right of way after the grant and before the forfeiture.

4. Transportation of Troops. — Lake Superior, etc., R. Co. v. U. S., 93 U. S. 442, four judges dissenting.

5. Act Cong. September 4, 1841, 5 U. S. Stat. at L. 455, c. 16, § 8.

6. Character of Grant. — Foley v. Harrison, 15 How. (U. S.) 433, affirming 5 La. Ann. 75; Godwin v. Davis, 74 Miss. 742; Shepley v. Cowan, 52 Mo. 559. See also Van Valkenburg v. McCloud, 21 Cal. 330; Doll v. Meador, 16 Cal. 295; Wiggins v. Guier, 13 La. Ann. 356.

7. Patterson v. Tatum, 3 Sawy. (U. S.) 164; Bludworth v. Lake, 33 Cal. 255; Megerle v. Ashe, 27 Cal. 322; Van Valkenburg v. McCloud, 21 Cal. 330; Doll v. Meador, 16 Cal. 295; Wardwell v. Paige, 9 Oregon 517.

8. Patent Relates Back to Selection. — Ison v. Nelson Min. Co., 47 Fed. Rep. 199; Patterson v. Tatum, 3 Sawy. (U. S.) 164.

9. Lands Reserved from Sale Not Subject to Selection. — Patterson v. Tatum, 3 Sawy. (U. S.) 164; Shepley v. Cowan, 91 U. S. 330, 52 Mo. 559; Copley v. Dinkgrave, 27 La. Ann. 601.

10. Lands Held under Pre-emption. — Terry v. Megerle, 24 Cal. 609, 85 Am. Dec. 84; Copley v.

expressly provided that the lands should be selected after the public surveys had been made, and with regard to the states thereafter to be admitted that the lands were "to be selected and located as aforesaid." This latter provision was construed by the earlier *California* decisions as relating merely to the manner, and not to the time, of the selection.¹ These decisions were afterwards overruled, and the law was settled that in all cases selections could be made only after the public surveys of the land.²

e. ACT TO QUIET LAND TITLES IN CALIFORNIA. — Owing to the unsettled condition of land titles in California, due to the conflicting decisions as to the time for making the selections,³ an act of Congress was passed in 1866 providing that selections of public lands which had been made by the state in part satisfaction of any grant made to the state by any act of Congress, and which the state had disposed of to purchasers in good faith under her laws, should thereby be confirmed to the state.⁴ It was held, however, that the general confirmation provided for by the first section of the act was restricted by the second section to selections of such lands as had been previously surveyed by authority of the United States, and of which selections notification had been or should thereafter be given to the register of the local land office; and that under the third section selections made upon lands surveyed only by authority of the state should have only the effect of pre-emption rights of a settler of unsurveyed public lands.⁵

2. Canal-land Grants—Illinois. — In 1822 an act of Congress was passed authorizing the state of Illinois to locate a canal "connecting the Illinois river with the southern bend of Lake Michigan," and reserving from future sale and vesting in the state for this purpose a strip of land ninety feet wide on each side of the canal located.⁶ In 1827 another act was passed granting to the state of Illinois, for the purpose of aiding it in opening a canal "to unite the waters of the Illinois river with those of Lake Michigan," a quantity of land equal to one-half of five sections in width on each side of such canal, reserving each alternate section to the United States.⁷ The Act of 1827, under which the canal was constructed, was not an amendment of the Act of 1822, but was a distinct and independent offer by the government of aid to the state, and this latter act having been accepted without reference to the first, the state became entitled only to the grant which it conveyed.⁸ The state acquired through the sections reserved to the United States merely a right of way. This did not extend to a strip ninety feet in width on each side of the canal, as provided by the Act of 1822, which by its terms became void upon the failure of the state to comply with its conditions.⁹

Indiana. — In 1827 Congress passed an act granting to the state of Indiana a certain quantity of land for the purpose of aiding her in opening a canal between the Wabash river and Lake Erie,¹⁰ and in 1830 another act was passed giving to the state power to select a certain quantity of land in lieu of the canal lands granted by the former act, but which had been previously

Dinkgrave, 27 La. Ann. 601; Ludeling v. Vester, 16 La. Ann. 450.

1. Van Valkenburg v. McCloud, 21 Cal. 330; Doll v. Meador, 16 Cal. 295.

2. All Selections to Be Made After Public Survey. — McNee v. Donahue, 142 U. S. 587; Hastings v. Jackson, 46 Cal. 234; Terry v. Megerle, 24 Cal. 609, 85 Am. Dec. 84, overruling Doll v. Meador, 16 Cal. 295.

3. McNee v. Donahue, 142 U. S. 587. See also Terry v. Megerle, 24 Cal. 609, 85 Am. Dec. 84, overruling Doll v. Meador, 16 Cal. 295.

4. Act Cong. July 23, 1866, 14 U. S. Stat. at L. 218, c. 219; McNee v. Donahue, 142 U. S. 587; Roberts v. Columbet, 63 Cal. 22.

5. McNee v. Donahue, 142 U. S. 587.

6. Illinois Canal Grant. — Act Cong. March 30, 1822, 3 U. S. Stat. at L. 659, c. 14; Chicago v. McGraw, 75 Ill. 566; Illinois, etc., Canal v. Haven, 10 Ill. 548.

7. Act Cong. March 2, 1827, 4 U. S. Stat. at L. 234, c. 51.

8. Werling v. Ingersoll, 181 U. S. 131, affirming 182 Ill. 25; Chicago v. McGraw, 75 Ill. 566. Contra, Wheeler v. Chicago, 68 Fed. Rep. 526.

9. Right of Way through Reserved Sections. — Werling v. Ingersoll, 181 U. S. 131. Compare Wheeler v. Chicago, 68 Fed. Rep. 526.

10. Indiana Canal Grant. — Act Cong. March 2, 1827, 4 U. S. Stat. at L. 236, c. 56; Doe v. Stephenson, 9 Ind. 144.

disposed of by the United States.¹ In 1841 an act was passed confirming to the state of Indiana certain lands which had been selected without authority by the state for the extension of the canal beyond its original limits. This confirmation, however, could not affect any pre-emption rights existing at the time when the lands were located.²

Michigan.—In 1852 an act of Congress granted to the state of Michigan certain public lands to aid in the construction of a canal, with the right to locate the canal through the public lands known as the Military Reservation at the falls of St. Mary's river in that state.³ The effect of this act was to extinguish so much of the Indian reserve as was embraced in the grant to the state for canal purposes.⁴ In 1865 another act was passed granting to the state of Michigan a certain amount of the public lands to aid in building a harbor and ship canal at Portage lake.⁵ Under this act the state had no right to select lands which prior to the act had been granted to the state for other purposes.⁶ In 1866 Congress passed an act granting additional land for this purpose, to inure to the benefit of the corporation to which the former grant had been conveyed by the state.⁷ It was held under this act that the corporation had the right to retain control of the canal when constructed and to collect the tolls therefrom.⁸

Ohio.—In 1828 Congress granted to the state of Ohio certain public lands to aid in the construction and extension of canals within that state.⁹ This act constituted a present grant to the state, requiring only an identification by the state of the lands granted.¹⁰

3. Wagon-road Grants—*a.* IN GENERAL.—Beginning with the Act of 1864, Congress passed a number of acts granting to the state of Oregon certain amounts of public land to aid in the construction of military wagon roads between different points in that state.¹¹

b. CHARACTER OF GRANTS.—The acts were held to be grants *in præsentia*, subject to be defeated by a failure to complete the roads within the time limited; but this was a condition subsequent of which only the government could take advantage, and until a forfeiture was enforced a perfect title vested in the grantee.¹² With regard to the Act of 1866, which authorized the selection of certain odd-numbered sections, but did not include the full number of such sections within the prescribed limits, it was held that no title to any particular lands vested until the section had been selected and the selections had been approved by the secretary of the interior.¹³

c. TERMS AND CONDITIONS OF GRANTS.—The acts, which varied somewhat as to the quantities of land, were substantially alike as to their terms

1. Act Cong. May 29, 1830, 4 U. S. Stat. at L. 416, c. 161; Doe v. Stephenson, 9 Ind. 144.

2. Act Cong. Feb. 27, 1841, 5 U. S. Stat. at L. 414, c. 12; Doe v. Stephenson, 9 Ind. 144.

3. Michigan Canal Grant.—Act Cong. Aug. 26, 1852, 10 U. S. Stat. at L. 35, c. 92.

4. Spalding v. Chandler, 160 U. S. 394, affirming 84 Mich. 140.

5. Act Cong. March 3, 1865, 13 U. S. Stat. at L. 519, c. 102.

6. Lake Superior Ship Canal, etc., Co. v. Cunningham, 155 U. S. 354, affirming 44 Fed. Rep. 819.

7. Act Cong. July 3, 1866, 14 U. S. Stat. at L. 81, c. 160.

8. Atty.-Gen. v. Lake Superior Ship Canal R., etc., Co., 32 Mich. 233.

9. Ohio Canal Grant.—Act Cong. May 24, 1828, 4 U. S. Stat. at L. 305, c. 108.

10. Strong v. Lehmer, 19 Ohio St. 93.

11. Act of July 2, 1864.—13 U. S. Stat. at L. 355, c. 213; U. S. v. California, etc., Land Co., 148 U. S. 31; Pengra v. Munz, 29 Fed. Rep. 830.

Act of July 5, 1866.—14 U. S. Stat. at L. 89, c. 174; Altschul v. Gittings, 102 Fed. Rep. 36; U. S. v. Dalles Military Road Co., 140 U. S. 599, 55 Fed. Rep. 711, 54 Fed. Rep. 807, 44 Fed. Rep. 234, 42 Fed. Rep. 351; Altschul v. Clark, 39 Oregon 315.

Act of February 25, 1867.—14 U. S. Stat. at L. 409, c. 77; U. S. v. Dalles Military Road Co., 140 U. S. 599, 51 Fed. Rep. 629, 41 Fed. Rep. 493, 40 Fed. Rep. 114.

Act of March 3, 1869.—15 U. S. Stat. at L. 340, c. 150; U. S. v. Coos Bay Wagon-Road Co., 89 Fed. Rep. 151.

12. Character of Wagon-road Grants.—U. S. v. Willamette Valley, etc., Wagon-Road Co., 54 Fed. Rep. 807, 44 Fed. Rep. 234, 42 Fed. Rep. 351; U. S. v. Oregon Cent. Military Road Co., 41 Fed. Rep. 501; U. S. v. Dalles Military Road Co., 41 Fed. Rep. 493, reversed on other grounds 140 U. S. 590.

13. Altschul v. Gittings, 102 Fed. Rep. 36; Altschul v. Clark, 39 Oregon 315.

and conditions. Each act authorized the sale of thirty sections of land upon the certificate of the governor that any ten continuous miles of the road had been completed, the sales to continue upon the same basis as the work progressed. It was not imperative, however, that these sales should be made; they might be postponed until the completion of the entire work.¹ The governor was made the sole judge as to the completion of the road, and his certificates were, in the absence of fraud, final and conclusive.² It was not necessary that the governor's certificate should be based upon a personal inspection of the road.³ The method of constructing the roads was governed entirely by the acts of Congress and the acts of the state of Oregon conferring the grants upon the road companies, and was not affected by any prior act of the state regulating the construction of roads by private corporations.⁴ Neither the acts of Congress nor of the state required that a road company or any person claiming under it should maintain the road after it had been completed and accepted by the government.⁵ Each act provided that in case the road was not completed within five years no further lands should be sold, and that the unsold portions should revert to the United States.⁶ The Act of 1869 expressly provided that it should not embrace any lands to which homestead or pre-emption rights had attached.⁷

Patents to Grantees of State. — In 1874 an act was passed providing for the issuance of patents for these lands to the state of Oregon or to the corporations to which the state had transferred its interest therein.⁸

Action to Determine Validity of Certificates. — In 1889, it being represented by the legislature of Oregon that certain certificates had been improperly issued before the proper completion of the roads, Congress passed an act authorizing the attorney-general to bring an action in the name of the United States to determine all questions relative to the proper completion of the roads, the legal effect of the certificates of the governors, and the right of resumption of such lands by the United States.⁹ The act expressly provided that the rights of purchasers for value of either grant or any part thereof should be protected.¹⁰

Completion of Road After Time Limited. — The completion of the road within the time limited being merely a condition subsequent to the vesting of the title, it was held that the actual completion of the road after the time limited, but prior to the passage of the Act of 1889, was a good defense to an action for forfeiture of the lands granted.¹¹

4. Miscellaneous Grants. — In 1820 Congress granted to the state of Missouri

1. Terms and Conditions of Wagon-road Grants. — *U. S. v. Dalles Military Road Co.*, (C. C. A.) 51 Fed. Rep. 629, 41 Fed. Rep. 493, *reversed* on other grounds 140 U. S. 599; *U. S. v. Oregon Cent. Military Road Co.*, 41 Fed. Rep. 501.

2. Governor to Certify Completion of Road. — *U. S. v. California, etc., Land Co.*, 148 U. S. 31; *U. S. v. Oregon Cent. Military Road Co.*, 41 Fed. Rep. 501; *U. S. v. Dalles Military Road Co.*, 41 Fed. Rep. 493.

3. U. S. v. Willamette Valley, etc., Wagon-Road Co., 55 Fed. Rep. 711.

4. Method of Construction. — *U. S. v. Dalles Military Road Co.*, 40 Fed. Rep. 114.

5. Duty to Maintain Road. — *U. S. v. Dalles Military Road Co.*, 40 Fed. Rep. 114; *U. S. v. Oregon Cent. Military Road Co.*, 40 Fed. Rep. 120.

6. U. S. v. Willamette Valley, etc., Wagon-Road Co., 55 Fed. Rep. 711.

7. Homestead and Pre-emption Rights. — *U. S. v. Coos Bay Wagon-Road Co.*, 89 Fed. Rep. 151.

8. Issuance of Patents. — Act Cong. June 18,

1874, 18 U. S. Stat. at L. 80, c. 305; *U. S. v. Dalles Military Road Co.*, 145 U. S. 599; *U. S. v. Willamette Valley, etc., Wagon-Road Co.*, 55 Fed. Rep. 711, 54 Fed. Rep. 807, 44 Fed. Rep. 234, 42 Fed. Rep. 351.

9. Action to Determine Validity of Certificates. — Act Cong. March 2, 1889, 25 U. S. Stat. at L. 850, c. 377; *U. S. v. Dalles Military Road Co.*, 140 U. S. 599; *U. S. v. Willamette Valley, etc., Wagon-Road Co.*, 55 Fed. Rep. 711.

10. Rights of Bona Fide Purchasers Protected. — *U. S. v. California, etc., Land Co.*, 49 Fed. Rep. 496, *affirmed* 148 U. S. 31; *U. S. v. Dalles Military Road Co.*, (C. C. A.) 51 Fed. Rep. 629.

Person Holding under Quitclaim Deed Bona Fide Purchaser. — *U. S. v. California, etc., Land Co.*, 148 U. S. 31.

Issuance of Patent Not Necessary to Constitute Bona Fide Purchase. — *U. S. v. Willamette Valley, etc., Wagon-Road Co.*, 55 Fed. Rep. 711.

11. U. S. v. Willamette Valley, etc., Wagon-Road Co., 55 Fed. Rep. 711, 54 Fed. Rep. 807.

four entire sections of land for the purpose of fixing the seat of government thereon.¹ This act was a present grant, and title to the particular land selected vested in the state as soon as the selection was made and reported to the surveyor-general.²

Court-house Grants. — In 1824 Congress passed an act granting to each of the several counties and parishes in states or territories where there were public lands the right of pre-emption to one quarter section of such land for the establishment of seats of justice.³ The money arising from the sale of such lands was a trust fund to be applied exclusively to the purposes contemplated by the grant.⁴

Grants for Public Buildings. — In 1831 an act of Congress was passed authorizing the legislature of the territory of *Arkansas* to select ten sections of the public lands of that territory for the purpose of raising a fund for the erection of a public building in Little Rock;⁵ and by a later act the authority granted to the legislature was vested in the governor of the territory.⁶ An act was passed in 1836 authorizing the state of *Michigan* to locate five sections of public land for the purpose of completing the public buildings of that state.⁷ Under this act, locations could not be made of tracts consisting of less than one hundred and sixty acres each, or upon lands which were otherwise appropriated.⁸

River Improvements. — In 1846 a grant of public lands was made to the state of *Wisconsin* to aid it in the improvement of the Fox and Wisconsin rivers and to connect them by a canal.⁹ The grant took effect and the title to the lands vested potentially in the state on its admission into the Union, the selection and approval of the particular tracts within the limits of the grant being merely acts of partition, and not of conveyance.¹⁰

XIV. SWAMP-LAND GRANTS — 1. **In General.** — By Act of Congress of Sept. 28, 1850, known as the Swamp Act or the Arkansas Swamp-land Grant, it was provided that "to enable the several states * * * to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of the swamp and overflowed lands made unfit thereby for cultivation and remaining unsold on or after the twenty-eighth day of September, A. D. eighteen hundred and fifty, are granted and belong to the several states respectively in which said lands are situated."¹¹ This act constituted a grant only to the states existing at the time of its passage, and upon the subsequent admission to the Union of another state it did not necessarily become entitled to the benefits of the grant;¹² but by a later act, the benefits of the grant were extended to states which had been subsequently organized and admitted to the Union.¹³ The Swamp Act of 1850, by virtue of the clause "are granted

1. **Grant to Missouri to Fix Seat of Government.** — Act Cong. March 6, 1820, 3 U. S. Stat. at L. 547, c. 22, § 6.

2. *Lessieur v. Price*, 12 How. (U. S.) 59, affirming 12 Mo. 15, and holding further that a selection including fractional sections was valid.

3. **Court-house Grants.** — Act Cong. May 26, 1824, 4 U. S. Stat. at L. 50, c. 169.

4. *Davis v. Muscatine County*, Morr. (Iowa) 161.

Act of 1824 Never in Force in State of Oregon. — *Whitlow v. Reese*, 4 Oregon 335.

5. **Grants for Public Buildings — Arkansas.** — Act Cong. March 2, 1831, 4 U. S. Stat. at L. 473, c. 67.

6. Act Cong. July 4, 1832, 4 U. S. Stat. at L. 563, c. 172; *Barnard v. Ashley*, 18 How. (U. S.) 43, affirming *Hempst.* (U. S.) 665.

7. *Michigan.* — Act Cong. June 23, 1836, 5 U. S. Stat. at L. 59, c. 121.

8. *Turner v. American Baptist Missionary Union*, 5 McLean (U. S.) 344.

9. **River Improvements.** — Act Cong. Aug. 8, 1846, 9 U. S. Stat. at L. 83, c. 170.

10. *Veeder v. Guppy*, 3 Wis. 502.

11. **Swamp Act of 1850.** — Rev. Stat. U. S., § 2479.

12. **Grants to Existing States Only.** — *Rice v. Sioux City, etc.*, R. Co., 110 U. S. 695. Compare *French v. Fyan*, 93 U. S. 169.

13. Act Cong. March 12, 1860, 12 U. S. Stat. at L. 3, c. 5; *Gaston v. Stott*, 5 Oregon 48.

It has been held that this statute, extending to Oregon the benefits of the Swamp Act of 1850, but providing that the selections of lands as swamp and overflowed shall be made within two years after notice to the governor that surveys have been completed, casts on the state the duty in the first instance of making the selection, and if selections are not made within the time prescribed, the state has no claim to swamp and overflowed lands within the survey. *Pengra v. Munz*, 29 Fed. Rep. 830.

and belong to the several states," has been frequently construed as a grant *in præsenti* of all lands coming within the description of swamp and overflowed lands, etc., though by a subsequent section the secretary of the interior was directed to make accurate lists and plats of all such lands and transmit them to the governors of the several states in which such lands might lie, and at the request of the governor of any state in which such swamp and overflowed lands might be, to cause patents to be issued to such state therefor, conveying to the state the fee simple of the land.¹ The description of the land as all "swamp and overflowed lands made unfit thereby for cultivation" is not too vague and indefinite to enable the act to operate as a grant *in præsenti*,² and upon the issuance of the patent to the state, it relates back to the date of the Swamp Act making the grant.³ The attempt of Congress by Act of March 2, 1855,⁴ to deprive the Swamp Act of 1850 of its operative effect as a grant *in præsenti* was ineffectual.⁵

The Identification of Lands as lands embraced by the Swamp Act is necessary before the state can claim a patent therefor.⁶ Until such identification, the title of the several states to lands under the act has been considered in several late cases as inchoate merely,⁷ and it is held that until particular land has been identified as swamp and overflowed land and a patent therefor has been issued, the legal title remains in the federal government.⁸ So it has been held that the state has no right of entry upon lands by virtue of the act before their character as swamp and overflowed lands has been established.⁹

Louisiana Grant. — By Act of Congress of March 2, 1849, a part of the swamp

1. **Grant in Præsenti** — *United States*. — Hannibal, etc., R. Co. v. Smith, 9 Wall. (U. S.) 95; French v. Fyan, 93 U. S. 169; Martin v. Marks, 97 U. S. 345; Rice v. Sioux City, etc., R. Co., 110 U. S. 695; Wright v. Roseberry, 121 U. S. 488; Lake Superior Ship Canal, etc., Co. v. Cunningham, 155 U. S. 354; Michigan Land, etc., Co. v. Rust, 168 U. S. 589, *affirming* 31 U. S. App. 731. *Compare* Brown v. Hitchcock, 173 U. S. 473.

Arkansas. — Hempstead v. Underhill, 20 Ark. 337; Fletcher v. Pool, 20 Ark. 100; Branch v. Mitchell, 24 Ark. 431; Chism v. Price, 54 Ark. 251; Ringo v. Rotan, 29 Ark. 56; Hendry v. Willis, 33 Ark. 833.

California. — Summers v. Dickinson, 9 Cal. 554; Owens v. Jackson, 9 Cal. 322; Kernan v. Griffith, 27 Cal. 88; Lux v. Haggin, 69 Cal. 255; Shanklin v. McNamara, 87 Cal. 371; McCabe v. Goodwin, 106 Cal. 486. *Compare* Kile v. Tubbs, 23 Cal. 431.

Illinois. — Dart v. Hercules, 34 Ill. 395; Wabash, etc., R. Co. v. McDougal, 113 Ill. 603; Keller v. Brickey, 78 Ill. 133. *Compare* Thompson v. Prince, 67 Ill. 281.

Indiana. — Edmondson v. Corn, 62 Ind. 17; Matthews v. Goodrich, 102 Ind. 557; State v. Portsmouth Sav. Bank, 106 Ind. 435; Tolleston Club v. State, 141 Ind. 197.

Iowa. — Allison v. Halfacre, 11 Iowa 450; Roynton v. Miller, 22 Iowa 579; Chicago, etc., R. Co. v. Brown, 40 Iowa 333; Page County v. Burlington, etc., R. Co., 40 Iowa 520; Snell v. Dubuque, etc., R. Co., 78 Iowa 88; Hays v. McCormick, 83 Iowa 89; American Emigrant Co. v. Fuller, 83 Iowa 599; Bailey v. Callanan, 87 Iowa 107; Nicodemus v. Young, 90 Iowa 423; Smith v. Miller, 105 Iowa 688.

Louisiana. — Betz v. Illinois Cent. R. Co., 52 La. Ann. 893.

Michigan. — Busch v. Donohue, 31 Mich. 481; Sterling v. Jackson, 69 Mich. 488, 13 Am.

St. Rep. 405; State v. Sparrow, 89 Mich. 263; Sherman v. A. P. Cook Co., 98 Mich. 61; People v. Warner, 116 Mich. 228; Olds v. State Land Office Com'r, (Mich. 1901) 86 N. W. Rep. 956; State v. Lake St. Clair Fishing, etc., Club, 127 Mich. 580.

Mississippi. — Fore v. Williams, 35 Miss. 533; Jackson v. Dilworth, 39 Miss. 772; Funston v. Metcalf, 40 Miss. 504; Daniel v. Purvis, 50 Miss. 261. *Compare* Dowd v. Louisville, etc., R. Co., 68 Miss. 159.

Missouri. — Simpson v. Stoddard County, 173 Mo. 421; Masterson v. Marshall, 65 Mo. 94; Clarkson v. Buchanan, 53 Mo. 563.

Oregon. — Gaston v. Stott, 5 Oregon 44; Miller v. Tobin, 16 Oregon 540; Warner Valley Stock Co. v. Calderwood, 36 Oregon 228. See, however, Birch v. Gillis, 67 Mo. 102; Stephenson v. Stephenson, 71 Mo. 127; Prior v. Lambeth, 78 Mo. 538; State v. School, etc., Lands Com'rs, 9 Wis. 236.

2. Wright v. Roseberry, 121 U. S. 488; Branch v. Mitchell, 24 Ark. 431; Owens v. Jackson, 9 Cal. 322; Gaston v. Stott, 5 Oregon 48.

3. **Patent Relates Back to Date of Act.** — Hempstead v. Underhill, 20 Ark. 337; Cramer v. Keller, 98 Mo. 279. See also Smith v. Goodell, 66 Ill. 450. *Compare* Prior v. Lambeth, 78 Mo. 538.

4. 10 U. S. Stat. at L. 634, c. 147.

5. **Effect of Act of 1855.** — Branch v. Mitchell, 24 Ark. 431; Gaston v. Stott, 5 Oregon 48.

6. **Identification of Lands as Affecting Right to Patent.** — Rogers Locomotive Mach. Works v. American Emigrant Co., 164 U. S. 559; Michigan Land, etc., Co. v. Rust, 168 U. S. 589.

7. **Title Inchoate until Identification.** — Schlosser v. Hemphill, (Iowa 1902) 90 N. W. Rep. 842; Ogden v. Buckley, 116 Iowa 352.

8. Pengra v. Munz, 29 Fed. Rep. 830.

9. State v. Lake St. Clair Fishing, etc., Club, 127 Mich. 580.

land of the federal government in the state of Louisiana was granted to that state to aid in draining the swamp lands therein.¹

2. "Swamp and Overflowed Lands." — The federal swamp-land grant of 1850 granted all swamp and overflowed lands, and not those only which were susceptible of profitable reclamation by drains and levees.²

Swamp Lands, as Distinguished from Overflowed Lands, have been considered to be such as require drainage to fit them for cultivation, whereas overflowed lands are such as require levees or embankments to keep out the water and render them suitable for cultivation.³ The term "overflowed" has also been construed as having reference to a permanent condition of the lands, that is, as applicable to lands which are overflowed and will remain so without reclamation or drainage,⁴ and not including lands which perchance might be temporarily overflowed at the time of freshets and high waters, but which for the greater part of the year are dry.⁵

Land Subject to Overflow by Tides. — Where, however, lands were subject to be daily overflowed by the tides so as to make them unfit to raise the ordinary crops of the country without levees to protect them from such overflow, they have been considered to be overflowed lands.⁶

Low and Swampy Lands Holding Rain Water and overflowed frequently to a great depth have been held to be swamp and overflowed lands.⁷ So low lands frequently though not annually overflowed, the waters at times of overflow remaining thereon for the greater part of the year and rendering cultivation impracticable, have been considered to be swamp and overflowed lands.⁸

Annual Overflow Preventing Cultivation. — It has been held that if land is not susceptible of cultivation in grain or other staple products, by reason of annual overflow, it is "swamp and overflowed" land though after the annual overflow a crop of grass will spring up which will make hay.⁹

Beds of Rivers, Bottoms of Lakes, Etc., do not pass to the state under the Swamp Act as swamp and overflowed lands;¹⁰ but partly submerged land connected with islands in lakes or rivers may come within these terms;¹¹ and in *Louisiana* the beds of shallow lakes in the nature of overflowed swamps, which would become dry as a direct, necessary, and inevitable result of the building of levees, have been considered as passing to the state under the statute.¹²

The Artificial Submersion of Land will not prevent it from being swamp and overflowed land so as to pass to the state.¹³

3. "Unfit for Cultivation." — Land is to be considered as unfit for cultivation if it is not susceptible of being cultivated in grain or other staple products,¹⁴

1. *Louisiana Grant of 1849.* — 9 U. S. Stat. at L. 352, c. 87; *Lawrence v. Grout*, 12 La. Ann. 835; *Thibodeaux v. Broussard*, 32 La. Ann. 881; *Cole v. Thompson*, 35 La. Ann. 1026; *Betz v. Illinois Cent. R. Co.*, 52 La. Ann. 893.

2. **All Swamp and Overflowed Lands Granted.** — *People v. Warner*, 116 Mich. 228.

3. **Swamp and Overflowed Lands Distinguished.** — *San Francisco Sav. Union v. Irwin*, 28 Fed. Rep. 708.

4. *Heath v. Wallace*, 138 U. S. 573, affirming 71 Cal. 50.

5. **Occasional Overflow.** — *Heath v. Wallace*, 138 U. S. 573. See also *Keeran v. Griffith*, 31 Cal. 461.

6. *San Francisco Sav. Union v. Irwin*, 28 Fed. Rep. 708.

7. *Branch v. Mitchell*, 24 Ark. 431.

8. *Keller v. Brickey*, 78 Ill. 133.

9. **Annual Overflow.** — *Keeran v. Griffith*, 31 Cal. 461. See also *Keeran v. Allen*, 33 Cal. 542, and see *infra*, this section, *Unfit for Cultivation*.

10. **Beds of Rivers and Bottoms of Lakes.** — *Edwards v. Rolley*, 96 Cal. 408, 31 Am. St. Rep. 234. Compare *Lamprey v. Danz*, 86 Minn. 317.

11. *People v. Warner*, 116 Mich. 228; *State v. Lake St. Clair Fishing, etc., Club*, 127 Mich. 580, in which latter case land connected with an island in Lake St. Clair which in its natural state was in some places a few inches above and in others slightly below the ordinary water level, and was at times entirely submerged, was held not to constitute a part of the bed of the lake, but to be swamp and overflowed lands within the meaning of the Swamp Act of 1850, so as to pass to the state of Michigan thereunder.

12. *McDade v. Bossier Levee Board*, 109 La. 625.

13. **Artificial Submersion.** — *Diana Shooting Club v. Lamoreux*, 114 Wis. 44.

14. **Unfit for Cultivation.** — *People v. Morrill*, 26 Cal. 336; *Keeran v. Griffith*, 31 Cal. 461. See also *Merrill v. Tobin*, 30 Fed. Rep. 738.

even though a crop of grass may be taken yearly from it.¹ If, after the annual overflow, a staple crop, such as wheat, rye, barley, oats, corn, buckwheat, peas, or beans, can be successfully cultivated and produced, the land cannot be considered as unfit for cultivation.² It is not necessary that the land can be profitably cultivated if it can be in fact cultivated in any staple crop, as the intrinsic condition of the soil may be such that its cultivation would be unprofitable, irrespective of its wet condition;³ but if the successful cultivation of the land is impossible because of its moist condition and liability to overflow, it is not considered fit for cultivation.⁴ If the land in question has not been cultivated prior to its fitness for cultivation, evidence to show that other lands in the neighborhood, similarly situated, were capable of cultivation is admissible.⁵

4. Legal Subdivisions. — The phrase "legal subdivisions," as used in the section providing that the secretary of the interior, in making out lists and plats of the land granted to the state, shall include "all legal subdivisions the greater part whereof is wet and unfit for cultivation,"⁶ refers to the smallest subdivisions under the Congressional system of surveys.⁷ If the greater part of such a subdivision is not wet and unfit for cultivation, the whole subdivision is excluded from the grant.⁸

5. Priority of Existing Equities. — The Swamp Act of 1850 was not intended to apply to lands held by the federal government charged with equitable claims of others which that government was bound to protect.⁹ Thus, public lands in California which the government was bound by treaty to protect¹⁰ or land on which a federal land warrant had been located prior to 1850, but which was not patented to the locator until after 1850,¹¹ did not pass to the state.

6. Identification of Lands — *a. CHARACTER OF LANDS AS TO TIME.* — The question whether particular lands passed to a state under the Swamp Act of 1850 is to be determined by the character of the land at the time of the passage of the act, and is not affected by any subsequent change in the character of the land from natural causes;¹² and therefore, where at such time particular lands were swamp and overflowed, they passed to the state though subsequently

1. **Annual Grass Crops.** — *Keeran v. Griffith*, 31 Cal. 461; *American Emigrant Co. v. Rogers Locomotive Mach. Works*, 83 Iowa 612, *reversed* on other grounds, 164 U. S. 559 (land capable of being seeded yearly to grasses, such as timothy or redtop). See also *McConaughy v. Wiley*, 33 Fed. Rep. 449, 13 Sawy. (U. S.) 148; and see *supra*, this section, *Swamp and Overflowed Lands*.

2. *Keeran v. Allen*, 33 Cal. 542.

3. *Foscalina v. Doyle*, 47 Cal. 436.

4. *Thompson v. Thornton*, 50 Cal. 142.

5. *Keeran v. Allen*, 33 Cal. 542.

6. **Legal Subdivisions.** — Rev. Stat. U. S., § 2481.

7. *Robinson v. Forrest*, 29 Cal. 317; *Fredericks v. Zumwalt*, 134 Cal. 44.

8. *Hogaboom v. Ehrhardt*, 58 Cal. 231, *affirmed* 115 U. S. 67; *Fredericks v. Zumwalt*, 134 Cal. 44.

9. **Priority of Existing Equities.** — *School Trustees v. Schroll*, 120 Ill. 509, 60 Am. Rep. 575 (school sections previously granted to state).

In *California* it has been held that it was not the intention of Congress to grant to the state swamp and overflowed lands within the exterior boundaries of a prior Mexican grant, though in the confirmation of the latter grant such lands were excluded. *Shanklin v. McNamara*, 87 Cal. 371.

10. *San Francisco v. Le Roy*, 138 U. S. 656.

11. *Culver v. Uthe*, 133 U. S. 655 (construction of term "remain unsold").

Act Cong. March 2, 1849, 9 U. S. Stat. at L. 352, c. 87, which, in donating to the state of *Louisiana* swamp and overflowed lands, reserved those "claimed or held by individuals," protects only those who hold by some right that can be enforced by law, and not those without any right which could serve to perfect or obtain a title afterwards. *Lawrence v. Grout*, 12 La. Ann. 835.

12. **Character of Land as to Time.** — *Kirby v. Lewis*, 39 Fed. Rep. 66; *Robinson v. Forrest*, 29 Cal. 317; *Keeran v. Griffith*, 31 Cal. 461; *Thompson v. Thornton*, 50 Cal. 142; *Connors v. Meservey*, 76 Iowa 691; *Young v. Hanson*, 95 Iowa 717; *Sterling v. Jackson*, 69 Mich. 488, 13 Am. St. Rep. 405.

In *Iowa* evidence that the land in question was of a swampy character before the prairie sod in the part of the state in which it was located had been broken has been held to be sufficient to prove that it was of such a character in 1850, the time of the Swamp Act, though the evidence did not run back to such date. *Bourne v. Moran*, 96 Iowa 566.

Evidence as to Character of Land at Subsequent Date Excluded. — *Connors v. Meservey*, 76 Iowa 691.

they became dry or were submerged by inroads from lakes or other waters.¹ Similarly, submerged lands which subsequently, from natural causes, became marsh lands did not pass under the act.²

b. ON FAILURE OF SECRETARY OF INTERIOR TO DETERMINE CHARACTER OF LAND—(1) *In General*.—Where the secretary of the interior has failed to determine the question whether particular land is swamp and overflowed, so as to pass to the state under the Swamp Act of 1850, the state or its grantee, when sued for the possession, may prove by parol evidence the actual character of the land,³ but the person claiming that the land in question passed to the state as swamp and overflowed land has the burden of proving that it was of such character.⁴

(2) *Patent from State*.—A patent from the state for lands determined by it in *ex parte* proceedings to be swamp and overflowed lands and inuring to it under the Swamp Act of 1850 is not conclusive as to the character of the lands patented as against one who connects himself with the title of the federal government. Such person may show that such lands were not in fact swamp and overflowed lands, and that, therefore, the state could grant no title thereto,⁵ and the patent is neither presumptive nor *prima facie* evidence that such was the character of the land as against one claiming under the federal government.⁶

(3) *Selection by State Officers*.—The result of an *ex parte* action by state officers in selecting particular lands as swamp and overflowed is not evidence as to the character of such lands as against one claiming under the federal government.⁷

(4) *Failure of State Officers to Select*.—Where officers are appointed by the state in each county to select and designate all swamp and overflowed lands within the county, the failure of such an officer to report particular land as swamp and overflowed has been considered to be evidence that such lands were not of that character.⁸

(5) *Ex-parte Proceedings of Federal Land Department*.—The federal government has no power by *ex parte* proceedings in the land department to determine what were and what were not swamp and overflowed lands so as to pass to the states under the Swamp Act of 1850 and bind thereby the state

1. Land Encroached on and Submerged by Waters of Lake Erie.—Sterling v. Jackson, 69 Mich. 488, 13 Am. St. Rep. 405.

2. People v. Warner, 116 Mich. 228.

Subsequent Change in Bed of River.—Edwards v. Rolley, 96 Cal. 408, 31 Am. St. Rep. 234.

Island Subsequently Forming in River.—Holman v. Hodges, 112 Iowa 714.

3. Failure of Secretary of Interior to Determine Character.—United States.—San Francisco Sav. Union v. Irwin, 28 Fed. Rep. 708; Hannibal, etc., R. Co. v. Smith, 9 Wall. (U. S.) 95; Buena Vista County v. Iowa Falls, etc., R. Co., 112 U. S. 165.

Arkansas.—Chism v. Price, 54 Ark. 251.

California.—Thornton v. Thompson, 28 Cal. 602; Keeran v. Griffith, 31 Cal. 461; Keeran v. Griffith, 34 Cal. 580.

Illinois.—Wabash, etc., R. Co. v. McDougal, 113 Ill. 603.

Iowa.—Chicago, etc., R. Co. v. Brown, 40 Iowa 333; Snell v. Dubuque, etc., R. Co., 78 Iowa 88; Bailey v. Callanan, 87 Iowa 107; American Emigrant Co. v. Fuller, 83 Iowa 599; Hays v. McCormick, 83 Iowa 89. Compare Iowa R. Land Co. v. Antonie, 52 Iowa 429.

Michigan.—People v. Warner, 116 Mich. 228.

Missouri.—Clarkson v. Buchanan, 53 Mo.

563; Campbell v. Wortman, 58 Mo. 258; Morgan v. Hannibal, etc., R. Co., 63 Mo. 129; Lockwood v. Hannibal, etc., R. Co., 65 Mo. 233; Funkhouser v. Peck, 67 Mo. 19. Compare Palmer v. Boorn, 80 Mo. 99.

4. Burden of Proof.—Kirby v. Lewis, 39 Fed. Rep. 66; Wright v. Roseberry, 121 U. S. 488, reversing 63 Cal. 252; Hays v. McCormick, 83 Iowa 89.

Character of Land Must Be Clearly Proved.—Kirby v. Lewis, 39 Fed. Rep. 66.

5. Patent from State.—Kile v. Tubbs, 23 Cal. 431; Robinson v. Forrest, 29 Cal. 317; People v. Stratton, 25 Cal. 242; Read v. Caruthers, 47 Cal. 181.

6. Keeran v. Griffith, 31 Cal. 461; Keeran v. Allen, 33 Cal. 542; Dowd v. Louisville, etc., R. Co., 68 Miss. 159. Compare Hendry v. Willis, 33 Ark. 833.

7. Selection by State Officers.—Smith v. Hollis, 46 Ark. 17; Buena Vista County v. Iowa Falls, etc., R. Co., 55 Iowa 157, affirmed 112 U. S. 165. Compare Page County v. Burlington, etc., R. Co., 40 Iowa 520; Connors v. Meservey, 76 Iowa 691; Snell v. Dubuque, etc., R. Co., 78 Iowa 88.

8. Failure of State Officers to Select Land.—Kirby v. Lewis, 39 Fed. Rep. 66.

and persons claiming under the state.¹ Therefore, a survey at the instance of the federal government by which particular land is designated as high land is not conclusive as against the state or its grantees that the land was not in fact swamp and overflowed land.² Such surveys have been recognized as admissible in evidence to show the character of the land,³ and have been considered as *prima facie* evidence of character.⁴

c. DECISION OF SECRETARY OF INTERIOR AS TO CHARACTER OF LAND.—

Under the provision that it shall be the duty of the secretary of the interior to make accurate lists and plats of all swamp and overflowed lands and transmit such lists to the governors of the several states, and at their request to issue to them patents for the land,⁵ the decision of the secretary of the interior that particular lands are swamp and overflowed lands, though no patent has been issued therefor to the state, is conclusive as against collateral attack, in the absence of fraud and imposition, as between a subsequent grantor of the federal government and the state or its grantee.⁶ So the decision of the secretary of the interior, at the instance of a state, that particular land is not swamp and overflowed land and therefore did not pass to the state is, unless impeached for fraud or mistake other than an error of judgment, conclusive against the claim of the state that the land was swamp and overflowed so as to pass to it under the act.⁷

A Patent Issued by the Secretary of the Interior for lands as swamp and overflowed has been held to be conclusive in a court of law, as against collateral attack, that the lands conveyed thereby were swamp and overflowed lands,⁸ both as against the federal government and as against persons claiming under the federal government by grant subsequent to the Act of 1850.⁹

Resurvey.—Where a survey has been made at the instance of the land department by which particular land is indicated as swamp land and therefore as passing under the Swamp Act to a state, it is still within the power of the land department at any time prior to the issuance of a patent to the state to order a resurvey and correct thereby any mistakes in the prior survey.¹⁰

The Provision that the Secretary of the Interior Shall Make a List of Lands passing under the act merely requires that the lands shall be ascertained and located under the authority and with the approval of the secretary, and confirmation by the secretary of a list of lands as swamp and overflowed, made by a com-

1. **Ex Parte Proceedings of Federal Land Office.**—*Kernan v. Griffith*, 27 Cal. 88; *Connors v. Meservy*, 76 Iowa 691; *Snell v. Dubuque*, etc., R. Co., 78 Iowa 88; *Young v. Hanson*, 95 Iowa 717.

2. **Federal Surveys.**—*Kernan v. Griffith*, 27 Cal. 88; *Robinson v. Forrest*, 29 Cal. 317; *Keeran v. Griffith*, 31 Cal. 461; *Rood v. Wallace*, 109 Iowa 5.

As to Patents, see *infra*, this section, *Conflicts Between State and Federal Grants—In General*.

3. *Kirby v. Lewis*, 39 Fed. Rep. 66. See also *McDade v. Bossier Levee Board*, 109 La. 625. Compare *Robinson v. Forrest*, 29 Cal. 317; *Keeran v. Griffith*, 31 Cal. 461.

4. *Ogden v. Buckley*, 116 Iowa 352; *Illinois Steel Co. v. Budzisz*, 115 Wis. 68.

5. *Cahn v. Barnes*, 5 Fed. Rep. 326.

6. **Decision of Secretary of Interior.**—*Hendry v. Willis*, 33 Ark. 833; *Bristol v. Carroll*, 95 Ill. 84; *State v. Portsmouth Sav. Bank*, 106 Ind. 435; *Rood v. Wallace*, 109 Iowa 5; *Clarkson v. Buchanan*, 53 Mo. 563; *Masterson v. Marshall*, 65 Mo. 94; *Jasper County v. Wadlow*, 82 Mo. 172; *Jasper County v. Mickey*, (Mo. 1887) 4

S. W. Rep. 424; *Diana Shooting Club v. Lamoreux*, 114 Wis. 44.

7. *Pengra v. Munz*, 29 Fed. Rep. 830; *Heath v. Wallace*, 138 U. S. 573; *Rogers Locomotive Mach. Works v. American Emigrant Co.*, 164 U. S. 559; *Michigan Land, etc., Co. v. Rust*, 168 U. S. 589; *Crane Creek Shooting Club Co. v. Cedar Point Club Co.*, 46 Fed. Rep. 273; *Chandler v. Calumet, etc., Min. Co.*, 36 Fed. Rep. 665, affirmed 149 U. S. 79; *Smith v. Hollis*, 46 Ark. 17.

8. **Federal Patent.**—*Matthews v. Goodrich*, 102 Ind. 557; *Lamprey v. Danz*, 86 Minn. 317; *Warner Stock Co. v. Calderwood*, 36 Oregon 228. See also *Cramer v. Keller*, 98 Mo. 279.

9. *French v. Fyan*, 93 U. S. 169, holding that this is true as to a railroad or its grantees claiming under a grant from the government by Act Cong. June 10, 1852, 10 U. S. Stat. at L. 8, c. 45, though the patent to the governor was not issued until 1857, and after the land had been certified as included in the railroad grant. See also *San Francisco Sav. Union v. Irwin*, 28 Fed. Rep. 708.

10. **Resurvey.**—*Michigan Land, etc., Co. v. Rust*, 168 U. S. 589.

mission appointed by the governor of a state, is sufficient.¹ After approval by the secretary of the interior of a list of swamp lands, such list may, with the consent of the state and before a patent has been issued, and before rights of third persons have attached, be corrected to cure frauds and errors and remove from it lands not properly listed.²

d. ACT OF CONGRESS MARCH 3, 1857. — The Act of Congress of March 3, 1857, confirmed to the several states the selections of lands as swamp and overflowed theretofore made and reported to the general land office, so far as such lands remained vacant and unappropriated and not interfered with by any actual settlement under any law of the United States.³ Under this act the title to lands so reported vested in the several states though they were not in fact swamp and overflowed lands, unless it was found that they were not vacant or had actually been settled on adversely to the swamp-land claim, and the land department was without authority to set aside such selections,⁴ especially when a patent had been issued to the state for such lands.⁵ This act did not apply to old lists founded on erroneous surveys which had been superseded by new lists, with the consent of the state.⁶

e. ACT OF CONGRESS JULY 23, 1866. — In regard to the swamp and overflowed lands in *California*, the Act of Congress of July 23, 1866, provided for the approval by the federal surveyor-general of segregation and identification maps, to be made by state authority, and for certification to the state of the lands so identified as swamp and overflowed lands.⁷

7. Conflicts Between State and Federal Grants — *a.* IN GENERAL. — As the Act of Congress of September 28, 1850, was a grant *in presenti*, vesting in the states as of that date title to all lands of the character specified,⁸ the federal government was without power after such time to convey title to such lands to third persons, and the title of the state and its grantees to land included in the act is superior to that of subsequent grantees of the federal government.⁹

1. What Constitutes Making List by Secretary. — *Fore v. Williams*, 35 Miss. 533.

2. *Michigan Land, etc., Co. v. Rust*, (C. C. A.) 68 Fed. Rep. 155, *affirmed* 168 U. S. 589. See also *Brown v. Hitchcock*, 173 U. S. 473.

3. Act of Congress 1857. — 11 U. S. Stat. at L. 251, c. 117; *Martin v. Marks*, 97 U. S. 345; *Keeran v. Allen*, 33 Cal. 542; *Tolleston Club v. State*, 141 Ind. 197.

This act applied only to lands that were vacant and not appropriated; lands which had been sold by the United States or entered with land warrants before patents issued to the state under the act were exempt from its operation. *Cramer v. Keller*, 98 Mo. 279.

4. *Martin v. Marks*, 97 U. S. 345; *Michigan Land, etc., Co. v. Rust*, 168 U. S. 589; *Chism v. Price*, 54 Ark. 251; *Tolleston Club v. State*, 141 Ind. 197; *Fremont County v. Burlington, etc., R. Co.*, 22 Iowa 91, *affirmed* 9 Wall. (U. S.) 89; *Montgomery County v. Burlington, etc., R. Co.*, 38 Iowa 208; *American Emigrant Co. v. Chicago, etc., R. Co.*, 47 Iowa 515; *Cramer v. Keller*, 98 Mo. 279.

5. *Smith v. Goodell*, 66 Ill. 450.
6. *Michigan Land, etc., Co. v. Rust*, (C. C. A.) 68 Fed. Rep. 155, *affirmed* 168 U. S. 589; *Michigan Land, etc., Co. v. Pack*, (C. C. A.) 68 Fed. Rep. 170. See also *Michigan v. Jackson, etc., R. Co.*, (C. C. A.) 69 Fed. Rep. 116.

7. Act of Congress 1866. — 14 U. S. Stat. at L. 219, c. 219; *Wright v. Roseberry*, 121 U. S. 488, *reversing* 63 Cal. 252; *Tubbs v. Wilhoit*, 138 U. S. 134; *Heath v. Wallace*, 138 U. S.

573, *affirming* 71 Cal. 50; *Keeran v. Allen*, 33 Cal. 542; *Thompson v. Thornton*, 50 Cal. 142; *Sacramento Sav. Bank v. Hynes*, 50 Cal. 195; *Sutton v. Fassett*, 51 Cal. 12; *Kile v. Tubbs*, 59 Cal. 191; *Sacramento Valley Reclamation Co. v. Cook*, 61 Cal. 341; *McCabe v. Goodwin*, 106 Cal. 486.

8. See *supra*, this section, *In General*.

9. Conflict Between State and Federal Grants — *United States*. — *French v. Fyan*, 93 U. S. 169; *American Emigrant Co. v. Wright County*, 97 U. S. 339; *Ehrhardt v. Hogaboom*, 115 U. S. 67; *Kirby v. Lewis*, 39 Fed. Rep. 66.

Arkansas. — *Branch v. Mitchell*, 24 Ark. 431; *Ringo v. Rotan*, 29 Ark. 56; *Hendry v. Willis*, 33 Ark. 833; *Chism v. Price*, 54 Ark. 251.

California. — *Robinson v. Forrest*, 29 Cal. 317; *Sutton v. Fassett*, 51 Cal. 12; *Kile v. Tubbs*, 59 Cal. 191.

Indiana. — *Matthews v. Goodrich*, 102 Ind. 557; *Tolleston Club v. State*, 141 Ind. 197.

Iowa. — *Fremont County v. Burlington, etc., R. Co.*, 22 Iowa 91, *affirmed* 9 Wall. (U. S.) 89; *Chicago, etc., R. Co. v. Brown*, 40 Iowa 333; *Page County v. Burlington, etc., R. Co.*, 40 Iowa 520; *Bailey v. Callanan*, 87 Iowa 107. Compare *Davis v. Nolan*, 49 Iowa 683; *Knapp v. Paine*, 95 Iowa 64.

Michigan. — *Busch v. Donohue*, 31 Mich. 481; *Sherman v. A. P. Cook Co.*, 98 Mich. 61. Compare *Dale v. Turner*, 34 Mich. 405; *Huggett v. Case*, 61 Mich. 480.

Mississippi. — *Daniel v. Purvis*, 50 Miss. 261. Compare *Funston v. Metcalf*, 40 Miss. 504.

So where there has been no decision by the secretary of the interior in proceedings in which the state is a party, a patent from the federal government for particular lands as high lands is not a final and conclusive decision that the lands were not swamp and overflowed lands so as not to pass to the state.¹ But one who does not connect himself with the title of the state cannot attack the title of a patentee from the federal government on the ground that the land passed to the state as swamp and overflowed land under the Swamp Act of 1850, and therefore that the federal government could convey no title to its patentee.²

In Ejectment between a patentee of the federal government and a patentee of the state, the decision of the court as to the character of the land, to determine whether it passed under the state or the federal grant, is, as between the parties and their privies, *res judicata*.³

b. CONFIRMATION BY STATE OF FEDERAL GRANTS.— Before the rights of third persons claiming under the state have attached to swamp and overflowed land granted by the Swamp Act of 1850, it is competent for the state to agree that sales of such lands by the federal government subsequent to the Swamp Act shall be respected by the state and that those claiming under the federal government shall be protected in their rights.⁴ But the governor of a state has no power to relinquish to the federal government the claim of the state to lands under the Swamp Act of 1850, and a state, after it has granted swamp lands to an individual, cannot, by any relinquishment of its claims under the Swamp Act, affect the right of its grantee.⁵

8. Conflicting Grants to State.— Where, since the enactment of the Swamp Act, the United States has granted lands to a state for other purposes, such as the construction of railroads, and certain lands are certified to the state as inuring to it under the later act, and the state does not question the correctness of this certification, it is estopped to claim that the lands in fact inured to it under the prior Swamp Act.⁶ As a county is a mere agency of the state, this estoppel is binding upon a county to which the state has granted its

Missouri.— Foster v. Evans, 51 Mo. 39; Campbell v. Wortman, 58 Mo. 258; Birch v. Gillis, 67 Mo. 102. Compare Prior v. Lambeth, 78 Mo. 538.

Oregon.— Miller v. Tobin, 16 Oregon 540; Warner Valley Stock Co. v. Calderwood, 36 Oregon 228.

1. Wright v. Roseberry, 121 U. S. 488, reversing 63 Cal. 252. See also *supra*, this section, *Ex Parte Proceedings of Federal Land Department*.

2. Ehrhardt v. Hogaboom, 115 U. S. 67. Compare Sutton v. Fassett, 51 Cal. 12.

3. Clink v. Thurston, 47 Cal. 21.

4. Confirmation by State of Federal Grant—United States.—Michigan Land, etc., Co. v. Rust, (C. C. A.) 68 Fed. Rep. 155; Kirby v. Lewis, 39 Fed. Rep. 66 (Laws Ark. Dec. 14, 1875).

Arkansas.—Fletcher v. Pool, 20 Ark. 100 (Laws Ark. Jan. 11, 1851); Bruce v. Patton, 54 Ark. 455 (Laws Ark. Dec. 14, 1875); Chism v. Price, 54 Ark. 251.

California.—Fredericks v. Zumwalt, 134 Cal. 44 (Laws Cal. March 10, 1874).

Illinois.—Cook County v. Calumet, etc., Canal, etc., Co., 131 Ill. 505, writ of error dismissed 138 U. S. 635.

Michigan.—Dale v. Turner, 34 Mich. 405.

Michigan Statute.—Iow. Stat. Mich., §§ 5384, 5385, authorizing the state treasurer to receive from the general government the proceeds of swamp lands sold by it after the grant

of such lands to the state in 1850, amounted to a waiver of the state's claim to all such lands as had been previously disposed of by the federal government. Ives v. Ely, 57 Mich. 569. See also Dale v. Turner, 34 Mich. 405. But this statute did not confirm title to such lands as were granted by the federal government after its passage. Sherman v. A. P. Cook Co., 98 Mich. 61.

The Missouri Swamp-land Act of 1868, p. 72, §§ 24, 25, only authorized the governor to relinquish such lands at the request of the County Court, and the register to collect the indemnity offered by the Act of Congress of 1855 upon such relinquishment or upon sale by the general government of lands belonging to the state, and did not constitute a relinquishment by the state of its title to such lands as had been sold by the general government. Master-son v. Marshall, 65 Mo. 94.

5. Matthews v. Goodrich, 102 Ind. 557.

6. Conflicting Grants to State.—Wright v. Roseberry, 121 U. S. 488; Chandler v. Calumet, etc., Min. Co., 36 Fed. Rep. 665, affirmed 149 U. S. 79; McCormick v. Hayes, 159 U. S. 332; Hough v. Buchanan, 27 Fed. Rep. 328; Pengra v. Munz, 29 Fed. Rep. 830; Rogers Locomotive Mach. Works v. American Emigrant Co., 164 U. S. 559, reversing 83 Iowa 612; Young v. Charnquist, 114 Iowa 116; State v. Flint, etc., R. Co., 89 Mich. 481, writ of error dismissed 152 U. S. 363. See also Crapo v. Troy Tp., 98 Mich. 635.

swamp lands prior to the subsequent conflicting grant to the state;¹ and it is likewise binding on individuals claiming under the state by an agreement entered into after the lands had been certified to the state as inuring to it under the later act.²

9. Disposition of Swamp Lands by State — *a. GENERAL POWER OF STATE.* — Though the federal Swamp Act of 1850 granted the swamp lands to the several states for the purpose expressed on the face of the act, to enable them to construct the necessary levees and drains to reclaim the land, and also provided that the proceeds of such lands, whether from sale or by direct appropriation in kind, should be applied exclusively as far as necessary to the purpose of reclaiming the lands by levees and drains, still it is the universally recognized rule that the several states took the lands with full power of disposition,³ and that the application of the proceeds to the purposes of the grant rested upon the good faith of the several states, which might exercise discretion as to their disposal, and no trust was created with regard to the lands or their proceeds which could be enforced against the grantees of the state;⁴ nor can an individual require that the proceeds of such lands be applied to reclaiming other lands.⁵ As the federal Swamp Act is recognized as a grant *in presenti*,⁶ the several states were enabled by it to make valid grants of the land though no patent therefor had been issued by the federal government to the state.⁷ In a number of states the legislatures granted to the several counties the swamp lands lying within their boundaries,⁸ with power to sell

1. Estoppel Against County. — *Rogers Locomotive Mach. Works v. American Emigrant Co.*, 164 U. S. 559, reversing 83 Iowa 612.

2. Estoppel Against Individual. — *Rogers Locomotive Mach. Works v. American Emigrant Co.*, 164 U. S. 559; *Cahn v. Barnes*, 5 Fed. Rep. 326; *Pengra v. Munz*, 29 Fed. Rep. 830.

3. General Power of Disposition — *United States*. — *Cook County v. Calumet, etc., Canal, etc., Co.*, 138 U. S. 635, dismissing writ of error from 131 Ill. 505; *Mills County v. Railroad Co's*, 107 U. S. 557; *U. S. v. Louisiana*, 127 U. S. 182; *American Emigrant Co. v. Adams County*, 100 U. S. 61; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, affirming 6 Sawy. (U. S.) 567, 4 Fed. Rep. 266. See also *Vose v. Internal Improvement Fund*, 2 Woods (U. S.) 647; *Vose v. Reed*, 1 Woods (U. S.) 647.

Illinois. — *Whiteside County v. Burchell*, 31 Ill. 68; *Dart v. Hercules*, 34 Ill. 395; *Illinois Cent. R. Co. v. Union County*, 94 Ill. 70.

Iowa. — *Barrett v. Brooks*, 21 Iowa 144.

Michigan. — *A. P. Cook Co. v. Aplin*, 79 Mich. 100; *McRae v. Shaffer*, 89 Mich. 463.

Missouri. — *Dunklin County v. District County Ct.*, 23 Mo. 449.

Oregon. — *Gaston v. Stott*, 5 Oregon 48; *Miller v. Tobin*, 16 Oregon 540. See also *Kings County v. Tulare County*, 119 Cal. 509; *Internal Imp. Fund v. St. Johns R. Co.*, 16 Fla. 531.

Construction of State Grant. — *State v. Portsmouth Sav. Bank*, 106 Ind. 451 (grant of land bordering on Beaver lake).

4. Whiteside County v. Burchell, 31 Ill. 68; *Dunklin County v. District County Ct.*, 23 Mo. 449; *Pool v. Brown*, 98 Mo. 675; *Gaston v. Stott*, 5 Oregon 48; *La Pointe v. Ashland*, 47 Wis. 251.

5. Barrett v. Brooks, 21 Iowa 144; *A. P. Cook Co. v. Aplin*, 79 Mich. 100.

6. See supra, this section, 7*a. In General.*

7. Summers v. Dickinson, 9 Cal. 554; *Owens v. Jackson*, 9 Cal. 322; *Kernan v. Griffith*, 27 Cal. 88; *Allison v. Halfacre*, 11 Iowa 450; *Bailey v. Callanan*, 87 Iowa 107; *Betz v. Illinois Cent. R. Co.*, 52 La. Ann. 893. See also *Smith v. Miller*, 105 Iowa 688. See, however, *Carr v. Moore*, (Iowa 1903) 93 N. W. Rep. 52.

8. Grants to Counties — *Illinois*. — *Whiteside County v. Burchell*, 31 Ill. 68; *Newell v. Bureau County*, 37 Ill. 253; *Bureau County v. Thompson*, 39 Ill. 566; *Wabash, etc., R. Co. v. McDougal*, 113 Ill. 603.

Iowa. — *Webster County v. Taylor*, 19 Iowa 117; *Montgomery County v. Burlington, etc., R. Co.*, 38 Iowa 208; *Buena Vista County v. Iowa Falls, etc., R. Co.*, 55 Iowa 157.

Michigan. — *People v. State Land Office Com'r*, 23 Mich. 270.

Mississippi. — *Jackson v. Dilworth*, 39 Miss. 772; *Clements v. Anderson*, 46 Miss. 581; *Warren County v. Nall*, 78 Miss. 726.

Missouri. — *State v. Register of Lands*, 48 Mo. 59; *Morgan v. Hannibal, etc., R. Co.*, 63 Mo. 129; *Lockwood v. Hannibal, etc., R. Co.*, 65 Mo. 233; *Pool v. Brown*, 98 Mo. 675; *Cape Girardeau Southwestern R. Co. v. Hatton*, 102 Mo. 45.

Wisconsin. — *State v. Hastings*, 11 Wis. 448.

The Iowa Act of 1853, granting the swamp lands to the several counties of the state, operated as a grant *in presenti* to such counties. *Bailey v. Callanan*, 87 Iowa 107; *Smith v. Miller*, 105 Iowa 688.

Whether lands were swamp lands so as to pass to the county may be shown by the testimony of witnesses who know the fact. *Wabash, etc., R. Co. v. McDougal*, 113 Ill. 603.

Divesting Title of County. — By Act Miss. March 16, 1852, c. 14, a vested right to all the swamp and overflowed lands situated within the district therein mentioned was granted to the several counties in which they lie, and the legislature cannot divest this right out of any

or dispose of such lands.¹

Grants to Railroads.—State grants of such swamp lands have also been made to railroad companies to aid in the construction of their roads.²

b. VALIDITY AND EFFECT OF STATE GRANTS.—The several states have in some instances by special acts granted swamp lands received from the federal government under the Swamp Act of 1850,³ and in a number of jurisdictions general laws have been enacted from time to time for their sale and disposition.⁴ Of course the officers intrusted with the duty of disposing of such lands must comply with the provisions of the statutes conferring the power.⁵

of such counties without their consent. *Jackson v. Dilworth*, 39 Miss. 772.

Effect of Subdivision of County.—*Alt v. Fullerton*, 151 Mo. 598.

1. United States.—*American Emigrant Co. v. Adams County*, 100 U. S. 61; *Viele v. Van Steenberg*, 31 Fed. Rep. 249.

Illinois.—*Dart v. Hercules*, 34 Ill. 395; *Newell v. Bureau County*, 37 Ill. 253; *Wabash, etc., R. Co. v. McDougal*, 113 Ill. 603; *Gilbreath v. Dilday*, 152 Ill. 207.

Iowa.—*State v. Napier*, 7 Iowa 425; *Webster County v. Taylor*, 19 Iowa 117; *Bell v. Foutch*, 21 Iowa 119; *Barrett v. Brooks*, 21 Iowa 144; *Baker v. Washington County*, 26 Iowa 148; *Grimes v. Hamilton County*, 37 Iowa 290; *Foster v. Bettsworth*, 37 Iowa 415; *Audubon County v. American Emigrant Co.*, 40 Iowa 460; *Page County v. American Emigrant Co.*, 41 Iowa 115; *Palmer v. Howard County*, 45 Iowa 61; *Gray v. Mount*, 45 Iowa 591; *Tama County v. Melendy*, 55 Iowa 395; *Chicago, etc., R. Co. v. Jackson*, 68 Iowa 301; *Henderson v. Robinson*, 76 Iowa 603; *Connors v. Meservey*, 76 Iowa 691; *Snell v. Dubuque, etc., R. Co.*, 78 Iowa 88 [followed in *Snell v. Dubuque, etc., R. Co.*, 80 Iowa 767]; *Callanan v. Merrill*, 81 Iowa 73; *American Emigrant Co. v. Fuller*, 83 Iowa 599; *Hays v. McCormick*, 83 Iowa 89.

Mississippi.—*Jackson v. Dilworth*, 39 Miss. 772; *Warren County v. Nall*, 78 Miss. 726.

Missouri.—*Dunklin County v. District County Ct.*, 23 Mo. 449; *Andrew County v. Craig*, 32 Mo. 528; *Funkhouser v. Mallen*, 62 Mo. 555; *Chouteau v. Allen*, 70 Mo. 290; *Wilcox v. Osborn*, 77 Mo. 621; *Prior v. Scott*, 87 Mo. 303; *Sturgeon v. Hampton*, 88 Mo. 203; *State v. Wayne County Ct.*, 98 Mo. 363; *Cape Girardeau Southwestern R. Co. v. Hatton*, 102 Mo. 45; *St. Louis, etc., R. Co. v. Wayne County*, 125 Mo. 351; *Hooke v. Chitwood*, 127 Mo. 372; *Hall v. Gregg*, 138 Mo. 286; *Elliott v. Buffington*, 149 Mo. 663; *Alt v. Fullerton*, 151 Mo. 598; *State v. Crumb*, 157 Mo. 545; *Eaton v. St. Charles County*, 8 Mo. App. 177; *Simpson v. Stoddard County*, 173 Mo. 421.

Private Sale.—*Spitler v. Scofield*, 43 Iowa 571; *Pool v. Brown*, 98 Mo. 675; *Alt v. Stoker*, 127 Mo. 466.

Minimum Price.—*Savery v. Moore*, 61 Iowa 505; *Cape Girardeau Southwestern R. Co. v. Hatton*, 102 Mo. 45; *State v. Crumb*, 157 Mo. 515; *Stone v. Perkins*, 85 Fed. Rep. 616.

Conveyance in Compromise of Claim Against County.—*Allen v. Cerro Gordo County*, 34 Iowa 54; *Grimes v. Hamilton County*, 37 Iowa 290; *Mills County v. Burlington, etc., R. Co.*, 47 Iowa 66.

Conveyance in Consideration of Recovery of Land.—*Grimes v. Hamilton County*, 37 Iowa

290; *Denison v. Crawford County*, 48 Iowa 211; *Palo Alto County v. Harrison*, 68 Iowa 81; *Emmet County v. Allen*, 76 Iowa 499.

Appropriation of Swamp Land in Aid of Railroad.—*Parks v. Iowa Cent. R. Co.*, 24 Iowa 188; *Dunklin County v. District County Ct.*, 23 Mo. 449; *Cape Girardeau Southwestern R. Co. v. Hatton*, 102 Mo. 45; *St. Louis, etc., R. Co. v. Wayne County*, 125 Mo. 351; *Moss v. Kauffman*, 131 Mo. 424.

Sale in Consideration of Construction of Levees and Drains.—*State v. Wayne County Ct.*, 98 Mo. 362; *St. Louis, etc., R. Co. v. Wayne County*, 125 Mo. 351; *Cape Girardeau Southwestern R. Co. v. Hatton*, 102 Mo. 45.

Appropriation of Proceeds for Court House.—*Rock v. Rinehart*, 88 Iowa 37.

Lien on Land for Price.—*Cedar County v. Williams*, 79 Mo. 581; *Jasper County v. Mickey*, (Mo. 1887) 4 S. W. Rep. 424.

Purchase-money Mortgage.—*Mitchell v. Nodaway County*, 80 Mo. 257.

Sale on Execution Against County.—*Stone v. Perkins*, 85 Fed. Rep. 616.

Election on Proposition for Sale.—*Cedar Rapids, etc., R. Co. v. Boone County*, 34 Iowa 45; *Gray v. Mount*, 45 Iowa 591.

2. Illinois Cent. R. Co. v. Union County, 94 Ill. 70; *Chouteau v. Allen*, 70 Mo. 290 (Act Mo. 1855). See generally *supra*, this title, *Grants in Aid of Railroads*.

3. Validity and Effect.—*Southern Pine Co. v. Hall*, (C. C. A.) 105 Fed. Rep. 84 (Act Miss. 1871); *Hardy v. Hartman*, 65 Miss. 504.

4. Wineman v. Gastrell, (C. C. A.) 53 Fed. Rep. 697 (Act Miss. 1852); *Brodie v. Moseby*, 23 Ark. 316; *Walworth v. Miles*, 23 Ark. 653; *Gaster v. Gaines*, 23 Ark. 712; *Branch v. Mitchell*, 24 Ark. 431; *Carver v. Chute*, 8 Ind. 145; *State v. Lanier*, 47 La. Ann. 568; *Wait v. State Land Office Com'r*, 87 Mich. 353; *Eaton v. St. Charles County*, 76 Mo. 492, *affirming* 8 Mo. App. 177; *Pool v. Brown*, 98 Mo. 675.

5. Wineman v. Gastrell, (C. C. A.) 53 Fed. Rep. 697 (Act Miss. 1852); *Butler v. Reardon*, 19 Ark. 9; *Hempstead v. Underhill*, 20 Ark. 337; *Deloach v. Brownfield*, 22 Ark. 344; *Cheatam v. Phillips*, 23 Ark. 80; *Walworth v. Miles*, 23 Ark. 653; *Cox v. Jones*, 47 Cal. 412; *Dart v. Hercules*, 57 Ill. 446; *Carver v. Chute*, 8 Ind. 145; *Atty.-Gen. v. Smith*, 31 Mich. 359; *Gustin v. State Land Office Com'r*, 126 Mich. 269; *Phillips v. Gastrell*, 62 Miss. 362, 64 Miss. 473.

Survey of Swamp Lands.—*Mahon v. Richardson*, 50 Cal. 333; *Maddux v. Brown*, 91 Cal. 523.

Presumption in Favor of Official Duty.—*Rice v. Harrell*, 24 Ark. 402.

Delegation of Power to Sell.—In *Cheatam*

Such officers can sell only such land as falls within the terms of the statutes conferring the power to sell.¹

c. **WHO MAY PURCHASE — PREFERENTIAL RIGHTS OF PURCHASE.** — Statutes in some jurisdictions have expressly provided who may purchase the swamp lands conveyed by the federal government to the state,² and have required sales to be made to actual settlers,³ or have limited the amount of land to be sold to one person.⁴ Other statutes have conferred preferential rights of purchase upon particular persons.⁵ Examples of statutes of this latter class are those giving preference to occupants or settlers⁶ or persons who have made improvements on the land;⁷ giving to the owner of land on the bank of any river in any swamp the preferential right to contract to levee such lands and to take in pay for executing the contract swamp and overflowed lands lying in the rear adjacent to his land;⁸ giving to levee contractors the right to take swamp land in payment for their work;⁹ and giving to contractors for the building of state roads the same privilege.¹⁰ In a contest between applicants to purchase swamp lands with regard to which neither has a preferential right to purchase, the application first presented is to be preferred.¹¹

To Render Enforceable a Statutory Preferential Right of purchase, the person claiming the preference must comply with the statutory provisions relating thereto.¹²

v. Phillips, 23 Ark. 80, it was held that the swamp-land commissioners authorized by the *Arkansas* statute of Jan. 11, 1851, and subsequent enactments to sell the swamp and overflowed lands granted by Congress to the state derived their power to sell from the statutes, and had to follow their requirements in order to make valid sales; and they could not appoint deputies or subcommissioners and transfer to them the power of sale intrusted to the commissioners themselves by the legislature.

1. Edwards v. Rolley, 96 Cal. 408, 31 Am. St. Rep. 234; Fredericks v. Zumwalt, 134 Cal. 44.

Unsurveyed Lands. — State v. Portsmouth Sav. Bank, 106 Ind. 435.

Reclaimable Land. — People v. Cowell, 60 Cal. 400.

Lands "Suitable for Cultivation." — Fulton v. Brannan, 88 Cal. 454; McNee v. Lynch, 88 Cal. 519; McDonald v. Taylor, 89 Cal. 42; Nuttall v. Lovejoy, 90 Cal. 163. See also Diss v. Long, (Cal. 1891) 26 Pac. Rep. 515; Marsh v. Hendy, (Cal. 1891) 27 Pac. Rep. 647.

Land "Not Otherwise Appropriated." — People v. State Land Office Com'r, 23 Mich. 270.

2. **Who May Purchase.** — Kirby v. Lewis, 39 Fed. Rep. 66 (Act Ark. March 18, 1879); Christman v. Brainard, 51 Cal. 534; Price v. Beaver, 73 Cal. 625; Geer v. Sibley, 83 Cal. 1; Barker v. Freeman, 85 Cal. 533; Stoner v. Freeman, (Cal. 1890) 24 Pac. Rep. 927.

3. **Actual Settlers.** — Dewar v. Ruiz, 99 Cal. 385; Miller v. Byrd, 90 Cal. 150; Goldberg v. Thompson, 96 Cal. 117.

Temporary absence from land does not prevent one from being a settler. Maddux v. Brown, 91 Cal. 523.

4. **Amount Limited.** — Gastrell v. Phillips, 64 Miss. 473.

5. **Preferential Rights.** — Chism v. Price, 54 Ark. 251; Wilson v. McLernan, 20 Iowa 30; Collins v. Dallas County, 44 Iowa 396; Walker v. Plumer, 44 Iowa 406; Briggs v. Jasper County, 49 Iowa 481; Bixby v. Adams County, 49 Iowa 507; Robertson v. Mereshon, 13 La. Ann. 373; Mast v. Hamilton, 14 La. Ann. 787;

Headley v. Leonard, 35 Mich. 71; Ely v. State Land Office Com'r, 49 Mich. 17; Wait v. State Land Office Com'r, 87 Mich. 353.

6. **Occupants or Settlers.** — Christman v. Brainard, 51 Cal. 534; McIntyre v. Sherwood, 82 Cal. 139; Wilson v. McLernan, 20 Iowa 30; McDade v. Bossier Levee Board, 109 La. 625; People v. State Treasurer, 7 Mich. 366; Hedley v. Leonard, 35 Mich. 71; Hasler v. Schumacher, 10 Wis. 419.

Actual residence is not necessary to render one a "settler." Pol. Code Cal., §§ 3442, 3443; McIntyre v. Sherwood, 82 Cal. 139.

Occupancy of the adjoining lands, under Laws Mich. 1858, § 9, might consist of cultivation and use, without actual residence, or might be by a tenant; and the commissioner of the state land office had no right to require actual residence. People v. State Treasurer, 7 Mich. 366.

7. **Improvers.** — McIvor v. Williams, 24 Ark. 33; Wright v. Green, 24 Ark. 38; Rice v. Harrell, 24 Ark. 402; Simpson v. Robinson, 37 Ark. 132; Songer v. Gallatin County Ct., 17 Ill. 53; Givens v. Decatur County, 9 Iowa 278; Wilson v. McLernan, 20 Iowa 30.

8. **Construction of Levees.** — Deloach v. Brownfield, 22 Ark. 344; Brodie v. Moseby, 23 Ark. 316; Branch v. Mitchell, 24 Ark. 431; Casselberry v. Fletcher, 27 Ark. 385.

9. **McGehee v. Mathis**, 21 Ark. 40; Deloach v. Brownfield, 22 Ark. 344.

10. **Contractors for State Roads.** — People v. Pritchard, 17 Mich. 260 (Act Mich. Feb. 12, 1859); Newcombe v. Chesebrough, 33 Mich. 321; State v. Sparrow, 89 Mich. 263.

11. **Allen v. Dake**, 50 Cal. 80; People v. State Land Office Com'r, 23 Mich. 270. See also People v. Pritchard, 17 Mich. 338.

12. **Keema v. Doherty**, 51 Cal. 2 (Act Cal. Apr. 27, 1863); People v. State Land Office Com'r, 23 Mich. 270.

Application to Purchase. — Rice v. Harrell, 24 Ark. 402; Branch v. Mitchell, 24 Ark. 431; Botsford v. Howell, 52 Cal. 158; Price v. Beaver, 73 Cal. 625; Garfield v. Wilson, 74 Cal. 175; Wren v. Mangan, 88 Cal. 274; Buchanan v.

d. GENERAL RIGHTS OF PURCHASERS. — The rights of purchasers of swamp lands from the several states depend, of course, upon the terms of the statutes authorizing the sale of the lands and the terms of the grant.¹

XV. SCHOOL AND UNIVERSITY GRANTS — 1. By Federal Government — a. IN GENERAL. — Provision for the maintenance of public schools has always been a part of the land system of the United States, and numerous acts of Congress providing for the disposal of the unappropriated public domain or for the admission of territories into the Union have either made it a condition that a certain section or sections of each township should be reserved and applied for the use of public schools, or have granted such section or sections to the state for that purpose.² The particular sections thus reserved or granted are generally the sixteenth or the sixteenth and thirty-sixth, some of the reservations and grants including only one and some including both.³ Grants or reservations of public lands are frequently made by Congress for the use of seminaries of learning;⁴ and various acts of Congress have donated public lands to such states or territories as might provide colleges for the benefit of agricultural and mechanical arts, the land to be used for the benefit of such institutions.⁵

b. TITLE AND TENURE OF STATE OR TERRITORY — (1) Vesting of Title — (a) In General. — Under a Congressional grant of public land for the support of schools or higher institutions of learning, where the specific land is not designated — and it seldom is — it is generally held that the title vests whenever the land is surveyed and identified or selected by the proper authorities and the attendant statutory proceedings have been completed, but not before;

Nagle, 88 Cal. 591; Ross v. Kennedy, (Cal. 1891) 26 Pac. Rep. 599; Nuttall v. Lovejoy, 90 Cal. 163; Stevens v. Lovejoy, (Cal. 1891) 27 Pac. Rep. 33; Belcher v. Farren, 89 Cal. 73; Dewar v. Ruiz, 89 Cal. 385; Marsh v. Hendy, (Cal. 1891) 27 Pac. Rep. 647; Maddux v. Brown, 91 Cal. 523.

1. General Rights of Purchasers — United States. — American Emigrant Co. v. Wright County, 97 U. S. 339; American Emigrant Co. v. Adams County, 100 U. S. 61; McConaughy v. Pennoyer, 43 Fed. Rep. 196, 339, affirmed 140 U. S. 1.

Arkansas. — Hempstead v. Underhill, 20 Ark. 337; Brewer v. Hall, 36 Ark. 334; Pence v. Sandford, 28 Ark. 235; Gaster v. Gaines, 23 Ark. 712; Beckham v. Worthen, 23 Ark. 720; Smithee v. Auditor, 40 Ark. 328; Cochran v. Cobb, 43 Ark. 180.

California. — Carpenter v. Sargent, 41 Cal. 557; Borland v. Lewis, 43 Cal. 569; Ringstorf v. Guth, 50 Cal. 86; Carpenter v. San Francisco Sav. Union, 128 Cal. 516; California Pastoral, etc., Co. v. Witson, 129 Cal. 376; Miller v. Batz, 131 Cal. 402.

Illinois. — Henry County v. Winnebago Swamp Drainage Co., 52 Ill. 299.

Louisiana. — State v. Lanier, 47 La. Ann. 110; McDade v. Bossier Levee Board, 109 La. 625.

Michigan. — Robertson v. State Land Office Com'r, 44 Mich. 274; Bangs v. Stephenson, 63 Mich. 661; A. P. Cook Co. v. Alpin, 79 Mich. 100; Mays v. Shaffer, 89 Mich. 460; McRae v. Shaffer, 89 Mich. 463; Olds v. State Land Office Com'r, (Mich. 1901) 86 N. W. Rep. 956.

Minnesota. — St. Paul, etc., R. Co. v. Brown, 24 Minn. 517; Goodwin v. Rice, 26 Minn. 20.

Oregon. — Husbands v. Mosier, 26 Oregon 55.

Wisconsin. — Barden v. Smith, 7 Wis. 439.

2. Provision for Schools Part of Land System. — See 2 Kent's Com. (13th ed.) 196, note e; Cooper v. Roberts, 18 How. (U. S.) 173; State v. Johanson, 26 Wash. 668.

3. See generally the various acts and ordinances of Congress of the character indicated and the cases throughout this section.

4. See Buhne v. Chism, 48 Cal. 467; Bettis v. Amonett, 4 La. Ann. 363.

Where an act of Congress making provision for the disposal of public lands reserved from sale a township (to be located) for the use of a seminary of learning, and, the township having been located, the territorial government incorporated a board of trustees to take the land, and afterwards the territory was admitted as a state into the Union, it was held that the title to the land had vested in the trustees, and not in the state; that the board of trustees was not a public corporation and had no political powers; that the grant of land for the support of the institution was like a donation to a private person; that the state legislature could not lawfully exercise any power to defeat the trust; and therefore that the sale of the land and payment of the proceeds into the state treasury by legislative direction were unlawful. Vincennes University v. Indiana, 14 How. (U. S.) 268, reversing 2 Ind. 293.

5. For discussions of questions arising under these particular statutes, see Cornell University v. Fiske, 136 U. S. 152, affirming Matter of McGraw, 111 N. Y. 66; McNee v. Donahue, 142 U. S. 587, affirming 76 Cal. 499; Massachusetts Agricultural College v. Marden, 156 Mass. 150; State v. Vicksburg, etc., R. Co., 51 Miss. 366; People v. Davenport, 117 N. Y. 549, modifying 30 Hun (N. Y.) 177, and distinguishing Matter of McGraw, 111 N. Y. 66. See generally the title UNIVERSITIES AND COLLEGES.

until that time the title and power of disposition remain in the United States¹ or its grantees who have selected the land under prior grants.²

(b) **Necessity for Completion and Approval of Survey.** — In order to vest title in the state, the survey must be completed,³ and before the survey is complete so that the title may vest, a plat of the survey must be approved by the surveyor-general of the United States.⁴

(2) **Effect of Reservation from Sale.** — Whether the various acts of Congress reserving from sale as a part of the public domain certain sections of land in each township, and providing that they shall be applied for the use of schools, operate as grants of these sections so as to vest the legal title thereto in the state or territory including them is a question which has given rise to some conflict in the decisions. By the weight of authority, however, such a reservation does not operate to pass the legal title to these lands out of the United States even though the lands are surveyed, but at most merely reserves the lands from disposal under the general land laws and thus leaves them subject to the entire and exclusive control of the general government.⁵ It amounts

1. Survey, Identification, or Selection Determines When Title Vests — *United States*. — *Gaines v. Nicholson*, 9 How. (U. S.) 364; *Campbell v. Doe*, 13 How. (U. S.) 244; *Kissell v. St. Louis Public Schools*, 18 How. (U. S.) 19, *affirming* 16 Mo. 553; *Cooper v. Roberts*, 18 How. (U. S.) 173, *reversing* 6 McLean (U. S.) 93; *Beecher v. Wetherby*, 95 U. S. 517; *Frasher v. O'Connor*, 115 U. S. 102; *McCreery v. Haskell*, 119 U. S. 327; *Williams v. U. S.*, 138 U. S. 516; *McNee v. Donahue*, 142 U. S. 587, *affirming* 76 Cal. 499; *Hibberd v. Slack*, 84 Fed. Rep. 571. See also *Heydenfeldt v. Daney Gold, etc.*, Min. Co., 93 U. S. 634, *affirming* 10 Nev. 290.

Alabama. — *Sprayberry v. State*, 62 Ala. 461. See also *Knabe v. Burden*, 88 Ala. 436.

California. — *Terry v. Megerle*, 24 Cal. 609, 85 Am. Dec. 84; *Higgins v. Houghton*, 25 Cal. 252; *Grogan v. Knight*, 27 Cal. 516; *Middleton v. Low*, 30 Cal. 596; *Hastings v. Devlin*, 40 Cal. 358; *Collins v. Bartlett*, 44 Cal. 371; *Buhne v. Chism*, 48 Cal. 467; *Rooker v. Johnston*, 49 Cal. 3; *Finney v. Berger*, 50 Cal. 248; *Medley v. Robertson*, 55 Cal. 396; *Wedekind v. Craig*, 56 Cal. 645; *Bullock v. Rouse*, 81 Cal. 590; *Gilson v. Robinson*, (Cal. 1885) 7 Pac. Rep. 428.

Kansas. — *State v. Stringfellow*, 2 Kan. 263.

Louisiana. — *McCastle v. Chaney*, 28 La. Ann. 720.

Missouri. — *Kissell v. St. Louis Public Schools*, 16 Mo. 553, *affirmed* 18 How. (U. S.) 19; *State v. Ham*, 19 Mo. 592, *affirmed* 18 How. (U. S.) 126; *Papin v. Ryan*, 32 Mo. 21; *Patterson v. Fagan*, 38 Mo. 70. Compare *Bowlin v. Furman*, 28 Mo. 427; *Cummings v. Powell*, 97 Mo. 524.

Nevada. — *State v. Blasdel*, 4 Nev. 241; *Layton v. Farrell*, 11 Nev. 451.

But see *Daggett v. Bonewitz*, 107 Ind. 276.

The rule of the text applies to the Mississippi school lands of which the state of Georgia was the donor. Upon the survey of the sections and the admission of Mississippi as a state, the title vested in the state in trust for the inhabitants of the several townships. *Jones v. Madison County*, 72 Miss. 777 [*overruling* *Hester v. Crisler*, 36 Miss. 681, and cases following 'it']; *Street v. Columbus*, 75 Miss. 832.

No Patent Necessary to Vest Title in State. — *Gaines v. Nicholson*, 9 How. (U. S.) 365; *Hedrick v. Hughes*, 15 Wall. (U. S.) 123; *Mc-*

Creery v. Haskell, 119 U. S. 327; *Jones v. Madison County*, 72 Miss. 777; *Kissell v. St. Louis Public Schools*, 16 Mo. 553, *affirmed* 18 How. (U. S.) 19; *Patterson v. Fagan*, 38 Mo. 70; *State v. Johanson*, 26 Wash. 676.

Approval by the Secretary of the Interior is prerequisite to the validity of a selection of seminary lands made by the state of California under Act Cong. March 3, 1853. Without such approval the title does not vest in the state or its grantee. *Buhne v. Chism*, 48 Cal. 467. See *Campbell v. Doe*, 13 How. (U. S.) 244, *affirming* 17 Ohio 267; *McNee v. Donahue*, 142 U. S. 587, *affirming* 76 Cal. 499.

But such approval has been held to be unnecessary with respect to the sixteenth and thirty-sixth sections granted for school purposes. *Higgins v. Houghton*, 25 Cal. 252.

2. Previous Selection by Prior Grantee of United States. — *McNee v. Donahue*, 142 U. S. 587, *affirming* 76 Cal. 499; *Terry v. Megerle*, 24 Cal. 609, 85 Am. Dec. 84. See also *Papin v. Ryan*, 32 Mo. 21.

3. Completion of Survey. — *Bullock v. Rouse*, 81 Cal. 590. And see the cases in the next following note.

4. Approval of Survey by Surveyor-General. — *Grogan v. Knight*, 27 Cal. 515; *Middleton v. Low*, 30 Cal. 596; *Collins v. Bartlett*, 44 Cal. 382; *Finney v. Berger*, 50 Cal. 248; *Medley v. Robertson*, 55 Cal. 396 [*overruling* on this point *Oakley v. Stuart*, 52 Cal. 522]; *Bullock v. Rouse*, 81 Cal. 590; *Gilson v. Robinson*, (Cal. 1885) 7 Pac. Rep. 428.

Filing of Approved Plat of Indemnity Lands in Local Land Office. — School indemnity lands cannot be regarded as legally surveyed in such a sense as to open them to selection or other disposition by the state until a plat of the lands has been approved by the surveyor-general and a certified copy of the approved plat has been filed in the local land office. *U. S. v. Curtner*, 38 Fed. Rep. 1.

5. Reservation Does Not Pass Title — *United States*. — *Minnesota v. Bachelder*, 1 Wall. (U. S.) 109. See also *Strother v. Lucas*, 12 Pet. (U. S.) 455. Compare *Vincennes University v. Indiana*, 14 How. (U. S.) 268, *reversing* 2 Ind. 293.

Minnesota. — *Coleman v. St. Paul, etc., R. Co.*, 38 Minn. 260.

merely to a declaration of intention, and not to a complete donation or grant; and although good faith requires that it be carried into effect, some further act of the general government is necessary before the legal title passes.¹

In Kansas, however, the law was declared to the contrary, it being held that an act of Congress reserving certain sections of the public land for the use of schools amounted to a grant of the land and passed title.² But the United States Supreme Court subsequently held that under the legislation of Congress and of Kansas and the accepted conditions upon which that state was admitted into the Union the original claim of the state to the school sections in the townships was rejected by Congress and abandoned by the state, and that the right of Congress was conceded to the absolute control and primary disposal of such lands until such right should be extinguished by appropriate legislation.³

(3) *Tenure*.—The title to school and university lands granted by the various acts and ordinances of Congress is generally held to be vested in the states, but in trust for the support of schools for the inhabitants of the respective townships in which the lands are situated.⁴ Legislation vesting the title to school lands in the state legislature in trust for the support of schools has the same effect as if the title were invested in the state *eo nomine*, and the lands become the property of the state, to be held in trust for the townships or districts for which they are designated.⁵ But an act of Congress enabling the people of a territory to form a constitution and state government, etc., and providing that certain lands in each township "shall be granted to the inhabitants of such township for the use of schools," constitutes a grant to the inhabitants of the township in which the lands are situated, and not to the state.⁶

Missouri.—Hammond v. St. Louis Public Schools, 8 Mo. 65; Cabanné v. Walker, 31 Mo. 274.

Montana.—U. S. v. Bisel, 8 Mont. 20.

South Dakota.—Riverside Tp. v. Newton, 11 S. Dak. 120.

Utah.—U. S. v. Elliot, 12 Utah 119, *overruling* 7 Utah 389. See also Hyndman v. Stowe, 9 Utah 27; Burrows v. Kimball, 11 Utah 149.

Washington.—Barkley v. U. S., 3 Wash. Ter. 522.

Whether Certain Lot Included in Reservation Held to Be Mixed Question of Law and Fact.

Eberle v. St. Louis Public Schools, 11 Mo. 247.

1. Hammond v. St. Louis Public Schools, 8 Mo. 65; Cabanné v. Walker, 31 Mo. 285. See also Strother v. Lucas, 12 Pet. (U. S.) 455. Compare Vincennes University v. Indiana, 14 How. (U. S.) 268, *reversing* 2 Ind. 293.

2. **Kansas Rule**.—Upon the principle that no particular words are necessary to constitute a grant for public uses, an act of Congress providing that when lands in the territory should be surveyed, certain sections in each township "shall be and the same are hereby reserved for the purpose of being applied to the use of schools in said territory and in the states and territories to be hereafter erected out of the same" was held to amount to a grant of the land therein described to the people of the territory for the use of schools—to be a dedication or an appropriation of the land for that object, and not merely a reservation from sale as a part of the public domain. State v. Stringfellow, 2 Kan. 263. See also Baker v. Newland, 25 Kan. 25.

3. **Claim to School Lands Held to Have Been Abandoned by Kansas**.—Missouri, etc., R. Co.

v. Roberts, 152 U. S. 114, *reversing* 43 Kan. 102, and *distinguishing* Beecher v. Wetherby, 95 U. S. 517.

4. **Title in State in Trust for Township**—United States.—Hedrick v. Hughes, 15 Wall. (U. S.) 123.

Alabama.—Long v. Brown, 4 Ala. 622; Gaston v. State, 88 Ala. 461.

Arkansas.—Mayers v. Byrne, 19 Ark. 308; Widner v. State, 49 Ark. 172; School Dist. v. Driver, 50 Ark. 346.

Iowa.—Weary v. State University, 42 Iowa 335 (university lands).

Louisiana.—Hunter v. Williams, 16 La. Ann. 129; School Directors v. Ober, 32 La. Ann. 417; State v. Nicholls, 42 La. Ann. 209.

Minnesota.—Regents of State University v. Hart, 7 Minn. 61 (university lands).

Missouri.—Maupin v. Parker, 3 Mo. 310; Marion County v. Moffett, 15 Mo. 606.

Nevada.—See State v. Rhodes, 4 Nev. 312.

Tennessee.—Lowry v. Francis, 2 Yerg. (Tenn.) 534; Goodman v. Tennessee Min. Co., 1 Head (Tenn.) 172.

Contra.—See Bardley v. Case, 4 Ill. 585.

School Indemnity Lands.—In *Louisiana* and *Missouri* school indemnity lands are within the rule of the text. Hedrick v. Hughes, 15 Wall. (U. S.) 123; State v. Nicholls, 42 La. Ann. 209. See also *infra*, this section, *Grants of Land as Indemnity for School Sections Otherwise Disposed Of*.

5. **Lands Vested in Legislature of State**.—Greene Tp. v. Campbell, 16 Ohio St. 11.

6. **Grant to Inhabitants of Township**.—State v. Newton, 5 Blackf. (Ind.) 455. See also State v. Springfield Tp., 6 Ind. 83; Daggett v. Bonewitz, 107 Ind. 276.

c. CONTROL AND POWER OF DISPOSAL AFTER GRANT OR RESERVATION

—(1) *As Between General Government and State or Territory* — (a) *In General.*

— When the title to school lands under a Congressional grant becomes vested in the state, the land ceases, of course, to be a part of the public domain, and Congress has no further control over the disposition of it.¹ Hence any subsequent legislation by Congress imposing conditions upon the power to sell or lease such land is not binding upon the state.² A subsequent patent,³ confirmation, or grant⁴ of the same land by the general government to other parties is, of course, inoperative, and the land does not fall within the acts of Congress relating to the sale or other disposal of the unappropriated public domain.⁵

Land Reserved. — Where, however, the acts of Congress merely reserve the school sections from sale as a part of the public domain and provide that they shall be applied to the use of schools, it is generally held that the title of the United States to these lands is not thereby divested.⁶ The general government may therefore dispose of them to third persons, as by granting a right of way over them.⁷

Under Compact Between State and Federal Government. — Where the legislation providing for the admission of a territory as a state makes obligatory upon the United States an unalterable condition of admission that the school lands shall be granted to the state for the use of schools, these lands became appropriated to the state, set apart from the public domain, and withdrawn from any other disposition by the general government, so that no subsequent law authorizing a sale of the public domain can be so construed as to embrace them, although they are not specially excepted; and this is true whether the words of the compact be considered as merely promissory on the part of the United States and as constituting only a pledge of a grant *in futuro*, or as operating to transfer the title to the state as soon as the sections can be identified by the public surveys.⁸ But this effect of such a compact or grant may be changed by act of Congress with the consent of the state, and the latter may thus relinquish its title to certain lands included in the grant and so give to the general government the power to dispose of them.⁹

1. Exclusive Control by State. — *Beecher v. Wetherby*, 95 U. S. 517; *Hibberd v. Slack*, 84 Fed. Rep. 571; *Mayers v. Byrne*, 19 Ark. 308; *School Trustees v. Schroll*, 120 Ill. 509, 60 Am. Rep. 575. See also *Higgins v. Houghton*, 25 Cal. 252; *Cummings v. Powell*, 97 Mo. 524, 116 Mo. 473, 38 Am. St. Rep. 610. And see *infra*, this section, *Sales and Leases of School and University Lands*.

2. Congress Cannot Impose Conditions on Power to Sell or Lease. — *Mayers v. Byrne*, 19 Ark. 308; *Jones v. Madison County*, 72 Miss. 777.

3. Subsequent Patent from United States Invalid. — *Daggett v. Bonewitz*, 107 Ind. 276. See also *Brygger v. Schweitzer*, 5 Wash. 564, as to university lands.

4. Subsequent Confirmation or Grant Inoperative. — *Cummings v. Powell*, 97 Mo. 524, 116 Mo. 473, 38 Am. St. Rep. 610.

5. Land Granted Not Subject to Disposal as Part of Public Domain. — *Beecher v. Wetherby*, 95 U. S. 517; *School Trustees v. Schroll*, 120 Ill. 509, 60 Am. Rep. 575. See also *Cooper v. Roberts*, 18 How. (U. S.) 173, 20 How. (U. S.) 467; *Minnesota Min. Co. v. National Min. Co.*, 11 Mich. 186, affirmed 3 Wall. (U. S.) 332; *Cummings v. Powell*, 97 Mo. 524, 116 Mo. 473, 38 Am. St. Rep. 610.

School Sections Included Within the Boundaries of a Forest Reservation have been held not to be

a part of such reservation. *Hibberd v. Slack*, 84 Fed. Rep. 571.

6. See *supra*, this section, *Title and Tenure of State or Territory* — *Effect of Reservation from Sale*.

7. Disposal by General Government After Reservation. — *Coleman v. St. Paul, etc.*, R. Co., 38 Minn. 260; *Riverside Tp. v. Newton*, 11 S. Dak. 120. See also *Missouri, etc.*, R. Co. *v. Roberts*, 152 U. S. 114, reversing 43 Kan. 102, and distinguishing *Beecher v. Wetherby*, 95 U. S. 517. And see *infra*, this section, *Sales and Leases of School and University Lands* — *Consent of Congress* — *Under Reservation*.

8. Compact Between General Government and State. — *Beecher v. Wetherby*, 95 U. S. 517. See also *Cooper v. Roberts*, 18 How. (U. S.) 173, 20 How. (U. S.) 467; *Minnesota Min. Co. v. National Min. Co.*, 11 Mich. 186, affirmed 3 Wall. (U. S.) 332. Compare the opinion of Davis, J., in *Heydenfeldt v. Daney Gold, etc.*, Min. Co., 93 U. S. 634, affirming 10 Nev. 290; opinion of Brewer, J., in *Minnesota v. Hitchcock*, 185 U. S. 393.

9. Relinquishment of Rights by State. — *Heydenfeldt v. Daney Gold, etc.*, Min. Co., 10 Nev. 290, affirmed 93 U. S. 634. See also *Missouri, etc.*, R. Co. *v. Roberts*, 152 U. S. 114, reversing 43 Kan. 102, and distinguishing *Beecher v. Wetherby*, 95 U. S. 517.

(b) **Before Survey.** — Until the survey is completed and the title has thus vested in the state the lands are not subject to sale by the state.¹ Hence, an application to purchase school sections before the survey is complete is void² unless validated by some curative statute,³ and no title to any specific land can pass to a purchaser from the state.⁴ Thus, where a warrant for the purchase of state school lands is located upon lands that have not been surveyed, the location is absolutely void and confers no rights upon the locator.⁵

(2) **Constitutional and Statutory Provisions.** — The legal title to school lands being generally vested in the state in trust for the support of schools, it is for the state to determine how and by whom these lands shall be controlled, managed, and disposed of;⁶ and these matters are quite generally made the subject of express statutory⁷ or constitutional⁸ provision. The officers or official bodies invested by law with these powers over the school lands are by no means the same in all states, but are sometimes the school commissioners of townships,⁹ sometimes the township trustees,¹⁰ sometimes the state board of land commissioners,¹¹ sometimes a special board of commissioners consisting of the governor, secretary of state, and state treasurer,¹² and sometimes the boards of supervisors of the several counties.¹³ In *Missouri* the management of the school lands in the respective counties is vested in the County Courts. The functions exercised by the County Courts in the management and control of these lands are not judicial, but are ministerial only; the courts act purely in an administrative capacity, not as agents of the county, but more as agents of the state, and in the performance of a duty specially imposed upon them by the state legislature.¹⁴ The statutes frequently make ample and explicit provision for all matters concerning the management and disposition of school lands by the proper authorities, and of course should always be consulted in connection with the discussion here presented.

Management and Control by Unauthorized Officials. — School boards or the directors of school districts have no inherent power with respect to the management and control of the school lands, and if not invested with such power by the legislature, any acts of theirs with respect to these lands are done without

1. **Sale by State Unauthorized Before Survey.** — *Grogan v. Knight*, 27 Cal. 522; *Middleton v. Low*, 30 Cal. 596; *Collins v. Bartlett*, 44 Cal. 371; *Rooker v. Johnston*, 49 Cal. 3; *Finney v. Berger*, 50 Cal. 248; *Bullock v. Rouse*, 81 Cal. 594. See also *supra*, this section, *Vesting of Title* — *Necessity for Completion and Approval of Survey*.

2. *Rooker v. Johnston*, 49 Cal. 3; *Finney v. Berger*, 50 Cal. 248; *Medley v. Robertson*, 55 Cal. 396.

3. See *Rooker v. Johnston*, 49 Cal. 3.

4. **Purchase from State Before Survey.** — *Grogan v. Knight*, 27 Cal. 522; *Terry v. Megerle*, 24 Cal. 609, 85 Am. Dec. 84; *Middleton v. Low*, 30 Cal. 596; *Collins v. Bartlett*, 44 Cal. 371; *Buhne v. Chism*, 48 Cal. 467; *Bullock v. Rouse*, 81 Cal. 590.

5. **Location upon Unsurveyed Lands.** — *Smith v. Athern*, 34 Cal. 506; *Hastings v. Devlin*, 40 Cal. 358; *Collins v. Bartlett*, 44 Cal. 371. *Contra*, *Van Valkenburg v. McCloud*, 21 Cal. 330.

6. **Power of State to Provide for Management and Control.** — *Widner v. State*, 49 Ark. 172; *School Dist. v. Driver*, 50 Ark. 346.

7. See generally the codes and statutes of the various states. See also *infra*, this section, *Sales and Leases of School and University Lands*.

8. **Provisions of State Constitutions.** — *Routt v.*

Greenwood Cemetery Land Co., 18 Colo. 132; *Hazard's Appeal*, 9 Oregon 366. And see in general the constitutions of the several states.

9. **School Commissioners of Township.** — As under an early *Alabama* statute (Aik. Dig. 370), for construction of which see *School Com'rs v. Aikin*, 5 Port. (Ala.) 173.

10. **Trustees of Township.** As under the later *Alabama* statute, Civ. Code Ala. (1896), c. 100, art. 11.

11. **State Board of Land Commissioners.** — *Routt v. Greenwood Cemetery Land Co.*, 18 Colo. 132.

12. **Board Consisting of Governor and Other State Officials.** — *Hazard's Appeal*, 9 Oregon 366.

District Attorney Not Entitled to Appear in Suits Concerning Management of School Lands, and Not Entitled to Fees in Such Suits. — *Hazard's Appeal*, 9 Oregon 366.

13. **County Board of Supervisors.** — *Laws Iowa* 1862, c. 148; *Poweshiek County v. Buttles*, 70 Iowa 246.

County Supervisors Authorized to Compromise with Insolvent Purchaser of School Lands. — *Poweshiek County v. Buttles*, 70 Iowa 246.

14. **Powers of Missouri County Courts.** — *Marion County v. Moffett*, 15 Mo. 604; *Ray County v. Bentley*, 49 Mo. 236; *Board of Education v. Boyd*, 58 Mo. 279; *Washington County v. Boyd*, 64 Mo. 179. See also *Cedar County v. Johnson*, 50 Mo. 227.

authority.¹ Hence the directors of a school district can confer no authority on any one to cut timber on the school lands of their district, and a person who cuts timber from such lands and converts it to his own use under an agreement between him and the directors to pay its value to them commits a trespass for which he is liable in an action by the state.²

Actions with Respect to School Lands. — In conformity to the foregoing principles it is held that a school district cannot maintain an action to recover the possession of school lands unless so authorized by statute.³ Statutes, however, have sometimes been passed conferring upon the trustees of townships the authority to prosecute, in their names, civil actions in certain cases relative to the school lands.⁴ Other statutes provide that trustees and a treasurer shall be elected for the purpose of taking school lands into their care, and that such persons shall constitute a body corporate, capable of suing and being sued, and vested with other powers over such lands; and such a body corporate can maintain ejectment to recover the school lands.⁵

d. GRANTS OF LAND AS INDEMNITY FOR SCHOOL SECTIONS OTHERWISE DISPOSED OF—(1) *In General.* — Congressional grants of public lands for school purposes or the acts of Congress relating thereto generally contain exceptions as to school sections which upon survey are found to have been previously sold or otherwise disposed of by the general government, and provide that in the event of such sale or other disposition of these sections other lands equivalent thereto shall be granted in lieu thereof.⁶ Legislation of the character indicated contemplates indemnity or compensation for a loss, *i. e.*, the giving of lands in lieu of school sections which, before any title thereto has vested in the state, have been otherwise disposed of by the general government; it does not apply to cases where the school sections have vested in the state.⁷ Hence, where school sections have not been otherwise disposed of by the general government prior to the operation of the grant,

1. **Unauthorized Acts of School Boards or Directors of School Districts.** — *Widner v. State*, 49 Ark. 172; *School Dist. v. Driver*, 50 Ark. 346.

2. **Person Cutting Timber under Authority from Directors of School District Held to Be Trespasser.** — *Widner v. State*, 49 Ark. 172. And see *infra*, this title, *Depredations on Public Lands*.

3. **Action to Recover School Lands Not Maintainable by School District.** — *School Dist. v. Driver*, 50 Ark. 346.

4. **Statute Authorizing Action by Township Trustees.** — *Greene Tp. v. Campbell*, 16 Ohio St. 11.

5. **Trustees and Treasurer Constituted Body Corporate by Statute.** — *Original Surveyed Tp. No. 1 v. Campbell*, 17 Ohio 267, *affirmed* 13 How. (U. S.) 244.

6. See the various school-land grants and other acts of Congress germane thereto.

Lands Previously Disposed of Cannot Pass under Grant for Use of Schools. — *Glasgow v. Baker*, 85 Mo. 559, *affirmed* 128 U. S. 560, *construing* Acts Cong. June 13, 1812, and March 6, 1820. See also *Middleton v. Low*, 30 Cal. 597; *Cummings v. Powell*, 97 Mo. 531, 116 Mo. 473, 38 Am. St. Rep. 610.

The Phrase "Or Otherwise Disposed Of" signifies some disposition of the property equally efficient to a sale and equally incompatible with any right in the state. *Ham v. Missouri*, 18 How. (U. S.) 126, *affirming* 19 Mo. 592. See also *Rosecrans v. Douglass*, 52 Cal. 213; *State v. Stringfellow*, 2 Kan. 263; *Bradley v. Parkhurst*, 20 Kan. 462.

Any person seeking to impeach the grant of a school section *eo nomine* must establish the fact that the lands had been previously sold or otherwise disposed of. *Bradley v. Parkhurst*, 20 Kan. 462.

Grant of Sixteenth and Thirty-sixth Sections to California. — Act Cong. March 3, 1853 (10 U. S. Stat. at L. 244, c. 145), granting sixteenth and thirty-sixth sections of public lands to the state of California for the use of schools, made express exception from the grant (section 7) "where any settlement by the erection of a dwelling house or the cultivation of any portion of the land" should be made upon such sections "before the same shall be surveyed, or where such sections may be reserved for public uses or taken by private claims," and provided that in such cases other lands should be selected in lieu thereof. For the construction of this statute see *Sherman v. Buick*, 93 U. S. 209, *reversing* 45 Cal. 656; *Huff v. Doyle*, 93 U. S. 558, *reversing* 50 Cal. 16; *Natoma Water, etc., Co. v. Bugbey*, 96 U. S. 165; *Ivanhoe Min. Co. v. Keystone Consol. Min. Co.*, 102 U. S. 167; *Fraser v. O'Connor*, 115 U. S. 102; *Terry v. Megerle*, 24 Cal. 609, 85 Am. Dec. 84; *Middleton v. Low*, 30 Cal. 597; *Rosecrans v. Douglass*, 52 Cal. 213; *Wedekind v. Craig*, 56 Cal. 642; *Bullock v. Rouse*, 81 Cal. 590.

7. **Statutes Held Not to Contemplate Exchange of Lands Between State and United States.** — *Hibberd v. Slack*, 84 Fed. Rep. 571, *construing* Rev. Stat. U. S. §§ 2275, 2276, as amended by Act Cong. Feb. 28, 1891, 1 Supp. Rev. Stat. (2d ed.) p. 898.

but the title to them has vested in the state, an attempted substitution of other lands for school purposes is ineffectual.¹

(2) *Vesting of Title.* — Where the act of Congress granting lands to a state for the use of schools provides that in case the lands granted have been otherwise disposed of, other lands equivalent thereto, etc., shall be granted for the same purpose, further legislation by Congress is necessary to render the grant of these indemnity lands effectual; otherwise there would be no more than a bare promise to grant, without designation of the subject on which the grant shall operate.² Under such circumstances Congress sometimes provides a mode of selection of these lands and declares that when selected they shall be held upon the same tenure and upon the same terms as the lands originally granted.³ When the lands have been duly surveyed by the proper authorities⁴ and the proceedings directed by Congress have been complied with, the legal title to the lands thus selected vests at once in the state⁵ and no patent is necessary to the validity of the grant.⁶ But until the lands are properly selected no title to them can pass to the state,⁷ and the land may be otherwise disposed of by the general government.⁸ If the act of Congress directs the secretary of the treasury to select other unappropriated lands as indemnity for the lands originally intended, but does not provide a mode of selection, the secretary of the treasury may prescribe it; and when the lands have been selected pursuant to his directions and the selection has been approved by him, the legal title vests in the state without the necessity of any further proceedings.⁹

(3) *Selection of Indemnity Lands Outside State.* — Where an act of Congress grants unappropriated public lands in lieu of school lands otherwise appropriated, and these indemnity lands are selected beyond the state and in a territory which subsequently is admitted into the Union, the title thus acquired during the territorial status is unaffected by the subsequent admission of the territory as a state; and unless an intention to render these lands subject to taxation appears from the act of Congress, they cannot, while held for school purposes, be taxed by the authority of the state in which they are situated.¹⁰

2. *By States.* — Lands owned by a state are sometimes granted by the state to trustees to be held and sold for the establishment and maintenance of

1. *Attempted Substitution by Public Officers Invalid.* — *Daggett v. Bonewitz*, 107 Ind. 276.

2. *Proceedings Prerequisite to Vesting of Title* — *Sprayberry v. State*, 62 Ala. 459; *Peck v. Louisville, etc., R. Co.*, 101 Ind. 366.

3. See the various acts of Congress on this point.

4. *Selection Before Survey Void.* — *U. S. v. Curtner*, 38 Fed. Rep. 1; *Grogan v. Knight*, 27 Cal. 515. And see *supra*, this section, *Title and Tenure of State or Territory—Vesting of Title—Necessity for Completion and Approval of Survey.*

5. *Title Vests upon Selection of Land According to Directions of Congress.* — *Hedrick v. Hughes*, 15 Wall. (U. S.) 123; *Fraser v. O'Connor*, 115 U. S. 102; *Durand v. Martin*, 120 U. S. 366. See also *Doe v. Mahana*, 21 How. (U. S.) 276. *Sprayberry v. State*, 62 Ala. 459.

Approval by Secretary of Interior of Selection of Lieu Lands Held Conclusive upon Transfer of Title. — *Johanson v. Washington*, 190 U. S. 179, *affirming* 26 Wash. 668.

Uninterrupted, Open, and Adverse Possession under a Patent from the State for more than twenty years has been held to give rise to a presumption that the land was properly selected

and set apart so as to vest title in the state. *Knabe v. Burden*, 88 Ala. 436. But see *Peck v. Louisville, etc., R. Co.*, 101 Ind. 366.

6. *Patent Unnecessary.* — *Hedrick v. Hughes*, 15 Wall. (U. S.) 123; *Fraser v. O'Connor*, 115 U. S. 102.

7. *No Title Passes Before Selection.* — *Matthews v. Baker*, 36 Ala. 186; *Berry v. Cammet*, 44 Cal. 347; *Collins v. Bartlett*, 44 Cal. 371; *Churchill v. Anderson*, 53 Cal. 212; *Roberts v. Gebhart*, 104 Cal. 67; *Peck v. Louisville, etc., R. Co.*, 101 Ind. 366; *Bres v. Louviere*, 37 La. Ann. 736; *Baker v. Jamison*, 54 Minn. 17; *Coombs v. Lane*, 4 Ohio St. 112.

8. *Roberts v. Gebhart*, 104 Cal. 67.

9. *Mode of Selection Prescribed by Secretary of Treasury.* — *Sprayberry v. State*, 62 Ala. 459. See also *Campbell v. Doe*, 13 How. (U. S.) 246.

Secretary of Treasury Proper Officer to Make Selection. — *Doe v. Mahana*, 21 How. (U. S.) 276.

Evidence of Selection—Question for Jury. — *Doe v. Mahana*, 21 How. (U. S.) 276.

10. *State School Lands Selected in Territory—Admission of Territory into Union.* — *Stoutz v. Brown*, 5 Dill. (U. S.) 445. See also the titles *STATES, post; TAXATION.*

particular institutions of learning; or such lands are granted for the use of public schools in much the same manner as similar grants are made by the United States. These grants, being comparatively few in number and involving no peculiar principles of law requiring extended treatment, are discussed briefly in the notes.¹

3. Sales and Leases of School and University Lands—*a. POWER TO SELL OR LEASE.*—It is generally held that the legislature of a state in which the legal title of school lands is vested has the power to direct the sale of those lands, at least with the consent of the inhabitants of the respective townships, in such manner as it deems advisable for the best interest of the schools; and where a statute directs that these lands be sold, and a sale is regularly had pursuant to the statute, the purchaser acquires a valid title not only as against the state, but as against the township, provided, of course, that the statute is not repugnant to the terms of the act of Congress under which the land vested in the state.² The same is true as to leases of school lands.³

b. CONSENT OF CONGRESS—(1) *Under Grant.*—The consent of Congress to the sale of school lands which have been donated to a state by Congressional grant has sometimes been given upon application by the state.⁴ It is held, however, by the Supreme Court of the United States, that unless the grant to the state contains some limitation or reservation in this respect, the

1. Grant by State to Academy—Same to County for Benefit of Common Schools.—*Kennedy v. McElroy*, 92 Ky. 72.

In a grant by state statute to the trustees of an academy, any language which expresses the legislative intention to invest the party with the title is sufficient. "That the land * * * shall be and the same is hereby vested in the trustees" is effectual. *Trustees v. Payne*, 3 T. B. Mon. (Ky.) 161.

No Trustees in Being and Academy Dissolved, Land Reverts to Commonwealth by Operation of Law.—*Kennedy v. McElroy*, 92 Ky. 72.

Grant of Swamp Lands by Congress to State of Missouri—Grant of Same by State to Counties, Not Proceeds to Be Part of School Fund.—See *supra*, this title, *Swamp-land Grants*.

Grant by State to City—Conveyance by City.—Where an act of Congress vested in the state the legal title to school lands to be sold, disposed of, or regulated for school purposes in such manner as might be directed by the legislature, and the state, by an act incorporating a city, granted the full property in these lands to the city for the benefit of schools, the grant being accompanied with directions to compromise disputed titles and to make sales, and the power of establishing, regulating, and supporting common schools was vested in the city councils by the charter, it was held that the legal title was in the city; that the city was a trustee; and that a conveyance by the city of a portion of the school lands was valid and operative in a court of law; and this though at the date of the conveyance there was no survey or assignment of the particular lands by the United States for the use of schools, for a subsequent designation of the land would be sufficient. *Bowlin v. Furman*, 28 Mo. 427.

2. Power of Legislature to Direct Sale—United States.—*Cooper v. Roberts*, 18 How. (U. S.) 173, reversing 6 McLean (U. S.) 93.

Alabama.—*Long v. Brown*, 4 Ala. 622; *Tankersly v. State Bank*, 6 Ala. 277.

Arkansas.—*Mayers v. Byrne*, 19 Ark. 308.

Illinois.—*Bradley v. Case*, 4 Ill. 585; *School*

Trustees v. Schroll, 120 Ill. 509, 60 Am. Rep. 575.

Louisiana.—See *State v. Nicholls*, 42 La. Ann. 209.

Missouri.—*Maupin v. Parker*, 3 Mo. 310 [*disapproving Lowry v. Francis*, 2 Yerg. (Tenn.) 534]; *Payne v. St. Louis County*, 8 Mo. 473; *State v. Dent*, 18 Mo. 313.

Wisconsin.—See *State v. Cunningham*, 88 Wis. 85.

Sale on Petition of Inhabitants of Township—Latter Estopped to Claim Lands.—*State v. Dent*, 18 Mo. 313.

Where the Inhabitants of a Township Had Received a Part of the Purchase Money of school lands, and interest for several years on the balance, and had expended the money for the purposes contemplated by the grant, and the purchaser had taken possession and made valuable improvements, it was held that they must be deemed to have acquiesced in the sale and that they were estopped to deny its validity. *State v. Stanley*, 14 Ind. 409.

School Indemnity Lands.—The state of *Louisiana* is authorized to sell her school indemnity lands and to convey a fee-simple title thereto, and the power to make such sale and conveyance is vested in the governor of the state and the register of the land office. *State v. Nicholls*, 42 La. Ann. 209. See also *supra*, this section, *Grants of Land as Indemnity for School Sections Otherwise Disposed Of*.

3. Leases of School Lands Authorized by Statute.—*Jones v. Madison County*, 72 Miss. 777. See also *Street v. Columbus*, 75 Miss. 822.

Lease Unauthorized by Statute.—Where a superintendent of school land makes a lease thereof for a longer term than the statute authorizes, a purchaser of the land cannot sue the lessee for breach of the contract of lease. *Garwood v. Cox*, 4 Blackf. (Ind.) 93.

4. Sale by State Authorized by Congress.—*Long v. Brown*, 4 Ala. 622; *State v. Springfield Tp.*, 6 Ind. 89; *School Directors v. Ober*, 32 La. Ann. 417; *State v. Nicholls*, 42 La. Ann. 209.

power of the state to sell these lands is plenary and exclusive, and the legislature may direct the sale of the lands without obtaining the consent of Congress.¹

(2) *Under Reservation.* — According to the weight of authority that where school lands are merely reserved from sale as a part of the public domain the title thereto does not pass out of the United States,² it is held that where school sections in a territory are thus reserved by an act of Congress, the territorial legislature cannot authorize a sale or lease of them without obtaining the consent of Congress.³ But under the *Kansas* decisions that such a reservation operates as a grant to the people of the territory for the use of schools,⁴ it has been held that the territorial legislature has the power to provide for the disposition of these lands, and that a sale made pursuant to an act of the territorial legislature directing it is valid.⁵ Congress, however, sometimes provides that school lands in the territory may be leased by the governor for the benefit of the schools, under regulations to be prescribed by the secretary of the interior, the period for which the lands may be leased being usually expressly prescribed; and sometimes the acts of Congress provide that the school lands so reserved in a territory may be leased under such laws and regulations as may be prescribed by the territorial legislature, and that pending such legislative action certain officers of the territory shall constitute a board to manage the leasing of such lands.⁶

(3) *Under Contract Between United States and Tennessee.* — In Tennessee, under the compact made with the United States, it was held that the school lands were inalienable except by permission of Congress, and that the state legislature had no power to direct their sale.⁷ But permission to alienate the lands was subsequently given by Congress, though subject to certain restrictions.⁸

c. CONSENT OF INHABITANTS OF TOWNSHIP — (1) *In General.* — Inasmuch as it is generally held that the title to school lands is vested in the state in trust for the inhabitants of the various townships in which the particular sections are situated,⁹ statutes authorizing the sale of school lands sometimes provide for obtaining the consent of the inhabitants of the township.¹⁰ In *Louisiana* the consent of the inhabitants of the township to a sale was made a condition of the grant.¹¹ But it has been held in *Mississippi* that a lease of school lands

1. Consent of Congress Not Prerequisite. — *Cooper v. Roberts*, 18 How. (U. S.) 173, reversing 6 McLean (U. S.) 92. See also *supra*, this section, *By Federal Government — Control and Power of Disposal After Grant or Reservation*.

2. See *supra*, this section, *By Federal Government — Effect of Reservation from Sale*.

3. Consent of Congress Necessary to Authorize Sale or Lease of Reserved School Lands. — *Burrows v. Kimball*, 11 Utah 149. See also *Vincennes University v. Indiana*, 14 How. (U. S.) 274, per McLean, J.

4. See *supra*, this section, *By Federal Government — Effect of Reservation from Sale*.

5. *Kansas Rule.* — *State v. Stringfellow*, 2 Kan. 263; *Stout v. Hyatt*, 13 Kan. 232.

6. Provisions by Congress for Leasing School Lands in Territory. — See *Renfrow v. Grimes*, 6 Okla. 608, holding that the governor, secretary, and auditor of *Oklahoma*, as the board for leasing the school and college lands of that territory, are not authorized, under the acts of Congress and the rules prescribed by the secretary of the interior, to lease any of those lands for a longer period than three years; hence they cannot accept an application to lease a por-

tion of such lands for a period of five years and thereby compel the persons making such application to comply with the terms and conditions thereof.

7. *Tennessee Rule.* — *Lowry v. Francis*, 2 Yerg. (Tenn.) 534; *Goodman v. Tennessee Min. Co.*, 1 Head (Tenn.) 172.

8. Act Cong. 1843, c. 346; *Goodman v. Tennessee Min. Co.*, 1 Head (Tenn.) 175, holding that a sale of school lands which previously have been leased is unauthorized by law and is void although the lease itself is also unauthorized and void.

9. See *supra*, this section, *Title and Tenure of State or Territory — Tenure*.

10. See the codes and statutes of the various states, and see the cases cited *infra*, this and the next following subdivisions of this subsection.

Whether a Township Contains the Requisite Number of Inhabitants to authorize the sale of an entire school section is a fact for the school commissioner to determine before he makes the sale of the land. *School Trustees v. Allen*, 21 Ill. 121.

11. Consent of Inhabitants Required in Louisiana. — *Telle v. School Board*, 44 La. Ann. 365.

may be made without obtaining the consent of the inhabitants of the township unless it is required by statute that such consent be obtained.¹

(2) *Method of Obtaining Consent.* — In *Alabama* and *Louisiana* the statutes authorize the sale of school lands upon the consent of the inhabitants of the township, and provide that this consent shall be obtained by an election.² In *Arkansas* the statute provides for the sale of school lands by the county collector of taxes on a written petition therefor signed by a majority of the male inhabitants of the township.³ The *Indiana* statutes provide for a petition for sale by five voters of the township and an election to determine whether a sale shall be had.⁴

d. PROCEEDINGS PRIOR TO SALE OR LEASE — (1) *In General.* — The various state statutes authorizing the selling or leasing of school lands generally make explicit provision for proceedings prior to the sale or lease.⁵

(2) *Application for Private Sale.* — In *Wisconsin* the statutes authorizing private sales of school and university lands require the intending purchaser to make a written application to the secretary of state.⁶ This statutory provision and an application pursuant thereto do not, however, constitute a contract between the state and the applicant,⁷ and an application without payment confers upon the applicant no vested rights.⁸

(3) *Appraisal of Lands.* — An appraisal of school lands before sale is generally required by statute, and it is usually provided that the appraisal and sale shall be made for not less than a certain sum per acre.⁹

e. WHO MAY MAKE SALE OR LEASE. — The power to make sales or leases of school lands is conferred by the various state statutes or constitutions upon certain officers or boards which vary widely in the different states. Some of these officers or boards are the school commissioners, the trustees of townships, the county collectors, the board of school land commissioners, the state board of land commissioners, the board of commissioners of school and university lands, etc.¹⁰ Where this power is vested in a particular officer or body,

1. *Consent of Inhabitants Not Necessary in Mississippi Unless Required by Statute.* — *Jones v. Madison County*, 72 Miss. 777.

2. *Election.* *Tankersly v. State Bank*, 6 Ala. 277; *Branch Bank v. Tillman*, 10 Ala. 149; *Knabe v. Burden*, 88 Ala. 436; *Telle v. School Board*, 44 La. Ann. 365.

Vote in Favor of Sale Presumed from Patent. — *Knabe v. Burden*, 88 Ala. 436.

Residents and Taxpayers of Township May Sue to annul the sale. *Telle v. School Board*, 44 La. Ann. 365.

3. *Written Petition.* — Act Ark. March 22, 1881 (Laws 1881, p. 154); Sand. & H. Dig. Stat. Ark. (1894), § 7114.

Petition Must Be Signed by Majority of Adult Male Inhabitants. — *Brown v. Rushing*, 70 Ark. 111.

4. *Petition and Election.* — *Horner's Stat. Ind.* (1901), § 4339; *McPheeters v. Wright*, 110 Ind. 519, 124 Ind. 560.

5. See the provisions of the various codes and statutes relating to school lands. See also *supra*, this subsection, *Consent of Congress; Consent of Inhabitants of Township.*

Publication of Notice of Sale Pursuant to Statute. — *McPheeters v. Wright*, 110 Ind. 519.

6. *Necessity for Written Application by Purchaser.* — *State v. Janssen*, 2 Wis. 423; *State v. Gray*, 4 Wis. 380; *Gough v. Dorsey*, 27 Wis. 119.

Written Application May Be Waived by State. — *State v. Gray*, 4 Wis. 380.

7. *Statute and Application Do Not Constitute Contract.* — *State v. Gray*, 4 Wis. 380.

8. *Application Without Payment.* — *State v. Gray*, 4 Wis. 380; *State v. School, etc., Land Com'rs*, 6 Wis. 334; *Gough v. Dorsey*, 27 Wis. 119.

9. *Appraisal.* — *School Directors v. Coleman*, 14 La. Ann. 182; *Telle v. School Board*, 44 La. Ann. 365; *Chapman v. State Land Office Com'r*, 26 Mich. 152.

Statute Means that Land Shall Not Be Appraised for Less than Statutory Sum. — *School Directors v. Coleman*, 14 La. Ann. 182.

Sales for Less than Statutory Amount per Acre Declared Void. — *School Directors v. Coleman*, 14 La. Ann. 182; *Telle v. School Board*, 44 La. Ann. 365.

The Acts of Two School Trustees, in dividing and appraising school lands to be offered for sale, are valid, and the third trustee need not join with them nor be notified of their proceedings. *School Trustees v. Allen*, 21 Ill. 121.

Unauthorized Reappraisal. — Under the *Nebraska* statutes a reappraisal of school lands which has neither been authorized nor approved by the board of educational lands and funds is absolutely void. *Luse v. Rankin*, 57 Neb. 632.

10. See the codes and statutes of the various states.

County Collector. — *State v. Morgan*, 52 Ark. 150; *Brown v. Rushing*, 70 Ark. 111.

State Board of Land Commissioners. — *Routt v. Greenwood Cemetery Land Co.*, 18 Colo. 132.

School Commissioner. — *Kidder v. School Trustees*, 10 Ill. 191.

Board of School Land Commissioners. — *Hurst v. Hawin*, 5 Oregon 275.

a sale made by any other officer or body is unauthorized.¹ But although a sale is made by officers unauthorized to act as agents for the state in the premises, yet by accepting and retaining the purchase money the state may ratify the sale and bind itself by the officers' contract.²

f. **SETTLER'S PREFERENTIAL RIGHT TO PURCHASE.** — In some states the statutes dealing with the sale of school lands provide that a settler or resident upon the school sections shall, upon complying with certain terms, have a preferential right or privilege to purchase a certain amount of such lands, the time within which such preference may be exercised being generally fixed by the terms of the statutes. Such statutes exist in *Kansas*³ and in *Oregon*.⁴

The Provisions of the California Constitution that lands belonging to the state which are suitable for cultivation shall be granted only to actual settlers, and in quantities not exceeding three hundred and twenty acres to each settler, under such conditions as shall be prescribed by law,⁵ apply to school lands granted to the state by Congress.⁶

g. **MODE OF CONDUCTING SALE.** — The manner in which school lands may be sold under authority from the state is generally provided by statute.⁷ The authority to sell school lands being statutory, it is held that a statute prescribing the mode in which the lands shall be sold is mandatory and must be followed or no title will pass.⁸

h. **WITHHOLDING LANDS FROM SALE.** — In *Michigan* a statute provides

Governor of State and Register of Land Office. — *State v. Nicholls*, 42 La. Ann. 209.

Board of Commissioners of School and University Lands. — Const. Wis., art. 10, §§ 7, 8; *McCabe v. Mazzuchelli*, 13 Wis. 478.

Power of Board of Regents to Sell Site of State University. — *Callvert v. Winsor*, 26 Wash. 368.

1. Sale Must Be by Authorized Officer. — *State v. Morgan*, 52 Ark. 150.

Where the Person Making the Sale Is Both Sheriff and County Collector, the sale is valid if he was authorized to make it in either capacity. *Brown v. Rushing*, 70 Ark. 111.

2. Ratification of Sale by Unauthorized Officer. — *Ambrose v. Huntington*, 34 Oregon 484, citing *Mechem on Agency*, §§ 148, 149.

3. Kansas — Preferential Rights of Settlers. — *State v. Dennis*, 39 Kan. 509; *Beedy v. State*, 4 Kan. App. 575.

Preference Only and Not Vested Right. — *State v. Budgett*, 35 Kan. 600.

Jurisdiction of Probate Court — Effect of Its Decision. — *State v. Dennis*, 39 Kan. 509.

Appeal from Probate Court by One of Two Applicants. — *Wilkie v. Howe*, 27 Kan. 518.

Appeal by County Superintendent. — *State v. Heaton*, 10 Kan. App. 296.

Actual Residence on Land Required. — *Bratton v. Cross*, 22 Kan. 673.

Mandamus to County Treasurer. — *Wilkie v. Howe*, 27 Kan. 518.

Suit by State to Annul Contract for Sale as Against Innocent Assignee — Repayment or Tender of Purchase Money. — *State v. Dennis*, 39 Kan. 509; *State v. Williams*, 39 Kan. 517; *State v. Carlander*, 39 Kan. 655; *State v. Pitzer*, 39 Kan. 656.

As to the necessity of a return of the purchase money in suits for rescission, see generally the titles **RESCISSIION, CANCELLATION, AND REFORMATION**, vol. 24, p. 620 *et seq.*; **VENDOR AND PURCHASER**.

4. Oregon. — *Hurst v. Hawn*, 5 Oregon 276.

Price to Be Fixed by County School Superin-

tendent. — *Hurst v. Hawn*, 5 Oregon 278.

5. Const. Cal., art. 17, § 3.

6. Lands Suitable for Cultivation — Sale Restricted to Settlers. — *Dillon v. Saloude*, 68 Cal. 267; *Mosely v. Torrence*, 71 Cal. 318; *Jacobs v. Walker*, 90 Cal. 43; *Albert v. Hobler*, 111 Cal. 398.

For a General Discussion, see *supra*, this title, *Disposal of State Lands — California*.

Provision Applicable to Indemnity Lands. — *Manley v. Cunningham*, 72 Cal. 236.

As to California University Land, see *White v. Douglass*, 71 Cal. 115.

7. See the codes and statutes of the various states.

Employment of Professional Auctioneers Held to Be Unauthorized. — *Bickerton v. Grimes*, 8 Wash. 451.

Order in Which Sections Shall Be Sold. — *State v. School, etc.*, Lands Com'rs, 14 Wis. 345.

8. Statute Mandatory. — *McDonald v. Mangold*, 61 Mo. App. 293.

Sale Must Be at Public Auction. — *McPheeters v. Wright*, 110 Ind. 519.

Failure of Commissioners to Keep Books. — But it has been held that a statute requiring school commissioners to keep certain books and to record therein, at length, all petitions for sale, accounts of sales, and all money received and disbursed and other matters connected with the sale of school lands was merely directory, and that the title to the land legally and fairly sold by a commissioner did not depend on his obeying the directions of the statute. *School Trustees v. Allen*, 21 Ill. 120.

Signing and Recording Statement of Sale — Wisconsin Statute. — In making a sale of school and university lands to a private individual it is not necessary that the commissioners should make, sign, and cause to be recorded a statement of the sale. This is necessary only where forfeited mortgaged lands are struck off to the state on resale. *State v. School, etc.*, Lands Com'rs, 14 Wis. 345, *distinguishing* *Krebs v. Dodge*, 9 Wis. 1.

that the officer authorized to sell the school lands may, in his discretion, reserve and withhold from sale such portions of the lands as in his opinion it may not be advantageous to sell or dispose of, and for so long a time as in his opinion will be beneficial to the several funds affected thereby;¹ and in *Wisconsin* the commissioners of public lands are authorized by the state constitution to withhold from sale any portion of the school lands when they shall deem it expedient.²

i. TERMS OF SALE OR LEASE—(1) *In General*.—The terms upon which a sale or lease of school lands may be made are generally the subject of express statutory provision,³ and the same is true of state university lands.⁴

(2) *Remedies for Noncompliance with Terms of Sale or Lease*—(a) *Rescission or Annulment of Contract*.—Where a purchaser has given notes for the purchase price of school lands and fails to pay them when due, the contract may be rescinded or annulled on behalf of the state; and it is held in *Louisiana* that where the notes are made payable to the state treasurer he may stand in judgment for rescission of the sale.⁵ It has been held that a state university selling lands has the same right as any other vendor to rescind or abandon the contract of sale for failure of performance by the purchaser.⁶

(b) *Resale on Failure of Immediate Payment*.—It is sometimes provided by statute that a sale of school lands shall be for cash, and that if any bidder shall fail to perfect his bid by paying the cash, a resale shall immediately be had.⁷ The requirements of such a statute with respect to immediate cash payment mean simply that the payment shall be made promptly and without delay.⁸

(c) *Forfeiture*—*aa. IN GENERAL*.—It is sometimes provided by statute that where a purchaser of school lands makes default in payment according to the

1. *Withholding Lands from Sale*.—Comp. Laws Mich. (1897), § 1339; *Chapman v. State Land Office Com'r*, 26 Mich. 146.

Mandamus Will Not Lie to Compel Sale.—*Chapman v. State Land Office Com'r*, 26 Mich. 146.

2. *Commissioners of Public Lands May Withhold School Lands from Sale*.—Const. Wis., art. 10, § 8; *State v. Cunningham*, 88 Wis. 81. See also Stat. Wis. (1898), § 207.

School Lands Once Offered at Public Sale May Be Withdrawn from Sale.—*State v. Cunningham*, 88 Wis. 81, *explaining and limiting State v. Public Com'rs*, 61 Wis. 274.

The Legislature Cannot Withhold School Lands from Sale, since this power is vested by the constitution in the commissioners of public lands. *State v. Cunningham*, 88 Wis. 81.

3. *Terms of Sale or Lease Prescribed by Statute*.—See the codes and statutes of the various states.

Who May Question Regularity of Sale.—*Brown v. Toler*, 66 Ark. 361.

Sale for Cash.—*State v. Morgan*, 52 Ark. 150.

Sale on Credit.—*Kidder v. School Trustees*, 10 Ill. 191.

Constitutional Requirement for Taking Mortgage for Unpaid Purchase Money.—*Smith v. Mariner*, 5 Wis. 551, 68 Am. Dec. 73.

Only Absolute Sale Authorized in Minnesota.—*Wright v. Burnham*, 31 Minn. 285.

Distinction Between Sale and Contract for Sale.—*Smith v. Mariner*, 5 Wis. 551, 68 Am. Dec. 73.

Payment by Surrender of School-land Warrants. *People v. Morris*, 77 Cal. 204 (under Pol. Code Cal., §§ 3494, 3502).

Mistake as to Amount Due from Purchaser.—Where both parties in executing a sale of school lands and a deed therefor make a mistake as to the amount due from the purchaser, whereby the latter obtains the title to the land for an amount less than that really due according to the terms of the sale, a cause of action accrues in favor of the state to recover the residue of the purchase money. *Seeley v. Thomas*, 31 Ohio St. 301.

4. *Terms of Sale by Trustees of State University Provided by Statute*.—See *State University v. Winston*, 5 Stew. & P. (Ala.) 17.

Terms of Sale of Kansas State Agricultural College Lands.—*State v. Thompson*, 22 Kan. 219, *distinguishing* *Iles v. Elledge*, 18 Kan. 296.

5. *Rescission for Nonpayment of Purchase-money Notes*.—*Hunter v. Williams*, 16 La. Ann. 129.

6. *Rescission by State University for Default of Purchaser*.—*Henn v. State University*, 22 Iowa 185, 26 Iowa 594. See generally the title VENDOR AND PURCHASER. See also the title UNIVERSITIES AND COLLEGES.

7. *Statute Requiring Immediate Cash Payment*.—See, for example, the *Arkansas* statute, Sand. & H. Dig. Stat. Ark. (1894), § 7119. See also *infra*, this subsection, *Resale After Forfeiture or Default*.

8. *Brown v. Toler*, 66 Ark. 361. In this case, while the collector who made the sale was preparing the certificate of the purchase, the purchaser went away and procured the money and in about an hour returned and paid it to the collector before the latter had finished preparing the certificate of sale. It was held that a finding that the payment was made immediately was sustained by the proof. See generally IMMEDIATE—IMMEDIATELY, vol. 15, p. 1020.

terms of the sale, his interest in the lands shall be forfeited.¹ Similar legislation exists with respect to lessees of school lands.² In *Kansas* numerous statutes have been passed providing for forfeiture upon nonpayment of the balance of the purchase money or the annual interest or taxes accruing on the land.³

Strict Compliance with Statutory Proceedings.—In divesting an estate for a forfeiture the statutory procedure must be strictly followed.⁴

bb. WHO CAN TAKE ADVANTAGE OF DEFAULT.—It is generally held that only the state or its officers can take advantage of the default of the purchaser or lessee.⁵ Hence, in an action for the purchase money, the purchaser cannot set up a forfeiture as a defense unless the state has taken some steps to enforce a forfeiture.⁶

cc. NOTICE OF DEFAULT.—Forfeitures not being favored in the law, the statutes sometimes require that written notice of default be given to the lessee, purchaser, or person in possession of the land, and these statutes prescribe the manner in which such notice shall be served.⁷ Under such a statute notice

1. **Forfeiture of Purchaser's Interest**—*Alabama*.—Civ. Code Ala. (1896), § 3648; *Watson v. Prestwood*, 79 Ala. 416, 111 Ala. 604.

Arkansas.—Gantt's Dig., § 5563; *Orr v. State*, 56 Ark. 107.

California.—*Rowell v. Perkins*, 56 Cal. 219; *People v. Harrison*, 107 Cal. 541.

Indiana.—*Horner's Stat. Ind.* (1901), § 4347; *McPheeters v. Wright*, 110 Ind. 519, 124 Ind. 560.

Minnesota.—Stat. Minn. (1894), §§ 3966, 3968; *McKinney v. Bode*, 32 Minn. 228; *Murphy v. Burke*, 47 Minn. 99.

Nebraska.—*Smith v. White*, 5 Neb. 405; *Richardson v. Pratt*, 20 Neb. 196; *State v. Graham*, 21 Neb. 329; *Richardson v. Doty*, 25 Neb. 420; *State v. Clark*, 39 Neb. 899.

Ohio.—*State v. Glidden*, 31 Ohio St. 309.

Wisconsin.—*State v. School, etc., Lands Com'rs*, 4 Wis. 414; *State v. School Com'rs*, 5 Wis. 348; *Smith v. Mariner*, 5 Wis. 551, 68 Am. Dec. 73; *Hurd v. Hall*, 12 Wis. 112; *State v. School, etc., Lands Com'rs*, 13 Wis. 457; *Lawton v. Howe*, 14 Wis. 241; *Sexton v. Appleyard*, 34 Wis. 235.

A forfeiture under the *Indiana* statute is held not to divest *ipso facto* the title of the purchaser, but simply to authorize the state to resell the land for its own reimbursement. *McPheeters v. Wright*, 124 Ind. 560. See also *infra*, this subsection, *Resale After Forfeiture or Default*.

Payment by Person Other than Purchaser Held to Be Sufficient to Prevent Forfeiture.—*McKinney v. Bode*, 32 Minn. 228.

2. **Forfeiture of Lease.**—*Hibbeler v. Gutheart*, 12 Neb. 526; *State v. Scott*, 17 Neb. 686; *Hoxie v. Iiams*, 26 Neb. 616; *State v. Henton*, 48 Neb. 488; *Hart v. Johnson*, 6 Ohio 87.

3. **Kansas Statutes as to Forfeitures.**—*Laws* 1855, p. 646, § 6; *Laws* 1864, c. 102, § 16; *Gen. Stat.* (1868) c. 94, § 15; *Laws* 1871, c. 138, §§ 1, 2; *Laws* 1873, c. 129, § 2; *Laws* 1876, c. 122, § 16; *Laws* 1879, c. 161, § 2; *Comp. Laws* 1879, c. 92, par. 5307, § 16; *Gen. Stat.* 1897, c. 65, § 26. See generally *Stout v. Hyatt*, 13 Kan. 232; *Reynolds v. Reynolds*, 30 Kan. 96; and the cases cited *infra*, this note.

Failure to Make Payment Ipso Facto Forfeiture.—*State v. Emmert*, 19 Kan. 546; *Ewing v. Baldwin*, 24 Kan. 87; *Baker v. Newland*, 25 Kan.

33; *Newland v. Baker*, 26 Kan. 344; *Flint v. Jackson County*, 43 Kan. 656; *Menger v. Douglas County*, 48 Kan. 553. Compare *Reynolds v. Reynolds*, 30 Kan. 91. See, however, as to other jurisdictions, *McPheeters v. Wright*, 124 Ind. 560, and see *infra*, this subsection, *Notice of Default*, notes.

No Judicial Proceeding Necessary to Determine Forfeiture.—*State v. Emmert*, 19 Kan. 546.

When Purchaser Not in Default.—*Reynolds v. Reynolds*, 30 Kan. 91.

Death of Purchaser Before Completing Payment.—*Reynolds v. Reynolds*, 30 Kan. 91.

Nonpayment of Note Given by Purchaser under Statute Allowing Loan of Proceeds of School Lands.—*Stout v. Hyatt*, 13 Kan. 232.

Forfeited Lands May Be Sold for Taxes.—*Ewing v. Baldwin*, 24 Kan. 82; *Baker v. Newland*, 25 Kan. 25; *Newland v. Baker*, 26 Kan. 341; *Larabee v. Prather*, 51 Kan. 743. See also *Richards v. Griffith*, 57 Kan. 238.

Sale for Taxes Accruing After Forfeiture Void.—*Flint v. Jackson County*, 43 Kan. 656; *Menger v. Douglas County*, 48 Kan. 553. See generally the titles *TAXATION*; *TAX TITLES*.

Waiver of Forfeiture.—It seems that the state may waive the statutory forfeiture and that it does so where, after default in payment, a purchaser completes his payment and receives a patent from the state. *Baker v. Newland*, 25 Kan. 34. See also *Reynolds v. Reynolds*, 30 Kan. 91.

4. **Statutory Proceedings Must Be Strictly Followed.**—*Hansen v. Wilson*, 40 Kan. 211; *State v. Henton*, 48 Neb. 488; *Hart v. Johnson*, 6 Ohio 87. See also *People v. Harrison*, 107 Cal. 541.

5. **State Alone Can Assert Forfeiture.**—*Orr v. State*, 56 Ark. 107; *McKinney v. Bode*, 32 Minn. 228; *Hoxie v. Iiams*, 26 Neb. 616. See also *Hibbeler v. Gutheart*, 12 Neb. 526.

6. *Orr v. State*, 56 Ark. 107.

7. **Notice of Default**—*Kansas*.—*Gen. Stat. Kan.* (1897), c. 65, §§ 26–28; *Hansen v. Wilson*, 40 Kan. 211. And see the cases cited *infra*, this and the next two notes.

Nebraska.—*Smith v. White*, 5 Neb. 405; *State v. Scott*, 17 Neb. 686; *Richardson v. Pratt*, 20 Neb. 196; *State v. Graham*, 21 Neb. 329; *State v. Clark*, 39 Neb. 899; *State v. Henton*, 48 Neb. 488.

must be given not only to the purchaser, but to his assignees,¹ and strict compliance with the law is required.²

dd. PERIOD OF REDEMPTION AND RECOVERY OF POSSESSION THEREAFTER.—Statutes authorizing the forfeiture of a lease or contract for sale of school lands generally allow to the delinquent lessee or purchaser a certain period of time within which to fulfil his contract, and provide for proceedings to recover the land in case he thereafter remains in possession.³ Where a purchaser or lessee in possession has made default in payment, and has been notified of his delinquency, but no proceeding has been taken to dispossess him, his right of redemption can be cut off only by the method pointed out by the statute, and his rights cannot be affected by proceedings instituted by an individual for the purpose of himself becoming a purchaser or lessee.⁴

ee. FORFEITURE OF STATE UNIVERSITY LANDS—(aa) *In General.*—Statutes incorporating trustees of state universities, vesting in the corporations lands granted by Congress for the maintenance of the universities, and conferring upon the corporations the power to sell the lands, sometimes provide for forfeiture of a purchaser's interest upon his default in payment.⁵

(bb) *Repeal of Statute Authorizing Forfeiture.*—Where a statute provides for forfeiture and resale of state university lands for nonpayment by the purchaser of interest due on his contract, the repeal of such statute does not exonerate the purchaser from the duty of prompt payment, and does not deprive the university of the general right of a vendor to rescind or abandon the contract of sale for failure of performance by the purchaser.⁶

(d) *Resale After Forfeiture or Default*—aa. *IN GENERAL.*—The statutes sometimes provide that after forfeiture or upon the failure of a purchaser or lessee of school lands to comply with his contract, the land shall be resold on behalf of the state or township,⁷ and such statutes generally require certain proceedings to be had prior to the sale, and direct the manner in which the property shall

Substituted Service by Posting Notice.—Knott v. Tade, 58 Kan. 94, 62 Am. St. Rep. 604; Abernathy Furniture Co. v. Spencer, 59 K. 168.

Description of Land in Notice.—Scott v. Flynn, 8 Kan. App. 857, 55 Pac. Rep. 675.

Notice to Nonresident by Publication.—State v. Scott, 17 Neb. 686; Richardson v. Pratt, 20 Neb. 196; State v. Clark, 39 Neb. 899; State v. Henton, 48 Neb. 488.

Presumption of Proper Notice.—State v. Graham, 21 Neb. 329.

1. Notice to Assignees of Purchaser.—Oberlin Loan, etc., Co. v. Flinn, 58 Kan. 83; Knott v. Tade, 58 Kan. 94, 62 Am. St. Rep. 604; Abernathy Furniture Co. v. Spencer, 59 Kan. 168.

Joint Assignees—Both Must Have Notice.—Abernathy Furniture Co. v. Spencer, 59 Kan. 168.

2. Necessity for Strict Compliance with Statute.—Hansen v. Wilson, 40 Kan. 211.

3. Period of Redemption—Recovery of Possession.—See Hibbeler v. Gutheart, 12 Neb. 526; State v. Scott, 17 Neb. 686; Richardson v. Pratt, 20 Neb. 196. And see the various statutory provisions dealing with forfeitures of school lands.

Recording of Assignment Prerequisite to Redemption by Assignee of Lease.—Langan v. Binfield, 49 Neb. 857.

4. Right of Redemption Can Be Cut off Only by Following Statute.—Hibbeler v. Gutheart, 12 Neb. 526. See also Hoxie v. Iiams, 26 Neb. 616.

5. Forfeiture of Purchaser's Interest in State

University Lands.—For construction of such a statute, see State University v. Winston, 5 Stew. & P. (Ala.) 17.

Kansas State Agricultural College.—Gen. Stat. Kan. (1897), c. 57, § 26; Dickinson County v. Baldwin, 29 Kan. 538.

6. Repeal of Statute Authorized Forfeiture.—Henn v. State University, 22 Iowa 185, 26 Iowa 594.

7. Resale After Forfeiture or Default—Arkansas.—Orr v. State, 56 Ark. 107.

Indiana.—McPheeters v. Wright, 110 Ind. 519, 124 Ind. 560.

Ohio.—Hart v. Johnson, 6 Ohio 87; Sealing v. Lawrence, 27 Ohio St. 441.

Wisconsin.—State v. School, etc., Lands Com'rs, 4 Wis. 414; State v. School Com'rs, 5 Wis. 348; Smith v. Mariner, 5 Wis. 551; 68 Am. Dec. 73; Hurd v. Hall, 12 Wis. 112; State v. School, etc., Lands Com'rs, 13 Wis. 409; Lawton v. Howe, 14 Wis. 241; State v. School, etc., Lands Com'rs, 14 Wis. 345; Sexton v. Appleyard, 34 Wis. 235.

The Bond and Mortgage Given by the Purchaser of school or university lands in Wisconsin may, upon default in payment, be assigned by the commissioners to one who becomes a purchaser of the mortgaged premises. Ely v. Cram, 17 Wis. 537.

Where the Resale Is Made under a Mistake, as where the purchaser was not actually in default, his payment not having been entered on the treasurer's books, the commissioners of school and university lands have the power under the Wisconsin statute to declare the

be sold.¹ A statute of this character providing that the school-land commissioners shall make a sale of forfeited mortgaged lands to the highest bidder has been held to be mandatory.²

b. WHETHER REMEDY BY RESALE EXCLUSIVE. — In *Ohio* the statute authorizing the auditor of the county to resell upon the default of the purchaser or lessee has been held to preclude the remedy of an action by the auditor to recover the unpaid purchase money, even though such an action is brought in the name of the state, although it seems that the statutory remedy is not the only one which it is competent for the state through its legislature to adopt.³

c. PURCHASER'S RIGHT OF REDEMPTION. — Under the *Wisconsin* statutes authorizing a resale of forfeited school and university lands at public auction, the delinquent purchaser has the right to revive his contract at any time before the resale by the payment of the sums due, with interest and all costs occasioned by the delay, together with a statutory penalty;⁴ and subsequent legislation cannot deprive him of this right without the offering of the property at public sale as required by the law in force at the time of his purchase.⁵

dd. PURCHASER'S RIGHT TO SURPLUS ON RESALE. — Under the statutes in some states, the surplus on resale goes to the original purchaser;⁶ and it has been held that where a purchaser has the right to receive this surplus he cannot be deprived of it by subsequent legislation.⁷

j. FRAUD, MISTAKE, OR IRREGULARITY IN SALE. — In *Wisconsin* it is provided by statute that a sale of school or university lands made by mistake or not in accordance with law, or obtained by fraud, shall be void; that no certificate of purchase issued thereon shall be of any effect; and that the holder of

resale void. Stat. Wis. (1898), § 230; State v. School, etc., Lands Com'rs, 17 Wis. 248.

1. See the various statutes on this point.

Strict Compliance with Statute Essential. — Hart v. Johnson, 6 Ohio 87. Compare Sealing v. Lawrence, 27 Ohio St. 446.

Petition by Voters of Township Unnecessary on Resale for Nonpayment of Interest. — McPheeters v. Wright, 110 Ind. 519.

Publication of Notice of Resale. — McPheeters v. Wright, 110 Ind. 519; Sealing v. Lawrence, 27 Ohio St. 441; Sexton v. Appleyard, 34 Wis. 235.

Patent Prima Facie Evidence of Due Publication. — Sexton v. Appleyard, 34 Wis. 235.

Resale at Public Auction. — State v. School, etc., Lands Com'rs, 4 Wis. 414; State v. School Com'rs, 5 Wis. 348; Hurd v. Hall, 12 Wis. 112.

Private Sale Void. — Hurd v. Hall, 12 Wis. 112.

Discretion of the Commissioners as to Order of Resale. — State v. School, etc., Lands Com'rs, 14 Wis. 345.

Resale in Parcels. — Sexton v. Appleyard, 34 Wis. 235.

Sale to State — Rights of Mortgagor. — Under Rev. Stat. Wis. 1849, §§ 87, 88, it was held that in selling forfeited mortgaged lands, the commissioners might sell to the state, where no other person bid the amount due, and they were not required to bid the amount due, but had discretion as to the sum they should offer. Krebs v. Dodge, 9 Wis. 1, holding further that the mortgagor could be held liable for any deficiency, and was entitled to receive any surplus. See also *infra*, this subsection, *Purchaser's Right to Surplus on Resale*.

Signing and Recording Statement of Sale. — Where the purchaser has given a mortgage for unpaid purchase money, and the land is re-

offered for sale on his default in payment, and is struck off to the state, a mere memorandum of the resale is not a compliance with the provisions of the *Wisconsin* statute requiring that a statement of the sale be made out and signed by the commissioners and recorded in their office. Compliance with this statute is necessary to constitute evidence of the state's title. Krebs v. Dodge, 9 Wis. 1; State v. Harvey, 11 Wis. 33.

On the Forfeiture of a Lease of School Lands, the lessee's interest in the entire tract must be sold, and the fact that there is a sublease of a part of the premises cannot be taken into consideration. Hart v. Johnson, 6 Ohio 87.

2. **Sale Must Be to Highest Bidder.** — Krebs v. Dodge, 9 Wis. 1.

3. **County Auditor Cannot Sue for Unpaid Purchase Money — Resale Sole Remedy.** — State v. Glidden, 31 Ohio St. 309. Compare Seeley v. Thomas, 31 Ohio St. 301.

4. **Redemption by Delinquent Purchaser.** — State v. School, etc., Lands Com'rs, 4 Wis. 414; State v. School Com'rs, 5 Wis. 348; Smith v. Mariner, 5 Wis. 551, 68 Am. Dec. 73.

But the Land Must Be Redeemed in Fact, and if not so redeemed it is subject to sale as forfeited; an erroneous book entry and receipt made by mistake, stating that the land has been redeemed, are of no effect. State v. School, etc., Lands Com'rs, 13 Wis. 409.

5. **State v. School, etc., Lands Com'rs,** 4 Wis. 414.

6. **Right to Surplus on Resale.** — McPheeters v. Wright, 124 Ind. 560; Sealing v. Lawrence, 27 Ohio St. 446; State v. School, etc., Lands Com'rs, 4 Wis. 414; Krebs v. Dodge, 9 Wis. 1.

7. **State v. School, etc., Lands Com'rs,** 4 Wis. 414.

any such certificate shall be required to surrender it and may receive the amount he has paid for the land.¹

k. REOFFERING FOR SALE WHEN LAND NOT SOLD. — It is sometimes provided by statute that where school land is offered for sale, but is not sold, it may be offered again until sold, and this without any new petition from the inhabitants of the township.² Such statutes sometime provide that the re-offering may be at private sale;³ but such a provision does not apply unless it appears that the lands have previously been offered for sale at public auction as required by the statutes relating to original sales.⁴

4. Legislative Confirmation of Irregular or Unauthorized Selections, Locations, and Sales — *a. IN GENERAL.* — Where a sale of school lands has been made without following the procedure prescribed by statute, and the inhabitants of the township acquiesce therein, it is within the power of the legislature to ratify and confirm the sale and thereby render valid the title of the purchaser. Thus, a sale made by an unauthorized officer or without obtaining the consent of the inhabitants of the township as prescribed by statute may be ratified and confirmed by special legislative enactment.⁵ Likewise, where acts of Congress merely reserved lands in a territory for the use of schools or a university, but the lands were sold by the territorial authorities under the belief that the reservation was a grant in fee giving to them the power of disposition, Congress has expressly ratified *bona fide* sales thus made and confirmed the titles of the purchasers.⁶ The title of a purchaser under these circumstances is superior to that of a subsequent patentee of the same lands from the United States.⁷

b. ACTS OF CONGRESS RELATING TO CALIFORNIA LANDS — **Act to Quiet Land Titles in California.** — In view of the unsettled condition of land titles in California, due to unauthorized selections, locations, and sales of public lands by the state authorities, Congress, in 1866, passed an act entitled, "An act to quiet land titles in California." By this act public lands which had been selected by the state in part satisfaction of any grant made to the state by any Act of Congress, and which the state had disposed of to purchasers in good faith under her laws, were confirmed to the state. The statute embraced school lands.⁸

Act Confirming Defective or Invalid Selections of Indemnity School Lands. — Owing to the fact that the authorities of the state of California had frequently made erroneous or defective selections of public lands as indemnity for school sections, Congress, in 1877, passed an act entitled, "An act relating to indemnity school selections in the state of California," and commonly known as the Booth Act. This act provided that the title to lands known as indemnity school selections certified to the state of California, which lands were selected in lieu of school sections lying within Mexican grants, of which grants the final survey had

1. Wisconsin Statute as to Fraud, Mistake, or Irregularity in Sale. — Stat. Wis. (1898), § 230; State v. School, etc., Lands Com'rs, 17 Wis. 249.

2. Reoffering Land until Sold. — See Act Ark. March 22, 1881, § 5 (Sand. & H. Dig. Stat. Ark. 1894, § 7119), construed in Brown v. Rushing, 70 Ark. 111.

3. Horner's Stat. Ind. (1901), § 4351.

4. Reoffering at Private Sale — Necessity for Original Offer at Public Sale. — McPheeters v. Wright, 110 Ind. 519.

5. Confirmation by Act of Legislature. — State v. Sickler, 9 Ind. 67.

6. Unauthorized Sales of School Lands Confirmed by Congress. — Romine v. State, 7 Wash. 215.

Confirmation of Unauthorized Sales of Lands Reserved for Priv. rshty. — Keane v. Brygger, 3 Wash. 338; Brygger v. Schweitzer, 5 Wash. 564.

7. Purchaser's Title Superior to That of Subsequent Patentee. — Brygger v. Schweitzer, 5 Wash. 564.

8. Act Cong. July 23, 1866, 14 U. S. Stat. at L. 218, c. 219.

For a discussion of the conditions which necessitated the enactment of this statute, and for construction of the various provisions of the act, see Huff v. Doyle, 93 U. S. 558, reversing 50 Cal. 16; Frasher v. O'Connor, 115 U. S. 102; McCreery v. Haskell, 119 U. S. 327; Durand v. Martin, 120 U. S. 366, affirming 63 Cal. 39; McNee v. Donahue, 142 U. S. 587, affirming 76 Cal. 499; Menotti v. Dillon, 167 U. S. 703; U. S. v. Curtner, 38 Fed. Rep. 1; Toland v. Mandell, 38 Cal. 30; Collins v. Bartlett, 44 Cal. 372; Buhne v. Chism, 48 Cal. 467; Laughlin v. McGarvey, 50 Cal. 169; Roberts v. Columbet, 63 Cal. 22.

not been made at the date of selection, should be confirmed to the state in lieu of the school sections for which the selections were made. Provision was also made that where indemnity school selections had been made and certified to the state, and such selections should fail because the school sections were not included within the final survey of a Mexican grant, or should be otherwise defective or invalid, the selections should be confirmed, and the school sections should, upon being excluded from such final surveys, be disposed of as other public lands of the United States, subject to certain provisions in favor of innocent purchasers of the selected lands where there were no school sections, and in favor of actual settlers claiming the right to enter. The act, by its terms, did not apply to mineral lands, to lands in the city and county of San Francisco, or to any incorporated city or town, or to any tide, swamp, or overflowed lands.¹

5. Diverting Land or Proceeds from Purposes of Grant — *a.* IN GENERAL. — Since school lands are held by the state in trust for the use of schools, the legislature is without power to divert them from that purpose.² This principle is frequently embodied in constitutional provisions embracing not only school lands, but the entire public school fund.³ In *Indiana* it is held that where school lands have been sold, the proceeds become trust funds which must be applied for the use of schools in the respective townships in which the lands are situated, and may not lawfully be diverted to the use of the school system of the state at large. A statute authorizing such a diversion of these funds is repugnant to the Acts of Congress granting the lands, and is in contravention of the state constitution.⁴

b. PURCHASER'S TITLE NOT AFFECTED. — The title of a purchaser of school lands that have been sold by order of the legislature is not affected by the fact that the statute directs the application of the proceeds of the sale to the use of schools in a way contrary to that contemplated by the Congressional grant.⁵

6. Purchaser's Contract and Certificate of Purchase or Location — *a.* BY WHOM EXECUTED. — The statutes generally designate the official who is authorized to execute a contract or certificate of purchase upon a sale of school lands.⁶

Execution by Deputy or Clerk. — Where a statute requires that a certificate of purchase of school lands be executed by a certain officer "in his official capacity," an execution by a deputy or clerk is unauthorized.⁷

b. NATURE AND INCIDENTS OF CERTIFICATE. — Certificates of purchase of school lands are in fact contracts for the sale of real estate, and must be governed by the principles of law applicable to contracts of that kind.⁸ The certificate itself is not title, but is merely evidence of title, and considered

1. Booth Act. — Act Cong. March 1, 1877, 19 Stat. at L. 267, c. 81. For construction, see *Durand v. Martin*, 120 U. S. 366, *affirming* 63 Cal. 39; *U. S. v. Curtner*, 38 Fed. Rep. 1; *U. S. v. Hendy*, 54 Fed. Rep. 447; *U. S. v. Southern Pac. R. Co.*, 76 Fed. Rep. 134; *Fletcher v. Mower*, 55 Cal. 119; *Hellman v. Jones*, 56 Cal. 462; *Green v. Hayes*, 70 Cal. 276; *Hambleton v. Duhain*, 71 Cal. 136; *Daniels v. Gualala Mill Co.*, 77 Cal. 300; *Cucamonga Fruit-Land Co. v. Moir*, 83 Cal. 101, *distinguishing* *Rowell v. Perkins*, 56 Cal. 219; *People v. Noyo Lumber Co.*, 99 Cal. 456.

This Statute Is a Curative Act, and should be liberally construed. *Martin v. Durand*, 63 Cal. 39, *affirming* 120 U. S. 366; *Hambleton v. Duhain*, 71 Cal. 136.

2. Land Must Be Used for School Purposes. — *Morton v. Grenada Male, etc., Academies*, 8 Smed. & M. (Miss.) 773; *State v. Cunningham*,

88 Wis. 81 (holding that the legislature cannot set apart these lands for a state park).

3. See Const. Colo., art. 9, § 3; *In re Canal Certificates*, 19 Colo. 69. And see generally the title *SCHOOLS*, vol. 25, p. 63 *et seq.*

4. *State v. Springfield Tp.*, 6 Ind. 83, *approved* in *State v. McClelland*, 138 Ind. 407, and in *State v. Mathews*, 150 Ind. 597.

5. Purchaser's Title Unaffected by Improper Use of Proceeds. — *State v. Stringfellow*, 2 Kan. 263.

6. See the provisions of the codes and statutes dealing with school lands.

7. Execution by Deputy or Clerk Held to Be Unauthorized. — *Lee v. Payne*, 4 Mich. 106.

8. Contract for Sale of Real Estate. — *Smith v. Clarke*, 7 Wis. 551; *Whitney v. State Bank*, 7 Wis. 620; *Mowry v. Wood*, 12 Wis. 425; *Lawton v. Howe*, 14 Wis. 245. See also *Harmon v. Steinman*, 9 Iowa 112. Compare *Hurd v. Hall*, 12 Wis. 112.

only as a contract reduced to writing on paper, it is simply a chattel: hence, a conversion of the certificate is not a conversion of its owner's interest in the land, for of course that is incapable of conversion.¹ While its assignability is frequently recognized by statute,² the certificate is in no sense negotiable, and possesses none of the attributes of a negotiable instrument.³

c. **TITLE OR INTEREST ACQUIRED**—(1) *In General*.—In respect to the estate or interest acquired by a purchaser of school lands from the state, there appears to be no distinction between his contract with the state and one made between private individuals for the sale of land.⁴ The purchaser acquires by his contract and certificate an equitable estate of inheritance in the land, an interest in fee, subject sometimes to statutory forfeiture for nonperformance of the stipulations in the contract, but, until so forfeited, perfect and indefeasible.⁵ But in the absence of a statute declaring the purchaser to have a greater estate,⁶ his interest is nothing more than equitable, and his certificate of purchase does not vest in him the legal title to the land.⁷ Hence, in a common-law action, a contract or certificate of purchase must yield to a subsequent patent conveying legal title, even where the holder of the certificate is in possession.⁸

Homestead Rights.—The interest of the owner of a certificate of purchase is within the homestead exemption laws.⁹

(2) *Title or Interest Defined by Statute*—(a) *In General*.—In several states the statutes dealing with the sale of school lands make specific provision as to the right, title, or interest which shall pass to a purchaser under a certificate of purchase or location.¹⁰ The *Alabama* code provides that a certificate of purchase shall operate to convey a conditional estate in fee, which shall become absolute upon the payment of the purchase money and interest, but which shall revert to the state upon the happening of certain contingencies that defeat a recovery of the purchase money.¹¹ In *California* statutes have been enacted providing that a certificate of purchase or of location, issued in pursuance of the laws of the state, shall be deemed *prima facie* evidence of legal title in the holder or his assignees, subject to the right of the state to declare a forfeiture for nonpayment of purchase money, and subject also to the right of parties in adverse possession of the land, and to the right of miners to enter and work the land for mining purposes.¹² Under a *Minnesota* statute providing that every person who by virtue of any grant or assignment is entitled to the actual possession of land and the receipts of the rents and profits thereof in law or equity shall be deemed to have a legal estate therein,

1. **Certificate Itself Personal Property.**—*Mowry v. Wood*, 12 Wis. 413. See also *Jarvis v. Dutcher*, 16 Wis. 307.

2. **Assignability.**—*Mowry v. Wood*, 12 Wis. 413. And see *infra*, this subsection, *Transfer of Purchaser's Title or Interest—By Assignment of Certificate*. See also the title **ASSIGNMENTS**, vol. 2, p. 1044 *et seq.*

3. See *infra*, this subsection, *Transfer of Purchaser's Title or Interest—By Assignment of Certificate—Certificates Not Negotiable*.

4. **Same Interest Acquired as by Any Other Land Contract.**—*Mowry v. Wood*, 12 Wis. 425; *Dodge v. Silverthorn*, 12 Wis. 644. See generally the title **VENDOR AND PURCHASER**.

5. *Mowry v. Wood*, 12 Wis. 425. Compare *Hurd v. Hall*, 12 Wis. 112.

As to **Forfeiture of a Purchaser's Interest for Noncompliance with the Terms of Sale**, see *supra*, this subsection, *Sales and Leases of School and University Lands—Terms of Sale or Lease—Remedies for Noncompliance with Terms of Sale or Lease—Forfeiture*.

6. See *infra*, this subsection, *Title or Interest Defined by Statute*.

7. **Legal Title Not in Holder of Certificate.**—*Harmon v. Steinman*, 9 Iowa 112. See also *Dodge v. Silverthorn*, 12 Wis. 647.

8. *Harmon v. Steinman*, 9 Iowa 112.

9. **Purchaser's Interest Subject to Homestead Rights.**—See the title **HOMESTEAD**, vol. 15, p. 562, and see *Green v. Lyndes*, 12 Wis. 404. See also *Haaven v. Hoas*, 60 Minn. 313, *per Start*, C. J.

10. See the provisions of the codes and statutes relating to the sale of school lands.

11. **Alabama Statute as to Title under Certificate of Purchase.**—Civ. Code Ala. (1896), § 3648; *Watson v. Prestwood*, 79 Ala. 416; *Prestwood v. Watson*, 111 Ala. 604. See also Act Ala. 1837 (Clay's Dig. 525, § 21); *Doe v. Godwin*, 30 Ala. 242.

12. **Certificate Prima Facie Evidence of Legal Title.**—Pol. Code Cal., § 3515; Code Civ. Pro. Cal., § 1925; *Higgins v. Houghton*, 25 Cal. 252; *Stanway v. Rubio*, 51 Cal. 41; *Watkins v. Lynch*, 71 Cal. 21.

the owner of a certificate of sale of school land is the owner of a legal estate in that land, and practically owns the land as against all the world except the state.¹

(b) **Nature and Incidents of Statutory Title.** — Under the statutes indicated above the holder of a certificate of purchase has sufficient title to maintain an action of ejectment² or to dedicate the land to the public use for the purpose of a highway.³ In *Minnesota* the certificate of sale has been held to be a conveyance within the meaning of a statute prohibiting resulting trusts.⁴ In *Alabama*, however, it is not clear from the authorities whether the holder of the certificate, pending the payment of the purchase money and the issuance of a patent by the state, has a legal title subject to defeasance or has merely an inchoate title or right to possession.⁵

d. TRANSFER OF PURCHASER'S TITLE OR INTEREST — (1) *By Conveyance.*

— The holder of a certificate of purchase may, after paying the purchase money, convey by deed all the rights which he has acquired from the state by virtue of his certificate and payment;⁶ and a deed by him purporting to convey all his interest in the lands operates to convey, also, all the rights which he may afterwards acquire from the state by virtue of a patent issued to him.⁷ The same principles apply where an assignee of the certificate conveys by quitclaim deed and afterward receives a patent from the state,⁸ and the patent operates by relation to pass the legal title to the grantee as of the date of the deed.⁹

(2) *By Mortgage.* — Under his certificate the purchaser acquires in the land described therein an interest or estate which he may mortgage.¹⁰

(3) *By Assignment of Certificate* — (a) **Assignability of Certificate.** — The assignability of certificates of purchase of school land is frequently affirmed or recognized by the statutes.¹¹

(b) **Method of Assignment.** — School-land certificates can be transferred only by assignment in writing in the same manner as any other contract for the sale of real estate.¹²

1. Holder of Certificate Owner of Legal Estate.

— *Haaven v. Hoaas*, 60 Minn. 313. See also *Wilder v. Haughey*, 21 Minn. 101.

2. Ejectment by Purchaser Having Certificate. —

Watson v. Prestwood, 79 Ala. 416; *Prestwood v. Watson*, 111 Ala. 604; *Stanway v. Rubio*, 51 Cal. 41; *Haaven v. Hoaas*, 60 Minn. 313.

In *Minnesota* a statute has been passed expressly making a certificate of purchase sufficient evidence of title to support an action for possession. Stat. Minn. (1894), § 3978; *McKinney v. Bode*, 32 Minn. 228.

Deceased Purchaser's Administrator May Maintain Ejectment. — *Watson v. Prestwood*, 79 Ala. 416; *Prestwood v. Watson*, 111 Ala. 604.

3. Holder of Certificate May Dedicate Land for Highway. — *Watkins v. Lynch*, 71 Cal. 21.

4. Certificate of Sale Within Statute Prohibiting Resulting Trusts. — *Haaven v. Hoaas*, 60 Minn. 313.

5. Nature of Title. — In *Watson v. Prestwood*, 79 Ala. 416, it was said by Stone, C. J., that the certificate clothed the purchaser with the legal title, with a condition of defeasance or reversion on the subsequent happening of one of the enumerated events on which the statute declares the land shall revert. But in *Prestwood v. Watson*, 111 Ala. 604, Brickell, C. J., while apparently approving the foregoing statement of Stone, C. J., declared that the legal title remains in the state, and until the final payment of the purchase money and the issue of a patent by the state that title is not divested though the

purchaser acquires an inchoate title, the right of possession, sufficient to maintain ejectment.

6. Effect of Deed by Holder of Certificate. — *Stanway v. Rubio*, 51 Cal. 41; *Jarvis v. Dutcher*, 16 Wis. 307, explaining *Mowry v. Wood*, 12 Wis. 413. See also *Burrows v. Hovland*, 40 Neb. 464.

But in *Minnesota* it is considered that he cannot convey directly to his wife. *Haaven v. Hoaas*, 60 Minn. 313, per Start, C. J.

7. Patent to Holder of Certificate Inures to Benefit of Grantee. — *Stanway v. Rubio*, 51 Cal. 41.

8. Quitclaim by Assignee Who Afterwards Receives Patent. — *Welch v. Dutton*, 79 Ill. 465; *Watkins v. Lynch*, 71 Cal. 21. Compare *Watson v. Prestwood*, 79 Ala. 416.

9. Patent to Assignee After Conveyance Operates by Relation. — *Welch v. Dutton*, 79 Ill. 465. See generally as to the doctrine of relation the title *RELATION*, vol. 24, p. 274.

10. Purchaser's Interest May Be Mortgaged. — *Burrows v. Hovland*, 40 Neb. 464; *Mowry v. Wood*, 12 Wis. 425; *Dodge v. Silverthorn*, 12 Wis. 644. See generally the title *MORTGAGES*, vol. 20, p. 915 *et seq.*

11. See the statutory provisions relating to the sale of school lands, and the cases cited *infra* in this subdivision.

Purchaser's Widow Cannot Make Assignment. — *Watson v. Prestwood*, 79 Ala. 416.

12. Assignment Must Be in Writing. — *Smith v. Clarke*, 7 Wis. 551; *Whitney v. State Bank*,

Assignment in Blank. — An assignment of a school-land certificate in blank, *i. e.*, with the name of the assignee omitted, does not operate a transfer of the certificate at law, and is unauthorized by the statutes of *Wisconsin* providing that the transfer may be by assignment in writing.¹ Neither can a practice of transferring the certificates by assignment in blank give to them any incidents of negotiability.²

Land Occupied as Homestead. — The interest of a purchaser under a certificate of purchase being within the homestead exemption laws,³ it is held that where the land embraced in the certificate is occupied by the husband and family as a homestead, an assignment of the certificate by him without the signature of his wife is wholly void, and that the wife can maintain possession of the homestead as against the assignee of the certificate.⁴

(e) **Certificates Not Negotiable.** — Certificates of purchase of school lands possess none of the peculiar incidents of negotiable securities, and are not subject to the principles governing the sale and transfer of such instruments. A statute making them assignable does not render them negotiable.⁵

(4) **Distinction Between Assignment of Certificate and Conveyance of Purchaser's Title.** — The equitable interest of a purchaser under a school-land certificate may be mortgaged or transferred by deed without an assignment or delivery of the certificate, but the title to the certificate itself cannot be transferred without an assignment in writing. Hence, the beneficial interest in the land may become vested wholly or in part in one person and the title to the certificate in another. Therefore, if the grantee of the purchaser's equitable estate does not procure an assignment of the certificate to him, he acquires no rights enforceable at law unless he is in actual possession, and thus cannot obtain a patent for the land or maintain ejectment for it or trespass for an injury done to it, but must resort to a court of equity to compel a transfer of the certificate, and in a court of equity alone can his estate be recognized and protected.⁶

e. ACKNOWLEDGMENT AND RECORDING. — Statutes in some states, as, for instance, in *Wisconsin*, provide that certificates of purchase of school lands or assignments of such certificates may be acknowledged and recorded in the same manner as deeds of conveyance. These statutes appear to bring the certificates and assignments thereof fully within the scope and policy of the recording acts.⁷ Likewise a conveyance or mortgage of the purchaser's equitable estate in the land described in his certificate of purchase is held in *Wisconsin* to be within the operation of the recording acts.⁸ Similarly it is held

7 Wis. 620; *Lawton v. Howe*, 14 Wis. 241. See generally the title ASSIGNMENTS, vol. 2, pp. 1052, 1053.

Stipulation Requiring Indorsement of Assignment on Contract. — Where a contract for the purchase of school lands contains a provision, that no assignment by the purchaser shall be valid unless indorsed on the contract, and that no agreements, conditions, or relations between the purchaser and his assignee or any other person acquiring title or interest from or through him shall preclude the state from the right to convey the premises to the purchaser, it is held that the provision as to the indorsement of the assignment is for the benefit of the state, and that only the state can insist upon a compliance therewith; and if the assignment is made in writing and is otherwise valid, the failure of the purchaser to indorse the assignment upon the contract does not render the assignment void, but makes it merely voidable at the election of the state. *Burrows v. Hovland*, 40 Neb. 464.

1. **Assignment in Blank Invalid.** — *Smith v.*

Clarke, 7 Wis. 551; *Mowry v. Wood*, 12 Wis. 413. See also *Whitney v. State Bank*, 7 Wis. 620.

2. *Smith v. Clarke*, 7 Wis. 551.

3. See *supra*, this subsection, *Title or Interest Acquired — In General*.

4. **Wife Must Join in Assignment.** — *Green v. Lyndes*, 12 Wis. 404; *McCabe v. Mazzuchelli*, 13 Wis. 478.

5. **Certificate of Purchase Not Negotiable Instrument.** — *Smith v. Clarke*, 7 Wis. 551; *Whitney v. State Bank*, 7 Wis. 620.

6. **Assignment of Certificate and Conveyance of Title Distinguished.** — *Jarvis v. Dutcher*, 16 Wis. 307, explaining *Mowry v. Wood*, 12 Wis. 413.

7. **Acknowledgment and Record of Certificate and Assignment.** — *Dodge v. Silverthorn*, 12 Wis. 644; *Jarvis v. Dutcher*, 16 Wis. 307. See generally the title RECORDING ACTS, vol. 24, p. 77 *et seq.*

8. **Mortgage or Conveyance of Purchaser's Equitable Interest.** — *Dodge v. Silverthorn*, 12 Wis. 644; *Jarvis v. Dutcher*, 16 Wis. 307.

in *Nebraska* that a vendee's assignment of a contract to purchase school lands, if the assignment is made to secure the payment of money, is in effect a mortgage and is within the recording acts.¹ In *Iowa*, however, it is held that where a statute requiring the recording of a contract of purchase of school lands does not provide for or require the filing or recording of an assignment of the contract, and does not make the recording of the original contract notice to third persons of the rights of the parties therein, the failure to file and record such an assignment can have no prejudicial effect upon the rights of the assignee, and cannot operate in favor of a purchaser at execution sale upon a judgment rendered against the assignor of the contract subsequent to the assignment.²

XVI. LAND DEPARTMENT OFFICIALS AND PROCEEDINGS—1. General Statement — **Federal Land Department.** — In the exercise of its exclusive power under the constitution, Congress has established a land department for the management and sale of public lands. This department constitutes a special tribunal vested with judicial power to decide whether a person has by purchase, by pre-emption, or by any other recognized mode established a right to receive from the government a title to any part of the public domain subject to its disposition.³ It is under the immediate supervision of the commissioner of the general land office, subject to the supervisory control of the secretary of the interior, upon whom such authority was conferred by the Act of Congress establishing the department of the interior,⁴ and the subordinate duties are performed by surveyors, registers, and receivers in the several districts.⁵

Administration of Land Grants. — It may be laid down as a general rule that in the absence of some specific provision to the contrary in respect to any particular grant of public land, its administration falls wholly and absolutely within the jurisdiction of the commissioner of the general land office under the supervision of the secretary of the interior. It is not necessary that with each grant there shall go a direction that its administration shall be under the authority of the land department.⁶

State Land Departments. — In several of the states statutes exist providing for a state land board or department or conferring upon designated officers functions corresponding to those exercised by the officers of the land department of the United States.⁷ An enumeration of these officers and a detailed treat-

1. **Assignment of Contract by Way of Mortgage.** — *Burrows v. Hovland*, 40 Neb. 464.

2. **Neglect to Record Assignment Inoperative.** — *Churchill v. Morse*, 23 Iowa 229.

3. **Establishment of Federal Land Department.** — *Moore v. Robbins*, 96 U. S. 530; *Noble v. Union River Logging R. Co.*, 147 U. S. 175; *U. S. v. Winona, etc., R. Co.*, 165 U. S. 463, *affirming* 67 Fed. Rep. 956; *King v. McAndrews*, (C. C. A.) 111 Fed. Rep. 860; *Cahn v. Barnes*, 5 Fed. Rep. 331; *Parker v. Duff*, 47 Cal. 554; *Arnold v. Grimes*, 2 Iowa 1; *Meyers v. U. S.*, 5 Okla. 173.

4. **Part of the Interior Department.** — *Cahn v. Barnes*, 5 Fed. Rep. 331; *U. S. v. Winona, etc., R. Co.*, (C. C. A.) 67 Fed. Rep. 948, *affirmed* 165 U. S. 463; *King v. McAndrews*, (C. C. A.) 111 Fed. Rep. 860; *Parker v. Duff*, 47 Cal. 554.

For the History of the Land Department, see *Patterson v. Tatum*, 3 Sawy. (U. S.) 164, 18 Fed. Cas. No. 10,830. See also *Shepley v. Cowan*, 91 U. S. 330; *Meyers v. U. S.*, 5 Okla. 173; *Arnold v. Grimes*, 2 Iowa 1.

Determination of Conflicting Pre-emption Rights. — Under the pre-emption act of September 4, 1841, questions as to the right of pre-emption arising between different settlers were to be

settled by the register and receiver of the local land office, subject to an appeal to and revision by the secretary of the treasury. *Johnson v. Towsley*, 13 Wall. (U. S.) 72; *Warren v. Van Brunt*, 19 Wall. (U. S.) 646; *Courtney v. Perkins*, 5 La. Ann. 216.

5. **Subordinate Officers.** — *Parker v. Duff*, 47 Cal. 554.

6. *Nesqually v. Gibbon*, 158 U. S. 155.

7. **Statutory Provisions for State Land Boards, etc.** — *United States.* — *Carrington v. Potter*, 37 Fed. Rep. 767 (decided under *Missouri* laws). *Arkansas.* — *Hempstead v. Underhill*, 20 Ark. 337; *Walworth v. Miles*, 23 Ark. 653; *Gaster v. Gaines*, 23 Ark. 712.

Colorado. — *Greenwood Cemetery Land Co. v. Routt*, 17 Colo. 165, 31 Am. St. Rep. 284; *Routt v. Greenwood Cemetery Land Co.*, 18 Colo. 137.

Louisiana. — *Hood v. Martin*, 11 La. Ann. 552; *Keller v. Loflin*, 13 La. Ann. 185; *Mast v. Hamilton*, 14 La. Ann. 787; *Betz v. Illinois Cent. R. Co.*, 52 La. Ann. 893.

Michigan. — *People v. State Treasurer*, 7 Mich. 366.

North Carolina. — *Wool v. Saunders*, 108 N. Car. 729.

ment of their powers and duties do not come within the scope of this article, and reference must be had therefor to the statutes of the various states.

2. Specific Officers Considered — *a. REGISTERS AND RECEIVERS* — (1) *Powers and Duties.* — In the course of the proceedings under the various statutes of the United States providing for the sale of public lands, such as the statutes relating to pre-emptions, homesteads, desert lands, etc., and in the examination of the proofs submitted by the entrymen, various questions of fact arise and are to be decided by the register and receiver, who are to be satisfied of the existence of the necessary facts mentioned in the statute, and of the regularity and sufficiency of the proofs. When so satisfied the register issues his certificate to that effect, and the receiver gives what is known as a "final receipt," and upon the two papers the patent finally issues. There must be the favorable action of both register and receiver before the final papers issue, but such action need not be simultaneous. The receiver may act at one time and the register at another, but both must act before the case is concluded and the papers signed upon which the patent is subsequently issued.¹

Performance by Deputy. — A mere ministerial duty of a register may, as in the case of public officers generally, be performed by a deputy.²

(2) *Salary and Commissions.* — Every register and receiver is allowed an annual salary of five hundred dollars.³ In addition to this fixed minimum salary, provision is made for fees and commissions in certain specified cases,⁴ with the proviso, however, that the compensation of registers and receivers, including salary, fees, and commissions, shall in no case exceed in the aggregate three thousand dollars a year each.⁵

Reimbursement for Rent. — On the principle that when a public officer is required to keep open a public office for the transaction of public business, he ought to be allowed for the necessary and proper expenses incurred in performing that duty, it has been held that there is an implied contract on the part of the United States to refund and pay the register of the land office the amount of rent paid by him for a properly appointed office.⁶

(3) *Liability on Official Bonds.* — A register or receiver is required to give a bond with sufficient sureties before he enters upon the duties of his office,

Oregon. — *Shively v. Pennoyer*, 27 Oregon 33.

Texas. — *Arnold v. State*, 71 Tex. 239; *King v. Jones*, 78 Tex. 285.

Washington. — *Billings v. State*, 27 Wash. 288.

1. General Duties of Registers and Receivers. — *Lytle v. Arkansas*, 9 How. (U. S.) 314; *Potter v. U. S.*, 107 U. S. 126; *Smith v. U. S.*, 170 U. S. 377; *Morton v. Green*, 2 Neb. 441. See also *Matthews v. Zane*, 7 Wheat. (U. S.) 164; *Fulton v. Doe*, 5 How. (Miss.) 751; *Groom v. Hill*, 9 Mo. 323; *Keith v. Cheeny*, 1 Oregon 285.

Simultaneous Action of Register and Receiver Unnecessary. — *Peters v. U. S.*, 2 Okla. 116.

Authority to Administer Oaths. — *Peters v. U. S.*, 2 Okla. 122.

2. Performance of Ministerial Duties by Deputy. — *Hunter v. Hemphill*, 6 Mo. 106. See generally the title *DEPUTY*, vol. 9, p. 370.

3. Rev. Stat. U. S., § 2237.

4. Rev. Stat. U. S., §§ 2238, 2239.

When Compensation Begins — Doing what is necessary in order that a newly created land office may be in a proper and fit condition at the time appointed for opening it for the transaction of public business, is a part of the official

duties of the person who is appointed to the office, within the meaning of section 2243, Rev. Stat. U. S., providing that "the compensation of registers and receivers, both for salary and commissions, shall commence and be calculated from the time they respectively enter upon the discharge of their duties." *U. S. v. Delaney*, 164 U. S. 282.

5. Rev. Stat. U. S., § 2240.

Retaining Excess of Commissions for Military Bounty Land Warrants. — *U. S. v. Babbit*, 1 Black. (U. S.) 55, *reaffirmed* 95 U. S. 334; *U. S. v. Brindle*, 110 U. S. 688.

Fiscal Year the Basis of Calculation. — Under Rev. Stat. U. S., § 2240, providing that "no register or receiver shall receive for any one quarter or fractional quarter more than a *pro rata* allowance of" the maximum limited by law, it has been held that the compensation is to be calculated on the basis of each quarter in the fiscal year, and not the calendar year. *Sweet v. U. S.*, 34 Ct. Cl. 377, *distinguishing* *U. S. v. Dickson*, 15 Pet. (U. S.) 141.

6. Reimbursement for Rent. — *Swigett v. U. S.*, 78 Fed. Rep. 456. *affirmed* (C. C. A.) 83 Fed. Rep. 97, and *distinguishing* *Bane v. U. S.*, 19 Ct. Cl. 644.

and for any breach of the conditions thereof both he and his sureties will be liable.¹

6. COMMISSIONER OF GENERAL LAND OFFICE. — In cases arising under the pre-emption laws of May 29, 1830, and of June 19, 1834, the power of ascertaining and deciding on the facts which entitle a party to the right of pre-emption was vested in the register and receiver of the land district in which the land was situated, from whose decision there was no direct appeal to higher authority. But, even under these laws, the proof on which the claim was to rest was to be made "agreeably to the rules to be prescribed by the commissioner of the general land office;" and if not so made, the entry would be suspended, when the proceeding was brought before the commissioner by an opposing claimant.² A general supervisory power over the acts of the register and receiver is given to the commissioner by the United States Revised Statutes, modifying the Act of July 4, 1831, and providing that the commissioner of the general land office shall perform under the direction of the secretary of the interior all executive duties appertaining to the public land of the United States or in any wise respecting such land, and also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the government.³

Adjudication as to Settlement and Improvement. — Under the Act of Congress of May 29, 1830, requiring that prior to any entry "proof of settlement or improvement shall be made to the satisfaction of the register and receiver," it was held that their decision was conclusive upon the questions of settlement and improvement.⁴ But the power of supervision and control granted by the Act of July 4, 1836, although in terms extending only to executive duties, includes the right to review a decision of the local land officers as to the matter of settlement and improvement,⁵ especially in cases in which the proof before those officers was by *ex parte* affidavits,⁶ the approval or disapproval of the evidence offered in respect to settlement and improvement being *quasi-judicial* only.

Controversies Between Different Settlers. — All questions as to the right of presumption arising between different settlers are, by express statutory provision, to be determined by the register and receiver of the district within which the

1. Registers and Receivers Required to Give Bond. — Rev. Stat. U. S., § 2236; U. S. v. Boyd, 5 How. (U. S.) 29.

Liability on Bond for Purchase Money Deposited by Entryman. — Smith v. U. S., 170 U. S. 372.

Liability for Money Received in Advance of Time Prescribed by Department of Interior. — Mears v. U. S., (C. C. A.) 81 Fed. Rep. 684.

Liability for Failure to Pay Over Surplus Beyond Compensation. — U. S. v. Babbitt, 95 U. S. 334.

Liability for Money Paid to Receiver's Agent. — Potter v. U. S., 107 U. S. 126.

Liability for Money Seized by Public Enemy. — Bevans v. U. S., 13 Wall. (U. S.) 56.

Liability for Default While Holding Over After Expiration of Term of Office. — U. S. v. Jameson, 3 McCrary (U. S.) 620.

Conclusiveness of Receiver's Return. — The return of a receiver to the treasury department is not conclusive as to the amount of money coming into his hands in an action by the government against the sureties upon his bond. U. S. v. Boyd, 5 How. (U. S.) 29.

2. Bernard v. Ashley, 18 How. (U. S.) 43, *affirming* Hempst. (U. S.) 665, 3 Fed. Cas. No. 1346. See also Arnold v. Grimes, 2 Iowa 1.

3. Supervisory Power of Commissioner — United

States. — Rev. Stat., § 453; U. S. v. Chaplin, 31 Fed. Rep. 894; Hosmer v. Wallace, 97 U. S. 575, *affirming* 47 Cal. 461; Warren v. Van Brunt, 19 Wall. (U. S.) 646.

Alabama. — Bates v. Herron, 35 Ala. 117; Saltmarsh v. Crommelin, 39 Ala. 54.

California. — Hestres v. Brennan, 50 Cal. 211.

Dakota. — Vantongerren v. Hefferman, 5 Dak. 180.

Illinois. — Gray v. McCance, 14 Ill. 343; Aldrich v. Aldrich, 37 Ill. 32.

Iowa. — Bellows v. Todd, 34 Iowa 18.

Kansas. — Darcy v. McCarthy, 35 Kan. 722.

Minnesota. — Randall v. Edert, 7 Minn. 450;

Gray v. Stockton, 8 Minn. 529; Judd v. Randall, 36 Minn. 12.

Nebraska. — Morton v. Green, 2 Neb. 441.

Wisconsin. — McLane v. Bovee, 35 Wis. 27.

4. Lytle v. Arkansas, 9 How. (U. S.) 314.

5. Power to Reverse Decision as to Settlement and Improvement. — Harkness v. Underhill, 1 Black (U. S.) 316; Orchard v. Alexander, 157 U. S. 372.

6. Barnard v. Ashley, 18 How. (U. S.) 43, *distinguishing and explaining* Wilcox v. Jackson, 13 Pet. (U. S.) 511; Lytle v. Arkansas, 9 How. (U. S.) 314.

land is situated, and appeals from the decision of district officers in cases of contest for the right of pre-emption are to be made to the commissioners of the general land office, and the decision is final unless appeal therefrom be taken to the secretary of the interior.¹ Under this provision it has been held that the commissioner and secretary have authority to pass upon questions of fact presented by the contest not passed upon by the register and receiver.²

Limitation upon Commissioner's Power. — The commissioner's power of reviewing and setting aside the action of the local land officers is not arbitrary and unlimited, and does not prevent judicial inquiry.³

c. SECRETARY OF INTERIOR — (1) *In General.* — The phrase "under the direction of the secretary of the interior," used in the United States Revised Statutes, prescribing the duties of the commissioner of the general land office, was intended as an expression in general terms of the power of the secretary to supervise and control the extensive operations of the land department, of which he is the head. It means that, in the important matters relating to the sale and disposition of the public domain, the surveying of private land claims and the issuing of patents thereon, and the administration of the trusts devolving upon the government by reason of the laws of Congress or under treaty stipulations respecting the public domain, the secretary of the interior is the supervising agent of the government to do justice to all claimants and preserve the rights of the people of the United States.⁴ The statutes, in placing the whole business of the department under the supervision of the secretary, invest him with authority to review, reverse, amend, annul, or affirm all proceedings in the department having for their ultimate object to secure the alienation of any portion of the public lands or the adjustment of private claims to lands with a just regard to the rights of the public and private parties. Such supervision may be exercised by direct orders or review on appeals. The mode in which the supervision shall be exercised in the absence of statutory direction may be prescribed by such rules and regulations as the secretary may adopt when proceedings affecting the titles to lands are before the department. The power of supervision may be exercised by the secretary whether these proceedings are called to his attention by formal notice or appeal. It is sufficient that they are brought to his notice.⁵

(2) *Review of Decision of Secretary* — (a) *Review by Secretary.* — The secretary of the interior may not only review his own decision prior to the passing of the legal title to the land in controversy,⁶ but may review a decision of his predecessor and set it aside if he is convinced that an error has been committed. An application for a rehearing may be made to a succeeding secretary, provided it could have been made to his predecessor who made the original decision, had he remained in office.⁷

1. *Controversies Between Pre-emption Settlers.* — Rev. Stat. U. S., § 2273; *Orchard v. Alexander*, 157 U. S. 372. See also *Godding v. Decker*, 3 Colo. App. 198.

2. *McHarry v. Stewart*, (Cal. 1893) 35 Pac. Rep. 141.

3. *Commissioner's Power of Review Not Arbitrary.* — *Orchard v. Alexander*, 157 U. S. 372; *Cornelius v. Kessel*, 128 U. S. 456; *Johnson v. Towsley*, 13 Wall. (U. S.) 72.

4. *Supervisory Power of Secretary of Interior.* — *Knight v. U. S. Land Assoc.*, 142 U. S. 161; *Nesqually v. Gibbon*, 158 U. S. 167; *Stoneroad v. Stoneroad*, 158 U. S. 240; *Russell v. Maxwell Land Grant Co.*, 158 U. S. 253; *Hays v. Steiger*, 76 Cal. 555; *McCord v. Hill*, 111 Wis. 499. See also *Warner Valley Stock Co. v. Smith*, 9 App. Cas. (D. C.) 187, reversed in 165 U. S. 28, for lack of necessary parties.

Power Supervisory Rather than Appellate. — *Hestres v. Brennan*, 50 Cal. 211.

No Original Jurisdiction Vested in Secretary of Interior. — Under the Act of Congress of March 3, 1849, transferring to the secretary of the interior the supervision of the land department, the secretary of the interior has no original cognizance of applications for patents for government lands. *Secretary v. McGarrahan*, 9 Wall. (U. S.) 298.

5. *Knight v. U. S. Land Assoc.*, 142 U. S. 161; *Orchard v. Alexander*, 157 U. S. 381; *Hestres v. Brennan*, 50 Cal. 211. See also *Stimson Land Co. v. Rawson*, 62 Fed. Rep. 429; *Ludeling v. Vester*, 16 La. Ann. 450.

6. *Secretary's Review of His Decisions.* — *Acers v. Snyder*, 8 Okla. 659.

7. *Review of Decision of Predecessor.* — *Beley v. Naphtaly*, 169 U. S. 353, affirming 73 Fed.

(b) **Appeal to President.** — It has been intimated that under special circumstances an appeal may be had to the President.¹

d. **SURVEYORS — Surveyors-General.** — Provision is made by Congress for the appointment in the various surveying districts of surveyors-general, whose rights and liabilities are also prescribed by statute.²

Deputy Surveyors. — Every surveyor-general is required to engage a sufficient number of skillful surveyors as his deputies, to whom he is authorized to administer the necessary oaths upon their appointment, and he has authority to frame regulations for their direction not inconsistent with law or the instructions of the general land office, and to remove them for negligence or misconduct in office.³

Supervisory Power of Department. — From the earliest days, matters pertaining to the survey of public lands have devolved upon the commissioner of the general land office under the supervision of the secretary of the interior. The commissioner, in the exercise of his superintendence over surveyors-general and of all subordinate officers, is clothed with large powers of control to prevent the consequences of inadvertence, mistakes, irregularities, and fraud in their operations.⁴

e. **TIMBER AGENTS.** — The department of the interior, under the idea of protecting from depredation timber on the lands of the government, has gradually come to assert the right to seize what is cut and taken away from these lands wherever it can be traced. In aid of this the registers and receivers of the land offices have, by instructions from the secretary of the interior, been constituted agents of the United States for these purposes, with power to appoint special agents under themselves. The authority from Congress to do this is to be inferred from appropriations made to pay for the services of these special timber agents.⁵

f. **BOARD OF EQUITABLE ADJUDICATION.** — Under the Revised Statutes of the United States relating to suspended entries of public lands and to suspended land claims, cases involving suspended entries are not left by law to be finally determined by the land department under the general provisions of the statute giving to the secretary of the interior and the commissioner of the general land office control of the administration of the public land business, but are required to be tried by the commissioner according to the principles of equity and under definite rules of procedure to be prescribed by the secretary of the interior, the attorney-general, and commissioner jointly, his adjudication being subject to approval by the secretary of the interior and the attorney-general acting as a board.⁶ These provisions apply only to decisions of the commissioner sustaining irregular entries; decisions rejecting or canceling such entries have the force and effect otherwise accorded to them by the general land laws and are subject to the appellate or supervisory

Rep. 120; *Warner Valley Stock Co. v. Smith*, 9 App. Cas. (D. C.) 187, reversed for lack of necessary parties 165 U. S. 28; *Brown v. Bliss*, 13 App. Cas. (D. C.) 279, 26 Wash. L. Rep. 660.

Power Not Divested by Rule Formulated by Land Department. — *Gage v. Gunther*, 136 Cal. 338.

Review of Decision After Passing of Legal Title Unauthorized. — *Noble v. Union River Logging R. Co.*, 147 U. S. 175; *Stimson Land Co. v. Rawson*, 62 Fed. Rep. 429. See also *Moore v. Robbins*, 96 U. S. 530; *Emblem v. Lincoln Land Co.*, 94 Fed. Rep. 710, affirmed 102 Fed. Rep. 559, affirmed 184 U. S. 660.

1. See *Shepley v. Cowan*, 91 U. S. 340.

2. **Surveyors-General.** — Rev. Stat. U. S., § 2207 *et seq.* See *U. S. v. Lytle*, 5 McLean (U. S.)

9, 26 Fed. Cas. No. 15,652.

Surveyors-General Required to Give Bond. — *Farrar v. U. S.*, 5 Pet. (U. S.) 373; *People v. Whitman*, 10 Cal. 38.

3. **Deputy Surveyors.** — Rev. Stat. U. S., § 3323. See *Reed v. Conway*, 26 Mo. 13.

4. **Supervision of Department Over Surveyors.** — *Haydel v. Dufresne*, 17 How. (U. S.) 23; *Bell v. Hearne*, 19 How. (U. S.) 252; *Cragin v. Powell*, 128 U. S. 691. See also *Dent v. Sigeron*, 29 Mo. 489.

5. **Timber Agents.** — *Wells v. Nickles*, 104 U. S. 444.

6. **Board of Equitable Adjudication.** — U. S. Rev. Stat., § 2450 *et seq.*; *Stimson Land Co. v. Hollister*, 75 Fed. Rep. 941; *Gage v. Gunther*, 136 Cal. 338.

authority of the secretary of the interior as in other instances.¹

3. Rules of Procedure — *a. IN GENERAL.* — Registers and receivers in the performance of their duties must look only to the Acts of Congress and to such regulations of the general land office as have been made in pursuance of law.² The secretary of the interior, or the commissioner of the general land office subject to the supervision of the secretary, may adopt rules for the convenient, systematic, and orderly conduct of the business of the office, and such rules if not repugnant to the acts of Congress will have the force and effect of law.³ But department regulations for the disposal of public lands must be appropriate, reasonable, and within the limitations of the law for the enforcement of which they are provided, and when otherwise they are void.⁴

Abrogation of Rules Promulgated by Secretary of the Interior. — The rules and regulations promulgated by the secretary of the interior, if not repugnant to law, can be overthrown by nothing short of an express and formal repeal or abrogation, and public notice thereof, by the secretary himself; a decision or opinion delivered by him or the department in disregard of a regulation is limited in its effect to the particular tract of land whose title was in question.⁵

b. APPLICATION OF RULES OF PLEADING. — While there are no formal pleadings in such cases, it is undoubtedly true, as a general rule, that in contested matters before the land department, as in those before the courts, the decision should be confined to the questions raised by the allegations of the respective parties; but this rule has its exceptions. If in any case it appears from the evidence that the claim of the complaining or moving party is against public policy or the law, so that in no event could he recover a final judgment or decision, whatever be the nature or extent of the testimony upon the point at issue the tribunal should not hesitate to dismiss the suit or the proceeding.⁶

4. Effect and Conclusiveness of Proceedings — *a. CANCELLATION BY LAND DEPARTMENT* — (1) *Prior to Issuance of Patent* — (a) *In General.* — The land department, having full jurisdiction over the disposition of public lands, has authority at any time before the passing of the legal title by the issue of a patent or otherwise, to inquire whether an entry is in conformity with law, and to correct or annul the same, where, for instance, it appears that the lands are not subject to entry or the entryman does not possess the qualifications required or has previously entered all that the law permits.⁷ If an investigation of the

1. *Hawley v. Diller*, 178 U. S. 476.

2. **Rules of Procedure Followed by Receivers.** — *Parker v. Duff*, 47 Cal. 562.

3. **Right of Secretary of Interior to Adopt Rules.** — *McDaid v. Oklahoma*, 150 U. S. 209; *Smith v. U. S.*, 170 U. S. 372; *U. S. v. Barnhart*, 33 Fed. Rep. 459; *Germania Iron Co. v. U. S.*, 19 U. S. App. 10, 58 Fed. Rep. 334; *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, (C. C. A.) 112 Fed. Rep. 4, *affirming* 104 Fed. Rep. 20; *Poppe v. Athearn*, 42 Cal. 607; *Chapman v. Quinn*, 56 Cal. 273; *German Ins. Co. v. Hayden*, 21 Colo. 137, 52 Am. St. Rep. 206; *Meyers v. U. S.*, 5 Okla. 173.

Power of State Land Officers to Make and Modify Regulations. — *Whiteman v. Severance*, 46 Minn. 495; *People v. Saxton*, 15 N. Y. App. Div. 263; *King v. Jones*, 78 Tex. 285.

4. *Anchor v. Howe*, 50 Fed. Rep. 366; *Meads v. U. S.*, (C. C. A.) 81 Fed. Rep. 684; *Baty v. Sale*, 43 Ill. 351, 92 Am. Dec. 128; *McDowell v. Morgan*, 28 Ill. 528.

5. *James v. Germania Iron Co.*, (C. C. A.) 107 Fed. Rep. 597.

6. **Application of Rules and Pleading to Proceedings.** — *Lee v. Johnson*, 116 U. S. 49, *reversing* 47 Mich. 52.

7. **Cancellation of Entries by Federal Land Department** — *United States*. — *Knight v. U. S. Land Assoc.*, 142 U. S. 161; *Orchard v. Alexander*, 157 U. S. 372; *Parsons v. Venzke*, 164 U. S. 89, *affirming* 4 N. Dak. 452; *Michigan Land, etc., Co. v. Rust*, 168 U. S. 593; *Hawley v. Diller*, 178 U. S. 488; *Easley v. Kellom*, 14 Wall. (U. S.) 279, *affirming* 1 Dill. (U. S.) 281, 2 Abb. (U. S.) 599.

California. — *Hestres v. Prennan*, 50 Cal. 211; *Vance v. Kohlberg*, 50 Cal. 346.

Colorado. — *German Ins. Co. v. Hayden*, 21 Colo. 127, 52 Am. St. Rep. 206.

Iowa. — *Klein v. Argenbriht*, 26 Iowa 493; *Bellows v. Todd*, 34 Iowa 18; *Durham v. Hussman*, 88 Iowa 29.

Kansas. — *Darcy v. McCarthy*, 35 Kan. 722.

Louisiana. — *Barton v. Hempkin*, 19 La. 510; *Bettis v. Amonett*, 4 La. Ann. 364; *Kittridge v. Hebert*, 9 La. Ann. 154; *Scurdy v. Shaffer*, 10 La. Ann. 133; *Gautreaux v. Boote*, 10 La. Ann. 137; *Guidry v. Woods*, 19 La. 334, 36 Am. Dec. 677; *Lott v. Prudhomme*, 3 Rob. (La.) 293.

Minnesota. — *Randall v. Edert*, 7 Minn. 450. *Mississippi*. — *Dickinson v. Doe*, 9 Smed. & M. (Miss.) 130.

validity of such entries were required in the courts of law before they could be canceled, the necessary delays attending the examination would greatly impair, if not destroy, the efficiency of the department.¹

A Purchaser from the Entryman after a final receipt is given takes the land subject to the right of the department to cancel the entry for sufficient reason.²

Ordering New Surveys. — The jurisdiction of the land department over the public lands until the issuance of a patent extends to the ordering of new surveys whenever in the judgment of the department there has been error or fraud in those already made.³

(b) **Cancellation for Fraud.** — So the land department has the power and authority upon the proper notice and hearing to cancel and annul an entry for public land even after the issuance of a final certificate but prior to the issuance of a patent, when its supervisory officers are convinced upon a proper showing that the entry was fraudulently made.⁴

Finding Supported Only by General Conclusion as to Fraud. — But it has been held that a cancellation supported only by a general conclusion, as, for instance, that fraud has been committed and that an entry was not made in good faith with intent on the part of the entryman to take the land for his exclusive use and benefit, is not conclusive upon the entryman, and that the secretary or commissioner making the cancellation must make of record findings of specific facts contradicting the evidence upon which the entry was allowed in a material point.⁵

(c) **Abandonment.** — When the land department becomes satisfied that there has been an abandonment of homestead rights by the applicant, the entry will be canceled and the lands will be subject to re-entry by another. The question whether or not there has been an abandonment may be determined,

Missouri. — See *Groom v. Hill*, 9 Mo. 323. Compare *Morton v. Blankenship*, 5 Mo. 346.

Texas. — *Moore v. Rogan*, (Tex. 1903) 73 S. W. Rep. 1.

Wisconsin. — *McLane v. Bovee*, 35 Wis. 27. **State Lands.** — *Shively v. Pennoyer*, 27 Oregon 33.

Action of Commissioner Held Not to Amount to Cancellation. — *Saltmarsh v. Crommelin*, 39 Ala. 54.

Erroneous Cancellation Vacated by Land Department. — *Potter v. Tibbetts*, 43 Fed. Rep. 505.

Preference Right to Person Procuring Cancellation. — 21 U. S. Stat. at L. 140; *Emblen v. Lincoln Land Co.*, 184 U. S. 660, affirming (C. C. A.) 102 Fed. Rep. 559, which affirmed 94 Fed. Rep. 710; *Gray v. Dixon*, 83 Cal. 33; *McCord v. Hill*, 111 Wis. 499.

1. *Cornelius v. Kessel*, 128 U. S. 456.

2. **Effect of Cancellation on Purchaser from Entryman.** — *Parsons v. Venzke*, 164 U. S. 89; *Swigart v. Walker*, 49 Kan. 100; *Fernald v. Winch*, 50 Kan. 79; *Camp v. Smith*, 2 Minn. 155; *Randall v. Edert*, 7 Minn. 450; *Gray v. Stockton*, 8 Minn. 529; *Pfund v. Valley L. & T. Co.*, 52 Neb. 473; *McSorley v. Hill*, 2 Wash. 638; *McAleer v. Hill*, 2 Wash. 653. See also *Freese v. Rusk*, 54 Kan. 274. Compare *Fariss v. Deming Invest. Co.*, 5 Okla. 496.

3. **Power of Land Department to Order Resurvey.** — *Cragin v. Powell*, 128 U. S. 691; *Tubbs v. Wilhoit*, 138 U. S. 134; *New Orleans v. Paine*, 147 U. S. 261; *Michigan Land, etc., Co. v. Rust*, 168 U. S. 589; *Murphy v. Sumner*, 74 Cal. 516.

4. **Cancellation for Fraud** — *United States*. — *Harkness v. Underhill*, 1 Black (U. S.) 316;

Orchard v. Alexander, 157 U. S. 372, affirming 2 Wash. 108; *Parsons v. Venzke*, 164 U. S. 89, affirming 4 N. Dak. 452; *Guaranty Sav. Bank v. Bladow*, 176 U. S. 448, affirming and modifying 6 N. Dak. 108; *Hawley v. Diller*, 178 U. S. 476; *Puget Mill Co. v. Brown*, 54 Fed. Rep. 987, affirmed (C. C. A.) 59 Fed. Rep. 35; *Jordan v. Ward*, (C. C. A.) 64 Fed. Rep. 904; *American Mortg. Co. v. Hopper*, 64 Fed. Rep. 553, 29 U. S. App. 12, affirming 56 Fed. Rep. 67; *California Redwood Co. v. Little*, 79 Fed. Rep. 854; *U. S. v. Steenerson*, 4 U. S. App. 332, 50 Fed. Rep. 504; *Bronson v. Kukuk*, 3 Dill. (U. S.) 490, 4 Fed. Cas. No. 1,929. Compare *Smith v. Ewing*, 23 Fed. Rep. 741, 11 Sawy. (U. S.) 56; *Wilson v. Fine*, 14 Sawy. (U. S.) 224, 40 Fed. Rep. 52.

Alabama. — *Holmes v. State*, 100 Ala. 291, 108 Ala. 24.

Idaho. — *Jones v. Meyers*, 2 Idaho 793, 35 Am. St. Rep. 259; *Sorrenson v. Meyers*, 2 Idaho 802.

Iowa. — *Burlington, etc., R. Co. v. Clingman*, 43 Iowa 306; *Durham v. Hussman*, 88 Iowa 29. See also *Reynolds v. Plymouth County*, 55 Iowa 90.

Kansas. — *Swigart v. Walker*, 49 Kan. 100.

Louisiana. — *Scuddy v. Shaffer*, 10 La. Ann. 133.

Minnesota. — *Judd v. Randall*, 36 Minn. 12.

Nebraska. — *Pfund v. Valley L. & T. Co.*, 52 Neb. 473.

Wisconsin. — *Lamont v. Stimson*, 3 Wis. 545, 62 Am. Dec. 696.

Wyoming. — *Caldwell v. Bush*, 6 Wyo. 342.

5. *Stimson v. Clarke*, 45 Fed. Rep. 760; *Stimson Land Co. v. Rawson*, 62 Fed. Rep. 426.

like every other question of the kind, by evidence, such as the formal relinquishment of the entryman's rights indorsed on his original receipt and filed in the land office. Such relinquishment will restore the land to the public domain, though a formal cancellation is not made at the time.¹ So it has been held that the voluntary filing in the land office by a pre-emption claimant of an amended pre-emption claim, wholly excluding therefrom the land included in the prior entry, and fixing his pre-emption entry upon other lands, will amount to an effectual cancellation of the former entry, and a formal cancellation is immaterial.²

(d) **Necessity of Notice and Hearing.**—The land department cannot arbitrarily destroy the equitable title acquired by the entryman and held by him or his assignee. Those who hold such title have a right to be notified of, and heard in, any proceeding instituted in the land department having for its object the cancellation of the entry upon which the equitable title depends.³ If the entry is canceled arbitrarily, without any notice to the entryman or any opportunity being given to him to be heard, it will not conclude him, and he will, notwithstanding the decision, have a right to show that his entry was valid and that he was entitled to a patent. In other words, it will not prevent the entryman, before the issue of the patent, from taking proceedings before the land department and therein showing the validity of the entry, or from proceeding in a court of equity against the patentee if the patent has already issued, and therein showing the validity of the entry. The finding in such case is not a nullity, and the party seeking equitable relief must assume the burden of proving the validity of the entry.⁴ So the cancellation of a certificate of entry is not conclusive against a transferee who had no notice and no opportunity to be heard upon questions of the original validity of the entry, but it leaves the transferee without the right to use the entry certificate as *prima facie* evidence of the validity of the entry or of his subsequent claim. The transferee is, however, left free to prove the validity of the entry by any means other than the certificate.⁵

1. Abandonment of Entry.—*Keane v. Brygger*, 160 U. S. 276, *affirming* 3 Wash. 338. See also *Brygger v. Schweitzer*, 5 Wash. 564; *Smith v. Arthur*, 7 Wash. 61.

2. Amacker v. Northern Pac. R. Co., (C. C. A.) 58 Fed. Rep. 850, *reversing* 53 Fed. Rep. 48, and *affirmed* 175 U. S. 564; *Sanborn v. Knight*, 100 U.S. 216. See also *Southern Pac. R. Co. v. Dull*, 10 Sawy. (U. S.) 506.

Mere Request for Correction of Entry.—In *Hedrick v. Stohl*, 105 Mo. 43, it was held that the mere fact that an entryman made application to correct his entry by applying the money to the purchase of other lands, and the secretary of the treasury granted his request, under the Act of March 3, 1819, was not conclusive evidence that he availed himself of the liberty given, and the officers of the general land office have no right to cancel his certificate without some further act on his part.

3. Necessity of Proper Notice and Hearing—United States.—*Lindsey v. Hawes*, 2 Black (U. S.) 559; *Cornelius v. Kessel*, 128 U. S. 456; *Parsons v. Venzke*, 164 U. S. 89; *Michigan Land, etc., Co. v. Rust*, 168 U. S. 589; *Guaranty Sav. Bank v. Bladow*, 176 U. S. 453; *Hawley v. Diller*, 178 U. S. 476. See also *Clark v. Herington*, 186 U. S. 206.

Illinois.—*Brill v. Stiles*, 35 Ill. 305, 85 Am. Dec. 364; *Cook County v. Calumet, etc., Canal, etc., Co.*, 131 Ill. 505, *writ of error dismissed* 138 U. S. 635. See also *Gilmore v. Sapp*, 100 Ill. 297.

Iowa.—See *Long v. Olson*, 115 Iowa 388.

Michigan.—*Merrill v. Hartwell*, 11 Mich. 200; *Boyce v. Danz*, 29 Mich. 146; *Ives v. Ely*, 57 Mich. 569.

Missouri.—*Groom v. Hill*, 9 Mo. 323.

Resurvey Made Without Notice to Entryman.—*Lindsey v. Hawes*, 2 Black (U. S.) 554; *Lamprey v. Mead*, 54 Minn. 298, 40 Am. St. Rep. 328.

State Lands.—*M'Nitt v. Logan*, Litt. Sel. Cas. (Ky.) 60; *Ward v. Lee*, 1 Bibb (Ky.) 18.

Service of Notice on Unauthorized Attorney Insufficient.—*Young v. Hanson*, 95 Iowa 717.

Giving of Notice Presumed.—*Durham v. Hussman*, 88 Iowa 29.

Notice of Secretary's Review of His Decision Held Unnecessary.—*Acers v. Snyder*, 8 Okla. 659. *Compare Gage v. Gunther*, 136 Cal. 338.

4. Effect of Want of Notice on Entryman.—*Guaranty Sav. Bank v. Bladow*, 176 U. S. 448; *Glidden v. Union Pac. R. Co.*, 30 Fed. Rep. 660.

Cancellation Without Notice Held a Nullity and Liable to Collateral Attack.—*Risdon v. Davenport*, 4 S. Dak. 555.

Cancellation Held Nullity in Action for Possession Prior to Issuance of Patent.—*Delles v. Brownsville Second Nat. Bank*, 7 Wyo. 66, 75 Am. St. Rep. 875.

5. Effect of Want of Notice on Transferee.—*Guaranty Sav. Bank v. Bladow*, 176 U. S. 448; *Thayer v. Spratt*, 189 U. S. 346, *affirming* 25 Wash. 62; *American Mortg. Co. v. Hopper*,

(e) **Cancellation Obtained through Fraud or Error of Law.** — A cancellation by the land department is subject to judicial review under the same conditions as other orders or rulings of the land department,¹ and redress may be had where in canceling the entry the officers have misconstrued the law,² or where any fraud or deception has been practiced which affected their judgment and decision.³ But a decision of the land department canceling an entry is *prima facie* correct, and a party who assails the correctness of such a decision must show affirmatively that it is invalid.⁴

(f) **Return of Purchase Money** — *dit.* IN GENERAL. — By section 2 of the Act of Congress of June 16, 1880, it is provided that in all cases where homestead or timber-culture or desert-land entries or entries of public lands have heretofore been or shall hereafter be canceled for conflict, or where from any cause the entry has been erroneously allowed and cannot be confirmed, the secretary of the interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excesses paid upon the same, upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claim to said land, whenever such entry shall have been duly canceled by the commissioner of the general land office.⁵

bb. WHO ENTITLED TO REPAYMENT. — Inasmuch as in the absence of statute there could be no recovery of the purchase money, one who seeks to take advantage of it must bring himself clearly within its equity as well as within its letter, and must show himself entitled not only to the land itself but to everything which the statute has annexed thereto as an incident. The provision requiring that repayment shall be made of the consideration to the entryman "or to his heirs or assigns" applies to voluntary assignees,⁶ and the purchaser of the

(C. C. A.) 64 Fed. Rep. 553; *California Redwood Co. v. Little*, 79 Fed. Rep. 854; *Pfund v. Valley L. & T. Co.*, 52 Neb. 473. See also *Cooke v. Blakely*, 6 Kan. App. 707; *Potter v. Tibbetts*, 43 Fed. Rep. 505.

Cancellation Without Notice to Transferee Held Void for Want of Jurisdiction. — *Lewis v. Shaw*, 57 Fed. Rep. 516, *affirmed* 70 Fed. Rep. 289; *Connors v. Meservey*, 76 Iowa 691; *Young v. Hanson*, 95 Iowa 717.

Notice Held Sufficient. — A failure to give notice to transferees of a certificate in regard to an order of the secretary of the interior directing the papers in proceedings for the cancellation of an entry, is immaterial if they had an opportunity to be heard before the secretary while the case was in his hands. *Hawley v. Diller*, 178 U. S. 476.

Want of Notice Immaterial Where Party Appears and Defends. — *Parsons v. Venzke*, 164 U. S. 80.

Waiver by Pleadings of Want of Sufficiency of Notice. — *Hussman v. Durham*, 165 U. S. 144; *Caldwell v. Bush*, 6 Wyo. 342.

Notice to Transferer Unnecessary. — It has been held not to be necessary, in a contest as to public land before the land department, that notice of the contest should be given to the claimant's predecessors in interest, who had parted with all of their title to the land in dispute, provided the claimant himself was duly notified of the proceedings in question and took an active part therein. *Durango Land, etc., Co. v. Evans*, (C. C. A.) 80 Fed. Rep. 425.

1. *Parsons v. Venzke*, 164 U. S. 80.

2. **Cancellation Erroneous in Law.** — *O'Brien v. Perry*, 1 Black (U. S.) 132; *Lindsey v. Hawes*, 2 Black (U. S.) 554; *Cornelius v. Kessel*, 128 U. S. 456; *Hawley v. Diller*, 178 U. S.

489; *Smith v. Hollis*, 46 Ark. 17; *Aldrich v. Aldrich*, 37 Ill. 32; *Laforest v. Downing*, 16 La. Ann. 301; *Perry v. O'Hanlon*, 11 Mo. 585, 49 Am. Dec. 100.

3. **Fraudulent Cancellation.** — *Stimson Land Co. v. Hollister*, 75 Fed. Rep. 941; *Freese v. Scouten*, 53 Kan. 347.

4. *Hawley v. Diller*, 178 U. S. 490; *Holmes v. State*, 100 Ala. 291; *Darcy v. McCarthy*, 35 Kan. 722.

5. **Provision for Return of Purchase Money upon Cancellation.** — 21 U. S. Stat. at L. 287; *Hoffeld v. U. S.*, 186 U. S. 273.

Commissioner's Refusal to Refund Not Conclusive. — *Emmons v. U. S.*, 103 Fed. Rep. 771.

Action for Money Had and Received. — *Nelson v. U. S.*, 35 Ct. Cl. 427.

Recovery Not Defeated by Embezzlement of Receiver. — *Slocum v. U. S.*, 35 Ct. Cl. 485.

Voluntary Overpayment Not Recoverable. — *Elliott v. U. S.*, 37 Ct. Cl. 136.

Refunding by Commissioner upon Cancellation by Court of Equity. — Where the commissioner of the land department, recognizing the effect of the decree of a court of equity compelling the conveyance of the land to the first entryman by a second entryman who paid the purchase price and received a patent, makes an award for the repayment of the money to the entryman who loses his title, and the award is approved by the secretary of the interior, it is a final award upon which an action will lie, and the award being a departmental recognition of a substantial cancellation, a formal order of cancellation by the department is not required. *Hollister v. U. S.*, 36 Ct. Cl. 13.

6. **Voluntary Assignees of Entryman Entitled to Repayment.** — See *Hoffeld v. U. S.*, 186 U. S.

original right of an entryman at an execution sale against him or his grantee cannot be said to be an "assign" within the meaning of the act.¹

cc. EFFECT OF VOLUNTARY ABANDONMENT. — Where land properly entered has been canceled on account of the failure of the entryman to complete his purchase, and his voluntary relinquishment of his rights, no cause of action exists for the sum paid to initiate the entry.²

dd. EFFECT OF FRAUD. — So a payment of the purchase money is not required in a case where the entry is canceled on account of fraud or false testimony.³

ee. NECESSITY OF SURRENDER OF DUPLICATE RECEIPT. — As a prerequisite to the refunding of the money, it must appear that there has been a surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to the land.⁴

(2) *Cancellation of Patent* — (a) *In General.* — After the land department has decided when a party has by purchase, by pre-emption, or by any other recognized mode established a right to receive from the government a title to any part of the public domain, and a patent has regularly issued upon the final decision within the department, the control of the department over the title to such land ceases, and any further action by it reserving and annulling the decision upon which the patent issues is void and of no effect. After the issue of the patent the matter becomes subject to inquiry only in the courts and by judicial proceedings.⁵

Delivery of Patent Unnecessary. — When the patent has been made out, signed, sealed, countersigned, and duly recorded, it becomes a solemn public act of the government and needs no further delivery or other authentication to make it perfect and valid, and all power of the executive department over it ceases from that time; acceptance of a patent in such case is presumed, unless the contrary appears.⁶

273; *Pacific Mill, etc., Co. v. Leete*, (C. C. A.) 94 Fed. Rep. 968; *Com. Title Ins., etc., Co. v. U. S.*, 37 Ct. Cl. 532.

Mortgagee. — *Com. Title Ins., etc., Co. v. U. S.*, 37 Ct. Cl. 532.

Right to Repayment Not Assignable After Cancellation. — See *Com. Title Ins., etc., Co. v. U. S.*, 37 Ct. Cl. 532.

1. *Hoffeld v. U. S.*, 186 U. S. 273.

2. *Effect of Abandonment to Right to Repayment.* — *U. S. v. Ingram*, 172 U. S. 327, *distinguishing U. S. v. Healey*, 160 U. S. 136; *Tictin v. U. S.*, 36 Ct. Cl. 1. See also *Slocum v. U. S.*, 35 Ct. Cl. 485.

3. *Effect of Fraud on Right to Repayment.* — *Emmons v. U. S.*, 103 Fed. Rep. 771; *Cooke v. Blakely*, 6 Kan. App. 707; *Walsh's Case*, 5 Land Dec. 319; *Woodward's Case*, 2 Land Dec. 688; *Reynold's Case*, 12 Land Dec. 131; *Hatch's Case*, 12 Land Dec. 607.

4. *Necessity of Surrender of Duplicate Receipt.* — *U. S. v. Foreman*, 5 Okla. 237. See also *Hoffeld v. U. S.*, 186 U. S. 273; *Emmons v. U. S.*, 42 Fed. Rep. 26.

5. *No Jurisdiction to Annul Patents* — *United States.* — *U. S. v. Stone*, 2 Wall. (U. S.) 525; *Warren v. Van Brunt*, 19 Wall. (U. S.) 646; *Moore v. Robbins*, 96 U. S. 530, *reversing sub nom. Robbins v. Bunn*, 54 Ill. 48, 5 Am. Rep. 75; *U. S. v. Schurz*, 102 U. S. 378; *Bicknell v. Comstock*, 113 U. S. 149; *Iron Silver Min. Co. v. Campbell*, 135 U. S. 286; *Williams v. U. S.*, 138 U. S. 514; *Bogan v. Edinburgh American Land Mortg. Co.*, (C. C. A.) 63 Fed. Rep. 192; *George v. Riddle*, 94 Fed. Rep. 689.

District of Columbia. — *Welton v. Carter*, 21 D. C. 587.

Illinois. — See *Danforth v. Morrical*, 84 Ill. 456.

Louisiana. — *Lott v. Prudhomme*, 3 Rob. (La.) 293; *Scuddy v. Shaffer*, 10 La. Ann. 133, *affirmed* 19 How. (U. S.) 16; *Wiggins v. Guier*, 13 La. Ann. 356; *Ford v. Morancy*, 14 La. Ann. 77.

Mississippi. — *Winn v. Cole*, Walk. (Miss.) 119.

Oregon. — *Oregon R., etc., Co. v. Hertzberg*, 26 Oregon 216.

State Lands. — *Foster v. Shaw*, 7 S. & R. (Pa.) 156; *Chew v. Morton*, 10 Watts (Pa.) 321. See also *Hanrick v. Cavanaugh*, 60 Tex. 1. *Compare Doswell v. De La Lanza*, 20 How. (U. S.) 20, decided under *Texas* laws.

Mandamus will not lie to compel the land department to review its acts culminating in the issuance of a patent. *In re Emblen*, 161 U. S. 52. See also *People v. Auditor*, 3 Ill. 567.

Cancellation of Patent and Issuance of New Patent Covering Different Lands under Authority of Congress. — *Nelson v. Moon*, 3 McLean (U. S.) 319, 17 Fed. Cas. No. 10,111.

6. *Delivery of Patent Not Essential.* — *U. S. v. Schurz*, 102 U. S. 378; *Le Roy v. Clayton*, 2 Sawy. (U. S.) 493, 15 Fed. Cas. No. 8,268 [citing *Marbury v. Madison*, 1 Cranch (U. S.) 160]; *Leroy v. Jamison*, 3 Sawy. (U. S.) 369, 2 Cent. L. J. 685, 15 Fed. Cas. No. 8,271; *Gilmore v. Sapp*, 100 Ill. 297; *Lott v. Prudhomme*, 3 Rob. (La.) 293; *Miller v. Donahue*, 96 Wis. 504.

Legal Title Not Divested by Mutilation of Patent and Record Before Delivery. — *Bicknell v. Comstock*, 113 U. S. 149.

Certification under Granting Act. — And the same principle protects a grantee of public land by an Act of Congress, after his rights have been passed upon, and a record made in the general land office showing that, by full compliance with the requirements of the act, the grant has taken effect and the granted land has been identified and segregated from the body of the public domain.¹

Correcting Surveys. — In accordance with this principle also, when the land department has once made and approved a government survey of public land (the plots, maps, field notes, and certificates all having been filed in the proper office), and has sold or disposed of such land, the courts have power to protect the private rights of a party who has purchased in good faith from the government, against the interferences or appropriations of corrective resurveys made by that department subsequently to such disposition or sale.²

(b) **In Case of Nonacceptance.** — Acceptance of the patent is, however, necessary, and hence, where a patent has been issued to one who protests against the survey on which it is made, and the record shows that he never accepted it, the land department may recall it.³

(c) **Correction of Clerical Errors.** — So where a patent was by a clerical error issued in the name of one person in favor of whom there was no evidence of any purchase, but was delivered to the actual purchaser, the land department has authority to cancel the patent erroneously issued and issue one in the proper name of the purchaser.⁴

b. REVIEW BY COURTS — (1) *Prior to Issuance of Patent* — (a) *In General.* — However the courts may, in ascertaining the rights of the parties in suits properly brought before them, pass upon the legality of a decision of the land department after the matter has once passed beyond its control, they cannot as a general rule interfere with the acts of the land officers so long as the department has jurisdiction to act or until its jurisdiction has ceased and its determination has become final by the issuance of a patent. The reason for this rule is that so long as the land department has jurisdiction of the subject-matter, and errors have occurred, the presumption is that it will correct such errors before its jurisdiction ceases.⁵ Accordingly, while a question is under

1. **Certification under Granting Act.** — *Noble v. Union River Logging R. Co.*, 147 U. S. 165; *Stimson Land Co. v. Rawson*, 62 Fed. Rep. 429; *Winona, etc., Land Co. v. Ehlclisor*, 52 Minn. 312.

2. **Resurveys Interfering with Patentee's Rights.** — *Cragin v. Powell*, 128 U. S. 691; *Harrington v. Boehmer*, 134 Cal. 196, 201; *Taylor v. Baker*, 1 Fla. 245; *Liddon v. Hodnett*, 22 Fla. 442; *Kean v. Roby*, 145 Ind. 221; *Mason v. Calumet Canal, etc., Co.*, 150 Ind. 699; *Spawr v. Johnson*, 49 Kan. 788; *Kittridge v. Breaud*, 2 Rob. (La.) 40; *Sprigg v. Hooper*, 9 Rob. (La.) 248; *Cage v. Danks*, 13 La. Ann. 128; *St. Paul, etc., R. Co. v. First Div. of St. Paul, etc., R. Co.*, 26 Minn. 31. See also *Lamprey v. Mead*, 54 Minn. 290, 40 Am. St. Rep. 328.

3. **Cancellation upon Nonacceptance.** — *Maguire v. Tyler*, 8 Wall. (U. S.) 650, *affirming* 40 Mo. 406, and *citing* *Magwire v. Tyler*, 1 Black (U. S.) 195, which *affirmed* 30 Mo. 202; *Le Roy v. Clayton*, 2 Sawy. (U. S.) 493, 15 Fed. Cas. No. 8,268; *Leroy v. Jamison*, 3 Sawy. (U. S.) 369, 2 Cent. L. J. 685, 15 Fed. Cas. No. 8,271.

Cancellation upon Patentee's Rejecting Action of Unauthorized Agent Receiving Patent. — *Moffatt v. Scratch*, 12 Ont. App. 157, *affirming* 8 Ont. 147, *reversing* 6 Ont. 564, *Patterson, J., dissenting*.

4. **Correction of Clerical Error in Patent.** — *Bell v. Hearne*, 19 How. (U. S.) 252, *reversing* 10

La. Ann. 515; *Phillips v. Sherman*, 36 Ala. 189. See also *Gaines v. Hale*, 26 Ark. 168, *affirmed* on other grounds 93 U. S. 3; *David v. Rickabaugh*, 32 Iowa 540.

The Quebec Statute (32 Vict., c. 11) provides that whenever a patent has been issued to, or in the name of, the wrong party, through mistake in the crown lands department, or contains any clerical error or misnomer or wrong description of the land thereby intended to be granted, the commissioner of the crown lands (there being no adverse claim) may direct the defective patent to be canceled, and a correct one to be issued in its stead, which corrected patent shall relate back to the date of the one so canceled, and have the same effect as if issued at the date of such canceled patent. *Rex v. Adams*, 31 Can. Sup. Ct. 220.

Under the statute it has been held that a cancellation by the commissioner where there is an adverse claim is *ultra vires* and utterly void. *Rex v. Adams*, 31 Can. Sup. Ct. 220, *affirming* 18 Quebec Super. Ct. 520. See also *O'Grady v. McCaffray*, 2 Ont. 309; *Stevens v. Cook*, 10 Grant. Ch. (U. C.) 410.

5. **Effect in Courts of Pendency of Matters Before Land Department.** — *Brown v. Hitchcock*, 173 U. S. 473; *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 190 U. S. 301; *Savage v. Wofsham*, 104 Fed. Rep. 18; *Vantongerren v. Hefferman*, 5 Dak. 180; *St. Paul, etc., R. Co. v. Olson*, 87 Minn. 117; *Grandin v. La Bar*, 3 N. Dak.

the consideration and within the control of the land department, the courts cannot take jurisdiction of the case by reason of their control of the parties concerned, and render a decree in advance and independently of the action of the government officials, and thereby render such action nugatory.¹

Interference with Officials by Mandamus or Injunction. — In the same way there exists no power in the court by any of its processes, such as the writ of injunction² or mandamus,³ to act upon the land department officials so as to interfere with the exercise of their judgment while the matter is properly before them for action. Indeed, it has been held that the land department being possessed of the power in general of surveying and disposing of public lands, and of administering the affairs of the government pertaining thereto, its exercise of jurisdiction cannot be questioned by the courts before it has taken final action, and hence the fact that the complainant claims a legal title to the land which the department officers are treating as public land will not be a ground for enjoining further action on their part.⁴ But where the land department has finally acted and afterwards attempts to resume jurisdiction, an injunction will be sustained.⁵

Proceeding in Equity to Remove Obstruction to Appeal in Land Department. — It has been held that courts of equity have no jurisdiction to grant relief by removing illegal obstructions to the exercise of the right of appeal in the land department, since the duty of the land office officials to entertain appeals is a legal duty enforceable by mandamus, and an illegal obstruction to such duty is void at law as well as in equity.⁶

(b) **Protection of Possessory Rights** — *aa. IN GENERAL.* — The courts have jurisdiction, however, to deal with the possession of public lands and to grant relief

447; *Forbes v. Driscoll*, 4 Dak. 336; *Moore v. Fields*, 1 Oregon 317; *Frink v. Thomas*, 20 Oregon 265.

1. Taking Jurisdiction of Action Between Contestants in Advance of Action of Land Department — *United States.* — *Marquez v. Frisbie*, 101 U. S. 473; *Casey v. Vassor*, 4 McCrary (U. S.) 127, 50 Fed. Rep. 258; *Northern Pac. R. Co. v. Soderberg*, 86 Fed. Rep. 49; *Humbird v. Avery*, 110 Fed. Rep. 465.

California. — *Brandt v. Wheaton*, 52 Cal. 430.

Minnesota. — See *Matthews v. O'Brien*, 84 Minn. 505. Compare *McHenry v. Nygaard*, 72 Minn. 2.

Missouri. — See *Lewis v. Lewis*, 9 Mo. 183, 43 Am. Dec. 540.

Oklahoma. — *Adams v. Couch*, 1 Okla. 17; *Commager v. Dicks*, 1 Okla. 91; *Herbien v. Warren*, 2 Okla. 4; *Twine v. Carey*, 2 Okla. 249; *Mathews v. Young*, 2 Okla. 616; *Fitzgerald v. Keith*, 5 Okla. 260; *Hammer v. Hermann*, 11 Okla. 127; *Hebeisen v. Hatchell*, (Okla. 1902) 69 Pac. Rep. 888; *McQuiston v. Walton*, (Okla. 1902) 69 Pac. Rep. 1048.

Oregon. — See *Pin v. Morris*, 1 Oregon 230. *Wisconsin.* — *Empey v. Plugert*, 64 Wis. 603. See *Ford v. Morancy*, 14 La. Ann. 77.

Wyoming. — *Laramie Nat. Bank v. Steinhoff* (Wyo. 1903) 71 Pac. Rep. 992.

Determination of Question of Alienage of Claimant. — *Merriam v. Bachioni*, 112 Cal. 191.

Suit in Equity to Quiet Title. — *Potter v. Randolph*, 126 Cal. 458; *Vantongeren v. Heffernan*, 5 Dak. 180; *Grant v. Hemphill*, 92 Iowa 218.

Taking Jurisdiction in Advance of Decision Creating Equitable Title. — *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 190 U. S. 301, affirming (C. C. A.) 112 Fed. Rep. 4, which affirmed 104 Fed. Rep. 20.

2. Interference with Officers by Injunction Not Allowable — *United States.* — *Fussell v. Gregg*, 113 U. S. 550, affirming 8 Fed. Rep. 384; *New Orleans v. Paine*, 147 U. S. 261, affirming 51 Fed. Rep. 833, 49 Fed. Rep. 12; *Brown v. Hitchcock*, 173 U. S. 473; *Chapman v. Keindel*, 46 Fed. Rep. 99; *Lane v. Anderson*, 67 Fed. Rep. 563. See also *Hot Springs Cases*, 10 Ct. Cl. 289, affirmed on other grounds, 92 U. S. 698.

District of Columbia. — *Warner Valley Stock Co. v. Smith*, 9 App. Cas. (D. C.) 187; *Brown v. Bliss*, 13 App. Cas. (D. C.) 279.

Michigan. — *Brewer v. Kidd*, 273 Mich. 440.

Oklahoma. — *Wilbourne v. Baldwin*, 5 Okla. 265.

And see the title **PUBLIC OFFICERS**, vol. 23, pp. 371, 372.

Cancellation of Entry Not Subject to Injunction. — *Gaines v. Thompson*, 7 Wall. (U. S.) 347.

3. Mandamus Against Land Officers. — *Secretary v. McGarrahan*, 9 Wall. (U. S.) 298; *Hot Springs Cases*, 10 Ct. Cl. 289; *In re Emblen*, 161 U. S. 52.

For a discussion of the question when mandamus will lie against land officials, see the title **MANDAMUS**, vol. 19, p. 779. See also the title **PUBLIC OFFICERS**, vol. 23, pp. 371, 372.

4. Claimant of Legal Title Not Entitled to Injunction. — *Kirwan v. Murphy*, 189 U. S. 35; *Litchfield v. Register*, 9 Wall. (U. S.) 575; *Koehler v. Barin*, 25 Fed. Rep. 161; *Sioux City, etc., R. Co. v. U. S.*, 34 Fed. Rep. 835, 36 Fed. Rep. 610.

5. Noble v. Union River Logging R. Co., 147 U. S. 165.

6. Craig v. Leitensdorfer, 123 U. S. 189, reversing *sub nom. Leitensdorfer v. Campbell*, 5 Dill. (U. S.) 419, 15 Fed. Cas. No. 8,225,

against the wrongful invasion of possessory rights of an individual, though the legal title has not finally passed from the government by the action of the land department, this power being expressly recognized by statute in some jurisdictions. In the exercise of this jurisdiction the courts do not attempt to pass upon the merits of the respective claims of the contending parties, and decide which had successfully initiated and established his right ultimately to receive the legal title to the land, but only to protect the actual possession and prevent wrongful and forcible interference therewith, until the government parts with its title.¹

Protection of Homestead Entries. — A person settling upon lands already segregated from the public domain by a homestead entry is a trespasser and will not be allowed to hold possession.² So one contesting for a preference right is not entitled to reside on or occupy any portion of the land in controversy, as against the homestead entryman, until he shall have procured the cancellation of the contested entry.³ Where under the homestead laws of Congress two adverse claimants, one by reason of a filing in the land office and one by virtue of a prior settlement, are entitled to the occupancy of a tract of land, it has been held that the courts will make an equitable disposition of the possession pending the determination of the contest proceedings in the land office, and will not permit either to have the exclusive possession.⁴

Protection of Successful Contestant. — Where the parties have been claimants of a tract of public land, and the adverse claims have been finally disposed of in the land department and the successful claimant has been permitted to make

1. Jurisdiction of Courts to Protect Right of Possession. — *United States.* — *Marquez v. Frisbie*, 101 U. S. 475. See *Atherton v. Fowler*,^{96 U. S. 519.}

Colorado. — *Fulmele v. Camp*, 20 Colo. 495; *Kelley v. Andrew*, 3 Colo. App. 124.

Minnesota. — *Michaelis v. Michaelis*, 43 Minn. 123; *Hastay v. Bonness*, 84 Minn. 120; *Matthews v. O'Brien*, 84 Minn. 505.

Oklahoma. — *Sproat v. Durland*, 2 Okla. 24; *Reaves v. Oliver*, 3 Okla. 62; *Pappe v. Trout*, 3 Okla. 260; *McQuiston v. Walton*, (Okla. 1902) 69 Pac. Rep. 1048.

Oregon. — *Woodside v. Rickey*, 1 Oregon 108; *Lee v. Simonds*, 1 Oregon 158.

Washington. — *Colwell v. Smith*, 1 Wash. Ter. 92, followed in *Ward v. Moorey*, 1 Wash. Ter. 104.

Injunction to Enforce Possessory Rights. — *United States.* — *Northern Pac. R. Co. v. Soderberg*, 86 Fed. Rep. 49; *Olive Land, etc., Co. v. Olmstead*, 103 Fed. Rep. 568, in which the sinking oil wells and taking oil therefrom was enjoined; *Utah, etc., R. Co. v. Utah, etc., R. Co.*, 110 Fed. Rep. 879. See also *Jones v. Florida, etc., R. Co.*, 41 Fed. Rep. 70; *Robinson v. Caldwell*, (C. C. A.) 67 Fed. Rep. 391, affirming decree *Caldwell v. Robinson*, 59 Fed. Rep. 653, appeal dismissed 165 U. S. 359.

Iowa. — *Wood v. Murray*, 85 Iowa 505.

Oklahoma. — *Sproat v. Durland*, 2 Okla. 24; *Reaves v. Oliver*, 3 Okla. 62; *Woodruff v. Wallace*, 3 Okla. 355; *Procter v. Stuart*, 4 Okla. 679; *Barnes v. Newton*, 5 Okla. 428; *Potts v. Hollon*, 6 Okla. 696; *Cox v. Garrett*, 7 Okla. 375; *Glover v. Swartz*, 8 Okla. 644.

Oregon. — *Kitcherside v. Myers*, 10 Oregon 21.

Washington. — *Coldwell v. Smith*, 1 Wash. Ter. 92; *Arment v. Henzel*, 5 Wash. 152.

State Statutes Allowing Recovery of Possession on Certificate or Other Evidence Short of Patent in

Ejectment. — *Wilson v. Fine*, 38 Fed. Rep. 789 [distinguishing *Langdon v. Sherwood*, 123 U. S. 74; *Fenn v. Holme*, 21 How. (U. S.) 481; *Hooper v. Scheimer*, 23 How. (U. S.) 235; *Foster v. Mora*, 98 U. S. 425]. See also *Bagnell v. Broderick*, 13 Pet. (U. S.) 436; *Dickinson v. Doe*, 9 Smed. & M. (Miss.) 130; *Griffith v. Deerfelt*, 17 Mo. 31. And see the title EJECTMENT, vol. 10, p. 483.

Under the *Nebraska* statute making a receiver's certificate proof of title equivalent to a patent against all but the holder of an actual patent, it has been held that a person not having a duplicate receipt or certificate from the land office or a patent from the government has no such interest in public land as will entitle him to recover in an action of ejectment, and that until the title has been parted with by the government the remedy of adverse claimants is in the department; and this applies to one who has obtained a receipt or certificate which has been canceled before the bringing of suit. *Morton v. Green*, 2 Neb. 441; *Kinney v. Degman*, 12 Neb. 237; *Headley v. Coffman*, 38 Neb. 68. Compare *Streeter v. Rolph*, 13 Neb. 388; *Carroll v. Patrick*, 23 Neb. 834.

2. Protection of Homestead Entry Against Trespasser. — *Sproat v. Durland*, 2 Okla. 24.

3. Reaves v. Oliver, 3 Okla. 62; *Potts v. Hollon*, 6 Okla. 696; *Glover v. Swartz*, 8 Okla. 642.

4. Equitable Disposition of Possession Between Contestants. — *Adams v. Couch*, 1 Okla. 17; *Commager v. Dicks*, 1 Okla. 82; *Sproat v. Durland*, 2 Okla. 24; *Peckham v. Faught*, 2 Okla. 173; *Littlefield v. Todd*, 3 Okla. 1; *Mason v. Cromwell*, 3 Okla. 240; *Clack v. Diehl*, 5 Okla. 148; *Glover v. Swartz*, 8 Okla. 642.

Protection of One Claimant under Pre-emption Laws Against Another. — *Colwell v. Smith*, 1 Wash. Ter. 92. See also *Ward v. Moorey*, 1 Wash. Ter. 104.

homestead entry, such entryman then becomes entitled to the undisturbed possession of the tract as against the defeated claimant, and the latter claimant, by refusing to vacate the land and continuing to occupy the same, becomes a trespasser, against whom relief may be had in any appropriate action. In such cases the courts give effect to the decisions of the land department so long as the title is in the United States.¹

bb. ENFORCEMENT OF CONTRACTS RELATING TO POSSESSORY RIGHTS.— Before the acquisition of even an equitable title to the land as against the government, contracts made by actual settlers concerning their possessory rights and the title hoped to be acquired from the United States may be valid as between the parties thereto and enforced in the courts.²

(c) *State Land Contests in Courts.*— Provision is made in some of the states whereby a contest over the title to state lands may be had under certain conditions in the courts before the patent issues.³

Caveat Proceedings.— In several of the states a caveat is the remedy to prevent the issuance of a patent, the proceeding being held in some of the states before the land officials and in others before the courts.⁴

(2) *Subsequent to Issuance of Patent*—(a) *In General.*— The general rule is well established that the determination by the land department of a question

1. Protection of Successful Contestant.— *Reaves v. Oliver*, 3 Okla. 62; *Woodruff v. Wallace*, 3 Okla. 355; *Radebaugh v. Wolfe*, 5 Okla. 147; *Barnes v. Newton*, 5 Okla. 428; *Black v. Jackson*, 6 Okla. 751; *Calhoun v. McCornack*, 7 Okla. 347; *Cox v. Garrett*, 7 Okla. 375; *Barrett v. Ruyle*, 9 Okla. 635; *McDonald v. Brady*, 9 Okla. 660; *Endicott v. Ellis*, 9 Okla. 666; *Mendenhall v. Cagle*, 9 Okla. 668; *Lee v. Ellis*, 9 Okla. 664; *McQuiston v. Walton*, (Okla. 1902) 69 Pac. Rep. 1048; *Brown v. Hartshorn*, (Okla. 1902) 69 Pac. Rep. 1049; *Cope v. Braden*, 11 Okla. 291.

Demand Prior to Suit to Enjoin—*Held Unnecessary.*— *Brown v. Donnelly*, 9 Okla. 32.

Notice to Contestee of Final Decision Unnecessary.— *Kirtley v. Dykes*, 10 Okla. 16.

2. Enforcement of Contracts Relating to Possession.— *Lamb v. Davenport*, 18 Wall. (U. S.) 307; *Stark v. Starr*, 94 U. S. 477. See also *Clark v. Herington*, 186 U. S. 206.

3. Under California Code.— *Thompson v. True*, 48 Cal. 601; *Keema v. Doherty*, 51 Cal. 3; *People v. Carrick*, 51 Cal. 325; *Vance v. Evans*, 52 Cal. 93; *Danielwitz v. Temple*, 55 Cal. 42; *Lane v. Pferdner*, 56 Cal. 122, cited in 57 Cal. 134; *Eads v. Clark*, 68 Cal. 481, cited in *Gould v. Lanterman*, 70 Cal. 248; *Gilson v. Robinson*, 68 Cal. 539; *Lobree v. Mullan*, 70 Cal. 150; *Espinosa v. Phelan*, 77 Cal. 100; *Perri v. Beaumont*, 91 Cal. 30 overruling *Urton v. Wilson*, 65 Cal. 11.

4. Caveat Proceedings Over State Lands—*United States.*— *Wilson v. Mason*, 1 Cranch (U. S.) 45; *Kinney v. Clark*, 2 How. (U. S.) 76.

Delaware.— *Records v. Melson*, 1 Houst. (Del.) 139.

Kentucky.— *Preston v. Preston*, 85 Ky. 16; *Alexander v. Noland*, 88 Ky. 142; *Sharp v. Curds*, 4 Bibb (Ky.) 547; *Patterson v. Trabue*, 3 J. J. Marsh. (Ky.) 598; *Crow v. Harrod*, Hard. (Ky.) 443.

Maryland.— *Cunningham v. Browning*, 1 Bland (Md.) 299; *Railroad Co. v. Hoyer*, 2 Bland (Md.) 258; *Atty.-Gen. v. Dorsey*, 1 Md.

Ch. 31; *Chapman v. Hoskins*, 2 Md. Ch. 485; *Chisholm v. Perry*, 4 Md. Ch. 31; *Jones v. Badley*, 4 Md. Ch. 167; *Dorothy v. Hillert*, 9 Md. 570; *Gittings v. Moale*, 21 Md. 135; *Patterson v. Gelston*, 23 Md. 432; *Goodsell v. Lawson*, 42 Md. 348; *Armstrong v. Bittinger*, 47 Md. 103; *Jay v. Van Bibber*, 94 Md. 688.

North Carolina.— *Cupples v. —*, 1 Hayw. (2 N. Car.) 456; *McNeil v. Lewis*, Term (4 N. Car.) 80; *In re Drewry*, 129 N. Car. 457; *Persson v. Davey*, 1 Murph. (5 N. Car.) 115.

Pennsylvania.— *Smith v. Walker*, 98 Pa. St. 133; *Wilson v. Altemus*, 2 W. & S. (Pa.) 255; *Urket v. Coryell*, 5 W. & S. (Pa.) 60; *King v. Baker*, 29 Pa. St. 200; *Hughes v. Stevens*, 43 Pa. St. 197; *Duncan v. Curry*, 3 Binn. (Pa.) 14; *Cox v. Cromwell*, 3 Binn. (Pa.) 114; *Balfour v. Meade*, 4 Dall. (Pa.) 363, 1 Wash. (U. S.) 18, 3 Cranch (U. S.) 52, note.

South Carolina.— *Nicholas v. Hubbard*, 5 Rich. L. (S. Car.) 267; *Muse v. Laughridge*, 2 Bay (S. Car.) 426; *Mounce v. Ingraham*, 2 Bay (S. Car.) 455.

Tennessee.— *Bugg v. Norris*, 4 Yerg. (Tenn.) 326; *Peeler v. Norris*, 4 Yerg. (Tenn.) 332. See *Porter v. Gordon*, 5 Yerg. (Tenn.) 100; *Williams v. Wilson*, Mart. & Y. (Tenn.) 248.

Virginia.— *Hunter v. Hall*, 1 Call (Va.) 206; *Staples v. Webster*, 5 Call (Va.) 261; *Johnson v. Brown*, 3 Call (Va.) 259; *Preston v. Harvey*, 3 Call (Va.) 495; *Hamilton v. Maze*, 4 Call (Va.) 196; *Ross v. Keewood*, 2 Munf. (Va.) 141; *Walton v. Hale*, 9 Gratt. (Va.) 194; *Harper v. Baugh*, 9 Gratt. (Va.) 508; *McNeel v. Herold*, 11 Gratt. (Va.) 309; *Clements v. Kyles*, 13 Gratt. (Va.) 468; *Depew v. Howard*, 1 Munf. (Va.) 293; *Noland v. Cromwell*, 4 Munf. (Va.) 155; *Gooseman v. Martin*, 4 Munf. (Va.) 533; *Carter v. Hagan*, 75 Va. 557; *Carter v. Ramey*, 15 Gratt. (Va.) 346; *Cline v. Catron*, 22 Gratt. (Va.) 378; *Trotter v. Newton*, 30 Gratt. (Va.) 582; *Hardman v. Boardman*, 4 Leigh (Va.) 377; *McClung v. Hughes*, 5 Rand. (Va.) 453; *Jackson v. McGavock*, 5 Rand. (Va.) 509; *Wilcox v. Calloway*, 1 Wash. (Va.) 38.

of fact depending upon conflicting testimony in a case within its jurisdiction is conclusive and cannot be challenged in an action either at law or in equity in the absence of fraud or some other element to invoke the jurisdictional powers of a court of chancery. For mere errors of judgment in estimating the weight of evidence or in making deductions therefrom, the only remedy is by appeal from one officer to another in the land department. The issue of a patent is in effect the final determination of the department in favor of the patentee and against the contestants of all disputed questions of fact.¹

1. Conclusiveness of Decision of Land Department

— *United States*. — *Ross v. Doe*, 1 Pet. (U. S.) 656; *Lytle v. Arkansas*, 9 How. (U. S.) 314, reversing 12 Ark. 9; *Foley v. Harrison*, 15 How. (U. S.) 433, affirming 5 La. Ann. 75; *Johnson v. Towsley*, 13 Wall. (U. S.) 72; *Samson v. Smiley*, 13 Wall. (U. S.) 91; *Warren v. Van Brunt*, 19 Wall. (U. S.) 646; *Shepley v. Cowan*, 91 U. S. 330; *Moore v. Robbins*, 96 U. S. 530, reversing sub nom. *Robbins v. Bunn*, 54 Ill. 48, 5 Am. Rep. 75; *Lansdale v. Daniels*, 100 U. S. 113, affirming 43 Cal. 41; *Marquez v. Frisbie*, 101 U. S. 476; *Vance v. Burbank*, 101 U. S. 514; *Quinby v. Conlan*, 104 U. S. 420; *St. Louis Smelting, etc., Co. v. Kemp*, 104 U. S. 636; *Steel v. St. Louis Smelting, etc., Co.*, 106 U. S. 447; *Baldwin v. Stark*, 107 U. S. 463, reversing 7 Neb. 114; *St. Paul, etc., R. Co. v. Winona, etc., R. Co.*, 111 U. S. 720, affirming 27 Minn. 128; *Lee v. Johnson*, 116 U. S. 48; *Cragin v. Powell*, 128 U. S. 691; *U. S. v. Marshall Silver Min. Co.*, 129 U. S. 579; *Knight v. U. S. Land Assoc.*, 142 U. S. 161; *U. S. v. California, etc., Land Co.*, 148 U. S. 31; *Barden v. Northern Pac. R. Co.*, 154 U. S. 288; *Carr v. Fife*, 156 U. S. 501; *Stewart v. McHarry*, 159 U. S. 643; *Catholic Bishop v. Gibbon*, 158 U. S. 155, affirming 44 Fed. Rep. 321; *McCormick v. Hayes*, 159 U. S. 332; *Weeks v. Bridgman*, 159 U. S. 541; *Burfenning v. Chicago, etc., R. Co.*, 163 U. S. 323; *Germania Iron Co. v. U. S.*, 165 U. S. 379, affirming 58 Fed. Rep. 334; *Johnson v. Drew*, 171 U. S. 93, affirming 34 Fla. 130; *U. S. v. Northern Pac. R. Co.*, 177 U. S. 435, affirming 95 Fed. Rep. 864; *Diller v. Hawley*, (C. C. A.) 81 Fed. Rep. 651, affirmed 178 U. S. 476; *Gardner v. Bonestell*, 180 U. S. 362, affirming 125 Cal. 316; *De Cambra v. Rogers*, 189 U. S. 119, affirming 132 Cal. 502; *Pugsley v. Brown*, 35 Fed. Rep. 688; *Potter v. Hall*, 189 U. S. 292; *Aiken v. Ferry*, 6 Sawy. (U. S.) 79, 1 Fed. Cas. No. 112; *Stevens v. Sharp*, 6 Sawy. (U. S.) 113, 23 Fed. Cas. No. 13,410; *Bear v. Luse*, 6 Sawy. (U. S.) 148, 2 Fed. Cas. No. 1,179.

Alaska. — *Lewis v. Johnson*, 1 Alaska 529.

California. — *Hess v. Rolinger*, 48 Cal. 349; *Rutledge v. Murphy*, 51 Cal. 388; *Shinn v. Young*, 57 Cal. 525; *Haven v. Haws*, 63 Cal. 452; *Powers v. Leith*, 53 Cal. 711; *Plummer v. Brown*, 70 Cal. 544; *Hays v. Steiger*, 76 Cal. 555; *Shanklin v. McNamara*, 87 Cal. 371; *Grant v. Oliver*, 91 Cal. 158; *Stewart v. Southerland*, 93 Cal. 270; *Wormouth v. Gardner*, 112 Cal. 506; *Gage v. Gunther*, 136 Cal. 338.

Colorado. — *Poire v. Wells*, 6 Colo. 406; *Iron Silver Min. Co. v. Campbell*, 17 Colo. 267; *German Ins. Co. v. Hayden*, 21 Colo. 127, 52 Am. St. Rep. 206.

Florida. — *Porter v. Bishop*, 25 Fla. 749.

Illinois. — *Gray v. McCance*, 14 Ill. 343; *Mc-*

Ghee v. Wright, 16 Ill. 555; *Danforth v. Morrical*, 84 Ill. 456; *Bennett v. Farrar*, 7 Ill. 598. *Kansas*. — *Burnham v. Starkey*, 41 Kan. 604; *Ard v. Pratt*, 43 Kan. 419; *Cooke v. Blakely*, 6 Kan. App. 707.

Louisiana. — *Jones v. Wheelis*, 4 La. Ann. 541; *Ford v. Morancy*, 14 La. Ann. 77; *Ludeling v. Vester*, 16 La. Ann. 450; *Boatner v. Ventress*, 8 Mart. N. S. (La.) 645, 20 Am. Dec. 266.

Minnesota. — *Leech v. Rauch*, 3 Minn. 448; *Castner v. Gunther*, 6 Minn. 119; *Castner v. Echard*, 6 Minn. 149; *Castner v. Lowry*, 6 Minn. 149; *Monette v. Cratt*, 7 Minn. 234; *Mankato v. Meagher*, 17 Minn. 265; *O'Connor v. Gertgens*, 85 Minn. 481.

Mississippi. — *Carter v. Spencer*, 4 How. (Miss.) 42, 34 Am. Dec. 106.

Missouri. — *Lewis v. Lewis*, 9 Mo. 183, 43 Am. Dec. 540; *O'Hanlon v. Perry*, 9 Mo. 805; *Hill v. Miller*, 36 Mo. 182; *Stucker v. Duncan*, 37 Mo. 160; *Garton v. Cannada*, 39 Mo. 357.

Nevada. — *Courchaine v. Bullion Min. Co.*, 4 Nev. 369.

Ohio. — *Milliken v. Starling*, 16 Ohio 61.

Oklahoma. — *King v. Thompson*, 3 Okla. 644; *Calhoun v. Violet*, 4 Okla. 321; *Acers v. Snyder*, 8 Okla. 659; *Cook v. McCord*, 9 Okla. 200; *Bertwell v. Haines*, 10 Okla. 469; *Hartwell v. Havighorst*, 11 Okla. 189. See *Paine v. Foster*, 9 Okla. 213.

Oregon. — *Small v. Lutz*, 41 Oregon 570.

South Dakota. — *Harrington v. Wilson*, 10 S. Dak. 606.

Washington. — *Wiseman v. Eastman*, 21 Wash. 163; *Gray's Harbor Co. v. Drumm*, 23 Wash. 706.

Wisconsin. — *Lamont v. Stimson*, 3 Wis. 545, 62 Am. Dec. 696; *Bracken v. Parkinson*, 1 Pin. (Wis.) 685.

Conclusiveness of Apportionment by Commissioners of Indemnity Money. — *Brown v. Jackson*, 7 Wheat. (U. S.) 218.

Decision of Commissioners Confirmed by Congress. — *Challefoux v. Ducharme*, 4 Wis. 554, 8 Wis. 287.

Decision of Governor of State Acting as Agent of United States. — *U. S. v. California, etc., Land Co.*, 148 U. S. 31, affirming 7 U. S. App. 128; *U. S. v. Dalles Military Road Co.*, 41 Fed. Rep. 493, reversed on other grounds 140 U. S. 599; *U. S. v. Oregon Cent. Military Road Co.*, 41 Fed. Rep. 501.

Decision Not Reviewable on Ground of Incompetency of Evidence. — It has been held that the decisions of the land department are not reviewable for error in admitting incompetent evidence. *Parsons v. Venzke*, 4 N. Dak. 452, 50 Am. St. Rep. 669; *Wiseman v. Eastman*, 21 Wash. 163.

Conclusiveness of Adjudication of State Land Officials. — *Pennoyer v. McConaughy*, 140 U. S.

Adjudications as to Physical Character of Lands. — Thus the decision of the land department as to the actual physical character of public lands is not open to relitigation in the courts.¹ Whether, for instance, a certain tract is swamp or overflowed lands,² saline lands,³ mineral lands,⁴ desert lands,⁵ agricultural lands,⁶ or timber lands,⁷ presents a question of fact not resting on record and dependent on oral testimony within the meaning of the rule.

Decisions as to Qualifications of Applicants. — So the decision of the land department as to the qualifications of applicants for the government lands in so far as they depend on questions of fact,⁸ and the acts performed by them to secure title,⁹ as for instance whether a claimant was or was not in possession of a particular tract of land at a given time or for a given period,¹⁰ is conclusive upon the courts.

Circumstances Giving Right of Review. — Where, however, the matters determined are not properly before the department, or its conclusions have been reached from a misconstruction by its officers of the law applicable to the cases before it, and it has thus denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practiced, necessarily affecting its judgment, or where its decision is the result of inadvertence or mistake, then the courts can, in a proper proceeding, interfere and control its determination so as to secure the just rights of parties injuriously affected.¹¹

1, *affirming* 14 Sawy. (U. S.) 584; *Paty v. Harrell*, 24 Ark. 40; *Miller v. Gibbons*, 34 Ark. 212; *Routt v. Greenwood Cemetery Land Co.*, 18 Colo. 141; *Fishback v. Major*, 1 A. K. Marsh. (Ky.) 147; *Finlay v. Humble*, 2 A. K. Marsh. (Ky.) 569; *Cates v. Loftus*, 3 A. K. Marsh. (Ky.) 202; *Marshall v. Rough*, 3 Bibb (Ky.) 629; *Speed v. Patton*, 3 Bibb (Ky.) 426; *People v. Saxton*, 15 N. Y. App. Div. 263; *People v. Woodruff*, 54 N. Y. App. Div. 1; *Corpe v. Brooks*, 8 Oregon 222; *Wardwell v. Paige*, 9 Oregon 524; *Robertson v. State Land Board*, 42 Oregon 183; *Fisher v. Kaufman*, 170 Pa. St. 440; *Galbraith v. Elder*, 8 Watts (Pa.) 81; *Rose v. Klinger*, 8 W. & S. (Pa.) 178; *Carothers v. Dunning*, 3 S. & R. (Pa.) 373; *Styles v. Gray*, 10 Tex. 503; *Decourt v. Sproul*, 66 Tex. 368.

1. **Adjudication as to Physical Character of Lands.** — *Heath v. Wallace*, 138 U. S. 585; *Shaw v. Kellogg*, 170 U. S. 312; *Gale v. Best*, 78 Cal. 235, 12 Am. St. Rep. 44; *Johnson v. Bridal Veil Lumbering Co.*, 24 Oregon 182.

2. **Adjudication as to Swamp Lands.** — *French v. Fyan*, 93 U. S. 169, *distinguishing* *Hannibal*, etc., R. Co. *v. Smith*, 9 Wall. (U. S.) 95, on the ground that in the latter case there had been non-action or refusal to act on the part of the secretary of the interior in selecting lands granted, and hence there was no action by the department that could be relied on as a conclusive determination. To the same effect see *Ehrhardt v. Hogaboom*, 115 U. S. 67; *Heath v. Wallace*, 138 U. S. 585; *Chandler v. Calumet*, etc., Min. Co., 149 U. S. 79, *distinguishing* *Wright v. Roseberry*, 121 U. S. 488; *McCormick v. Hayes*, 159 U. S. 332; *Shanklin v. McNamara*, 87 Cal. 371.

3. **Decision as to Saline Lands.** — See *Burtenning v. Chicago*, etc., R. Co., 163 U. S. 323.

4. **Decision as to Mineral Lands.** — *Steel v. St. Louis Smelting*, etc., Co., 106 U. S. 447; *Barden v. Northern Pac. R. Co.*, 154 U. S. 288; *Shaw v. Kellogg*, 170 U. S. 312; *Northern Pac. R. Co. v. Soderberg*, 86 Fed. Rep. 49;

Northern Pac. R. Co. v. Cannon, 7 U. S. App. 507, *affirmed* 17 U. S. Sup. Ct. Rep. 997; *U. S. v. Edwards*, 38 Fed. Rep. 812; *Gale v. Best*, 78 Cal. 235, 12 Am. St. Rep. 44; *Potter v. Randolph*, 126 Cal. 458; *Ferry v. Street*, 4 Utah 521.

5. **Desert Lands.** — *U. S. v. Mackintosh*, 85 Fed. Rep. 333, 56 U. S. App. 483.

6. **Agricultural Lands.** — *Scott v. Lockey Invest. Co.*, 60 Fed. Rep. 34; *Saunders v. La Purisima Gold Min. Co.*, 125 Cal. 159.

7. **Timber Lands.** — *U. S. v. Budd*, 144 U. S. 154, *affirming* 43 Fed. Rep. 630.

8. *Brown v. Donnelly*, 9 Okla. 32.

Citizenship of Applicant. — *Burrell v. Haw*, 40 Cal. 373. See also *Steel v. St. Louis Smelting*, etc., Co., 106 U. S. 447.

9. See *Steel v. St. Louis Smelting*, etc., Co., 106 U. S. 447.

Time of Applicant's Entry into Territory Where Land Is Situated. — *Calhoun v. Violet*, 173 U. S. 60.

Bona Fides of Entry or Settlement. — *Green v. Hayes*, 70 Cal. 276; *Reaves v. Oliver*, 3 Okla. 62; *McCord v. Hill*, (Wis. 1903) 94 N. W. Rep. 65.

10. **Finality of Decision as to Fact of Occupation of Land.** — *Vance v. Burbank*, 101 U. S. 519; *Stewart v. McHarry*, 159 U. S. 643; *Johnson v. Drew*, 171 U. S. 93, *affirming* 34 Fla. 130; *Northern Pac. R. Co. v. McCormick*, 89 Fed. Rep. 659, *affirmed* (C. C. A.) 94 Fed. Rep. 932; *Edwards v. Begole*, (C. C. A.) 121 Fed. Rep. 1; *McCord v. Hill*, (Wis. 1903) 94 N. W. Rep. 65.

Extent of Occupation and Value of Improvements. — *Rector v. Gibbons*, 111 U. S. 276.

11. **Circumstances Giving Right of Review.** — *Irvine v. Marshall*, 20 How. (U. S.) 558; *Dubuque*, etc., R. Co. *v. Litchfield*, 23 How. (U. S.) 66; *Silver v. Ladd*, 7 Wall. (U. S.) 219; *Johnson v. Towsley*, 13 Wall. (U. S.) 72; *Quinby v. Conlan*, 104 U. S. 420, *affirming* 51 Cal. 412; *Sanford v. Sanford*, 139 U. S. 642; *Northern Pac. R. Co. v. Sanders*, 47 Fed. Rep. 604, *affirming* on rehearing 46 Fed. Rep. 239,

(b) **Collateral Attack** — *aa. IN GENERAL.* — Where the authorized officers of the government have issued a patent, or a certificate under a land grant equivalent to a patent, in due form of law, which on its face is sufficient to convey the title to the land described in it, it will be presumed that all the prerequisites to the issuance of a valid patent or certificate have been complied with, and the title conveyed is impregnable to collateral attack.¹ It follows that in an

affirmed (C. C. A.) 49 Fed. Rep. 129, 166 U. S. 620; *Vankirk Land, etc., Co. v. Green*, 132 Ala. 348; *Sousa v. Pereira*, 132 Cal. 77; *Emslie v. Young*, 24 Kan. 732.

1. Patent Not Subject to Collateral Attack — *United States.* — *Minter v. Crommelin*, 18 How. (U. S.) 87; *French v. Fyan*, 93 U. S. 169; *U. S. v. Schurz*, 102 U. S. 378; *Quinby v. Conlan*, 104 U. S. 420; *St. Louis Smelting, etc., Co. v. Kemp*, 104 U. S. 636; *Steel v. St. Louis Smelting, etc., Co.*, 106 U. S. 447; *Doolan v. Carr*, 125 U. S. 618; *Heath v. Wallace*, 138 U. S. 573; *Sanford v. Sanford*, 139 U. S. 642, *affirming* 19 Oregon 3; *Knight v. U. S. Land Assoc.*, 142 U. S. 161; *Noble v. Union River Logging R. Co.*, 147 U. S. 174; *Barden v. Northern Pac. R. Co.*, 154 U. S. 288; *Wilcox v. Jackson*, 13 Pet. (U. S.) 511; *Gazzam v. Phillip*, 20 How. (U. S.) 372, *overruling* *Brown v. Clements*, 3 How. (U. S.) 650, which *reversed* 4 Ala. 129; *Cowell v. Lammers*, 21 Fed. Rep. 200; *Hartman v. Warren*, (C. C. A.) 76 Fed. Rep. 157, *affirming* 70 Fed. Rep. 946; *Harkrader v. Carroll*, 76 Fed. Rep. 474; *New Dunderberg Min. Co. v. Old*, 79 Fed. Rep. 598, 49 U. S. App. 201; *James v. Germania Iron Co.*, (C. C. A.) 107 Fed. Rep. 597, *affirming sub nom.* *Germania Iron Co. v. Craig*, 98 Fed. Rep. 23; *King v. McAndrews*, (C. C. A.) 111 Fed. Rep. 860; *Le Roy v. Clayton*, *v. Sawy*. (U. S.) 493, 15 Fed. Cas. No. 8,268; *Dodge v. Perez*, 2 Sawy. (U. S.) 645, 7 Fed. Cas. No. 3,953; *Sharp v. Stephens*, 6 Sawy. (U. S.) 48, 21 Fed. Cas. No. 12,710; *Mora v. Nunez*, 7 Sawy. (U. S.) 455, 10 Fed. Rep. 634; *Lariviere v. Madegan*, 1 Dill. (U. S.) 455, 14 Fed. Cas. No. 8,096.

Alabama. — *Masters v. Eastis*, 3 Port. (Ala.) 368; *Bates v. Herron*, 35 Ala. 117; *Phillips v. Sherman*, 36 Ala. 189; *Stringfellow v. Tennessee Coal, etc., R. Co.*, 117 Ala. 250. See also *Mitchell v. Cobb*, 13 Ala. 137.

Arkansas. — *Finley v. Woodruff*, 8 Ark. 328. See also *Gaines v. Hale*, 16 Ark. 9, *followed* *Burke v. Gaines*, 16 Ark. 27.

California. — *Kimball v. Semple*, 25 Cal. 440; *Cruz v. Martinez*, 53 Cal. 239; *Turner v. Donnelly*, 70 Cal. 597; *Leviston v. Ryan*, 75 Cal. 293; *Southern Pac. R. Co. v. Purcell*, 77 Cal. 69; *Gale v. Best*, 78 Cal. 235, 12 Am. St. Rep. 44; *Irvine v. Tarbat*, 105 Cal. 237; *Dreyfus v. Badger*, 108 Cal. 58; *Rogers v. De Cambra*, 132 Cal. 502; *McHarry v. Stewart*, (Cal. 1893) 35 Pac. Rep. 141; *Miller v. Grunsky*, (Cal. 1901) 66 Pac. Rep. 858.

Colorado. — *Smith v. Pipe*, 3 Colo. 194; *Anderson v. Bartels*, 7 Colo. 256; *Aspen v. Aspen Town, etc., Co.*, 10 Colo. 201; *Chever v. Horner*, 11 Colo. 72; *Justice Min. Co. v. Lee*, 21 Colo. 262, 52 Am. St. Rep. 216.

Illinois. — *Gallipot v. Manlove*, 2 Ill. 156; *Moore v. Hunter*, 6 Ill. 317; *Garner v. Willett*, 18 Ill. 455.

Kansas. — *Missouri, etc., R. Co. v. Pratt*, 64 Kan. 118.

Louisiana. — *Morancy v. Ford*, 2 La. Ann. 299; *Jenkins v. Gibson*, 3 La. Ann. 203; *Terry v. Hennen*, 4 La. Ann. 458; *Williams v. Robinson*, 5 La. Ann. 110.

Michigan. — *Ives v. Ely*, 57 Mich. 569. See also *Boyce v. Danz*, 29 Mich. 146.

Mississippi. — *Bledsoe v. Doe*, 4 How. (Miss.) 13; *Surget v. Doe*, 24 Miss. 118; *Johnston v. Horne*, 32 Miss. 151; *Harris v. McKissack*, 34 Miss. 464; *Sweatt v. Corcoran*, 37 Miss. 513.

Missouri. — *Allison v. Hunter*, 9 Mo. 749; *Kissell v. St. Louis Public Schools*, 16 Mo. 553; *Cramer v. Keller*, 98 Mo. 279.

Nebraska. — *Kinney v. Degman*, 12 Neb. 237; *Rush v. Valentine*, 12 Neb. 513; *Van Sant v. Butler*, 19 Neb. 351; *Green v. Barker*, 47 Neb. 934.

New Mexico. — *Chavez v. Chavez de Sanchez*, 7 N. Mex. 58.

Ohio. — *Hall v. Prindle*, 2 Ohio Dec. (Reprint) 261, 2 West. L. Month. 193.

Wisconsin. — *Schnee v. Schnee*, 23 Wis. 377, 99 Am. Dec. 183; *Mandota Club v. Anderson*, 101 Wis. 479.

Attack by Mere Intruder. — *Ehrhardt v. Hoga-boon*, 115 U. S. 67, *affirming* 58 Cal. 231; *Cooper v. Roberts*, 18 How. (U. S.) 173, *reversing* 6 McLean (U. S.) 93.

Record of Land Office Proceedings Held Inadmissible to Impeach Patent. — *St. Louis Smelting, etc., Co. v. Kemp*, 104 U. S. 636; *Irvine v. Tarbat*, 105 Cal. 237; *Miller v. Grunsky*, (Cal. 1901) 66 Pac. Rep. 858.

Rule Applied in Canada. — *Farmer v. Livingstone*, 5 Can. Sup. Ct. 221. See also 8 Can. Sup. Ct. 140.

Rule Applied to State Lands — *United States.* — *Stringer v. Young*, 3 Pet. (U. S.) 319; *Boardman v. Reed*, 6 Pet. (U. S.) 329; *Brown v. Huger*, 21 How. (U. S.) 305; *Lea v. Polk County Copper Co.*, 21 How. (U. S.) 493; *Pollard v. Dwight*, 4 Cranch (U. S.) 421; *Blackwell v. Patton*, 7 Cranch (U. S.) 471; *Green v. Lister*, 8 Cranch (U. S.) 229; *Dodge v. Perez*, 2 Sawy. (U. S.) 645, 7 Fed. Cas. No. 3,953; *Boynton v. Haggart*, (C. C. A.) 120 Fed. Rep. 819.

Arkansas. — *Heeler v. Gist*, 27 Ark. 201; *Smithee v. Mosely*, 31 Ark. 425.

California. — *Doll v. Meador*, 16 Cal. 295; *Harrington v. Goldsmith*, 136 Cal. 168; *Churchill v. Anderson*, 56 Cal. 55; *O'Connor v. Frasher*, 56 Cal. 499; *Kentfield v. Hayes*, 57 Cal. 409; *Dreyfus v. Badger*, 108 Cal. 58.

Georgia. — *Tilson v. Yawn*, 15 Ga. 491, 60 Am. Dec. 708.

Iowa. — *Pendergast v. Burlington, etc., R. Co.*, 53 Iowa 326.

Kentucky. — *Frazier v. Frazier*, 81 Ky. 137; *Kirksey v. Turner*, 95 Ky. 226; *Hartley v. Hartley*, 3 Met. (Ky.) 56; *Taylor v. Fletcher*, 7 B. Mon. (Ky.) 80; *Underwood v. Crutcher*, 7 J. J. Marsh. (Ky.) 529; *Bledsoe v. Wells*, 4 Bibb (Ky.) 329; *Jennings v. Whitaker*, 4 T. B. Mon.

action at law, such as ejectment and collateral actions generally, the strict legal title evidenced by a patent must prevail against any inchoate or equitable rights of a claimant without patent.¹

Fraud, Mistake, and Error of Law. — The validity of the patent cannot be assailed collaterally on the ground of fraud,² or mistake,³ or error of law.⁴

bb. EFFECT OF STATUTES ALLOWING EQUITABLE DEFENSE. — Under statutes in several states, however, equities which would support a suit in equity to annul a

(Ky.) 51; *Marshall v. McDaniel*, 12 Bush (Ky.) 381; *Atchley v. Latham*, 2 Litt. (Ky.) 362; *Pearson v. Baker*, 4 Dana (Ky.) 322; *Cain v. Flynn*, 4 Dana (Ky.) 501; *Ray v. Barker*, 1 B. Mon. (Ky.) 368; *Sutton v. Menser*, 6 B. Mon. (Ky.) 438; *Taylor v. Fletcher*, 7 B. Mon. (Ky.) 81; *Little v. Bishop*, 9 B. Mon. (Ky.) 246; *McMillan v. Hutcheson*, 4 Bush (Ky.) 616; *Jennings v. Whitaker*, 4 T. B. Mon. (Ky.) 50; *Ballowe v. Hillman*, 37 S. W. Rep. 950, 18 Ky. L. Rep. 677; *American Assoc. v. Innis*, 60 S. W. Rep. 388, 22 Ky. L. Rep. 1196; *Allen v. Pulliam*, (Ky. 1902) 66 S. W. Rep. 722.

Maryland. — *Stallings v. Ruby*, 27 Md. 149.

Michigan. — *Carpenter v. Ingersoll*, 43 Mich. 433.

Nebraska. — *State v. Sioux City, etc.*, R. Co., 7 Neb. 357.

New Jersey. — *American Dock, etc., Co. v. Public Schools Trustees*, 39 N. J. Eq. 409.

New York. — *People v. Mauran*, 5 Den. (N. Y.) 389; *People v. Livingston*, 8 Barb. (N. Y.) 253; *E. G. Blakslee Mfg. Co. v. E. G. Blakslee's Sons Iron Works*, 129 N. Y. 155; *New York Cent., etc., R. Co. v. Aldridge*, 135 N. Y. 83.

North Carolina. — *Reynolds v. Flinn*, 1 Hayw. (2 N. Car.) 106; *Sears v. Parker*, 1 Hayw. (2 N. Car.) 126; *Dickey v. Hoodenpile*, 1 Hayw. (2 N. Car.) 358; *Foreman v. Tyson*, 1 Hayw. (2 N. Car.) 496; *Williams v. Wells*, 1 Law Repos. (4 N. Car.) 383; *Tyrrell v. Mooney*, 1 Murph. (5 N. Car.) 401; *Den v. Greenlee*, 2 Hawks (9 N. Car.) 231; *Wagh v. Richardson*, 8 Ired. L. (30 N. Car.) 470; *Dugger v. McKesson*, 100 N. Car. 1; *Wyman v. Taylor*, 124 N. Car. 426.

Pennsylvania. — *Compare Bushey v. South Mountain Min., etc., Co.*, 136 Pa. St. 541; *Burd v. Seabold*, 6 S. & R. (Pa.) 137.

South Carolina. — *Frampton v. Wheat*, 27 S. Car. 288.

Virginia. — *Carter v. Hagan*, 75 Va. 557; *Holleran v. Meisel*, 91 Va. 143; *Norvell v. Camm*, 6 Munf. (Va.) 233, 8 Am. Dec. 742; *Witherinton v. McDonald*, 1 Hen. & M. (Va.) 306, 3 Am. Dec. 603.

1. Patent Prevails Over Equitable Claim in Action at Law. — *Kissell v. St. Louis Public Schools*, 18 How. (U. S.) 19, *affirming* 16 Mo. 553; *Greer v. Mezes*, 24 How. (U. S.) 268; *Singleton v. Touchard*, 1 Black (U. S.) 342; *Gibson v. Chouteau*, 13 Wall. (U. S.) 92, *reversing* 39 Mo. 537; *Oaksmith v. Johnston*, 92 U. S. 343; *Foster v. Mora*, 98 U. S. 425; *Redfield v. Parks*, 132 U. S. 239; *Le Roy v. Clayton*, 2 Sawy. (U. S.) 493, 15 Fed. Cas. No. 8,268; *Jones v. Walker*, 47 Ala. 175; *Harmon v. Steinman*, 9 Iowa 112.

Petitory Action in Louisiana Corresponding to Ejectment. — *Foley v. Harrison*, 15 How. (U. S.) 433, *affirming* 5 La. Ann. 75.

2. Fraud No Ground for Collateral Attack — United States. — *Steel v. St. Louis Smelting*

etc., Co., 106 U. S. 447; *St. Louis Smelting, etc., Co. v. Green*, 13 Fed. Rep. 208, 4 McCrary (U. S.) 232.

California. — *Yount v. Howell*, 14 Cal. 465; *Miller v. Dale*, 44 Cal. 562; *Turner v. Donnelly*, 70 Cal. 597; *Shanklin v. McNamara*, 87 Cal. 371.

Colorado. — *Poire v. Wells*, 6 Colo. 409; *Wells v. Francis*, 7 Colo. 420.

District of Columbia. — *Welton v. Carter*, 21 D. C. 587.

Illinois. — *Compare Rogers v. Brent*, 10 Ill. 573, 50 Am. Dec. 422; *Garner v. Willett*, 18 Ill. 455.

Iowa. — *Arnold v. Grimes*, 2 Greene (Iowa) 77; *Klein v. Argenbright*, 26 Iowa 493.

Mississippi. — *Dixon v. Doe*, 23 Miss. 84.

State Lands — United States. — *Field v. Seabury*, 19 How. (U. S.) 332; *Oliver v. Pullam*, 24 Fed. Rep. 127.

Georgia. — *Tison v. Yawn*, 15 Ga. 491, 60 Am. Dec. 708.

Kentucky. — *Marshall v. McDaniel*, 12 Bush (Ky.) 381.

Maryland. — *Cook v. Carroll*, 6 Md. 104.

New Jersey. — *Elizabeth v. Central Pac. R. Co.*, 53 N. J. L. 491.

New York. — *People v. Mauran*, 5 Den. (N. Y.) 389.

North Carolina. — *Gilchrist v. Middleton*, 108 N. Car. 705; *Dosh v. Cape Fear Lumber Co.*, 128 N. Car. 84; *Lovinggood v. Burgess*, Busb. L. (44 N. Car.) 407.

Tennessee. — *Polk v. Hill*, 2 Overt. (Tenn.) 118.

Texas. — *Decourt v. Sproul*, 66 Tex. 368.

Compare Stringer v. Young, 3 Pet. (U. S.) 319 (decided under *Virginia* land laws); *Boardman v. Reed*, 6 Pet. (U. S.) 329 (decided under *Virginia* land laws); *White v. Jones*, 4 Call (Va.) 253, 2 Am. Dec. 564.

Rule Applied in Canada. — *Farmer v. Livingstone*, 5 Can. Sup. Ct. 221, 8 Can. Sup. Ct. 140.

3. Mistake No Ground for Collateral Attack. — *Bagnell v. Broderick*, 13 Pet. (U. S.) 436; *Williams v. Carpenter*, 35 Mo. 52. See also *Bruckner v. Lawrence*, 1 Dougl. (Mich.) 19.

State Lands. — *Sykes v. Doe*, 10 Ga. 465, 54 Am. Dec. 402; *Tison v. Yawn*, 15 Ga. 491, 60 Am. Dec. 708; *Romain v. Lewis*, 39 Mich. 233; *Jackson v. Hart*, 12 Johns. (N. Y.) 77, 7 Am. Dec. 280; *Brady v. Begun*, 36 Barb. (N. Y.) 533; *Lovinggood v. Burgess*, Busb. L. (44 N. Car.) 407; *Dosh v. Cape Fear Lumber Co.*, 128 N. Car. 84.

4. Error of Law No Ground for Collateral Attack. — *Patterson v. Tatum*, 3 Sawy. (U. S.) 173; *Aurora Hill Consol. Min. Co. v. 85 Min. Co.*, 34 Fed. Rep. 515, 12 Sawy. (U. S.) 355; *King v. McAndrews*, (C. C. A.) 111 Fed. Rep. 860; *St. Louis Smelting, etc., Co. v. Kemp*, 104 U. S. 646; *Steel v. St. Louis Smelting, etc., Co.*, 106 U. S. 447.

patent or compel the patentee to convey to the plaintiff, may, instead of being presented in a separate suit, be set up as a defense to an action at law to recover the possession of the land. And this rule is applied in causes arising in the courts of these states involving the validity of patents to federal lands¹ as well as in causes relating to the state lands.²

cc. STATUTES GIVING TO CERTIFICATES OF PURCHASE EFFECT AS EVIDENCE OF LEGAL TITLE. — The rule has been laid down that in the state courts when the question presented is whether the plaintiff or the defendant has the superior legal title from the United States, the patent must prevail, and that a state statute declaring certificates of purchase of equal dignity with a patent is inoperative with respect to federal lands, since Congress has the sole power to declare the dignity and effect of titles emanating from the United States.³ *A fortiori* is such statute without effect in a case arising in the federal courts.⁴

dd. CONFLICTING PATENTS. — The courts have maintained in a number of cases that where two conflicting patents regular on their face are set up in an action at law, the senior patent must prevail over the junior; the elder patent is conclusive against the junior patentee until set aside or annulled by a court of equity.⁵ On the other hand, it has been held by the Supreme Court of the United States that while as a general proposition the rulings of the land officers in regard to the facts on which patents for land are issued are decisive in actions at law, and such patents can only be impeached in regard to those facts by a suit in chancery brought to set the grant aside, the rule is limited to cases in which no prior patent had been issued for the same land, and where the party contesting the patent had no evidence of a superior legal title, but was compelled to rely on the equity growing out of frauds and mistakes in issuing the patent to his opponent; and that where each party has a patent from the government, and the question is as to the superiority of the title under those patents, if this depends upon extrinsic facts not shown by the patents themselves, it is competent, in any judicial proceeding where this question of superiority of title arises, to establish it by proof of these facts.⁶

Junior Patent and Senior Entry Held Superior to Senior Patent. — Under the practice prevailing in some jurisdictions an elder entry and a junior patent may be given in evidence in connection as one title in an action at law, so as to overreach an elder patent founded on a junior entry.⁷

1. Effect of Statutes Allowing Equitable Defense in Action at Law. — *Quinby v. Conlan*, 104 U. S. 420; *Widdicombe v. Childers*, 124 U. S. 400, *affirming* 84 Mo. 382; *Cornelius v. Kessel*, 128 U. S. 456; *O'Brien v. Perry*, 1 Black (U. S.) 132; *Gibson v. Chouteau*, 13 Wall. (U. S.) 92, *reversing* 39 Mo. 537; *Trulock v. Taylor*, 26 Ark. 54; *St. Paul, etc., R. Co. v. Ward*, 47 Minn. 40; *Carman v. Johnson*, 20 Mo. 108, 61 Am. Dec. 593, 29 Mo. 84; *Northern Pac. R. Co. v. Spray*, 27 Wash. 1.

2. *McNee v. Donahue*, 142 U. S. 587.

3. Statutes Giving Certificates of Purchase Effect as Evidence of Legal Title. — *Dickinson v. Doe*, 9 Smed. & M. (Miss.) 130; *Griffith v. Deerfelt*, 17 Mo. 31; *Carman v. Johnson*, 20 Mo. 108, 61 Am. Dec. 593. See also *Gibson v. Chouteau*, 13 Wall. (U. S.) 92; *Bagnell v. Broderick*, 13 Pet. (U. S.) 450; *Wilson v. Fine*, 38 Fed. Rep. 789. Compare *Gallipot v. Manlove*, 2 Ill. 156.

4. *Bagnell v. Broderick*, 13 Pet. (U. S.) 436; *Hooper v. Scheimer*, 23 How. (U. S.) 235. See also *Langdon v. Sherwood*, 124 U. S. 74. And see the title *EJECTMENT*, vol. 10, p. 483.

5. Senior Patent Conclusive Against Junior Patentee. — *U. S. v. Stone*, 2 Wall. (U. S.) 525; *Hayner v. Stanly*, 13 Fed. Rep. 217. See

also *Moore v. Robbins*, 96 U. S. 530; *Gallipot v. Manlove*, 2 Ill. 156; *Parkinson v. Bracken*, 1 Pin. (Wis.) 174, 39 Am. Dec. 296; *Garner v. Willett*, 18 Ill. 455.

State Lands. — *Oliver v. Pullam*, 24 Fed. Rep. 127; *Simpson v. Kilpatrick*, 148 Mo. 507; *Jackson v. Lawton*, 10 Johns. (N. Y.) 23, 6 Am. Dec. 311; *Holland v. Crow*, 12 Ired. L. (34 N. Car.) 275.

Conflict Between Patents Issued on Same Day Determined by Numbers Marked. — *Den v. Leggat*, 3 Murph. (7 N. Car.) 539; *Den v. Mulford*, 1 Hayw. (2 N. Car.) 311; *Foreman v. Tyson*, 1 Hayw. (2 N. Car.) 496. Compare *Talbot v. Callaway*, Hard. (Ky.) 38.

6. *Iron Silver Min. Co. v. Campbell*, 135 U. S. 286, *Fuller, C. J., and Brewer, J., dissenting*. In this case, however, the patent attacked was the subsequent patent.

7. Elder Entry and Junior Patent Held Superior to Senior Patent. — In *Ross v. Doe*, 1 Pet. (U. S.) 663, a decision in the *Mississippi* courts to this effect, relating to federal lands, was upheld. See also *Bagnell v. Broderick*, 13 Pet. (U. S.) 436; *Smith v. Athern*, 34 Cal. 506.

State Lands. — In *Tennessee* this is the long-established and well-settled rule. *Kerr v. Por-*

ee. ATTACKING SURVEYS. — It is a well-settled rule of law that the power to make and correct surveys of the public lands belongs exclusively to the political department of the government, and that a survey made by the proper officers within the scope of their authority is unassailable in the courts except by a direct proceeding.¹

ff. VOID PATENTS — (aa) In General. — A patent, or a certificate under a land grant equivalent to a patent, is subject at all times to the inquiry in an action at law whether the officers of the land department had the lawful authority to make a conveyance of the title;² it may be shown to be void on its face or by such extrinsic evidence as from its nature is capable of showing a want of authority for its issuance.³ This rule is applicable to patents to state as well as federal lands.⁴

ter, 1 Overt. (Tenn.) 15; Wilson v. Kilcannon, 1 Overt. (Tenn.) 207; Reid v. Buford, 1 Overt. (Tenn.) 421; Hendrick v. Dallum, 1 Overt. (Tenn.) 428; Polk v. Hill, 2 Overt. (Tenn.) 157; Hitchcock v. Southern Iron, etc., Co., (Tenn. Ch. 1896) 38 S. W. Rep. 589; Webb v. Haley, 7 Baxt. (Tenn.) 601; Anderson v. Cannon, Cooke (Tenn.) 31; Thomas v. Tankersly, 5 Coldw. (Tenn.) 165; White v. Crockett, 3 Hayw. (Tenn.) 188; Goodman v. Tennessee Min. Co., 1 Head (Tenn.) 172; Cross v. Sabin, 13 Fed. Rep. 308; Brummett v. Scott, 4 Heisk. (Tenn.) 321; Sampson v. Bone, 4 Heisk. (Tenn.) 705; Fowler v. Nixon, 7 Heisk. (Tenn.) 719; Wood v. Elledge, 11 Heisk. (Tenn.) 607; Donegan v. Taylor, 6 Humph. (Tenn.) 504; Parrish v. Cummins, 11 Humph. (Tenn.) 297; Berry v. Wagner, 5 Lea (Tenn.) 565; Collier v. Underwood, 1 Shannon Tenn. Cas. 53; Roach v. Boyd, 1 Sneed (Tenn.) 138; Sampson v. Taylor, 1 Sneed (Tenn.) 600; Barnes v. Sellars, 2 Sneed (Tenn.) 35; Curle v. Barrel, 2 Sneed (Tenn.) 65; Conn v. Haislip, 1 Swan (Tenn.) 32; Parker v. Claiborne, 2 Swan (Tenn.) 566; Terrell v. Murray, 2 Yerg. (Tenn.) 390; Trousdale v. Campbell, 3 Yerg. (Tenn.) 167, 5 Hayw. (Tenn.) 104; Reese v. Crockett, 8 Yerg. (Tenn.) 129; Maury v. Lewis, 10 Yerg. (Tenn.) 115. See also Ross v. Reed, 1 Wheat. (U. S.) 483; Blunt v. Smith, 7 Wheat. (U. S.) 249.

In Texas a similar rule has been applied. O'Neal v. Manning, 48 Tex. 403.

1. Collateral Attack of Surveys. — *Cragin v. Powell, 128 U. S. 691; Knight v. U. S. Land Assoc., 142 U. S. 176, reversing on other grounds sub nom. United Land Assoc. v. Knight, 85 Cal. 448; Russell v. Maxwell Land Grant Co., 158 U. S. 253; Horne v. Smith, 159 U. S. 40; Gardner v. Bonestell, 180 U. S. 369; Brown v. Parker, 127 Mich. 390; McBride v. Whitaker, (Neb. 1902) 90 N. W. Rep. 966.*

2. Collateral Attack of Patent Void for Want of Jurisdiction — United States. — *Reichart v. Felps, 6 Wall. (U. S.) 160; St. Louis Smelting, etc., Co. v. Kemp, 104 U. S. 636; Doolan v. Carr, 125 U. S. 618; Davis v. Weibbold, 139 U. S. 507, reversing on other grounds 7 Mont. 107; Hardin v. Jordan, 140 U. S. 371, reversing on other grounds 16 Fed. Rep. 823; Knight v. U. S. Land Assoc., 142 U. S. 161; Lakin v. Dolly, 53 Fed. Rep. 333, affirmed (C. C. A.) 54 Fed. Rep. 461; U. S. v. Winona, etc., R. Co., (C. C. A.) 67 Fed. Rep. 948, affirmed 165 U. S. 463; Northern Pac. R. Co. v. McCormick, 72 Fed. Rep. 736, 44 U. S. App. 396; U. S. v. Coos Bay Wagon-Road Co., 89 Fed. Rep. 151; King v. McAndrews, (C. C. A.)*

111 Fed. Rep. 860, reversing 104 Fed. Rep. 430; Patterson v. Tatum, 3 Sawy. (U. S.) 174; Smith v. Mitchell, 12 Sawy. (U. S.) 651, 32 Fed. Rep. 680. See also Minter v. Crommelin, 18 How. (U. S.) 87.

Alabama. — *Haden v. Ware, 15 Ala. 149; Bates v. Herron, 35 Ala. 117; McTyer v. McDowell, 36 Ala. 39; Masters v. Eastis, 3 Port. (Ala.) 368.*

California. — *Durfee v. Plaisted, 38 Cal. 80; Foss v. Hinkell, 78 Cal. 158; McLaughlin v. Menotti, 89 Cal. 362.*

Colorado. — *Poire v. Wells, 6 Colo. 410; Anderson v. Bartels, 7 Colo. 263; Chever v. Horner, 11 Colo. 72; Omaha, etc., Smelting, etc., Co. v. Tabor, 13 Colo. 52.*

Florida. — *Johnson v. Drew, 34 Fla. 137.*

Illinois. — *Ballance v. McFadden, 12 Ill. 317.*

Iowa. — *Arnold v. Grimes, 2 Greene (Iowa) 77.*

Kansas. — *McAlpin v. Henshaw, 6 Kan. 176. Michigan.* — *Webber v. Pere Marquette Boom Co., 62 Mich. 626; Crapo v. Troy Tp., 98 Mich. 635.*

Mississippi. — *Hit-tuk-ho-mi v. Watts, 7 Smed. & M. (Miss.) 363, 45 Am. Dec. 308.*

Missouri. — *Elting v. Gould, 96 Mo. 535; Cummings v. Powell, 97 Mo. 524, affirmed 116 Mo. 473, 38 Am. St. Rep. 610.*

Nevada. — *Rose v. Richmond Min. Co., 17 Nev. 25, affirmed 114 U. S. 576.*

Texas. — *Harris v. Byrd, 3 Tex. Civ. App. 677.*

Utah. — *Kahn v. Old Tel. Min. Co., 2 Utah 174; Ferry v. Street, 4 Utah 521.*

Patent to Alien. — *Etheridge v. Doe, 18 Ala. 565.*

Effect of Creation of New Land District. — Where a new land district is erected out of a part of an old district, the power of sale in the old district of land included in the new district is suspended, and such sale may be attacked in a collateral suit. *Matthews v. Zane, 5 Cranch (U. S.) 92. See also Garner v. Willett, 18 Ill. 455.*

The Test of Jurisdiction has been said to be not right decision, but the right to enter upon the inquiry to make some decision. *New Dunderberg Min. Co. v. Old, 79 Fed. Rep. 598, 49 U. S. App. 201; King v. McAndrews, (C. C. A.) 111 Fed. Rep. 864. See also Kahn v. Old Tel. Min. Co., 2 Utah 174.*

3. Sherman v. Buick, 93 U. S. 209; Doolan v. Carr, 125 U. S. 618. See also Poire v. Wells, 6 Colo. 406.

4. Void Patents to State Lands — United States. — *Polk v. Wendal, 9 Cranch (U. S.) 87;*

Where Government Is Without Title. — This rule applies to cases in which the title to the land patented or certified either never had been in the government¹ or before the initiation of the proceedings upon which the patent or certificate was issued had passed out of the government by legislative grant, by patent treaty or otherwise,² and hence was not within the jurisdiction of the officers of the land department when that tribunal decided and attempted to convey it.

Polk v. Wendell, 5 Wheat. (U. S.) 293; *Doe v. Winn*, 11 Wheat. (U. S.) 381; *Brush v. Ware*, 15 Pet. (U. S.) 93.

California. — *Laugenour v. Shanklin*, 57 Cal. 70; *Rondell v. Fay*, 32 Cal. 354.

Kentucky. — *Kirksey v. Turner*, 95 Ky. 226, 15 Ky. L. Rep. 585; *American Assoc. v. Innis*, (Ky. 1901) 60 S. W. Rep. 388; *McMillan v. Hutcheson*, 4 Bush (Ky.) 611; *Jennings v. Whitaker*, 4 T. B. Mon. (Ky.) 51; *Ray v. Barker*, 1 B. Mon. (Ky.) 368; *Taylor v. Fletcher*, 7 B. Mon. (Ky.) 82; *Clark v. Jones*, 16 B. Mon. (Ky.) 126.

Maryland. — See *Cook v. Carroll*, 6 Md. 104.

Mississippi. — *Clements v. Anderson*, 46 Miss. 581.

New Hampshire. — See *Enfield v. Day*, 11 N. H. 520.

New York. — *People v. Van Rensselaer*, 9 N. Y. 291, reviewing 8 Barb. (N. Y.) 189; *People v. Livingston*, 8 Barb. (N. Y.) 277.

North Carolina. — *Lunsford v. Boston*, 1 Dev. Eq. (16 N. Car.) 487; *McCormick v. Monroe*, 1 Jones L. (46 N. Car.) 13; *Harshaw v. Taylor*, 3 Jones L. (48 N. Car.) 513; *Den. v. Cathey*, 1 Murph. (5 N. Car.) 162, 3 Am. Dec. 683; *Harris v. Norman*, 96 N. Car. 59.

Pennsylvania. — *Hunter v. Howard*, 10 S. & R. (Pa.) 243; *Kelly v. Graham*, 9 Watts (Pa.) 116.

Tennessee. — *Kerr v. Porter*, 1 Overt. (Tenn.) 361; *Murfree v. Logan*, 2 Overt. (Tenn.) 229; *Polk v. Windel*, 2 Overt. (Tenn.) 436; *Graham v. Gunn*, 87 Tenn. 458; *Roach v. Boyd*, 1 Sneed (Tenn.) 135; *Curle v. Barrel*, 2 Sneed (Tenn.) 65; *Woodfolk v. Nail*, 2 Sneed (Tenn.) 674; *Fowler v. Nixon*, 7 Heisk. (Tenn.) 725; *Moss v. Gibbs*, 10 Heisk. (Tenn.) 284; *Calloway v. Hopkins*, 11 Heisk. (Tenn.) 374; *Crutchfield v. Hammock*, 4 Humph. (Tenn.) 205.

Texas. — *Todd v. Fisher*, 26 Tex. 239.

Virginia. — *Blankenpickler v. Anderson*, 16 Gratt. (Va.) 62; *Alexander v. Greenup*, 1 Munf. (Va.) 134, 4 Am. Dec. 541; *Hambleton v. Wells*, 4 Call (Va.) 213; *Witherinton v. McDonald*, 1 Hen. & M. (Va.) 306, 3 Am. Dec. 603.

Forged Patent Held Void. — *Garretson v. Cole*, 1 Har. & J. (Md.) 370; *Boring v. Singery*, 4 Har. & M. (Md.) 398; *Boring v. Lemmon*, 5 Har. & J. (Md.) 223; *Hanrick v. Cavanaugh*, 60 Tex. 1. See also *Polk v. Windel*, 2 Overt. (Tenn.) 436; *Roach v. Boyd*, 1 Sneed (Tenn.) 137; *Woodfolk v. Nail*, 2 Sneed (Tenn.) 678; *Egnew v. Cochrane*, 2 Head (Tenn.) 336; *Fowler v. Nixon*, 7 Heisk. (Tenn.) 725.

Unsealed Grant Held Void. — *Jarrett v. Stevens*, 36 W. Va. 445.

Grants Held Void in Part. — *Danforth v. Wear*, 9 Wheat. (U. S.) 673; *Patterson v. Jenks*, 2 Pet. (U. S.) 217; *People v. Livingston*, 8 Barb. (N. Y.) 253; *People v. Mauran*, 5 Den.

(N. Y.) 389; *People v. Van Rensselaer*, 9 N. Y. 291; *Hough v. Dumas*, 4 Dev. & B. L. (20 N. Car.) 328; *Thomson v. Gaillard*, 3, Rich. L. (S. Car.) 418, 45 Am. Dec. 778. See also *M'Iver v. Ragan*, 2 Wheat. (U. S.) 25.

1. Where Title Has Never Been in Government. — *Copley v. Dinkgrave*, 25 La. Ann. 577; *Marks v. Martin*, 27 La. Ann. 528. See *Steel v. St. Louis Smelting, etc., Co.*, 106 U. S. 447; *Sabariego v. Maverick*, 124 U. S. 261.

State Lands. — *Fairfax v. Hunter*, 7 Cranch (U. S.) 604; *Sherman v. Buick*, 93 U. S. 209, reversing on other grounds 45 Cal. 656; *Baker v. Swan*, 32 Md. 355. See also *Aurrecochea v. Sinclair*, 60 Cal. 532.

2. Lands Previously Transferred from Government — United States. — *Stoddard v. Chambers*, 2 How. (U. S.) 284; *Easton v. Salisbury*, 21 How. (U. S.) 426; *Reichart v. Felps*, 6 Wall. (U. S.) 160; *Best v. Polk*, 18 Wall. (U. S.) 112; *Lake Superior Ship Canal, etc., Co. v. Cunningham*, 155 U. S. 354; *Wright v. Roseberry*, 121 U. S. 488; *Smythe v. New Orleans Canal, etc., Co.*, 141 U. S. 659, affirmed 34 Fed. Rep. 825; *Northern Pac. R. Co. v. Colburn*, 164 U. S. 383, reversing 13 Mont. 476; *Wisconsin Cent. R. Co. v. Forsythe*, 159 U. S. 46, reversing 43 Fed. Rep. 867; *Francoeur v. Newhouse*, 40 Fed. Rep. 618.

Alabama. — *Knabe v. Burden*, 88 Ala. 436.

California. — *Whitman v. Steiger*, 46 Cal. 256; *Sutton v. Fassett*, 51 Cal. 12; *Shanklin v. McNamara*, 87 Cal. 371; *McLaughlin v. Menotti*, 89 Cal. 354.

Indiana. — *Daggett v. Bonewitz*, 107 Ind. 279.

Iowa. — *Fremont County v. Burlington, etc., R. Co.*, 22 Iowa 91, affirmed 9 Wall. (U. S.) 89.

Michigan. — *Butler v. Grand Rapids, etc., R. Co.*, 85 Mich. 246, 24 Am. St. Rep. 84.

Montana. — *Mantle v. Noyes*, 5 Mont. 274, affirmed on appeal 127 U. S. 348. Compare *Moore v. Northern Pac. R. Co.*, 18 Mont. 290; *Vogel v. Northern Pac. R. Co.*, 18 Mont. 292; *Sales v. Northern Pac. R. Co.*, 18 Mont. 293.

Washington. — *Northern Pac. R. Co. v. Miller*, 20 Wash. 21.

Wisconsin. — *Dousman v. Hooe*, 3 Wis. 466.

State Lands. — *Polk v. Wendal*, 9 Cranch (U. S.) 87; *Green v. Watkins*, 7 Wheat. (U. S.) 28; *Doe v. Robertson*, 11 Wheat. (U. S.) 333; *Brown v. Huger*, 21 How. (U. S.) 305; *Rich v. Braxton*, 158 U. S. 375, affirming 47 Fed. Rep. 178; *Nelson v. Moon*, 3 McLean (U. S.) 319, 17 Fed. Cas. No. 10,111; *Walls v. M'Gee*, 4 Harr. (Del.) 108; *Clements v. Anderson*, 46 Miss. 581; *Archibald v. New York Cent., etc., Co.*, 157 N. Y. 574, affirming 1 N. Y. App. Div. 251; *Roseberry v. Hollister*, 4 Ohio St. 297; *Jones v. Snapp*, 1 Shannon Tenn. Cas. 56, Thomp. Tenn. Cas. 82.

Rule Applied in Canada. — *Millar v. Millar*, 15 L. C. Rep. 229; *Miller v. Lanty*, 1 Nova

Lands Reserved or Dedicated to Special Purpose. — So when by Act of Congress a tract of land has been reserved from homestead and pre-emption, or from sale generally, or dedicated to any special purpose, proceedings in the land department in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action at law.¹ Such, for instance, is the case where the land was reserved from sale or disposal by the land department until a claim under a Mexican or Spanish grant should be determined, the power to determine the extent and validity of this claim being conferred on tribunals other than the land department;² or where the land had been set apart as a portion of a military or other like reservation, and had thus ceased to be a part of the public domain subject to sale or other disposition by the officers of the land department.³

Absence of Statutory Provision for Disposition of Lands. — So the rule applies where no legislative provision has been made for the disposition of the land.⁴

Patent Issued under Repealed Statute. — On the same principle, if a patent on its face shows that it is issued under and in pursuance of certain Acts of Congress which were repealed prior to the application for the patent, it is void, and is liable to impeachment in a court of law.⁵

(bb) *Presumption of Validity.* — The general rule is that public lands are subject to the disposition of the land department, and a patent of the government is therefore presumptive evidence that the department had jurisdiction. If there could have been any state of facts which under the laws would have given the department jurisdiction to dispose of the lands described in the patent, the presumption is that this state of facts existed, and hence the burden of proof is on the person assailing the patent to show want of authority on the part of the land department.⁶

(cc) *Attack by Stranger.* — Where a patent is issued without authority and is therefore void and not merely voidable, it is held that even an intruder may defend his possession by showing title in the government in an action of ejectment, on the principle that in this action the plaintiff must recover on the strength of his own title and not on the weakness of the defendant's title.⁷

Scotia 161; Robinson v. Chisholm, 27 Nova Scotia 74, affirmed 24 Can. Sup. Ct. 704.

Certificate of Entry Held Invalid. — Dudley v. Gallups, 128 Ala. 236.

1. **Lands Reserved or Dedicated to Special Purpose.** — Stoddard v. Chambers, 2 How. (U. S.) 284; Barry v. Gamble, 3 How. (U. S.) 32, affirming 8 Mo. 88; Morton v. Nebraska, 21 Wall. (U. S.) 660; Burfenning v. Chicago, etc., R. Co., 163 U. S. 321; Clark v. Herington, 186 U. S. 206; Garrard v. Silver Peak Mines, 82 Fed. Rep. 578, affirmed (C. C. A.) 94 Fed. Rep. 983; Stephens v. Westwood, 20 Ala. 275, 25 Ala. 716; Wright v. Rutgers, 14 Mo. 585. See also Noble v. Union River Logging R. Co., 147 U. S. 174.

State Lands. — Hedley v. Leonard, 35 Mich. 71; Holley v. Smith, 130 N. Car. 85; Stanmire v. Powell, 13 Ired. L. (35 N. Car.) 312; Hoover v. Thomas, Phil. L. (61 N. Car.) 184; Sherwood v. Fleming, 25 Tex. Supp. 408.

Patent or Certification under Grant Excepting or Reserving Part of Lands Patented or Certified. — Weeks v. Bridgman, 159 U. S. 541; Menotti v. Dillon, 167 U. S. 703; Patterson v. Tatum, 3 Sawy. (U. S.) 164, 18 Fed. Cas. No. 10,830; Chism v. Price, 54 Ark. 251; McLaughlin v. Heid, 63 Cal. 208; Stewart v. Altstock, 22 Oregon 182.

2. **Land Reserved by Claim under Mexican or Spanish Land Grant sub Judice.** — Doolan v.

Carr, 125 U. S. 618; Carr v. Quigley, 57 Cal. 394.

3. U. S. v. Stone, 2 Wall. (U. S.) 525; Wilcox v. Jackson, 13 Pet. (U. S.) 498. See also Nicks v. Rector, 4 Ark. 251.

4. **Absence of Statutory Provision for Disposition of Lands.** — Steel v. St. Louis Smelting, etc., Co., 106 U. S. 447; Davis v. Weibbold, 139 U. S. 507; U. S. v. Winona, etc., R. Co., (C. C. A.) 67 Fed. Rep. 948.

State Lands. — Doll v. Meador, 16 Cal. 295; Rondell v. Fay, 32 Cal. 354; McCaslin v. State, 99 Ind. 440; Matthews v. Goodrich, 102 Ind. 569; State v. Portsmouth Sav. Bank, 106 Ind. 451.

5. **Patent Issued under Repealed Statute.** — Schwenke v. Union Depot, etc., Co., 7 Colo. 514.

6. **Presumption of Validity of Patent.** — Minter v. Crommelin, 18 How. (U. S.) 87, reversing 24 Ala. 347, 9 Ala. 594; King v. McAndrews, (C. C. A.) 111 Fed. Rep. 860; Collins v. Bartlett, 44 Cal. 371; Leviston v. Ryan, 75 Cal. 293; Southern Pac. R. Co. v. Purcell, 77 Cal. 69; Tregent v. Whiting, 14 Mich. 77. See also St. Louis Smelting, etc., Co. v. Kemp, 104 U. S. 636.

State Lands. — People v. Stratton, 25 Cal. 242.

7. **Collateral Attack by Stranger.** — Doolan v. Carr, 125 U. S. 618; Edwards v. Rolley, 96

(c) **Direct Attack** — *aa. SUIT BY GOVERNMENT* — (*aa*) *In General.* — A patent is the highest evidence of title, and is as a general rule conclusive as against the government and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal. In *England* this was originally done by *scire facias*,¹ but a bill in chancery was later found to be a more convenient remedy.² The government may properly proceed on equitable grounds by bill in equity to have a judicial decree of nullity and an order of cancellation of a patent, where the government has a direct interest or is under an obligation respecting the relief invoked, *i. e.*, where the patent if allowed to stand would work prejudice to the interests or rights of the government or would prevent the government from fulfilling an obligation incurred by it either to the public or an individual.³ But if it is apparent that the suit is brought for the benefit of some third person, and that the government has no pecuniary interest in the remedy sought and is under no obligation to the party who will be benefited to sustain an action for his use, an action in the name of the government cannot be sustained.⁴

(*bb*) *Patent Issued Without Authority.* — Thus a court of equity may be invoked by the government to vacate a patent issued without authority on the part of the land department, and hence inoperative and void, as for instance where the lands for which the patent was granted were reserved from sale for the use of the government or had been granted to a third person.⁵

(*cc*) *Fraud, Mistake, and Error of Law.* — Suit may be brought by the government also to annul or set aside a patent or certification under a land grant issued through an error of law,⁶ mistake or inadvertence,⁷ or through fraud and

Cal. 408, 31 Am. St. Rep. 234; *Cummings v. Powell*, 116 Mo. 473, 38 Am. St. Rep. 610. See also *Reynolds v. Iron Silver Min. Co.*, 116 U. S. 687; *Rosecrans v. Douglass*, 52 Cal. 213; *Cucamonga Fruit Co. v. Moir*, 83 Cal. 101; *Minnesota Land, etc., Co. v. Davis*, 40 Minn. 455; *Winona, etc., Land Co. v. Eblcisor*, 52 Minn. 312. *Compare Doll v. Meador*, 16 Cal. 295; *Foss v. Hinkell*, 78 Cal. 158; *Breckenridge v. Beard*, 1 A. K. Marsh. (Ky.) 64. See also the title *EJECTMENT*, vol. 10, p. 481.

1. *Scire Facias to Set Aside Patent.* — *Rex v. Eyre*, 1 Stra. 43. See also *Fonseca v. Atty.-Gen.*, 17 Can. Sup. Ct. 612; *U. S. v. Stone*, 2 Wall. (U. S.) 535; *Mowry v. Whitney*, 14 Wall. (U. S.) 434; *Moore v. Robbins*, 96 U. S. 530.

In *Georgia* it has been held that when one who has filed a caveat to an application for a head-right warrant fraudulently obtains from the state a grant to the land in controversy, and thus prevents the applicant who would otherwise be entitled thereto from receiving such a grant, the latter cannot in his own name and right, without making the state a party, maintain a proceeding by *scire facias* for the purpose of setting aside and canceling the grant so obtained. *Calhoun v. Cawley*, 104 Ga. 335. See also *Walker v. Wells*, 17 Ga. 547, 63 Am. Dec. 252; *Parker v. Hughes*, 25 Ga. 374; *Dart v. Orme*, 41 Ga. 376.

2. *Atty.-Gen. v. Vernon*, 1 Vern. 277, 370, 2 Ch. Rep. 353; *Magdalen College Case*, 11 Coke 67. See also *Field v. Seabury*, 19 How. (U. S.) 323; *U. S. v. Stone*, 2 Wall. (U. S.) 535.

3. *When Government May Sue to Annul Patent.* — *Hughes v. U. S.*, 4 Wall. (U. S.) 232; *Mullan v. U. S.*, 118 U. S. 271, *affirming* 7 Sawy. (U. S.) 466; *U. S. v. San Jacinto Tin Co.*, 125 U. S.

273; *U. S. v. Beebe*, 127 U. S. 338; *U. S. v. Missouri, etc., R. Co.*, 141 U. S. 358, *reversing* 37 Fed. Rep. 68; *San Pedro, etc., Co. v. U. S.*, 146 U. S. 120; *Germania Iron Co. v. U. S.*, 165 U. S. 379; *U. S. v. Oregon, etc., R. Co.*, 101 Fed. Rep. 316, *affirmed* (C. C. A.) 109 Fed. Rep. 514.

State Lands. — *People v. Stratton*, 25 Cal. 244; *State v. Bland*, 123 N. Car. 739; *Atty.-Gen. v. Grantees*, 4 Dall. (Pa.) 237, 3 Cranch (U. S.) 45; *State v. Rhomberg*, 69 Tex. 212; *Musselman v. Strohl*, 83 Tex. 473. See also *People v. Jackson*, 62 Cal. 548; *Calhoun v. Cawley*, 104 Ga. 335.

4. *U. S. v. San Jacinto Tin Co.*, 125 U. S. 273. See also *U. S. v. Minor*, 114 U. S. 233, *reversing* 10 Sawy. (U. S.) 155, 26 Fed. Rep. 672; *U. S. v. Des Moines Valley R. Co.*, 70 Fed. Rep. 435, *affirmed* (C. C. A.) 84 Fed. Rep. 40; *U. S. v. Chicago, etc., R. Co.*, (C. C. A.) 116 Fed. Rep. 969.

5. *Patent Issued Without Authority.* — *U. S. v. Stone*, 2 Wall. (U. S.) 525; *Mullan v. U. S.*, 118 U. S. 271, *affirming* 7 Sawy. (U. S.) 466; *U. S. v. Tichenor*, 12 Fed. Rep. 415, 8 Sawy. (U. S.) 142; *U. S. v. Coos Bay Wagon-Road Co.*, 89 Fed. Rep. 151; *U. S. v. Leavenworth, etc., R. Co.*, 1 McCrary (U. S.) 610, 26 Fed. Cas. No. 15,582, *affirmed* 92 U. S. 735. See also *Hughes v. U. S.*, 4 Wall. (U. S.) 232.

Patent to State Lands. — *Day Land, etc., Co. v. State*, 68 Tex. 526. See also *Singery v. Atty.-Gen.*, 2 Har. & J. (Md.) 487.

6. *Patent Issued through Error of Law.* — *Kansas City, etc., R. Co. v. Atty.-Gen.*, 118 U. S. 682. See *U. S. v. Marshall Silver Min. Co.*, 129 U. S. 579.

7. *Patent Issued through Mistake or Inadvertence.* — *Williams v. U. S.*, 138 U. S. 514, *affirming* 30 Fed. Rep. 309; *U. S. v. Missouri, etc.,*

imposition practiced upon the department and affecting its decision,¹ or through the fraudulent action of the department itself.² But in view of the solemnity of a patent emanating from the government and the presumption that all the preceding steps required by law have been observed before its issue, to justify a cancellation the burden of proof is on the government to establish the fraud, mistake, or error of law by clear, unequivocal, and convincing testimony; it cannot be canceled upon a bare preponderance of evidence which leaves the issue in doubt.³ Particularly is this so where the money which had been paid may be forfeited and there would exist no equitable claim upon the government for its subsequent repayment.⁴

Under Statute in Canada a patent issued through "fraud or in error or improvidence" may be annulled at the suit of the crown,⁵ the burden being upon the crown to establish the fraud, error, or improvidence by clear and convincing proof.⁶

bb. SUIT BY PRIVATE INDIVIDUAL — (aa) In General — Bill to Declare Patentee Trustee.—

If for any reason recognized in courts of equity as a ground of interference in such cases the legal title has passed from the government to one person when in equity and good conscience and by the laws which Congress has made on the subject it ought to go to another, a court of equity will consider him as a trustee for the true owner and compel him to convey the legal title.⁷ The

R. Co., 141 U. S. 358; Germania Iron Co. v. U. S., 165 U. S. 379 [*distinguishing* U. S. v. Central Pac. R. Co., 26 Fed. Rep. 479]; U. S. v. Reed, 53 Fed. Rep. 405; U. S. v. Hendy, 54 Fed. Rep. 447; U. S. v. Central Pac. R. Co., 84 Fed. Rep. 218.

1. Patent Obtained by Fraud or Imposition.— U. S. v. Minor, 114 U. S. 233, *reversing* 10 Sawy. (U. S.) 155, and *distinguishing* U. S. v. Throckmorton, 98 U. S. 65, and Vance v. Burbank, 101 U. S. 514; Colorado Coal, etc., Co. v. U. S., 123 U. S. 307; U. S. v. San Jacinto Tin Co., 125 U. S. 273, *affirming* 23 Fed. Rep. 279; U. S. v. White, 9 Sawy. (U. S.) 125, 17 Fed. Rep. 561; U. S. v. Beebe, 127 U. S. 338, *affirming* 17 Fed. Rep. 36; U. S. v. Iron Silver Min. Co., 128 U. S. 673, *affirming* 24 Fed. Rep. 568, 16 Fed. Rep. 810; San Pedro, etc., Co. v. U. S., 146 U. S. 120; U. S. v. Southern Colorado Coal, etc., Co., 18 Fed. Rep. 273, 5 McCrary (U. S.) 563; U. S. v. Pratt Coal, etc., Co., 18 Fed. Rep. 708; U. S. v. Rose, 24 Fed. Rep. 196. *Compare* U. S. v. Reed, 28 Fed. Rep. 482.

State Lands.—Dulany v. Jennings, 1 Har. & M. (Md.) 92; Smith v. State, 2 Har. & M. (Md.) 244; Atty.-Gen. v. Snowden, 1 Har. & J. (Md.) 332; Singery v. Atty.-Gen., 2 Har. & J. (Md.) 487; State v. Bevers, 86 N. Car. 588; Lewis v. Billips, 1 Leigh (Va.) 353; White v. Jones, 1 Wash. (Va.) 116; Lyne v. Jackson, 1 Rand. (Va.) 114. See also *People v. Swift*, 96 Cal. 165; *People v. Clarke*, 10 Barb. (N. Y.) 120.

2. Patent Issued through Fraud of Land Officials.—Moffat v. U. S., 112 U. S. 24.

3. Clear Proof of Fraud, etc., Essential.—Kansas City, etc., R. Co. v. Atty.-Gen., 118 U. S. 682, *reversing* 25 Fed. Rep. 243; Maxwell Land-Grant Case, 121 U. S. 325; Colorado Coal, etc., Co. v. U. S., 123 U. S. 307, *reversing* 18 Fed. Rep. 273; U. S. v. San Jacinto Tin Co., 125 U. S. 273, *affirming* 23 Fed. Rep. 279; U. S. v. Iron Silver Min. Co., 128 U. S. 673, *affirming* 24 Fed. Rep. 568; U. S. v. Marshall Silver Min. Co., 129 U. S. 579; U. S. v. Hancock, 133 U. S. 193, *affirming* 30 Fed. Rep. 851; U. S. v. Des Moines

Nav., etc., Co., 142 U. S. 510, *affirming* 43 Fed. Rep. 1; U. S. v. Budd, 144 U. S. 154, *affirming* 43 Fed. Rep. 638; U. S. v. Meeker, 50 Fed. Rep. 146; U. S. v. Central Pac. R. Co., 93 Fed. Rep. 871; U. S. v. Edwards, 33 Fed. Rep. 104.

4. U. S. v. Budd, 144 U. S. 154.

5. Rule under Statute in Canada.—Fonseca v. Atty.-Gen., 17 Can. Sup. Ct. 612, *reversing* 5 Manitoba 173; Atty.-Gen. v. Garbutt, 5 Grant Ch. (U. C.) 181; Atty.-Gen. v. Garbutt, 5 Grant Ch. (U. C.) 383, Esten, V. C., *dissenting*; Atty.-Gen. v. McNulty, 8 Grant Ch. (U. C.) 324, 11 Grant Ch. (U. C.) 281; Atty.-Gen. v. Hill, 8 Grant Ch. (U. C.) 532; Atty.-Gen. v. Contois, 25 Grant Ch. (U. C.) 346; Saugeen v. Church Soc., 6 Grant Ch. (U. C.) 538.

6. Fonseca v. Atty.-Gen., 17 Can. Sup. Ct. 612, *reversing* 5 Manitoba 173; Atty.-Gen. v. Garbutt, 5 Grant Ch. (U. C.) 181; McIntyre v. Atty.-Gen., 14 Grant Ch. (U. C.) 86.

7. Bill to Declare Patentee Trustee.—United States.—Bogan v. Edinburgh American Land Mortg. Co., 27 U. S. App. 346, 63 Fed. Rep. 195; *Comegys v. Vasse*, 1 Pet. (U. S.) 193; *Cunningham v. Ashley*, 14 How. (U. S.) 377; *Barnard v. Ashley*, 18 How. (U. S.) 43; *Garland v. Wynn*, 20 How. (U. S.) 6; *Lytle v. Arkansas*, 22 How. (U. S.) 193; *Lindsey v. Hawes*, 2 Black (U. S.) 562; *Stark v. Starrs*, 6 Wall. (U. S.) 402, *reversing* on other grounds 2 Oregon 118; *Silver v. Ladd*, 7 Wall. (U. S.) 228; *Johnson v. Towsley*, 13 Wall. (U. S.) 85, 2 Neb. 484, *affirming* 1 Neb. 95; *Samson v. Smiley*, 13 Wall. (U. S.) 91, *affirming* 1 Neb. 56; *Warren v. Van Brunt*, 19 Wall. (U. S.) 646, *affirming* 12 Minn. 70; *Shepley v. Cowan*, 91 U. S. 330; *Moore v. Robbins*, 96 U. S. 538; *Marquez v. Frisbie*, 101 U. S. 473; *Vance v. Burbank*, 101 U. S. 514; *Quinby v. Conlan*, 104 U. S. 420; *Rector v. Gibbon*, 111 U. S. 276; *Moffat v. U. S.*, 112 U. S. 24; *Aurrecochea v. Sinclair*, 114 U. S. 387, *affirming* 60 Cal. 532; *Lee v. Johnson*, 116 U. S. 48; *Mullan v. U. S.*, 118 U. S. 279; *Craig v. Leitensdorfer*, 123 U. S. 212; *Bernier v. Bernier*, 147 U. S. 242; *Turner v. Sawyer*, 150 U. S. 578; *Puget Mill Co. v.*

relief given in this class of cases does not proceed upon the ground of annulling or setting aside the patent wrongfully issued. That would leave the title in the United States, and the plaintiff might be as far from obtaining justice as before. The relief granted is founded on the theory that the title which has passed from the United States to the defendant inured in equity to the benefit of the plaintiff; and a court of chancery gives effect to this equity.¹

Bill to Quiet Title. — So it has been held that the aggrieved party may in a proper case proceed against the patentee by a bill to quiet title and to remove what would otherwise be a cloud upon his own title.² Thus, where a grant has been made by an act of Congress, but a patent has not been issued to the grantee so as to give him the strict legal title, a patent subsequently issued to a third person for the same land creates a cloud on the title of the grantee under such act of Congress, and equity will give him relief by declaring the invalidity of the title under the patent and enjoining the patentee from asserting any claim to the land.³

State Lands. — Numerous cases are to be found in the courts of the different states under the practice prevailing in those states and in the federal courts, following the practice of the state courts, where, by proceedings in equity, a junior patent of state lands has been established as the title as against an elder patent, by an inquiry into the priority of location or entry or some other equitable matter, or the holder of the patent has been compelled to convey in whole or in part to a person whose claim rested on an entry or some other equitable matter anterior to the issuing of the patent.⁴

Brown, (C. C. A.) 59 Fed. Rep. 37, *affirming* 54 Fed. Rep. 987; *James v. Germania Iron Co.*, (C. C. A.) 107 Fed. Rep. 597, *affirming sub nom.* *Germania Iron Co. v. Craig*, 98 Fed. Rep. 23; *Hot Springs Cases*, 10 Ct. Cl. 289, *affirmed* 92 U. S. 698. See also *In re Emblen*, 161 U. S. 52.

California. — *Rutledge v. Murphy*, 51 Cal. 388; *Buckley v. Howe*, 86 Cal. 596; *Chapman v. Quinn*, 56 Cal. 266; *Wormouth v. Gardner*, 112 Cal. 510.

Colorado. — *Bassick Min. Co. v. Davis*, 11 Colo. 130.

Minnesota. — *Winona, etc., R. Co. v. St. Paul, etc.*, R. Co., 26 Minn. 179.

Mississippi. — *Stark v. Mather, Walk.* (Miss.) 181, 12 Am. Dec. 553.

Oklahoma. — *Twine v. Carey*, 2 Okla. 249.

Oregon. — *White v. Allen*, 3 Oregon 103.

Washington. — *Shockley v. Brown*, 1 Wash. Ter. 463.

Canada. — For decisions in Canada on this question, see *Martyn v. Kennedy*, 4 Grant Ch. (U. C.) 61; *Simpson v. Grant*, 5 Grant Ch. (U. C.) 267; *Dougall v. Lang*, 5 Grant Ch. (U. C.) 292; *Lawrence v. Pomeroy*, 9 Grant Ch. (U. C.) 474; *Stevens v. Cook*, 10 Grant Ch. (U. C.) 410; *Barnes v. Boomer*, 10 Grant Ch. (U. C.) 532; *Bull v. Frank*, 12 Grant Ch. (U. C.) 80; *Mahon v. McLean*, 13 Grant Ch. (U. C.) 361; *McIntyre v. Atty.-Gen.*, 14 Grant Ch. (U. C.) 86; *Kennedy v. Lawlor*, 14 Grant Ch. (U. C.) 224; *Cosgrove v. Corbett*, 14 Grant Ch. (U. C.) 617; *Brouse v. Cram*, 14 Grant Ch. (U. C.) 677; *Boulton v. Jeffrey*, 1 U. C. Err. & App. 111, 2 U. C. Jur. 702; *Sturton v. Lessard*, 1 Quebec Super. Ct. 121; *Pride v. Rodger*, 27 Ont. 320; *Farmer v. Livingstone*, 8 Can. Sup. Ct. 140.

1. *Silver v. Ladd*, 7 Wall. (U. S.) 219.

2. **Bill to Quiet Title.** — *Duluth, etc., R. Co. v. Roy*, 173 U. S. 587; *Peabody Gold Min. Co. v. Gold Hill Min. Co.*, 106 Fed. Rep. 242. See

also *McNee v. Donahue*, 76 Cal. 499, *affirmed* 142 U. S. 587. And see generally the title *CLOUD ON TITLE*, vol. 6, p. 149.

State Lands. — *Pioneer Land Co. v. Maddux*, 109 Cal. 633, 50 Am. St. Rep. 67; *McKinnie v. Shaffer*, 74 Cal. 514.

3. *Van Wyck v. Knevals*, 106 U. S. 360, *affirming sub nom.* *Knevals v. Hyde*, 5 Dill. (U. S.) 469, 6 Fed. Rep. 651.

4. **Equitable Relief Against Patentee of State Lands.** — *United States.* — *M'Arthur v. Browder*, 4 Wheat. (U. S.) 489; *Stephens v. M'Cargo*, 9 Wheat. (U. S.) 502; *Bodley v. Taylor*, 5 Cranch (U. S.) 191; *Taylor v. Brown*, 5 Cranch (U. S.) 234; *Finley v. Williams*, 9 Cranch (U. S.) 165; *Monroe Cattle Co. v. Becker*, 147 U. S. 47. See also *Johnson v. Towsley*, 13 Wall. (U. S.) 72, 2 Neb. 484, *affirming* 1 Neb. 95.

Kentucky. — *Gray v. Gray*, 2 B. Mon. (Ky.) 201.

Minnesota. — *Winona, etc., R. Co. v. St. Paul, etc.*, R. Co., 26 Minn. 179.

Ohio. — *Parker v. Wallace*, 3 Ohio 490; *Wallace v. Patten*, 14 Ohio 272.

Pennsylvania. — *Urket v. Coryell*, 5 W. & S. (Pa.) 60; *MacLay v. Work*, 5 Binn. (Pa.) 154; *Gonzalus v. Hoover*, 6 S. & R. (Pa.) 118; *Woods v. Wilson*, 37 Pa. St. 379.

Texas. — *Sherwood v. Fleming*, 25 Tex. Supp. 408; *Wyllie v. Wynne*, 26 Tex. 42; *Todd v. Fisher*, 26 Tex. 239; *Mitchell v. Bass*, 26 Tex. 376; *Wright v. Hawkins*, 28 Tex. 452; *Johnson v. Eldridge*, 49 Tex. 507; *League v. Rogan*, 59 Tex. 427.

Equitable Claim to Be Clearly Established. — *Finley v. Williams*, 9 Cranch (U. S.) 164; *Garnett v. Jenkins*, 8 Pet. (U. S.) 76; *Davis v. Bryant*, 2 Bibb (Ky.) 110; *Steel v. M'Dowell*, 2 Bibb (Ky.) 123; *Estill v. Patrick*, 4 T. B. Mon. (Ky.) 306; *Clements v. Eggleston*, 2 Tex. Unrep. Cas. 483; *O'Neal v. Lockhart*, 2 Tex.

(bb) *Error or Misconstruction of Law.* — Where a patent is issued by a mistake or misconstruction of the law to a person not entitled to it he will be declared to be a trustee of the rightful owner and compelled in equity to convey the title to the latter.¹

Clear and Definite Mistake of Law to Be Shown. — Where, however, there is a mixed question of law and fact, and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the land department to which the law has confided the matter is conclusive. But if it can be made entirely plain to a court of equity that on facts about which there is no dispute, or no reasonable doubt, those officers have, by a mistake of the law, deprived a man of his right, it will give relief.²

(cc) *Fraud.* — So where fraud or imposition necessarily affecting the judgment of the department has been practiced by the patentee, a court of equity has jurisdiction to compel him to transfer the property to a plaintiff to whom but for such fraud the patent would have been awarded.³ Thus, where the register or receiver of public land has been imposed upon by *ex parte* affidavits and the patent has been obtained by one having no interest secured to him in virtue of the pre-emption laws, to the destruction of another's right who had a preference of entry which he put forward and exerted in due form, but which right was defeated by false swearing and fraudulent contrivance brought about by him to whom the patent was awarded, a court of equity will grant

Unrep. Cas. 597; *Rutherford v. French*, 2 Tex. Unrep. Cas. 724; *Gullett v. O'Connor*, 54 Tex. 408; *Hagan v. Warden*, 3 Gratt. (Va.) 301.

Under statute in *North Carolina* it has been held that a grant can be set aside only at the suit of the state or of a prior grantee. *Crow v. Holland*, 4 Dev. L. (15 N. Car.) 417; *Featherstone v. Mills*, 4 Dev. L. (15 N. Car.) 596; *Dugger v. McKesson*, 100 N. Car. 1; *Carter v. White*, 101 N. Car. 33; *Henry v. McCoy*, 131 N. Car. 586.

1. Error or Misconstruction of Law — United States. — *Barnard v. Ashley*, 18 How. (U. S.) 43; *Minnesota v. Bachelder*, 1 Wall. (U. S.) 109; *Johnson v. Towsley*, 13 Wall. (U. S.) 72; *Shepley v. Cowan*, 91 U. S. 330; *Moore v. Robbins*, 96 U. S. 530; *Quinby v. Conlan*, 104 U. S. 420; *St. Louis Smelting, etc., Co. v. Kemp*, 104 U. S. 636; *Rector v. Gibbon*, 111 U. S. 276; *Bernier v. Bernier*, 147 U. S. 242; *Southern Pac. R. Co. v. Wiggs*, 43 Fed. Rep. 333, 14 Sawy. (U. S.) 568, *appeal dismissed* without opinion 159 U. S. 269; *James v. Germania Iron Co.*, (C. C. A.) 107 Fed. Rep. 597, *affirming sub nom.* *Germania Iron Co. v. Craig*, 98 Fed. Rep. 23; *Manley v. Tow*, 110 Fed. Rep. 241; *Lownsdale v. Portland*, *Deady* (U. S.) 1; *Langdon v. Joy*, 4 Dill. (U. S.) 391, 14 Fed. Cas. No. 8,062. See also *Curtner v. U. S.*, 149 U. S. 662, *reversing* 38 Fed. Rep. 1, 26 Fed. Rep. 296.

Arkansas. — *Branch v. Mitchell*, 24 Ark. 431. *California.* — *Wormouth v. Gardner*, 112 Cal. 506; *Gage v. Gunther*, 136 Cal. 338.

Kansas. — *Emslie v. Young*, 24 Kan. 732. *Nevada.* — *Rose v. Richmond Min. Co.*, 17 Nev. 25.

Oklahoma. — *Smith v. Townsend*, 1 Okla. 117, *affirmed* 148 U. S. 490; *Thornton v. Peery*, 7 Okla. 441.

Oregon. — *White v. Allen*, 3 Oregon 103. *Wisconsin.* — *McCord v. Hill*, 111 Wis. 499. **State Lands.** — *Winona, etc., R. Co. v. St. Paul, etc., R. Co.*, 26 Minn. 179; *Barnett v. Woods*, 5 Jones Eq. (58 N. Car.) 428.

2. Clear Mistake of Law Essential. — *Marquez v. Frisbie*, 101 U. S. 476; *Wright v. Roseberry*, 121 U. S. 488, *reversing* 63 Cal. 252; *Tubbs v. Wilhoit*, 138 U. S. 134, *affirming* 83 Cal. 279, 73 Cal. 61; *Moss v. Dowman*, (C. C. A.) 88 Fed. Rep. 181, *affirming* 82 Fed. Rep. 810, *affirmed* 176 U. S. 413.

3. Patent Obtained through Fraud — United States. — *Lytle v. Arkansas*, 22 How. (U. S.) 193; *Sanford v. Sanford*, 139 U. S. 642, *affirming* 19 Oregon 3.

California. — *Dolhequy v. Tabor*, 22 Cal. 279; *Bird v. Wilcox*, 45 Cal. 686; *Burrell v. Haw*, 48 Cal. 222; *Hollinshead v. Simms*, 51 Cal. 158; *Plummer v. Brown*, 70 Cal. 544; *Buckley v. Howe*, 86 Cal. 596; *Mery v. Brodt*, 121 Cal. 332.

Illinois. — *Rogers v. Brent*, 10 Ill. 573, 50 Am. Dec. 422.

Iowa. — *Arnold v. Grimes*, 2 Iowa 1; *Bisson v. Curry*, 35 Iowa 72; *Farber v. Levi*, *Morr.* (Iowa) 372.

Louisiana. — *Davis v. Fletcher*, 11 La. Ann. 506; *Knox v. Pulliam*, 14 La. Ann. 123; *Cannon v. White*, 16 La. Ann. 85; *Kittridge v. Breaud*, 4 Rob. (La.) 79, 39 Am. Dec. 512.

Minnesota. — *Corbett v. Wood*, 32 Minn. 509.

Missouri. — *Wright v. Rutgers*, 14 Mo. 585; *Carman v. Johnson*, 29 Mo. 84.

State Lands. — *Dunlap v. Stetson*, 4 Mason (U. S.) 349, 8 Fed. Cas. No. 4,164, decided under *Massachusetts* laws; *Chism v. Price*, 54 Ark. 251; *Hoye v. Johnston*, 2 Gill (Md.) 291; *Seward v. Hicks*, 1 Har. & M. (Md.) 22; *Wilson v. Shiveley*, 11 Oregon 215; *Olney v. Moore*, 13 Oregon 238; *Drinkard v. Barnett*, 16 Tex. Civ. App. 550; *Kohlhass v. Linney*, 26 Tex. 332. Compare *Henry v. McCoy*, 131 N. Car. 586.

Clear Case of Fraud Necessary. — *James v. Germania Iron Co.*, (C. C. A.) 107 Fed. Rep. 600; *Burrell v. Haw*, 48 Cal. 222; *Atkins v. Faulkner*, 11 Iowa 326; *Empey v. Plugert*, 64 Wis. 603.

relief,¹ and its jurisdiction will not be ousted by the regulations of the commissioner of the general land office whereby a party may be held to prove his better claim to enter.² So if one takes title in his own name while acting as agent, trustee, or guardian or in any other fiduciary capacity, a court of equity will, upon a showing of the fact in an appropriate proceeding, subject the lands to proper trusts in his hands or compel him to transfer the title to the party equitably entitled to it.³ Thus, where a tenant in common proceeds surreptitiously to acquire a patent to himself alone in disregard of the rights of his cotenants, the patent inures to the benefit of all, and a bill in equity will lie to enforce the trust.⁴

Character of Fraud Required. — It is not enough that fraud and imposition have been practiced upon the department or that false testimony or fraudulent documents have been presented; the fraud and imposition must be such as have prevented the unsuccessful party from fully presenting his case, or the officers of the department from fully considering it; such as have imposed upon its jurisdiction or turned its attention from the real controversy. It must also appear that but for such imposition and fraud the determination would have been in favor of the plaintiff and would have entitled him to the patent for the land in dispute.⁵

Fraud of Officers. — When, however, the officers themselves have been guilty of fraudulent conduct and as a result a patent has issued to the wrong party relief may be had at the suit of the rightful claimant.⁶

(*dd*) **Mistake or Inadvertence.** — So where a patent has been issued by inadvertence or mistake a court of equity may grant relief at the suit of the rightful owner either by compelling a conveyance to him or by quieting his title against the patentee and enjoining the latter from asserting title.⁷

(*ee*) **Newly Discovered Evidence.** — It has been intimated by the Supreme Court of the United States that in proper cases the courts may furnish relief to a party where new evidence is discovered which, if possessed and presented at the time, would have changed the action of the land officers.⁸

(*ff*) **Want of Jurisdiction.** — It has been held that a trust cannot be founded upon a void patent from the state, and that equity will not declare a patentee to be a trustee and compel him to make a conveyance on the ground that the patent was issued without authority on the part of the land department.⁹ A suit in equity to restrain an action at law instituted by the patentee cannot be sustained on the ground that the patent was issued without authority for

1. *Garland v. Wynn*, 20 How. (U. S.) 6, affirming 16 Ark. 440; *Lytle v. Arkansas*, 22 How. (U. S.) 193, affirming 17 Ark. 608; *Minnesota v. Bachelder*, 1 Wall. (U. S.) 109, reversing 5 Minn. 223, 80 Am. Dec. 410. See also *Turner v. Sawyer*, 150 U. S. 578.

2. *Garland v. Wynn*, 20 How. (U. S.) 6; *Turner v. Sawyer*, 150 U. S. 578.

3. *Irvine v. Marshall*, 20 How. (U. S.) 558; *Sanford v. Sanford*, 139 U. S. 642, affirming 19 Oregon 3; *Chesser v. De Prater*, 20 Fla. 691; *Stephenson v. Smith*, 7 Mo. 610.

4. *Turner v. Sawyer*, 150 U. S. 578.

5. **Character of Fraud Required.** — *Vance v. Burbank*, 101 U. S. 514; *Sanford v. Sanford*, 139 U. S. 642, affirming 19 Oregon 3; *Lee v. Johnson*, 116 U. S. 48, reversing on other grounds 47 Mich. 52; *Durango Land, etc., Co. v. Evans*, (C. C. A.) 80 Fed. Rep. 425; *Thornton v. Peery*, 7 Okla. 441; *Empey v. Plugert*, 64 Wis. 603.

Where Question of Fraud Was Passed upon. — *Wiseman v. Eastman*, 21 Wash. 163; *McCord v. Hill*, (Wis. 1903) 94 N. W. Rep. 65.

6. **Patent Obtained through Fraud of Officials.** — *Stimson Land Co. v. Hollister*, 75 Fed. Rep. 941. See also *Durango Land, etc., Co. v. Evans*, (C. C. A.) 80 Fed. Rep. 425; *Gonzales v. French*, 164 U. S. 338.

Admissibility of Record of Proceedings in Land Office. — Where the plaintiff endeavors by bill in equity to invalidate a patent by charging misconduct on the part of the land office officials, a complete record of their proceedings is relevant and admissible on their behalf. *Carr v. Fife*, 156 U. S. 494.

7. **Patent Issued through Mistake or Inadvertence.** — *Cornelius v. Kessel*, 128 U. S. 456; *Duluth, etc., R. Co. v. Roy*, 173 U. S. 587; *U. S. v. Chapman*, 5 Sawy. (U. S.) 528; *Hess v. Bolinger*, 48 Cal. 349; *Brygger v. Schweitzer*, 5 Wash. 564. See also *Bernier v. Bernier*, 147 U. S. 242; *Wilson v. Byers*, 77 Ill. 76.

8. *Shepley v. Cowan*, 91 U. S. 330, reversing 52 Mo. 559. Compare *U. S. v. Marshall Silver Min. Co.*, 129 U. S. 579.

9. *Peabody v. Prince*, 78 Cal. 511.

lands which under the acts of Congress were not open to selection, since this defense could be set up in the action at law.¹ So, for the same reason, it has been held that a person claiming the legal title to public lands cannot invoke a court of equity to declare him the true owner and put him in the possession of the lands on the ground that the action of the land department in declaring in favor of the validity of certain adverse grants was unauthorized and void.²

(gg) *Who Entitled to Relief.* — The validity of a patent and the correctness of the decision under which it was issued are not, as a general rule, open to contest in equity by a mere intruder or volunteer without title, either legal or equitable.³ The mere cancellation of the patent, with the reversion of the land to the government, is not within the province of a private party to effect by a suit in equity.⁴ Accordingly, a patent or certification under a granting act equivalent to a patent cannot be attacked in equity by a person having no equitable rights by acts done anterior to its issuance;⁵ and this whether the patent or certification is voidable only, at the election of the government, or void, at least when subsequent acts on which he relies were done with knowledge of the claims of the holder of the patent or certificate and without the sanction of the land department.⁶ And even where the party seeking relief against a patent of the government claims under an alleged equitable right which had been initiated before the issuance of the patent, or anterior to the proceedings which culminated in its issuance, he must, to entitle him to such relief, show a better right to the land than the patentee. It is not sufficient to show that the patentee ought not to have received the patent; it

1. *Deweese v. Reinhard*, 165 U. S. 386.

2. *Smyth v. New Orleans Canal, etc., Co.*, 34 Fed. Rep. 825, affirmed 141 U. S. 656.

3. *Mere Intruder Not Entitled to Sue* — *United States*. — *Field v. Seabury*, 19 How. (U. S.) 324; *Hamblin v. Western Land Co.*, 147 U. S. 531, affirming 79 Iowa 539; *Niles v. Cedar Point Club*, 175 U. S. 300; *Carter v. Thompson*, 65 Fed. Rep. 329; *Mullen v. Wine*, 26 Fed. Rep. 206, appeal dismissed without opinion 136 U. S. 654; *Dodge v. Perez*, 2 Sawy. (U. S.) 645, 7 Fed. Cas. No. 3,953; *Madison, etc., R. Co. v. Wisconsin*, 16 Fed. Cas. No. 8,938; *Patterson v. Tatum*, 3 Sawy. (U. S.) 164, 18 Fed. Cas. No. 10,830; *Southern Pac. R. Co. v. Orton*, 32 Fed. Rep. 457, 6 Sawy. (U. S.) 157.

California. — *Mahoney v. Winkle*, 33 Cal. 448; *Thompson v. Doaksum*, 68 Cal. 593.

Kansas. — *Burnham v. Starkey*, 41 Kan. 604; *Janes v. Wilkinson*, 2 Kan. App. 361.

Louisiana. — *Bry v. Fouché*, 11 La. Ann. 665; *Ford v. Morancy*, 14 La. Ann. 77; *Leblanc v. Ludrique*, 14 La. Ann. 785; *Mumford v. McKinney*, 21 La. Ann. 547; *Copley v. Dinkgrave*, 27 La. Ann. 601.

Michigan. — *Clark v. Hall*, 19 Mich. 356; *Ives v. Ely*, 57 Mich. 569.

Minnesota. — *Minnesota Land, etc., Co. v. Davis*, 40 Minn. 455; *Dawson v. Mayall*, 45 Minn. 408; *Winona, etc., Land Co. v. Ebliscior*, 52 Minn. 312.

Mississippi. — *Ross v. Barland, Walk.* (Miss.) 489, affirmed 1 Pet. (U. S.) 656.

Missouri. — *Hunter v. Hemphill*, 6 Mo. 106.

Ohio. — *Martin v. Boon*, 2 Ohio 237.

Oregon. — *Lee v. Summers*, 2 Oregon 260.

Canada. — *Hall v. Reg.*, 7 British Columbia 89, affirmed 7 British Columbia 480.

Patent for State Lands. — *Cooper v. Roberts*, 18 How. (U. S.) 173; *Spencer v. Lapsley*, 20 How. (U. S.) 264.

4. *Northern Pac. R. Co. v. Cannon*, 7 U. S.

App. 507; *Scott v. Lockey Invest. Co.*, 60 Fed. Rep. 34; *Peabody Gold Min. Co. v. Gold Hill Min. Co.*, 106 Fed. Rep. 241.

5. *Equity Anterior to Patent Essential*. — *Beard v. Federy*, 3 Wall. (U. S.) 478; *Carter v. Thompson*, 65 Fed. Rep. 329; *Peabody Gold Min. Co. v. Gold Hill Min. Co.*, 106 Fed. Rep. 241; *Moore v. Wilkinson*, 13 Cal. 478; *Wilkinson v. Merrill*, 52 Cal. 424; *Southern Pac. R. Co. v. Wood*, 124 Cal. 475; *Mumford v. McKinney*, 21 La. Ann. 548; *Board of Education v. Mansfield*, (S. Dak. 1903) 95 N. W. Rep. 286. See also *Bear v. Luse*, 6 Sawy. (U. S.) 148, 2 Fed. Cas. No. 1,179; *Houck v. Kelsey*, 17 Kan. 333; *White v. Allen*, 3 Oregon 113.

State Lands. — *Woodruff v. Core*, 23 Ark. 341; *McIvor v. Williams*, 24 Ark. 33; *Paty v. Harrell*, 24 Ark. 40; *Schaer v. Gliston*, 24 Ark. 137; *Holland v. Moon*, 39 Ark. 120; *Dawson v. Parham*, 55 Ark. 286; *Peabody v. Prince*, 78 Cal. 511; *Dodson v. Cocke*, 1 Overt. (Tenn.) 314, 3 Am. Dec. 757; *State v. Nashville University*, 4 Humph. (Tenn.) 168; *Webb v. Haley*, 7 Baxt. (Tenn.) 605.

Entry on State Lands After Issuance of Patent Insufficient. — *Hoofnagle v. Anderson*, 7 Wheat. (U. S.) 212.

Rule Applied in Canada. — *Farmer v. Livingstone*, 8 Can. Sup. Ct. 140. In *Mutchmore v. Davis*, 14 Grant Ch. (U. C.) 346, it was held that a bill by a private individual impeaching a patent for fraud or error must show that the plaintiff's interest arose before the impeached patent issued, and that this rule applies whether he claims under another patent for the same land or under a contract to purchase.

6. *Deweese v. Reinhard*, 165 U. S. 386, affirming 61 Fed. Rep. 777. See also *Cragin v. Powell*, 128 U. S. 692; *Branch v. Mitchell*, 24 Ark. 431; *Driver v. Evans*, 47 Ark. 297.

State Lands. — *Bourne v. Ragan*, 96 Iowa 566.

must affirmatively appear that the claimant, by prosecuting his claim with diligence and by taking the proper steps by way of appeal or otherwise, was entitled to it, and that in consequence of fraud, misconstruction of the law, or mistake and inadvertence, it was denied him by the land department.¹ This principle, however, has been held to mean only that the claimant against the patent must so far bring himself within the laws as to entitle him, if not obstructed or prevented by the wrongful action of the land department, to complete his claim, and does not mean that at the moment of time the patent issued it should have been awarded to him. If the claimant uses due diligence and offers to do all the law requires him to do in order to entitle him to a patent or certification under a land grant, his rights will be protected.²

(hh) *Correcting Surveys.*—While it is within the province of a court of equity to correct government surveys made through fraud or mistake,³ before such correction can be made a mistake or fraud must be shown by clear and convincing testimony.⁴

cc. *RETURN OF PURCHASE MONEY.*—In a suit by the United States to set aside a patent issued by the land department without authority, it has been held that the defendants were not entitled to a decree for the return of the purchase money, and for costs, where the invalidity of the patent was not apparent on its face, but was proved by extrinsic evidence, and the controversy respecting the title was not abandoned by the defendants.⁵ So a defendant in a suit in equity by the government is not entitled to a return of his purchase money upon the cancellation of a patent illegally and fraudulently obtained from the government for his benefit in the name of another.⁶

Statutory Forfeiture of Purchase Money for False Oath.—Under Rev. Stat. U. S., § 2262, expressly providing that a person claiming the benefit of the chapter on pre-emptions shall, if he makes a false oath in reference to certain specified matters, forfeit any money he may have paid for the land, the government is not bound to offer, in a bill to vacate a patent on account of the fraud, to return the purchase money.⁷ And the same rule has been applied in a suit

1. *Plaintiff Must Show Himself Entitled to Patent*—*United States.*—*Stark v. Starrs*, 6 Wall. (U. S.) 402; *Bohall v. Dilla*, 114 U. S. 47; *Sparks v. Pierce*, 115 U. S. 408; *Lee v. Johnson*, 116 U. S. 48; *Gonzales v. French*, 164 U. S. 338, *affirming* (Ariz. 1893) 33 Pac. Rep. 501; *Aiken v. Ferry*, 6 Sawy. (U. S.) 79, 1 Fed. Cas. No. 112; *Osborne v. Altschul*, 101 Fed. Rep. 739.

California.—*Boggs v. Merced Min. Co.*, 14 Cal. 279; *Burrell v. Haw*, 40 Cal. 373; *Sacramento Sav. Bank v. Hynes*, 50 Cal. 195; *Schiefery v. Tapia*, 68 Cal. 184; *Plummer v. Brown*, 70 Cal. 544; *Burling v. Thompkins*, 77 Cal. 257; *Buckley v. Howe*, 86 Cal. 596; *Shanklin v. McNamara*, 87 Cal. 371; *Roberts v. Gilbert*, 104 Cal. 67; *Dreyfus v. Badger*, 108 Cal. 58. See also *Mase v. Merrill*, 56 Cal. 554; *Merriam v. Bacioni*, 112 Cal. 191.

Kansas.—*Burnham v. Starkey*, 41 Kan. 604; *Wood v. Beach*, 43 Kan. 427.

Montana.—*Small v. Rakestraw*, (Mont. 1903) 72 Pac. Rep. 746.

Oklahoma.—*Twine v. Carey*, 2 Okla. 249.

Wisconsin.—*Dunn v. Schneider*, 20 Wis. 509.

Rejected Offer to Locate After Issuance of Certificate and Prior to Patent Held Not to Give Equitable Right.—*Hartman v. Warren*, (C. C. A.) 76 Fed. Rep. 157. To the same effect, see *Parker v. Lynch*, 7 Okla. 631.

State Lands.—*Hastings v. Jackson*, 46 Cal. 234; *Kentfield v. Hayes*, 57 Cal. 409; *Peabody*

v. Prince, 78 Cal. 511; *Dreyfus v. Badger*, 108 Cal. 58; *Bangs v. Stephenson*, 63 Mich. 661; *Warren v. De Force*, 34 Oregon 168.

2. *Shepley v. Cowan*, 91 U. S. 330; *Morrison v. Stalnaker*, 104 U. S. 213, *affirming* 6 Neb. 363; *Ard v. Brandon*, 156 U. S. 538; *Duluth, etc., R. Co. v. Roy*, 173 U. S. 590; *Marsh v. Gonsoulin*, 16 La. 84; *Nelson v. Sims*, 23 Miss. 383, 57 Am. Dec. 144. See also *Lytie v. Arkansas*, 9 How. (U. S.) 314; *Weeks v. Bridgman*, 159 U. S. 546; *Wallerton v. Snow*, 15 Fed. Rep. 401.

Failure to Take Appeal from Cancellation of Entry Made Without Notice Immaterial.—*Glidden v. Union Pac. R. Co.*, 30 Fed. Rep. 660.

3. *Correction of Surveys.*—*Kittridge v. Landry*, 2 Rob. (La.) 72.

4. *Clear Case of Fraud or Mistake Essential.*—*Brett v. Meisterling*, 117 Fed. Rep. 768; *Haydel v. Dufresne*, 17 (U. S.) 23, *reversing* 7 La. Ann. 661; *Ballance v. Forsyth*, 24 How. (U. S.) 183; *Harrington v. Wilson*, 10 S. Dak. 606; *Blair v. Brown*, 17 Wash. 570.

5. *Morris v. U. S.*, 174 U. S. 196.

6. *No Return of Purchase Money upon Cancellation for Fraud.*—*U. S. v. Trinidad Coal, etc., Co.*, 137 U. S. 161. See also *Moffat v. U. S.*, 112 U. S. 24; *Reg. v. Montminy*, 29 Can. Sup. Ct. 484.

7. *U. S. v. Minor*, 114 U. S. 233, *reversing* 10 Sawy. (U. S.) 155, 26 Fed. Rep. 672. *Contra*, *U. S. v. White*, 9 Sawy. (U. S.) 125, 17 Fed. Rep. 561.

by a private individual to declare the patentee a trustee.¹

(3) *Decisions of Land Department as Aids to Statutory Construction.* — When the meaning of a statute relating to public lands is doubtful, the contemporaneous construction placed thereon by the land department charged with its execution, especially where such construction has long prevailed, while not binding on the courts is entitled to great weight and should not be overthrown except for cogent reasons.² But where the practice of the department has not been uniform, the courts will determine the construction of statutes without reference to the practice in the department.³

XVII. INCHOATE RIGHT OR TITLE AND GRANT — 1. Right and Title Prior to Issuance of Patent — a. BEFORE RIGHT TO PATENT COMPLETE. — The rights of occupants of public lands who are seeking to acquire title thereto but have not perfected their right to patents differ under the various statutes, and hence have been discussed in that portion of this title which deals with the acquisition of title to public lands by settlement and occupancy.⁴

b. AFTER RIGHT TO PATENT COMPLETE — (1) Title. — A person who has acquired a complete right to a patent for public lands, but to whom a patent has not been issued, is usually regarded as an equitable owner, the United States or the state holding the naked legal title in trust for him.⁵ But in many of the states statutes have been enacted providing that such person shall be deemed to have the complete legal title or that the land-office certificate of final payment shall be evidence of the legal title in the holder.⁶

1. *Mery v. Brodt*, 121 Cal. 332.

2. *Decisions of Land Department as Aids to Statutory Construction.* — Five Per Cent Cases, 110 U. S. 471; *Hewitt v. Schultz*, 180 U. S. 139, reversing 7 N. Dak. 601; *Moore v. Carmode*, 180 U. S. 167, affirming 20 Wash. 305; *Powers v. Slaght*, 180 U. S. 173, affirming 20 Wash. 712; *McFadden v. Mountain View Min., etc., Co.*, (C. C. A.) 97 Fed. Rep. 670, reversed on other grounds 180 U. S. 533; *St. Paul, etc., R. Co. v. Ward*, 47 Minn. 40; *Lavagnino v. Uhlig*, (Utah 1903) 71 Pac. Rep. 1046.

Decision of State Land Officials. — *Pennoyer v. McConaughty*, 140 U. S. 1, affirming 14 Sawy. (U. S.) 584, 43 Fed. Rep. 339 (decided under the Oregon Laws).

Clearly Erroneous Construction Disregarded. — *St. Paul, etc., R. Co. v. Phelps*, 137 U. S. 528, reversing 26 Fed. Rep. 569; *U. S. v. Murphy*, 32 Fed. Rep. 376; *Sémon v. Callvert*, 27 Wash. 679, disregarding the uniform construction of state land officers.

3. *Shang v. U. S.*, 36 Ct. Cl. 466; *Emslie v. Young*, 24 Kan. 732.

4. See *supra*, this title, *Disposal of United States and Canadian Lands; Disposal of State Lands.*

5. **Equitable Title — United States.** — *Carroll v. Safford*, 3 How. (U. S.) 447; *Witherspoon v. Duncan*, 4 Wall. (U. S.) 210; *Stark v. Starrs*, 6 Wall. (U. S.) 402; *Myers v. Croft*, 13 Wall. (U. S.) 291; *Wirth v. Branson*, 98 U. S. 118; *Simmons v. Wagner*, 101 U. S. 260; *Deffeback v. Hawke*, 115 U. S. 392; *Cornelius v. Kessel*, 128 U. S. 456; *U. S. v. Steenerson*, 4 U. S. App. 332; *U. S. v. Freyberg*, 32 Fed. Rep. 195; *Olive Land, etc., Co. v. Olmstead*, 103 Fed. Rep. 568; *Hooper v. Scheimer*, 23 How. (U. S.) 235; *Langdon v. Sherwood*, 124 U. S. 74.

Arkansas. — *Gaither v. Lawson*, 31 Ark. 279.

California. — *Witcher v. Conklin*, 84 Cal. 499.

Florida. — *Hagan v. Ellis*, 39 Fla. 463; *Lovell v. Wall*, 31 Fla. 73.

Indiana. — *Mosier v. Smith*, 3 Blackf. (Ind.)

132.

Indian Territory. — *Gulf, etc., R. Co. v. Clark*, 2 Indian Ter. 319.

Louisiana. — *Terry v. Hennen*, 4 La. Ann. 458.

Minnesota. — *Hayes v. Carroll*, 74 Minn. 134.

Missouri. — *Egbert v. Bond*, 148 Mo. 19.

Nebraska. — See *Axtell v. Warden*, 7 Neb. 182.

New Mexico. — *U. S. v. Saucier*, 5 N. Mex. 569.

Ohio. — See *Dresback v. M'Arthur*, 7 Ohio (pt. i.) 146.

Oklahoma. — *Shy v. Brockhause*, 7 Okla. 35.

Tennessee. — See *Hopkins v. Toel*, 4 Humph. (Tenn.) 46.

Wisconsin. — *Cornelius v. Kessel*, 58 Wis. 237.

Patent Relates Back to Date of Certificate. — *Struby-Estabrook Mercantile Co. v. Davis*, 18 Colo. 93. See also *Ross v. Doe*, 1 Pet. (U. S.) 656, affirming *Walk. (Miss.)* 489.

If the Entry Was Not Made in Good Faith, but was in fraud of the law, it cannot be said that the claimant has become the equitable owner of the land and that the United States is merely a trustee holding the legal title for his benefit. *U. S. v. Steenerson*, 4 U. S. App. 332.

6. **Legal Title under Statutes — Alabama.** — *Bullock v. Wilson*, 2 Port. (Ala.) 436, 5 Port. (Ala.) 338; *Bates v. Herron*, 35 Ala. 117; *Birdwell v. Bowlinger*, 5 Port. (Ala.) 86; *Case v. Edgeworth*, 87 Ala. 204; *Masters v. Eastis*, 3 Port. (Ala.) 368; *Knabe v. Burden*, 88 Ala. 436.

California. — *Combs v. Jelly*, 28 Cal. 498.

Indiana. — *Matthews v. Goodrich*, 102 Ind. 557; *Edmondson v. Corn*, 62 Ind. 17; *Doe v. Stephenson*, 9 Ind. 144.

Minnesota. — *Tidd v. Rines*, 26 Minn. 201.

Effect of State Statutes. — A state may well provide by statute what shall be evidence of and

In *Pennsylvania* the state courts have adopted this as the rule without any statute on the subject, and the courts of the United States have recognized the rule as established by the state courts.¹

The Title May Descend or be aliened or divested,² and the wife of the person who has acquired the land is entitled to dower therein.³

(2) *Right to Possession*. — Such a person has also a right to the undisturbed possession of the land in question.⁴

(3) *Right to Maintain Actions*. — It has been established as a general rule, in some states by express statute, that such a person has such a title to and interest in the property as will entitle him to maintain a possessory⁵ or petitory⁶ action, or an action for damages or injury to the property.⁷

what shall constitute title to land as between a purchaser from the United States and third persons; but it is not within the power of the state in any case to provide what shall be evidence of and constitute title as between such purchaser and the United States. That is committed by the Federal Constitution to the Congress of the United States. *Wood v. Pittman*, 113 Ala. 207. See also *Bagnell v. Broderick*, 13 Pet. (U. S.) 436; *Wilcox v. Jackson*, 13 Pet. (U. S.) 498, reversing 2 Ill. 344.

Certificate Evidence of Legal Title Only in Case of Bona Fide Holder. — *Smith v. Mosier*, 5 Blackf. (Ind.) 51.

Where Right to Patent Not Completed. — A certificate which shows on its face that part of the purchase money is unpaid is not evidence of legal title. *Dickerson v. Nelson*, 4 Ind. 160.

Certificate of Homestead Entry Cannot Prevail Against Patent. — *Stringfellow v. Tennessee Coal, etc., Co.*, 117 Ala. 250.

1. **Pennsylvania Rule**. — See *Dull v. Heath*, 7 Pa. St. 85; *Hoey v. Furman*, 1 Pa. St. 295, 44 Am. Dec. 129; *Sims v. Irvine*, 3 Dall. (U. S.) 425; *Herron v. Dater*, 120 U. S. 464; *Willink v. Miles*, Pet. (C. C.) 429, 30 Fed. Cas. No. 17,768; *Wells v. Wright*, 3 Wash. (U. S.) 250, 29 Fed. Cas. No. 17,405; *Willis v. Bucher*, 3 Wash. (U. S.) 369, 30 Fed. Cas. No. 17,769; *Potts v. Gilbert*, 3 Wash. (U. S.) 475, 19 Fed. Cas. No. 11,347; *Dubois v. Newman*, 4 Wash. (U. S.) 74, 7 Fed. Cas. No. 4,108; *Lanning v. London*, 4 Wash. (U. S.) 159, 14 Fed. Cas. No. 8,074. But compare *Gregg v. Patterson*, 9 W. & S. (Pa.) 197.

2. **Descent, Alienation, Etc.** — *Goodlet v. Smithson*, 5 Port. (Ala.) 245; *Atwood v. Beck*, 21 Ala. 590; *Winter v. Jones*, 10 Ga. 190.

3. **Wife Entitled to Dower in Lands**. — *Purcell v. Lang*, 108 Iowa 199; *Craig v. Templeton*, 8 Grant Ch. (U. C.) 483. And see generally the title *DOWER*, vol. 10, p. 122.

4. **Right to Possession**. — *La Chapelle v. Bubb*, 69 Fed. Rep. 481, 62 Fed. Rep. 545; *Bullock v. Wilson*, 2 Port. (Ala.) 436, 5 Port. (Ala.) 338; *Bates v. Herron*, 35 Ala. 117; *Birdwell v. Bowlinger*, 5 Port. (Ala.) 86; *Case v. Edgeworth*, 87 Ala. 204; *McDonald v. Edmonds*, 44 Cal. 328; *Courchaine v. Bullion Min. Co.*, 4 Nev. 369; *Doe v. Seymour*, 9 U. C. Q. B. 47.

5. **Right to Maintain Possessory Action** — *Alabama*. — *Bullock v. Wilson*, 2 Port. (Ala.) 436, 5 Port. (Ala.) 338; *Bates v. Herron*, 35 Ala. 117; *Birdwell v. Bowlinger*, 5 Port. (Ala.) 86; *Case v. Edgeworth*, 87 Ala. 204; *Ledbetter v. Borland*, 108 Ala. 418. See also *White v. St. Guirons, Minor* (Ala.) 331.

Arkansas. — *McClairn v. Wicker*, 8 Ark. 195; *Gaither v. Lawson*, 31 Ark. 279; *Floyd v. Ricks*, 14 Ark. 286, 58 Am. Dec. 374; *Gaines v. Hale*, 16 Ark. 9; *Burke v. Gaines*, 16 Ark. 27; *Hale v. Gaines*, 19 Ark. 94, affirmed 22 How. (U. S.) 144; *Rector v. Gaines*, 19 Ark. 71; *Hunter v. Gaines*, 19 Ark. 93; *Butler v. Gaines*, 19 Ark. 95; *Sweeptzer v. Gaines*, 19 Ark. 96; *Surginer v. Paddock*, 31 Ark. 528.

California. — *Wright v. Roseberry*, 81 Cal. 87. *Georgia*. — *Moore v. Coulter*, 31 Ga. 278; *Winter v. Jones*, 10 Ga. 190.

Michigan. — *Fisher v. Hallock*, 50 Mich. 463.

Oklahoma. — *Shy v. Brockhause*, 7 Okla. 35; *McClung v. Penny*, (Okla. 1902) 70 Pac. Rep. 404.

Texas. — *Duren v. Houston, etc., R. Co.*, 86 Tex. 287; *Von Rosenberg v. Cuellar*, 80 Tex. 249.

Washington. — *Pierce v. Frace*, 2 Wash. 81, affirmed 157 U. S. 372.

Wisconsin. — *McLane v. Bovee*, 35 Wis. 27. See also *Wisconsin Cent. R. Co. v. Wisconsin River Land Co.*, 71 Wis. 94.

Canada. — *Nelson, etc., R. Co. v. Parker*, 6 British Columbia 1; *Doe v. Seymour*, 9 U. C. Q. B. 47.

See generally the title *EJECTMENT*, vol. 10, p. 483.

Ejectment Not Maintainable Without Statutory Authority. — *Gaither v. Lawson*, 31 Ark. 279.

Rule in United States Courts. — A practice prevailing in some of the states of permitting the action of ejectment to be maintained upon warrants for land and upon other titles not complete or legal in character has no application to suits brought in courts of the United States. Compliance with the land laws entitling one to a patent gives no such estate as will sustain ejectment in those courts. *Fenn v. Holme*, 21 How. (U. S.) 481.

6. **Right to Maintain Petitory Action**. — *Herriot v. Broussard*, 4 Mart. N. S. (La.) 260; *Lott v. Prudhomme*, 3 Rob. (La.) 293; *Broussard v. Broussard*, 43 La. Ann. 921; *Simien v. Perrodin*, 35 La. Ann. 931; *Robertson v. Wood*, 5 La. Ann. 197; *McGill v. McGill*, 4 La. Ann. 262; *Terry v. Hennen*, 4 La. Ann. 458.

7. **Actions for Damages** — *United States*. — *Gulf, etc., R. Co. v. Clark*, 101 Fed. Rep. 678, 41 C. C. A. 597; *Wisconsin Cent. R. Co. v. Price County*, 133 U. S. 406; *Carroll v. Safford*, 3 How. (U. S.) 441; *Witherspoon v. Duncan*, 4 Wall. (U. S.) 210; *Northern Pac. R. Co. v. Lewis*, 7 U. S. App. 254; *Gulf, etc., R. Co. v. Johnson*, 10 U. S. App. 620.

2. Assignment, Incumbrance, and Alienation of Inchoate Right—*a. INTERESTS ACQUIRED FROM FEDERAL GOVERNMENT*—(1) *Assignment of Land Warrants and Right to Enter Public Lands.*—Under various statutes, land warrants, or “floats,” as they are sometimes called, have been issued to individuals, entitling the warrantees to locate upon and receive patents to vacant public lands. Under other statutes, preferential rights to purchase or enter public lands have been given generally to particular classes, such as actual settlers who have made improvements upon lands, adjacent or adjoining owners, etc. In the absence of statutory prohibition, such warrants have been recognized as assignable so as to authorize the assignee to locate on the land and receive the patent thereto,¹ and the same has been held true as to a preferential right to enter or purchase.² But the preferential right conferred by the federal statutes on a person who successfully contests an entry on public lands by another, to file an entry upon the land within thirty days, has been held to be purely personal and not transferable.³ In order to protect persons to whom land warrants were issued or to whom the right to enter or purchase public lands was given, the land laws have frequently prohibited the transfer or assignment of warrants or pre-emption rights.⁴ Land warrants are not negotiable instruments, and the assignee can acquire no higher legal rights than his assignor or the warrantee had, either as against

Arkansas.—Brummett *v.* Pearle, 36 Ark. 471; Hill *v.* Plunkett, 41 Ark. 465.

California.—Butterfield *v.* Central Pac. R. Co., 31 Cal. 264.

Georgia.—Winter *v.* Jones, 10 Ga. 190.

Indian Territory.—Wilson *v.* Owens, 1 Indian Ter. 163.

Nevada.—Couchaine *v.* Bullion Min. Co., 4 Nev. 369.

New Mexico.—U. S. *v.* Saucier, 5 N. Mex. 569.

Pennsylvania.—Baker *v.* King, 18 Pa. St. 138.

Canada.—Dinan *v.* Breakey, 7 Quebec 120; Deedes *v.* Wallace, 8 U. C. C. P. 385; Whiting *v.* Kernahan, 12 U. C. C. P. 57; Bruyey *v.* Rose, 19 Ont. 433. See also Henderson *v.* McLean, 16 U. C. Q. B. 630.

1. **Warrants Held to Be Assignable.**—Bronson *v.* Kukuk, 3 Dill. (U. S.) 490, 4 Fed. Cas. No. 1,929; Lewis *v.* Baird, 3 McLean (U. S.) 56; Cunningham *v.* Ashley, 14 How. (U. S.) 377; Bouldin *v.* Massie, 7 Wheat. (U. S.) 123; Moyer *v.* McCullough, 1 Ind. 339; Stinson *v.* Geer, 42 Kan. 520; Stuart *v.* Rector, 1 Mo. 361; Key *v.* Jennings, 66 Mo. 356; McSorley *v.* Hill, 2 Wash. 638. And see the title ASSIGNMENTS, vol. 2, p. 1045, note 1.

Disposition by Will.—Kerr *v.* Moon, 9 Wheat. (U. S.) 565.

2. **Preferential Rights Held to Be Assignable**—*United States.*—Webster *v.* Luther, 163 U. S. 331, affirming 50 Minn. 77; Barnes *v.* Poirier, 64 Fed. Rep. 14, 27 U. S. App. 500, affirming 57 Fed. Rep. 956; Langdon *v.* Joy, 4 Dill. (U. S.) 391, 14 Fed. Cas. No. 8,062; Stroud *v.* Missouri River, etc., R. Co., 4 Dill. (U. S.) 396, 23 Fed. Cas. No. 13,547; Mullen *v.* Wine, 26 Fed. Rep. 206, appeal dismissed without opinion 136 U. S. 654.

California.—Rose *v.* Nevada, etc., Wood, etc., Co., 73 Cal. 385; Montgomery *v.* Pacific Coast Land Bureau, 94 Cal. 284, 28 Am. St. Rep. 122.

Minnesota.—Webster *v.* Luther, 50 Minn. 77;

Bradley *v.* Whitesides, 55 Minn. 455; Pardoe *v.* Merritt, 75 Minn. 12; Tuman *v.* Pillsbury, 60 Minn. 520.

Mississippi.—Downs *v.* Downs, 2 How. (Miss.) 915; Grand Gulf R., etc., Co. *v.* Bryan, 8 Smed. & M. (Miss.) 234.

Missouri.—Coleman *v.* Allen, 75 Mo. 332, affirming 5 Mo. App. 127.

Utah.—Montague *v.* McCarroll, 15 Utah 318, 10 Utah 22. Compare Macintosh *v.* Renton, 2 Wash. Ter. 121.

Where land warrants are assignable, powers of attorney to convey land entered under the warrant are valid. Montague *v.* McCarroll, 15 Utah 318. See also Barnes *v.* Poirier, 64 Fed. Rep. 14, 27 U. S. App. 500; Knight *v.* Leary, 54 Wis. 459.

3. Welsh *v.* Duncan, 7 Land Dec. 186; Kellem *v.* Ludlow, 10 Land Dec. 561; Bowman *v.* Riddle, 1 Copp's Pub. Land Laws 204; Dameron *v.* Dingee, 1 Colo. App. 436.

4. **Assignment of Warrants and Pre-emption Rights Prohibited.**—*United States.*—Marks *v.* Dickson, 20 How. (U. S.) 501.

Alabama.—Tenison *v.* Martin, 13 Ala. 21; McTyer *v.* McDowell, 36 Ala. 39; Woodstock Iron Co. *v.* Strickland, 121 Ala. 616.

Iowa.—Johns *v.* Warren, 85 Iowa 300.

Minnesota.—Dole *v.* Wilson, 20 Minn. 356.

Ohio.—Smith *v.* Stark, 7 Ohio (pt. ii.) 200.

Oklahoma.—Sproat *v.* Durland, 2 Okla. 24.

Tennessee.—Moore *v.* Mills, 5 Sneed (Tenn.) 461.

Washington.—Mackintosh *v.* Renton, 3 Wash. Ter. 431.

Wisconsin.—Nichols *v.* Nichols, 3 Pin. (Wis.) 174; Week *v.* Bosworth, 61 Wis. 78.

In Dupre *v.* McCright, 6 La. Ann. 146, it was held that Act Cong. 1847, prohibiting the disposal of any soldier's claim to military bounty land before the issuance of the warrant, was for his benefit, and that he could waive it; and a sale, when no opposition was made by the soldier or his heirs, was sustained.

the government¹ or as against third persons.² In case of an assignment of land warrants, the law implies a warranty that they are genuine.³ In the assignment of land warrants it is not essential that the assignment be indorsed upon the warrant or on a paper annexed thereto.⁴

(2) *Voluntary Conveyances and Contracts to Convey Land* — (a) *In General.* — In the absence of statutory provisions to the contrary, no rule of public policy prohibits conveyances between individuals of lands the legal title to which may be in the government⁵ or contracts to convey when title shall be acquired from the government,⁶ and where an individual makes a conveyance, with covenants of warranty, of land the title to which is in the United States, and the grantor subsequently acquires title from the government, such title inures to the benefit of the grantee.⁷ An allottee of public lands whose right to a

1. *Tyler v. Bailey*, 71 Ill. 34.

The assignee of a land warrant takes it subject to all equities in favor of the government, and the government, although the warrant is regular on its face, is not estopped to deny its validity where it was fraudulently procured. *Bronson v. Kukuk*, 3 Dill. (U. S.) 490.

2. *Fort v. Wilson*, 3 Iowa 153. See also *Stoddard v. Smith*, 11 Ohio St. 581.

3. *Tyler v. Bailey*, 71 Ill. 34; *Lunt v. Wrenn*, 113 Ill. 168.

No implied warranty of title attaches to the assignment of a land-office certificate of the location of land. *Johnson v. Houghton*, 19 Ind. 359.

4. *Bouldin v. Massie*, 7 Wheat. (U. S.) 123.

5. *United States*. — *Thredgill v. Pintard*, 12 How. (U. S.) 24 [*affirming sub nom.* *Pintard v. Goodloe*, Hempst. (U. S.) 502, 19 Fed. Cas. No. 11,171]; *Lamb v. Davenport*, 18 Wall. (U. S.) 307; *Springfellow v. Cain*, 99 U. S. 610 [*reversing sub nom.* *Cain v. Young*, 1 Utah 361]; *Cannon v. Pratt*, 99 U. S. 619 [*affirming sub nom.* *Pratt v. Young*, 1 Utah 347]; *Kingman v. Holthaus*, 59 Fed. Rep. 305. See also *Goode v. Gaines*, 145 U. S. 141.

Alabama. — *Vice v. Littlejohn*, 116 Ala. 276.

Arizona. — *Singer Mfg. Co. v. Tillman*, (Ariz. 1889) 21 Pac. Rep. 818.

California. — *Whitney v. Buckman*, 13 Cal. 536; *Kirkaldie v. Larrabee*, 31 Cal. 455, 89 Am. Dec. 205; *Christy v. Dana*, 34 Cal. 548; *Snow v. Ferrea*, 45 Cal. 195; *Ayres v. Palmer*, 57 Cal. 309; *Pekin Min., etc., Co. v. Kennedy*, 81 Cal. 356.

Illinois. — *Phelps v. Kellogg*, 15 Ill. 131; *Delauney v. Burnett*, 9 Ill. 454.

Nebraska. — *Burley v. Shinn*, 1 Neb. 433.

Canada. — *Rae v. Trim*, 27 Grant Ch. (U. C.) 374.

Where, after a sale of land by warranty deed, it is discovered that a part of the land belongs to the United States, and the parties agree that the vendee shall enter such part under the pre-emption laws of the United States as being contiguous to the other part, and that the vendor will reimburse him for all the expense incurred in making the title good, such title is not invalid as the sale of a pre-emption right within Rev. Stat. U. S., § 2290; and in a suit to foreclose the vendor's lien on the premises, the vendee is entitled to recoup only to the extent of the expenses incurred by him in making the title good, and not an amount equal to the full value of the land thus entered. *Purcell v. Lay*, 84 Ala. 287.

Dedication. — *Mankato v. Meagher*, 17 Minn. 265.

6. *United States*. — *Maxwell v. Moore*, 22 How. (U. S.) 189, *affirming* 18 Ark. 469; *Lamb v. Davenport*, 18 Wall. (U. S.) 307; *Myrick v. Thompson*, 99 U. S. 291, *affirming* 20 Minn. 205; *Gaines v. Molen*, 30 Fed. Rep. 27.

Arizona. — *Arnold v. Christy*, (Ariz. 1893) 33 Pac. Rep. 619.

Arkansas. — *Cain v. Leslie*, 15 Ark. 312; *Baker v. Hollobaugh*, 15 Ark. 322; *Hamilton v. Fowlkes*, 16 Ark. 340.

California. — *Thurston v. Alva*, 45 Cal. 16; *Peasley v. Hart*, 65 Cal. 522; *Montgomery v. Pacific Coast Land Bureau*, 94 Cal. 284, 28 Am. St. Rep. 122. See *Southern Pac. R. Co. v. Allen*, 112 Cal. 455; *Wilson v. Southern Pac. R. Co.*, 135 Cal. 421.

Colorado. — *Platte Land Co. v. Hubbard*, 12 Colo. App. 465; *Lipscomb v. Nichols*, 6 Colo. 290.

Iowa. — *Ellis v. Mosier*, 2 Green (Iowa) 246; *Snow v. Flannery*, 10 Iowa 318, 77 Am. Dec. 120.

Kansas. — *Fackler v. Ford*, *McCahon* (Kan.) 21; *Stone v. Young*, 5 Kan. 229.

Minnesota. — *Irvine v. Marshall*, 7 Minn. 286; *Wood v. Cullen*, 13 Minn. 394; *Townsend v. Fenton*, 30 Minn. 528.

Nevada. — *Rose v. Treadway*, 4 Nev. 455, 97 Am. Dec. 546; *Treadway v. Wilder*, 8 Nev. 91.

Tennessee. — *Smith v. Rankin*, 4 Yerg. (Tenn.) 1, 26 Am. Dec. 213.

Texas. — *Miller v. Roberts*, 18 Tex. 16, 67 Am. Dec. 688; *Horn v. Shamblin*, 57 Tex. 243.

Canada. — *Burns v. Burns*, 21 Grant Ch. (U. C.) 7. See also *Kilborn v. Forester*, *Draper* (U. C.) 332.

In *Miller v. Roberts*, 18 Tex. 16, 67 Am. Dec. 688, a contract between A and B to the effect that if A would move B and his wife from the state of Tennessee to the state of Texas, B would give to A one-half of all the land B should acquire by virtue of his emigration to Texas and settlement there, was held not to be illegal as against public policy.

7. *Carpenter v. Rannels*, 19 Wall. (U. S.) 138; *Irvine v. Irvine*, 9 Wall. (U. S.) 617; *Croft v. Doe*, 125 Ala. 391; *Pekin Min., etc., Co. v. Kennedy*, 81 Cal. 356; *Lyon v. Gombert*, 63 Neb. 630; *Phelps v. Kellogg*, 15 Ill. 131.

A *Quitclaim Deed* to public lands by a person who has taken no step to acquire title by pre-emption will not operate to pass title which the

patent depends upon the performance of conditions subsequent may assign his inchoate rights before such conditions have been performed.¹ *A fortiori*, where a person has entered public lands and has complied with the provisions of the land laws so as to entitle him to a patent, he has in effect the full equitable title, which he may convey before the patent is actually issued,² and whether the conveyance is by warranty deed or otherwise, upon the issuance of the patent to the grantor he holds the title in trust for his grantee, or the title inures to the benefit of the grantee.³ So where one holding such an equitable title conveys it to another who agrees to pay therefor when a

grantor may subsequently acquire from the government. *Harden v. Collins*, 8 Nev. 49.

1. *Jenkins v. Noel*, 3 Stew. (Ala.) 60.

2. *United States*.—*Myers v. Croft*, 13 Wall. (U. S.) 291; *Marks v. Dickson*, 20 How. (U. S.) 501; *French v. Spencer*, 21 How. (U. S.) 228; *Irvine v. Irvine*, 9 Wall. (U. S.) 617; *Barney v. Dolph*, 97 U. S. 652; *Quinby v. Conlan*, 104 U. S. 420; *Gray v. Jones*, 14 Fed. Rep. 83; *Dunn v. Barnum*, (C. C. A.) 51 Fed. Rep. 355; *Wallerton v. Snow*, 15 Fed. Rep. 401, 5 McCrary (U. S.) 64; *Wythe v. Palmer*, 3 Sawy. (U. S.) 412, 30 Fed. Cas. No. 18,120; *McClung v. Steen*, 32 Fed. Rep. 373; *U. S. v. Bubb*, 43 Fed. Rep. 630, *affirmed* 144 U. S. 154; *Robinson v. Caldwell*, (C. C. A.) 67 Fed. Rep. 391, *affirming* 59 Fed. Rep. 653.

Alabama.—*Wright v. Swan*, 6 Port. (Ala.) 84; *Goodlet v. Smithson*, 5 Port. (Ala.) 245; *Rosser v. Bradford*, 9 Port. (Ala.) 354; *Iverson v. Dubose*, 27 Ala. 418; *Jones v. Walker*, 47 Ala. 175.

Arkansas.—*Nicks v. Rector*, 4 Ark. 251.

California.—*Byers v. Neal*, 43 Cal. 210; *Thurston v. Alva*, 45 Cal. 16; *Witcher v. Conklin*, 84 Cal. 499; *Grant v. Oliver*, 91 Cal. 158; *Stewart v. Sutherland*, 93 Cal. 270; *Phillips v. Carter*, 135 Cal. 604.

Colorado.—*Godding v. Decker*, 3 Colo. App. 198.

Illinois.—*Delauney v. Burnett*, 9 Ill. 454; *Phelps v. Smith*, 15 Ill. 572; *Dyke v. McVey*, 16 Ill. 41; *May v. Symms*, 20 Ill. 95; *Franklin v. McIntyre*, 23 Ill. 91.

Iowa.—*Sillyman v. King*, 36 Iowa 207; *Waters v. Bush*, 42 Iowa 255; *Burdick v. Wentworth*, 42 Iowa 440; *Cady v. Eighmeyer*, 54 Iowa 615; *McDaniel v. Large*, 55 Iowa 312.

Kansas.—*McKean v. Crawford*, 6 Kan. 112; *Ogden v. Walters*, 12 Kan. 282; *Newkirk v. Marshall*, 35 Kan. 77; *Stinson v. Geer*, 42 Kan. 520.

Louisiana.—*Dufau v. Degruys*, 5 Mart. N. S. (La.) 418; *Woods v. Kimbal*, 5 Mart. N. S. (La.) 246; *Poirrier v. White*, 2 La. Ann. 934; *Marks v. Dickson*, 10 La. Ann. 597; *Helluin v. Minor*, 12 La. Ann. 124; *Richardson v. Emswiler*, 14 La. Ann. 668; *Steinspring v. Bennett*, 16 La. Ann. 201.

Michigan.—*Clark v. Hall*, 19 Mich. 356; *Fisher v. Hallock*, 50 Mich. 463.

Minnesota.—*Camp v. Smith*, 2 Minn. 155; *Sharon v. Wooldrick*, 18 Minn. 354; *McAlpine v. Resch*, 82 Minn. 523.

Mississippi.—*Bledsoe v. Doe*, 4 How. (Miss.) 13; *Grand Gulf R., etc., Co. v. Bryan*, 8 Smed. & M. (Miss.) 234.

Missouri.—*Callahan v. Davis*, 90 Mo. 78; *Hammond v. Johnston*, 93 Mo. 108; *Coleman v. Allen*, 75 Mo. 332, *affirming* 5 Mo. App. 127.

Nebraska.—*Rube v. Sullivan*, 23 Neb. 779; *Gregory v. Kenyon*, 34 Neb. 640.

Nevada.—*Brown v. Warren*, 16 Nev. 228.

North Dakota.—*Bowne v. Wolcott*, 1 N. Dak. 415.

Ohio.—*Kay v. Watson*, 17 Ohio 27; *Magruder v. Esmay*, 35 Ohio St. 221.

Oklahoma.—*Hagar v. Wikoff*, 2 Okla. 580; *Guthrie v. Beamer*, 3 Okla. 652; *Laughlin v. Fariss*, 7 Okla. 1.

Oregon.—*Dolph v. Barney*, 5 Oregon 191, *affirmed* 97 U. S. 652; *Ramsey v. Loomis*, 6 Oregon 367; *McKay v. Freeman*, 6 Oregon 449; *Parker v. Rogers*, 8 Oregon 183; *Richards v. Snyder*, 11 Oregon 501; *Hyde v. Holland*, 18 Oregon 331.

Utah.—*Cain v. Young*, 1 Utah 361; *Clawson v. Wallace*, 16 Utah 300.

Wisconsin.—*Taylor v. Noble*, 2 Pin. (Wis.) 415; *Hayward v. Ormsbee*, 11 Wis. 3; *Knight v. Leary*, 54 Wis. 459; *Whittlesey v. Hoppenyan*, 72 Wis. 140.

Canada.—*Wiggins v. Meldrum*, 15 Grant Ch. (U. C.) 377.

Judgment Lien Does Not Attach Prior to Issuance of Patent.—*Roads v. Symmes*, 1 Ohio 281, 13 Am. Dec. 621.

3. *United States*.—*French v. Spencer*, 21 How. (U. S.) 228; *Landes v. Brant*, 10 How. (U. S.) 372; *Irvine v. Irvine*, 9 Wall. (U. S.) 617; *McCarthy v. Mann*, 19 Wall. (U. S.) 20, *affirming* 2 Dill. (U. S.) 441, 15 Fed. Cas. No. 8, 685; *Gray v. Jones*, 14 Fed. Rep. 83, 4 McCrary (U. S.) 515; *McClung v. Steen*, 32 Fed. Rep. 373; *Lewis v. Baird*, 3 McLean (U. S.) 56.

California.—*Bludworth v. Lake*, 33 Cal. 262; *Byers v. Neal*, 43 Cal. 214; *Stark v. Barrett*, 15 Cal. 361.

Illinois.—*Frink v. Darst*, 14 Ill. 306.

Louisiana.—*Hennen v. Wood*, 16 La. Ann. 263; *Watterston v. Bennett*, 18 La. Ann. 250.

Michigan.—*Fisher v. Hallock*, 50 Mich. 463.

Minnesota.—*Camp v. Smith*, 2 Minn. 155; *Randall v. Edert*, 7 Minn. 450.

Mississippi.—*Bledsoe v. Doe*, 4 How. (Miss.) 13.

Nevada.—*Brown v. Warren*, 16 Nev. 229.

New York.—*Jackson v. Fish*, 10 Johns. (N. Y.) 456.

Ohio.—*Allen v. Parish*, 3 Ohio 107; *Magruder v. Esmay*, 35 Ohio St. 221.

Oregon.—*Hyde v. Holland*, 18 Oregon 331.

Wisconsin.—*Jackson v. Astor*, 1 Pin. (Wis.) 137, 39 Am. Dec. 281, *affirmed sub nom.* *Grignon v. Astor*, 2 How. (U. S.) 319.

Canada.—*Leblanc v. Pellerin*, 7 L. C. Jur. 113.

patent to the land shall be issued, neither the purchaser nor his grantee can, by taking out a patent in his own name, escape liability to pay therefor.¹

After the Patent to Public Lands Has Been Issued, and the entire title, both legal and equitable, has become vested in the patentee, he may, of course, unless expressly restricted by the laws under which his title was acquired, dispose of the land as he may see fit.² Restrictions upon the right of persons to whom land warrants, certificates, floats, or script are issued, authorizing them to locate public lands, to assign such warrants, etc., do not restrict their right to alienate the land after they have acquired title.³ Of course, the grantee of a purchaser from the government whose title has not been perfected by the issuance of a patent acquires by his purchase no greater rights than his grantor had.⁴

Form of Conveyance. — In conveying equitable interests in public lands the title to which is still in the government, the form of the conveyance must comply with the general laws of the state in which the land is situated.⁵

(b) **Statutory Restrictions.** — The government, in disposing of the public lands, may annex such conditions to the grant as it sees fit, and a restriction against the alienation of the land by the grantee will not be held to be invalid on the ground that it is against the policy of the law.⁶ For the purpose of preventing acquisition of large tracts of public lands by land grabbers, and to restrict the acquisition of such lands to *bona fide* settlers, provisions have been inserted in the laws for the disposition of public lands by which the right of persons to traffic in public lands, title to which they expect to acquire, is restricted.⁷

1. Galloway v. Finley, 12 Pet. (U. S.) 265; Wallerton v. Snow, 5 McCrary (U. S.) 64. See also Guaranty Sav. Bank v. Bladow, 176 U. S. 448; Pepper v. Dunlap, 9 La. Ann. 137.

2. Gilbert v. Thompson, 14 Minn. 544; Johnson v. Bridal Veil Lumbering Co., 24 Oregon 182; Bolton v. La Camas Water Power Co., 10 Wash. 246.

3. Gilbert v. Thompson, 14 Minn. 544; Felix v. Patrick, 145 U. S. 317, affirming 36 Fed. Rep. 457.

4. Randall v. Edert, 7 Minn. 450; Ankeny v. Clark, 148 U. S. 345, affirming 1 Wash. 549.

5. **Form of Conveyance.** — Griffin v. Chattanooga Southern R. Co., 127 Ala. 570.

To Bar Down of Wife of Patentee. — McKay v. Freeman, 6 Oregon 449.

6. Cundiff v. Orms, 7 Port. (Ala.) 58; Suñol v. Hepburn, 1 Cal. 274; Hunt v. Robinson, 1 Tex. 748; Cook v. Lindsay, 57 Tex. 67; Meek v. Parsons, 31 Ont. 54.

The restriction in a patent in severalty to an Indian, that "said lands shall never be sold or conveyed by the grantee or his heirs without the consent of the secretary of the interior for the time being" (Act Cong. March 3, 1859), does not operate as a condition, because a violation thereof does not affect his title, nor as a limitation on his title, for the whole title of the government by the patent passed, but it operates as a personal disability, similar to that of a minor, which the government was competent to impose. Blue-Jacket v. Johnson County, 3 Kan. 299.

Grant to State. — Where Congress grants land to a state with a proviso that it shall remain inalienable forever, the state legislature has no power to make an unconditional and absolute grant of it to a third person in violation of such trust. Low v. Hutchings, 41 Cal. 634, affirmed 15 Wall. (U. S.) 77 (Yosemite valley grant, Act Cong. 1864).

7. **Traffic in Public Lands Restricted.** — *United States.* — Felix v. Patrick, 145 U. S. 317; Quinby v. Conlan, 104 U. S. 420, affirming 51 Cal. 512; Wright v. Taylor, 2 Dill. (U. S.) 23, 30 Fed. Cas. No. 18,096; Warren v. Van Brunt, 19 Wall. (U. S.) 646, affirming 12 Minn. 70; Wythe v. Smith, 4 Sawy. (U. S.) 17, 30 Fed. Cas. No. 18,122; Smith v. Shane, 1 McLean (U. S.) 22, 22 Fed. Cas. No. 13,105.

Alabama. — M'Elyea v. Hayter, 2 Port. (Ala.) 148; Dial v. Hair, 18 Ala. 798; Cothran v. McCoy, 33 Ala. 65; McTyer v. McDowell, 36 Ala. 39; Mulloy v. Cook, 101 Ala. 178; Hudson v. Milner, 12 Ala. 667; Tenison v. Martin, 13 Ala. 21; Marston v. Rowe, 43 Ala. 271.

California. — Quinn v. Kenyon, 38 Cal. 499; Huston v. Walker, 47 Cal. 484; Turner v. Donnelly, 70 Cal. 597; Snow v. Kimmer, 52 Cal. 624; McGregor v. Donnelly, 67 Cal. 149; Ladda v. Hawley, 57 Cal. 51; Mitchell v. Cline, 84 Cal. 409; Kreamer v. Earl, 91 Cal. 112.

Colorado. — Dameron v. Dingee, 1 Colo. App. 436.

Illinois. — Rose v. Buckland, 17 Ill. 309.

Iowa. — Persons v. Persons, 113 Iowa 745; Hill v. Smith, Morr. (Iowa) 70.

Kansas. — Brake v. Ballou, 19 Kan. 397.

Kentucky. — McDermed v. McCastland, Hard. (Ky.) 21.

Louisiana. — Poirrier v. White, 2 La. Ann. 934; Arbour v. Nettles, 12 La. Ann. 217; Penn v. Ott, 12 La. Ann. 233; Moore v. Jourdan, 14 La. Ann. 417; Steinspring v. Bennett, 16 La. Ann. 201.

Michigan. — Hannah v. Fife, 27 Mich. 172.

Minnesota. — St. Peter Co. v. Bunker, 5 Minn. 192; Evans v. Folsom, 5 Minn. 422.

Mississippi. — Brown v. Poindexter, 10 Smed. & M. (Miss.) 596; Glenn v. Thistle, 23 Miss. 42; Wilkerson v. Mayfield, 27 Miss. 542.

Missouri. — Bower v. Higbee, 9 Mo. 259; Paulding v. Grimsley, 10 Mo. 210.

Thus, under the pre-emption and homestead acts, the application for the right to enter land must be accompanied by an oath that the entry is made for the purpose of actual settlement and cultivation or for the exclusive use and benefit of the applicant, and not either directly or indirectly for the use or benefit of any third person, and in case of a homestead entry, the homesteader, in making final proof, must make oath that he has not alienated the land in whole or in part. The provisions, of course, render invalid conveyances of contracts by a pre-emptor or homesteader entered into before entry of the claim to convey any interest in the land to be pre-empted or homesteaded,¹ or conveyances or contracts to convey by a homesteader before he has made final proofs.² It has been held that where assignments and transfers or alien-

Nebraska.—*Robinson v. Jones*, 31 Neb. 20; *Bateman v. Robinson*, 12 Neb. 508.

North Dakota.—*Fleischer v. Fleischer*, 11 N. Dak. 221.

Texas.—*Grant v. Wallis*, 60 Tex. 350.

Washington.—*Macintosh v. Renton*, 2 Wash. Ter. 121; *Johnson v. Leonhard*, 1 Wash. 564.

Canada.—*Hughson v. Cook*, 20 Grant Ch. (U. C.) 238; *Hutchinson v. Beatty*, 40 U. C. Q. B. 135; *Chapiewski v. Campbell*, 29 Ont. 343; *Meek v. Parsons*, 31 Ont. 54.

The proviso of the Oregon Donation Act of Sept. 27, 1850, which forbade the future sale of the settler's interest until a patent should issue, does not affect contracts for sale prior to the passage of the act. *Lamb v. Davenport*, 18 Wall. (U. S.) 307, *affirming* 1 Sawy. (U. S.) 609, 14 Fed. Cas. No. 8,015. See also *Fields v. Squires*, *Deady* (U. S.) 366, 9 Fed. Cas. No. 4776.

1. *United States.*—*Anderson v. Carkins*, 135 U. S. 483, *reversing* 21 Neb. 364; *Aldrich v. Anderson*, 2 Land Dec. 71.

Alabama.—*Hudson v. Milner*, 12 Ala. 667; *Smith v. Johnson*, 37 Ala. 633.

Arkansas.—*Marshall v. Cowles*, 48 Ark. 362; *Cox v. Donnelly*, 34 Ark. 763; *Nichols v. Council*, 51 Ark. 26, 14 Am. St. Rep. 20.

California.—*Damrell v. Meyer*, 40 Cal. 166; *Snow v. Kimmer*, 52 Cal. 624; *Thompson v. Doaksum*, 68 Cal. 593; *Turner v. Donnelly*, 70 Cal. 597; *Simpson v. Applegate*, 75 Cal. 342; *Matter of Groom*, 94 Cal. 69; *Moffatt v. Bulson*, 96 Cal. 106, 31 Am. St. Rep. 192; *Groome v. Almstead*, 101 Cal. 425; *Moore v. Moore*, 130 Cal. 110.

Colorado.—*Brown v. Kennedy*, 12 Colo. 235.

Florida.—*McCrillis v. Copp*, 31 Fla. 100.

Iowa.—*Oaks v. Heaton*, 44 Iowa 116. *Compare* *Sweesey v. Sparling*, 81 Iowa 433, 25 Am. St. Rep. 506.

Kansas.—*Mellison v. Allen*, 30 Kan. 382.

Michigan.—*Carley v. Gitchell*, 105 Mich. 38, 55 Am. St. Rep. 428.

Minnesota.—*Ferguson v. Kumler*, 11 Minn. 104.

Nebraska.—*Dawson v. Merrille*, 2 Neb. 119.

Oregon.—*Clark v. Bayley*, 5 Oregon 343; *Pacific Livestock Co. v. Gentry*, 38 Oregon 275. *Compare* *Frink v. Hoke*, 35 Oregon 17.

Wisconsin.—*Spaulding v. Wood*, 8 Wis. 195.

Agreements Between Settlers on Same Quarter Section.—Rev. Stat. U. S., § 2274, provides that where several settlements have been made on agricultural lands prior to survey, the several settlers on any quarter section may agree for one of them to enter such quarter section

for the benefit of all, and, after patent, for the patentee to convey to the others their respective shares, upon the payment to him of a proportionate share of the expenses. *Miles v. Johnson*, 18 Utah 428; See also *Rose v. Treadway*, 4 Nev. 455, 97 Am. Dec. 546; *Turner v. Donnelly*, 70 Cal. 597. Under such section, such agreements entered into prior to its enactment, but adopted and recognized by the parties after its enactment, have been sustained. *Miles v. Johnson*, 18 Utah 428.

2. *United States.*—*Gonzales v. French*, 164 U. S. 338, *affirming* (Ariz. 1893) 33 Pac. Rep. 501.

Alabama.—*Lindsey v. Veasy*, 62 Ala. 421.

Arkansas.—*Cox v. Donnelly*, 34 Ark. 762; *Nichols v. Council*, 51 Ark. 26, 14 Am. St. Rep. 20.

California.—*Moffatt v. Bulson*, 96 Cal. 106, 31 Am. St. Rep. 192.

Colorado.—*Everett v. Todd*, 19 Colo. 322.

Florida.—*McCrillis v. Copp*, 31 Fla. 100.

Iowa.—*Oaks v. Heaton*, 44 Iowa 116.

Kansas.—*Mellison v. Allen*, 30 Kan. 382; *Sutphen v. Sutphen*, 30 Kan. 510; *Kraft v. Baxter*, 38 Kan. 351; *Schottbauer v. Baxter*, 38 Kan. 359; *Weeks v. White*, 41 Kan. 569.

Nebraska.—*Dawson v. Merrille*, 2 Neb. 119.

Oregon.—*Horseman v. Horseman*, (Oregon 1903) 72 Pac. Rep. 698.

Partnership in Mill on Homestead Entry.—An agreement by a party who has entered homestead land whereby he unites with another person furnishing the means to build a mill on the premises, the latter to have a partner's interest in the mill and its profits, is not alienation of the land with the prohibition contained in the homestead law, but is a use of it by the pre-emptor substantially for his own benefit, and consistently with a purpose to retain it as a homestead. *Hot Springs R. Co. v. Tyler*, 36 Ark. 205.

Conveyance of Homestead Not Valuable Consideration.—A person who abandons land which he has entered as a homestead, before he has resided upon it for five years as required by the homestead law, has no interest in the premises which he can transfer; and a note given for the transfer of such land and the delivery of the certificate of entry issued by the land office is wanting in the least consideration and cannot be enforced. *McCollum v. Edmonds*, 109 Ala. 322.

A Contract for Sale of Timbers on pre-empted land prior to final proof has been upheld. *Butterfield Lumber Co. v. Hartman*, (Miss. 1903) 30 So. Rep. 328.

ations of the interest of pre-emptors or homesteaders in public lands prior to a particular time are prohibited, a conveyance made under a power of attorney executed prior to such time is invalid;¹ and the same rule has been applied to agreements to convey.²

Perfected Right to Patent. — The provisions as to the form of oath to be taken on application for permission to pre-empt public lands do not restrict the entryman's right, after he has perfected his right to a patent, to dispose of the land before the patent is in fact issued;³ and it has been held that the provision that "all assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void,"⁴ was intended to prohibit merely transfers of the right to enter land for pre-emption, and does not prohibit a conveyance of the land by the pre-emptor after he has made final proof of his claim and paid the purchase money, though he has not received his patent.⁵ A deed by a pre-emptor or homesteader made after he has acquired the right to convey the land is not rendered invalid by reason of the fact that it was executed in pursuance of a prior illegal agreement to convey,⁶ and the same has been held true of a contract to convey entered into after the issuance of a patent in pursuance of a prior illegal verbal contract.⁷

Agreements in Violation of the Pre-emption and Homestead Acts, involving as they do the contemplated commission of perjury to enable the pre-emptor or homesteader to receive his patent, are not only invalid and unenforceable, but are regarded as illegal as against public policy.⁸ Hence, the person paying money on the basis of such an agreement cannot recover it back,⁹ nor can the pre-emptor, where he has made a conveyance, recover the consideration agreed upon.¹⁰

Federal Question. — The validity of conveyances or contracts to convey public lands the title of which has not passed from the federal government, as affected by the restrictions imposed by the federal laws under which title was

1. Power of Attorney to Convey. — *Felix v. Patrick*, 145 U. S. 317, affirming 36 Fed. Rep. 457; *Wright v. Taylor*, 30 Fed. Cas. No. 18,096, less fully reported 2 Dill. (U. S.) 23; *M'Elyea v. Hayter*, 2 Port. (Ala.) 148; *Nichols v. Council*, 51 Ark. 26, 14 Am. St. Rep. 20.

2. Agreements to Convey. — *Cundiff v. Orms*, 7 Port. (Ala.) 58; *Marston v. Rowe*, 43 Ala. 271; *McCrillis v. Copp*, 31 Fla. 100; *Mellison v. Allen*, 30 Kan. 382; *Carley v. Gitchell*, 105 Mich. 38, 55 Am. St. Rep. 428; *Dawson v. Merrille*, 2 Neb. 119.

In *Minnesota*, however, an agreement to convey after final proofs should have been made, for a consideration then to be paid, was held not to be an alienation and therefore not prohibited, though entered into before final proof was made. *Townsend v. Fenton*, 30 Minn. 528. See also *McAlpin v. Resch*, 82 Minn. 523.

An Option for the Purchase of a homestead and a pre-emption claim executed before final entry is in contravention of the acts of Congress and is not enforceable. *Everett v. Todd*, 19 Colo. 322.

3. U. S. v. Budd, 43 Fed. Rep. 630, affirmed 144 U. S. 154; *Sharon v. Woodrnick*, 18 Minn. 354; *Church v. Adams*, 37 Oregon 355. See also *Doll v. Stewart*, (Colo. 1902) 70 Pac. Rep. 326.

4. Rev. Stat. U. S., § 2263.

5. United States. — *Myers v. Croft*, 13 Wall. (U. S.) 291.

California. — *Merrill v. Clark*, 103 Cal. 367.

Colorado. — *McMillen v. Gerstle*, 19 Colo. 98; *Cooper v. Hunter*, 8 Colo. App. 101.

Kansas. — *McKean v. Crawford*, 6 Kan. 112.

Minnesota. — *Camp v. Smith*, 2 Minn. 155.

Oregon. — *Richards v. Snyder*, 11 Oregon 501.

Washington. — *Boggan v. Reid*, 1 Wash. 514.

Wisconsin. — *Dillingham v. Fisher*, 5 Wis.

475. Compare *M'Elyea v. Hayter*, 2 Port. (Ala.) 148; *Taylor v. Baker*, 1 Fla. 245.

Where the deed of a pre-emptor bore the same date as his certificate of purchase, it was held that there was no presumption that the deed was executed before the certificate, and therefore void, under Rev. Stat. U. S., § 2262. *Carson v. Railsback*, 3 Wash. Ter. 168.

6. McMillen v. Gerstle, 19 Colo. 98; *Sutphen v. Sutphen*, 30 Kan. 510; *Carson v. Railsback*, 3 Wash. Ter. 168.

7. Larison v. Wilbur, 1 N. Dak. 284.

8. Anderson v. Carkins, 135 U. S. 483; *Smith v. Johnson*, 37 Ala. 633; *Marshall v. Cowles*, 48 Ark. 362; *Moore v. Moore*, 130 Cal. 110; *Brown v. Kennedy*, 12 Colo. 235; *Oaks v. Heaton*, 44 Iowa 116; *Brake v. Bailou*, 19 Kan. 397; *Mellison v. Allen*, 30 Kan. 382; *Bruggerman v. Hoerr*, 7 Minn. 337, 82 Am. Dec. 97; *St. Peter Co. v. Bunker*, 5 Minn. 192; *Evans v. Folsom*, 5 Minn. 422; *Ferguson v. Kumler*, 11 Minn. 104; *Fleischer v. Fleischer*, 11 N. Dak. 221; *Pacific Livestock Co. v. Gentry*, 38 Oregon 275.

9. Bruggerman v. Hoerr, 7 Minn. 337, 82 Am. Dec. 97; *St. Peter Co. v. Bunker*, 5 Minn. 192. See, however, *Simmons v. Yurann*, 11 Neb. 516; *Bateman v. Robinson*, 12 Neb. 508.

10. Ainsworth v. Miller, 20 Kan. 220. See also *Mackintosh v. Renton*, 3 Wash. Ter. 431. See, however, *Higgins v. Butler*, 10 Okla. 345.

Mortgage for Purchase Money Invalid. — *Moffatt v. Bulson*, 96 Cal. 106, 31 Am. St. Rep. 192.

subsequently acquired, presents a federal question, and the decisions of the courts of the state in which the land is situated are not binding on the federal courts.¹ The federal statutes expressly provide that any person who has settled or who may hereafter settle on public lands either by pre-emption or by virtue of the homestead laws shall have the right to transfer, by warranty against his own acts, any portion of his pre-emption or homestead for the right of way of railways, for cemetery purposes, etc., and that a transfer for such public purpose shall in no way violate the right to complete and perfect the title to the pre-emption or homestead.²

(3) *Mortgages.* — A person entering public land who has complied with the provisions of the statutes and become absolutely entitled to receive a patent has such an interest before the patent is actually issued as will enable him to mortgage the land, and the patent, when issued, inures to the benefit of the mortgagee;³ and where a person in possession of public lands executes a mortgage thereof with express or implied covenants of warranty before he has made final proofs so as to entitle him to a patent, any subsequent title he may acquire from the government will inure to the benefit of the mortgagee, in the absence of statutory provisions prohibiting such transactions.⁴ So where a pre-emptor, after acquiring title from the government, conveys the land to a third person who has notice of the mortgage, the mortgage will be enforced against such grantee.⁵

If the settler does not acquire title from the government, the mortgage cannot, of course, be of any validity as against the government or its grantees. Thus, where the settler, after executing the mortgage, conveys the land to a third person, who secures the title from the government, the mortgage cannot be enforced against such third person.⁶ So where a homesteader, after executing a mortgage on the land, dies before full compliance with the law entitling him to make final proof and obtain a patent, the mortgage cannot be enforced as against his heirs who perfect the entry and receive the patent in their names.⁷

Restrictions on Right to Mortgage. — Where a settler on public lands executes a mortgage on the land before he has perfected his claim, the fact that under the pre-emption laws the execution of such mortgage is a bar to the mort-

1. *Anderson v. Carkins*, 135 U. S. 483. Compare *Morgan v. Curtenius*, 4 McLean (U. S.) 366, affirmed 20 How. (U. S.) 1.

2. *U. S. v. Turner*, 54 Fed. Rep. 228; *St. Louis, etc., R. Co. v. Tapp*, 64 Ark. 357; *Hays v. Steiger*, 76 Cal. 555, affirmed 156 U. S. 387; *Burlington, etc., R. Co. v. Johnson*, 38 Kan. 142.

3. **Mortgage After Perfecting Right to Patent.** — *Com. Title Ins., etc., Co. v. U. S.*, 37 Ct. Cl. 532; *Smart v. Kennedy*, 123 Ala. 627; *Gilkinson Sloss Co. v. Forbes*, 54 Ark. 148, 26 Am. St. Rep. 29. See also *Fariß v. Deeming Invest. Co.*, 5 Okla. 496. And see generally the title *MORTGAGES*, vol. 20, pp. 915, 916.

4. **Mortgage Before Perfecting Right to Patent.** — *Wright v. Shumway*, 1 Biss. (U. S.) 23; *Kirkaldie v. Larabee*, 31 Cal. 455, 89 Am. Dec. 205; *Christy v. Dana*, 42 Cal. 175; *Camp v. Grider*, 62 Cal. 25; *Orr v. Stewart*, 67 Cal. 275; *Whitney v. Buckman*, 13 Cal. 536; *Tartar v. Hall*, 3 Cal. 263; *Hubbard v. Mulligan*, 13 Colo. App. 116; *Nycum v. McAllister*, 33 Iowa 374; *Fuller v. Hunt*, 48 Iowa 163; *McFall v. Murray*, 4 Kan. App. 554; *Blanchard v. Jamison*, 14 Neb. 244.

In *Herbert v. Brown*, 65 Fed. Rep. 2, however, where A filed a claim for pre-emption of certain land, and then mortgaged the land, and after the execution of the mortgage relinquished his

pre-emption claim and entered a homestead claim to the same land, it was held that the mortgage would not cover the title acquired by him from the government under his homestead claim.

The Town-site Act of Congress of March 2, 1867, does not prohibit mortgages by the occupants of lots, and an occupant after the passage of the act may make a valid mortgage of the premises although the land has not yet been entered as a town site under the act. *Hussey v. Smith*, 99 U. S. 20. See also *Hussey v. Merritt*, 99 U. S. 25, note.

5. **Conveyance to Third Person After Patent.** — *Christy v. Dana*, 42 Cal. 174.

6. **Failure of Mortgagor to Acquire Title.** — *Bull v. Shaw*, 48 Cal. 455.

7. **Death of Homesteader.** — *Marley v. Sturkert*, 62 Neb. 163, holding that such heirs, upon making proof of the necessary acts in compliance with the law governing homestead entries on public lands, do not receive the land from or through their ancestor, the original entryman, but direct from the government, which, upon the issuance of the patent, invests them with the full and complete legal and equitable title, free from any lien which the entryman may have sought to create thereon in his lifetime.

gagor's right to pre-empt the land, and that it was executed in ignorance of such law, will not authorize a court of equity to set aside the mortgage.¹ The provision of the pre-emption laws prohibiting a contract by a pre-emptor by which the title he may acquire shall inure in whole or in part to the benefit of another does not render invalid an agreement to mortgage or a mortgage executed by him, when there is nothing to show that it was the intention of the mortgagor not to pay the mortgage or that the mortgage should be used as a vehicle to transfer to the mortgagee the title to be acquired.² So in jurisdictions in which a mortgage is regarded merely as a lien, a mortgage by pre-emptor or homesteader is not a "grant or conveyance" or "alienation" so as to come within the prohibition of the pre-emption or homestead laws against grants, conveyances, or alienations;³ and the same has been held true with regard to a trust deed.⁴ In some jurisdictions, however, mortgages have been considered to come within the prohibition against grants, conveyances, and alienations.⁵

The Provision of the Federal Homestead Act that lands acquired under the provisions of the act shall in no event become liable to the satisfaction of any indebtedness contracted prior to the issuance of the patent was intended solely to prevent the involuntary appropriation of the land to the satisfaction of such indebtedness, and does not prevent the homesteader from voluntarily applying the land to the satisfaction thereof;⁶ and therefore a mortgage executed by the homesteader to secure an indebtedness contracted prior to the issuance of the patent is valid and enforceable,⁷ even though executed prior to the issuance of the patent or before final proofs have been made so as to entitle the homesteader to a patent.⁸

1. *Douglas v. Gould*, 52 Cal. 656.

2. *Stewart v. Powers*, 98 Cal. 514; *Jones v. Tainter*, 15 Minn. 512, *overruling McCue v. Smith*, 9 Minn. 252, 86 Am. Dec. 100, and *Woodbury v. Dorman*, 15 Minn. 338. See, however, *Brewster v. Madden*, 15 Kan. 249.

3. *United States*.—*Larson v. Weisbecker*, 1 Dec. Dep. Int. 422.

California.—*Stewart v. Powers*, 98 Cal. 514. See also *Whitney v. Buckman*, 13 Cal. 536.

Colorado.—*Wilcox v. John*, 21 Colo. 367; *Hubbard v. Mulligan*, 13 Colo. App. 116.

Iowa.—*Fuller v. Hunt*, 48 Iowa 163.

Minnesota.—*Jones v. Tainter*, 15 Minn. 512, *overruling McCue v. Smith*, 9 Minn. 252, 86 Am. Dec. 100, and *Woodbury v. Dorman*, 15 Minn. 338.

Missouri.—*Dickerson v. Bridges*, 147 Mo. 235.

Montana.—*Norris v. Heald*, 12 Mont. 282, 33 Am. St. Rep. 581, *overruling Bass v. Buker*, 6 Mont. 442.

Nevada.—*Orr v. Ulyatt*, 23 Nev. 134.

Oklahoma.—*Stark v. Duvall*, 7 Okla. 213.

Washington.—*Weber v. Laidler*, 26 Wash. 144.

See also *Smith v. Sackett*, 15 Ill. 528; *Kneen v. Halin*, 6 Idaho 621. See, however, *Craig v. Tappin*, 2 Sandf. Ch. (N. Y.) 78.

4. *Wilcox v. John*, 21 Colo. 367; *Dickerson v. Bridges*, 147 Mo. 235.

5. *Brewster v. Madden*, 15 Kan. 249; *Biddle v. Adams*, 5 Kan. App. 734; *Strong v. Rachal*, 16 La. 232; *Penn v. Ott*, 12 La. Ann. 233. See also *Mellison v. Allen*, 30 Kan. 382.

Where land is mortgaged by a pre-emptor before final proofs, and after securing the patent he conveys the land, his grantee expressly agreeing to pay the mortgage indebtedness, such

grantee is estopped to assert that the mortgage was in violation of the land laws. *Green v. Houston*, 22 Kan. 35.

6. *Smart v. Kennedy*, 123 Ala. 627; *Jones v. Yoakam*, 5 Neb. 265.

7. *Alabama*.—*Smart v. Kennedy*, 123 Ala. 627.

Arkansas.—*Gilkerson Sloss Co. v. Forbes*, 54 Ark. 148, 26 Am. St. Rep. 29.

California.—*Kirkaldie v. Larrabee*, 31 Cal. 455, 89 Am. Dec. 205; *Orr v. Stewart*, 67 Cal. 275; *Klemp v. Northrop*, 137 Cal. 414.

Iowa.—*Nycum v. McAllister*, 33 Iowa 374; *Fuller v. Hunt*, 48 Iowa 163.

Minnesota.—*Lewis v. Wetherell*, 36 Minn. 386, 1 Am. St. Rep. 674; *Lang v. Morey*, 40 Minn. 396, 12 Am. St. Rep. 748; *Townsend v. Fenton*, 30 Minn. 528.

Missouri.—*Dickerson v. Bridges*, 147 Mo. 235; *Dickerson v. Cuthburth*, 56 Mo. App. 647.

Nebraska.—*Cheney v. White*, 5 Neb. 261, 25 Am. Rep. 487; *Jones v. Yoakam*, 5 Neb. 265; *Skiner v. Reynick*, 10 Neb. 323, 35 Am. Rep. 479; *Blanchard v. Jamison*, 14 Neb. 244; *Forgy v. Merryman*, 14 Neb. 513.

Nevada.—*Orr v. Ulyatt*, 23 Nev. 134.

Oklahoma.—*Stark v. Duvall*, 7 Okla. 213.

Oregon.—*Howard v. Reckling*, 31 Oregon 161.

Washington.—*Boggan v. Reid*, 1 Wash. 514; *Weber v. Laidler*, 26 Wash. 144.

Wisconsin.—*Spieß v. Neuberg*, 71 Wis. 279, 5 Am. St. Rep. 211; *Meinhold v. Walters*, 102 Wis. 389, 72 Am. St. Rep. 888. See, however, *Webster v. Bowman*, 25 Fed. Rep. 880.

8. *Gilkerson-Sloss Co. v. Forbes*, 54 Ark. 148, 26 Am. St. Rep. 29; *Kirkaldie v. Larrabee*, 31 Cal. 455, 89 Am. Dec. 205; *Nycum v. McAllister*, 33 Iowa 374; *Fuller v. Hunt*, 48 Iowa 163.

(4) *Involuntary Alienation*. — In the absence of any statutory provision to the contrary, a pre-emptor of public lands, after he has paid the purchase price and become entitled to a patent for the land, has an equitable interest or title to the land which is subject to forced sale for the satisfaction of judgments recovered against him,¹ and where he subsequently receives a patent, he holds the legal title thus acquired in trust for the purchaser at the prior judicial sale.² In case of a judicial sale prior to the issuance of the patent the purchaser's title is purely an equitable one as distinguished from a legal title.³

After a Patent Has Issued, the title of the patentee becomes absolute, and his interest may be sold for the payment of his debts contracted either before or after the issuance of the patent.⁴

Pre-emption Claim. — The preferential privilege given by the pre-emption laws to one who occupies and improves public land without express permission, to purchase the land during a limited period, is not subject to judicial sale.⁵ Upon the death of the occupant, this preferential right passes to his heirs at law,⁶ and where the administrator borrowed money which was used to pay the purchase money to the government, and the patent was issued to the heirs, it was held that there was no lien on the land for the money so advanced.⁷

Statutory Exemptions. — The government, in disposing of public lands, may impose such restrictions with regard to its alienation by the patentee as it sees fit, irrespective of the situation of the land, whether in one of the states or in a territory.⁸ Thus it is expressly provided by the Federal Homestead Act that no land acquired under the provisions thereof shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuance of the patent therefor, and under such provision judgments recovered for such debts cannot be enforced against the land.⁹ The Timber-culture Act

1. *Involuntary Alienation* — *United States*. — *Landes v. Brant*, 10 How. (U. S.) 348; *Levi v. Thompson*, 4 How. (U. S.) 17; *Bigelow v. Chatterton*, 10 U. S. App. 267, 51 Fed. Rep. 614. See also *Carroll v. Safford*, 3 How. (U. S.) 441.

Alabama. — *Goodlet v. Smithson*, 5 Port. (Ala.) 249.

California. — *Henley v. Hotaling*, 41 Cal. 22.

Colorado. — *Weare v. Johnson*, 20 Colo. 363.

Illinois. — *Jackson v. Spink*, 59 Ill. 404. See also *Gray v. McCance*, 14 Ill. 344.

Iowa. — *Levi v. Thompson*, Morr. (Iowa) 235; *Cavender v. Smith*, 5 Iowa 157.

Mississippi. — *Huntingdon v. Grantland*, 33 Miss. 453.

Canadian Crown Lands. — In *Ferguson v. Ferguson*, 16 Grant Ch. (U. C.) 309, it was held that the interest of a debtor in land bought from the crown, but for which at the time of his death he had not fully paid, and had not obtained the patent, is available in equity for the benefit of his creditors; and their right is not destroyed by a friend of the heirs paying the balance of the purchase money and procuring the issuance of the patent in the names of the heirs. See also *Yale v. Tollerton*, 13 Grant Ch. (U. C.) 302.

2. *Kenyon v. Quinn*, 41 Cal. 325.

3. **Equitable as Distinguished from Legal Title**. — *Kenyon v. Quinn*, 41 Cal. 325.

4. *Morse v. Garrison*, 4 Fla. 460, wherein it was held that Act Cong. Aug. 4, 1842, providing for the "armed occupation and settlement of the unsettled part of the peninsula of East

Florida," did not relieve the title of a settler after patent issued from being sold to satisfy debts contracted prior to the issuance of the patent.

5. *Rhea v. Hughes*, 1 Ala. 219; *Montgomery v. Whiting*, 40 Cal. 294; *Moore v. Besse*, 43 Cal. 511; *Rupert v. Jones*, 119 Cal. 111; *McMillen v. Gerstle*, 19 Colo. 98. See also *Emerson v. Sansome*, 41 Cal. 553.

6. *Johnson v. Collins*, 12 Ala. 322.

7. *Black v. Dressell*, 20 Kan. 153.

8. *United States*. — *Seymour v. Sanders*, 3 Dill. (U. S.) 437, 21 Fed. Cas. No. 12,690.

Arkansas. — *Sorrels v. Self*, 43 Ark. 451.

California. — *Miller v. Little*, 47 Cal. 348.

Colorado. — *McMillen v. Gerstle*, 19 Colo. 101.

Kansas. — *Nash v. Farmers, etc., Bank*, 3 Kan. App. 694.

Minnesota. — *Russell v. Lowth*, 21 Minn. 167, 18 Am. Rep. 389.

Nebraska. — *Brandhoefer v. Bain*, 45 Neb. 781.

Oregon. — *Adams v. Church*, 42 Oregon 270. Compare *Morse v. Garrison*, 4 Fla. 460.

9. *United States*. — *Seymour v. Sanders*, 3 Dill. (U. S.) 437, 21 Fed. Cas. No. 12,690.

Arkansas. — *Sorrels v. Self*, 43 Ark. 451; *Shorman v. Eakin*, 47 Ark. 351.

California. — *Miller v. Little*, 47 Cal. 348; *Barnard v. Boller*, 105 Cal. 214.

Colorado. — *Brown v. Kennedy*, 12 Colo. 235; *Struby-Estabrook Mercantile Co. v. Davis*, 18 Colo. 93.

Iowa. — *Boucher v. Smith*, 73 Iowa 610.

Kansas. — *Kansas Lumber Co. v. Jones*, 32

contains a similar provision.¹ Under such provision the land is protected from forced sale for such indebtedness though the homesteader has ceased to occupy it as a homestead;² and upon the death of the homesteader the land descends to his heirs or devisees and cannot be sold to satisfy indebtedness incurred by him prior to the issuance of the patent.³ Where the land is conveyed by the homesteader to a third person after the issuance of the patent, even though a judgment has been secured against him for an indebtedness incurred prior to the issuance of the patent, the land still remains exempt from forced sale for such indebtedness while in the hands of such third person,⁴ and in most jurisdictions it would appear that the exemption still exists in case the land is reconveyed to the patentee,⁵ though in *California* it has been held that where the land is reconveyed by such third person to the original homesteader, he takes it divested of its homestead character and exemption, which do not revive upon his repurchase.⁶ A contract by a homesteader to convey the land, after a patent shall be issued, to a partnership consisting of himself and another, will not subject the property as a whole to liability for partnership debts contracted prior to the issuance of the patent, but the patentee is entitled to claim his undivided interest in the property free from liability for such debts.⁷ The provision that no land acquired under the homestead act "shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor," is intended solely

Kan. 195; *J. B. Watkins Land Mortg. Co. v. Mullen*, 8 Kan. App. 705.

Louisiana. — *Patton v. Richmond*, 28 La. Ann. 795.

Minnesota. — *Russell v. Lowth*, 21 Minn. 167, 18 Am. Rep. 389; *Coleman v. McCormick*, 37 Minn. 179.

Missouri. — *Dickerson v. Bridges*, 147 Mo. 235.

Nebraska. — *Smith v. Schmitz*, 10 Neb. 600; *Smith v. Steele*, 13 Neb. 1; *Kruger v. Adams, etc., Harvester Co.*, 13 Neb. 97; *Baldwin v. Boyd*, 18 Neb. 444; *Jackett v. Bower*, 62 Neb. 232.

Oklahoma. — *Flanagan v. Forsythe*, 6 Okla. 225.

Oregon. — *Clark v. Bayley*, 5 Oregon 343; *Springer v. Young*, 14 Oregon 289; *Faull v. Cooke*, 19 Oregon 466, 20 Am. St. Rep. 840.

Washington. — *Jean v. Dee*, 5 Wash. 580.

Wisconsin. — *Gile v. Hallock*, 33 Wis. 523.

The Term "Debt" as used in Rev. Stat. U. S., § 2296, includes liability for a tort. *Flanagan v. Forsythe*, 6 Okla. 225. See also *Warner v. Cammack*, 37 Iowa 642; *State v. O'Neil*, 7 Oregon 141. *Compare Hill v. Bowman*, 35 Mich. 191.

As to Mechanics' Liens, see the title MECHANICS' LIENS, vol. 20, p. 301.

Irrigation Ditches for the Use of a Homesteader are exempt as part of the homestead. *Faull v. Cooke*, 19 Oregon 466, 20 Am. St. Rep. 840.

An Entry Perfected by a Devisee of the Original Homesteader is exempt from forced sale to satisfy an indebtedness of the devisee incurred prior to issuance of the patent. *Coleman v. McCormick*, 37 Minn. 179.

Canadian Homestead Grant. — Mortgages taken by a locatee of a free grant for the purchase money of a sale of a portion of the grant are not an interest in the lands granted owned by the locatee and exempt from sale for payment of debts within the Free Grant and Homestead Act, Rev. Stat. Ont., c. 25, § 20, subsec. 2,

which enacts that "after the issuing of the patent for any land, and while the land or any part thereof or interest therein is owned by the locatee or his widow, heirs, or devisees, such land, part, or interest shall during the twenty years next after the date of the location be exempt from attachment, levy under execution, or sale for payment of debts." *Cann v. Knott*, 19 Ont. 422, affirmed 20 Ont. 294.

1. **Timber-culture Act**. — *Nash v. Farmers, etc., Bank*, 3 Kan. App. 694; *Adams v. Church*, 42 Oregon 270.

2. **Discontinuance of Occupation**. — *Jean v. Dee*, 5 Wash. 580.

3. **Death of Homesteader**. — *Sorrels v. Self*, 43 Ark. 451; *J. B. Watkins Land Mortg. Co. v. Mullen*, 8 Kan. App. 705; *Gjerstadengen v. Van Duzen*, 7 N. Dak. 612, 66 Am. St. Rep. 679.

4. **Rights of Purchasers**. — *Miller v. Little*, 47 Cal. 348; *Russell v. Lowth*, 21 Minn. 167, 18 Am. Rep. 389; *Smith v. Schmitz*, 10 Neb. 600; *Smith v. Steele*, 13 Neb. 1; *Baldwin v. Boyd*, 18 Neb. 444; *Brandhoefer v. Bain*, 45 Neb. 781.

A Grantee by Warranty Deed of a Patentee under the homestead laws is entitled to the benefit of the exemption. *Baldwin v. Boyd*, 18 Neb. 444.

Assumption by Vendee of Prior Indebtedness. — If the vendee of the patentee in making the purchase expressly agrees to pay an indebtedness on the part of the patentee, incurred prior to the issuance of the patent, the land may be subjected in the hands of such vendee to the payment of such indebtedness. *Skinner v. Reynick*, 10 Nev. 323, 35 Am. Rep. 479; *Kruger v. Adams, etc., Harvester Co.*, 9 Neb. 526, 13 Neb. 97.

5. **Reconveyance to Patentee**. — *Bouscher v. Smith*, 73 Iowa 610; *Brandhoefer v. Bain*, 45 Neb. 781; *Van Doren v. Miller*, 14 S. Dak. 264, approving *Brandhoefer v. Bain*, 45 Neb. 781.

6. *Delany v. Knapp*, 111 Cal. 165, 52 Am. St. Rep. 160.

7. *Adams v. Church*, 42 Oregon 270.

for the benefit of the homesteader, and though the exemption is not restricted expressly to indebtedness incurred by the homesteader, it is held that such restriction is implied, and that the land in the hands of a grantee of the homesteader is not exempt from sale for indebtedness incurred by such grantee prior to the issuance of the patent.¹ In *California* and *Oregon* it has been held that this provision protects the land from sale for indebtedness incurred prior to the actual issuance of the patent, and that the patent, when issued, will not relate back to the time of the issuance of the final certificate of entry, so as to subject the land to forced sale for an indebtedness incurred between such time and the actual issuance of the patent.² In other jurisdictions, however, it is held that the patent, when issued, will be referred back to the time when the homesteader became absolutely entitled to receive it, so as to render the land subject to sale to satisfy an indebtedness incurred after the homesteader became entitled to the patent, but before its actual issuance.³

(5) *Resulting Trusts*. — Where the policy of the pre-emption laws is that the settler shall profit by the bounty of the government, and alienations before purchase by the pre-emptor are prohibited, if one person advances the money to enable a settler to enter land, no resulting trust is created thereby in favor of the lender;⁴ but where the laws under which the land is purchased from the government contain no restriction against alienation, the general equitable doctrine that a trust results in favor of one who furnishes the money to purchase land the title to which is taken in the name of another⁵ applies to the purchase of public lands.⁶ It has been held by the United States Supreme Court that a state statute abolishing generally such trusts did not apply to transactions relating to the purchase of government land,⁷ though the *Minnesota* court, in the construction of the statutes of that state in this regard, has held the contrary.⁸

(6) *Contracts with Regard to Improvements*. — The courts have recognized improvements upon the public lands as property, and have upheld contracts with regard to them when fair and reasonable, irrespective of the right to transfer an inchoate interest in the land, and though the contract involved a relinquishment of the vendor's right to pre-empt the land.⁹

(7) *Relinquishment of Entries and Entry Rights*. — So the relinquishment of an entry or the right to enter public lands and the withdrawal of a protest against the final proof of another have been recognized as a valuable consideration.¹⁰

1. *Duell v. Potter*, 51 Neb. 241; *Hannah v. Perkins*, (Neb. 1902) 89 N. W. Rep. 599.

2. *Barnard v. Boller*, 105 Cal. 214; *Wallowa Nat. Bank v. Riley*, 29 Oregon 289, 54 Am. St. Rep. 794.

3. *Struby-Estabrook Mercantile Co. v. Davis*, 18 Colo. 93; *Leonard v. Ross*, 23 Kan. 292; *Johnson v. Borin*, 7 Kan. App. 369; *Flanagan v. Forsythe*, 6 Okla. 225. See also *Kansas Lumber Co. v. Jones*, 32 Kan. 197.

4. *Resulting Trusts*. — *Johnson v. Collins*, 12 Ala. 322; *Cothran v. McCoy*, 33 Ala. 65; *Brake v. Ballou*, 19 Kan. 397; *Higgins v. Higgins*, 55 Mo. 346; *Robinson v. Jones*, 31 Neb. 20. Compare *Franklin v. McEntyre*, 23 Ill. 91.

5. See the title IMPLIED TRUSTS, vol. 15, p. 1132 et seq.

6. See the title IMPLIED TRUSTS, vol. 15, p. 1141; and see *Irvine v. Marshall*, 20 How. (U. S.) 558; *Lipscomb v. Nichols*, 6 Conn. 290; *Key v. Jennings*, 66 Mo. 356.

7. *Effect of State Statute Abolishing Resulting Trusts*. — *Irvine v. Marshall*, 20 How. (U. S.) 558.

8. *Irvine v. Marshall*, 7 Minn. 286. See also *Wentworth v. Wentworth*, 2 Minn. 277, 72 Am. Dec. 97.

9. *Improvements — United States*. — *Lamb v. Davenport*, 18 Wall. (U. S.) 307.

Alabama. — *Tarrance v. Hatfield*, 71 Ala. 234.

Arkansas. — *Mantooth v. Burke*, 35 Ark. 540.

Florida. — *Taylor v. Baker*, 1 Fla. 245.

Kansas. — *Hardesty v. Service*, 45 Kan. 614; *Lapham v. Head*, 21 Kan. 332; *Moore v. McIntosh*, 6 Kan. 39; *Bell v. Parks*, 18 Kan. 152; *Fessler v. Haas*, 19 Kan. 216.

Louisiana. — *Jenkins v. Gibson*, 3 La. Ann. 203; *Wood v. Lyle*, 4 La. Ann. 145; *Hollon v. Sapp*, 4 La. Ann. 519; *Price v. Curran*, 5 La. Ann. 686; *Norman v. Ellis*, 5 La. Ann. 694; *Bryan v. Glass*, 6 La. Ann. 740, 54 Am. Dec. 576. See also *Arbour v. Nettles*, 12 La. Ann. 217. *Minnesota*. — *Lindersmith v. Schwiso*, 17 Minn. 26.

Nebraska. — *McWilliams v. Bridges*, 7 Neb. 419; *Paxton Cattle Co. v. Arapahoe First Nat. Bank*, 21 Neb. 621, 59 Am. Rep. 852; *Blanchard v. Jamison*, 14 Neb. 244.

Compare *Carr v. Allison*, 5 Blackf. (Ind.) 63; *Spaulding v. Wood*, 8 Wis. 195. See the title IMPROVEMENTS, vol. 16, p. 62.

10. *Relinquishment of Entry — Kansas*. — *Hardesty v. Service*, 45 Kan. 614.

(8) *Effect of Unlawful Transfers on Title of Patentee.*—Where an applicant to enter public lands has made an agreement to transfer, or has transferred, in violation of the land laws, an interest in the land to be occupied, the land office is warranted in denying his application,¹ and if a patent is issued it may be canceled at the instance of the government on account of the fraud on the part of the patentee.² But such unlawful agreements do not prevent the patentee from acquiring a valid title through his patent which will hold good as against every one but the government, which alone can insist upon the forfeiture.³

b. INTERESTS ACQUIRED FROM STATE—(1) *In General.*—Though a grantor has no interest whatever in state lands, still, if he conveys such lands by warranty deed, such deed will operate by way of estoppel to pass to the grantee any title subsequently acquired title by the grantor;⁴ but a quitclaim deed or a sheriff's deed to land sold on execution will not have such effect.⁵ Though the grantor in a quitclaim deed has filed an application to purchase, he has no interest subject to transfer, and such deed will not pass to the grantee the after-acquired title of the grantor.⁶ A contract to convey land after title thereto is acquired from the state is valid.⁷ After land has been conveyed by the state, it is, of course, in the hands of the grantee, subject to alienation as other property.⁸

Statutory Restrictions.—In some instances the state statutes providing for the disposition of state lands restrict the right of applicants to transfer their interests.⁹ Thus, a statute requiring an applicant for the purchase of state land to file an affidavit that the application was not made for the purpose of acquiring

Michigan.—McCabe v. Caner, 68 Mich. 182.

Minnesota.—Palmer v. March, 34 Minn. 127; Lindersmith v. Schwiso, 17 Minn. 26; Thompson v. Hanson, 28 Minn. 484; Olson v. Orton, 28 Minn. 36.

Mississippi.—Hooker v. McIntosh, 76 Miss. 693.

Missouri.—Huntsucker v. Clark, 12 Mo. 333.

Nebraska.—Jones v. Dunbar, 52 Neb. 151.

Nevada.—Rose v. Treadway, 4 Nev. 455, 97 Am. Dec. 546; Treadway v. Wilder, 8 Nev. 91.

North Dakota.—Peoples v. Evans, 8 N. Dak. 121.

Oklahoma.—Tecumseh State Bank v. Mad-dox, 4 Okla. 583.

See also Moss v. Dowman, 82 Fed. Rep. 810, decree affirmed 88 Fed. Rep. 181, appeal to Supreme Court allowed 90 Fed. Rep. 831, affirmed 176 U. S. 413; Tarrance v. Hatfield, 71 Ala. 234. See, however, Hudson v. Milner, 12 Ala. 667. Compare Tenison v. Martin, 13 Ala. 21; Dameron v. Dingee, 1 Colo. App. 436.

Right of Wife to Contest Relinquishment.—Michaelis v. Michaelis, 43 Minn. 123.

1. *Unlawful Transfers.*—Hyde v. Bishop Iron Co., 177 U. S. 281, affirming 72 Minn. 16.

2. *Slina Stock Co. v. U. S. (C. C. A.)* 85 Fed. Rep. 339.

A Mere Intention on the part of a locator of desert lands to convey them when he has acquired them, though carried out after the patent has issued, is not ground for canceling the patent. U. S. v. Mackintosh, 56 U. S. App. 483. See also U. S. v. Budd, 144 U. S. 154, affirming 43 Fed. Rep. 630, where the same was held true with regard to a timber entry under Act Cong. June 3, 1878. And see U. S. v. Reed, 28 Fed. Rep. 482.

3. *McMillen v. Gerstle*, 19 Colo. 98; *Snow v. Flannery*, 10 Iowa 318, 77 Am. Dec. 120; *Larison v. Wilbur*, 1 N. Dak. 284; *Carson v. Rails-back*, 3 Wash. Ter. 168. See also *Turner v. Donnelly*, 70 Cal. 597; *Towsley v. Johnson*, 1 Neb. 95, affirmed on other grounds 13 Wall. (U. S.) 72.

4. *State Lands Warranty Deed.*—*Kelly v. Greenfield*, 2 Har. & M. (Md.) 121.

5. *Quitclaim Deed.*—*Bates v. Bacon*, 66 Tex. 348.

6. *Morrison v. Wilson*, 30 Cal. 344; *People v. Blake*, 84 Cal. 614; *Anderson v. Yoakum*, 94 Cal. 227, 28 Am. St. Rep. 121.

7. *Contracts to Convey.*—*Wilson v. Simpson*, 68 Tex. 306.

Thus, a contract by which one desiring to appropriate public domain as a pre-emptor under the Texas laws agrees to convey to a third party a portion of the land when title is secured, in consideration of his services in building a house on the land, fencing, and cultivating it, is not violative of public policy, and after the issuance of title by the state may be enforced. *Horm v. Shamblin*, 57 Tex. 243.

8. *Banton v. Crosby*, 95 Me. 429; *McMasters v. Mills*, 30 Tex. 591; *Hines v. Thorn*, 57 Tex. 98; *Fields v. Davis*, (Tex. Civ. App. 1903) 74 S. W. Rep. 52.

Swamp lands granted by Congress to Missouri and by the state legislature to the counties are held in trust for the benefit of the county public schools, and are not subject to sale on execution to pay a general judgment against the county. *Stone v. Perkins*, 85 Fed. Rep. 616; *State v. New Madrid County Ct.*, 51 Mo. 82.

9. *Statutory Restrictions.*—*Thompson v. England*, 1 Hawks (8 N. Car.) 137; *Buchanan v. Park*, (Tex. Civ. App. 1896) 36 S. W. Rep. 807.

title for a third person renders invalid a contract to convey entered into by an applicant prior to the filing of his application.¹ Some statutes restrict the right to alienate the land after title has been acquired from the state.²

(2) *Preferential Rights of Purchase.* — In providing for the disposition of state lands, statutes have been enacted giving to certain classes of persons, such as actual settlers, a preferential right to purchase. In one instance this preferential right has been considered to be personal and not assignable,³ but as a general rule it has been considered an assignable interest.⁴

(3) *Land Warrants and Scrip.* — Under state land laws land warrants or scrip have been issued, entitling the warrantees to locate them upon the vacant state lands and to receive patents for the lands so located, and such warrants or scrip have been recognized as representing an interest which could be assigned.⁵ So a part interest in an unlocated land certificate may be

1. *Churchill v. Anderson*, 56 Cal. 55; *McGregor v. Donnelly*, 67 Cal. 149.

2. *Ames v. Hubby*, 49 Tex. 705, holding that the provision of Pasch. Dig. Tex., art. 4062, that lands granted to soldiers under Act Tex. Dec. 27, 1837, shall not be "subject to sale, alienation, mortgage, or execution during the lifetime of" the grantee did not restrain him from bequeathing the land. *Todd v. Masterson*, 61 Tex. 618; *Williams v. Wilson*, 76 Tex. 69.

3. *Preferential Right Not Assignable.* — *Forbis v. Bowen*, 1 A. K. Marsh. (Ky.) 407.

4. *Preferential Right Held to Be Assignable* — *Iowa*. — *Wilson v. McLernan*, 20 Iowa 30.

Kentucky. — *Burgess v. Tipton*, 5 Dana (Ky.) 541; *Bohannon v. Pace*, 6 Dana (Ky.) 194; *Derrington v. Goodman*, 8 Dana (Ky.) 174.

New York. — *Armour v. Alexander*, 10 Paige (N. Y.) 571.

North Carolina. — *Barnett v. Woods*, 2 Jones Eq. (55 N. Car.) 198.

Pennsylvania. — *Reed v. Dickey*, 2 Watts (Pa.) 459; *Heady v. Noul*, 5 S. & R. (Pa.) 191; *Zubler v. Schrack*, 46 Pa. St. 67.

Tennessee. — *Danforth v. Lowry*, 3 Hayw. (Tenn.) 61, *overruled* *Dunlap v. Gibbs*, 4 Yerg. (Tenn.) 97; *Clinton v. McClarin*, 3 Hayw. (Tenn.) 299; *Smith v. Rankin*, 4 Yerg. (Tenn.) 1, 26 Am. Dec. 213; *Chester v. Hubbard*, 2 Humph. (Tenn.) 354; *Scott v. Price*, 2 Head (Tenn.) 534.

Texas. — *Bledsoe v. Cains*, 10 Tex. 455; *Moreland v. Atchison*, 24 Tex. 164; *Johnson v. Newman*, 43 Tex. 629; *De Montel v. Speed*, 53 Tex. 339; *Johnson v. Townsend*, 77 Tex. 639; *Mitchell v. Nix*, 1 Tex. Unrep. Cas. 127; *Horne v. Gambrell*, 1 Tex. App. Civ. Cas. § 999; *Kinsey v. Sasse*, 3 Tex. Civ. App. 216; *Savoy v. Brewton*, 3 Tex. Civ. App. 336; *Roberts v. Trout*, 13 Tex. Civ. App. 70; *State v. Palin*, (Tex. Civ. App. 1894) 25 S. W. Rep. 820; *Clifton v. Thompson*, (Tex. Civ. App. 1895) 29 S. W. Rep. 197; *Nesting v. Terrell*, (Tex. 1903) 75 S. W. Rep. 485. *Compare* *Palmer v. Chandler*, 47 Tex. 332.

Virginia. — *Westfall v. Singleton*, 1 Wash. (Va.) 227; *Tichanal v. Roe*, 2 Rob. (Va.) 288. See also *Sargent v. Simpson*, 8 Me. 148.

The Texas Act of 1873 authorizes a sale of an incomplete occupation by a pre-emptor of a homestead, and will allow the time of occupancy of the original settler and his assignee to be added together in computing the three years. *Johnson v. Townsend*, 77 Tex. 639. See also *Palmer v. Bennett*, 81 Tex. 451.

Statute of Frauds. — *Danforth v. Lowry*, 3 Hayw. (Tenn.) 61; *Hickman v. Withers*, 83 Tex. 575; *Thompson v. Johnson*, 2 Tex. Unrep. Cas. 258.

Bounties for Factories. — Under Act Tex. Dec. 15, 1863, providing for the grant by the state of one section of three hundred and twenty acres of land for every thousand dollars' worth of machinery erected and put in efficient operation by any person, company, or corporation by the first day of March, 1865, in accordance with the provisions of that act, the right to land resulting from the erection of machinery under the law by a third party did not pass as an incident of the sale of the machinery. *Maxwell v. Bastrop Mfg. Co.*, 77 Tex. 233; *McLeary v. Dawson*, 87 Tex. 524, *reversing on other grounds*, (Tex. Civ. App. 1894) 25 S. W. Rep. 705.

5. *Land Warrants* — *United States.* — *Miller v. Texas*, etc., R. Co., 132 U. S. 662; *Brown v. Galloway*, Pet. (C. C.) 291, 4 Fed. Cas. No. 2,006.

Kentucky. — *Cobb v. Thompson*, 1 A. K. Marsh. (Ky.) 507.

New York. — *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 62.

Ohio. — *McArthur v. Phcebus*, 2 Ohio 415; *McArthur v. Nevill*, 3 Ohio 178.

Pennsylvania. — *Bechtel v. Rhoads*, 3 S. & R. (Pa.) 333; *Grant v. Levan*, 4 Pa. St. 393.

Tennessee. — *Pillow v. Shannon*, 3 Yerg. (Tenn.) 508; *Hogue v. Anderson*, 3 Yerg. (Tenn.) 245; *Chester v. Campbell*, 1 Swan (Tenn.) 513.

Texas. — *Graham v. Henry*, 17 Tex. 164; *Andrews v. Smithwick*, 20 Tex. 111; *Babb v. Carroll*, 21 Tex. 765; *Mitchell v. Bass*, 26 Tex. 372; *Ripley v. Withee*, 27 Tex. 14; *Ross v. Mitchell*, 28 Tex. 150; *Walters v. Jewett*, 28 Tex. 192; *Cox v. Bray*, 28 Tex. 247; *Merriweather v. Kennard*, 41 Tex. 273; *Johnson v. Newman*, 43 Tex. 629; *Simpson v. Chapman*, 45 Tex. 561; *Farris v. Gilbert*, 50 Tex. 350; *Hermann v. Reynolds*, 52 Tex. 391; *Smith v. Shinn*, 58 Tex. 1; *League v. Rogan*, 59 Tex. 427; *Goode v. Lowery*, 70 Tex. 150; *Dean v. Blount*, 71 Tex. 270; *Dodge v. Litter*, 73 Tex. 319; *Robertson v. DuBose*, 76 Tex. 1; *Davis v. Bargas*, 88 Tex. 662; *Jackson v. Waldstein*, 10 Tex. Civ. App. 156; *Estell v. Kirkby*, (Tex. Civ. App. 1898) 48 S. W. Rep. 8.

Virginia. — *Morrison v. Campbell*, 2 Rand. (Va.) 206.

Sale for Payment of Decedent's Debts. — *Peevy*

assigned.¹ One who advances money for the purchase of land warrants from the state acquires an interest in such warrants though they are taken in the name of another.² Where a land certificate or warrant has been duly assigned, and the warrant is subsequently located and a patent is issued to the assignor or his heirs, it will inure to the benefit of the assignee of the certificate.³

Mode of Assignment. — Where no particular mode of assigning unlocated state land warrants is prescribed by law, the assignment may be made by indorsement on the warrant or upon a separate paper.⁴ The transfer need not be under seal,⁵ and transfers by parol agreement and delivery of the warrant have been sustained.⁶ Land warrants or certificates are not in the nature of negotiable instruments, and the assignee as a general rule acquires no other interest than that of his assignor;⁷ but one who in good faith and for a valuable consideration acquires the legal title to a land certificate and the right to the patent is entitled to protection as against an equitable title of which he had no notice.⁸ Thus, a purchaser without notice of an agreement to assign the land certificate

v. Hurt, 32 Tex. 146; *Barker v. Swenson*, 66 Tex. 407; *Santana Live-Stock, etc., Co. v. Pendleton*, (C. C. A.) 81 Fed. Rep. 784; *Ingram v. Walker*, 7 Tex. Civ. App. 74; *Harvey v. Petty*, (Tex. Civ. App. 1901) 63 S. W. Rep. 893.

Mortgage. — *Ross v. Mitchell*, 28 Tex. 150; *McCamant v. Roberts*, 87 Tex. 241, *reversing* (Tex. Civ. App. 1894) 25 S. W. Rep. 731.

Measure of Damages for Breach of Contract for Transfer and Delivery of Land Certificate. — *Randon v. Barton*, 4 Tex. 289.

Proof of Transfer. — *Walters v. Jewett*, 28 Tex. 192; *Palmer v. Curtner*, 55 Tex. 64; *Capps v. Terry*, 75 Tex. 391; *Herndon v. Davenport*, 75 Tex. 462; *Walker v. Caradine*, 78 Tex. 489; *Swan v. Acres*, 80 Tex. 245; *Lyne v. Sanford*, 82 Tex. 58, 27 Am. St. Rep. 852; *Parker v. Newberry*, 83 Tex. 428; *Davis v. Bargas*, 88 Tex. 662; *Huff v. Crawford*, 89 Tex. 214; *Peterson v. Rogan*, 94 Tex. 176; *Fleener v. Walker*, 5 Tex. Civ. App. 145; *Jones v. Reus*, 5 Tex. Civ. App. 628; *Roach v. Fletcher*, 11 Tex. Civ. App. 225; *DeCordova v. Bliss*, 12 Tex. Civ. App. 530; *Batchellor v. Besancon*, 19 Tex. Civ. App. 137; *Hanaford v. Morton*, 22 Tex. Civ. App. 587; *Day Land, etc., Co. v. New York, etc., Land Co.*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1089; *Riggs v. Nafe*, (Tex. Civ. App. 1895) 30 S. W. Rep. 706; *Barrett v. Spence*, 28 Tex. Rep. Civ. App. 344.

Possession as Evidence of Transfer. — *Chamberlain v. Pybas*, 81 Tex. 511.

Possession of a land certificate with a blank indorsement of the grantee thereon prior to its location, followed by location, is, when unexplained, *prima facie* evidence of title. *Fisher v. Ullman*, 3 Tex. Civ. App. 322.

1. Part Interest in Unlocated Certificate. — *Babb v. Carroll*, 21 Tex. 765; *Lott v. King*, 79 Tex. 292; *Estell v. Kirby*, (Tex. Civ. App. 1898) 48 S. W. Rep. 8.

If the owner sells one-half of a certificate before the location of any part of it, he must be held to have authorized the location by the purchaser of his interest in a single survey. It would be unreasonable to oblige the purchaser to procure a patent upon the entire certificate to make available his portion of it. *Glasscock v. Hughes*, 55 Tex. 461.

2. Advancement of Purchase Money. — *Patrick v. Marshall*, 2 Bibb (Ky.) 40, 4 Am. Dec. 670. See generally the title IMPLIED TRUSTS, vol. 15, p. 1132 *et seq.*

3. Location After Assignment. — *Santana Live Stock, etc., Co. v. Pendleton*, (C. C. A.) 81 Fed. Rep. 784; *Keyes v. Houston, etc., R. Co.*, 50 Tex. 169; *Hollis v. Dashiell*, 52 Tex. 187; *Burkett v. Scarborough*, 59 Tex. 495; *Capps v. Terry*, 75 Tex. 391; *Gresham v. Chambers*, 80 Tex. 544; *Lyne v. Sanford*, 82 Tex. 58, 27 Am. St. Rep. 852; *Ralston v. Skerrett*, 82 Tex. 486; *Barroum v. Culmell*, 90 Tex. 93; *Baldwin v. Root*, 90 Tex. 546; *Davis v. Bargas*, 12 Tex. Civ. App. 59; *Ledbetter v. Higbee*, 13 Tex. Civ. App. 267; *Culmell v. Borroum*, 13 Tex. Civ. App. 458; *Batcheller v. Besancon*, 19 Tex. Civ. App. 137; *Rankin v. Busby*, (Tex. Civ. App. 1894) 25 S. W. Rep. 678. Compare *McKinney v. Brown*, 51 Tex. 94.

4. Mode of Assignment. — *McArthur v. Galaher*, 8 Ohio 512.

Assignment in Blank. — *Walker v. Peterson*, (Tex. Civ. App. 1897) 42 S. W. Rep. 1045.

5. Seal Not Required. — *Randon v. Barton*, 4 Tex. 289.

6. Delivery of Warrant. — *Miller v. Texas, etc., R. Co.*, 132 U. S. 662; *McArthur v. Galaher*, 8 Ohio 512; *Cox v. Bray*, 28 Tex. 247 (not within statute of frauds); *Stone v. Brown*, 54 Tex. 330; *Parker v. Spencer*, 61 Tex. 155; *Sickles v. White*, 66 Tex. 178; *Reed v. Howard*, 71 Tex. 204; *Sewell v. Laurance*, 2 Tex. Unrep. Cas. 376; *Harvey v. Carroll*, 5 Tex. Civ. App. 324; *Jones v. Reus*, 5 Tex. Civ. App. 628; *Staley v. Hankla*, (Tex. Civ. App. 1897) 43 S. W. Rep. 20; *Ehrenberg v. Baker*, (Tex. Civ. App. 1899) 54 S. W. Rep. 435.

7. Shifflet v. Morelle, 68 Tex. 382; *Dodge v. Litter*, 73 Tex. 319; *Gunter v. Meade*, 78 Tex. 634; *Durst v. Daugherty*, 81 Tex. 650; *Randolph v. Junker*, 1 Tex. Civ. App. 517; *Master-son v. Todd*, 6 Tex. Civ. App. 131; *Hensel v. Kegans*, 8 Tex. Civ. App. 583; *New York, etc., Land Co. v. Hyland*, 8 Tex. Civ. App. 601; *Ferguson v. Kentucky Land, etc., Co.*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1074; *Jackson v. Waldstein*, (Tex. Civ. App. 1894) 27 S. W. Rep. 26; *Wilson v. Rucker*, *Wythe (Va.)* 113; *Morrison v. Campbell*, 2 Rand. (Va.) 206.

8. Hill v. Moore, 62 Tex. 610.

made prior to the issuance of the patent takes a good title,¹ and where the owner of land certificates intrusts a third person with the *indicia* of ownership, a *bona fide* purchaser from such person will be protected in his title.²

Transfer After Location. — The owner of state-land warrants or certificates after their location has a conveyable interest in the land so located before a patent is issued,³ and after a land warrant or certificate has been located, it is merged in the land and its transfer is governed by the law for the transfer of land as to the mode of conveyance, registration, etc.⁴

Statutory Restrictions. — In *Texas* the transfer or assignment of particular land warrants or certificates has been expressly prohibited by statute.⁵

(4) *Interest under Certificate of Purchase.* — The vendee in a contract or certificate of purchase of state lands has a conveyable interest before a patent is issued.⁶ A conveyance of the land carries the equitable title, of which the

1. **Purchaser Without Notice of Agreement to Assign.** — *Johnson v. Newman*, 43 Tex. 629.

2. *Stone v. Brown*, 54 Tex. 330.

3. *United States.* — *Vowles v. Craig*, 8 Cranch (U. S.) 371.

California. — *Bludworth v. Lake*, 35 Cal. 255.

Kentucky. — *Bowman v. Bartlett*, 3 A. K. Marsh. (Ky.) 86; *McMillan v. Hutcheson*, 4 Bush (Ky.) 613.

Ohio. — *Bond v. Swearingen*, 1 Ohio 395; *Wallace v. Seymour*, 7 Ohio (pt. i.) 156; *Duke v. Thompson*, 16 Ohio 34.

Tennessee. — *Bickerstaff v. Hughlett*, 2 Overt. (Tenn.) 269; *Irby v. McKissack*, 8 Yerg. (Tenn.) 42; *Hess v. Crawford*, 8 Humph. (Tenn.) 609; *King v. Coleman*, 98 Tenn. 561.

Texas. — *Peavy v. Hurt*, 32 Tex. 146; *Gould v. West*, 32 Tex. 338; *Renick v. Dawson*, 55 Tex. 102; *Sanders v. Duval*, 39 Tex. 182; *Hearne v. Gillett*, 62 Tex. 23; *Daniel v. Bridges*, 73 Tex. 149; *Robertson v. Du Bose*, 76 Tex. 1; *Latimer v. Logwood*, (Tex. Civ. App. 1893) 27 S. W. Rep. 960; *Norton v. Conner*, (Tex. 1890) 14 S. W. Rep. 193; *Smyth v. Veal*, 2 Tex. Unrep. Cas. 393; *Smith v. Estill*, 87 Tex. 264; *Morgan v. Baker*, (Tex. Civ. App. 1897) 40 S. W. Rep. 27; *Watts v. Bruce*, (Tex. Civ. App. 1903) 72 S. W. Rep. 258.

See also *Stallings v. Ruby*, 27 Md. 149.

Tax Sale. — *Gwynne v. Niswanger*, 15 Ohio 367; *Harlan v. Thatcher*, 18 Ohio 48; *Matthews v. Rector*, 24 Ohio St. 439; *Taylor v. Lyon Lumber Co.*, 13 Pa. Co. Ct. 235.

Execution Sale. — *Lewis v. Meredith*, 3 Wash. (U. S.) 81; *Jackson v. Williams*, 10 Ohio 69; *Bumpas v. Gregory*, 8 Yerg. (Tenn.) 56; *King v. Coleman*, 98 Tenn. 561.

Failure of Location. — A sale of land includes a sale of the certificate under which it was located. The title to the land failing, the purchaser may relocate the certificate upon other lands. The lands so located follow the ownership of the certificate. *Robertson v. Du Bose*, 76 Tex. 1; *Parker v. Walker*, 15 Tex. Civ. App. 370; *Gist v. East*, 16 Tex. Civ. App. 274.

4. *Simpson v. Chapman*, 45 Tex. 561; *Hearne v. Gillett*, 62 Tex. 23; *Sewell v. Laurance*, 2 Tex. Unrep. Cas. 376; *Biggerstaff v. Murphy*, 3 Tex. Civ. App. 363; *Flash v. Herndon*, (Tex. Civ. App. 1898) 44 S. W. Rep. 608; *Lewis v. Johnson*, 68 Tex. 448.

A Sale by an Administrator of a Land Certificate after a patent has been issued under it does not convey the land. *East v. Dugan*, 79 Tex. 329.

Lifting Survey and Relocation. — Where the owner of a land certificate, after having conveyed a part of the survey made under such certificate, lifts the certificate and relocates it without the knowledge of his grantee of part of the first location, upon obtaining a patent in his own name for the second location he takes the legal title in the land; the equity in the grantee of the part of the first location may be lost by laches; and stale demand for ten years is a defense against such equity. *Abernathy v. Stone*, 81 Tex. 430.

Sale of Certificate After Location. — *Hume v. Ware*, 87 Tex. 380; *Odell v. Kennedy*, 26 Tex. Civ. App. 439.

In *Thompson v. Langdon*, 87 Tex. 254, in speaking of the effect of the conveyance of the certificate after location, the court said: "In order to show title to the land sued for, the plaintiff introduced in evidence a conveyance by Shaphard to him of the certificate executed after it had been located upon the land. It is contended that the sale of the certificate did not pass title to the land. But it is held in *Lewis v. Johnson*, 68 Tex. 448, that 'the sale of a certificate after location operates the equitable transfer of the land located under it.' This ruling is in accordance with the previous intimations of the court, and we do not doubt its correctness. *Simpson v. Chapman*, 45 Tex. 566; *Hearne v. Gillett*, 62 Tex. 25. We have held that a sale by an administrator of a certificate after it has been located will not pass the title to the land, but that ruling rests upon a different principle. *East v. Dugan*, 79 Tex. 329."

5. **Assignment Forbidden by Statute.** — *Smith v. Johnson*, 8 Tex. 418; *Turner v. Hart*, 10 Tex. 438; *Cannon v. Vaughan*, 12 Tex. 399; *Graham v. Henry*, 17 Tex. 165; *Pitts v. Booth*, 15 Tex. 453; *Perry v. Glass*, 25 Tex. 368; *Newman v. Dallas*, 26 Tex. 642.

6. **Certificate of Purchase — Arkansas.** — *Woodward v. Campbell*, 39 Ark. 580.

California. — *Ward v. Packard*, 18 Cal. 391; *Watkins v. Lynch*, 71 Cal. 21; *McCabe v. Goodwin*, 106 Cal. 486; *Wills v. Pauly*, 116 Cal. 575.

Colorado. — *Patterson v. De Long*, 11 Colo. App. 103.

Illinois. — *Whipple v. Whipple*, 109 Ill. 418.

Indiana. — *Miller v. Tipton*, 6 Blackf. (Ind.) 238.

Iowa. — *Wilson v. McLernan*, 20 Iowa 30.

Maine. — *Hinckley v. Haines*, 69 Me. 76.

certificate of purchase is merely the evidence.¹ The grantee from the holder of a certificate of purchase is entitled to the patent from the state,² or if the grantor receives a patent from the state he holds the legal title in trust for his grantee.³

Mortgage. — A certificate of purchase of land from a state may be assigned as security,⁴ or the lands may be conveyed by mortgage.⁵

Involuntary Alienation. — The interest in land under a certificate of purchase from the state may, before issuance of the patent, be sold on execution.⁶

Restrictions. — The subsequent adoption of a constitutional provision or the enactment of a statute restricting the right of a vendee under a certificate of purchase to convey his interest in the land does not affect the right to convey interests acquired under certificates of purchase theretofore issued.⁷

3. Manner of Granting Public Lands — *a.* BY PATENT — (1) *In General.* — The usual mode of granting the public lands is by patent.⁸ A patent is simply the government conveyance,⁹ by virtue of which the title passes from the government to its grantee.¹⁰

(2) *Execution of Patent.* — The execution of the patent is delegated by law to certain of the public officials.¹¹

A Patent for United States Lands must be signed by the President, either in person or by his duly appointed secretary,¹² countersigned by the recorder of the general land office,¹³ and sealed with the seal of the general land office.¹⁴ Each of these integral parts of the execution is essential to the perfection of the patent, and no one of them can be dispensed with.¹⁵

Oregon. — Schmidt v. Vogt, 8 Oregon 345; Gliem v. School, etc., Lands Com'rs, 16 Oregon 479.

Texas. — Chancey v. State, 84 Tex. 529; Nesting v. Terrel, (Tex. 1903) 75 S. W. Rep. 485; O'Keefe v. McPherson, 25 Tex. Civ. App. 313; Gunnels v. Cartledge, 26 Tex. Civ. App. 623. See also Tenant v. Roe, 27 Ga. 418.

May Dedicate Land to Public Use. — Watkins v. Lynch, 71 Cal. 21.

1. Jackson v. Hyde, 91 Cal. 463.
2. Bludworth v. Lake, 33 Cal. 255; Cerf v. Reichert, 73 Cal. 360. See also Duncan v. Gardner, 46 Cal. 24.

Surrender of Certificate as Condition to Issuance of Patent. — Cerf v. Reichert, 73 Cal. 360.

3. Bludworth v. Lake, 33 Cal. 255; Wasley v. Foreman, 38 Cal. 90; Watkins v. Lynch, 71 Cal. 21.

4. **Mortgage.** — Murray v. Walker, 31 N. Y. 399.

Protection of Security — Payment of Accruing Instalments. — An assignment of a certificate of purchase of land issued by the state, by way of security for a debt due by the assignor to the assignee, operates as an equitable mortgage on the interest in the land which the assignor acquired by virtue of his certificate, and if the assignee pays money due to the state on the certificate in order to prevent a forfeiture of the assignor's title, the money so paid becomes a portion of the mortgage debt, and the court will enforce an equitable lien for the whole sum. Hill v. Eldred, 49 Cal. 398.

5. Augusta, etc., R. Co. v. Kittel, 2 U. S. App. 409; Henderson v. Grammar, 66 Cal. 332; Patterson v. De Long, 11 Colo. App. 103; Miller v. Tipton, 6 Blackf. (Ind.) 238.

6. Cerf v. Reichert, 73 Cal. 360; Foster v. Whelpley, 123 Mich. 350; Wilson v. Deweese, 114 N. Car. 653.

7. McCabe v. Goodwin, 106 Cal. 486, holding

that to give a retroactive effect to such restriction would operate as an impairment of the obligation of the contract between the purchaser and the state.

8. **Patent the Usual Mode of Grant.** — Boatner v. Ventress, 8 Mart. N. S. (La.) 644, 20 Am. Dec. 266; Shelton v. Keirn, 45 Miss. 106; Fulton v. Doe, 5 How. (Miss.) 751; People v. Mauran, 5 Den. (N. Y.) 389.

9. **A Patent Is a Government Conveyance.** — St. Louis Smelting, etc., Co. v. Kemp, 104 U. S. 636; Hayner v. Stanly, 8 Sawy. (U. S.) 225, 13 Fed. Rep. 217; Patterson v. Tatum, 3 Sawy. (U. S.) 164, 18 Fed. Cas. No. 10,830; Gibson v. Chouteau, 13 Wall. (U. S.) 92; Fisher v. Wisner, 34 Iowa 447; Bushey v. South Mountain Min., etc., Co., 26 W. N. C. (Pa.) 543.

10. **Patent Passes Title.** — Wilcox v. Jackson, 13 Pet. (U. S.) 498; Matter of Mechanics' Soc., 31 La. Ann. 627; Sweatt v. Corcoran, 37 Miss. 513.

11. **Patent Is Authorized Act of Public Official.** — Huidekoper v. Burrus, 1 Wash. (U. S.) 109, 12 Fed. Cas. No. 6,848; U. S. v. Winona, etc., R. Co., (C. C. A.) 67 Fed. Rep. 948; Summers v. Dickinson, 9 Cal. 554.

12. **President May Sign in Person or by Secretary.** — Secretary v. McGarrahan, 9 Wall. (U. S.) 298; U. S. v. General Land Office Com'r, 5 Wall. (U. S.) 563; Bonds v. Hickman, 29 Cal. 461; Liddon v. Hodnett, 22 Fla. 442.

13. **Countersignature by Recorder of General Land Office.** — Secretary v. McGarrahan, 9 Wall. (U. S.) 298; U. S. v. General Land Office Com'r, 5 Wall. (U. S.) 563; Liddon v. Hodnett, 22 Fla. 442.

14. **Seal of General Land Office to Be Affixed.** — McGarrahan v. New Idria Min. Co., 96 U. S. 316, affirming 45 Cal. 301.

15. **No Requirement as to Execution Can Be Dispensed With.** — McGarrahan v. New Idria Min. Co., 96 U. S. 316, affirming 45 Cal. 301.

A Patent for State Lands must be signed by the governor, countersigned by the secretary of state, and sealed with the great seal of the state.¹

In Canada a grant of crown lands by the governor of a province must be made under the great seal of the province.²

Execution by Special Agents. — Both congressional and state acts have, however, in particular instances, provided for the issuance of patents by officials other than those mentioned above,³ or by agents appointed for such special purpose.⁴

The Name of the Grantee must be inserted in the patent before it can be said to be issued.⁵ The grantee may be the assignee of the patent primarily entitled to the patent,⁶ or the administrator of a deceased assignee.⁷ It is no objection to a state patent that it was issued to a state official.⁸

(3) *Recitals in Patent.* — The patent is not required to recite the advertisement of the survey required by law.⁹

In Tennessee a plat of the land must be annexed to the patent.¹⁰

(4) *Delivery and Acceptance of Patent.* — Title by patent is title by record, and when a patent is filled out, signed, and recorded, the title vests in the patentee without a formal delivery of the instrument.¹¹ Delivery is considered to have been made when the patent is given to the proper official for recording and transmission to the grantee.¹² The latter, however, has a right to the actual possession of the instrument and may enforce such right by mandamus.¹³

The Acceptance of a Patent Will Ordinarily Be Presumed from the beneficial nature of

1. *Arkansas.* — *Harrison v. Lewis*, 27 Ark. 152.

Florida. — *Liddon v. Hodnett*, 22 Fla. 442.

Georgia. — *Compton v. Killen*, 60 Ga. 543. A state grant containing no seal may, nevertheless, be received in evidence upon proof that the same was lost or destroyed after the issuance of the grant. *Doe v. Roe*, 14 Ga. 252.

Indiana. — *Mason v. Cooksey*, 51 Ind. 519.

Kentucky. — *Hedden v. Overton*, 4 Bibb (Ky.) 406.

Michigan. — *Crane v. Secretary of State*, 51 Mich. 195.

Mississippi. — *Exum v. Brister*, 35 Miss. 391.

New York. — A patent not signed by the governor is, nevertheless, valid if the great seal is attached, as it is the latter which authenticates the patent. *People v. Livingston*, 8 Barb. (N. Y.) 253; *Williams v. Sheldon*, 10 Wend. (N. Y.) 654; *Bogardus v. Trinity Church*, 4 Sandf. Ch. (N. Y.) 735. But when the grant is by an act of legislature and not by individuals, pursuant to it, a seal is unnecessary. *Wetmore v. Story*, 22 Barb. (N. Y.) 414.

North Carolina. — *Den v. Williams*, 1 Hawks (8 N. Car.) 221. See also *Beam v. Jennings*, 96 N. Car. 82; *Steele v. Anthony*, 1 Hayw. (2 N. Car.) 98.

Tennessee. — *Calloway v. Sanford*, (Tenn. Ch. 1895) 35 S. W. Rep. 776; *Hitchcock v. Southern Iron, etc., Co.*, (Tenn. Ch. 1896) 38 S. W. Rep. 588. See also *State v. Cooper*, (Tenn. Ch. 1899) 53 S. W. Rep. 391. The act requiring the countersignature of the secretary of state is directory, and his failure to countersign will not invalidate the grant. *Philips v. Irwin*, 1 Overt. (Tenn.) 235; *Reid v. Dodson*, 1 Overt. (Tenn.) 396. Nor will a grant countersigned by a deputy secretary, instead of by the secretary himself, be invalid. *Ayres v. Stewart*, 1 Overt. (Tenn.) 221.

Wisconsin. — *McCabe v. Mazzuchelli*, 13 Wis. 478, cited *Harrington v. Smith*, 28 Wis. 43.

2. *Canada.* — *Doe v. Ramsay*, 9 U. C. Q. B. 105; *Doe v. Wilkes*, 4 U. C. Q. B. O. S. 142.

3. *Commissioners of General Land Office.* — *Leroy v. Jamison*, 3 Sawy. (U. S.) 369; *Jackson v. Seaman*, 3 Johns. (N. Y.) 495.

Secretary of War. — *McCullough v. Wall*, 4 Rich. L. (S. Car.) 68, 53 Am. Dec. 715.

Governor of Northwest Territory. — *Reichart v. Felps*, 6 Wall. (U. S.) 160, affirming 33 Ill. 433.

4. *Patents Executed by Agents.* — *Dart v. Hercules*, 34 Ill. 401; *Thompson v. Carr*, 5 N. H. 510. See also *Hill v. Dyer*, 3 Me. 441.

5. *Name of Grantee Must Be Inserted.* — *Howard v. Colquhoun*, 28 Tex. 134.

6. *Grantee May Be Assignee.* — *Cary v. Whitney*, 48 Me. 516.

7. *Grantee May Be Administrator of Assignee.* — *Bonds v. Hickman*, 29 Cal. 461.

8. *Grantee May Be State Official.* — *Compton v. Killen*, 60 Ga. 543.

9. *Advertisement of Survey Need Not Be Recited.* — *Cruz v. Martinez*, 53 Cal. 239; *Doe v. Roe*, 31 Ga. 593.

10. *Plat of Land to Be Annexed.* — *M'Iver v. Walker*, 9 Cranch (U. S.) 173, 4 Wheat. (U. S.) 444.

11. See *infra*, this subsection, *When Patent Takes Effect.*

Delivery Not Necessary. — *Wood v. Pittman*, 113 Ala. 207; *Eltzroth v. Ryan*, 89 Cal. 135; *Houghton v. Hardenberg*, 53 Cal. 181; *Cruz v. Martinez*, 53 Cal. 239; *Miller v. Ellis*, 51 Cal. 73; *Donner v. Palmer*, 31 Cal. 500; *Gilmore v. Sapp*, 100 Ill. 297; *Shearer v. Clay*, 1 Litt. (Ky.) 260; *Hedrick v. Stohl*, 105 Mo. 43; *Hammond v. Johnston*, 93 Mo. 198; *Sayward v. Thompson*, 11 Wash. 706; *Wisconsin Cent. R. Co. v. Wisconsin River Land Co.*, 71 Wis. 94.

12. *When Patent Deemed Delivered.* — *Le Roy v. Clayton*, 2 Sawy. (U. S.) 493.

13. *Patentee May Obtain Patent by Mandamus.* — *U. S. v. Schurz*, 102 U. S. 378.

the grant; but such presumption may be rebutted by proof of actual refusal to accept.¹

(5) *Recording Patent.* — The United States Statutes require that patents shall be recorded, before issuance, in the general land office,² and the record thereof is declared to be of the same force as the patent itself.³ But the patent, when issued, is evidence of title irrespective of the record,⁴ and therefore a failure to record will not defeat the grant.⁵

State Patents are generally required to be recorded in the office of the secretary of state,⁶ but the failure of the secretary to perform his duty in this respect cannot work injury to the grantee;⁷ and a patent first recorded has no priority over another patent of equal date.⁸

Place of Record. — The recording of the patent in the county where the lands are situated is permissible,⁹ but not necessary¹⁰ unless required by statute.¹¹ No acknowledgment or order of registration is required to entitle a patent to record in a county office.¹²

(6) *When Patent Takes Effect.* — The date of a patent is not indicative of the time of its taking effect, but is merely evidence of the time of its execution.¹³ So the patent will not be void though the date is entirely omitted¹⁴ or is fixed at a point of time subsequent to a demise of the land by the patentee¹⁵ or even subsequent to his death.¹⁶ The patent may take effect from the time it is issued or executed,¹⁷ but generally relates back to some prior date, such as the time when the right thereto became perfected,¹⁸ the date of entry or pre-emption settlement,¹⁹ the date of the original purchase,²⁰

1. *Acceptance of Patent Presumed.* — U. S. v. Schurz, 102 U. S. 378; Leroy v. Jamison, 3 Sawy. (U. S.) 369; Le Roy v. Clayton, 2 Sawy. (U. S.) 493; Wood v. Pittman, 113 Ala. 207; Alvarado v. Nordholt, 95 Cal. 116; Bailey v. Callanan, 87 Iowa 107; Shearer v. Clay, 1 Litt. (Ky.) 260.

Refusal by One of Several Grantees to Accept. — Where land was granted by the legislature to several grantees and one of them refused to accept the grant, the latter's share being paid for by another of the grantees, the estate vested in those grantees who thus accepted. Corbett v. Norcross, 35 N. H. 99.

2. *United States Patent Must Be Recorded.* — Hendrick v. Stohl, 105 Mo. 43; Callaway v. Fash, 50 Mo. 420.

3. *Record Is of Same Force as Patent.* — Liddon v. Hodnett, 22 Fla. 442; Sands v. Davis, 40 Mich. 14.

4. *Patent Is Evidence Without Record.* — Callaway v. Fash, 50 Mo. 420.

5. *Failure to Record Will Not Defeat Grant.* — McGarrahan v. New Idria Min. Co., 96 U. S. 316.

6. *State Patent Must Be Recorded.* — Nitche v. Earle, 117 Ind. 270, 88 Ind. 375; New York Cent., etc., R. Co. v. Brockway Brick Co., 158 N. Y. 470; Overton v. Campbell, 5 Hayw. (Tenn.) 165, 9 Am. Dec. 780. See also McKineron v. Bliss, 31 Barb. (N. Y.) 180.

7. *Failure to Record Will Not Injure Grantee.* — Den v. Green, 2 Hawks (9 N. Car.) 218; Ayres v. Stewart, 1 Overt. (Tenn.) 221.

Failure to Give Certificate of Registry Does Not Invalidate Patent. — Ritchie v. Woods, 1 Wash. (U. S.) 11, 20 Fed. Cas. No. 11,865.

8. *Recording Gives No Priority.* — Coleman v. Talbot, 2 Bibb (Ky.) 129, 4 Am. Dec. 687.

9. *Recording in County Permissible.* — Sands v. Davis, 40 Mich. 14.

10. *Recording in County Not Necessary.* — Eltzroth v. Ryan, 89 Cal. 135; Nitche v. Earle, 117 Ind. 270, 88 Ind. 375; Mason v. Cooksey, 51 Ind. 519; Jackson v. Chamberlain, 8 Wend. (N. Y.) 620; Jackson v. Colver, 1 Wend. (N. Y.) 488; Mackinnon v. Barnes, 66 Barb. (N. Y.) 91; Webster v. Clear, 49 Ohio St. 392; State v. Cooper, (Tenn. Ch. 1899) 53 S. W. Rep. 391; Evitts v. Roth, 61 Tex. 81; Sayward v. Thompson, 11 Wash. 706.

11. *Recording in County Required by Statute.* — Den v. Green, Hawks (9 N. Car.) 218; Meacham v. Stewart, 19 Oregon 285. See also Wyman v. Taylor, 124 N. Car. 426.

12. *Acknowledgment Unnecessary.* — Barcello v. Hapgood, 118 N. Car. 712; Coltrane v. Lamb, 109 N. Car. 209; Ray v. Stewart, 105 N. Car. 472. But see Reilly v. Mountain Coal Co., 204 Pa. St. 270.

13. See *supra*, this subsection, *Delivery and Acceptance of Patent.*

Date Is Evidence of Time of Execution. — McGowan v. Crooks, 5 Dana (Ky.) 65.

14. *Omission of Date.* — Mackinnon v. Barnes, 66 Barb. (N. Y.) 91; Reid v. Dodson, 1 Overt. (Tenn.) 396.

15. *Patent Dated After Demise by Patentee.* — Winn v. Cole, Walk. (Miss.) 119.

16. *Patent Dated After Death of Patentee.* — Carter v. Blanton, 33 Miss. 291.

17. *Date of Execution or Issuance.* — Dillon v. Shugar, 73 Iowa 434; McGowan v. Crooks, 5 Dana (Ky.) 65; Hammond v. Johnston, 93 Mo. 198.

18. *Date When Right to Patent Becomes Perfected.* — Busch v. Donohue, 31 Mich. 481.

19. *Date of Entry or Pre-emption Settlement.* — Shepley v. Cowan, 91 U. S. 330; Denver v. Mullen, 7 Colo. 345.

20. *Date of Original Purchase.* — Cavender v. Smith, 3 Greene (Iowa) 349, 56 Am. Dec. 541.

the date of the act granting the land,¹ the date of recording the patent,² or the date of the selection of lands by a state under a congressional grant.³ Where a patent does not take effect until it is approved and sealed, the fact that it purports to have been signed before its approval and sealing is immaterial.⁴ A state has no authority to provide the manner in which United States patents take effect, whether upon delivery or otherwise.⁵

b BY DIRECT LEGISLATIVE ACT. — That a patent is not necessary in all cases to confer a legal title to soil of which the government is the proprietor is well settled. The government may make a perfect grant directly, and without the issuing of a patent or any other evidence of title. An act of Congress, or of a state legislature, containing words of present grant or provisions clearly indicating an intention to pass the fee, operates *ipso facto* to vest the title in the grantee,⁶ not the less because certain conditions prescribed by the act must first be complied with and because the title may be defeated by failure so to comply.⁷ No particular words or terms are necessary to effectuate this object, as the statute will be construed in accordance with the evident intention of the legislators.⁸ But the statute may declare in express

1. Date of Act Granting Land. — *Winn v. Cole*, Walk. (Miss.) 119.

2. Date of Recording Patent. — *Woods v. Jackson Iron Mfg. Co.*, Holmes (U. S.) 379.

3. Date of Selection of Lands. — *Shepley v. Cowan*, 91 U. S. 330.

4. When Dated Before Approval and Sealing. — *Jackson v. Douglass*, 5 Cow. (N. Y.) 458.

5. State Cannot Legislate as to United States Patents. — *Miller v. Ellis*, 51 Cal. 73.

6. Grant by Direct Legislative Act—United States. — *Stokes v. Dawes*, 4 Mason (U. S.) 268, 23 Fed. Cas. No. 13,477; *Wilcox v. Jackson*, 13 Pet. (U. S.) 498; *Rutherford v. Greene*, 2 Wheat. (U. S.) 196.

Alabama. — *Knabe v. Burden*, 88 Ala. 436.

California. — *Jatunn v. Smith*, 95 Cal. 154; *Megerle v. Ashe*, 27 Cal. 322, 87 Am. Dec. 76.

Colorado. — *Schwenke v. Union Depot, etc.*, Co., 7 Colo. 512; *Estes Park Toll Road Co. v. Edwards*, 3 Colo. App. 74.

Illinois. — *Hall v. Jarvis*, 65 Ill. 302; *Dart v. Hercules*, 34 Ill. 401; *Ballance v. Tesson*, 12 Ill. 326.

Louisiana. — *Boatner v. Ventress*, 8 Mart. N. S. (La.) 644, 20 Am. Dec. 266.

Maine. — *Cary v. Whitney*, 48 Me. 516.

Massachusetts. — *Mayo v. Libby*, 12 Mass. 339; *Ward v. Bartholomew*, 6 Pick. (Mass.) 409.

Michigan. — *Stockton v. Williams*, 1 Dougl. (Mich.) 546.

Mississippi. — *Shelton v. Keirn*, 45 Miss. 106; *Sweatt v. Corcoran*, 37 Miss. 513; *Fulton v. Doe*, 5 How. (Miss.) 751.

Missouri. — *Lessieur v. Price*, 12 Mo. 15, affirmed 12 How. (U. S.) 59.

New York. — *Jackson v. Stanley*, 10 Johns. (N. Y.) 134, 6 Am. Dec. 319.

Ohio. — *Allen v. Parish*, 3 Ohio 107.

Grants May Be Made either by statute or by patent under the great seal, or by any public functionary designed by law for that purpose. *Jackson v. Hart*, 12 Johns. (N. Y.) 77, 7 Am. Dec. 280.

Possession by Government Unnecessary. — The legislature may make a grant of land to which the state has a valid title, although the same

may not be in actual possession of any of its officers, or may be held adversely by others. The statute making the grant merely grants the title of the state and its right to institute and prosecute a suit for the recovery of the land. *McCaughal v. Ryan*, 27 Barb. (N. Y.) 376.

When Grant Considered Disaffirmance of Former Grant. — A grant of land by the legislature after the Revolution must be considered a virtual disaffirmance of a grant made before the Revolution, and which required the assent of the crown thereto, where such assent was never obtained. *Hill v. Dyer*, 3 Me. 441.

Entry Unnecessary. — A grant by a government competent to make it carries with it seizin, and no entry is necessary. *Bellows v. Copp*, 20 N. H. 492.

7. Compliance with Conditions. — *Shaw v. Kellogg*, 170 U. S. 212; *Rutherford v. Greene*, 2 Wheat. (U. S.) 196; *Lee v. Summers*, 2 Oregon 260.

8. Intention of Legislature Governs. — *Stokes v. Dawes*, 4 Mason (U. S.) 268; *Fletcher v. Pool*, 20 Ark. 100; *Enfield v. Day*, 11 N. H. 520; *Enfield v. Permit*, 5 N. H. 280, 20 Am. Dec. 580.

Words Expressing Intent. — The following words have been held to effect a grant *in presenti*:

"*Hereby Is Granted.*" — *Megerle v. Ashe*, 27 Cal. 322, 87 Am. Dec. 76.

"*There Shall Be Granted.*" — *Shepley v. Cowan*, 52 Mo. 559.

"*Shall Be Entitled.*" — *Boatner v. Ventress*, 8 Mart. N. S. (La.) 644, 20 Am. Dec. 266.

Particular Acts Held to Be Grants In Presenti. — See the following cases: *Gaines v. Nicholson*, 9 How. (U. S.) 356; *Broder v. Natoma Water Co.*, 101 U. S. 274, affirming 50 Cal. 621; *Chandler v. Calumet, etc.*, Min. Co., 149 U. S. 79; *Leroy v. Doe*, 13 Sawy. (U. S.) 30; *U. S. v. Willamette Valley, etc.*, *Wagon-Road Co.*, 54 Fed. Rep. 711; *Pengra v. Munz*, 29 Fed. Rep. 830; *Whitehead v. Plummer*, 76 Iowa 181; *Goodnow v. Wells*, 67 Iowa 654; *Republican River Bridge Co. v. Kansas Pac. R. Co.*, 12 Kan. 410, affirmed 92 U. S. 315; *Taylor v. Winona, etc.*, R. Co., 45 Minn. 66; *Shelton v. Keirn*, 45

terms what shall amount to a grant or what shall pass the title;¹ or an obligation may be imposed by the statute upon the grantee to apply for and obtain a patent, in which case a patent is generally regarded as indispensable,² unless the intent to make a conveyance of title at the time, despite such requirement, is clearly evident.³ The title to lands thus granted by legislative enactment is not strengthened by a subsequent patent, which is considered to be a mere confirmation or evidence of an existing title and an instrument of quiet and security to the patentee.⁴ But the direct grant is the highest evidence of the title⁵ and so is superior to a subsequent patent issued for the same property to a different grantee.⁶

Acts Confirming Claims. — The legislative confirmation of a claim to land is a recognition of the validity of such claim and operates as effectually as a grant or quitclaim from the government.⁷ If the claim be to land with defined boundaries, or capable of identification, the legislative confirmation perfects the title to the particular tract; if the claim be to quantity, and not to a specific tract capable of identification, a segregation by survey will be required, and the confirmation will then immediately attach the title to the land segregated.⁸

Miss. 106; *Brazee v. Schofield*, 2 Wash. Ter. 209.

Particular Acts Held Not to Be Grants In Præsent. — See *Langlois v. Crawford*, 59 Mo. 456; *Heywood v. Wild River Lumber Co.*, 70 N. H. 24.

1. Statute May Declare When Title Will Pass. — *Shelton v. Keirn*, 45 Miss. 106; *Fulton v. Doe*, 5 How. (Miss.) 751.

Where Statute Authorizes Official to Convey. — Where the resolve does not contain any words of grant, but simply authorizes a public officer to convey land upon compliance with certain conditions, the title will not pass until such conveyance is executed. *U. S. v. Stockslager*, 129 U. S. 470; *Lambert v. Carr*, 9 Mass. 184; *Harlow v. French*, 9 Mass. 192; *Cary v. Whitney*, 48 Me. 516.

2. When Statute Makes Patent Necessary. — *Hall v. Jarvis*, 65 Ill. 302; *Boatner v. Ventress*, 8 Mart. U. S. (La.) 644, 20 Am. Dec. 266. But see *Turner v. Rogers*, 38 Tex. 582, holding that a joint resolution of the legislature directing the commissioner of the general land office to issue a patent upon a survey made may be regarded as a legislative grant.

3. Where Grant of Title Clearly Expressed. — *Cary v. Whitney*, 48 Me. 516.

4. Subsequent Patent Merely Evidence of Title — *United States*. — *Curtner v. U. S.*, 149 U. S. 662, reversing 38 Fed. Rep. 1; *Desert Salt Co. v. Tarpey*, 142 U. S. 241, affirming 5 Utah 494; *McNee v. Donahue*, 142 U. S. 587, affirming 76 Cal. 499; *St. Paul, etc., R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1, affirming 26 Fed. Rep. 551; *Wisconsin Cent. R. Co. v. Price County*, 133 U. S. 496; *Wright v. Roseberry*, 121 U. S. 488; *Morrow v. Whitney*, 95 U. S. 51; *Bryan v. Forsyth*, 19 How. (U. S.) 334; *Adams v. Burke*, 3 Sawy. (U. S.) 415; *Wythe v. Haskell*, 3 Sawy. (U. S.) 574; *Huidekoper v. Burrus*, 1 Wash. (U. S.) 109; *Rutherford v. Greene*, 2 Wheat. (U. S.) 196; *Chapman v. School Dist. No. 1*, *Deady* (U. S.) 108; *Lamb v. Starr*, *Deady* (U. S.) 447; *Northern Pac. R. Co. v. Cannon*, 46 Fed. Rep. 224, affirmed (C. C. A.) 54 Fed. Rep. 252; *Pengra v. Munz*, 29 Fed. Rep. 830.

Alabama. — *Goodlet v. Smithson*, 5 Port. (Ala.) 245, 30 Am. Dec. 561.

California. — *Jatunn v. Smith*, 95 Cal. 154; *Owens v. Jackson*, 9 Cal. 322.

Illinois. — *Ballance v. Tesson*, 12 Ill. 326; *McConnell v. Wilcox*, 4 Ill. 344.

Louisiana. — *Broussard v. Broussard*, 43 La. Ann. 921.

Massachusetts. — *Ward v. Bartholomew*, 6 Pick. (Mass.) 409.

Michigan. — *Sterling v. Jackson*, 69 Mich. 488, 13 Am. St. Rep. 405; *Busch v. Donohue*, 31 Mich. 481.

Minnesota. — *Camp v. Smith*, 2 Minn. 155.

Missouri. — *Langlois v. Crawford*, 59 Mo. 456.

New York. — *People v. Mauran*, 5 Den. (N. Y.) 389.

Oregon. — *Gaston v. Stott*, 5 Oregon 48.

Pennsylvania. — *Delaware, etc., Canal Co. v. Dimock*, 47 Pa. St. 393; *Hagerty v. Mathers*, 31 Pa. St. 348.

Copy of Patent as Evidence. — Under Code Civ. Pro Cal., §§ 1919, 1951, it is not necessary that the plaintiff prove the loss of the original patent before he can introduce a copy thereof in evidence. *Elzroth v. Ryan*, 89 Cal. 135.

5. Grant Is Highest Evidence of Title. — *Whitney v. Morrow*, 112 U. S. 693, affirming 50 Wis. 197; *Grignon v. Astor*, 2 How. (U. S.) 319, affirming *sub nom.* *Jackson v. Astor*, 1 Pin. (Wis.) 137, 39 Am. Dec. 281; *Northern Pac. R. Co. v. Majors*, 5 Mont. 111.

6. Grant Superior to Patent. — *Knabe v. Burden*, 88 Ala. 436; *Dousman v. Hooe*, 3 Wis. 466.

7. Confirmation of Claim Operates as Grant. — *Langdeau v. Hanes*, 21 Wall. (U. S.) 521; *Middletown v. Sage*, 8 Conn. 222; *East Haven v. Hemingway*, 7 Conn. 186; *Commons of Kaskaskia v. McClure*, 167 Ill. 23; *Solomon v. Grosbeck*, 65 Mich. 540; *Langlois v. Crawford*, 59 Mo. 456; *Dousman v. Hooe*, 3 Wis. 466.

Confirmation by Commissioners. — *Millar v. Millar*, 15 L. C. Rep. 229.

Confirmation by Governor of Northwest Territory. — *Payne v. Markle*, 89 Ill. 66; *Doe v. Hill*, 1 Ill. 304. Compare *Dubois v. McLean*, 4 McLean (U. S.) 486.

8. When Confirmation Takes Effect. — *Langdeau v. Hanes*, 21 Wall. (U. S.) 521; *Bryan v.*

Treaties. — The right of the government to make a grant of land by treaty is unquestionable; and whether or not the treaty operates as a present grant is to be determined from a construction of the treaty as a whole, and not from the particular form of expression used in relation to the grant.¹ If an immediate grant is intended, a patent is unnecessary;² but if the treaty provides that the land shall be granted by a patent from the President or other official, the title can pass only in such manner.³

4. Construction and Operation of Grants — *a. STRICT OR LIBERAL CONSTRUCTION AS TO GRANTEE* — (1) *Strict Construction General Rule.* — Contrary to the rule applicable to grants of land by private persons,⁴ the general rule of construction applying to grants of public lands by a sovereignty to corporations or individuals is that the grant must be construed liberally as to the grantor and strictly as to the grantee, and that nothing shall be taken to pass by implication.⁵

Forsyth, 19 How. (U. S.) 334; *Leroy v. Jamison*, 3 Sawy. (U. S.) 369; *Ballance v. Tesson*, 12 Ill. 326; *Morrow v. Whitney*, 95 U. S. 551, reversing 36 Wis. 438. See also *Whitney v. Gunderson*, 31 Wis. 359.

1. Treaty to Be Construed as a Whole. — *Stockton v. Williams*, 1 Dougl. (Mich.) 546, affirming *Walk*. (Mich.) 120. See also *Doe v. Beardsley*, 2 McLean (U. S.) 412, 10 Fed. Cas. No. 5497; *Larrieviere v. Madegan*, 1 Dill. (U. S.) 455, 14 Fed. Cas. No. 8,096; *Dequindre v. Williams*, 31 Ind. 444; *Dewey v. Campau*, 4 Mich. 565; *Stockton v. Williams*, 1 Dougl. (Mich.) 546.

The Words "Shall Be Ratified and Confirmed" are properly words of contract, but they are not necessarily so. They may imply a ratification and confirmation by force of the instrument itself, and this is to be determined by the construction of the treaty in which they are employed, the connection in which they are used, and the purpose intended to be effected by them. *U. S. v. Percheman*, 7 Pet. (U. S.) 51; *Puget Sound Agricultural Co. v. Pierce County*, 1 Wash. Ter. 159.

Authority to Sell Equivalent to Grant. — An authority given by treaty to the heirs of a deceased alien to sell his lands and appropriate the proceeds of the sale is equivalent to a grant of the ownership thereof. *Bollermann v. Blake*, 24 Hun (N. Y.) 187.

2. Patent Unnecessary. — *Stockton v. Williams*, 1 Dougl. (Mich.) 546, affirming *Walk*. (Mich.) 120.

3. When Treaty Provides for Patent. — *Verden v. Coleman*, 4 Ind. 457; *Longlois v. Coffin*, 1 Ind. 446.

4. See the title INTERPRETATION AND CONSTRUCTION, vol. 17, p. 14.

5. Strict Construction of Grant to Corporation or Private Individual — *England*. — Atty.-Gen. v. *Ewelme*, 17 Beav. 366.

Canada. — *Bulmer Hospital v. Reg.*, 23 Can. Sup. Ct. 488.

United States. — *U. S. v. Arredondo*, 6 Pet. (U. S.) 691; *Rice v. Minnesota*, etc., R. Co., 1 Black (U. S.) 358, affirming *Dalles v. Missionary Soc.*, 6 Sawy. (U. S.) 126, 6 Fed. Rep. 356; *Shively v. Bowlby*, 152 U. S. 1, affirming 22 Oregon 410. See also *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420.

Alabama. — *Hagan v. Campbell*, 8 Port. (Ala.) 9, 33 Am. Dec. 267; *Swann v. Jenkins*, 82 Ala. 478.

California. — *Oakland v. Oakland Water Front Co.*, 118 Cal. 160.

Illinois. — *Wilcoxon v. McGhee*, 12 Ill. 381, 54 Am. Dec. 409.

Kansas. — *Republican River Bridge Co. v. Kansas Pac. R. Co.*, 12 Kan. 410, affirmed 92 U. S. 315.

Maryland. — *Tolson v. Lanham*, 2 Har. & J. (Md.) 174.

Minnesota. — *St. Paul, etc., R. Co. v. Brown*, 24 Minn. 552.

Nebraska. — *Burlington, etc., R. Co. v. Abink*, 14 Neb. 95.

Nevada. — *Vansickle v. Haines*, 7 Nev. 249.

New Jersey. — *Townsend v. Brown*, 24 N. J. L. 80; *Stevens v. Paterson, etc., R. Co.*, 34 N. J. L. 552. Compare *Atty.-Gen. v. Delaware, etc., R. Co.*, 27 N. J. Eq. 631.

New York. — *East Hampton v. Vail*, 151 N. Y. 472. See also *People v. Broadway R. Co.*, 126 N. Y. 29.

Virginia. — *Alexander v. Greenup*, 1 Munf. (Va.) 134, 4 Am. Dec. 541.

See also *infra*, this section, *Legislative Grants for Purpose of Public Improvement*, and the titles *INTERPRETATION AND CONSTRUCTION*, vol. 17, pp. 14, 15; *LAKES AND PONDS*, vol. 18, p. 137; *NAVIGABLE WATERS*, vol. 21, pp. 435, 436, note.

Conflict in Michigan Cases. — In Michigan the cases on the construction of public grants are in direct conflict. The rule of the text is supported by *La Plaisance Bay Harbor Co. v. Monroe, Walk*. (Mich.) 155, and in *Kiefer v. German American Seminary*, 46 Mich. 636, the rule was recognized as being well settled. But in the later case of *Butler v. Grand Rapids, etc., Co.*, 85 Mich. 255, it was held that a grant by the federal government constituted no exception to the common-law rule that all grants must be construed most strongly against the grantors.

Grant to Number of Persons. — Where a legislative grant is made to an aggregation of persons as individuals — as tenants in common — the grant is construed strictly as to the grantee. *Haight v. Keokuk*, 4 Iowa 199 (holding that such a grant did not convey the land between high-water and low-water marks on navigable rivers) followed in *Barney v. Keokuk*, 94 U. S. 324. See also *Indiana v. Milk*, 11 Fed. Rep. 389, 11 Biss. (U. S.) 197, holding that where a state conveyed to private persons land surround-

Reason for Rule. — The principle underlying this rule is that the state or government should be protected against the encroachment of private interests upon its sovereign rights and against the overreaching rapacity of monopolistic corporations.¹ But where the reason for this rule of construction fails the rule fails with it, and the grant may be construed liberally as to the grantee.²

(2) *Grant Made Gratuitously.* — Where the grant is gratuitous, *i. e.*, not founded upon a valuable consideration, it is held in the *United States* that it must be construed strictly as against the grantee,³ though the *English* rule in respect to royal grants appears to be less rigid.⁴ It has been held, too, that unless a legislative grant is made in discharge of some obligation of the government which the law recognizes, it cannot be deemed, in a legal sense, to be anything but an act of sovereign grace and bounty on the part of the political authority, it matters not how meritorious the considerations are upon which such donation is made.⁵

(3) *Grant Made on Consideration.* — But where the grant is made on a valuable consideration, the rule is that the grant shall be construed strictly as to the grantor and liberally as to the grantee.⁶ The performance of services by the grantee constitutes as valuable a consideration to support the grant as does the payment of the money;⁷ and a grant which is made in fulfilment of a pre-existing obligation on the part of the government toward the grantee cannot be deemed gratuitous and must be construed favorably for the grantee.⁸

(4) *Intent and Purpose Controlling* — (a) **General Principles.** — The rule that public grants are to be construed strictly against the grantee means simply that nothing shall pass by implication unless it is necessary to carry into effect the obvious intent of the grant. But the intention of the parties, when expressed in plain language, cannot be ignored in a public any more than in a private grant. A construction that would lead to false consequences or unjust or inconvenient results, not contemplated or intended, should be avoided in a grant as well as in a statute.⁹ Thus, it is a leading principle in the construction of grants of public land that they shall not be destroyed or be held ineffectual for uncertainty if by any reasonable means the intention of the parties can be collected; and these means are not confined to what

ing a nonnavigable lake, the title to the bed of the lake did not pass to the grantees.

Grant by Municipal Corporation. — The rule of the text has been applied to a grant by a municipal corporation under authority derived from the state. *Allegheny v. Ohio*, etc., R. Co., 26 Pa. St. 355. See also *Indianapolis Cable St. R. Co. v. Citizens St. R. Co.*, 127 Ind. 369.

Rule of Strict Construction Provided by Statute. — In *California* it is provided by statute that "every grant by a public officer or body as such, to a private party, is to be interpreted in favor of the grantor." Civ. Code Cal., § 1069; *Oakland v. Oakland Water Front Co.*, 118 Cal. 175.

1. **Reason for Rule** — *De Witt v. Elmira Transfer R. Co.*, 134 N. Y. 500. See also *Dubuque, etc., R. Co. v. Litchfield*, 23 How. (U. S.) 66.

2. *De Witt v. Elmira Transfer R. Co.*, 134 N. Y. 495, holding that under such circumstances a legislative grant was subject to a general statute (1 Rev. Stat. N. Y. 748, § 1), providing that all the estate or interest of the grantor shall pass by the grant, "unless the intent to pass a less estate or interest shall appear by express terms or be necessarily implied in the terms of such grant."

3. **Gratuitous Grant Strictly Construed.** — *Oakland v. Oakland Water Front Co.*, 118 Cal.

160, *distinguishing* *Hyman v. Read*, 13 Cal. 444, and *disapproving* certain remarks of Terry, C. J., in the latter case. See also *Globe Mill Co. v. Bellingham Bay Imp. Co.*, 10 Wash. 461.

4. See *Whistler's Case*, 10 Coke 63; *Legat's Case*, 10 Coke, 112b.

5. *Causici v. La Coste*, 20 Tex. 269.

6. **Grant Made on Consideration.** — *Doe v. Wilson*, 10 Moo. P. C. 502; *Doe v. Westover*, 1 U. C. Err. & App. 465; *Johnson's Case*, 2 Ct. Cl. 391; *Hyman v. Read*, 13 Cal. 444; *Donworth v. Sawyer*, 94 Me. 252. See also the title *INTERPRETATION AND CONSTRUCTION*, vol. 17, p. 15, and see *Clark v. Bonnycastle*, 3 U. C. Q. B. O. S. 528.

7. **Services as Consideration.** — *Johnson's Case*, 2 Ct. Cl. 391.

8. **Pre-existing Obligation of Government.** — *Forsythe v. Ballance*, 6 McLean (U. S.) 562, 9 Fed. Cas. No. 4,951; *Hodge v. Donald*, 55 Tex. 344, *distinguishing* *Causici v. La Coste*, 20 Tex. 269.

9. **Intent of Parties.** — *People v. Deehan*, 153 N. Y. 528, *reversing* 11 N. Y. App. Div. 175. See also *Atty.-Gen. v. Delaware, etc., R. Co.*, 27 N. J. Eq. 634; *East Haven v. Hemingway*, 7 Conn. 186; *Martin v. Waddell*, 16 Pet. (U. S.) 367.

appears on the face of the grant itself, but the court will apply the maxim *id certum est quod certum reddi potest*, and any fact or matter *in pais* to which the grant either directly or indirectly refers may be shown in affirmation of the grant.¹

(b) **Legislative Grants Construed as Statutes** — *aa. PRINCIPLE STATED.* — In construing a legislative grant of public land, the act by which the grant is made is considered as a law as well as a conveyance. Such effect must be given to it as will carry out the intent of the legislature and fulfil the purposes to be effectuated; and this intent and these purposes, once ascertained, must not be defeated by applying to the grant the rules of the common law properly applicable only to conveyances between private parties, but such rules and technical principles of construction must yield to the legislative will.²

bb. HOW AND WHEN GRANT OPERATES. — Although a grant by an individual must generally operate at once if it operates at all, a grant by a sovereignty is governed by different principles and must have operation according to its intent, whatever that intent may be. Thus, the grant may have a continuous operation so as to transfer different parcels of land from time to time as the sovereignty may become vested with title thereto, if this appears to be its purpose, especially where the general policy of the sovereignty is in accord with this apparent purpose.³

cc. PRESENT POWER OF IDENTIFICATION OF LANDS. — To the validity of conveyances between private persons it may be admitted that by the common law there must exist a present power of identification of the land, and that where no such power exists instruments with words of present grant are operative, if at all, only as contracts to convey. But where a legislative grant of public land is involved, the rules of the common law must yield to the legislative will.⁴

1. *Doe v. Wilson*, 10 Moo. P. C. 502; *White v. Hembree*, 1 Overt. (Tenn.) 531.

Thus, the grantee shall have his land if his grant designates its locality with reasonable certainty. The grant shall not be nugatory by reason of the repugnancy of its calls. Those most to be relied on shall fix the location of the grant, and those repugnant to them and less to be relied on shall be rejected. *Funa v. Manning*, 11 Humph. (Tenn.) 311.

Particular Description in Patent Controls General Description. — *People v. Saxton*, 15 N. Y. App. Div. 263, *affirmed* 154 N. Y. 748.

In Construing a Royal Grant, if the letters patent "may be taken to one intent good and to another intent void, then, for the king's honor and for the benefit of the subject, they shall be taken in such manner that the king's grant shall take effect; for it was not the king's meaning to make a void grant." *Priddle's Case*, 11 Coke 8b. See to the same effect *Wood's Case*, 11 Coke 40b; *St. Saviours Church Case*, 10 Coke 67b; *Doe v. Wilson*, 10 Moo. P. C. 502.

As to Extrinsic Evidence in construing a grant from the crown, the same rules apply as in cases of grants from a subject. *Brady v. Sadler*, 16 Ont. 49, *reversed* on other grounds but *affirmed* as to this point 17 Ont. App. 365.

2. Intent and Purpose Override Technical Rules of Construction — *United States.* — *Silver v. Ladd*, 7 Wall (U. S.) 219; *Green v. Lister*, 8 Cranch (U. S.) 248; *Schulenberg v. Harriman*, 21 Wall. (U. S.) 62 [*distinguishing Rice v. Minnesota*, etc., R. Co., 1 Black (U. S.) 381]; *Missouri*, etc., R. Co. v. *Kansas Pac. R. Co.*, 97 U. S. 497; *Winona*, etc., R. Co. v. *Barney*, 113 U. S. 618, *reversing* on other grounds 2 McCrary

(U. S.) 421, 6 Fed. Rep. 802; *Smith v. Townsend*, 148 U. S. 494; *U. S. v. Denver*, etc., R. Co., 150 U. S. 14, *affirming* 34 Fed. Rep. 838; *Shaw v. Kellogg*, 170 U. S. 331; *Northern Pac. R. Co. v. St. Paul*, etc., R. Co., 26 Fed. Rep. 551, *affirmed* 139 U. S. 1; *St. Paul*, etc., R. Co. v. *Greenhalgh*, 26 Fed. Rep. 563, *affirmed* 139 U. S. 19. See also *Lindsey v. Hawes*, 2 Black (U. S.) 562.

Connecticut. — See *East Haven v. Hemingway*, 7 Conn. 186.

Louisiana. — *Price v. Curran*, 5 La. Ann. 686.

Michigan. — *Ballou v. O'Brien*, 20 Mich. 304; *Johnson v. Ballou*, 28 Mich. 379; *Kiefer v. German-American Seminary*, 46 Mich. 636; *Jackson*, etc., R. Co. v. *Davison*, 65 Mich. 416.

Minnesota. — *Nash v. Sullivan*, 29 Minn. 206.

Montana. — *Northern Pac. R. Co. v. Majors*, 5 Mont. 133.

Texas. — See *Hodge v. Donald*, 55 Tex. 354, *distinguishing Causici v. La Coste*, 20 Tex. 269.

Washington. — *State v. Johanson*, 26 Wash. 675, *affirmed* 190 U. S. 179.

3. Continuous Operation of Grant. — *Ballou v. O'Brien*, 20 Mich. 304. See also *Johnson v. Ballou*, 28 Mich. 379.

4. Possibility of Present Identification Unnecessary. — *Schulenberg v. Harriman*, 21 Wall. (U. S.) 62 [*distinguishing Rice v. Minnesota*, etc., R. Co., 1 Black (U. S.) 381]; *Missouri*, etc., R. Co. v. *Kansas Pac. R. Co.*, 97 U. S. 497; *U. S. v. Southern Pac. R. Co.*, 146 U. S. 570; *Northern Pac. R. Co. v. St. Paul*, etc., R. Co., 26 Fed. Rep. 551, *affirmed* 139 U. S. 1; *St. Paul*, etc., R. Co. v. *Greenhalgh*, 26 Fed. Rep. 563, *affirmed* 139 U. S. 19; *Northern Pac. R. Co. v. Majors*, 5 Mont. 133.

dd. NATURE AND QUANTUM OF ESTATE GRANTED. — Where the federal government conveys land by act of Congress, that which constitutes the deed also constitutes the law which defines the right or estate given and stamps it with whatever character it possesses. Such a sovereign legislative grant partakes more of the nature of a treaty cession than of individual bargaining, and no court may subject it to the definitions and refinements which the rules of municipal law apply to conveyances from man to man. It is unnecessary that the grant should be capable of being brought within any of the definitions given to the estates of the common law; and so long as the government is dealing only with its own property, the right of estate granted, whether anomalous, unprecedented, or otherwise, will be entitled to recognition and effect for what it appears and was intended to be.¹

ee. PARTICULAR MATTERS TO BE CONSIDERED IN CONSTRUING GRANT — (*aa*) *Contemporaneous History and Condition of Country.* — In construing a statute the court may with propriety recur to the history of the times when the act was passed; and this is frequently necessary in order to ascertain the reasons as well as the meaning of particular provisions.² Likewise, in endeavoring to ascertain the meaning of the legislature, the court must, as far as possible, place itself in the light that the legislature enjoyed, look at things as they appeared to it, and discover its purpose from the language used, in connection with attending circumstances.³ These principles are to be followed where the court is called upon to construe a legislative grant of public lands.⁴ Similarly, it is held that to ascertain the intent of the legislature and the purposes to be subserved by the grant, the court should not only look to the purpose declared in the enactment, and read all parts of the act together, but should consider the condition of the country when the act was passed.⁵

(*bb*) *Prior Legislation upon Same Subject.* — The purpose of preceding legislation upon the same subject may be considered as an element showing a liberal tendency on the part of the legislature, and this may properly influence the court to construe the grant liberally as to the grantee.⁶

(*c*) *Legislative Grants for Purpose of Public Improvement.* — The rule of strict construction as to the grantee has been held to be fully applicable to grants made to a state or territory for the purpose of aiding in public or quasi-public improvements,⁷ such as the navigation of a river⁸ or the building of a railroad.⁹ On the other hand, it has been held that where the grant is from one state or political community to another, as from the federal government to a state, a more liberal rule of construction is permitted than in cases of grants

1. Estate Not Subject to Common-law Rules. — *Johnson v. Ballou*, 28 Mich. 379.

Quantum of Estate. — It is held in *North Carolina* that a royal grant made prior to the Revolution will be presumed to be in fee, though the abstract of such grant contains no words of inheritance. *Tolson v. Mainor*, 85 N. Car. 235.

2. History of Times Important. — U. S. v. Union Pac. R. Co., 91 U. S. 72; *Aldridge v. Williams*, 3 How. (U. S.) 9; *Preston v. Browder*, 1 Wheat. (U. S.) 120. See generally the title *STATUTES, post*.

3. *Platt v. Union Pac. R. Co.*, 99 U. S. 48. See generally the title *STATUTES, post*.

4. *Stark v. Starrs*, 6 Wall. (U. S.) 415; *Silver v. Ladd*, 7 Wall. (U. S.) 225; *Green v. Liter*, 8 Cranch (U. S.) 248; *Smith v. Townsend*, 148 U. S. 494; *Lownsdale v. Portland*, 1 Oregon 391. See also *Lindsey v. Hawes*, 2 Black (U. S.) 562; *Forsythe v. Ballance*, 6 McLean (U. S.) 562; *Martin v. Waddell*, 16 Pet. (U. S.) 411.

5. Condition of Country When Statute Passed. — *Stark v. Starrs*, 6 Wall. (U. S.) 415; *Silver v. Ladd*, 7 Wall. (U. S.) 225; *Green v. Liter*, 8 Cranch (U. S.) 248; *Winona, etc.*, R. Co. v. Barney, 113 U. S. 618, *reversing* on other grounds 2 McCrary (U. S.) 421, 6 Fed. Rep. 802; *Shaw v. Kellogg*, 170 U. S. 331; *U. S. v. Denver, etc.*, R. Co., 150 U. S. 14, *affirming* 34 Fed. Rep. 838; *Lownsdale v. Portland*, 1 Oregon 391; *State v. Johanson*, 26 Wash. 675, *affirmed* 190 U. S. 179.

6. Prior Legislation Important. — *Price v. Curran*, 5 La. Ann. 686. See also *State v. Springfield*, 6 Ind. 83; *State v. Johanson*, 26 Wash. 675, *affirmed* 190 U. S. 179.

7. Grant of Swamp Lands. — *Rice v. Sioux City, etc.*, R. Co., 110 U. S. 695, *affirming* 3 McCrary (U. S.) 410, 9 Fed. Rep. 368.

8. Grant to Improve Navigation. — *Dubuque, etc.*, R. Co. v. Litchfield, 23 How. (U. S.) 66.

9. Grant to State to Aid Building of Railroad. — *Leavenworth, etc.*, R. Co. v. U. S., 92 U. S.

to individuals;¹ and that where the federal government grants to a state lands of a designated class for the purpose of securing objects of public interest, no rigid rule of construction should be allowed to defeat the plain object and purpose of the parties.² But whether the fact that the grant by the federal government is made directly to a state has or has not any importance in determining its construction, it is well settled that in the interpretation of grants of public lands for the purpose of public improvement, as well as in the interpretation of grants for other purposes, the intention of the legislature and the purposes to be subserved by the grant furnish the criterion of construction, to which technical rules must yield; and that if it appears that the legislature intended the grant to have a liberal and beneficent operation, this intention will be effectuated by the court.³ Thus, where an act operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers interests in public lands to individuals or to corporations as inducements to undertake and accomplish great and expensive enterprises or works of a *quasi*-public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it is enacted.⁴

b. "PRACTICAL INTERPRETATION" SHOWN BY CONDUCT OF PARTIES. — In the construction of a public charter granted for the purpose of creating a civil community, the practical interpretation it has received from and which has been acquiesced in by those interested therein for a long series of years is the most important evidence in the determination of rights existing thereunder, and the strict letter of the instrument becomes of little importance. So the fact that until shortly before action brought the grantee never claimed any title to or exercised any acts of ownership over the property he seeks to hold under the grant must be regarded as a practical interpretation of the grant by the parties interested therein and is important in determining their rights.⁵

c. GRANTS BY FEDERAL GOVERNMENT OF LANDS ABUTTING ON WATERS — CONSTRUCTION GOVERNED BY STATE LAW. — Where the federal government has granted public lands abutting upon lakes, ponds, rivers, or other watercourses, the construction of the grant with reference to its boundaries upon such waters will depend upon the law of the state where the lands are situated.⁶

d. OPERATION OF GRANT IN RESPECT TO SEIZIN OR POSSESSION. — It is generally held that a grant of unoccupied public lands by a state or the federal government operates to vest in the grantee an absolute estate in fee simple, and to transfer to him seizin and possession without the necessity of an actual entry, and this in as full and beneficial a manner as if livery of seizin

733, *affirming* 1 McCrary (U. S.) 610, 1 Cent. L. J. 425, 26 Fed. Cas. No. 15,582.

1. *Distinction as to Grant by Federal Government to State.* — *Indiana v. Milk*, 11 Fed. Rep. 389, 11 Biss. (U. S.) 197.

2. *Indiana v. Milk*, 11 Biss. (U. S.) 204; *State v. Johanson*, 26 Wash. 675, *affirmed* 190 U. S. 179.

3. *Liberal Construction of Grants to Aid Construction of Railroads.* — *Schulenberg v. Harri-*
man, 21 Wall. (U. S.) 62; *Missouri, etc., R. Co. v. Kansas Pac. R. Co.*, 97 U. S. 497; *U. S. v. Denver, etc., R. Co.*, 150 U. S. 14, *affirming* 34 Fed. Rep. 838; *Nash v. Sullivan*, 29 Minn. 206; *Northern Pac. R. Co. v. Majors*, 5 Mont. 111.

Liberal Construction of Grant to State for Use of Schools. — *State v. Johanson*, 26 Wash. 675, *affirmed* 190 U. S. 179.

4. *Grant to Induce Undertaking of Extensive Enterprise or Work of Quasi-public Character.* — *U. S. v. Denver, etc., R. Co.*, 150 U. S. 14, *affirming* 34 Fed. Rep. 838.

5. *Practical Interpretation by Parties Matter of Importance.* — *Southampton v. Mecox Bay Oyster Co.*, 116 N. Y. 1; *East Hampton v. Vail*, 151 N. Y. 463.

6. *Federal Grants of Land Abutting on Waters.* — *Packer v. Bird*, 137 U. S. 661; *Hardin v. Jordan*, 140 U. S. 371; *Kean v. Calumet Canal, etc., Co.*, 190 U. S. 452, *affirming* 150 Ind. 699; *Hardin v. Shedd*, 190 U. S. 508, *affirming* 177

had been made according to the common law; and the grantee holds to the same extent and in the same manner as the grantor previously held, and acquires all the legal remedies incident to the estate granted.¹ With respect to conveyances of crown lands by letters patent, the same rule has been applied by the courts of *Canada*,² and to some extent it appears to be the crown law of *England*.³

e. DEATH OF GRANTEE BEFORE ISSUANCE OF PATENT — (1) *Common-law Rule*. — At common law a patent for public lands to a person who is dead at the time of its issuance is absolutely void; the title remains in the sovereignty, and the heirs or legal representatives of the decedent take nothing but the grant.⁴ The same is true of an entry made in the name of a deceased person.⁵

(2) *Practice Adopted to Avoid Rule* — (a) *Statement of Practice*. — To avoid the result of this rule, the commissioner of the United States land office, upon consulting the attorney-general, adopted the practice of issuing the patent certificate and even the patent to the original grantee "or his legal repre-

lil. 123, and 161 Ill. 462, 52 Am. St. Rep. 380; *In re Valley*, 116 Fed. Rep. 983; *White v. Leovy*, 49 La. Ann. 1660. See generally the title *BOUNDARIES*, vol. 4, p. 756.

1. *Entry under Grant Not Necessary to Give Seizin* — *United States*. — *Green v. Litter*, 8 Cranch (U. S.) 229; *Green v. Watkins*, 7 Wheat. (U. S.) 28; *Gilman v. Brown*, 1 Mason (U. S.) 191, 10 Fed. Cas. No. 5,441, *affirmed* 4 Wheat. (U. S.) 256; *Stokes v. Dawes*, 4 Mason (U. S.) 268, 23 Fed. Cas. No. 13,477; *Potts v. Gilbert*, 3 Wash. (U. S.) 475, 19 Fed. Cas. No. 11,347; *Braxton v. Rich*, 47 Fed. Rep. 178, *affirmed* 158 U. S. 375.

Indiana. — *Daggett v. Bonewitz*, 107 Ind. 276 (grant of school lands to inhabitants of townships).

Kentucky. — *Ewing v. Savary*, 4 Bibb (Ky.) 424. See also *Botts v. Shields*, 3 Litt. (Ky.) 35. Earlier Kentucky cases had held that the patentee acquired under his patent a right of entry, but not actual seizin. *Innes v. Crawford*, 2 Bibb (Ky.) 412; *Speed v. Beuford*, 3 Bibb (Ky.) 57.

Montana. — *Northern Pac. R. Co. v. Majors*, 5 Mont. 111.

New Hampshire. — *Enfield v. Permit*, 8 N. H. 512, 31 Am. Dec. 207.

Tennessee. — *Peeler v. Norris*, 4 Yerg. (Tenn.) 343; *Webb v. Haley*, 7 Baxt. (Tenn.) 604.

Texas. — *Whitehead v. Foley*, 28 Tex. 269.

Virginia. — *Clay v. White*, 1 Munf. (Va.) 162; *Taylor v. Burnside*, 1 Gratt. (Va.) 166; *Overton v. Davisson*, 1 Gratt. (Va.) 212, 42 Am. Dec. 544.

A grant of public land by act of Congress is the highest evidence of title, and imports possession and livery of seizin. *Northern Pac. R. Co. v. Majors*, 5 Mont. 111.

2. *Grants of Crown Lands* — *Canada*. — *Doe v. Caft*, 3 N. Bruns. 546; *Doe v. Chace*, 8 N. Bruns. 501; *Clench v. Hendricks*, *Taylor* (U. C.) 555; *Greenlaw v. Fraser*, 24 U. C. C. P. 230; *Doe v. Turnbull*, 5 U. C. Q. B. 129; *Doe v. Seymour*, 9 U. C. Q. B. 47.

A *Lease of Crown Lands* under the Great Seal gives possession to the lessee, and after he has showed his intention to accept it by claiming the land from an intruder who is in possession and has improved it, he can without actual entry maintain an action of trespass against the

intruder for timber cut by the latter. *St. Leger v. Manahan*, 5 U. C. Q. B. O. S. 89.

Tenancy by Curtesy. — As grantee of the crown, a married woman has, by virtue of the letters patent, that seizin in law and in deed which is necessary to the existence of an estate by the curtesy in her husband; and to be entitled to this estate, the husband need not have entered upon the land. *Weaver v. Burgess*, 22 U. C. C. P. 104.

3. *England* — *Title Passes by King's Letters Patent Without Livery of Seizin*. — *Lancaster's Case*, *Plowd.* 213. See also *Weaver v. Burgess*, 22 U. C. C. P. 104.

4. *Patent Void When Issued After Death of Grantee* — *United States*. — *Galloway v. Finley*, 12 Pet. (U. S.) 264; *Landes v. Brant*, 10 How. (U. S.) 348.

Alabama. — *Tarver v. Smith*, 38 Ala. 135.

Kentucky. — *Moss v. Currie*, 1 Dana (Ky.) 266; *Lewis v. M'Gee*, 1 A. K. Marsh. (Ky.) 199; *Skeene v. Fishback*, 1 A. K. Marsh. (Ky.) 356; *Bowman v. Bartlett*, 3 A. K. Marsh. (Ky.) 100; *Bowman v. Violet*, 4 T. B. Mon. (Ky.) 350; *Currie v. Tibbs*, 5 T. B. Mon. (Ky.) 444; *Russell v. Marks*, 3 Met. (Ky.) 37.

New York. — *Jackson v. Skeels*, 19 Johns. (N. Y.) 198; *Jackson v. Lyon*, 9 Cow. (N. Y.) 664.

Ohio. — *Wood v. Ferguson*, 7 Ohio St. 288.

Texas. — *Gould v. West*, 32 Tex. 338; *Cole v. Grigsby*, 89 Tex. 228.

Virginia. — *Blankenpickler v. Anderson*, 16 Gratt. (Va.) 59.

Canada. — *Doe v. Finn*, 1 U. C. Q. B. 76; *Brouse v. Cram*, 14 Grant Ch. (U. C.) 677.

That the patent is void for this reason may be shown in an action of ejectment where one party claims under the patent. *Blankenpickler v. Anderson*, 16 Gratt. (Va.) 59.

5. *Entry in Name of Person Deceased*. — *Galt v. Galloway*, 4 Pet. (U. S.) 332; *M'Donald v. Smalley*, 6 Pet. (U. S.) 261; *Bowman v. Violet*, 4 T. B. Mon. (Ky.) 351; *M'Cracken v. Beall*, 3 A. K. Marsh. (Ky.) 208; *Price v. Johnston*, 1 Ohio St. 390; *Stubblefield v. Boggs*, 2 Ohio St. 216.

Both an entry and a survey in the name of one person as attorney in fact for another person deceased are void. *Wallace v. Saunders*, 7 Ohio (pt. i.) 173.

sentatives," and this practice has been followed by the recorders of land titles and by the several boards of commissioners appointed to determine and report upon claims under particular grants, concessions, or donations, the certificate or patent being issued sometimes to the original grantee or his legal representative," and sometimes simply to his "legal representative."¹ Sometimes, also, in pursuance of particular legislative grants, patents have issued to the persons originally entitled or their heirs or assigns, or their legal representatives, their heirs or assigns.²

(b) **Construction of Certificate, Patent, or Confirmation to Heirs, Etc.** — *aa.* To "HEIRS" AND "LEGAL REPRESENTATIVES" OF DECEDENT. — A patent from the United States to "the heirs" of a deceased person is not void for uncertainty, since the persons who are intended can be ascertained and identified by extrinsic evidence.³ Likewise, a patent is not invalid which grants land to the "legal representatives" of a person without naming them, but extrinsic evidence is admissible to show who were the representatives who made the claim and became entitled thereby to receive the grant;⁴ and the same is true of a certificate issued to a person "or his legal representatives."⁵

Conveyance by Person Entitled — Patent to His Heirs. — It has been held that where a claimant of land held property by entry and survey and had done all acts necessary to entitle him to a patent, thus securing an inchoate and alienable title, if he sold and conveyed this title by deed with warranty binding his heirs, and after his death a patent issued to his heirs, the title thus perfected by the patent inured to the benefit of the ancestor's grantee and those claiming under him, and the heirs were estopped from controverting the validity of the ancestor's title when the conveyance was made.⁶

Who Are "Legal Representatives." — The phrase "legal representatives" has generally been construed to embrace representatives of the original grantee by contract, such as assigns or grantees, as well as by operation of law, and to leave for inquiry the question as to the particular person to whom the certificate, patent, or confirmation should inure.⁷ And where the original claimant sold his interest in the property to a stranger, a certificate of confirmation issued to his legal representatives after his death conveys no title to his heirs.⁸ But a confirmation by act of Congress to the legal representatives of a person inures to the benefit of those persons only who by competent and legal evidence show that they have obtained the right or title of the person to whom the confirmation is made.⁹

bb. **WHETHER HEIRS TAKE BY DESCENT OR BY PURCHASE.** — Where an ancestor holds land by entry and survey and has done all acts necessary to entitle him to a patent, he acquires an inchoate and alienable title which upon his death descends to his heirs, and where a patent afterwards issues to his heirs they

1. **Practice of Issuing Patent or Certificate to "Legal Representative."** — *Hogan v. Page*, 2 Wall. (U. S.) 605; *Carpenter v. Rannels*, 19 Wall. (U. S.) 138; *Morehouse v. Phelps*, 21 How. (U. S.) 294 [*reversing* 18 Ill. 473, *sub nom.* *Phelps v. Smith*, 15 Ill. 573]; *Delauney v. Burnett*, 9 Ill. 495; *Bowman v. Long*, 89 Ill. 19; *Bryan v. Wear*, 4 Mo. 106; *Papin v. Massey*, 27 Mo. 445. See also *Wear v. Bryant*, 5 Mo. 147.

2. This was true under Act Cong. Aug. 10, 1790 (1 U. S. Stat. at L. 182, c. 40). *Bond v. Swearingen*, 1 Ohio 407.

3. **Patent to Heirs — Extrinsic Evidence.** — *Payne v. Mathis*, 92 Ala. 585. See also the title *DEEDS*, vol. 9, p. 132 *et seq.*

4. **Patent to "Legal Representatives."** — *Morehouse v. Phelps*, 21 How. (U. S.) 294, *reversing* 18 Ill. 473, *sub nom.* *Phelps v. Smith*, 15 Ill. 573.

5. *Bryan v. Wear*, 4 Mo. 106. See also *Holme v. Strautman*, 35 Mo. 293.

6. **Grantee of Ancestor Takes under Patent to Heirs.** — *Bond v. Swearingen*, 1 Ohio 395; *Douglass v. McCoy*, 5 Ohio 522.

7. **Assignees and Grantees.** — *Hogan v. Page*, 2 Wall. (U. S.) 605; *Carpenter v. Rannels*, 19 Wall. (U. S.) 138; *Bowman v. Long*, 89 Ill. 19; *Bryan v. Wear*, 4 Mo. 106; *Wear v. Bryant*, 5 Mo. 147; *Boone v. Moore*, 14 Mo. 420; *Papin v. Massey*, 27 Mo. 445. And see generally as to the construction of this phrase *LEGAL REPRESENTATIVES*, etc., vol. 18, p. 813 *et seq.*

Purchaser of Pre-emption Right "Legal Representative." — *Delauney v. Burnett*, 9 Ill. 454.

8. *Montgomery v. Landusky*, 9 Mo. 714.

9. *Allen v. Moss*, 27 Mo. 354; *Allen v. King*, 35 Mo. 217.

take the completed title by descent, and not by purchase.¹ On the other hand, where the ancestor has no estate whatever in the lands during his life, as where the statute making the grant was passed after his death, nothing can, of course, descend to his heirs, and though the statute grants the land to the ancestor "or his legal representative," the heirs take by purchase, and not by descent.²

cc. TO EXECUTORS OR ADMINISTRATORS OF DECEDENT. — A patent issued by the United States to several persons as executors of a decedent is valid, and vests title in the patentees;³ and where an assignee of a warrant for military lands has died, a patent issued by the United States to his administrator is equally valid and operative.⁴

dd. WHAT LAW CONTROLS IN ASCERTAINING GRANTEES. — Under a grant of land by the United States to a person or his legal representatives, the question who are such legal representatives must be determined by the law of the state in which the land is situated.⁵

ee. LIMITATION TO SUCCESSORS RESTRICTED BY STATUTE UNDER WHICH PATENT IS ISSUED. — But the limitation in letters patent to the successors of the grantee named in the patent can have effect only so far as it accords with the act of Congress under which the patent is issued.⁶

(3) *Statutes Passed to Avoid Rule* — (a) **Introductory.** — To remedy the inconvenience resulting from the common-law rule that a patent issued after the death of the person entitled thereto is void, statutes have been passed both in *Canada* and in the *United States*, the statutes in the United States comprising an act of Congress as well as acts of the legislatures of several states.

(b) **Canadian Heir-and-Devisee Act.** — Under the Canadian Heir-and-Devisee Act, commissioners are empowered to ascertain, determine, and declare who is or are the heir or heirs, devisee or devisees of the said nominee or nominees of the crown; and it is provided that the decision of the commissioners shall be final and conclusive, and that the governor in council shall direct a patent to issue for granting the lands in question to the party who has been determined by the decision of the commissioners to be entitled to it as representing the original nominee of the crown.⁷

(c) **Federal Statute** — aa. **TERMS OF ACT.** — In 1836 the Congress of the United States passed a general law⁸ which was afterwards re-enacted,⁹ providing that "in all cases where patents for public lands have been or may hereafter be issued, in pursuance of any law of the United States; to a person who had died or who shall hereafter die before the date of such patent, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assignees of such deceased patentee as if the patent had issued to the deceased person during life."¹⁰

1. **Heirs Take by Descent, and Not by Purchase.** — *Bond v. Swearingen*, 1 Ohio 395; *Douglass v. McCoy*, 5 Ohio 522.

2. **No Title in Ancestor — Heirs Take by Purchase, Not by Descent.** — *Thompson v. Gotham*, 9 Ohio 170, *distinguishing* *Bond v. Swearingen*, 1 Ohio 395.

Devise. — In *Ware v. Emory College*, 65 Ga. 283, it appeared that C., during his life, became entitled to certain bounty lands for services to the federal government. For some reason it was necessary to apply to Congress in regard to the lands. Pending the application C. died, leaving a will, and afterwards Congress passed an act allowing his heirs or legal representatives to lay off the land, which was done. It was held that the lands passed under the act of Congress, and not under the will.

3. **Patent to Executors.** — *Christy v. Fisher*, 58 Cal. 256.

4. **Patent to Administrator of Deceased Assignee.** — *Bonds v. Hickman*, 29 Cal. 461, 32 Cal. 202.

5. **Legal Representatives Ascertained by State Law.** — *Hammond v. Coleman*, 4 Mo. App. 307; *Cummings v. Jamison*, 21 Mo. App. 591.

6. **Statute Controls Operation of Patent.** — *Smith v. Pipe*, 3 Colo. 195.

7. **Canadian Heir-and-Devisee Act.** — For construction see *Scane v. Hartrick*, 7 Grant Ch. (U. C.) 161; *McDiarmid v. McDiarmid*, 9 Grant Ch. (U. C.) 144; *Doe v. Finn*, 1 U. C. Q. B. 70.

8. **Federal Statute.** — Act Cong. May 20, 1836, 5 U. S. Stat. at L. 31, c. 76.

9. *Rev. Stat. U. S.*, § 2448.

10. **United States.** — *Galloway v. Finley*, 12 Pet. (U. S.) 296; *Bissell v. Penrose*, 8 How. (U. S.) 317; *Landes v. Brant*, 10 How. (U. S.) 348; *Schedda v. Sawyer*, 4 McLean (U. S.) 181,

bb. TO WHAT LANDS APPLICABLE. — The federal statute, it is held, was intended to cover all cases where any rights belonging to the United States existed in lands which could be relinquished by patent, even though the lands were not strictly public lands and an interest therein was held by the patentee himself.¹ A clause in the statute required that the provisions of the act should be construed to extend to patents for land within the Virginia military district in the state of Ohio.²

cc. CONSTRUCTION AND EFFECT OF ACT — **Prior Title Lawfully Acquired Not Affected.** — The design of the act was not to set up void entries or surveys, but merely to give effect to patents which, but for that act, would be void. The act is not to be so construed as to interfere with titles lawfully acquired before its passage.³

Grantees and Assignees Preferred to Heirs and devisees. — If the original claimant in his lifetime had an alienable estate in the property, and granted or assigned it by a *bona fide* conveyance, his grantees or assignees and those claiming under them take title under this statute in preference to his heirs or devisees,⁴ especially where the conveyance was with covenants of warranty.⁵ Thus, a grantee in a sheriff's deed made prior to the patent takes title in preference to the heir or devisee of the original claimant;⁶ and an assignee of such heir or devisee occupies no better position, where he is chargeable with notice of the rights of the grantee in the sheriff's deed, as where the grantee is in open and notorious possession of the property.⁷

Where Original Claimant Had No Alienable Interest. — Where until the date of entry and purchase title remains in the United States,⁸ and where in the absence of statute no deed or assignment of the claimant's rights is valid, a patent granted by the United States to the settler's legal representatives inures to the benefit of a person who has presented his claim as the legal representative of a deceased settler, has obtained the certificate, and has paid the money; a grantee of the decedent takes no title.⁹

21 Fed. Cas. No. 12,443; *Brazee v. Schofield*, 124 U. S. 495.

Alabama. — *Cothran v. McCoy*, 33 Ala. 65; *Phillips v. Sherron*, 36 Ala. 189; *Tarver v. Smith*, 38 Ala. 135.

Colorado. — *Reynolds v. Campling*, 23 Colo. 105.

Mississippi. — *McInnis v. Pickett*, 65 Miss. 354.

Missouri. — *Boyd v. Mammoth Spring Imp.*, etc., Co., 137 Mo. 482.

Ohio. — *Sullivant v. Weaver*, 10 Ohio 275.

Statute as Affected by Terms of Act under Which Grant Is Made. — This statute applies to patents obtained under the *Oregon* Donation Act of September 27, 1850; but its language must be construed in accordance with and as limited by the provisions of the donation act which give to the survivor and children, unless otherwise provided by will, the property of a husband and wife who shall die before the patent issues; and the patent must be held to inure in favor of these parties instead of the heirs solely. *Davenport v. Lamb*, 13 Wall. (U. S.) 418 [*affirming Lamb v. Starr, Deady* (U. S.) 447, 14 Fed. Cas. No. 8,022]; *Lamb v. Davenport*, 18 Wall. (U. S.) 307, *affirming* 1 Sawy. (U. S.) 609, 14 Fed. Cas. No. 8,015.

Act of March, 1803. — The term "legal representatives," used in the Act of Congress of March 3, 1803, concerning pre-emption claims under the act, does not mean children or heirs only; it embraces also assignees and grantees, who, in regard to the thing assigned or granted,

are the legal representatives of the assignor and grantor. *Grand Gulf R., etc., Co. v. Bryan*, 8 Smed. & M. (Miss.) 234. And see generally *LEGAL REPRESENTATIVES*, etc., vol. 18, p. 816, note.

1. All Rights Which Can Be Relinquished by Patent. — *Waterman v. Smith*, 13 Cal. 373.

The Statute Applies to a Patent Issued under the Act of March 3, 1851, the act to ascertain and settle private land claims in the state of California. *Waterman v. Smith*, 13 Cal. 373; *Chipley v. Farris*, 45 Cal. 527.

2. Virginia Military District in Ohio. — *Galloway v. Finley*, 12 Pet. (U. S.) 296.

3. Act Does Not Affect Prior Lawful Title. — *Stubblefield v. Boggs*, 2 Ohio St. 216.

4. Grantees and Assignees Take to Exclusion of Heirs and Devisees. — *Landes v. Brant*, 10 How. (U. S.) 348. See also *Stoddard v. Chambers*, 2 How. (U. S.) 316; *Bissell v. Penrose*, 8 How. (U. S.) 317; *Wright v. Rutgers*, 14 Mo. 585.

5. Trimble v. Boothby, 14 Ohio 109.

6. Landes v. Brant, 10 How. (U. S.) 348.

7. Assignee of Heir or Devisee — Notice. — *Landes v. Brant*, 10 How. (U. S.) 348.

8. As under 4 U. S. Stat. at L. 334, c. 15, and 5 U. S. Stat. at L. 79, c. 269.

9. No Alienable Estate in Decedent — Grantee Takes Nothing. — *Morehouse v. Phelps*, 21 How. (U. S.) 294, *reversing* 18 Ill. 473, *sub nom.* *Phelps v. Smith*, 15 Ill. 573, and holding that the decedent's administrator was entitled to the property.

Purchaser from Heirs Locating Land for Himself. — Under this statute it has been held that one who has contracted to purchase from the heirs of a grantee who died before the issuance of the patent cannot enter and locate the land for himself so as to defeat the contract and release himself from liability thereunder, but can enter and locate only for the benefit of his vendors; and that where such a purchaser, upon discovering that the original patent was issued after the grantee's death, attempts to enter and locate the land for himself, a court of equity will neither grant to him rescission of his contract of purchase upon the ground that the title to be conveyed was defective, nor aid him to obtain reimbursement for his expenses for warrants and surveys.¹ Where the purchaser, by entering and locating the land, does not seek wholly to defeat his contract, it seems that the most that he can ask is that the contract of purchase be reformed and the amount he has advanced to perfect the title be deducted from the unpaid purchase money.²

Doctrine of Relation and Statute of Limitations. — Where a patent was issued to a deceased person prior to the act of Congress under discussion, that act did not operate to vest the title in the deceased patentee's heirs as of the date of the patent, so as to make the statute of limitations run against the heirs from that date; the period of limitation began at the date of the act, and not at the date of the patent.³

(d) **Kentucky Statutes** — *aa.* **EARLY STATUTE.** — In Kentucky a statute was passed in 1792 which, after reciting that "in some instances grants have been issued in the names of persons who were deceased at the date of the grant, and cases of the same nature may happen in the future," enacted that "in all such cases, the land conveyed shall descend to the heirs or devisees in the same manner as it would do had the grant issued in the lifetime of such decedent."⁴

Construction — **As to Compact with Virginia.** — The Act of 1792 was not a violation of the compact between Kentucky and Virginia,⁵ and was not so construed as to conflict with that compact.⁶

When Title Vested — **Second Patent Prior to Statute.** — Under this statute title vested in the decedent's heir or devisee only from the date of the act, and if prior to the statute another patent had been issued to a living person for the same land, the heir or devisee of the decedent took no title.⁷ The same rule applied to an entry made in the name of the decedent.⁸

Ascertaining Heirs. — Where a patent was issued to a deceased person prior to the Act of 1792, the statute operated to vest the title in those persons who were heirs of the decedent at the time of his death, and not those who were heirs at the issuing of the grant.⁹

Devise Before Statute of Wills. — A will made before the statute of wills¹⁰ did not pass after-acquired lands. So where a decedent who had made a will before the statute, and in whose name a patent issued after his death, had not in his lifetime acquired an inchoate title by entry, the statute of 1792 vested

1. **Purchaser from Heir Cannot Defeat Contract by Locating Land for Himself.** — *Galloway v. Finley*, 12 Pet. (U. S.) 264.

As to the purchase of paramount title by the vendee, see generally the title **VENDOR AND PURCHASER**. See also the title **PURCHASERS FOR VALUE AND WITHOUT NOTICE**, vol. 23, p. 472.

2. *Galloway v. Finley*, 12 Pet. (U. S.) 264.

3. **Title Not Vested by Relation as of Date of Patent.** — *Wood v. Ferguson*, 7 Ohio St. 288.

4. **Kentucky Act of 1792.** — 1 *Littell's Laws Ky.* 160; *Hansford v. Minor*, 4 *Bibb* (Ky.) 385. See also *Russell v. Marks*, 3 *Met.* (Ky.) 37; *Currie v. Tibbs*, 5 *T. B. Mon.* (Ky.) 440; *M'Cracken v. Beall*, 3 *A. K. Marsh.* (Ky.) 208.

5. **Statute Not Violation of Compact with Virginia.** — *Hansford v. Minor*, 4 *Bibb* (Ky.) 385.

6. *M'Cracken v. Beall*, 3 *A. K. Marsh.* (Ky.) 212.

7. **Patent to Living Person Prior to Act Passed Title.** — *Bowman v. Bartlet*, 3 *A. K. Marsh.* (Ky.) 86; *M'Cracken v. Beall*, 3 *A. K. Marsh.* (Ky.) 208; *Bowman v. Violet*, 4 *T. B. Mon.* (Ky.) 350; *Currie v. Tibbs*, 5 *T. B. Mon.* (Ky.) 444.

8. *M'Cracken v. Beall*, 3 *A. K. Marsh.* (Ky.) 208; *Bowman v. Violet*, 4 *T. B. Mon.* (Ky.) 350.

9. **Heirs Ascertained at Time of Patentee's Death.** — *Hansford v. Minor*, 4 *Bibb* (Ky.) 385. See also *Skeene v. Fishback*, 1 *A. K. Marsh.* (Ky.) 356.

10. Statute of 1785, to take effect Jan. 1, 1787.

title not in his devisee, but in his heir,¹ unless, of course, an intermediate grant had been made, in which event the second grantee took title, and the subsequent statute of 1792 had no effect.² But where the testator in his lifetime had acquired an inchoate title by entry, this title would not only descend, but could be devised, and where the patent issued in the testator's name after his death, the statute of 1792 vested the complete title in his devisee.³

Grant to Two Persons, One Deceased. — Where the state made a grant to two persons as tenants in common, and the patent issued after the death of one of them, only one moiety of the land passed to the survivor. In the absence of a second grant the other moiety remained vested in the state, prior to the Act of 1792, by force of which the title would vest in the heirs of the deceased grantee. But an intermediate grant of that moiety to a living person would pass title and constitute the grantees in the separate grants tenants in common, and the heirs of the deceased grantee in the first grant would take nothing.⁴

bb. LATER FORM OF STATUTE. — The later form of this statute is: "When a patent is issued or shall issue, or a deed shall be made, to a person who is dead at the issuing of the patent or the making of the deed, the heirs of such patentee or vendee shall take, hold, and enjoy the title to the estate so patented or conveyed as if such patent had issued or deed had been made to such heirs by name."⁵

Construction. — In this statute the word "devisee," which occurred in the Act of 1792, is omitted, the provisions of the act relating only to the heirs. It is held, however, that while upon the issuing of the patent after the testator's death the statute vests the legal title in his heirs, the latter take this title in trust for the devisees.⁶

(e) New York Statute. — A New York statute passed in 1803⁷ provided that "the title to all lands heretofore granted by letters patent to officers and soldiers serving in the line of this state in the army of the United States in the late war with Great Britain, and who died previous to the 27th day of March, 1783, shall be and hereby is declared to have been vested in the said persons at the time of their deaths respectively." This statute was construed in a number of early cases.⁸ By the same act the rules of descent as established by the act to abolish entails and to regulate descents⁹ were made applicable to all cases provided for by the first section (the section above mentioned) except where the lands or any part thereof were on April 5, 1803, held by *bona fide* purchasers or devisees under any person or persons who would have been the heirs at law of the patentees if this section had not been passed.¹⁰

(f) North Carolina and Tennessee Statute. — In 1779, when the lands now embraced in the state of Tennessee were a part of the state of North Carolina, the legislature of North Carolina passed a statute¹¹ providing that "in case of the death of any person who heretofore has made an entry of land, or who hereafter shall make an entry, pending the same, or before the making out the

1. *Skeene v. Fishback*, 1 A. K. Marsh. (Ky.) 356; *Bowman v. Violet*, 4 T. B. Mon. (Ky.) 350.

2. *Bowman v. Violet*, 4 T. B. Mon. (Ky.) 350.

3. *Adams v. Logan*, 6 T. B. Mon. (Ky.) 175.

4. *Currie v. Tibbs*, 5 T. B. Mon. (Ky.) 440.

5. **Kentucky Statute — Later Form.** — Stat. Ky. (1894), § 2063. See also *Cox v. Prewitt*, 88 Ky. 156; *Cobb v. Stewart*, 4 Met. (Ky.) 255, 83 Am. Dec. 465.

6. **Heirs Take in Trust for Devisees.** — *Cobb v. Stewart*, 4 Met. (Ky.) 255, 83 Am. Dec. 465.

7. Act N. Y. April 5, 1803, 3 Laws N. Y. 399.

8. **Construction of Statute.** — *Jackson v. Phelps*,

3 Cai. (N. Y.) 62; *Jackson v. Winslow*, 2 Johns. (N. Y.) 80; *Stevens v. Woolsey*, 9 Johns. (N. Y.) 325; *Fisher v. Fields*, 10 Johns. (N. Y.) 495; *Jackson v. Howe*, 14 Johns. (N. Y.) 405; *Smith v. Van Dursen*, 15 Johns. (N. Y.) 343; *Jackson v. Mumford*, 9 Cow. (N. Y.) 254; *Jackson v. Lyon*, 9 Cow. (N. Y.) 664; *Sherwood v. Vandunburgh*, 2 Hill (N. Y.) 303.

9. Act N. Y. Feb. 23, 1786, 1 Rev. Laws N. Y. (1813), p. 52.

10. For construction of this section, see *Sherwood v. Vandunburgh*, 2 Hill (N. Y.) 305; *Jackson v. Winslow*, 2 Johns. (N. Y.) 80; *Stevens v. Woolsey*, 9 Johns. (N. Y.) 325.

11. Act N. Car. Oct. 1779, c. 4, § 4, 1 Scott's Rev. 239.

grant, his or their heirs or assigns shall have a fee-simple estate in the premises, although the grant shall be made in the name of the decedent." This act was construed in several early cases arising in Tennessee.¹

(g) **Texas Statute.** — In 1851 a statute was passed in Texas providing that "all patents for land which have heretofore been issued by the authorities of the republic or state of Texas in the names of persons then at the time of issuing such patents deceased, and all patents for lands which may be issued hereafter by authority of the state of Texas in the names of persons deceased at the time at which said patents may be issued, shall be to all intents and purposes and effects as valid and effectual to convey and secure to the heirs or assigns, as the case may be, of such deceased persons the lands as patented as though such deceased persons had been in being at the time such patents bear date; provided that nothing in this act contained shall be so construed as to validate any claim not otherwise just and legal, but it shall simply mean that a patent issued to one not in being at the time said patent issued shall not be void for such cause."² By force of this statute a patent issued after the death of the patentee becomes valid whether made before or after the passage of the act.³ If the patentee did not alienate the land in his lifetime, the title, by force of the statute, inures to his heirs in virtue of their right of inheritance; but if the patentee in his lifetime sold and conveyed his interest by deed with warranty binding his heirs, the title inures to the grantee as against the heirs.⁴ Under this statute the rights of the decedent's heirs are precisely the same as if the patent had issued in the lifetime of the patentee; they take the same interest which they would have taken if their ancestor had been living when the patent issued, and they take no greater interest. Hence, where the wife of the patentee had a community interest in the land, the statute does not operate to vest in the heirs of the patentee the legal title to the entire tract, and does not in any way affect the interest of the wife and her heirs.⁵

5. Conditions Precedent and Subsequent — *a.* **IN GENERAL.** — Grants of public lands sometimes contain conditions. These conditions are either precedent or subsequent, and in their general qualities and characteristics do not differ from such conditions in private grants. Such conditions have been defined in another part of this work.⁶ Where public lands are granted upon condition

1. **Tennessee Cases Construing Act.** — *Dougherty v. Edmiston*, Brun. Col. Cas. (U. S.) 194, 7 Fed. Cas. No. 4,025; *Cooke* (Tenn.) 134; *Battle v. Rawles*, 2 Sneed (Tenn.) 576; *Billingsley v. Rhea*, 1 Overt. (Tenn.) 198.

2. Act Tex. Dec. 24, 1851 (now in slightly different language, Rev. Stat. Tex. (1895), art. 4185).

3. *Gould v. West*, 32 Tex. 338.

4. *Gould v. West*, 32 Tex. 338. See also generally the title **ESTOPPEL**, vol. 11, p. 385.

5. **Community Interest of Decedent's Wife.** — *Cole v. Grigsby*, 89 Tex. 223.

6. See the title **CONDITIONS**, vol. 6, p. 500.

Conditions Precedent. — Where the legislature grants public lands upon the consideration that they be reclaimed, and restricts the right of the grantee to take the lands until "after reclamation," the reclamation of the lands is a condition precedent to the acquisition of the title by the grantee. *Montgomery v. Casson*, 16 Cal. 189.

For grants held to be upon condition precedent, see also *Brinsfield v. Carter*, 2 Ga. 143; *Bowne v. Bilsland*, 83 Iowa 162; *Chicago*, etc., R. Co. v. *Van Cleove*, 52 Kan. 665; *Argyle v. Dwinel*, 29 Me. 29; *Minneapolis*, etc., R. Co. v. *Duluth*, etc., R. Co., 45 Minn. 104.

Conditions Subsequent. — The condition con-

tained in a grant of public lands by the United States to a state to aid in the construction of certain railroads, that "if any of said roads is not completed within ten years, no further sale shall be made, and the lands unsold shall revert to the United States," is a condition subsequent, not precedent. *U. S. v. Tennessee*, etc., R. Co., 176 U. S. 242, 71 Fed. Rep. 71; *U. S. v. Loughrey*, (C. C. A.) 71 Fed. Rep. 921, *affirmed* 172 U. S. 206; *Swann v. Lindsey*, 70 Ala. 507; *Mathis v. Tennessee*, etc., *Rivers R. Co.*, 83 Ala. 411; *McCarver v. Herzberg*, 120 Ala. 523; *Vankirk Land*, etc., Co. v. *Green*, 132 Ala. 348. See also *U. S. v. Wallamet Valley*, etc., *Wagon Road Co.*, 42 Fed. Rep. 351, 44 Fed. Rep. 234, 54 Fed. Rep. 807, 55 Fed. Rep. 711.

A resolve was held to pass title to public lands without deed upon the condition subsequent of payment of a certain sum of money. *Sargent v. Simpson*, 8 Me. 148.

At common law where a grant by the crown provided for the payment of a quit-rent, the payment of the rent was a condition subsequent implied in law, and essential to be observed in order to insure a continuance of the grant. *DeLancey v. Piepzas*, 138 N. Y. 26, *affirming* 63 Hun (N. Y.) 169. See also *Sneed v. Ward*, 5 Dana (Ky.) 187.

For conditions in grants of public lands

precedent no estate passes until the performance of the condition,¹ and the burden is on the grantee to prove that the condition has been performed.² Where to a grant of public lands a condition subsequent is annexed a default in the performance of the condition will render the estate, already created, liable to be defeated.³

Conditions Subsequent Are Not Favored, and a grant will not be held to contain such a condition unless the terms used clearly show that such was the intention of the grantor.⁴

In Order to Warrant a Forfeiture of a grant for nonperformance of such a condition the failure to perform the condition should ordinarily be made clearly to appear.⁵

b. POWER TO PRESCRIBE CONDITIONS. — The legislature of a state can prescribe such conditions as it sees fit to which grants of public land shall be subject.⁶ But only such conditions can be inserted in such a grant as are authorized by law. A condition imposed by the executive officers of the land department of the government, which is in contravention of or unauthorized by law, is void, and the grantee will take his title free from the performance of such condition.⁷

c. CONSTRUCTION OF CONDITIONS SUBSEQUENT. — A condition subsequent in a grant of public lands is to be construed strictly against the state; and the state is entitled to enforce it only when a forfeiture would be fairly within the intent of the act whereby the grant was made.⁸

d. WHO CAN ENFORCE FORFEITURE ON BREACH OF CONDITION SUBSEQUENT. — No one can take advantage of the breach of a condition subsequent in a grant in fee of public lands but the government. If it does not see fit to assert its right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee.⁹

held to be conditions subsequent, see also *Chicago, etc., R. Co. v. Grinnell*, 51 Iowa 476; *Porter v. Griswold*, 6 Me. 430; *Northern Pac. R. Co. v. Majors*, 5 Mont. 111; *Towle v. Palmer*, 1 Robt. (N. Y.) 437.

1. No Estate Passes until Performance of Condition Precedent. — *Kansas Pac. R. Co. v. Prescott*, 16 Wall. (U. S.) 603, *reversing* 9 Kan. 38; *Union Pac. R. Co. v. McShane*, 22 Wall. (U. S.) 444, *affirming* 3 Dill. (U. S.) 303; *Northern Pac. R. Co. v. Traill County*, 115 U. S. 600; *Central Pac. R. Co. v. Nevada*, 162 U. S. 512; *Montgomery v. Casson*, 16 Cal. 189; *People v. Center*, 66 Cal. 551; *Brinsfield v. Carter*, 2 Ga. 143; *Chicago, etc., R. Co. v. Van Cleave*, 52 Kan. 665; *Paine v. State Land Office Com'r*, 66 Mich. 245. See also *Hovey v. Deane*, 15 Me. 216.

2. Burden to Prove Performance on Grantee. — *People v. Center*, 66 Cal. 551.

3. Effect of Default in Performance of Condition Subsequent. — *Northern Pac. R. Co. v. Majors*, 5 Mont. 111; *Hancock v. McKinney*, 7 Tex. 384.

4. Conditions Subsequent Not Favored. — *Morgan v. Rogers*, (C. C. A.) 79 Fed. Rep. 577, *appeal dismissed* 173 U. S. 702.

5. For Evidence Held Not Sufficient to Show Nonperformance of Conditions Subsequent and to warrant a forfeiture of the grant therefor, see *Reg. v. Robin*, 16 Nova Scotia 91.

6. Power of the Legislature. — *Paine v. State Land Office Com'r*s, 66 Mich. 245.

7. Condition Unauthorized by Law Is Void. — *Deffebach v. Hawke*, 115 U. S. 392; *Davis v. Weibbold*, 139 U. S. 507, *reversing* on other grounds 7 Mont. 107; *Shaw v. Kellogg*, 170

U. S. 312, 1 Denver Leg. Adv. 627; *Francoeur v. Newhouse*, 40 Fed. Rep. 618; *Innerarity v. Mims*, 1 Ala. 660; *Contois v. Bonfield*, 25 U. C. C. P. 39, *affirmed* 27 U. C. C. P. 84.

8. Construction of Conditions Subsequent. — *Kiefer v. German-American Seminary*, 46 Mich. 636.

9. Government Only Can Enforce Forfeiture on Breach of Condition Subsequent — *United States*. — *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44, *affirming* 2 Dill. (U. S.) 398; *Tucker v. Ferguson*, 22 Wall. (U. S.) 527; *Knevals v. Hyde*, 5 Dill. (U. S.) 469, 1 McCrary (U. S.) 402, 20 Alb. L. J. 370, 12 Chicago Leg. N. 66; *Denny v. Dodson*, 13 Sawy. (U. S.) 68; *Grinnell v. Chicago, etc., R. Co.*, 103 U. S. 739, *affirming* 51 Iowa 476; *Van Wyck v. Knevals*, 106 U. S. 360, *affirming* Bybee v. Oregon, etc., R. Co., 139 U. S. 663, *affirming* 26 Fed. Rep. 586; *Lake Superior Ship Canal, etc., Co. v. Cunningham*, 155 U. S. 354, *affirming* 44 Fed. Rep. 819; *U. S. v. Tennessee, etc., R. Co.*, 176 U. S. 242, 71 Fed. Rep. 71; *Southern Pac. R. Co. v. Orton*, 32 Fed. Rep. 457, 6 Sawy. (U. S.) 157; *U. S. v. Curtner*, 38 Fed. Rep. 1; *Francoeur v. Newhouse*, 40 Fed. Rep. 618; *U. S. v. Dalles Military Road Co.*, 41 Fed. Rep. 493; *U. S. v. Oregon Cent. Military Road Co.*, 41 Fed. Rep. 501; *U. S. v. Wollamet Valley, etc., Wagon Road Co.*, 42 Fed. Rep. 351, 44 Fed. Rep. 234, 54 Fed. Rep. 807, 55 Fed. Rep. 711; *U. S. v. Loughrey*, (C. C. A.) 71 Fed. Rep. 921, *affirmed* 172 U. S. 206; *Southern Pac. R. Co. v. Groeck*, (C. C. A.) 87 Fed. Rep. 970.

Alabama. — *Swann v. Miller*, 82 Ala. 530; *Mathis v. Tennessee, etc., Rivers R. Co.*, 83

Recovery of Possession After Breach a Prerequisite to a Valid Conveyance. — Though there has been a breach of a condition subsequent in a grant of public lands, so as to entitle the government to recover possession therefor, the government can make no valid conveyance of the estate without first recovering possession.¹

e. MODE OF ENFORCING FORFEITURE ON BREACH OF CONDITION SUBSEQUENT. — At common law the sovereign, upon the breach of a condition subsequent in a grant from the crown, could not make an entry in person, and therefore an office found or other matter of record was necessary to determine the estate granted.² But after breach of a condition subsequent in a grant of public lands the mode of asserting or of resuming the forfeited grant is subject to the legislative authority of the government. In the *United States*, therefore, it has been held that after breach of the condition, the reserved right of the state must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement. Until the reserved right has been asserted in one of these modes the title remains in the grantee.³ A

Ala. 411; *Miller v. Swann*, 89 Ala. 631. See also *Case v. Edgeworth*, 87 Ala. 203.

Colorado. — *McMillen v. Gerstle*, 19 Colo. 98. *Iowa.* — *Chicago, etc., R. Co. v. Grinnell*, 51 Iowa 476. See also *Barrett v. Brooks*, 21 Iowa 144; *Keltner v. Story County*, 28 Iowa 35; *Hatch v. Pottawattamie County*, 43 Iowa 442.

Louisiana. — *Vicksburg, etc., R. Co. v. Sledge*, 41 La. Ann. 896; *Mower v. Kemp*, 42 La. Ann. 1007; *State v. Vicksburg, etc., R. Co.*, 44 La. Ann. 981; *Vicksburg, etc., R. Co. v. Elmore*, 46 La. Ann. 1237.

Maine. — *Little v. Watson*, 32 Me. 214.

Minnesota. — *Woodbury v. Dorman*, 15 Minn. 338.

Missouri. — *Kennett v. Plummer*, 28 Mo. 142.

Montana. — *Northern Pac. R. Co. v. Majors*, 5 Mont. 111.

New Mexico. — *U. S. Trust Co. v. Atlantic, etc., R. Co.*, 8 N. Mex. 673.

New York. — *Williams v. Sheldon*, 10 Wend. (N. Y.) 654; *Towle v. Palmer*, 1 Robt. (N. Y.) 437; *Archibald v. New York Cent., etc., R. Co.*, 157 N. Y. 574, *affirming* 1 N. Y. App. Div. 251.

Tennessee. — *Weakly v. Wilson*, 1 Overt. (Tenn.) 370.

See also *Larison v. Wilbur*, 1 N. Dak. 284; *Fleischer v. Fleischer*, 11 N. Dak. 221.

Under the Spanish Law in Force in Texas before its annexation by the United States, where a grant of public lands was made with conditions subsequent, if the conditions were not performed any one might prove the forfeiture and apply and have the lands granted to himself. *Hancock v. McKinney*, 7 Tex. 384.

But after the adoption of the state constitution, art. 13, § 4, individuals could not by location assert any rights to lands previously granted, on the ground of forfeiture for non-compliance with the conditions of the original grant. *Hancock v. McKinney*, 7 Tex. 384; *Swift v. Herrera*, 9 Tex. 263; *Luter v. Mayfield*, 26 Tex. 325.

Power to Terminate Grant for Nonpayment of Quit-rent. — At common law, for a breach of the

condition to pay a quit-rent the king might have had the estate of the grantee declared at an end, and have resumed possession, and his original seizin would have been restored unaffected by the previous demise. In the United States the right of the crown in this respect became vested, at the Revolution, in the people of the several states. Accordingly, thereafter, the people of a state in their sovereign capacity had authority to terminate a grant by the crown, for failure by the grantee to discharge the rent services imposed by it. *De Lancey v. Piepgras*, 138 N. Y. 26, *affirming* 63 Hun (N. Y.) 169.

Where Lands Are Granted by the United States to a State in Trust to aid in the building of a railroad, the lands to revert to the United States if the road is not completed within a certain period of time, the state, a mere trustee, cannot, after the road has been completed, declare a forfeiture of the lands for failure to complete it within the specified time. *State v. Vicksburg, etc., R. Co.*, 44 La. Ann. 981; *Vicksburg, etc., R. Co. v. Elmore*, 46 La. Ann. 1237. See also *Vicksburg, etc., R. Co. v. Sledge*, 41 La. Ann. 896; *Mower v. Kemp*, 42 La. Ann. 1007. And see generally *supra*, this title, *Grants in Aid of Railroads*.

1. *Thompson v. Bright*, 1 Cush. (Mass.) 420. See also *Wilbur v. Tobey*, 16 Pick. (Mass.) 177.

2. **Necessity of Office Found at Common Law.** — *Com. Dig.*, *Prerogative*, D. 67, 70; *Doe v. Redfern*, 12 East 96; *Wheelock v. McKnown*, 1 Nova Scotia 41; *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44, *affirming* 2 Dill. (U. S.) 398, 21 Fed. Cas. No. 12,486; *Brinsfield v. Carter*, 2 Ga. 143.

3. **Judicial Proceedings or Legislative Assertion of Ownership Necessary.** — *United States.* — *U. S. v. Repentigny*, 5 Wall. (U. S.) 211; *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44, *affirming* 2 Dill. (U. S.) 398, 21 Fed. Cas. No. 12,486; *Tucker v. Ferguson*, 22 Wall. (U. S.) 527; *Schow v. Harriman*, 22 U. S. (L. ed.) 556; *Farnsworth v. Minnesota, etc., R. Co.*, 92 U. S. 49; *McMicken v. U. S.*, 97 U. S. 204; *Grinnell v. Chicago, etc., R. Co.*, 103 U. S. 739, *affirming* 51 Iowa 476; *Van Wyck v. Knevals*, 106 U. S.

mere assertion by the legislature of a forfeiture for condition broken will not preclude the grantee or those in privity of estate with him from showing that he was not in default.¹ But it will be presumed that the sovereign authority did not act without knowledge or proof of the existence of a cause of forfeiture, and, until overthrown, this presumption will be sufficient to support their action.²

A Legislative Declaration of Forfeiture Must Be Clear, unambiguous, and unmistakable.³

f. WAIVER OF CONDITIONS—(1) *Conditions Precedent*.—The performance of a condition precedent in a grant of public lands may be waived by the government.⁴

(2) *Conditions Subsequent*.—So the performance of, or forfeiture for a breach of, a condition subsequent in a grant of public lands may be waived by the grantor.⁵

Enlargement of Time for Performance of Condition.—A resolve of the legislature,

360, *affirming sub nom.* St. Louis, etc., R. Co. v. McGee, 115 U. S. 469; St. Paul, etc., R. Co. v. Greenalgh, 139 U. S. 19, *affirming* 26 Fed. Rep. 563; Bybee v. Oregon, etc., R. Co., 139 U. S. 663, *affirming* 26 Fed. Rep. 586; Lake Superior Ship Canal, etc., Co. v. Cunningham, 155 U. S. 354, *affirming* 44 Fed. Rep. 819; Atlantic, etc., R. Co. v. Mingus, 165 U. S. 413; U. S. v. Tennessee, etc., R. Co., 176 U. S. 242; U. S. v. Northern Pac. R. Co., 177 U. S. 435, *affirming* (C. C. A.) 95 Fed. Rep. 864; Knevals v. Hyde, 5 Dill. (U. S.) 469, 1 McCrary (U. S.) 402, 6 Fed. Rep. 651, 20 Alb. L. J. 370, 12 Chicago Leg. N. 66; U. S. v. Cartner, 38 Fed. Rep. 1; Francoeur v. Newhouse, 40 Fed. Rep. 618; U. S. v. Wallamet Valley, etc., Wagon Road Co., 42 Fed. Rep. 351, 44 Fed. Rep. 234; U. S. v. Willamette Valley, etc., Wagon-Road Co., 54 Fed. Rep. 807, 55 Fed. Rep. 711; U. S. v. Loughrey, (C. C. A.) 71 Fed. Rep. 921, *affirmed* 172 U. S. 206; Southern Pa. R. Co. v. Groeck, (C. C. A.) 87 Fed. Rep. 970.

Alabama.—Mathis v. Tennessee, etc., Rivers R. Co., 83 Ala. 411; McCarver v. Herzberg, 120 Ala. 523; Vankirk Land, etc., Co. v. Green, 132 Ala. 348. But see Gill v. Taylor, 3 Port. (Ala.) 182; Kennedy v. McCartney, 4 Port. (Ala.) 141; Rogers v. Rawlings, 8 Port. (Ala.) 325; State University v. Winston, 5 Stew. & P. (Ala.) 17; Crommelin v. Minter, 9 Ala. 594.

Louisiana.—Mower v. Kemp, 42 La. Ann. 1007.

Massachusetts.—Thompson v. Bright, 1 Cush. (Mass.) 420.

Minnesota.—Minneapolis, etc., R. Co. v. Duluth, etc., R. Co., 45 Minn. 104.

Montana.—Northern Pac. R. Co. v. Majors, 5 Mont. 111.

New Mexico.—U. S. Trust Co. v. Atlantic, etc., R. Co., 8 N. Mex. 673.

New York.—De Lancey v. Piepgras, 138 N. Y. 26, *affirming* 63 Hun (N. Y.) 169; Archibald v. New York Cent., etc., R. Co., 157 N. Y. 574, *affirming* 1 N. Y. App. Div. 251.

Tennessee.—Weakly v. Wilson, 1 Overt. (Tenn.) 370.

See also Chicago, etc., R. Co. v. Lewis, 53 Iowa 101; Johnson v. Thornton, 54 Iowa 144; Jackson, etc., R. Co. v. Davison, 65 Mich. 416; State v. Sioux City, etc., R. Co., 7 Neb. 357. But see McGregor, etc., R. Co. v. Sioux City, etc., R. Co., 49 Iowa 604.

In *Maine* it has been held that the title to

lands granted by the state upon a condition to be subsequently performed within a limited time will remain in the grantee, notwithstanding his failure to perform the condition within the prescribed time, until the grantor, by some legislative act, shall avail itself of the breach of condition. Little v. Watson, 32 Me. 214.

But in *California* it has been held that where by statute it is provided that the breach of a condition in a grant of public lands shall work a forfeiture of such lands, no action is necessary to enforce or to judicially establish the forfeiture, but that immediately upon the breach of the condition the title to the lands vests in the state. Borland v. Lewis, 43 Cal. 569; Oakland R. Co. v. Oakland, etc., R. Co., 45 Cal. 365, 13 Am. Rep. 181; Upham v. Hosking, 62 Cal. 250.

1. Mere Legislative Assertion of Forfeiture Not Conclusive.—Atlantic, etc., R. Co. v. Mingus, 165 U. S. 413; De Lancey v. Piepgras, 138 N. Y. 26, *affirming* 63 Hun (N. Y.) 169.

2. De Lancey v. Piepgras, 138 N. Y. 26, *affirming* 63 Hun (N. Y.) 169.

3. Requisites of Legislative Declaration of Forfeiture.—Minnesota v. Duluth, etc., R. Co., 97 Fed. Rep. 353.

4. Performance of Condition Precedent May Be Waived.—Thompson v. Bright, 1 Cush. (Mass.) 420. But see Towle v. Palmer, 1 Robt. (N. Y.) 448.

5. Waiver of Conditions Subsequent.—U. S. v. Wallamet Valley, etc., Wagon Road Co., 42 Fed. Rep. 351, 44 Fed. Rep. 234; U. S. v. Northern Pac. R. Co., (C. C. A.) 95 Fed. Rep. 864; Cedar Rapids, etc., R. Co. v. Sac County, 46 Iowa 243; Chicago, etc., R. Co. v. Grinnell, 51 Iowa 476; Chicago, etc., R. Co. v. Lewis, 53 Iowa 101. See also Minneapolis, etc., R. Co. v. Duluth, etc., R. Co., 45 Minn. 104.

As to What Constitutes Such a Waiver, see U. S. v. Wallamet Valley, etc., Wagon Road Co., 42 Fed. Rep. 351, 44 Fed. Rep. 234; U. S. v. Northern Pac. R. Co., (C. C. A.) 95 Fed. Rep. 864; Chicago, etc., R. Co. v. Grinnell, 51 Iowa 476; Chicago, etc., R. Co. v. Lewis, 53 Iowa 101.

Act of Congress Held Not to Constitute a Waiver of any of the conditions subsequent in a prior grant of lands to a railroad company, except so far as such conditions had already been broken. Atlantic, etc., R. Co. v. Mingus, 165 U. S. 413.

whereby the time for the performance of a condition subsequent in a grant of public lands is enlarged, is a waiver of the right of the state to enter or to recover possession for the breach of the former condition.¹

Waiver of Forfeiture After Resale of Land Forfeited. — If after forfeiture for breach of condition subsequent the state resells the land forfeited, a subsequent waiver of the forfeiture will not have the effect to divest the rights acquired by the second purchase.²

g. ESTOPPEL TO ENFORCE FORFEITURE FOR BREACH OF CONDITION SUBSEQUENT. — Where lands are granted by the United States to aid in the construction of a road, with the condition annexed that if the road is not completed within a certain time the lands shall revert to the United States, and after the expiration of the time specified an authorized officer of the government, after investigation, decides that the road has been completed, and thereafter patents are issued, and the road company, assuming that such action is a final determination of the question of title, and relying on the same, makes certain expenditures in relation to the road and the lands granted, the government will be estopped from enforcing forfeiture for breach of the condition.³

6. Exceptions and Reservations — *a. EXCEPTIONS* — (1) *In General.* — A grant may except all surveys to which there is already a lawful title, and in such case title passes to all the vacant and unappropriated land within the boundaries called for by the patent.⁴ But the patentee acquires no title whatever to the excepted land, and if such land becomes forfeited he is not in a position to claim the title thereto.⁵

(2) *Adverse Possession of Excepted Land.* — The patentee has sufficient color of title on which to base a title by adverse possession for the land excepted.⁶

(3) *Burden of Proving Locality of Excepted Land.* — Where a patent excepts certain land it devolves on him who claims under the exception to bring himself within its terms.⁷

(4) *Description of Exception in Grant.* — Where exceptions are located or the

1. Waiver of Time of Performance of Condition. — *Thompson v. Bright*, 1 Cush. (Mass.) 420.

Under a sale of a parcel of crown land on the express condition that buildings for manufacturing purposes should be erected within a designated period, the acceptance by the proper officer of the balance due of the purchase price after the expiration of such period is a waiver of the time of performance but not of performance; and on notice, unless the condition is complied with within a reasonable time, the sale could be canceled. *Peterson v. Reg.*, 2 Can. Exch. 67.

Under the Express Provisions of the Massachusetts Statute, Providing for the Separation of the State of Maine, which was assented to by the latter state and made a part of her constitution, Massachusetts was authorized to extend the time allowed for the performance of a condition contained in a grant made by that state prior to the separation. *Little v. Watson*, 32 Me. 214.

2. *Borland v. Lewis*, 43 Cal. 569.

3. Estoppel to Enforce Forfeiture. — U. S. v. Wallamet Valley, etc., Wagon Road Co., 42 Fed. Rep. 351, 44 Fed. Rep. 234; U. S. v. Willamette Valley, etc., Wagon-Road Co., 54 Fed. Rep. 807, 55 Fed. Rep. 711. See also U. S. v. Northern Pac. R. Co., (C. C. A.) 95 Fed. Rep. 864.

4. *Scott v. Ratliffe*, 5 Pet. (U. S.) 82; *Bal- lowe v. Hillman*, (Ky. 1896) 37 S. W. Rep. 950.

For the distinction between exceptions and reservations, see title CONDITIONS, vol. 6, p. 515.

5. Patentee Acquires No Title to Excepted Land. — *Scott v. Ratliffe*, 5 Pet. (U. S.) 82; *Dredge v. Forsyth*, 2 Black (U. S.) 563; *Ballance v. Forsyth*, 13 How. (U. S.) 18, 24 How. (U. S.) 183; *Lafayette v. Kenton*, 18 How. (U. S.) 197; *Bryan v. Forsyth*, 19 How. (U. S.) 334; *Armstrong v. Morrill*, 14 Wall. (U. S.) 120, *affirming* 4 Am. L. Rev. 194, 17 Fed. Cas. No. 9,822; *Halsted v. Buster*, 140 U. S. 273; *Farmers' High Line Canal, etc., Co. v. Moon*, 22 Colo. 560; *Republican River Bridge Co. v. Kansas Pac. R. Co.*, 12 Kan. 410, *affirmed* 92 U. S. 315; *Rountree v. Barton*, 8 B. Mon. (Ky.) 627; *Dillingham v. Smith*, 30 Me. 370; *Hammond v. Morrell*, 33 Me. 300; *Carter v. Hagan*, 75 Va. 557; *Harman v. Stearns*, 95 Va. 58; *Bryan v. Willard*, 21 W. Va. 65; *Stockton v. Morris*, 39 W. Va. 432.

6. Patentee May Acquire Adverse Possession of Excepted Land. — *Gregg v. Tesson*, 1 Black (U. S.) 150; *Dredge v. Forsyth*, 2 Black (U. S.) 563; *Kellogg v. Forsyth*, 2 Black (U. S.) 571; *Bryan v. Forsyth*, 19 How. (U. S.) 334; *McLean, J., dissenting*; *Meehan v. Forsyth*, 24 How. (U. S.) 175; *Gregg v. Forsyth*, 24 How. (U. S.) 179.

7. Burden of Proving Locality of Excepted Land. — *McCormick v. Monroe*, 1 Jones L. (46 N. Car.) 13; *Gudger v. Hensley*, 82 N. Car. 481; *Scott v. Elkins*, 83 N. Car. 424; *Wyman v.*

data given by which they may be located, the exception is good and the grant is also good and conveys that part of the boundary not embraced in the reservation.¹ Where the patent leaves everything in doubt and uncertainty as to the location of either the vacant or excluded lands, so that neither can be found or ascertained, the patent is void for uncertainty.² If the description of the exception is defective, the exception becomes ineffectual,³ while the patent remains in force.⁴ However, an insufficient exception may be aided and made valid by the production of the former grant.⁵

b. RESERVATIONS — (1) *Unauthorized and Repugnant Reservation*. — Where a patent contains a repugnant⁶ or unauthorized reservation, such reservation is a nullity.⁷

(2) *Patent Not Containing Reservation Required by Statute*. — A patent for lands under water is not void because it does not reserve gold and silver mines as required by the statute. The patent is good for the lands and void for the mines.⁸

(3) *Right of Patentee to Maintain Trover*. — Where the patent reserves certain trees on the land the patentee has a sufficient possession to maintain an action of trover against a wrongdoer who cuts such trees.⁹

(4) *Reservations for Public Uses* — (a) *In General*. — Where lands are reserved for public uses it is not necessary to specify the uses for which the reservations are made.¹⁰

(b) *Nonexistence of Beneficiary of Reservation*. — Where reservations for charitable uses are contained in a grant of land made by the state, and the beneficiaries are not in existence, the fee does not pass from the state, or, if it does pass, remains in abeyance, until the corporation in which it is to vest shall come into existence. The state in either supposition holds such reservation in trust.¹¹

(c) *Right to Revoke Reservation*. — Under the *English* statute, reservations for public uses may be revoked at any time before the issue of letters patent, and it is immaterial that improvements have been made on such lands.¹²

Taylor, 124 N. Car. 426; Bowman v. Bowman, 3 Head (Tenn.) 47. See *contra*, Madison v. Owens, Litt. Sel. Cas. (Ky.) 281; Hall v. Martin, 89 Ky. 9; Harman v. Stearns, 95 Va. 58; Reusens v. Lawson, 91 Va. 226.

1. *Sufficient Description of Grant and Exception*. — Eastern Carolina Land, etc., Co. v. Frey, 112 N. Car. 158; Wyman v. Taylor, 124 N. Car. 426.

For Patents That Are Sufficiently Definite, see Kirk v. Williamson, 82 Ky. 161; Brown v. Rickard, 107 N. Car. 639.

2. *Insufficient Description of Grant and Exception*. — Hamilton v. Fugett, 81 Ky. 366; Hall v. Martin, 89 Ky. 9; Breathitt Coal, etc., Co. v. Strong, 106 Ky. 699.

3. *Insufficient Description of Exception Renders It Void*. — Waugh v. Richardson, 8 Ired. L. (30 N. Car.) 470.

4. *Insufficient Description of Exception Does Not Affect Grant*. — Kidd v. Central Trust, etc., Co., (Ky. 1901) 65 S. W. Rep. 355; Helton v. Central Trust, etc., Co., (Ky. 1902) 69 S. W. Rep. 720; Hall v. Martin, 89 Ky. 9; Breathitt Coal, etc., Co. v. Strong, 106 Ky. 699. See *contra*, Hillman v. Hurley, 82 Ky. 626; Roberts v. Davidson, 83 Ky. 279.

5. *Insufficient Description of Exception May Be Aided*. — McCormick v. Monroe, 1 Jones L. (46 N. Car.) 13; Melton v. Monday, 64 N. Car. 295.

6. *Repugnant Reservation Void*. — Haight v. Keokuk, 4 Iowa 199.

7. *Unauthorized Reservation Void*. — Clary v. Hazitt, 67 Cal. 286; Silver Bow Min., etc., Co. v. Clark, 5 Mont. 378.

8. *Patent Need Not Reserve Gold and Silver Mines*. — People v. Mauran, 5 Den. (N. Y.) 389.

9. Casselman v. Hersey, 32 U. C. Q. B. 333.

10. *Use of Reservation Need Not Be Specified*. — Farrar v. Loring, 26 Me. 202; State v. Baring, 8 Me. 135.

The Sale of Lots Reserved for Public Uses cannot prevent their legal location. Argyle v. Dwinell, 29 Me. 29.

Commissioners to Locate Public Lots must be sworn. Assessors of Clifton, Petitioners, 33 Me. 369.

Notice of the Location of Public Lots must be published and posted. State v. Baring, 8 Me. 135. But it is sufficient if the record states that this has been done. Farrar v. Loring, 26 Me. 202.

The Return of a Committee appointed to locate public lots must be made within six months. Scammon v. Scammon, 41 Me. 561.

The Location by the Commissioners of Public Lots is conclusive upon the public. Dillingham v. Smith, 30 Me. 370.

11. *State Holds Reservation in Trust*. — Washington County v. Brown, 33 Me. 442.

Protection of Reservation. — When land is reserved for public uses, the state, to secure such land from depredations, may cause it to be severed from the residue or may prohibit the taking from the township of any timber or other property which may be found on the land. Hammond v. Morrell, 33 Me. 300.

12. *Reservation May Be Revoked*. — Simpson v. Grant, 5 Grant Ch. (U. C.) 267.

(d) **Reservation of Highways.**—Where a patent reserves a portion of the grant for highways, the term "highways" does not include streams of water or water highways, but has reference to roads opened upon land for the travel of persons with their animals and vehicles.¹

7. Direct and Collateral Attack—Conflicting Rights and Grants.—Questions of collateral and direct attack upon inchoate interests and grants, by the government or persons claiming adversely under it, and of the effect and conclusiveness, within the land department and in the courts, of decisions rendered by department officials in selling or otherwise disposing of public land, are, for convenience, treated elsewhere in this article.²

XVIII. BONA FIDE PURCHASERS—NOTICE—1. General Rule.—It has been stated that as between conflicting entries of public land the equitable doctrine of notice is utterly disregarded; that the grantees of the government and their successors in title and interest are affected by the principle of *caveat emptor*.³ Thus, it has often been held, without reference to the doctrine of notice, that the rights of persons seeking to acquire land who perform all the duties required of them by law cannot be defeated by mistakes, wrongful acts, or omissions, not attributable to them, but to the government or some of its officials, whereby apparent adverse rights are vested in others.⁴

2. Scope of Rule.—As between immediate purchasers from the government it is generally true that where their rights or grants conflict, priority of

1. Reservation for Highways Does Not Include Water Highways.—*De Camp v. Dix*, 159 N. Y. 436.

2. See *supra*, this title, *Land Department Officials and Proceedings*; also *supra*, this title, *Lands Subject to Disposition*.

3. Conflicting Entries and Equitable Doctrine of Notice.—*Taylor v. Brown*, 5 Cranch (U. S.) 234; *Bagnell v. Broderick*, 13 Pet. (U. S.) 436, *per* McLean, J., *dissenting*; *Kerr v. Watts*, 6 Wheat. (U. S.) 550; *Doe v. Robertson*, 11 Wheat. (U. S.) 333; *Arnold v. Grimes*, 2 Iowa 1; *Gourley v. Hankins*, 2 Iowa 75; *Klein v. Argenbright*, 26 Iowa 493; *Harmon v. Clayton*, 51 Iowa 36; *Webster v. Clear*, 49 Ohio St. 392 [*citing* *Roseberry v. Hollister*, 4 Ohio St. 297]; *Wardwell v. Paige*, 9 Oregon 517.

Under the Decisions in Kentucky an entry must be a legal one, by embracing all the substantial requisites of the law, or a valid subsequent entry may be made on the same land, though the locator have full knowledge of the first entry. *Bagnell v. Broderick*, 13 Pet. (U. S.) 436, *per* McLean, J., *dissenting*. See also *Craig v. Pelham*, *Sneed (Ky.)* 242.

4. Mistakes, Wrongful Acts, or Omissions of Government or Its Officers—United States.—*Lytle v. Arkansas*, 22 How. (U. S.) 193 [*affirming* 17 Ark. 608], 9 How. (U. S.) 314 [*reversing* 12 Ark. 91]; *Taylor v. Brown*, 5 Cranch (U. S.) 234; *Tarpey v. Madsen*, 178 U. S. 215, *reversing* 17 Utah 352; *Craig v. Radford*, 3 Wheat. (U. S.) 594; *Wallerton v. Snow*, 5 McCrary (U. S.) 64, 15 Fed. Rep. 401; *Stringer v. Young*, 3 Pet. (U. S.) 320; *Caldwell v. Robinson*, 59 Fed. Rep. 653, *affirmed* (C. C. A.) 67 Fed. Rep. 391, *appeal dismissed* 165 U. S. 359; *U. S. v. Blendauer*, 122 Fed. Rep. 703. *Arkansas.*—*Harrison v. Lewis*, 27 Ark. 152; *Chowling v. Stanfield*, 49 Ark. 87.

California.—*Hinckley v. Fowler*, 43 Cal. 56; *Allen v. Dake*, 50 Cal. 80; *Pollard v. Putnam*, 54 Cal. 630; *Sherman v. Wrinkle*, 121 Cal. 503.

Kentucky.—*Beckley v. Bryan*, *Sneed (Ky.)* 91; *Alexander v. Lively*, 5 T. B. Mon. (Ky.)

159, 17 Am. Dec. 50 [*cited in* *Doe v. Kennedy*, 5 T. B. Mon. (Ky.) 174]; *Hickman v. Boffman*, *Hard. (Ky.)* 356 [*cited in* *Com. v. Clark*, 1 Bibb (Ky.) 531]; *Wallace v. Maxwell*, 1 J. J. Marsh. (Ky.) 447; *Bowman v. Egner*, 7 Bush (Ky.) 68. See also *Bibb v. Pickett*, *Litt. Sel. Cas. (Ky.)* 309.

Louisiana.—*Beridon v. Barbin*, 13 La. Ann. 458.

Minnesota.—*Sage v. Swenson*, 64 Minn. 517; *Hastay v. Bonness*, 84 Minn. 120.

Missouri.—*Allison v. Hunter*, 9 Mo. 749; *Perry v. O'Hanlon*, 11 Mo. 585, 49 Am. Dec. 100; *O'Brien v. Perry*, 28 Mo. 500.

Pennsylvania.—*Davis v. Keefer*, 4 Binn. (Pa.) 161; *Blair v. McKee*, 6 S. & R. (Pa.) 193; *Blackburn v. Holliday*, 12 S. & R. (Pa.) 140.

Tennessee.—*Murfree v. Logan*, 2 Overt. (Tenn.) 220; *Smith v. Buchannon*, 2 Overt. (Tenn.) 305; *Blount v. Ramsey*, *Cooke (Tenn.)* 489; *Polk v. Wendell*, 5 Wheat. (U. S.) 293.

Texas.—*Hughes v. Perry*, 21 Tex. 778; *De Montel v. Speed*, 53 Tex. 339; *Jumbo Cattle Co. v. Bacon*, 79 Tex. 5; *Faucett v. Sheppard*, 24 Tex. Civ. App. 552.

Failure to Return Survey—Pennsylvania.—*Bell v. Levers*, 4 Dall. (Pa.) 210, 3 Yeates (Pa.) 23; *Drinkers v. Holliday*, 2 Yeates (Pa.) 87; *Meade v. Haymaker*, 3 Yeates (Pa.) 68; *Kyle v. White*, 1 Binn. (Pa.) 246; *Miles v. Potter*, 2 Binn. (Pa.) 65; *Bond v. Stroup*, 3 Binn. (Pa.) 66; *Lauman v. Thomas*, 4 Binn. (Pa.) 51; *Lilly v. Paschal*, 2 S. & R. (Pa.) 395; *Boyles v. Kelly*, 10 S. & R. (Pa.) 214; *McDowell v. Young*, 12 S. & R. (Pa.) 115; *Nickroy v. Skelley*, 14 S. & R. (Pa.) 372; *Wilson v. Horner*, 59 Pa. St. 155; *Zerbe v. Schall*, 4 Watts (Pa.) 138; *Adams v. Jackson*, 4 W. & S. (Pa.) 55.

Texas.—*Texas, etc., R. Co. v. Thompson*, 65 Tex. 186; *Groesbeck v. Harris*, 82 Tex. 411 [*citing* *Evitts v. Roth*, 61 Tex. 87]; *New York, etc., Land Co. v. Thomson*, 83 Tex. 169; *Huff v. Crawford*, 89 Tex. 214; *Robles v. Cooksey*, (Tex. Civ. App. 1902) 70 S. W. Rep. 584.

right under the land laws, and not priority of grant, will control, and the equitable doctrine of notice has no application. Furthermore, in jurisdictions where it is held that a subsequent entry and grant of land already covered by vested rights are wholly void, purchasers from the grantee holding under the void grant take subject to prior equities, although the purchase is made for value and without notice; since even under general principles there is no room for the application of the doctrine of *bona fide* purchasers where the grant is void and passes no title from the government.¹ With these limitations, however, the status of prior equities outstanding in persons other than the grantee of the government, acquired before the passing of the grant, is usually determined according to the well-established principles of notice.²

3. Equitable Doctrine of Notice — a PURCHASERS FOR VALUE AND WITHOUT NOTICE — (i) Of Legal Title. — Thus, equities acquired by third persons while the legal title remains in the government, whether acquired directly from it or through the person to whom it subsequently grants the land, and which might have been enforced against the grantee, are of no avail against purchasers of his legal title who take for value and without notice. They are not required to look behind the patent or other source of that title, nor are they charged with constructive notice of prior equities which the records of the land office

1. Scope of Rule — In General. — See the cases cited in the preceding note; and see *supra*, this title, *Lands Subject to Disposition*; *supra*, this title, *Land Department Officials and Proceedings — Effect and Conclusiveness of Proceedings*.

Immediate Purchasers from Government. — "It is answered that the doctrine of *caveat emptor* applies to all purchases from the government; that all patents are simply deeds of quitclaim, and convey no better legal or equitable title than there might be in the government, and that the doctrine as to an innocent purchaser does not apply in such case. However this may be, we conceive it would only apply to the immediate purchaser, and would not extend to succeeding remote purchasers buying an apparently perfect title of record." *Betser v. Rankin*, 77 Ill. 289. See also *Acker v. Walker*, 53 Iowa 454; *Fricht v. Scheck*, 10 Grant Ch. (U. C.) 254; *Stevens v. Cook*, 10 Grant Ch. (U. C.) 410.

As between the immediate purchasers from the government, the last purchaser is, no doubt, chargeable with knowledge of any defects in his title disclosed by the records of the land office at which he purchases, or of the general land office. *Bryson v. Hower*, 8 S. & R. (Pa.) 409; *Horton v. Pace*, 9 Tex. 81; *Byrne v. Fagan*, 16 Tex. 391; *Nicholson v. Horton*, 23 Tex. 47; *Wilson v. Williams*, 25 Tex. 64; *McClung v. Hughes*, 5 Rand. (Va.) 453; *Jackson v. McGavock*, 5 Rand. (Va.) 509; *French v. Loyal Co.*, 5 Leigh (Va.) 627; *Donnell v. King*, 7 Leigh (Va.) 393; *Schnee v. Schnee*, 23 Wis. 377, 99 Am. Dec. 183. See also *Porter v. Robb*, 7 Ohio (pt. i.) 206.

Void Grants — United States. — *Polk v. Wendell*, 5 Wheat. (U. S.) 293; *Sampeyreac v. U. S.*, 7 Pet. (U. S.) 222; *Kissell v. St. Louis Public Schools*, 18 How. (U. S.) 19, *affirming* 16 Mo. 553; *Moffat v. U. S.*, 112 U. S. 24; *U. S. v. Southern Colorado Coal, etc., Co.*, 5 McCrary (U. S.) 563, 18 Fed. Rep. 273, *reversed* on other grounds *sub nom.* *Colorado Coal, etc., Co. v. U. S.*, 123 U. S. 307; *California, etc., Land Co. v. Worden*, 85 Fed. Rep.

94; *U. S. v. Oregon Cent. Military Road Co.*, 103 Fed. Rep. 549. See also *U. S. v. Marshall Silver Min. Co.*, 129 U. S. 579.

California. — *People v. Carrick*, 51 Cal. 325. *Iowa.* — *Rankin v. Miller*, 43 Iowa 11.

Missouri. — *Funkhouser v. Mallen*, 62 Mo. 555; *Moss v. Kauffman*, 131 Mo. 424.

Pennsylvania. — *Gonzalus v. Hoover*, 6 S. & R. (Pa.) 118 [cited in *Patten v. Scott*, 118 Pa. St. 115, 4 Am. St. Rep. 576]; *Blair v. McKee*, 6 S. & R. (Pa.) 193; *MacLay v. Work*, 5 Binn. (Pa.) 154; *Gingrich v. Foltz*, 19 Pa. St. 38, 57 Am. Dec. 631. See also *Bell v. Levers*, 4 Dall. (Pa.) 210, 3 Yeates (Pa.) 23.

Texas. — *Bryan v. Crump*, 55 Tex. 1; *Decourt v. Sproul*, 66 Tex. 368; *Kempner v. State*, (Tex. Civ. App. 1903) 72 S. W. Rep. 888.

In the case of void grants it has sometimes been said that the records of the land office are notice to purchasers from the grantee. Every one is also bound in law to take notice of any prior statutory or other grant whereby the government is left without any title or interest to convey. *Kerr v. Watts*, 6 Wheat. (U. S.) 550; *Southern Pac. R. Co. v. Dull*, 10 Sawy. (U. S.) 506, 22 Fed. Rep. 489; *Knevals v. Hyde*, 5 Dill. (U. S.) 469, 6 Fed. Rep. 651, *affirmed sub nom.* *Van Wyck v. Knevals*, 106 U. S. 360; *Vièle v. Van Steenberg*, 31 Fed. Rep. 249; *U. S. v. Curtner*, 38 Fed. Rep. 1, *reversed* on other grounds 149 U. S. 662; *Wine-man v. Gastrell*, (C. C. A.) 53 Fed. Rep. 697, *rehearing denied* (C. C. A.) 54 Fed. Rep. 819; *Rider v. Burlington, etc., R. Co.*, 14 Neb. 120. See also *Dart v. Hercules*, 57 Ill. 446.

If a patent is void it cannot be vitalized by an innocent purchaser. If it is void only while the title is in the grantee or assigns with notice, it is not void at law, but is voidable only. *Decourt v. Sproul*, 66 Tex. 368.

2. See generally *infra*, this subdivision; and for general discussion of the equitable doctrines of notice and *bona fide* purchasers, see the titles NOTICE, vol. 21, p. 580; PURCHASERS FOR VALUE AND WITHOUT NOTICE, vol. 23, p. 472.

might disclose,¹ in the absence of positive law to the contrary.²

(2) *Of Equitable Title*.—As a general rule, the law of *bona fide* purchasers has application only to conveyances of the legal title, and not to transfers of mere equities. A purchaser of inchoate interests in public land, therefore, although the purchase is made for value and without notice, takes subject to all prior equities outstanding in third persons, and to the right of the government to annul and rescind such an interest for fraud, mistake, and the like in its inception at any time before the grant passes.³

(3) *As Against Government*.—Where the title of the grantee has been transferred to a *bona fide* purchaser, it cannot be rescinded by the government for fraud, mistake, or other equity. A purchase for value and without notice is as good a defense against the government as against individuals.⁴

1. **Purchasers of Legal Title for Value and Without Notice**—*United States*.—*Lea v. Polk County Copper Co.*, 21 How. (U. S.) 493; *Lewis v. Barnhardt*, 43 Fed. Rep. 854, *affirmed* 145 U. S. 56; *Scott v. Evans*, 1 McLean (U. S.) 486, 21 Fed. Cas. No. 12,529; *Babcock v. Pettibone*, 12 Blatchf. (U. S.) 354, 2 Fed. Cas. No. 700. *California*.—*Marshall v. Farmers' Bank*, 115 Cal. 330.

Georgia.—*Martin v. Anderson*, 21 Ga. 301. *Illinois*.—*Betser v. Rankin*, 77 Ill. 289; *Robbins v. Moore*, 129 Ill. 30.

Iowa.—*Acker v. Walker*, 53 Iowa 454; *Robinson v. Hague*, 63 Iowa 273; *Dillon v. Shugar*, 73 Iowa 434.

Kentucky.—*Patrick v. Chenault*, 6 B. Mon. (Ky.) 315; *Huff v. Miniard*, 73 S. W. Rep. 1036, 24 Ky. L. Rep. 2272.

Michigan.—*Damouth v. Klock*, 29 Mich. 289; *Austin v. Dean*, 40 Mich. 386; *Holcomb v. Mosher*, 50 Mich. 252; *Warner v. Hall*, 53 Mich. 371; *Allen v. Caldwell*, 55 Mich. 8.

Missouri.—*Alt v. Fullerton*, 151 Mo. 598; *Simpson v. Stoddard County*, 173 Mo. 421.

Ohio.—*Bell v. Duncan*, 11 Ohio 192; *Dixon v. Caldwell*, 15 Ohio St. 412, 86 Am. Dec. 487. *Pennsylvania*.—*Ross v. Vaughan*, 1 Yeates (Pa.) 14; *Woods v. Wilson*, 37 Pa. St. 379.

Texas.—*Johnson v. Durst*, 2 Tex. Unrep. Cas. 417; *Johnston v. Smith*, 21 Tex. 722; *Babb v. Carroll*, 21 Tex. 765; *Wimberly v. Pabst*, 55 Tex. 587; *Sickles v. White*, 66 Tex. 178; *Decourt v. Sproul*, 66 Tex. 368.

Virginia.—*McClung v. Hughes*, 5 Rand. (Va.) 453; *Jackson v. McGavock*, 5 Rand. (Va.) 509; *French v. Loyal Co.*, 5 Leigh (Va.) 627; *Donnell v. King*, 7 Leigh (Va.) 393 [*approving* *Noland v. Cromwell*, 4 Munf. (Va.) 1551]; *Cline v. Catron*, 22 Gratt. (Va.) 378.

Washington.—*Bolton v. La Camas Water Power Co.*, 10 Wash. 246.

Wisconsin.—*Schnee v. Schnee*, 23 Wis. 377, 99 Am. Dec. 183; *Barton v. Babcock*, 28 Wis. 192.

Canada.—*Proctor v. Grant*, 9 Grant Ch. (U. C.) 224, *reversing* on rehearing 9 Grant Ch. (U. C.) 26.

Compare, on the question of notice by record of defects disclosed by records of the land office, *Moore v. Hunter*, 6 Ill. 317; *Kittridge v. Breaud*, 2 Rob. (La.) 40, 4 Rob. (La.) 79, 39 Am. Dec. 512; *Bastable v. Curry*, 5 La. Ann. 411; *Dulany v. Jennings*, 1 Har. & M. (Md.) 92; *Martin v. Nash*, 31 Miss. 324; *Huntingdon v. Grantland*, 33 Miss. 453; *Wyllie v. Wynne*, 26 Tex. 42; *Olcott v. Ferris*, (Tex. Civ. App. 1894) 24 S. W. Rep. 848.

A Voluntary Purchase or a Purchase in Consideration of a Pre-existing Debt is not such a purchase as is entitled to the benefit of this equitable principle. *Moyer v. McCullough*, 1 Ind. 339; *Harmon v. Clayton*, 51 Iowa 36; *State v. Burnett*, (Tex. Civ. App. 1900) 59 S. W. Rep. 599.

Transfer by Quitclaim Deed.—*U. S. v. California, etc.*, Land Co., 148 U. S. 31, *affirming* 7 U. S. App. 128; *McClung v. Steen*, 32 Fed. Rep. 373; *Richards v. Snyder*, 11 Oregon 501.

2. *Terrell v. Manney*, 2 Murph. (6 N. Car.) 375; *Creswell Ranche, etc.*, Co. v. Waldstein, (Tex. Civ. App. 1894) 28 S. W. Rep. 260; *Texas, etc.*, R. Co. v. Barber, (Tex. Civ. App. 1902) 71 S. W. Rep. 393.

3. **Purchasers of Equitable Titles**—*United States*.—*Hawley v. Diller*, 178 U. S. 476, *affirming* 81 Fed. Rep. 651, which *reversed* 75 Fed. Rep. 946; *Root v. Shields*, Woolw. (U. S.) 340, 20 Fed. Cas. No. 12,038; *Wallerton v. Snow*, 5 McCrary (U. S.) 64, 15 Fed. Rep. 401; *American Mortg. Co. v. Hopper*, 56 Fed. Rep. 67, *affirming* (C. C. A.) 64 Fed. Rep. 553; *California Redwood Co. v. Little*, 79 Fed. Rep. 854.

California.—*Taylor v. Weston*, 77 Cal. 534. *Idaho*.—*Jones v. Meyers*, 2 Idaho 794, 35 Am. St. Rep. 259.

Indiana.—*Godfrey v. Cushman*, 7 Blackf. (Ind.) 253.

Iowa.—*Bixby v. Adams County*, 49 Iowa 507.

Kansas.—*Stout v. Hyatt*, 13 Kan. 232.

Tennessee.—*Craig v. Leiper*, 2 Yerg. (Tenn.) 193, 24 Am. Dec. 479; *University v. Cambridge*, 6 Yerg. (Tenn.) 79; *Williams v. Love*, 2 Head (Tenn.) 80, 73 Am. Dec. 191.

Wyoming.—*Caldwell v. Bush*, 6 Wyo. 342.

Canada.—See *Reed v. Wilson*, 23 Ont. 552.

And see the cases cited *infra*, this section, *Operation of Recording Acts*, note *Conveyances Not Within Terms of Recording Acts*.

Contra, *Lewis v. Shaw*, 57 Fed. Rep. 516, 70 Fed. Rep. 289; *Moore v. Kane*, 24 Ont. 541. See also *Smith v. Ewing*, 11 Sawy. (U. S.) 56.

Bona Fide Purchasers of Land Scrip or Land Warrants.—*James v. Germania Iron Co.*, (C. C. A.) 107 Fed. Rep. 597, *affirmed sub nom.* *Germania Iron Co. v. Craig*, 98 Fed. Rep. 23; *Boyd v. Mammoth Spring Imp., etc.*, Co., 137 Mo. 482 [*citing* *Rev. Stat. U. S.*, § 2441]; *Keen v. Casey*, 22 Tex. 412; *Baggett v. McKenzie*, 28 Tex. 581. And see *supra*, this title, *Inchoate Right or Title and Grant—Assignment, Incumbrance, and Alienation of Inchoate Right*.

4. **Purchase for Value and Without Notice Good Defense Against Government**.—*U. S. v. Cali-*

b. PURCHASERS WITH NOTICE — (1) *In General*. — On the other hand, purchasers, whether of the government's legal or equitable title, who take with actual notice of prior equities outstanding in others, or are chargeable with constructive notice by adverse possession or occupation of the land, defects apparent from the title papers, or the like, take subject to such equities.¹

(2) *Operation of Recording Acts*. — Where transfers and incumbrances of inchoate interests in public land are valid they are generally held to be within the operation of local recording acts requiring title papers to be recorded in the county within which the land is situated, whether the premises are a part of the national or of the state domain,² provided the mode of conveyance used

fornia, etc., Land Co., 148 U. S. 31 [affirming 7 U. S. App. 128 explaining U. S. v. Dalles Military Road Co., 140 U. S. 599, which reversed on other grounds 41 Fed. Rep. 501, 42 Fed. Rep. 351, 44 Fed. Rep. 2341]; U. S. v. Winona, etc., R. Co., 165 U. S. 463 [affirming 67 Fed. Rep. 948, citing U. S. v. Burlington, etc., R. Co., 98 U. S. 335, and Colorado Coal, etc., Co. v. U. S., 123 U. S. 3071]; U. S. v. Minor, 29 Fed. Rep. 134; U. S. v. Wenz, 34 Fed. Rep. 154; U. S. v. Scholl, 45 Fed. Rep. 758; U. S. v. Dalles Military Road Co., 51 Fed. Rep. 629, affirmed 148 U. S. 49; U. S. v. Willamette Valley, etc., Wagon-Road Co., 54 Fed. Rep. 807, 55 Fed. Rep. 711; U. S. v. Sierra Nevada Wood, etc., Co., 79 Fed. Rep. 691; U. S. v. Oregon Cent. Military Road Co., 103 Fed. Rep. 549; People v. Swift, 96 Cal. 165. See also Fletcher v. Peck, 6 Cranch (U. S.) 87; Buckingham v. Dorsey, 1 Md. Ch. 31. Compare Atty.-Gen. v. McNulty, 11 Grant Ch. (U. C.) 281.

1. *Purchasers with Notice* — *United States*. — Hughes v. U. S., 4 Wall. (U. S.) 232; Widdicombe v. Childers, 124 U. S. 400, affirming 84 Mo. 382 [which distinguished Sensenderfer v. Smith, 66 Mo. 80]; Hedrick v. Atchison, etc., R. Co., 167 U. S. 673, affirming 120 Mo. 516 [which overruled Sensenderfer v. Neale, 66 Mo. 669, and Widdicombe v. Mercer, 72 Mo. 588]; Ware v. Brush, 1 McLean (U. S.) 533, 29 Fed. Cas. No. 17,171, affirmed 15 Pet. (U. S.) 93; Bogan v. Edinburgh American Land Mortg. Co., (C. C. A.) 63 Fed. Rep. 192; Godkin v. Cohn, (C. C. A.) 80 Fed. Rep. 458; U. S. v. La Chappelle, 81 Fed. Rep. 152; Garrard v. Silver Peak Mines, 82 Fed. Rep. 578, affirmed (C. C. A.) 94 Fed. Rep. 983; Germania Iron Co. v. Craig, 98 Fed. Rep. 23, affirmed sub nom. James v. Germania Iron Co., (C. C. A.) 107 Fed. Rep. 597. See also Dewees v. Reinhard, 165 U. S. 386, affirming 61 Fed. Rep. 777.

California. — Christy v. Dana, 34 Cal. 548; Peasley v. Hart, 65 Cal. 522; Huling v. Abbott, 86 Cal. 423; Jackson v. Hyde, 91 Cal. 463.

Colorado. — Doll v. Stewart, (Colo. 1902) 70 Pac. Rep. 326.

Illinois. — Wilson v. Byers, 77 Ill. 76; Maghee v. Robinson, 98 Ill. 458.

Iowa. — Arnold v. Grimes, 2 Iowa 1; Bisson v. Curry, 35 Iowa 72; Weeks v. Loy, 52 Iowa 202; McDaniel v. Peabody, 54 Iowa 305.

Kansas. — Fearn v. Atchison, etc., R. Co., 33 Kan. 275.

Kentucky. — Patrick v. Chenault, 6 B. Mon. (Ky.) 315; Gillum v. Catron, 29 S. W. Rep. 302, 16 Ky. L. Rep. 575.

Louisiana. — Kittridge v. Breaud, 2 Rob. (La.) 40, 4 Rob. (La.) 79, 39 Am. Dec. 512

[citing Latiolais v. Richard, 6 Mart. N. S. (La.) 214]; Climer v. Selby, 10 La. Ann. 182; Broussard v. Pharr, 48 La. Ann. 230.

Michigan. — Atty.-Gen. v. Smith, 31 Mich. 359; Davis v. Filer, 40 Mich. 310; Austin v. Dean, 40 Mich. 386; Holcomb v. Mosher, 50 Mich. 252; Warner v. Hall, 53 Mich. 371; Allen v. Cadwell, 55 Mich. 8; Mason Lumber Co. v. Collier, 74 Mich. 241.

Minnesota. — Coy v. Coy, 15 Minn. 119, cited in Mankato v. Meagher, 17 Minn. 265.

Mississippi. — Nelson v. Sims, 23 Miss. 383, 57 Am. Dec. 144.

Missouri. — Stephenson v. Smith, 7 Mo. 610; Cedar County v. Williams, 79 Mo. 581; Sensenderfer v. Kemp, 83 Mo. 581; Swisher v. Sensenderfer, 84 Mo. 104; Sturgeon v. Hampton, 88 Mo. 203 [cited in Simpson v. Stoddard County, 173 Mo. 421]; Hedrick v. Beeler, 110 Mo. 91; State v. Crumb, 157 Mo. 545; Johnson v. Fluetsch, (Mo. 1903) 75 S. W. Rep. 1005.

North Carolina. — Person v. Roundtree, 1 Hayw. (2 N. Car.) 378, note; Bryan v. Hughes, 107 N. Car. 492.

Ohio. — Reeder v. Barr, 4 Ohio 446, 22 Am. Dec. 762; Bonner v. Ware, 10 Ohio 465; Bell v. Duncan, 11 Ohio 192; Strong v. Lehmer, 10 Ohio St. 93; Stoddard v. Smith, 11 Ohio St. 581; Mack v. Brammer, 28 Ohio St. 508.

Oregon. — Carter v. Portland, 4 Oregon 340; Richards v. Snyder, 11 Oregon 501; Baker v. Woodward, 12 Oregon 3, citing Bohlman v. Coffin, 4 Oregon 314.

Pennsylvania. — Cherry v. Robinson, 1 Yeates (Pa.) 522; Burkart v. Bucher, 2 Binn. (Pa.) 455, 4 Am. Dec. 457; Ruggles v. Gaily, 2 Rawle (Pa.) 232; Gingrich v. Foltz, 19 Pa. St. 38, 57 Am. Dec. 631; George v. Messinger, 73 Pa. St. 423.

Tennessee. — Egnew v. Cochrane, 2 Head (Tenn.) 320; Fogg v. Williams, 2 Head (Tenn.) 474; Buck v. Williams, 10 Heisk. (Tenn.) 264.

Texas. — Alford v. McDonald, 2 Tex. Unrep. Cas. 175; Morris v. Byers, 14 Tex. 278; Magee v. Chadoin, 30 Tex. 644, 20 Tex. 476; Bryan v. Crump, 55 Tex. 1; Cassin v. O'Sullivan, 61 Tex. 594; Metzler v. Johnson, 1 Tex. Civ. App. 137, citing Jumbo Cattle Co. v. Bacon, 79 Tex. 12.

Virginia. — Roberts v. Stanton, 2 Munf. (Va.) 129, 5 Am. Dec. 463; Cline v. Catron, 22 Gratt. (Va.) 378.

2. *Conveyances and Incumbrances of Inchoate Interests in Public Land* — *California*. — Christy v. Dana, 34 Cal. 548; Henderson v. Grammar, 66 Cal. 332, 53 Cal. 652; Eversdon v. Mayhew, 85 Cal. 1, 65 Cal. 163; Merrill v. Clark, 103 Cal. 367.

is within the language of the particular act.¹

Patents and Other Deeds whereby the government conveys its legal title are not within the operation of such acts unless the terms employed necessarily include them.²

4. Statutes Adjusting Invalid or Forfeited Rights or Grants. — Statutes, in adjusting land grants or inchoate rights which are erroneous or void or have become forfeited for failure in performing conditions subsequent, have frequently given to *bona fide* purchasers from the grantee or claimant, or to settlers on the land in good faith, a preference right to acquire title from the government, or have confirmed and perfected such claims.³ These statutes are

Illinois. — *Phelps v. Kellogg*, 15 Ill. 131.

Iowa. — *Klein v. Argenbright*, 26 Iowa 493; *Sillyman v. King*, 36 Iowa 207; *Acker v. Walker*, 53 Iowa 454. See also *David v. Rickabaugh*, 32 Iowa 540; *McDaniel v. Peabody*, 54 Iowa 365.

Minnesota. — *Davis v. Murphy*, 3 Minn. 119, cited in *Carson v. Smith*, 5 Minn. 78, 77 Am. Dec. 539.

Missouri. — *McCamant v. Patterson*, 39 Mo. 100; *Dickerson v. Bridges*, 147 Mo. 235.

Texas. — *Adams v. House*, 61 Tex. 639.

Washington. — *Carson v. Railsback*, 3 Wash. Ter. 168.

See also *Bogan v. Edinburgh American Land Mortg. Co.*, (C. C. A.) 63 Fed. Rep. 192; *Treize v. Lacy*, 22 Kan. 742; *Love v. Berry*, 22 Tex. 371; *Vance v. Cummings*, 13 Grant Ch. (U. C.) 25 [criticised in *Watson v. Lindsay*, 6 Ont. App. 609, which affirmed 27 Grant Ch. (U. C.) 253]; *Reg. v. Montminy*, 29 Can. Sup. Ct. 484. And see generally the title RECORDING ACTS, vol. 24, p. 73.

Where a Statute Disposing of Indian Land contains a special provision for the registration of absolute assignments of equitable rights, the county registry act has no application to such matters although the assignment in question is not within the terms of the statute. *Reed v. Wilson*, 23 Ont. 552.

1. Conveyances Not Within Terms of Recording Acts. — *Falkner v. Jones*, 12 Ala. 165; *Maghee v. Robinson*, 98 Ill. 458; *Sheldon, J., dissenting*; *David v. Rickabaugh*, 32 Iowa 540; *Lockwood v. Kitteringham*, 42 Iowa 257; *McGill v. McGill*, 4 La. Ann. 262; *Bastable v. Curry*, 5 La. Ann. 411; *Martin v. Nash*, 31 Miss. 324; *Huntington v. Allen*, 44 Miss. 654; *Schnee v. Schnee*, 23 Wis. 377, 99 Am. Dec. 183. See also *Pinckney v. Collicie*, 114 Iowa 441. Compare *Shippen v. Kimball*, 47 Kan. 173; *Johnston, J., dissenting*; *Sayward v. Thompson*, 11 Wash. 706.

2. Government Conveyances of Legal Title. — *Mason v. Cooksey*, 51 Ind. 519; *Nitche v. Earle*, 88 Ind. 375, 117 Ind. 270; *Rankin v. Miller*, 43 Iowa 11; *Kittridge v. Breaud*, 2 Rob. (La.) 40, 4 Rob. (La.) 79, 39 Am. Dec. 512; *Stallings v. Ruby*, 27 Md. 149; *Huntington v. Allen*, 44 Miss. 654; *Webster v. Clear*, 49 Ohio St. 302; *Meacham v. Stewart*, 10 Oregon 288; *Byrne v. Fagan*, 16 Tex. 391; *Musquis v. Blake*, 24 Tex. 461; *King v. Elson*, 30 Tex. 246, criticising *Guilbeau v. Mays*, 15 Tex. 410. And see the title RECORDING ACTS, vol. 24, p. 86.

As to the Effect on the Question of Notice of failure to register or deposit evidence of a grant in the general land office or other place, as required by law, see *Guilbeau v. Mays*, 15

Tex. 410 [criticised in *King v. Elson*, 30 Tex. 246]; *Byrne v. Fagan*, 16 Tex. 391; *Elliott v. Mitchell*, 47 Tex. 445; *Roberts v. Stanton*, 2 Munf. (Va.) 129, 5 Am. Dec. 463. See also *Sullivan v. Brown*, 1 Overt. (Tenn.) 6.

3. Grants in Aid of Railroads. — *United States.* — *Lake Superior Ship Canal, etc., Co. v. Cunningham*, 155 U. S. 354, affirming 44 Fed. Rep. 819, which granted new trial in 44 Fed. Rep. 587; *Lake Superior Ship Canal, etc., Co. v. Finan*, 155 U. S. 385; *U. S. v. Winona, etc., R. Co.*, 165 U. S. 463, affirming 67 Fed. Rep. 948; *U. S. v. Union Pac. R. Co.*, 165 U. S. 482, affirming 67 Fed. Rep. 974, which affirmed 61 Fed. Rep. 143; *Winona, etc., R. Co. v. U. S.*, 165 U. S. 483, affirming 67 Fed. Rep. 969; *Adams v. Henderson*, 168 U. S. 573, affirming 11 Utah 480; *U. S. v. Southern Pac. R. Co.*, 184 U. S. 49, modifying 98 Fed. Rep. 45, which affirmed 88 Fed. Rep. 832; *Clark v. Herington*, 186 U. S. 206, affirming 62 Kan. 866, 56 Kan. 644; *San Jose Land, etc., Co. v. San Jose Ranch Co.*, 189 U. S. 177, affirming 129 Cal. 673; *Burr v. Greeley*, (C. C. A.) 52 Fed. 1 ep. 926; *Montgomery v. Northern Pac. R. Co.*, 67 Fed. Rep. 445; *U. S. v. Southern Pac. R. Co.*, 76 Fed. Rep. 134; *Norton v. Evans*, (C. C. A.) 82 Fed. Rep. 804; *U. S. v. Central Pac. R. Co.*, 84 Fed. Rep. 218; *U. S. v. Flint, etc., R. Co.*, (C. C. A.) 95 Fed. Rep. 551; *Wagstaff v. Collins*, (C. C. A.) 97 Fed. Rep. 3; *U. S. v. Southern Pac. R. Co.*, (C. C. A.) 98 Fed. Rep. 27, affirming 86 Fed. Rep. 962, reversed on other grounds 183 U. S. 519; *U. S. v. Holmes*, 105 Fed. Rep. 41, reversed on other grounds (C. C. A.) 118 Fed. Rep. 996; *Southern Pac. R. Co. v. U. S.*, (C. C. A.) 109 Fed. Rep. 913; *Manley v. Tow*, 110 Fed. Rep. 241; *Cunningham v. Metropolitan Lumber Co.*, (C. C. A.) 110 Fed. Rep. 332, writ of certiorari denied 187 U. S. 647; *Humbird v. Avery*, 110 Fed. Rep. 465; *Benner v. Lane*, 116 Fed. Rep. 407; *U. S. v. Southern Pac. R. Co.*, 117 Fed. Rep. 544; *Brett v. Meisterling*, 117 Fed. Rep. 768.

California. — *Southern Pac. R. Co. v. Choate*, 132 Cal. 278.

Michigan. — *Paine v. State Land Office Com'r*, 66 Mich. 245; *Webster v. Newell*, 66 Mich. 503, citing *Potter v. State Land Office Com'r*, 55 Mich. 485.

Minnesota. — *St. Paul, etc., R. Co. v. Broulette*, 65 Minn. 367; *O'Connor v. Gertgens*, 85 Minn. 481.

Washington. — *Wiseman v. Eastman*, 21 Wash. 163; *Ramsay v. Tacoma Land Co.*, 31 Wash. 351; *Carratt v. Carratt*, (Wash. 1903) 22 Pac. Rep. 481.

Des Moines River Improvement Grant. — *Litchfield v. Webster County*, 101 U. S. 773; *Litch-*

generally intended to relieve settlers and purchasers who, through the erroneous or wrongful acts of officers of the government or other persons, have lost their rights or acquired equities which in justice should be recognized. In such cases they are remedial in their nature, and are liberally construed, and the terms "*bona fide* purchaser" and the like, used in them, are not to be taken in their strict technical meaning.

XIX. ESTOPPEL, LACHES, AND LIMITATIONS — **Estoppel.** — The rule has been laid down in some jurisdictions that the doctrine of estoppel is not applicable against the state in making grants of land, because the state acts by agents and is a trustee for the people, and for their benefit the truth may always be shown.¹ Other decisions, however, hold that an estoppel may arise from the express grants of a state as well as in the case of individuals.² But in proceedings for the recovery of lands an estoppel cannot arise against a state or the United States from the unauthorized acts of the agents or officers of the government.³ Thus, it has been held that the unauthorized acts of the ministerial officers of a state in assessing taxes on land belonging to the state and collecting the amount from those claiming the land will not estop the state to assert its title, even though the amount so collected by the officers has been appropriated by them to public uses.⁴ It is a general rule that in order to

field *v.* Hamilton County, 101 U. S. 781, note; U. S. *v.* Des Moines Nav., etc., Co., 142 U. S. 510, *affirming* 43 Fed. Rep. 1.

Invalid Mexican Land Grants. — Beley *v.* Naphthaly, 169 U. S. 353, *affirming* 73 Fed. Rep. 120.

Act Cong. June 8, 1872, 17 U. S. Stat. at L. 340, c. 357, giving a preference right to innocent parties holding land in good faith under invalid locations of Chippewa half-breed scrip to purchase it from the government. Fee *v.* Brown, 162 U. S. 602, *affirming* 17 Colo. 510; Pugsley *v.* Brown, 35 Fed. Rep. 688.

Act Cong. June 15, 1880, 21 U. S. Stat. at L. 238, c. 227, giving to persons to whom an attempt has been made to transfer the right of a homestead entryman by a *bona fide* instrument in writing the privilege of purchasing the land covered by it. Northern Pac. R. Co. *v.* Amacker, 175 U. S. 564, *affirming* 92 Fed. Rep. 1021 and 58 Fed. Rep. 850, which *reversed* 53 Fed. Rep. 48; Puget Mill Co. *v.* Brown, (C. C. A.) 59 Fed. Rep. 35, *affirming* 54 Fed. Rep. 987; Dewhurst *v.* Wright, 29 Fla. 223; McCrillis *v.* Copp, 31 Fla. 100.

Act Cong. March 3, 1891, 26 U. S. Stat. at L. 1098, c. 561, perfecting the title of entries under the pre-emption, homestead, desert land, or timber-culture laws as to which there are no adverse claims originating prior to final entry, and which have been sold or encumbered prior to March 1, 1888, and after final entry, to *bona fide* purchasers or incumbrancers for a valuable consideration and without fraud on their part. The statute applies only to entries in existence at the time of its enactment. Parsons *v.* Venzke, 164 U. S. 89, *affirming* 4 N. Dak. 452, 50 Am. St. Rep. 669; Guaranty Sav. Bank *v.* Bladow, 176 U. S. 448, *modifying* 6 N. Dak. 108; Pfund *v.* Valley L. & T. Co., 52 Neb. 473; Caldwell *v.* Bush, 6 Wyo. 342.

Act Cong. July 23, 1886, 14 U. S. Stat. at L. 218, c. 219, confirming selections made by the state of California of any portion of the national domain in part satisfaction of any grant made to it by Congress, where the land has been disposed of by the state to purchasers in good faith under her laws. See generally

supra, this title, *Disposal of State Lands — California*; *supra*, this title, *Grants for Internal Improvements*. And see McNeely *v.* Donahue, 142 U. S. 587, *affirming* 76 Cal. 499; Hodapp *v.* Sharp, 40 Cal. 69.

1. State Grants. — Wallace *v.* Maxwell, 10 Ired. L. (32 N. Car.) 110, 51 Am. Dec. 380; State *v.* Bevers, 86 N. Car. 588. See also Carver *v.* Jackson, 4 Pet. (U. S.) 1; Casey *v.* Inloes, 1 Gill (Md.) 430, 39 Am. Dec. 658. And for cases holding broadly that the doctrine of estoppel does not apply as against the state, see the title ESTOPPEL, vol. 11, p. 396.

Thus, where a grant of land by the government is void because it has been previously granted to another, if the title of the first grantor is subsequently revested in the government, there is no estoppel, as there would be in the case of a private grantor, or other rule of law under which it will inure to the benefit of the second grantee. Doe *v.* Robertson, 11 Wheat. (U. S.) 332; Stith *v.* Hart, 6 T. B. Mon. (Ky.) 624; Jones *v.* Chiles, 4 J. J. Marsh. (Ky.) 610; Doe *v.* Roe, 4 Hawks (11 N. Car.) 116, 15 Am. Dec. 512.

2. Grants of Land by State. — Vermont *v.* Society, etc., 2 Paine (U. S.) 545; Com. *v.* André, 3 Pick. (Mass.) 224; Enfield *v.* Permit, 5 N. H. 280, 20 Am. Dec. 580.

Estoppel Against United States. — U. S. *v.* Des Moines Valley R. Co., 84 Fed. Rep. 40, 55 U. S. App. 246; U. S. *v.* Scott, 38 Fed. Rep. 393; U. S. *v.* Willamette Valley, etc., Wagon-Road Co., 54 Fed. Rep. 807.

Applicability of Doctrine of Estoppel Against County. — Simpson *v.* Stoddard County, 173 Mo. 421.

County Estopped from Claiming Lands. — Briggs *v.* Jasper County, 49 Iowa 481.

3. Government Not Estopped by Unauthorized Acts of Officers. — U. S. *v.* Winona, etc., R. Co., (C. C. A.) 67 Fed. Rep. 969; U. S. *v.* Southern Colorado Coal, etc., Co., 18 Fed. Rep. 273; McDade *v.* Bossier Levee Board, 109 La. 625; Day Land, etc., Co. *v.* State, 68 Tex. 526. See also the title ESTOPPEL, vol. 11, p. 397.

4. Unauthorized Tax Assessment. — State *v.*

work an estoppel by deed parties must be competent to make it effectual as a contract.¹ Applying this principle, it has been held that a county is not estopped by covenants of warranty in a deed of land which it had no authority to make.²

Laches.—It is a general rule that one who has been guilty of laches in asserting a right will not be aided by a court of equity,³ but it is well settled that when the government has a direct pecuniary interest in the subject-matter of litigation, the defenses of stale claim and laches cannot be set up as a bar, because, for reasons of public policy, laches is not imputable to the government.⁴ Consequently it has been held that this rule is applicable in a proceeding by the United States to set aside a land patent⁵ or to recover from a state property and funds flowing from a land grant to the state.⁶ But where the United States is merely a nominal party complainant in such proceedings and has no real interest in the litigation, it is held that the defense of laches may be successfully invoked.⁷

The Applicability of the Statute of Limitations Against the Government, independently of express statutory authority making the government bound thereby,⁸ is controlled by principles of public policy similar to those which control the applicability of the defense of laches against the government in equity proceedings;⁹ and, as has been stated above concerning the applicability of laches against the government, it may be said that in proceedings to recover land by the government, where the claim prosecuted is not a purely governmental matter, there is no exemption from the statute of limitations.¹⁰

XX. EVIDENCE — 1. **Patent** — *a.* **ISSUANCE.** — The issuance of a patent can always be proved by a certified copy or an exemplification of the record,

Portsmouth Sav. Bank, 106 Ind. 435. See also Buena Vista County v. Iowa Falls, etc., R. Co., 46 Iowa 226; Bixby v. Adams County, 49 Iowa 507; Howard County v. Bullis, 49 Iowa 519; Hays v. McCormick, 83 Iowa 89; Rossire v. Boston, 4 Allen (Mass.) 57; St. Louis v. Gorman, 29 Mo. 593, 77 Mo. Dec. 586; McFarlane v. Kerr, 10 Bosw. (N. Y.) 249.

1. See the title STOPPEL, vol. 11, p. 395.

2. **County Not Estopped by Unauthorized Deed of Warranty.** — Robinson v. Bailey, 26 Fed. Rep. 219.

Title from County Not Defeated by Unauthorized Warranty in Deed. — Pool v. Brown, 98 Mo. 675.

County Not Liable for Damages on Unauthorized Covenant of Warranty. — Harrison v. Palo Alto County, 104 Iowa 383.

3. See the title LACHES, vol. 18, p. 97.

Laches Held to Bar Recovery of Swamp Lands from County. — Lemoine v. Dunklin County, (C. C. A.) 51 Fed. Rep. 487, affirming 46 Fed. Rep. 219.

4. **Laches Not Imputable to Government.** — San Pedro, etc., Co. v. U. S., 146 U. S. 120; U. S. v. Dalles Military Road Co., 140 U. S. 599, reversing 41 Fed. Rep. 493, 42 Fed. Rep. 351, 44 Fed. Rep. 234; U. S. v. Winona, etc., R. Co., (C. C. A.) 67 Fed. Rep. 969, affirmed 165 U. S. 483; U. S. v. Insley, 130 U. S. 263; U. S. v. Beebe, 127 U. S. 338; U. S. v. Nashville, etc., R. Co., 118 U. S. 120; U. S. v. Michigan, 190 U. S. 379; Young v. Charnquist, 114 Iowa 116. And see generally the titles STATES, *post*; UNITED STATES.

Applicability of Laches Against County. — Simpson v. Stoddard County, 173 Mo. 421.

5. **Laches Not Imputable to United States in Proceeding to Annul Land Patent.** — San Pedro,

etc., Co. v. U. S., 146 U. S. 120 [citing U. S. v. Dalles Military Road Co., 140 U. S. 599, which reversed 41 Fed. Rep. 493, 42 Fed. Rep. 351, 44 Fed. Rep. 234]; U. S. v. Willamette Valley, etc., Wagon-Road Co., 54 Fed. Rep. 807. Compare U. S. v. Blackburn, (Ariz. 1897) 48 Pac. Rep. 904.

Laches Not Imputable to State for Not Avoiding Sale of Public Land. — Massey v. Smith, 64 Mo. 347.

Laches Applicable to County Claiming Lands. — Simpson v. Stoddard County, 173 Mo. 421; Dunklin County v. Chouteau, 120 Mo. 577.

6. U. S. v. Michigan, 190 U. S. 379.

7. U. S. v. Beebe, 127 U. S. 338, affirming 17 Fed. Rep. 36; U. S. v. Chicago, etc., R. Co., (C. C. A.) 116 Fed. Rep. 969; Curtner v. U. S., 149 U. S. 662; U. S. v. Des Moines Nav., etc., Co., 142 U. S. 510, affirming 43 Fed. Rep. 1; U. S. v. Des Moines Valley R. Co., 70 Fed. Rep. 435, affirmed 84 Fed. Rep. 40, 55 U. S. App. 246.

8. **Government Bound by Express Statutes.** — People v. Clarke, 9 N. Y. 349, affirming 10 Barb. (N. Y.) 120. See also Peabody Gold Min. Co. v. Gold Hill Min. Co., 106 Fed. Rep. 241; U. S. v. Insley, 130 U. S. 263; U. S. v. Winona, etc., R. Co., 165 U. S. 463, affirming 32 U. S. App. 272; People v. Center, 66 Cal. 551.

9. See U. S. v. Insley, 130 U. S. 263; U. S. v. Beebe, 127 U. S. 338; San Francisco Sav. Union v. Irwin, 28 Fed. Rep. 708. See also the titles ADVERSE POSSESSION, vol. 1, pp. 875, 876; LIMITATION OF ACTIONS, vol. 19, p. 188 *et seq.*

10. Curtner v. U. S., 149 U. S. 662; U. S. v. Des Moines Nav., etc., Co., 142 U. S. 510; U. S. v. Beebe, 127 U. S. 338; U. S. v. Des Moines Valley R. Co., 70 Fed. Rep. 435, affirmed 84 Fed. Rep. 40, 55 U. S. App. 246; U. S. v. Winona, etc., R. Co., (C. C. A.) 67 Fed. Rep. 969, affirmed 165 U. S. 483.

as well as by producing the patent itself.¹ And in an early case it was held that an entry on the books of the land office that the balance of the purchase money had been paid by the party to whom the patent issued ought to be considered as evidence that a patent did issue, although such patent was not produced.²

b. AS EVIDENCE. — A patent is not only the deed of the government, but is evidence of the facts recited in it, and is a solemn record of the government's action and judgment with respect to the title of the claimant.³ It follows that the government, those claiming under it, and the grantee, as well as those in privity with him, are bound by recitals of facts contained in the patent;⁴ and, of course, persons who show no title are likewise bound.⁵ The patent is evidence of the due performance of every prerequisite to its issuance, and cannot be questioned either at law or in equity except on the ground of fraud or mistake.⁶ And for the purpose of showing the consideration on which the patent is founded and the authority by which it issued, the recitals therein are indispensable on a trial at law.⁷ But the recitals in a patent are not evidence against one holding by right prior to the date of such patent.⁸ The patent is admissible without any proof of its execution. The official seal sufficiently authenticates it.⁹

c. COPY AS EVIDENCE. — As a general rule an exemplification of a public grant under the great seal is admissible in evidence as being record proof of as high a nature as the original,¹⁰ and in most states a copy is admissible where

1. Patent May Be Proved by Certified Copy or Exemplification. — *Vance v. Kohlberg*, 50 Cal. 346; *McKineron v. Bliss*, 31 Barb. (N. Y.) 180; *Ney v. Mumme*, 66 Tex. 268; *Stevens v. Geiser*, 71 Tex. 140.

Parol Proof of Canceled Patent. — See *Bell v. Hearne*, 10 La. Ann. 515.

The Date on the Patent is evidence of the time of the issuance and execution of such patent. *McGowan v. Crooks*, 5 Dana (Ky.) 65.

2. Payment of Purchase Money. — *Willis v. Bucher*, 3 Wash. (U. S.) 369. Compare *Jones v. Bache*, 3 Wash. (U. S.) 199.

3. Patent Is Evidence of Facts Recited Therein, Etc. — *Arkansas*. — *Hendry v. Willis*, 33 Ark. 833; *Chrisman v. Jones*, 31 Ark. 609.

California. — *Jatunn v. Smith*, 95 Cal. 154; *Chant v. Reynolds*, 49 Cal. 213; *McGarrahan v. New Idria Min. Co.*, 49 Cal. 331; *Teschemacher v. Thompson*, 18 Cal. 11, 79 Am. Dec. 151; *Stark v. Barrett*, 15 Cal. 361; *Yount v. Howell*, 14 Cal. 465.

Kentucky. — *Weaver v. Froman*, 6 J. J. Marsh. (Ky.) 216; *Cain v. Flynn*, 4 Dana (Ky.) 501.

Pennsylvania. — *Lake Winola Assoc. v. Mott*, 1 Pa. Super. Ct. 304; *Downing v. Gallagher*, 2 S. & R. (Pa.) 455; *M'Coy v. Michew*, 7 W. & S. (Pa.) 386.

Texas. — *Malone v. Dick*, 94 Tex. 419.

Wisconsin. — *Knight v. Leary*, 54 Wis. 459.

4. Persons Bound by Facts Recited in Patent. — *Carver v. Jackson*, 4 Pet. (U. S.) 1; *McGarrahan v. New Idria Min. Co.*, 49 Cal. 331; *Yount v. Howell*, 14 Cal. 465; *Bachop v. Critchlow*, 142 Pa. St. 518; *Read v. Thompson*, 5 Pa. St. 327; *Steiner v. Cox*, 4 Pa. St. 13.

5. Person Not Showing Title Bound by Recitals in Patent. — *Stark v. Barrett*, 15 Cal. 361; *Boatner v. Ventress*, 8 Mart. N. S. (La.) 657; *Green v. Brennessholtz*, 73 Pa. St. 423; *Downing v. Gallagher*, 2 S. & R. (Pa.) 455.

6. Patent Evidence of Performance of Prerequisites. — *Knabe v. Burden*, 88 Ala. 436; *Chever v. Horner*, 11 Colo. 68, 7 Am. St. Rep. 217; *Sweatt v. Corcoran*, 37 Miss. 513.

Pending Suit to Set Aside for Fraud. — Until the proceedings to set aside a patent for fraud have resulted in a decree setting it aside or modifying it, its efficacy remains for all purposes. *Ely v. Frisbie*, 17 Cal. 250.

Assignment of Right to Patent. — Where a patent issued to an assignee or a subassignee of the premises contains recitals of the assignment, it is evidence that the assignment was duly made. *Sweatt v. Corcoran*, 37 Miss. 513.

Patents Only Prima Facie Evidence. — In *Kentucky* patents are received as *prima facie* evidence of correctness. *Wallace v. Maxwell*, 1 J. J. Marsh. (Ky.) 447.

7. Recitals Necessary to Show Consideration and Authority for Patent. — *Marsh v. Brooks*, 8 How. (U. S.) 223.

8. Recital Not Evidence Against Prior Title. — *Stephens v. Westwood*, 20 Ala. 275; *Penrose v. Griffith*, 4 Binn. (Pa.) 231; *Green v. Brennessholtz*, 73 Pa. St. 423; *Read v. Thompson*, 5 Pa. St. 327.

9. Execution of Patent Need Not Be Proved. — *Knabe v. Burden*, 88 Ala. 436; *Robinson v. Cahalan*, 91 Ala. 479; *Yount v. Howell*, 14 Cal. 465; *Gallup v. Armstrong*, 22 Cal. 481. See the title *SEALS*, vol. 25, p. 81.

10. Exemplification Admissible. — *Doe v. Winn*, 5 Pet. (U. S.) 234; *Nitche v. Earle*, 117 Ind. 270; *New York Cent., etc., R. Co. v. Brockway Brick Co.*, 10 N. Y. App. Div. 387; *M'Creight v. Gossitt*, 1 Brev. (S. Car.) 515. And see the titles *DOCUMENTARY EVIDENCE*, vol. 9, p. 880; *RECORDS*, vol. 24, p. 200 *et seq.*

Exemplification Evidence of Facts Stated Therein. — *Ropes v. Kemps*, 38 Fla. 233.

Copy of Seal Not Necessary. — *Jackson v. Berner*, 48 Ill. 203; *Hedden v. Overton*, 4 Blbb (Ky.) 406; *Sneed v. Ward*, 5 Dana (Ky.) 188.

the original would be admissible.¹ In other jurisdictions a copy of the record of the patent is admissible only when the absence of the original is accounted for.²

2. Evidence to Show Title.—It has been held that a patent is the highest evidence of title³ and is evidence that the state has parted with its title and that such title has vested in the patentee.⁴

3. Pre-emption.—A party relying on a pre-emption right must prove the facts which entitle him to it,⁵ and it is not enough to show that an entry was made with an intent to claim under the pre-emption laws without also showing a right to make a claim under such laws.⁶

4. Location of Grant.—To identify land granted by United States patents, resort may be had to the plat and field notes;⁷ and in some cases parol evidence is admissible to show the location and boundaries of the land.⁸ The location may be satisfactorily established from circumstantial or presumptive evidence, or deduced as a fact from other facts which are proved or are of

Absence of Seal on Original.—A copy of a grant is admissible where the registry does not show the impress of the proper seal, provided it appears that it was intended to affix the seal. *Aycock v. Raleigh, etc., Air-Line R. Co.*, 89 N. Car. 321.

1. Copy Admissible When Original Is Admissible.—*Campbell v. Laclede Gas Co.*, 119 U. S. 445; *Eltzroth v. Ryan*, 89 Cal. 135; *Natoma Water, etc., Co. v. Clarkin*, 14 Cal. 544; *Chandler v. Wilson*, 77 Me. 76; *New York Cent., etc., R. Co. v. Brockway Brick Co.*, 158 N. Y. 470; *Dupree v. Frank*, (Tex. Civ. App. 1897) 39 S. W. Rep. 988. *Contra*, *Curtis v. Hunting*, 6 Iowa 536.

2. Absence of Original Must Be Accounted For.—*Hensley v. Tarpey*, 7 Cal. 288; *Smith v. Mosier*, 5 Blackf. (Ind.) 51; *Baylor v. Tillebach*, 20 Tex. Civ. App. 490.

3. Patent Highest Evidence of Title.—*Knabe v. Burden*, 88 Ala. 436; *Bell v. Hearne*, 10 La. Ann. 515. See also *Hamilton v. Shoaff*, 99 Ind. 63.

4. Patent Evidence of Transfer of Title from State to Patentee.—*Downing v. Gallagher*, 2 S. & R. (Pa.) 455; *Stevens v. Geiser*, 71 Tex. 140.

Patent Only Prima Facie Evidence of Title.—*Jasper County v. Mickey*, (Mo. 1887) 4 S. W. Rep. 424; *Gingrich v. Foltz*, 19 Pa. St. 38, 57 Am. Dec. 631; *Olewine v. Messmore*, 128 Pa. St. 470.

Other Evidences of Title—Correspondence Between Surveyor-General and His Deputy.—*Ewing v. McKnight*, 1 S. & R. (Pa.) 128.

Lists of Swamp Lands and Plats.—*Bristol v. Carroll County*, 95 Ill. 84; *Dart v. Hercules*, 34 Ill. 395.

Extracts from Record Books in Land Office.—*Lee v. Hoyle*, 1 Gill (Md.) 188.

Receipt of Register and Receiver of State Land Office.—*Wickersham v. Woodbeck*, 57 Mo. 59.

Lists of Land Belonging to and Official Report of Commissioner.—*Kerr v. Farish*, 52 Miss. 101.

Original Book of Entries of United States Land Office.—*Welborn v. Spears*, 32 Miss. 138.

Certificate of United States Land Office.—*Burdick v. Briggs*, 11 Wis. 131.

Copies of Ancient Instruments.—A certified copy of an ancient instrument from the general

land office is admissible to show title. *Dupree v. Frank*, (Tex. Civ. App. 1897) 39 S. W. Rep. 988. See the title *ANCIENT DOCUMENTS*, vol. 2, p. 322.

Extracts from the General Draft and the Donation Book in the land office are legitimate evidence to show title out of the commonwealth. *Jennings v. McDowell*, 25 Pa. St. 387.

5. Burden of Proof on Party Claiming Pre-emption Right.—*Megerle v. Ashe*, 33 Cal. 74; *Page v. Hobbs*, 27 Cal. 484; *Brown v. Corson*, 16 Oregon 388.

6. Intent to Claim under Pre-emption Laws Not Sufficient.—*Page v. Hobbs*, 27 Cal. 484.

A Right of Pre-emption May Be Proved by the Record of Proceedings of Commissioners appointed by the President to hear and determine such rights. *Delauney v. Burnett*, 9 Ill. 454.

Testimony that Person Is Qualified Pre-emptor.—Testimony showing that a person has been accepted by the United States land officers as one duly qualified to settle upon and purchase land is *prima facie* evidence of such person's qualification as a pre-emptor. *Barnhart v. Ford*, 41 Kan. 341.

Evidence Insufficient to Prove Right of Pre-emption.—The certificate of land officers that a party has filed a declaratory statement is not sufficient evidence to prove that such person was entitled to pre-empt. *McFarland v. Culbert*, 2 Nev. 280.

7. Plat and Field Notes.—*Mitchell v. Cobb*, 13 Ala. 137; *Chapman v. Polack*, 70 Cal. 487; *Turner v. Union Pac. R. Co.*, 112 Mo. 542; *Morrill v. Bartlett*, 58 Tex. 644.

The Only Authentic Evidence of location is a survey made by the proper authority. *Edwards v. Ballard*, 14 La. Ann. 362.

Copies of the Maps Compiled in the Land Office, and lithographed, printed, and published by that office, are admissible for the purpose of identifying the location of surveys. *Barrow v. Gridley*, 25 Tex. Civ. App. 13.

Exemplification of Record of Location in General Land Office Admissible.—*Wilcox v. Jackson*, 109 Ill. 261.

8. Parol Evidence Admissible in Certain Cases.—*Foreman v. Sandefur*, 1 Brev. (S. Car.) 474; *Perry v. Middleton*, 1 Brev. (S. Car.) 546.

Parol Evidence Is Not Admissible when written evidence of location exists at the general land office. *Mitchell v. Cobb*, 13 Ala. 137; *Chapman v. Polack*, 70 Cal. 487.

judicial knowledge.¹ Thus, the survey and plat of a town site officially surveyed and platted by the United States may be admitted for the purpose of determining where a piece of land adjoining such town site, and outside of its exterior boundaries, is situated.² If the grant is not clear as to the land included, the contemporaneous and subsequent acts of the state and its grantee are admissible to show the location.³

5. Land-office Records — *a. JUDICIAL NOTICE.* — The courts will take judicial notice of the rules, decisions, and general course of business of the land department.⁴

b. CONTEST IN LAND OFFICE. — Although the executive officers of the land office do not enter up judgments or keep records, like the judgment roll of a court, their decisions are admissible in a proceeding in the land office.⁵

c. LAND CERTIFICATES. — The production of a certificate from the general land office, signed by the proper officer, is *prima facie* evidence of its validity,⁶ and the recitals in such certificate are legitimate evidence for or against any party claiming under it.⁷

1. Location May Be Proved by Other than Positive Proof. — *Wright v. Hawkins*, 28 Tex. 452.

In *Alabama* the courts are authorized to take judicial notice of the location of certain lands. *Knabe v. Burden*, 88 Ala. 436; *Chambers v. Ringstaff*, 69 Ala. 140; *Ledbetter v. Borland*, 128 Ala. 418. See generally the title *JUDICIAL NOTICE*, vol. 17, p. 945.

2. Evidence to Locate Land Adjoining Town Site. — *Carroll v. Price*, 81 Fed. Rep. 137.

Parol Testimony of County Surveyor. — The location of land described in a certificate from the land office may be proved by the parol testimony of the county surveyor. *Turney v. Goodman*, 2 Ill. 184.

Evidence to Prove Location Where Plat Is Lost. — In a deed of land a plat of a town site referred to becomes a part of the deed; hence, parol proof cannot be introduced as to the identity of the land conveyed until the plat is first produced, if available. But upon proof of the loss of the original plat, copies thereof may be introduced to identify the land. *Murray v. Hobson*, 10 Colo. 75.

3. Roberts v. Richards, 84 Me. 1.

4. Judicial Notice of Land-office Rules, Etc. — *Caha v. U. S.*, 152 U. S. 211; *Fisher v. Hallock*, 50 Mich. 463; *Whitney v. Spratt*, 25 Wash. 62. See the title *JUDICIAL NOTICE*, vol. 17, p. 914 *et seq.*

Opening and Closing of Land Office. — The certificate of the commissioner of the general land office is not competent to establish when the land office opened and closed. *Chambers v. Fisk*, 22 Tex. 504.

5. Decisions by Officers of Land Office Admissible in Contest in Land Office. — *Potter v. Randolph*, 126 Cal. 458.

Copies of Records Appertaining to the Land Office are evidence in nearly all the Western and Southwestern states. *Best v. Polk*, 18 Wall. (U. S.) 112; *Campbell v. Laclede Gas Co.*, 119 U. S. 445; *Stephens v. Westwood*, 25 Ala. 716; *Dawson v. Parham*, 55 Ark. 286; *Finley v. Woodruff*, 8 Ark. 328; *Goodwin v. McCabe*, 75 Cal. 584; *Smith v. Mosier*, 5 Blackf. (Ind.) 51; *Franklin v. Woodland*, 14 La. Ann. 184; *Beauvais v. Wall*, 14 La. Ann. 195; *Boddie v. Pardee*, 74 Miss. 13; *McLane v. Bovee*, 35 Wis. 27.

Name of Register Who Issues Copy Not Necessary. — *Mitchell v. Mitchell*, 8 Gill (Md.) 98.

Records of Register of Land Office May Be Proved by Certified Copies. — *Ward v. Moorey*, 1 Wash. Ter. 104.

Certified Copy of Official Letter from Commissioner of Land Office Not Admissible. — *McCarver v. Herzberg*, 120 Ala. 523; *Hendry v. Willis*, 33 Ark. 833; *Preiner v. Meyer*, 67 Minn. 197.

Certified Copy of Letter from Recorder of State Land Office Admissible. — *People v. Hagar*, 52 Cal. 171.

Certified Copy of Extract from Record of Land Office Not Admissible. — *Griffith v. Evans*, 1 Pet. (C. C.) 166; *Griffith v. Tunckhouser*, 1 Pet. (C. C.) 418.

Admissibility of Book Containing Entries Without Seal or Signature. — In *Holleran v. Meisel*, 91 Va. 143, it was held that where a book, labeled "Patents," in the office of the register of the land office, contained an entry without seal or signature, such entry was not a patent, but was admissible as "a memorandum from the colonial records," tending to prove that proceedings had been taken looking to the execution and issuance of a grant, to be followed, if possible, by evidence tending to show that the grant so contemplated and begun was actually executed, issued, and delivered.

Letter from Secretary of Land Office to Deputy Surveyor Admissible. — *Fothergill v. Stover*, 1 Dall. (Pa.) 6.

Deposition of Register of Land Office Inadmissible to Prove Vacancy of Public Lands. — *Lacey v. Marnan*, 37 Ind. 168.

Certificate of Land Officer Evidence When Made So by Statute. — *Mays v. Johnson*, 4 Ark. 614; *Hastings v. Devlin*, 40 Cal. 358. See also *Johnson v. Mays*, 8 Ark. 386; *Turney v. Goodman*, 2 Ill. 184; *Russell v. Whiteside*, 5 Ill. 7; *Delauney v. Burnett*, 9 Ill. 454; *Culbertson v. Coleman*, 47 Wis. 193. Compare *Brown v. Warren*, 16 Nev. 228.

Land Certificate Prima Facie Evidence of Validity. — *Olcott v. Ferris*, (Tex. Civ. App. 1894) 24 S. W. Rep. 848.

7. Recitals in Land Certificate Legitimate Evidence. — *McPhail v. Burris*, 42 Tex. 142.

Admissibility of Mutilated and Defaced Land Certificate. — *Pope v. Anthony*, (Tex. Civ. App. 1902) 68 S. W. Rep. 521.

In Order to Identify a Land Certificate, not
Volume XXVI.

XXI. DEPREDACTIONS ON PUBLIC LANDS — 1. In General. — Congress and the state legislatures have at various times passed laws forbidding and defining depredations on the public lands.¹

Common-law Rights of Government. — The United States government has all the common-law rights of an individual in respect to depredations committed upon its property, and, through the commissioner of the general land office, representing the executive department of the government having charge of the public domain, may direct the seizure and sale of timber cut by trespassers upon the public lands.²

Government and Grantee Not Tenants in Common. — Where a given number of alternate sections is granted to a railroad to aid in its construction, after the road is completed, but before the sections granted are selected or surveyed, such grantee and the United States are not tenants in common, and cannot maintain a joint action against a trespasser upon territory embracing both odd and even numbered sections, although only a government survey is needed to distinguish the respective sections.³ Nevertheless, an injunction will be awarded in behalf of the company, showing the necessary interest in the property, to prevent such waste and destruction.⁴

Titled of Forfeited Lands. — Where lands granted to a state by the United States are forfeited by the nonperformance of conditions subsequent, the title to such lands remains in the state until some action has been taken either by legislation or by judicial proceedings to enforce a forfeiture. Hence the timber cut upon such lands, although converted into personalty by being cut, remains the property of the state, and the state can authorize one to take possession of such property wherever found.⁵ Nothing remains of the original title to the United States except the possibility of a reversion, which is an insufficient basis for an action of trover for such timber. Nor does the title to such timber, after cutting, revert to the United States by virtue of an act of Congress forfeiting the lands upon which such timber has been cut; such forfeiture affects the land only.⁶

Repeal of Statute Before Termination of Suit. — Where, before the termination of an action for depredations upon timber land of the United States, the statute under which the action was brought is repealed, such action does not necessarily fall.⁷

only may reference be made to the patent issued thereon, but recourse may also be had to the records of the general land office. *Cox v. Cook*, 59 Tex. 521.

A Patent Is Evidence of the Genuineness of the Certificate on which such patent issued. *Kimbro v. Hamilton*, 28 Tex. 560.

Indorsements on the Certified Land-office Copy of a Certificate which are certified to be correct copies of indorsements on the original certificate are admissible. *Pendleton v. Shaw*, 18 Tex. Civ. App. 439.

1. Principal Federal Statutes. — The chief federal statutes upon the subject are those of March 2, 1831, Rev. Stat. U. S., § 2461, and amendments thereto of March 3, 1859, Rev. Stat. U. S., § 5388; June 3, 1878, 20 U. S. Stat. at L. 90, c. 151, §§ 4, 5; and June 4, 1888, 25 U. S. Stat. at L. 166, c. 340.

2. Common-law Rights of Government. — *Camfield v. U. S.*, 167 U. S. 518; *Stephenson v. Little*, 10 Mich. 433.

Replevin. — Where the ownership of timber is dependent on the question of the title to the land from which it was cut, that issue may be determined in an action of replevin brought by the government. *U. S. v. Cook*, 19 Wall. (U.

S.) 591; *U. S. v. Steenerson*, (C. C. A.) 50 Fed. Rep. 504.

3. Government and Grantee Not Tenants in Common. — *Northern Pac. R. Co. v. Hussey*, 15 U. S. App. 391.

Proper Form of Action. — So where the United States and its grantee own a given tract in ascertained proportions, but the land has not been surveyed and apportioned to each, a suit for an accounting is not the proper method to determine the damage to the interest of one of the parties by the other in cutting timber upon such land, since they are not tenants in common, and it is impossible to tell on whose land the timber was cut. *U. S. v. Northern Pac. R. Co.*, 6 Mont. 351.

4. *Erhardt v. Boaro*, 113 U. S. 537; *Northern Pac. R. Co. v. Hussey*, 15 U. S. App. 391.

5. Title of Forfeited Lands. — *Schulenberg v. Harriman*, 88 U. S. 44.

6. *Schulenberg v. Harriman*, 88 U. S. 44; *U. S. v. Loughrey*, 172 U. S. 206, *distinguishing* *Heath v. Ross*, 12 Johns. (N. Y.) 140, and *Musser v. McRae*, 44 Minn. 343.

7. Repeal of Statute Before Termination of Suit. — *U. S. v. Williams*, 8 Mont. 85.

As to the effect in general of the repeal of

2. Meaning of "Timber." — Construing the Act of 1831, prohibiting the cutting of live-oak or red cedar trees "or other timber" except for naval purposes, it has been held that the word "timber" includes not only live-oak or red cedar trees, but oak, hickory, and any other trees, although cut and used for fuel.¹

Question of Fact. — Whether wood cut from public lands is timber within the statute is a question of fact to be determined by a jury, and cannot be properly determined upon a demurrer to the indictment.²

3. Inclosures. — The Act of February 25, 1885, forbids the erection and maintenance of inclosures upon public lands without claim, color of title, or an assertion of right thereto.³

Meaning of Prohibition. — It is, however, only when, under the guise of inclosing his own land, a person builds a fence for the purpose and with the intention of inclosing the public lands of the government that the fence or inclosure becomes unlawful. Fencing or inclosing one's own land is lawful, and it is also lawful to fence or inclose up to a point connecting immediately with the fence or inclosure of an adjoining landowner.⁴

Inclosing Withdrawn Lands. — The inclosure of lands which have been withdrawn from settlement by the government, with intention to transfer title thereto to a railroad, is not a violation of the statute.⁵

Inclosure of School Lands. — Prohibition against inclosures applies to school sections, since these are public lands, the title thereto remaining in the United States until final steps necessary to transfer such title to the state.⁶

The Inclosure of Public Lands for Private Use Is Both a Purpresture and a Public Nuisance, and the government can abate the inclosure and procure an injunction against its re-erection or continuance.⁷

Jurisdiction. — The act prohibiting inclosures confers upon territorial District Courts jurisdiction to try cases arising thereunder.⁸

a statute giving a remedy for the invasion of a common-law right, see the title *STATUTES, post*.

1. What Meant by "Timber." — *U. S. v. Briggs*, 9 How. (U. S.) 351; *U. S. v. Redy*, 5 McLean (U. S.) 358, 27 Fed. Cas. No. 16,133; *U. S. v. Stores*, 4 Woods (U. S.) 641; *U. S. v. Soto*, (Ariz. 1901) 64 Pac. Rep. 419.

The Act Embraces Standing Trees and Trees Felled and prepared for transportation to a vessel or sawmill, but does not embrace any article manufactured from the trees, such as shingles or boards. *U. S. v. Schuler*, 6 McLean (U. S.) 28.

But scrub-oaks are not timber which the government forbids any one to cut or sell from its lands. *O'Hanlon v. Denver*, 81 Cal. 60, 15 Am. St. Rep. 19.

Boxing Turpentine Trees Not "Cutting." — *U. S. v. Leatherberry*, 27 Fed. Rep. 606; *U. S. v. Garretson*, 42 Fed. Rep. 22; *Bryant v. U. S.*, 105 Fed. Rep. 941, 45 C. C. A. 145. But see *U. S. v. Taylor*, 35 Fed. Rep. 484.

2. Question of Fact. — *U. S. v. Soto*, (Ariz. 1901) 64 Pac. Rep. 419, *overruling* *Bustamente v. U. S.*, (Ariz. 1895) 42 Pac. Rep. 111.

3. Inclosures. — 23 U. S. Stat. at L. 321, c. 140.

4. Meaning of Prohibition. — *Potts v. U. S.*, (C. C. A.) 114 Fed. Rep. 52, *distinguishing* *Camfield v. U. S.*, 167 U. S. 518.

Inclosing Even Sections with Odd. — Under this statute an owner of the odd-numbered sections cannot erect fences thereupon in such a manner as to inclose the even sections belonging to the United States, even though he erects gates at

the section lines in such a way as to afford ingress to and egress from the lands of the United States. *U. S. v. Brighton Ranch Co.*, 25 Fed. Rep. 465; *Camfield v. U. S.*, (C. C. A.) 66 Fed. Rep. 101, 167 U. S. 518; *U. S. v. Buford*, 8 Utah 173. But see *U. S. v. Douglas-Willan Sartoris Co.*, 3 Wyo. 287; *U. S. v. Elliott*, 7 Utah 389.

5. Inclosing Withdrawn Lands. — *U. S. v. Bransteen*, 13 Sawy. (U. S.) 64, 32 Fed. Rep. 738; *U. S. v. Godwin*, 7 Mont. 402.

6. Inclosure of School Lands. — *U. S. v. Bisel*, 8 Mont. 20; *U. S. v. Elliott*, 12 Utah 119, *overruling* 7 Utah 389; *Barkley v. U. S.*, 3 Wash. Ter. 522. See also *supra*, this title, *School and University Grants*.

Whether a school section in a territory is or is not public land before the admission of the territory as a state, after such admission the section becomes the land of the state, and the United States can no longer prosecute an action against one who inclosed it before the admission of the state. *U. S. v. Elliott*, 74 Fed. Rep. 92.

7. Nuisance. — Mississippi, etc., R. Co. v. Ward, 2 Black (U. S.) 485; *U. S. v. Brighton Ranch Co.*, 26 Fed. Rep. 218; *State v. Goodnight*, 70 Tex. 682; *State v. Woodward*, 23 Vt. 92; *State v. Atkinson*, 24 Vt. 448.

It Is No Defense to an Inclosure of Public Lands that the trespasser has expended large sums of money in erecting irrigation plants upon such property. *Camfield v. U. S.*, 167 U. S. 518.

8. Jurisdiction. — *U. S. v. Bisel*, 8 Mont. 20; *U. S. v. Flaherty*, 8 Mont. 32.

4. Intent as Affecting Liability — *a. CUTTING TIMBER.* — The Act of June 3, 1878, makes the unlawfulness of removing timber from public land dependent upon the "intent to export or dispose of the same."¹ To bring any case within the statute it is necessary to show that the defendant cut the timber from land known to be public land, and with intent to export or dispose of the same. It is not necessary to show further that there was an actual evil or criminal intent or bad purpose amounting to moral culpability.²

Test of Intention. — The test to determine whether one is a wilful or an innocent trespasser is not his compliance with the law, but his honest belief and his actual intention at the time when he commits the trespass. Neither a justification of his acts nor any other complete defense to them is essential to the proof that he who committed them was not a wilful trespasser; and when the good faith or the intent of the party is in issue, his acts and sayings in relation to the affair at the time of the transaction generally constitute the best evidence of the fact, and are always competent and material.³

Question for Jury. — Whether the defendant cut and took the timber unintentionally and in the honest belief that he was lawfully exercising the right is a question for the jury.⁴

***b. INCLOSURE OF LAND* — Intent Immaterial.** — Under the Act of February 25, 1885, the inclosure of public land is unlawful, regardless of the intent.⁵

5. Grants to Railroads. — The Act of March 3, 1875, granted to any railroad company within certain limitations a right of way through the public lands of the United States "to the extent of one hundred feet on each side of the central line of said road; also the right to take from the public lands adjacent to the line of said road material, earth, stone, and timber necessary for the construction of said railroad."⁶ It has been held that the meaning of the word "adjacent" in this act is to be determined by the evidence in each particular case;⁷ that it is a mixed question of law and fact;⁸ and that the road is restricted to the use of land, timber, etc., in proximity, contiguous, or near to the road, and cannot include land fifty or one hundred miles distant.⁹

1. Intent as Affecting Liability. — 20 U. S. Stat. at L. 90, c. 151, § 4.

2. Proof of Intent. — *Teller v. U. S.*, (C. C. A.) 113 Fed. Rep. 273. See also *U. S. v. Mock*, 149 U. S. 273; *U. S. v. Hacker*, 73 Fed. Rep. 292.

In *U. S. v. English*, 107 Fed. Rep. 867, it was regarded as a fairly open question whether timber might not be cut for use at a quartz mill located on lands adjacent to those on which the timber was cut; and the question being a new one, the court refused to hold the defendants criminally liable, but held them liable to the value of the timber so used.

Construing the Act of June 3, 1878, which forbade the cutting of timber in the states of California, Oregon, and Nevada and the territory of Washington, it was held that the offense was completed by the cutting of the timber, and that it was not necessary that it should have been cut with an intent to export. *English v. U. S.*, (C. C. A.) 116 Fed. Rep. 625, *distinguishing* *U. S. v. Hacker*, 73 Fed. Rep. 292, and *following* *Wooden-ware Co. v. U. S.*, 106 U. S. 432.

3. Test of Intention. — *U. S. v. Gentry*, (C. C. A.) 119 Fed. Rep. 70, *following* *U. S. v. Homestead Min. Co.*, (C. C. A.) 117 Fed. Rep. 481, and *Durant Min. Co. v. Percy Consol. Min. Co.*, (C. C. A.) 93 Fed. Rep. 166.

4. Question for Jury. — *Gentry v. U. S.*, (C. C. A.) 101 Fed. Rep. 51; *Grubbs v. U. S.*, 105

Fed. Rep. 314, 44 C. C. A. 513; *U. S. v. Van Winkle*, (C. C. A.) 113 Fed. Rep. 903.

Where, however, timber was cut by a purchaser thereof from a homesteader, such purchaser knowing that the land belonged to the government and that the homesteader did not intend immediately to cultivate the land from which the timber was cut, it was held that an unlawful intent must be presumed. *U. S. v. Niemeyer*, 94 Fed. Rep. 147.

5. Intent Immaterial in Regard to Enclosing Lands. — *U. S. v. Camfield*, 59 Fed. Rep. 562; *Camfield v. U. S.*, (C. C. A.) 66 Fed. Rep. 101, 167 U. S. 518; *U. S. v. Brighton Rancho Co.*, 26 Fed. Rep. 218; *U. S. v. Cleveland, etc., Cattle Co.*, 33 Fed. Rep. 323. But see *U. S. v. Douglas-Willan-Sartoris, etc., Co.*, 3 Wyo. 288; *U. S. v. Brandestein*, 32 Fed. Rep. 738.

6. Grants to Railroad. — 18 U. S. Stat. at L. 482, c. 152.

7. Meaning of "Adjacent." — *U. S. v. St. Anthony R. Co.*, (C. C. A.) 114 Fed. Rep. 722; *U. S. v. Bachelder*, 9 N. Mex. 15; *U. S. v. Lynde*, 47 Fed. Rep. 297. See also *U. S. v. Denver, etc., R. Co.*, 150 U. S. 14. And see *ADJACENT*, vol. 1, pp. 634, 635, notes.

8. Mixed Question. — *Bachelder v. U. S.*, 83 Fed. Rep. 986, 55 U. S. App. 227.

9. Land Too Distant. — *Stone v. U. S.*, 29 U. S. App. 32, 64 Fed. Rep. 667, 167 U. S. 178.

Within Three Miles. — Lands lying within three miles of a railroad tract are adjacent

Extent of Right. — The right to take material necessary for the construction of the railroad means the railroad as a completed structure, and therefore includes the right to take materials necessary for the construction of stations, machine shops, sidetracks, turnouts, and water tanks.¹

Right to Buy Timber Unlawfully Cut. — The Act of June 3, 1878, which gave to citizens of the United States the right to cut timber "for buildings, agricultural, mining, or other domestic purposes,"² expressly denied such right to railroad corporations; therefore it has been held that a railroad had no right to purchase for fuel wood which has been cut by others.³

Timber for Branch Line. — Timber may be taken from land adjacent to a completed portion of the main line to be used in the construction of a branch line, although the latter is not constructed until several years after the main line is completed.⁴

Performance by Railroad of Conditions Precedent. — The Act of 1875 grants land only to railroad companies that communicate to the United States their acceptance of the offer by filing the prescribed papers with the secretary of the interior. Until this is done the railroad has no right to cut timber upon public land, and therefore can confer no such right upon others; nor does the filing of the prescribed papers confer any right or title to timber cut before such filing. The statute does not grant to the railroad company the right to appropriate timber already cut, but confers only the right to go upon public land adjacent to the line of its road and take timber in its natural state.⁵

6. Rules and Regulations of Secretary. — The Act of June 3, 1878, gives to the secretary of the interior power to prescribe rules and regulations concerning the cutting and removal of timber.⁶ The secretary, however, has no power to enlarge or restrict the purposes expressed in the act for which timber may be used,⁷ nor can he vary the provisions of the statute as to the lands from which it may be cut, or in any way enlarge or detract from the privileges granted by the statute.⁸

7. Damages. — In estimating damages caused by depredations upon timber lands of the United States, the courts have applied the following rules:

A Wilful Trespasser is liable for the full value of the property taken at the time of the commencement of the suit, without any deduction for labor or expense bestowed thereon;⁹ but if he is an unintentional or mistaken trespasser, he

thereto. *U. S. v. Denver, etc., R. Co.*, (N. Mex. 1901) 66 Pac. Rep. 550.

And Even Lands Lying from Seventeen to Twenty-six Miles Distant have been held to be adjacent where no suitable land could be found nearer, and where the removal of the materials taken benefited the land. *U. S. v. St. Anthony R. Co.*, (C. C. A.) 114 Fed. Rep. 722.

1. Extent of Right. — *U. S. v. Chaplin*, 31 Fed. Rep. 890, 12 Sawy. (U. S.) 605; *U. S. v. Denver, etc., R. Co.*, 150 U. S. 1, 16.

2. 20 U. S. Stat. at L. 88, c. 150.

3. Right to Buy Timber Unlawfully Cut. — *U. S. v. Eureka, etc., R. Co.*, 40 Fed. Rep. 419.

4. Timber for Branch Line. — *U. S. v. Price Trading Co.*, 109 Fed. Rep. 239, 48 C. C. A. 331. See further *Denver, etc., R. Co. v. U. S.*, 34 Fed. Rep. 838, 150 U. S. 15; *U. S. v. Lynde*, 47 Fed. Rep. 297.

5. Performance of Conditions Precedent by Railroad. — *U. S. v. Eccles*, 111 Fed. Rep. 490, following *U. S. v. Price Trading Co.*, (C. C. A.) 109 Fed. Rep. 243.

6. Rules and Regulations of Secretary. — 20 U. S. Stat. at L. 88, c. 150; *Northern Pacific R. Co. v. Lewis*, 162 U. S. 376; *U. S. v. United*

Verde Copper Co., (Ariz. 1903) 71 Pac. Rep. 954; *U. S. v. Williams*, 6 Mont. 379.

Not Class Legislation. — Such rules and regulations do not come within the ban of class legislation prohibited by the Constitution, since they operate alike on all persons and property similarly situated and do not deny to any one the equal protection of the laws. *Dastervignes v. U. S.*, (C. C. A.) 122 Fed. Rep. 30.

7. May Not Enlarge or Restrict Purposes of Act. — *U. S. v. United Verde Copper Co.*, (Ariz. 1903) 71 Pac. Rep. 954.

8. *U. S. v. Copper Queen Consol. Min. Co.*, (Ariz. 1900) 60 Pac. Rep. 885.

Roasting of Ore Allowed. — It has been held that the "roasting" of ore in order to prepare it for the operation of smelting is a part of mining for which timber may be used, and is not a part of smelting, the use of timber for which is forbidden by the rules of the secretary promulgated January 18, 1900. *U. S. v. United Verde Copper Co.*, (Ariz. 1903) 71 Pac. Rep. 954.

9. Wilful Trespasser Liable for Full Value. — *Wooden-ware Co. v. U. S.*, 106 U. S. 432; *Benson Min., etc., Co. v. Alta Min., etc., Co.*, 145 U. S. 428; *U. S. v. Ordway*, 30 Fed. Rep. 30,

is liable only for the value of the timber at the time of the conversion less the value of any such labor or expense.¹

A Purchaser from a Wilful Trespasser without notice of the wrong or of the true ownership of the property is liable only for the value thereof at the time of such purchase, and not for any labor or expense he may bestow upon it thereafter; but if he had such notice, he is liable for the value thereof at the time of such purchase without deduction for labor or expense bestowed thereupon.²

In Determining the Value of the Growing Timber, recovery is not limited to its actual value for firewood or lumber, but is measured by the injury to the estate. If the trees have a value ascertainable without reference to the soil on which they grew, the recovery may be of the value of the trees destroyed or injured, and not of the difference between the value of the land before and after such injury. The value of the trees after cutting and working must be determined with reference to perils of fire and ravages of worms or decay caused by or traceable to the trespass of the defendant.³

Exemplary Damages. — Where the injury is wilful or the result of gross negligence or reckless indifference to the rights of the government, the defendant may be compelled to pay exemplary damages.⁴

Nominal Damages. — Where trespass is shown, but the value of the standing timber cannot be shown, the government is entitled at least to nominal damages.⁵

Intermingling of Logs. — Where logs taken from public land are so mixed with those taken from the plaintiff's own land that they cannot be distinguished, the trespasser loses all right to the logs taken from his own land and intermixed by him with logs taken from land belonging to the government.⁶

8. Defenses — *a.* **IN GENERAL.** — The right to cut timber on public lands is exceptional and for specific purposes only. The broad general rule is against the right, and the presumption in the absence of evidence is that the cutting is illegal.⁷

b. **RIGHTS OF HOMESTEADERS TO USE TIMBER.** — Under the Homestead Act and the supplements thereto a settler upon a homestead may cut such timber as is necessary to clear the land for cultivation, or to build for himself a house, outbuildings, and fences, or to exchange for lumber to be devoted to the same purposes; but not to sell for money except so far as the timber may have been cut for the purpose of clearing the land for cultivation.⁸

36; *Durant Min. Co. v. Percy Consol. Min. Co.* (C. C. A.) 93 Fed. Rep. 166; *Gentry v. U. S.*, (C. C. A.) 101 Fed. Rep. 51; *U. S. v. Van Winkle*, (C. C. A.) 113 Fed. Rep. 903.

1. Unintentional Trespass. — *Wooden-ware Co. v. U. S.*, 106 U. S. 432; *Benson Min., etc., Co. v. Alta Min., etc., Co.*, 145 U. S. 428; *U. S. v. Mock*, 149 U. S. 273; *U. S. v. Williams*, 18 Fed. Rep. 475, 9 Sawy. (U. S.) 377; *U. S. v. Northern Pac. R. Co.*, 67 Fed. Rep. 890; *U. S. v. Eccles*, 111 Fed. Rep. 490; *U. S. v. Van Winkle*, 113 Fed. Rep. 903, 51 C. C. A. 533; *Powers v. U. S.*, 119 Fed. Rep. 562; *Fisher v. Brown*, 37 U. S. App. 407; *Gentry v. U. S.*, 41 C. C. A. 185; *Potter v. U. S.*, (C. C. A.) 122 Fed. Rep. 49; *Pine River Logging Co. v. U. S.*, 186 U. S. 279.

2. Purchaser from Trespasser. — *Wooden-Ware Co. v. U. S.*, 106 U. S. 432; *U. S. v. Heilner*, 26 Fed. Rep. 80; *U. S. v. Perkins*, 44 Fed. Rep. 670.

3. How Value Is Determined. — *U. S. v. Taylor*, 35 Fed. Rep. 488.

4. Exemplary Damages. — *U. S. v. Taylor*, 35 Fed. Rep. 484.

5. Nominal Damages. — *U. S. v. Mock*, 149 U. S. 273; *U. S. v. Taylor*, 35 Fed. Rep. 484.

Where a party who has cut timber on crown land without right has obtained a judgment against other persons, who also are without right to the timber cut, for seizing and carrying it away, the crown has a right to the judgment recovered to the extent of the value of the timber. *Atty.-Gen. v. Price*, 15 Grant Ch. (U. C.) 304.

6. Intermingling of Logs. — *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44; *U. S. v. Loughrey*, 172 U. S. 206; *Stephenson v. Little*, 10 Mich. 433. See also the title *CONFUSION OF GOODS*, vol. 6, p. 594 et seq.

7. Cutting Timber Prima Facie Illegal. — *U. S. v. Cook*, 19 Wall. (U. S.) 591; *Northern Pac. R. Co. v. Lewis*, 162 U. S. 366; *U. S. v. Price Trading Co.*, (C. C. A.) 109 Fed. Rep. 249; *U. S. v. United Verde Copper Co.*, (Ariz. 1903) 71 Pac. Rep. 954; *U. S. v. Gumm*, 9 N. Mex. 611.

8. Rights of Homesteaders to Use Timber. — *U. S. v. Cook*, 19 Wall. (U. S.) 591; *Shiver v. U. S.*, 159 U. S. 491; *U. S. v. Nelson*, 5 Sawy. (U. S.) 68; *Timber Cases*, 11 Fed. Rep. 81; *U. S. v. Smith*, 11 Fed. Rep. 487; *U. S. v. Stores*, 14 Fed. Rep. 824; *U. S. v. Yoder*, 18 Fed. Rep. 372; *U. S. v. Williams*, 18 Fed. Rep.

It Is No Defense to a Trespass upon public lands that the government has overlooked prior acts of trespass,¹ or that an agent of the government has, outside of his authority, given permission to the trespasser,² or that the trespasser derived no profit from his acts.³ So it is no defense that the timber was cut by mistake when the evidence shows that it would have been likewise a trespass to cut timber where the defendant claimed that he intended to cut it.⁴

But It Is a Defense that an authorized agent of the government has released all claim to the timber, or has permitted the defendant to go upon the land and has accepted full pay for the rent thereof.⁵

Where Permit Is Irregular. — If a permit to cut timber on state lands is not strictly according to the statute, the holder of the permit may be a trespasser as against the state; but until the state interferes, he may hold and sell the timber cut, and his vendee will take title subject to the right of the state. And if the state, instead of interfering, receives payment in full, the title is unobjectionable.⁶

Cutting under Inchoate Right to Land. — A settler who, under the Homestead Act, pending his residence and prior to the issue of a final certificate, cuts and removes timber for export and sale and afterwards obtains a certificate of his compliance with the law is not liable to the United States for damages for cutting such timber.⁷

Trespasser Commuting Entry. — Moreover, where a defendant, after the commencement of a civil suit for damages, commutes his entry, as he is permitted by law to do, by paying in full the minimum price for which such lands are

475; *U. S. v. Lane*, 19 Fed. Rep. 910; *Cunningham v. Metropolitan Lumber Co.*, (C. C. A.) 110 Fed. Rep. 332; *U. S. v. Blendauer*, 122 Fed. Rep. 703; *U. S. v. Young*, 8 Sawy. (U. S.) 108; *U. S. v. Ball*, 31 Fed. Rep. 667, 12, Sawy. (U. S.) 514; *U. S. v. Freyberg*, 32 Fed. Rep. 195; *U. S. v. Murphy*, 32 Fed. Rep. 376; *U. S. v. Taylor*, 35 Fed. Rep. 486; *Grubbs v. U. S.*, 105 Fed. Rep. 314, 44 C. C. A. 513; *U. S. v. McEntee*, 23 Int. Rev. Rec. 368, 26 Fed. Cas. No. 15,673; *Stone v. U. S.*, 167 U. S. 178; *U. S. Niemeyer*, 94 Fed. Rep. 147; *Ladda v. Hawley*, 57 Cal. 51; *Brown v. Throckmorton*, 11 Ill. 529.

A purchaser of timber may defend by showing that it was bought from a homesteader who had complied with all the statutory requirements, but who, on account of his age and poverty, could not clear his land and had therefore contracted with the defendant to exchange timber for a house and buildings. *Conway v. U. S.* (C. C. A.) 95 Fed. Rep. 615.

1. Condonation by Government. — *U. S. v. Mock*, 149 U. S. 273; *U. S. v. Humphries*, 149 U. S. 277; *Teller v. U. S.*, (C. C. A.) 113 Fed. Rep. 273.

2. Permission of Agent in Excess of Authority. — *Whiteside v. U. S.*, 93 U. S. 247; *Carr v. U. S.*, 98 U. S. 438; *Pine River Logging Co. v. U. S.*, 186 U. S. 279; *U. S. v. Murphy*, 32 Fed. Rep. 376; *Potter v. U. S.*, (C. C. A.) 122 Fed. Rep. 49; *State ex rel. Cayard*, 52 La. Ann. 4; *Nickles v. Wells*, 2 Utah 167.

Where, in order to preserve their value, the government consents that logs wrongfully cut may be sawed into lumber, such consent does not give to a trespasser the right to sell the lumber and appropriate the proceeds. *U. S. v. Pine River Logging, etc., Co.*, 49 U. S. App. 24, 78 Fed. Rep. 319.

State assessors authorized by the land agent

to guard public land against trespassers are liable in damages if they assume to permit others to sell timber from such land. *State v. Smith*, 78 Me. 260, 57 Am. Rep. 802.

3. Business Not Profitable. — *U. S. v. Humphries*, 149 U. S. 277.

4. U. S. v. Williams, 9 Sawy. (U. S.) 377, 18 Fed. Rep. 475.

5. Act of Government Amounting to Permission. — *U. S. v. Gear*, 3 McLean (U. S.) 571, 25 Fed. Cas. No. 15,195; *U. S. v. Teller*, 106 Fed. Rep. 447, 45 C. C. A. 416; *Wells v. Nickles*, 104 U. S. 444.

Question for Jury. — Where the defendant can show a communication from the land department which he construed as a permission to proceed with the cutting of timber, the sufficiency of the defense should at least be submitted to the jury. *U. S. v. Teller*, 106 Fed. Rep. 447, 45 C. C. A. 416.

6. Irregular Permit. — *Mason v. Sprague*, 47 Me. 18.

Under the *Minnesota* statute forbidding the sale of any pine timber on state lands except where such timber is liable to waste, the state auditor acting as commissioner of the state land office has no authority to sell any pine timber without a statement by a board appointed for the purpose; and a permit issued by such officer to cut and remove timber under the circumstances is void, and may be attacked collaterally although it recites on its face facts showing that the law has been complied with. *State v. Shevlin-Carpenter Co.*, 62 Minn. 99.

7. Cutting under Inchoate Right to Land. — *U. S. v. Ball*, 31 Fed. Rep. 667.

And the rule is the same in the case of possession under a contract of purchase where the vendee cuts and removes timber under circumstances that would give to the vendor a right in equity to an injunction to prevent the im-

sold,¹ he thereby makes a completed purchase of the land and so changes the character or status of the original entry as to deprive the United States of the right of recovery for timber previously cut from the land.²

Where Trespasser Buys Land. — But one who has made no application to preempt land³ or whose entry is canceled⁴ has no right to cut, or to the timber cut, although he may afterwards buy the land.

And under the Act of June 3, 1878, which applies only to the states of California, Oregon, and Nevada, and the territory of Washington, a defendant is permitted to relieve himself from the criminal charge by buying the land from which the timber was cut, paying two dollars and fifty cents per acre therefor; but such payment does not relieve him from his liability to account to the United States in damages for the value of the timber.⁵

Cutting Outside of Improvements. — While a settler may cut the timber necessary to clear his land for cultivation, and may sell the portion of the timber not needed for building purposes, he cannot go outside of the improvements and cut and sell timber, even though he intends to acquire the title to such land under his claim, since he might at any time change his intention after the timber is taken, and thus defeat the object of the law.⁶

Trespasser Acquires No Title to Timber Cut. — One who has unlawfully cut wood upon public land acquires no title thereto, and his vendee, in purchasing such wood, acquires no title which he can maintain against the government.⁷

Where Title Has Passed from Government. — If the settler has fully perfected his entry upon public land by the payment of the purchase price, such land ceases to be a part of the public domain,⁸ and the secretary of the interior cannot confer upon another person the right to cut timber thereupon.⁹

Cutting Timber on Mineral Lands. — Under the Act of Congress of June 3, 1878, giving to the residents of mineral districts of the United States the right to fell and remove timber for building, agricultural, mining, or other domestic purposes,¹⁰ it is necessary in order to justify such cutting to show that minerals exist in sufficient quantities in such land to justify exploration and development. The mere fact that the land contains particles of gold or other valuable minerals does not necessarily impress it with the character of mineral land as defined by the statute.¹¹

License Not Restricted to Citizens. — The authority of the act last cited is not limited to citizens of the United States who are also at the time *bona fide* residents of the territory, but includes aliens as well, provided they are *bona fide* residents of the territory mentioned.¹²

pairment of the value of the property pending the performance of the contract. *U. S. v. Ellis*, 122 Fed. Rep. 1016.

1. **Where Trespasser Commutes His Entry.** — *Rev. Stat. U. S.*, §§ 2259, 2301.

2. *U. S. v. Freyberg*, 32 Fed. Rep. 195.

3. **Where Trespasser Buys Land.** — *U. S. v. Brown*, 4 McLean (U. S.) 378.

4. *U. S. v. Perkins*, 44 Fed. Rep. 670; *Potter v. U. S.*, (C. C. A.) 122 Fed. Rep. 49.

5. **Act of June 3, 1878.** — 20 U. S. Stat. at L. 90, c. 151, § 5; *U. S. v. Scott*, 39 Fed. Rep. 900; *U. S. v. Norris*, 41 Fed. Rep. 424; *U. S. v. Kelly*, 3 Wash. Ter. 421.

6. **Cutting Outside of Improvements.** — *Timber Cases*, 11 Fed. Rep. 81.

7. **Trespasser Acquires No Title to Timber Cut.** — *Northern Pac. R. Co. v. Lewis*, 162 U. S. 366; *U. S. v. Eureka*, etc., R. Co., 40 Fed. Rep. 419; *Cunningham v. Metropolitan Lumber Co.*, (C. C. A.) 110 Fed. Rep. 332; *Spencer's Case*, 10 Ct. Cl. 255.

8. **Where Title Has Passed from Government.** — *Teller v. U. S.*, (C. C. A.) 113 Fed. Rep. 273

[*distinguishing Benson Min., etc., Co. v. Alta Min., etc., Co.*, 145 U. S. 428]; *Nelson v. Big Blackfoot Milling Co.*, 17 Mont. 553. See also *Belk v. Meagher*, 104 U. S. 279; *Whitney v. Taylor*, 158 U. S. 85; *Shiver v. U. S.*, 159 U. S. 491.

9. *U. S. v. Mullan Fuel Co.*, 118 Fed. Rep. 663.

10. **Cutting Timber on Mineral Lands.** — 20 U. S. Stat. at L. 88, c. 150.

11. *U. S. v. Copper Queen Consol. Min. Co.* (Ariz. 1900) 60 Pac. Rep. 885; *U. S. v. Saucier*, 5 N. Mex. 569.

What Are "Mineral" Lands — Lands in a mountain region in the vicinity of valuable mines, and showing some indications of valuable metals, which are unfit for cultivation and pasturage, and are not subject to entry as agricultural lands, are mineral lands within the meaning of the act. *U. S. v. Edwards*, 38 Fed. Rep. 812; *U. S. v. Basic Co.*, (C. C. A.) 121 Fed. Rep. 504. See also the title MINES AND MINING CLAIMS, vol. 20, p. 687.

12. **License Not Restricted to Citizens.** — *U. S.*

Clearing for Grazing. — It is not within the privilege of the statute to clear land for grazing purposes. Tilling of the land by the plow is what is contemplated by the act.¹

c. COLOR OF TITLE. — Under the Act of February 25, 1885, the essentials of an unlawful occupancy are that at the time of its inception there should have been no claim to the land made in good faith, and no color of title acquired in good faith. Hence, such claim and color of title constitute a perfect defense to an action for unlawfully inclosing public lands.²

Equitable Title. — Where a settler has paid for land taken up, but has received no patent therefor, he owns the equitable title, and the right of action for trespass upon such land is in him, and not in the United States; and it is immaterial that a contest has been instituted in a local land office since such payment and before the trespass.³

Government May Restrain Such Claimant. — The government, finding parties in possession of the public domain, even though under a claim and color of title, may restrain such parties from improper use of such land before proceeding in an action at law to establish its title.⁴

Acquittal in Criminal Action No Defense to Civil Action. — The fact that the defendant has been indicted for removing timber and acquitted does not bar an action against him to recover the value of the timber removed. The civil and criminal offenses are entirely distinct, and different rules of evidence are applicable to the two.⁵

9. Evidence — In General. — Under the plea of "not guilty" the government must be prepared to prove the commission by the defendant, his servants, employees, or agents, of the trespass of which it complains. It must be proved that the acts of trespass complained of were done by the defendant, or by his command, or that they were done for his benefit and with his knowledge and consent, or that he subsequently adopted and ratified them.⁶

Quantum of Proof. — In actions for trespass the ordinary rule in civil actions is applied, and proof beyond a reasonable doubt is not required as in criminal cases.⁷

Honesty of Intention is not proved by evidence showing that the defendant notified the agent of the government that he was cutting certain timber, and that he received no notice to desist.⁸ But the fact that the defendant makes reparation for his trespass by purchasing the land or by paying the purchaser for timber cut therefrom seems to indicate the absence of intent to defraud the public, and such offense is properly punishable by a nominal fine.⁹

v. Copper Queen Consol. Min. Co., (Ariz. 1900) 60 Pac. Rep. 885. See also *U. S. v. Smith*, 11 Fed. Rep. 487; *U. S. v. Eureka, etc.*, R. Co., 40 Fed. Rep. 419; *U. S. v. Richmond Min. Co.*, 40 Fed. Rep. 415.

1. Clearing for Grazing Not Authorized. — *U. S. v. Murphy*, 32 Fed. Rep. 376; *U. S. v. Mann*, 32 Fed. Rep. 386; *U. S. v. Niemeyer*, 94 Fed. Rep. 147.

2. Color of Title. — *U. S. v. Osborn*, 44 Fed. Rep. 29.

Color of title exists wherever there is a reasonable doubt regarding the validity of an apparent title, whether such doubt arises from the circumstances under which the land is held, the identity of the land conveyed, or the construction of the instrument under which the party in possession claims his title. *Cameron v. U. S.*, 148 U. S. 301; *Tidwell v. Chiricahua Cattle Co.*, (Ariz. 1898) 53 Pac. Rep. 192; *Los Angeles Farming, etc., Co. v. Hoff*, (Cal. 1893) 34 Pac. Rep. 518.

3. Equitable Title. — *U. S. v. Saucier*, 5 N. Mex. 569.

4. U. S. v. Cleveland, etc., Cattle Co., 33 Fed. Rep. 323.

5. Acquittal in Criminal Action No Defense to Civil Action. — *U. S. v. Nelson*, 5 Sawy. (U. S.) 68; *U. S. v. Smith*, 8 Sawy. (U. S.) 100; *U. S. v. Briggs*, 9 How. (U. S.) 354; *Stone v. U. S.*, 29 U. S. App. 32, 167 U. S. 178; *U. S. v. Konkapot*, 43 Fed. Rep. 64; *U. S. v. Stone*, 49 Fed. Rep. 848; *Broward v. State*, 9 Fla. 422.

6. Evidence. — *U. S. v. Taylor*, 35 Fed. Rep. 485.

7. Quantum of Proof. — *U. S. v. Taylor*, 35 Fed. Rep. 485.

Facts Tending to Show Criminal Intent. — *Teller v. U. S.*, (C. C. A.) 113 Fed. Rep. 273.

8. Notifying Government Agent. — *Teller v. U. S.*, (C. C. A.) 113 Fed. Rep. 273.

9. Purchasing Land or Timber. — *U. S. v. Murray*, 5 McLean (U. S.) 207, 27 Fed. Cas. No. 15,843.

Parol Evidence. — Where the trespass has been proved and the defendant fails to show any right or title in himself, parol evidence is not admissible to show that the land trespassed upon is swamp land and therefore belongs to the state.¹

Official Documents. — In order to show that the land which is the subject of the trespass has not been sold by the government, the official plats and other documents in the office of the land register may be produced in evidence by that officer.² But the receipts of the receiver of the land office are not of themselves sufficient evidence that the government's title has been divested, and that it has vested in the homestead claimant; hence such receipts are not a defense to an action for damages to the land in question.³

Burden of Proof — On Government. — The burden of proof is on the government to establish the cutting and conversion of timber by the defendant⁴ and to show that the terms of the grant have been exceeded.⁵

On Defendant. — The burden is on the defendant to show that the acts complained of were authorized by some statute,⁶ or that the timber was cut by mistake,⁷ or that those from whom he purchased the timber were authorized to cut it,⁸ or that a portion of the logs cut was not cut from public lands.⁹

Judgment Not Res Judicata. — As the question of title comes up collaterally and incidentally, in a prosecution for a criminal trespass, for the sole object of determining for the purpose of the particular case the question of trespass, the judgment in such case is not *res judicata* in any civil suit between the different claimants to the land so as to determine the ownership thereof.¹⁰

XXII. OFFENSES AGAINST LAND LAWS — 1. Forgery. — The altering or forging of documents or title papers, or uttering or publishing such altered or forged documents as true for the purpose of establishing against the United States a claim for public lands, is by statute made a criminal offense.¹¹

2. Fraud. — A conspiracy to defraud the government out of public lands by a pretended compliance with the exemption laws is an indictable offense.¹² A statute has been enacted by Congress providing for the punishment of persons guilty of fraudulent practices with regard to sales of public lands at auction.¹³

3. Perjury. — By act of Congress it is made perjury to make a false oath or affidavit in a proceeding authorized by law in relation to public lands.¹⁴

4. Injuring or Intimidating Occupant. — A conspiracy to injure, oppress, threaten, or intimidate one who resides on and cultivates public land for the purpose of perfecting his right thereto is made punishable by federal statute.¹⁵

1. **Parol Evidence.** — *Bly v. U. S.*, 4 Dill. (U. S.) 464, 3 Fed. Cas. No. 1,581.

2. **Official Documents.** — *Bly v. U. S.*, 4 Dill. (U. S.) 464, 3 Fed. Cas. No. 1,581; *Stoddard County v. Malone*, 115 Mo. 508.

3. **Receiver's Receipts.** — *U. S. v. Taylor*, 35 Fed. Rep. 484.

4. **Burden of Proof on Government.** — *Norris v. U. S.*, 44 Fed. Rep. 739; *U. S. v. Gumm*, 9 N. Mex. 611.

5. *Denver, etc., R. Co. v. U. S.*, 9 N. Mex. 382.

6. **Burden on Defendant.** — *Northern Pac. R. Co. v. Lewis*, 162 U. S. 376; *U. S. v. Eccles*, 111 Fed. Rep. 490; *U. S. v. Gumm*, 9 N. Mex. 611.

7. *U. S. v. Baxter*, 46 Fed. Rep. 350.

8. *U. S. v. Denver, etc., R. Co.*, 31 Fed. Rep. 886.

9. *Norris v. U. S.*, 44 Fed. Rep. 735; *U. S. v. Eccles*, 111 Fed. Rep. 490.

10. **Judgment Not Res Judicata.** — *State ex rel. Gayard*, 52 La. Ann. 4.

11. **Forgery of Title Papers.** — *U. S. v. Bickford*, 4 Blatchf. (U. S.) 337, 24 Fed. Cas. No. 14,591; *U. S. v. Wilcox*, 4 Blatchf. (U. S.) 385, 28 Fed. Cas. No. 16,691; *U. S. v. Reese*, 4 Sawy. (U. S.) 629, 27 Fed. Cas. No. 16,138; *U. S. v. Spaulding*, 3 Dak. 85.

12. **Conspiracy to Defraud.** — *U. S. v. Gordon*, 22 Fed. Rep. 250; *U. S. v. Thompson*, 29 Fed. Rep. 89.

13. **Fraudulent Practices.** — *Fackler v. Ford*, 24 How. (U. S.) 322; *Stannard v. McCarty*, *Morr.* (Iowa) 124.

14. **False Swearing.** — *U. S. v. Stanley*, 6 McLean (U. S.) 409, 27 Fed. Cas. No. 16,376; *U. S. v. Hearing*, 26 Fed. Rep. 744; *U. S. v. Bedgood*, 49 Fed. Rep. 54; *U. S. v. Wood*, 70 Fed. Rep. 485; *U. S. v. Maid*, 116 Fed. Rep. 650; *Peters v. U. S.*, 2 Okla. 116. And see the title PERJURY, vol. 22, p. 681.

State Courts Without Jurisdiction. — *People v. Kelly*, 38 Cal. 145, 99 Am. Dec. 360.

15. **Conspiracy to Injure Occupant.** — *U. S. v. Waddell*, 112 U. S. 76.

STATE ATTORNEY. — See the title PROSECUTING AND DISTRICT ATTORNEYS, vol. 23, p. 271.

STATE BOND. — See note 1.

STATE CHARITABLE INSTITUTION. — See note 2.

STATE CONSTABLE. (See also the title SHERIFFS AND CONSTABLES, vol. 25, p. 658.) — See note 3.

STATE COURTS. — See the titles COURTS, vol. 8, p. 21; JURISDICTION, vol. 17, p. 1039; MUNICIPAL COURTS, vol. 21, p. 1; SURROGATE AND PROBATE COURTS; UNITED STATES COURTS. As to the concurrent jurisdiction of state and federal courts, see the title UNITED STATES COURTS.

STATED. — Stated means regular, occurring at regular times, not occasional, as stated hours of business; fixed, established, as a stated salary.⁴

STATED ACCOUNTS. — See the title ACCOUNTS, vol. 1, p. 433.

STATED DAMAGES. — See note 5.

STATE DEBT. — See note 6.

STATED SUPPLY. — See note 7.

1. **State Bond.** — In *Hutchins v. State Bank*, 12 Met. (Mass.) 421, Shaw, C. J., said: "A *state bond* or note, a certificate of a sum due from the *state* or United States, and ordinarily called 'stock,' is a chose in action and an evidence of debt, though no action lies for it." See also *Brown v. Bokee*, 53 Md. 167.

2. **State Charitable Institution.** — In *State v. Laramie County*, 8 Wyo. 139, it was said: "Construing the terms *state charitable institution* in the light of the constitutional provisions above mentioned, which require that the penal code shall be framed upon the humane principles of reformation and prevention, and as well according to the present-day notions of the purpose of confinement and treatment of prisoners, it is impossible to escape the conclusion that it cannot be confined to an institution which is designed merely for the care of the poor and helpless, or the treatment of those suffering from mere physical infirmities. Its meaning and intent are broader than that, and we are convinced that our penitentiary is reasonably within its purport in the sense in which it is employed."

3. **State Constable.** — A warrant of search for intoxicating liquors under Gen. Stat. Mass., c. 86, § 42, in force in 1867, was, by virtue of Stat. 1865, c. 249, § 2, addressed to "the constable of the commonwealth or either of his deputies." The officer who served it subscribed his return as "deputy *state constable*." It was held that this was a sufficient description of himself as a deputy of the constable of the commonwealth. *Com. v. Certain Intoxicating Liquors*, 97 Mass. 63. See also *Com. v. Connolly*, 97 Mass. 591.

4. **Stated.** — *Zulich v. Bowman*, 42 Pa. St. 87, quoting Webst. Dict.

Stated Places of Worship. — In *Mullen v. Erie County*, 85 Pa. St. 291, it was said: "They must be places of *stated* worship. The word *stated* means fixed, established, occurring at regular times, as *stated* hours of business. So *statedly* means at certain times, not occasionally."

Stated Attendants. — In *People v. Tuthill*, 31 N. Y. 560, it was said: "*Stated*, as defined by Webster, is 'settled, established, regular, occurring at regular times, not occasional; as *stated* hours of business.' A *stated* attendant

is one who attends *statedly*, which is defined to be 'regularly, at certain times, not occasionally.' The distinction between an attendant of that character and one whose attendance is irregular and at uncertain periods, or occasional only, is plain and well understood."

5. **Stated Damages.** (See generally the title LIQUIDATED DAMAGES, vol. 19, p. 394.) — In *Hooper v. Savannah, etc., R. Co.*, 69 Ala. 535, it was said: "It is certainly competent for parties entering into a contract, to avoid all future contention as to the amount of damages which may result from its breach, to agree and fix upon a certain, definite sum as that which shall be paid to the party injured by the party in default in performance of the contract. Damages so ascertained are termed indifferently liquidated or *stated* or stipulated damages." See also *Zulich v. Bowman*, 42 Pa. St. 87.

6. **State Debt.** — In *Rodman v. Munson*, 13 Barb. (N. Y.) 198, it was said: "A *state debt*, as it is generally understood, is such a pecuniary demand as would, under the attending circumstances, be valid against an individual. The obligation to pay, under such circumstances, is perfect, and cannot be disregarded without a violation of the public faith and that sense of justice which should ever govern the action of states as well as of individuals."

7. **Stated Supply — Presbyterian Church.** — In *Myers v. Perry First Presb. Church*, 11 Okla. 554, it was said: "A *stated supply* is not a pastor; his selection is made by the presbytery. He may be commissioned as a missionary by the mission board, and his compensation fixed in whole or in part by the board. It is not the policy of this board to aid a church which will not help itself; hence each church receiving aid is required to give something for the support of its minister or supply. *Stated supplies* are under the charge and control of the presbytery in whose jurisdiction they work, and have only such rights and prerogatives as may be expressly conferred on them by the presbytery."

In *Trustees v. Sturgeon*, 9 Pa. St. 330, it was said: "A 'clergyman who *statedly* officiates' designates one who, either as regularly inducted pastor or as *stated supply*, acts by superior ecclesiastical authority."

STATE ELECTION. — See note 1.

STATE JAIL — STATE PRISON. (See also the title PRISONS AND PRISONS, vol. 22, p. 1298.) — See note 2.

STATE LIBRARIES. — See note 3.

STATE OFFICER. (See also the title PUBLIC OFFICERS, vol. 23, p. 314, and the references there given.) — See note 4.

STATE OF NATURE. — See note 5.

STATE PURPOSE. — See note 6.

STATE RELIGION. — See note 7.

STATE ROAD. — See note 8.

1. **State Election.** — An election for constable, held under a general law which provides for such an election on the same day in each militia district of the several counties of this state, is a *state election*, within the meaning of the statute which forbids the sale or furnishing of intoxicating liquors to any person on days of election, state, county, or municipal; and the fact that the official duties of the officers elected are confined to respective counties or subdivisions of counties does not change the character of the election. *Rose v. State*, 107 Ga. 697.

2. **State Prison — Prison in Another State.** — See *Martin v. Martin*, 47 N. H. 52.

State Prison Synonymous with Penitentiary. — See *U. S. v. Smith*, 40 Fed. Rep. 755, stated under PENITENTIARY, vol. 22, p. 656.

State Jail. — A *state jail* is one supported by the state at large as distinguished from the jails kept by the counties of the state by virtue of state laws. *U. S. v. Schroeder*, 14 Blatchf. (U. S.) 345.

3. **State Libraries.** — A tariff act put on the free list books specially imported in more than two copies in any one invoice, in good faith, for the use or by the order of any state or public library. A state statute provided for the organization in each county of libraries which were partly supported by money received from persons admitted to practice as attorneys and by certain fees. It was held that such a library was a *state library* within the tariff act. *Little v. U. S.*, 104 Fed. Rep. 540.

4. **State Officer.** — In *People v. Hossefross*, 17 Cal. 141, it was said: "The term *state officers* is a general term, applicable, probably, as well to members of the legislature as to a governor and other officers elected by the body of the electors of the state."

Within a constitutional provision that the compensation or fees of a state, county, or municipal officer should not be increased during his term of office, it has been said that the words *state officers* "were intended only to refer to such officers whose official duties and functions are coextensive with the boundaries of the state, and were never intended to include such officers as sheriffs, coroners, county justices, etc., whose functions are confined to their respective counties, and are commonly known and called county officers; and that the constitution recognizes a clear distinction between state, county, and township officers." *Henderson v. Koenig*, 168 Mo. 367. See also *State v. Dillon*, 90 Mo. 229.

Constable. — In *State v. McKee*, 69 Mo. 508,

in ruling that a constable was not a city officer, the court said: "He is a *state officer* in the same sense that sheriffs and clerks of courts of record are *state officers*, * * * although they can only discharge the duties of their respective offices within a limited territory, and not throughout the state."

A City Councilman is not a *state officer*. *Concordia v. Hagaman*, 1 Kan. App. 35.

Representative. — In *Morril v. Haines*, 2 N. H. 246, it was held that a representative in the state legislature was a *state officer*.

A Probate Judge has been held not to be a *state officer*. *Secord v. Foutch*, 44 Mich. 90.

Member of Board of Regents. — In *State v. Smith*, 6 Wash. 496, it was held that a member of the board of regents of an agricultural college was not a *state officer* over whom the Supreme Court had original jurisdiction in mandamus proceedings.

A Trustee of the State Agricultural College, appointed by the board of regents of education, as provided by Const. S. Dak., art. 14, § 3, in force in 1892, is not a *state officer* within the meaning of article 16, section 3, providing that *state officers* are liable to impeachment. The court said: "We are of the opinion that the term *state officers*, as used in said section, includes only such general officers as immediately belong to one of the three constituent branches of the state government." *State v. Hewitt*, 3 S. Dak. 196.

Sheriff. — In *State v. Dillon*, 90 Mo. 229, a sheriff was held not to be a *state officer* within a constitutional provision conferring jurisdiction on the Supreme Court in cases where any *state officer* was a party. Compare *State v. McKee*, 69 Mo. 508.

5. **State of Nature.** — The term *state of nature*, as applied to land in Rev. Stat. Ont., § 5, subsec. 4, is used in contradistinction to the expression "residing upon or cultivating." *Stovel v. Gregory*, 21 Ont. App. 137.

6. **State Purpose.** — In *People v. Scott*, 9 Colo. 430, it was said: "Any legitimate expenditure of the state necessary to be provided for by a state tax is a *state purpose*, and the tax to be provided is a tax for a *state purpose*." See also *State v. Storey County*, 1 Nev. 264, and see the title TAXATION.

7. **State Religion.** — See Board of Education *v. Minor*, 23 Ohio St. 249.

8. **State Road.** — See the title HIGHWAYS, vol. 15, p. 352; and see *Houlton v. Carpenter*, 29 Ind. App. 643; *Stebbins v. Treasurer*, 17 Ohio 186; *State v. Hayden*, 32 Wis. 673.

STATES.

BY THE EDITORIAL STAFF.

I. DEFINITION, 465.

II. ADMISSION INTO THE UNION, 466.

1. *Power to Admit*, 466.
2. *When Admission Takes Place*, 466.
3. *Effect of Admission*, 466.
 - a. *Binding Force of Compact*, 466.
 - b. *Equality with Original States*, 466.
 - c. *As to Territorial and Federal Laws*, 466.
 - d. *As to Courts and Pending Actions*, 467.
 - e. *Division of State into Several*, 467.

III. RELATION BETWEEN THE STATES, 467.

IV. STATE BOUNDARIES, 468.

1. *Power to Establish — Effect*, 468.
2. *Jurisdiction of Court — How Exercised*, 468.
3. *River as Boundary*, 469.
4. *Possession under Claim of Title*, 469.
5. *Certain State Boundaries*, 469.

V. COMPACTS BY AND BETWEEN THE STATES, 469.

VI. STATE BONDS, 470.

1. *In General*, 470.
2. *Where Purpose Illegal*, 471.
3. *Where Directions of Statute Not Observed*, 471.
4. *Where Debt Limit Exceeded*, 471.
5. *Fraudulent or Other Improper Circulation*, 471.
6. *Fund Pledged for Interest*, 471.
7. *Scheme of Compromise — Offer to Refund*, 471.
8. *Security for Loan of Bonds*, 471.

VII. APPROPRIATIONS, FUNDS, DEBTS, ETC., 472.

1. *Appropriations*, 472.
 - a. *Necessity for*, 472.
 - b. *What Constitute*, 472.
 - c. *Purpose*, 473.
 - (1) *In General — Moral Obligation*, 473.
 - (2) *Reimbursement of County*, 473.
 - (3) *Aid to State Normal School*, 473.
 - (4) *Care of Indigent Insane*, 473.
 - (5) *Aid to Institutions Not under State Control*, 474.
 - (6) *Aid to Sufferers from Flood or Tornado*, 474.
 - (7) *For Industrial Exhibits or Expositions*, 474.
 - (8) *For Internal Improvements*, 474.
 - (9) *Directing Payment of License Fees to Private Corporation*, 474.
 - (10) *Extra Compensation to Public Officers, etc.*, 474.
 - (11) *Using County Taxes in Aid of Cities*, 474.
 - (12) *Creating New Liabilities*, 474.
 - (13) *Contracts Made Without Express Authority of Law*, 475.
 - d. *Priority*, 475.
 - e. *Duration*, 475.
 - f. *Questioning Validity of Appropriation Law*, 475.
 - g. *Use of Fund Raised by Popular Vote*, 476.
2. *Limitation on Indebtedness*, 476.

3. *Loan of State's Credit*, 476.
4. *Warrants in Payment of Debts Due State*, 476.
5. *Adjustment, Release, etc., of State's Claims*, 476.

VIII. SEAT OF GOVERNMENT — PUBLIC INSTITUTIONS, 477.

IX. CONTRACTS, 477.

1. *Power to Make*, 477.
2. *Incidents of*, 477.
 - a. *Sovereignty Relinquished*, 477.
 - b. *Power to Defeat Enforcement*, 477.
 - c. *How Intention Ascertained*, 478.
 - d. *Interest*, 478.
 - e. *Prospective Profits*, 478.
 - f. *Illegality*, 478.
3. *State Anti-trust Law Inapplicable*, 479.

X. STATUS OF STATE AS CREDITOR, 479.

XI. STATE AS GRANTEE OR DEVISEE, 479.

XII. RESPONSIBILITY FOR ACTS OF OFFICERS, 479.

1. *Limits of Responsibility*, 479.
 - a. *In General*, 479.
 - b. *Laches, Errors, and Mistakes*, 480.
 - c. *Torts*, 480.
 - d. *Estoppel*, 481.
2. *Contracts*, 481.
 - a. *In General*, 481.
 - b. *Officer's Authority to Contract*, 482.
 - c. *Ratification*, 484.

XIII. SUITS BY OR AGAINST STATE, 485.

1. *Suits by State*, 485.
 - a. *In State Courts*, 485.
 - b. *In Federal Courts*, 486.
2. *Suits Against State*, 486.
 - a. *In State Courts*, 486.
 - (1) *Consent Necessary*, 486.
 - (2) *Who May Give Consent*, 486.
 - (3) *Effect of Consent*, 486.
 - (4) *Consent May Be Conditional*, 487.
 - (5) *Constitutional Provision Not Self-executing*, 487.
 - (6) *Construction of Statutes Authorizing Suit*, 487.
 - (7) *Withdrawal of Consent*, 488.
 - (8) *Tests — Illustrative Cases*, 488.
 - b. *In Federal Courts — Eleventh Amendment to Constitution*, 489.
 - (1) *Origin and Purpose*, 489.
 - (2) *Terms and Principle of Construction*, 489.
 - (3) *Operation and Effect*, 490.
 - (a) *As to Parties Who May Sue*, 490.
 - aa. *General Government*, 490.
 - bb. *Sister State or Foreign Power*, 490.
 - cc. *Citizens of State*, 490.
 - dd. *National Corporation*, 490.
 - (b) *As to What Is Suit Against State*, 490.
 - aa. *How Question Determined*, 490.
 - bb. *Performance or Breach of State's Contract*, 491.
 - cc. *Ministerial Duties of State Officers*, 491.
 - dd. *Torts Against Persons or Property*, 491.
 - ee. *Mere Assertion of Title in State*, 491.
 - ff. *Corporation in Which State Interested*, 491.
 - gg. *Defense to Suit by State*, 492.
 - c. *Waiver of Immunity*, 492.
 - d. *Illustrative Cases*, 492.

CROSS-REFERENCES.

For matters of *PROCEDURE*, see the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, vol. 20, p. 587.

See in this work such titles as: *ADVERSE POSSESSION*, vol. 1, p. 787; *APPORTIONMENT ACTS*, vol. 2, p. 478; *CONSTITUTIONAL LAW*, vol. 6, p. 882, and the references there given; *EMINENT DOMAIN*, vol. 10, p. 1043; *ESTOPPEL*, vol. 11, p. 385; *IMPAIRMENT OF OBLIGATION OF CONTRACTS*, vol. 15, p. 1030; *INJUNCTIONS*, vol. 16, p. 337; *LIMITATION OF ACTIONS*, vol. 19, p. 136; *MANDAMUS*, vol. 19, p. 709; *MONOPOLIES AND CORPORATE TRUSTS*, vol. 20, p. 844; *OCCUPATION, BUSINESS, AND PRIVILEGE TAXES*, vol. 21, p. 770; *POLICE POWER*, vol. 22, p. 914; *PUBLIC OFFICERS*, vol. 23, p. 321, and the references there given; *SCHOOLS*, vol. 25, p. 4; *STATE AND PUBLIC LANDS*, *ante*; *STATUTES*, *post*; *TAXATION*; *TERRITORIES*.

I. DEFINITION — In International Law. — A state is a body politic, or society of men, united together for the purpose of promoting their mutual safety and advantage, by the joint efforts of their combined strength.¹ This is the commonly accepted definition of the term as employed in international law, but as the subject in that connection has received full treatment elsewhere in this work,² this title will deal with the term only as used in American constitutional law.

State of the Union. — A state, in the ordinary sense of the Federal Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution and established by the consent of the governed — one of the component commonwealths of the United States.³

Within the Meaning of the Word "State," as used in the grant of judicial power to the Federal Government in the Constitution, neither the District of Columbia, nor a territory,⁴ nor an Indian tribe or nation,⁵ can be said to be a state; but

1. **State Defined.** — Vattel's Law of Nations, b. 1, c. 1, § 1. See also *Keith v. Clark*, 97 U. S. 459; *Terry v. Olcott*, 4 Conn. 445; *Honduras Republic v. Soto*, 112 N. Y. 312, 8 Am. St. Rep. 744; *State v. Taylor*, 7 S. Dak. 533; *State v. Stark*, 3 Brev. (S. Car.) 103.

2. See the title *INTERNATIONAL LAW*, vol. 16, p. 431.

3. See *U. S. v. Reese*, 92 U. S. 249; *Ex p. Morgan*, 20 Fed. Rep. 298; *McPherson v. Blacker*, 146 U. S. 25; *Dorman v. State*, 34 Ala. 232; *Seton v. Hanham*, R. M. Charl. (Ga.) 374; *New Orleans, etc., R. Co. v. Rabosse*, 44 La. Ann. 180; *Employers' Liability Assur. Co. v. Insurance Com'rs*, 64 Mich. 616; *Bishop v. Bishop*, 30 Pa. St. 416.

Various Meanings of Term as Used in Constitution. — In the clauses which impose prohibitions upon the states in respect to making treaties, emitting bills of credit, and laying duties on tonnage, and which guarantee to the states representation in Congress, are found some instances of this use of the term in the constitution. It is also employed in a geographical sense simply, as in the clauses which require that a representative in Congress shall be an inhabitant of the state in which he shall be chosen; and that the trial of crimes shall be held within the state where committed. It is sometimes used in the sense of a people or political community as distinguished from a government. This idea is presented in the provision that the United States shall guarantee to every state a republican form of government,

and protect it against invasion. *Texas v. White*, 7 Wall. (U. S.) 700.

4. **District of Columbia — Territories.** — *Hepburn v. Ellzey*, 2 Cranch (U. S.) 445; *New Orleans v. Winter*, 1 Wheat. (U. S.) 91; *Scott v. Jones*, 5 How. (U. S.) 343; *Miners' Bank v. Iowa*, 12 How. (U. S.) 1; *Barney v. Baltimore City*, 6 Wall. (U. S.) 287; *Cissel v. McDonald*, 16 Blatchf. (U. S.) 150, 57 How. Pr. (N. Y.) 175; *U. S. v. Ames*, 95 Fed. Rep. 455; *Darst v. Peoria*, 13 Fed. Rep. 561; *Picquet v. Swan*, 5 Mason (U. S.) 35; *Hooe v. Jamieson*, 166 U. S. 395.

In *Watson v. Brooks*, 8 Sawy. (U. S.) 316, this ruling was followed, but questioned, the court observing: "It is very doubtful if this ruling would now be made if the question was one of first impression, and it is to be hoped that it may yet be reviewed and overthrown."

In what sense the District of Columbia may be regarded a distinct political society, see *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, qualifying the statement in the case last cited, that the District is a state in the larger sense of the term, and also the position assented to by Marshall, Ch. J., in *Hepburn v. Ellzey*, 2 Cranch (U. S.) 445, that the District of Columbia is a distinct political society, and is therefore a state according to the definitions of writers on general law.

Crimes Act of 1825. — The word "state" as used in this act does not embrace a territory. *Smith v. U. S.*, 1 Wash. Ter. 262.

5. **Indian Tribes.** — *Cherokee Nation v. U.* Volume XXVI.

in some statutes to term "state" has been held to comprehend both the territories and the District of Columbia.¹

II. ADMISSION INTO THE UNION — 1. Power to Admit. — The sole power of admitting new states into the Union is vested in Congress by the Constitution,² and that body may impose "fundamental conditions" of admission.³

2. When Admission Takes Place. — There are several theories as to when a territory ceases to be such and becomes a state, and as to when the constitution and governmental machinery of a new state become operative.⁴

3. Effect of Admission — a. BINDING FORCE OF COMPACT. — In the compact for statehood the people of the territory act for themselves and their successors, the people of the future state, and the latter are bound by the conditions accepted by the former.⁵

b. EQUALITY WITH ORIGINAL STATES. — Admitting a state into the Union on equal footing with the original states, means that the newly admitted state is equal to her sister states in being alike free in the formation of her constitution and the exercise of government, under such restrictions and limitations as she may voluntarily impose upon herself, and in the people having power to modify or change the constitution at will.⁶

c. AS TO TERRITORIAL AND FEDERAL LAWS. — Where a federal statute is applicable only to the territories, when one of such territories is admitted as a state of the Union the statute ceases to be operative within its boundaries unless by appropriate legislation it is continued in force for the purpose of

Georgia, 5 Pet. (U. S.) 1; *Holden v. Joy*, 17 Wall. (U. S.) 211; *Warner v. Joy*, 17 Wall. (U. S.) 253. See also *Eastern Band of Cherokee Indians v. U. S.*, 117 U. S. 288; *Roche v. Washington*, 19 Ind. 56.

It has been said that the Cherokee Nation bears the same relation to the United States government as a territory did under the Ordinance of 1787. It is not a foreign but a domestic territory. *U. S. v. Cox*, 18 How. (U. S.) 100. See generally the title *INDIANS*, vol. 16, p. 212.

1. U. S. Rev. Stat., § 3140 (internal revenue laws); *The Panama, Deady* (U. S.) 31 (U. S. Rev. Stat., § 4236, regulating taking of pilots on waters forming boundaries between two states), *followed in The Ullock*, 9 Sawy. (U. S.) 641; *The Abercorn*, 26 Fed. Rep. 877; *In re Bryant, Deady* (U. S.) 118 (act relating to shipping and deserting of seamen). See also *Tallbot v. Silver Bow County*, 139 U. S. 444; *Geofroy v. Riggs*, 133 U. S. 258; *Newton v. Turpin*, 8 Gill & J. (Md.) 435.

2. Admission of New States. — U. S. Constitution, art. 4, § 3, cl. 1. See *Brittle v. People*, 2 Neb. 198. According to the opinion of Attorney-General Bates, the act for the admission of West Virginia was unconstitutional, for the reason that it did not receive the assent of the people of the state of Virginia. 10 Op. Atty.-Gen. 426. But the decision in *Virginia v. West Virginia*, 11 Wall. (U. S.) 39, settles the question the other way.

3. When a Constitution Has Been Adopted by the people of a territory, preparatory to admission as a state, and Congress prescribes certain changes and additions to be adopted by the legislature as part of the constitution, and declares such changes and additions to be fundamental conditions of the admission of the state, and the legislature accepts such changes, additions, and conditions, and the state is thus admitted, they become thereby a part of the con-

stitution and binding as such, although not submitted to the people for their approval. *Brittle v. People*, 2 Neb. 198.

4. Theories as to Time of Admission. — "One theory is, that a territory continues in all respects a territory until admitted into the Union by act of Congress, and that until such act of admission, the proposed state constitution cannot take effect, nor any part of the machinery of a state government go into operation. Another theory is that where, under an enabling act of Congress, the people adopt a state constitution and form a state government, such constitution goes into effect upon its adoption by the people, and the former territory thereby becomes a state, although not in the Union, for the purposes of representation in Congress, until formally admitted by Congress. A third theory, which is really only an extension of the one last named, is that an enabling act operates as a constitutional act of admission, and that when a state complies with the conditions of that act, it is a state in the Union for all purposes without any further action on the part of Congress. See *Scott v. Detroit Young Men's Soc.*, 1 Dougl. (Mich.) 119; *Campbell v. Fields*, 35 Tex. 751." *Mitchell, Jr.*, in *Secombe v. Kittelson*, 29 Minn. 555. See also *Benner v. Porter*, 9 How. (U. S.) 235; *Calkin v. Cocke*, 14 How. (U. S.) 227.

The Texas Reconstruction Constitution became operative before the state was admitted to representation in Congress. *Peak v. Swindle*, 68 Tex. 242.

5. *Anderson v. Tyree*, 12 Utah 129.

6. Spooner v. McConnell, 1 McLean (U. S.) 337, where it is also said that this does not mean that its powers, legislative, executive, and judicial, shall be exercised to the same extent, and in the same mode, as in all the other states; in this respect the states are unequal, as perhaps the powers of no two states are exercised in the same mode and to the same extent.

prosecuting violations thereof committed during the existence of the territorial government.¹ The new constitution may continue in force, under the state, such territorial laws as are not repugnant to it and thereby make them state laws.²

d. AS TO COURTS AND PENDING ACTIONS. — Upon the Unconditional Admission into the Union of a Territory as a state, the erection of federal courts therein, and the extension of the laws of the United States over the same, the territorial government is extinguished, and with it the existence of the territorial courts of the general government, and consequently, if a cause, brought from the Supreme Court of the territory, is pending in a court of the United States at the time of the admission, the jurisdiction of the latter tribunal ceases, in the absence of provision for the disposal of such cases.³

But by Adoption on the Part of the State, with the consent of Congress, those courts may become provisional and temporary courts of the state.⁴

And Congress May Provide for a State Constitutional Convention to aid in preparing for the change from territorial existence to statehood, and may properly invest it with authority to provide for all the details incident to such change, among which is the proper distribution and placing of the causes depending in the territorial courts which would pass out of existence with the change.⁵

Crimes Against Federal Government. — The fact that pending a prosecution in a territorial court for a crime against the federal government the territory becomes a state, will not deprive such government of power to punish the crime through its own tribunals.⁶

e. DIVISION OF STATE INTO SEVERAL. — Where a state is divided into two or more states, in the adjustment of liabilities between each other the debts of the parent state should be ratably apportioned among them.⁷ When a new state is carved from an old one, a contract made in the original state to convey lands subsequently embraced in the newly created state is binding according to the laws of the original state which existed at the time the contract was made.⁸

III. RELATION BETWEEN THE STATES. — For national purposes embraced by

1. *Moore v. U. S.*, (C. C. A.) 85 Fed. Rep. 465.

Process Act of 1828. — The provision of the act admitting a state which declares, upon such admission, the laws of the United States which are not locally inapplicable, to be in force there, renders the Process Act of 1828 in force in the federal courts of such newly-admitted state. *U. S. v. Keokuk*, 6 Wall. (U. S.) 514; *Smith v. Cockrill*, 6 Wall. (U. S.) 756.

2. *Whipple v. Henderson*, 13 Utah 484; *Pleasant Valley Coal Co. v. Salt Lake County*, 15 Utah 97; *Jungk v. Holbrook*, 15 Utah 198, 62 Am. St. Rep. 921; *In re Moore*, 81 Fed. Rep. 356.

3. *Jurisdiction of Federal Courts.* — *Ames v. Colorado, etc.*, R. Co., 4 Dill. (U. S.) 251; *Benner v. Porter*, 9 How. (U. S.) 235; *McNulty v. Batty*, 10 How. (U. S.) 72; *Preston v. Brocken*, 10 How. (U. S.) 81; *Freeborn v. Smith*, 2 Wall. (U. S.) 160; *Hunt v. Palao*, 4 How. (U. S.) 588.

4. *Ames v. Colorado, etc.*, R. Co., 4 Dill. (U. S.) 251. See also *Freeborn v. Smith*, 2 Wall. (U. S.) 160.

5. *McCormick v. Western Union Tel. Co.*, (C. C. A.) 79 Fed. Rep. 449, quoted in *Hecht v. Metzler*, 82 Fed. Rep. 342.

On the Admission of North Dakota the state District Court became the successor of the territorial District Court as to all actions no longer pending, and the judgments of such territorial

District Court passed under the jurisdiction of the state District Court. *Merchants' Nat. Bank v. Braithwaite*, 7 N. Dak. 358, 66 Am. St. Rep. 653.

Admission of Montana. — All claims, causes of action, etc., existing at the time of the admission of Montana into the Union were saved by the constitution to be enforced under the laws of the state. *Wastl v. Montana Union R. Co.*, 24 Mont. 159.

Section 5, Article 8, of the Constitution of Utah providing for the trial of business in the county in which it arises, etc., is prospective only and does not apply to actions pending when the constitution was adopted. *Jungk v. Holbrook*, 15 Utah 198, 62 Am. St. Rep. 921.

6. *U. S. v. Baum*, 74 Fed. Rep. 43.

7. *Hartman v. Greenhow*, 102 U. S. 672.

8. *Caldwell v. Carrington*, 9 Pet. (U. S.) 86.

Erection of State of West Virginia — Effect on Virginia Corporation. — Upon the creation of the state of West Virginia, a corporation created by Virginia continues to be a corporation of the latter state until it becomes affirmatively a corporation of West Virginia, by complying with an act of the legislature of that state, providing for certain proceedings, which being taken by corporations shall result in their becoming corporations of the new state. *Kanawha Coal Co. v. Kanawha, etc., Coal Co.*, 7 Blatchf. (U. S.) 391.

the Federal Constitution, the states are regarded as domestic, being united under the same sovereign authority and governed by the same laws; in other respects, they are necessarily foreign to and independent of one another.¹

IV. STATE BOUNDARIES — 1. Power to Establish — Effect. — The right of the several states of the Union to establish and fix the disputed boundaries between their respective limits is recognized by the Constitution, and is guarded in its exercise by a single limitation or restriction, requiring the consent of Congress; and the boundaries so established and fixed by compact become conclusive upon all the citizens of the states concerned, and bind their rights.²

2. Jurisdiction of Court — How Exercised. — The Supreme Court of the United States has jurisdiction of a bill filed by one state against another to ascertain and establish the boundary between them,³ and this jurisdiction is not defeated because in deciding that question the court must examine and construe compacts or agreements between the states concerned, or because its decision may affect the territorial limits of the political jurisdiction and sovereignty of those states.⁴

How Court Proceeds. — The court does not act otherwise in deciding on boundaries between states than on lines between separate tracts of land. Thus, if there is uncertainty or confusion as to the lines, it is a case appropriate for equity; an issue at law is directed, and a commission of boundary awarded; or, if the court is satisfied without either, it decrees what and where the boundary is and shall be.⁵ The boundary of a state, when a material question in the determination of the extent of the jurisdiction of a court, is not a simple question of law, but the application of the evidence in the ascertainment of it belongs to the jury.⁶

1. See the titles *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 78; *FOREIGN JUDGMENTS*, vol. 13, p. 981; *FOREIGN LAWS*, vol. 13, p. 1051. And see generally the title *CONSTITUTIONAL LAW*, vol. 6, p. 882.

The sentiment of the text was expressed with force by the president of the Court of Appeals of *Virginia* in *Warder v. Arall*, 2 Wash. (Va.) 282, 1 Am. Dec. 488, where he states that in cases of contracts the laws of a foreign country where the contract was made must govern, and then adds as follows: "The same principle applies, though with no greater force, to the different states of America, for though they form a confederated government, yet the several states retain their individual sovereignties, and, with respect to their municipal laws, are to each other foreign."

"**Full Faith and Credit.**" — In *Smith v. Lathrop*, 44 Pa. St. 326, 84 Am. Dec. 448, it was held that, except in cases governed by that clause of the Federal Constitution which gives "full faith and credit" in each state to judicial proceedings in every other state, the courts of the several states are foreign to each other. See also *Davis v. Morris*, 76 Va. 27.

2. Boundaries — Consent of Congress. — Const. U. S., art. 1, § 10, cl. 2. The settlement of state boundaries requires not only ratification by the state but also the consent of Congress. *New Castle Circle Boundary Case*, 6 Pa. Dist. 184.

And the requisite consent of Congress to an agreement between two states fixing their boundaries may be given subsequently, or may be implied from subsequent action of Congress itself towards the states, and the agreement, when thus made and thus assented to, is valid. *Virginia v. Tennessee*, 148 U. S. 503. See *infra*, this title, *Compacts By and Between the States*.

This Provision of the Constitution Is Obviously

Intended to guard the rights and interests of the other states, and to prevent any compact or agreement between any two states which might affect injuriously the interests of the others. And the right and duty to protect these interests are vested in the general government. Accordingly, where a bill is filed by one state against another to establish a disputed boundary, the attorney-general of the United States, on his application, may intervene and appear in behalf of the United States and adduce evidence, and be heard in argument, without making the United States a party in the technical sense of the term. He will, however, have no right to interfere in the pleading, or evidence, or admissions of the states, or either of them. The judgment can be neither for nor against the United States. *Florida v. Georgia*, 17 How. (U. S.) 478.

3. Jurisdiction of Supreme Court. — *Rhode Island v. Massachusetts*, 12 Pet. (U. S.) 657; *Florida v. Georgia*, 17 How. (U. S.) 478; *Virginia v. West Virginia*, 11 Wall. (U. S.) 39; *Virginia v. Tennessee*, 148 U. S. 503.

But a Question Arising in a State Court in regard to the construction of a compact between two states, as to the boundary line between them, is one of which the Supreme Court of the United States has no jurisdiction under the 25th section of the Judiciary Act. *New York v. Central R. Co.*, 12 Wall. (U. S.) 455.

4. Virginia v. West Virginia, 11 Wall. (U. S.) 39; *Rhode Island v. Massachusetts*, 12 Pet. (U. S.) 724; *Missouri v. Iowa*, 7 How. (U. S.) 660; *Florida v. Georgia*, 17 How. (U. S.) 478.

5. Rhode Island v. Massachusetts, 12 Pet. (U. S.) 657. See generally the title *BOUNDARIES*, vol. 4, p. 756.

6. U. S. v. Jackalow, 1 Black (U. S.) 484. **Testimony of Living Witnesses.** — And upon

3. River as Boundary. — When a river is the boundary between two states, if the original property is in neither and there is no convention respecting it, each holds to the middle of the stream; but when one state is the original proprietor and grants territory on one side only, it retains the river within its domain, and the granted territory extends to the river only.¹

4. Possession under Claim of Title. — The period of time which in equity constitutes a bar is held not to apply to the case of a disputed boundary between two states, especially where the boundary is in a wild and unsettled country; but it seems that long possession under a claim of title will be protected, especially where there is not clear proof of mistake.²

5. Certain State Boundaries. — In the notes will be found under a convenient arrangement cases in which certain state boundaries have been passed upon.³

V. COMPACTS BY AND BETWEEN THE STATES — Congressional Sanction. — The states are authorized by the Federal Constitution to enter into compacts with each other or with foreign powers, subject to the qualification of Congressional sanction for their absolute validity.⁴

No Provision Is Made Respecting the Mode or Form in which the assent of Congress

questions of boundaries on rivers and similar matters, the testimony of living witnesses as to matters within their memory is to be preferred to evidence derived from early maps and the reports of early explorers and travelers. *Missouri v. Kentucky*, 11 Wall. (U. S.) 395.

1. *Handly v. Anthony*, 5 Wheat. (U. S.) 379; *Howard v. Ingersoll*, 13 How. (U. S.) 381; *The Pea Patch Islands*, 1 Wall. Jr. (C. C.) appendix ii; *Indiana v. Kentucky*, 136 U. S. 479. See generally the title **BOUNDARIES**, vol. 4, p. 756.

2. *Rhode Island v. Massachusetts*, 4 How. (U. S.) 591; *Virginia v. Tennessee*, 148 U. S. 503. See also *Phillips v. Payne*, 92 U. S. 130. See the titles **ADVERSE POSSESSION**, vol. 1, p. 876; **PRESCRIPTION**, vol. 22, p. 1189.

3. **Certain State Boundaries — Alabama and Georgia.** — *Howard v. Ingersoll*, 13 How. (U. S.) 381; *Alabama v. Georgia*, 23 How. (U. S.) 505. And see *Handly v. Anthony*, 5 Wheat. (U. S.) 374.

Arkansas and Tennessee. — *Stockley v. Cissna*, (C. C. A.) 119 Fed. Rep. 812.

Connecticut and New York. — *Keyser v. Coe*, 9 Blatchf. (U. S.) 32.

Delaware and New Jersey. — *Pea Patch Island*, 1 Wall. Jr. (C. C.) appendix ii.

Georgia and South Carolina. — *Simpson v. State*, 92 Ga. 41, 44 Am. St. Rep. 75.

Illinois and Iowa. — *Iowa v. Illinois*, 147 U. S. 1, followed in *Keokuk*, etc., *Bridge Co. v. People*, 145 Ill. 596, 167 Ill. 15, and *Chicago*, etc., *R. Co. v. Clinton*, 88 Iowa 188.

Illinois and Missouri. — *Bellefontaine Imp. Co. v. Niedringhaus*, 181 Ill. 426, 72 Am. St. Rep. 269; *Buttenth v. St. Louis Bridge Co.*, 123 Ill. 535, 5 Am. St. Rep. 545.

Indiana and Kentucky. — *Indiana v. Kentucky*, 136 U. S. 479; *Indiana v. Kentucky*, 163 U. S. 526; *Henderson Bridge Co. v. Henderson*, 173 U. S. 592; *Memphis*, etc., *Packet Co. v. Pikey*, 142 Ind. 304; *Meyler v. Wedding*, 107 Ky. 310, 92 Am. St. Rep. 347.

Iowa and Missouri. — *Missouri v. Iowa*, 7 How. (U. S.) 660; *Missouri v. Iowa*, 160 U. S. 688, 165 U. S. 118.

Kansas and Missouri. — *St. Joseph*, etc., *R. Co. v. Devereux*, 41 Fed. Rep. 14.

Kentucky and Missouri. — *Missouri v. Kentucky*, 11 Wall. (U. S.) 395.

Louisiana and Mississippi. — *Jenkins v. Trager*, 40 Fed. Rep. 726.

Louisiana and Texas. — *State v. Burton*, 105 La. 516.

Maryland and Virginia. — *Ex p. Marsh*, 57 Fed. Rep. 719.

New Jersey and New York. — *Devoe Mfg. Co.*, 108 U. S. 401.

North Carolina and Tennessee. — *Belding v. Hebard*, 43 C. C. A. 296; *Stevenson v. Fain*, (C. C. A.) 116 Fed. Rep. 147.

Tennessee and Virginia. — *Tennessee v. Virginia*, 190 U. S. 64.

Greer County Was Not Part of Texas at Time of Admission to Union, but is subject to the exclusive jurisdiction of the United States. *U. S. v. Texas*, 162 U. S. 1.

Northern Boundary of Ohio is the line between the United States and Canada. *Edson v. Crangle*, 62 Ohio St. 49.

4. Art. 1, § 10, cl. 2.

The Constitution Declares that no state shall, without the consent of Congress, enter into any agreement or compact with another state. U. S. Const., art. 1, § 10, cl. 3. Thus admitting that with such consent it may be done. *Poole v. Fleeher*, 11 Pet. (U. S.) 185; *Rhode Island v. Massachusetts*, 11 Pet. (U. S.) 226. And see *supra*, this title, **State Boundaries**.

Circumstances Held Not to Constitute Compact. — In *Virginia v. Tennessee*, 13 Sup. Ct. Rep. 728, it was held that the mere selection of parties to settle a boundary line between two states, and the legislative adoption of their report by one of the states, does not amount to a "compact" or "agreement" between states, which they are forbidden by the United States Constitution to make without the consent of Congress, until the one state has adopted the report in consequence of its adoption by the other, nor even then unless the boundary established leads to the increase or decrease of the political power or influence of the states concerned.

Compact Between New Jersey and Pennsylvania — Right of Fishery. — *Bennett v. Boggs*, Bald. (U. S.) 60.

Compact Between Virginia and Kentucky — Affecting Jurisdiction of United States Courts. — *Wilson v. Mason*, 1 Cranch (U. S.) 45.

is to be signified, and it has been adjudged that it need not be an express and formal statement of every proposition of the compact, and of its consent thereto, but may be shown by clear and satisfactory inference from an act which necessarily implies such consent.¹

Power to Modify or Annul. — In a compact between two states, the states in their character as states are the parties, and not the individual citizens, though the latter are bound as well as the contracting parties, and the same power which establishes the compact may modify or annul it.²

Further Legislation Unnecessary. — The conditions of a compact which has received the sanction of Congress may be enforced by the courts without further legislation.³

A Compact Affecting Commerce, though entered into before the adoption of the constitution, is subordinate to the provisions of that instrument on that subject.⁴

A Contract. — A compact between members of the Union is a contract within the meaning of the constitution, and when a state law impairs the obligation thereof, the Supreme Court is authorized to declare such law unconstitutional.⁵

Effect of State Decisions. — A question arising under and to be decided by a compact between two states partakes, so to speak, of an international character, and the adjudications of either state are not controlling as a rule of decision in the federal courts.⁶

VI. STATE BONDS — 1. In General. — Parties dealing in the bonds of a state must rely upon the sense of justice and good faith of the state, the judiciary of the state not being authorized to enforce them without the consent of the state, and the federal courts being expressly prohibited from exercising such a jurisdiction.⁷

1. **Form of Congressional Assent.** — *Virginia v. West Virginia*, 11 Wall. (U. S.) 39; *Green v. Biddle*, 8 Wheat. (U. S.) 1. And an act of Congress, which, after recognizing the conditions upon which alone one of the states agrees to a compact, assents to the compact by express declaration, necessarily includes an assent to these conditions and is sufficient to satisfy the constitutional requirement. *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. (U. S.) 518; *Green v. Biddle*, 8 Wheat. (U. S.) 1.

2. *Mayor, etc., of Georgetown v. Alexandria Canal Co.*, 12 Pet. (U. S.) 91. See also *Fleeher v. Pool*, 1 McLean (U. S.) 185.

3. *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. (U. S.) 518.

4. **Compact Concerning Commerce.** — *South Carolina v. Georgia*, 93 U. S. 4.

The compact between Virginia and Kentucky cannot restrict the power of Congress to regulate commerce between the states, and an act of Congress declaring a bridge across the Ohio river to be a lawful structure, although it does in fact interfere with commerce, is valid. *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. (U. S.) 518.

5. *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. (U. S.) 518; *Green v. Biddle*, 8 Wheat. (U. S.) 1. See also *Fisher v. Cockerell*, 5 Pet. (U. S.) 248.

The Limitation Act of Kentucky, commonly known as the "seven years" law, does not impair the compact between the states of Virginia and Kentucky. *Hawkins v. Barney*, 5 Pet. (U. S.) 457.

6. *Marlatt v. Silk*, 11 Pet. (U. S.) 1.

7. *Washington Bank v. Arkansas*, 20 How. (U. S.) 530. See also *infra*, this title, *Suits By or Against State*.

Proceeds of Sale of State Property to Be Applied to Bonded Indebtedness. — *Park v. Candler*, 113 Ga. 647.

May Be Applied to Interest on Such Debt. — *Park v. Candler*, 114 Ga. 466.

Liability of Railroad Company as Guarantor of State Bonds. — *Florida, etc., R. Co. v. Schutte*, 103 U. S. 118. See also *Tompkins v. Little Rock, etc., R. Co.*, 15 Fed. Rep. 6, 18 Fed. Rep. 344.

South Carolina Revenue Bond Scrip Held to Be Bills of Credit. — *Wesley v. Eells*, 90 Fed. Rep. 151, affirmed 177 U. S. 370; *Robinson v. Lee*, 122 Fed. Rep. 1012; *State v. Comptroller Gen.*, 4 S. Car. 185; *Auditor v. Treasurer*, 4 S. Car. 311.

Certain Warrants of the State of Texas Held Not to Be "Treasury Warrants issued to circulate as money," in violation of the state constitution, nor bills of credit in violation of the Federal Constitution. *Houston, etc., Cent. R. Co. v. Texas*, 177 U. S. 66.

Redemption of Public Debt Fund — Consolidated Bonds and Past Due Coupons. — *State v. Pickett*, 46 La. Ann. 7.

Refunding State Debt — Bonds to Be Sold at Not Less than "Face Value" — Accrued Interest. — *Evans v. Tillman*, 38 S. Car. 238.

Liability of Internal Improvement Fund — Neglect of Duty by Trustees — Holders of Railroad Bonds. — *Wilson v. Mitchell*, (Fla. 1901) 30 So. Rep. 703.

State Authorized to Make Good Losses to Interest, Income, and Permanent School Funds — Issuance of State Bonds. — *In re State Bonds*, 7 S. Dak. 42.

Allowance of Commissions for Selling State Bonds Valid. — *State v. Buchanan*, (Tenn. Ch. 1901) 62 S. W. Rep. 287.

2. Where Purpose Illegal. — Bonds of a state issued for a purpose contrary to the United States Constitution are not a valid consideration for a promissory note, and this is not altered by the fact that they were employed as a circulating medium in the state.¹

3. Where Directions of Statute Not Observed. — Where certain bonds did not conform to the law authorizing their issuance, which fact appeared from the act printed on the reverse side of the bonds, they are not binding obligations of the state, even in the hands of innocent third parties.²

4. Where Debt Limit Exceeded. — And bonds which constitute a debt in excess of the amount which a state may constitutionally create are void.³

5. Fraudulent or Other Improper Circulation — Fraudulent Reissuance. — No recovery can be had on state bonds negotiable in form, even in favor of innocent holders, into whose hands they came after having been fraudulently reissued from the treasurer's office.⁴

Legislative Recognition of Validity. — But if the legislature recognizes the legality of bonds which have been put into circulation improperly, upon condition that certain securities shall be given, and directs that they may be sold in open market, the state may not afterwards repudiate them.⁵

Bonds Sold in Foreign Country. — And in one instance, where bonds which were, in the opinion of the court, "steeped in fraud at their inception," were sold in a foreign country, among people largely unacquainted with the English language, their holders were considered to "occupy the position of purchasers for value and in good faith, and entitled to relief accordingly." ⁶

6. Fund Pledged for Interest. — When a state borrows money on bonds issued by it for that purpose, and pledges a certain fund for the payment of the interest to accrue thereon, such pledge is a part of the contract with the holders of the bonds, and the diversion of the fund to other purposes is an impairment of the contract, and prohibited by the Federal Constitution.⁷

7. Scheme of Compromise — Offer to Refund. — A *bona fide* holder of invalid state bonds is not entitled to the benefit of a scheme of compromise which the state offers to holders of its securities that were valid in the hands of the first takers.⁸ An offer on the part of a state to issue new bonds for all its valid outstanding bonds, whenever the holders thereof choose to accept the terms on which the exchange is to be made, is, before acceptance, not a contract, but a mere proposal, which may be withdrawn.⁹

8. Security for Loan of Bonds. — Where a state lends its own bonds, taking back security for their payment, the presumption is strong that it intends, by means of such security, to indemnify itself against loss by reason of the loan of its credit, rather than to protect those who may subsequently become

Pledge of Illegal Bonds — Repledge by Pledgee with Knowledge — Recovery by State of Interest Paid on Coupons. — *State v. Hart*, 46 La. Ann. 54, cited in *State v. Gaines*, 46 La. Ann. 436.

Bonds to Pay Off Indebtedness of State Prison. — *Arendell v. Worth*, 125 N. Car. 111.

Bonds for Expenses of Military Expeditions Against the Indians — Insufficiency of Appropriation by Congress. — *Reis v. State*, (Cal. 1899) 59 Pac. Rep. 298; *Sawyer v. Colgan*, 102 Cal. 283.

Coupon Feature of Virginia Funding Act renders the whole coupon contract invalid. *Com. v. McCullough*, 90 Va. 597.

Burden of Proof of Genuineness of Bonds. — *Com. v. Dunlop*, 89 Va. 431. See also *Com. v. Hurt*, 85 Va. 918.

1. Purpose Illegal. — So decided in the case of bonds of the state of *Arkansas*, issued for the purpose of aiding the Southern cause in the war between the states. *Hanauer v. Woodruff*, 15 Wall. (U. S.) 439.

2. Cecil v. Board of Liquidation, 30 La. Ann.

34. See also Carver v. Board of Liquidation, 35 La. Ann. 263; *Adams v. Board of Liquidation*, 39 La. Ann. 690.

3. Williams v. Louisiana, 103 U. S. 637.

Bonds for State Normal School Void as Exceeding State Debt Limit. — *State v. McMillan*, (N. Dak. 1903) 96 N. W. Rep. 310.

4. Fraudulent Re-issuance. — *Pugh v. Moore*, (La. 1892) 10 So. Rep. 710; *Herwig v. Richardson*, (La. 1892) 11 So. Rep. 135.

5. Butler v. Dubois, 29 Ill. 105.

6. Florida, etc., R. Co. v. Schutte, 103 U. S. 118.

7. State v. Cardozo, 8 S. Car. 71, 28 Am. Rep. 275.

8. New York Guaranty, etc., Co. v. Board of Liquidation, 105 U. S. 622.

9. Durkee v. Board of Liquidation, 103 U. S. 646. See generally the title *CONTRACTS*, vol. 7, p. 88.

holders of such bonds against the consequences of its own repudiation or inability to pay.¹

VII. APPROPRIATIONS, FUNDS, DEBTS, ETC. — 1. Appropriations — a. NECESSITY FOR. — It is very generally provided by the constitutions of the states that "no money shall be drawn from the treasury except in pursuance of appropriations made by law."²

Incurring Indebtedness — Current Expenses. — A constitutional prohibition against incurring indebtedness "except in pursuance of an appropriation for the specific purpose first made" does not forbid the legislature from immediately authorizing the incurring of indebtedness in the current and usual administration of state affairs.³

Overdrawing State's Bank Account. — No executive officer of the state has the power to incur a state debt by overdrawing the bank account of the state, or in any other form without authority of law.⁴

b. WHAT CONSTITUTE. — No particular form of words is necessary to constitute an appropriation, if the intention to appropriate is plainly manifested.⁵ At the same time the courts invariably refuse to infer an intention

1. Effect of State Taking Security for Loan of Bonds. — *Stevens v. Memphis, etc., R. Co.*, 114 U. S. 663. In this case this presumption was held to be supported by certain provisions of the statutes under which the bonds were issued, and it was decided that the statutory lien with which the state of Tennessee was invested, upon the issue of its bonds to railroad companies under the "Internal Improvement Acts," was created solely for the state's security, and the holders of the bonds were not entitled to the benefit thereof. *Chamberlain v. St. Paul, etc., R. Co.*, 92 U. S. 299, was upon statutes and facts similar to the case just preceding, and it was held that where a state has loaned its bonds to a corporation, and received a conveyance of lands as indemnity, the bondholders have no equity for the application of the lands in the hands of the state's grantees to the payment of the bonds.

2. Appropriation as Prerequisite. — See *Institute for Mute, etc., v. Henderson*, 18 Colo. 98; *Goodykoontz v. Acker*, 19 Colo. 360; *Kroutinger v. Board of Examiners*, (Idaho 1902) 69 Pac. Rep. 279; and the constitutions of the several states.

Some Constitutions Require Specific Appropriation. — See *Providence Washington Ins. Co. v. Weston*, 63 Neb. 764.

Specific Appropriation Defined. — *Stratton v. Green*, 45 Cal. 149; *State v. La Grave*, 23 Nev. 25; *State v. Wallichs*, 12 Neb. 407; *State v. Wallichs*, 15 Neb. 457; *State v. Wallichs*, 15 Neb. 610, 16 Neb. 679; *State v. Moore*, 50 Neb. 88, 61 Am. St. Rep. 538; *Weston v. Herdman*, (Neb. 1902) 89 N. W. Rep. 384.

However Just and Equitable a Claim may be, no duty devolves upon the auditor to issue his warrant for its payment until an appropriation shall have been made by law for that purpose. *Collier, etc., Lithographing Co. v. Henderson*, 18 Colo. 259.

Money Deposited with the State Treasurer by Investment Companies for the protection of investors in the securities of such companies (*Mo. Acts 1893, p. 121*) is not money belonging to the state within the meaning of the constitutional requirement that such money shall not be paid out "except in pursuance of an appro-

priation by law." *State v. Stephens*, 136 Mo. 537.

The Exchange of Warrants on the State Capitol Building Fund for Cash, to be held and disbursed by the treasurer for work on such building, is not violative of the prohibition against the payment of funds except in pursuance of an appropriation. *State v. McGraw*, 13 Wash. 311.

Contingent Expenses of Legislature. — *McDonald v. Norman*, 95 Ky. 593; *Stone v. Dispatch Pub. Co.*, (Ky. 1900) 55 S. W. Rep. 725.

3. Warrant Drawn on General Fund to Reimburse Sinking Fund — Rights of Purchaser. — *State v. Omaha Nat. Bank*, 59 Neb. 483.

Incurring Indebtedness. — *Carter v. Thorson*, 5 S. Dak. 474, 49 Am. St. Rep. 893. See also *In re Incurring of State Debts*, 19 R. I. 610.

Where a statute divides the public printing into classes and authorizes a designated official to advertise for proposals for doing the work, and to make contracts for doing so much as the state may require, a contract so made does not "incur an indebtedness" within the meaning of a constitutional prohibition against incurring indebtedness "except in pursuance of an appropriation for the specific purpose first made;" the legal effect of such a contract is simply to fix the relations of the parties and their respective rights and duties, and may prove the foundation upon which an indebtedness growing out of further facts may finally rest. *Carter v. Thorson*, 5 S. Dak. 474, 49 Am. St. Rep. 893.

Appropriation of Revenues in Anticipation of Receipt — Held Not Incurring of Indebtedness. — *State v. McCauley*, 15 Cal. 430; *State v. Parkinson*, 5 Nev. 15; *State v. Medbery*, 7 Ohio St. 529; *In re State Warrants*, 6 S. Dak. 518, 55 Am. St. Rep. 852.

4. In re Incurring of State Debts, 19 R. I. 610.

5. Ingram v. Colgan, 106 Cal. 113; *State v. La Grave*, 23 Nev. 25, 62 Am. St. Rep. 764.

To Constitute an Appropriation there must be money placed in the fund applicable to the designated purpose. *State v. La Grave*, 23 Nev. 25, 62 Am. St. Rep. 764.

To an appropriation nothing more is requisite than a designation of the amount and of the fund out of which it is to be paid. *McCauley v.*

to appropriate from doubtful or ambiguous language.¹ An appropriation cannot be implied from the fact that the legislature has by law created an obligation to make a payment.²

c. PURPOSE — (1) *In General — Moral Obligation.* — In some states the constitution denies to the legislature the right to make direct appropriations to individuals from general considerations of charity or gratitude, or because of some supposed moral obligation resting upon the people of the state. But where it does not appear upon the face of the act that the appropriation made is of the forbidden kind, it is not competent for the court to receive evidence *aliunde* to establish such fact.³

(2) *Reimbursement of County.* — If, in the opinion of the legislature, one county or political division has been compelled to bear more than its proper share of taxation, that body may, in the absence of constitutional limitation, remedy the injustice and direct reimbursement from the state treasury.⁴

(3) *Aid to State Normal School.* — Notwithstanding the state is prohibited from paying the debts of, or loaning its credit to, any corporation, it has been held that an appropriation to a state normal school was valid, since, under the constitution, the state was free to employ such agencies for the advancement of public school education as it might deem proper under the policy of the state.⁵

(4) *Care of Indigent Insane.* — An appropriation for the support of indigent insane persons in a city asylum who belonged to the state outside such city, has been sustained, notwithstanding the constitution prohibited the legislature

Brooks, 16 Cal. 28. See also *Stratton v. Green*, 45 Cal. 149.

Joint Resolution. — The auditor may not draw a warrant for money attempted to be appropriated by joint resolution. *May v. Rice*, 91 Ind. 546.

General Appropriation Bill — Limited to Ordinary Expenses of Executive, Legislative, and Judicial Departments. — *Com. v. Gregg*, 161 Pa. St. 582.

For Instances of what has been held to be an appropriation, or what not, see the following cases:

Colorado. — *Parks v. Hays*, 11 Colo. App. 415; *People v. Goodykoontz*, 22 Colo. 507.

Idaho. — *Kingsbury v. Anderson*, (Idaho 1898) 51 Pac. Rep. 744.

Illinois. — *Burrill v. State Contract Com'rs*, 120 Ill. 322.

Indiana. — *Rice v. State*, 95 Ind. 34; *Hart v. State*, (Ind. 1902) 64 N. E. Rep. 854.

Louisiana. — *Thorpe v. Frazee*, 105 La. 250.

Montana. — *State v. Kenney*, 10 Mont. 485; *State v. Kenny*, 11 Mont. 553.

Nebraska. — *State v. Moore*, 50 Neb. 88, 61 Am. St. Rep. 538; *State v. Cornell*, 54 Neb. 647. See also *State v. Moore*, 37 Neb. 229.

Nevada. — *State v. La Grave*, 23 Nev. 387; *State v. Westerfield*, 23 Nev. 468.

Oregon. — *Shattuck v. Kincaid*, 31 Oregon 379; *Croasman v. Kincaid*, 31 Oregon 445.

South Dakota. — *Meade County Bank v. Reeves*, 13 S. Dak. 193.

Texas. — *Pickle v. Finley*, 91 Tex. 484.

Washington. — *State v. Grimes*, 7 Wash. 191.

Wyoming. — *State v. Burdick*, 4 Wyo. 272 (where Groesbeck, C. J., in a well-considered opinion reviews numerous authorities).

See also the titles **PUBLIC OFFICERS**, vol. 23, p. 387; **STATUTES, post**. And see **APPROPRIATION**, vol. 2, p. 514.

1. *Humbert v. Dunn*, 84 Cal. 57; *Irelan v.*

Colgan, 96 Cal. 413; *In re Continuing Appropriations*, 18 Colo. 192; *Goodykoontz v. Acker*, 19 Colo. 360; *Beshoar v. Las Animas County*, 7 Colo. App. 444.

2. *State v. Moore*, 50 Neb. 88, 61 Am. St. Rep. 538.

3. *Stevenson v. Colgan*, 91 Cal. 649.

Appropriations for the Benefit of or "to Aid" Sectarian Institution Prohibited. — *Cook County v. Chicago Industrial School*, 125 Ill. 540, 8 Am. St. Rep. 386; *Synod of Dakota v. State*, 2 S. Dak. 366. See also *State v. Hallock*, 16 Nev. 373; *Pfeiffer v. Board of Education*, 118 Mich. 560.

Act Authorizing Repayment of Money Paid on Liens of School Lands under Void Territorial Act — Just Claims — Action by State Board of Examiners. — *Thoreson v. State Board of Examiners*, 21 Utah 187, 19 Utah 18.

Appropriation to Fire Companies not a "donation" within section 1, art. 13, *South Dakota Constitution*; compliance with conditions valid consideration for appropriation. *Cutting v. Taylor*, 3 S. Dak. 11, followed in *State v. Hipple*, 7 S. Dak. 234.

Appropriation to Pay Innocent Purchasers of County Orders Issued under Invalid Law — Unauthorized. — *State v. Froehlich*, (Wis. 1903) 94 N. W. Rep. 50.

Appropriation to Family of Deceased Official of Salary which such official would have been entitled to if living and continuing in office; public advantage the test of the right. *Opinion of Justices*, 175 Mass. 599.

4. *Cayuga County v. State*, 153 N. Y. 279, holding further that provision for reimbursement of a county, intended as a discharge of an equitable obligation, although unenforceable, which in the judgment of the legislature rested upon the state, is not a "gift."

5. *Boehm v. Hertz*, 182 Ill. 154. See generally the title **SCHOOLS**, vol. 25, p. 63.

from making any grant of money to individuals, associations, etc.¹

(5) *Aid to Institutions Not under State Control.*—The state of *Colorado* is forbidden to extend aid for charitable, industrial, educational, or benevolent purposes to any person, corporation, etc., unless the same is "under the absolute control of the state."² Nevertheless, where the state, in the prosecution of a public improvement, has taken private property, and there is no other way in which the value of the property may be ascertained or paid, the legislature may agree with the owner upon the amount that the state shall give and make an appropriation therefor, and it is immaterial that the owner is a sectarian institution.³

(6) *Aid to Sufferers from Flood or Tornado.*—In *Wisconsin* an appropriation to relieve the sufferers in a portion of the state from a tornado, has been considered to be for a public purpose and valid.⁴ But under the *California* constitution, an appropriation in aid of sufferers by a flood occurring in a county of the state is not permissible.⁵

(7) *For Industrial Exhibits or Expositions.*—In several cases appropriations in aid of displays of the material and other resources of the state at expositions of a public character have been upheld.⁶

(8) *For Internal Improvements.*—By some of the constitutions, the state is prohibited from contracting any debt for, or engaging in, works of internal improvement,⁷ with the exception, in some instances, of the "expenditure of grants to the state of land or other property."⁸

(9) *Directing Payment of License Fees to Private Corporation.*—A statute of *New York* compelling owners of dogs to pay license fees to the Society for the Prevention of Cruelty to Animals is void as authorizing a gift of public moneys in violation of the constitution.⁹

(10) *Extra Compensation to Public Officers, etc.*—The legislature of *Michigan* is prohibited from granting or authorizing extra compensation to any public officer, agent, or contractor after the service has been rendered or the contract entered into.¹⁰

(11) *Using County Taxes in Aid of Cities.*—An act attempting to appropriate county taxes paid into the county treasury to cities in which the county has no interest, violates the *Missouri* constitutional provision forbidding the state to grant or authorize the making of any grant of public money, etc., to individuals or corporations.¹¹

(12) *Creating New Liabilities.*—To increase the existing obligation of the state for coupons by adding thereto the right to recover interest thereon, would be in violation of the constitutional provision forbidding the legislature to make any gift of public money.¹² And such provision prevents the legislature from creating a liability against the state for past acts of negligence on the part of its officers.¹³

1. *State v. Seibert*, 123 Mo. 424. And see the title *HOSPITALS AND ASYLUMS*, vol. 15, p. 757.

2. *In re Relief Bills*, 21 Colo. 62. And see *Daggett v. Colgan*, 92 Cal. 53.

3. *In re Substitute for Senate Bill No. 83*, 21 Colo. 69.

4. *State v. Davidson*, 114 Wis. 563.

5. *Patty v. Colga*, 97 Cal. 251.

6. *Daggett v. Colgan*, 92 Cal. 53; *Norman v. Kentucky Board of Managers*, 93 Ky. 537; *Minneapolis v. Janney*, 86 Minn. 111. See also the title *MUNICIPAL AID*, vol. 20, p. 1082.

7. *Act for Erection of State Warehouse and Grain Elevator—Violative of Constitutional Prohibition Against State Contracting for "Works of Internal Improvement."*—*Rippe v. Becker*, 56 Minn. 100.

The Construction of a System of Levees is a work of "internal improvement" within the meaning of the constitutional inhibition against

the state contracting any debt, etc., on account of such works. *State v. Froehlich*, 115 Wis. 32.

8. *Internal Improvements—Lands Bid in to State for Taxes—Not Lands Granted to State.*—*Gibson v. State Land Office Com'r*, 121 Mich. 49, citing *Wilcox v. Paddock*, 65 Mich. 23.

9. *Fox v. Mohawk, etc., Humane Soc.*, 165 N. Y. 517.

10. *Olds v. State Land Office Com'r*, (Mich. 1901) 86 N. W. Rep. 956, holding that a joint resolution authorizing a contractor to select certain swamp lands in payment for services did not offend against this provision.

11. *State v. St. Louis County Ct.*, 142 Mo. 575, distinguishing *State v. Seibert*, 123 Mo. 424, and *Hannibal v. Marion County*, 69 Mo. 571. See also *Elting v. Hickman*, 172 Mo. 237; *State v. Marion County Ct.*, 128 Mo. 427.

12. *Molineux v. State*, 109 Cal. 378.

13. *Chapman v. State*, 104 Cal. 690.

(13) *Contracts Made Without Express Authority of Law.* — By the constitutions of some of the states, the legislature may not appropriate money to pay any claim founded upon any agreement or contract made "without express authority of law," and all such unauthorized agreements or contracts are declared to be null and void.¹

d. PRIORITY — Necessary Expenses of Administration. — In *Colorado*, in the event of deficiency of revenue to meet appropriations, the necessary expenses of the executive, legislative, and judicial departments of the state, and interest on any public debt, are entitled to preference.² And salaries of necessary clerks and assistants are preferred claims equally with the salaries of officers.³

Mistake of Auditor. — If the auditor, through inadvertence or otherwise, has issued warrants upon a later appropriation, this will afford no defense to an action by a party having the prior right.⁴

e. DURATION. — A constitutional provision that no appropriation shall be made for a longer period than two years is prospective only, leaving unaffected appropriations made before its adoption.⁵ An appropriation may be prospective — that is, it may be made in one year, of the revenues to accrue in another or future years — the law being so framed as to address itself to such future revenues.⁶

Wrongful Refusal of Auditor. — The legislative authority to draw money from the treasury for the satisfaction of a just claim does not become extinguished by the wrongful refusal of auditing officers to exercise their functions within the proper time.⁷

f. QUESTIONING VALIDITY OF APPROPRIATION LAW. — In *Kentucky* the

1. *Lewis v. Colgan*, (Cal. 1896) 44 Pac. Rep. 1081. See also *In re Senate Bill No. 196*, 23 Colo. 508.

Exceeding Expenditure Authorized — State Building. — Where a statute authorizing the construction of a state building expressly limited the cost, a contract by state officers for additions and alterations whereby the amount was exceeded is not binding upon the state, as there was no "pre-existing law" upon which to base the claim as required by the constitution. *Nichols v. State*, 11 Tex. Civ. App. 327.

Subsistence of Military. — Under the constitutional provisions of *South Dakota*, and the statutes supplemental thereto, providing for the subsistence of the military forces of the state, the governor neither directly, nor indirectly through the officer in charge of such forces, has authority to make contracts binding upon the state for the expense of their maintenance. *Stanton v. State*, 5 S. Dak. 515.

2. *In re Appropriations*, 13 Colo. 316; *Henderson v. People*, 17 Colo. 587; *Institute for Mute, etc., v. Henderson*, 18 Colo. 98; *Goodykoontz v. People*, 20 Colo. 374; *Parks v. Soldiers, etc., Home Com'rs*, 22 Colo. 86.

3. *In re Appropriations*, 13 Colo. 316; *Stuart v. Nance*, 28 Colo. 194, affirming 12 Colo. App. 125.

Order of Passage of Appropriation Bills — No Priority of Payment. — *State v. Henderson*, 160 Mo. 190.

Refusal of Treasurer to Pay Preferred Claim — Burden of Proof of Registry Whereby Treasury Funds Exhausted. — *Nance v. Stuart*, 12 Colo. App. 125, explaining 7 Colo. App. 510.

Priority of Particular Appropriation Not Affected by Being Made by Special Act. — *Parks v. Soldiers, etc., Home Com'rs*, 22 Colo. 86; *Stuart v. Nance*, 28 Colo. 194.

Appropriation in Aid of Soldiers' and Sailors'

Home — Order of Payment in Event of Insufficiency of Revenues. — *Goodykoontz v. People*, 20 Colo. 374.

All Preferred Appropriations for a Given Fiscal Year, whether continuing or those made at the session of the legislature for that particular year, are of the same relative rank and importance. *Stuart v. Nance*, 28 Colo. 194.

4. *Parks v. Soldiers, etc., Home Com'rs*, 22 Colo. 86.

5. *State v. Kenney*, 111 Mont. 553.

Beyond Life of Legislature. — The legislature of *Minnesota* may, for the purpose of erecting a state capitol, make appropriations covering a period of time beyond the period of two years for which it was elected. *Fleckten v. Lamberton*, 69 Minn. 187.

Appropriations for Several Years — Expenditures for One Year Not to Exceed Proportion Which One Year Bears to Whole Time. — *State v. Mayhew*, 10 S. Dak. 365.

Temporary Fund. — The *Idaho* act providing for the erection of a capitol building and the issuance of bonds, etc., did not contemplate a permanent fund, but only a temporary one which was to continue until the bonds and interest were paid, after which the revenue appropriated to the fund must be turned into the general fund of the state, until otherwise provided by law. *Streunenberg v. Storer*, (Idaho 1898) 52 Pac. Rep. 14.

Duration of Appropriations Limited to the End of Quarter Succeeding the Following Session. — *State v. Moore*, 50 Neb. 88, 61 Am. St. Rep. 538.

Lapsing of Appropriation. — *State v. Babcock*, 22 Neb. 33; *State v. Moore*, 36 Neb. 579.

Unused Portion of Special Appropriation Transferred to General Fund — No Lapse. — *State v. Cook*, 14 Mont. 332.

6. *Ristine v. State*, 20 Ind. 339.

7. *State v. Cornell*, 60 Neb. 694.

auditor may, when called upon to order the payment of money out of the treasury, question the validity of the law making the appropriation.¹

g. **USE OF FUND RAISED BY POPULAR VOTE.** — Where, by a vote of the people, a fund was to be raised and so much thereof as might be necessary devoted to a specific purpose, such fund could not legally be applied to any other purpose without the consent of the people, notwithstanding that it was almost absolutely certain that the money would be returned, with interest, from the regular income of the state, before it should be needed.²

2. Limitation on Indebtedness. — Acts of Legislature attempting to authorize expenditures in excess of the constitutional limit are void.³

Casual Deficits. — There are constitutional provisions limiting the amount of debt that may be contracted to meet "casual deficits or failures in revenues, or for expenses not provided for."⁴

Future Failures of Revenues. — The limitation in the *Kentucky* constitution refers to future casual deficits and not to debts theretofore created for that or other purposes.⁵

Insurrection, etc. — As a rule there is no limitation as to the amount of debt the state may contract by loan for the expense of suppressing insurrection, invasion, and the like.⁶

3. Loan of State's Credit. — Where a state is prohibited from loaning its credit it may not borrow money on its bonds and then loan the money.⁷

4. Warrants in Payment of Debts Due State. — On grounds of public policy the state may not be required to accept its outstanding treasury warrants in payment of debts due it.⁸

5. Adjustment, Release, etc., of State's Claims. — When the state, acting through its duly authorized tribunal, makes a settlement of accounts, all the parties, including the state, are concluded thereby, in the absence of a showing of mistake or fraud.⁹ Where a claim against the state is allowed in part by the auditor, the claimant, by accepting a warrant for such part, waives his right of appeal.¹⁰ The legislature is without power to release or extinguish any obligations due the state.¹¹

1. *Norman v. Kentucky Board of Managers*, 93 Ky. 537.

2. *In re State House Fund*, 15 R. I. 393.

The "State House Fund" contemplated by Pub. Laws of *Rhode Island*, c. 1093, can be legally utilized in acquiring a site and erecting thereon such portion of a new state house as the fund may be sufficient to pay for, whether it be one-half, or three-fourths, or any other proportion. *In re State House Constr. Loan*, 20 R. I. 704; *In re New Statehouse*, (R. I. 1897) 37 Atl. Rep. 2.

Fund Appropriated for Addition to State Normal School — May Be Used to Purchase Necessary Ground. — *Kepley v. Prather*, 52 Kan. 9.

3. *In re Appropriations*, 13 Colo. 316, followed in *Parks v. Soldiers', etc., Home Com'rs*, 22 Colo. 86, and *Henderson v. People*, 17 Colo. 587.

Constitutional Limitation of Expenditures — Warrants against "State Capitol Building Fund" Create no Indebtedness Against State. — *State v. Cook*, 17 Mont. 529.

Issuance of State Bonds for Sale to State Permanent School Fund — Not Increase of Indebtedness. — *State v. Rogers*, 21 Wash. 206, distinguishing *State v. McGraw*, 12 Wash. 541.

Act Authorizing Issue of Bonds to Fund State Debt — Not for "the Purpose of Defraying Extraordinary Expenditures" — No New Debt or Increase of Debt. — *Robertson v. Tillman*, 39 S. Car. 298.

Limitation on State Debts — Consent of the People. — *In re Incurring of State Debts*, 19 R. I. 610.

Certificates of Indebtedness for Canal Construction — Constitutional Limitation upon State Indebtedness. — *In re Canal Certificates*, 19 Colo. 63.

4. *In re Loan of School Fund*, 18 Colo. 195; *In re Contracting of State Debt by Loan*, 21 Colo. 399; *State v. McGraw*, 12 Wash. 541.

What Is Casual Deficiency of the Revenue. — *In re Appropriations*, 13 Colo. 316.

Casual Deficiency of Revenue Held to Exist — Legislature Authorized to Contract Loan by Issuing Bonds to Pay State's Indebtedness. — *In re Casual Deficiency*, 21 Colo. 403.

5. *Eastern Kentucky Lunatic Asylum v. Bradley*, 101 Ky. 551.

6. *In re Contracting of State Debt by Loan*, 21 Colo. 399.

7. *Deering v. Peterson*, 75 Minn. 118.

8. *Kentucky Chair Co. v. Com.*, 105 Ky. 455.

9. *Mason, etc., Co. v. Com.*, (Ky. 1896) 36 S. W. Rep. 570.

10. *Weston v. Falk*, (Neb. 1902) 92 N. W. Rep. 204, affirmed (Neb. 1903) 93 N. W. Rep. 131.

11. *State v. Mellette*, (S. Dak. 1902) 92 N. W. Rep. 395.

Resolution Held Not to Vest Board of State Auditors with Authority to Compromise State's Alleged Claims, but simply to determine whether, in its opinion, the state had a lawful claim, and

VIII. SEAT OF GOVERNMENT — PUBLIC INSTITUTIONS. — Owners of property in a city wherein is located the seat of the state government have no such vested rights in the location as will prevent the removal thereof.¹ A private citizen cannot prevent the location of a public institution at a place other than that provided by law without showing some special injury to himself.² But the state in its sovereign capacity may do so on the relation of its executive law officer, without showing more than that the public funds are about to be applied in a manner prohibited by the constitution.³

IX. CONTRACTS — 1. Power to Make. — A state may make a binding contract; indeed, the power to contract is one of the necessary constituents of its sovereignty.⁴ A state may, and frequently does, contract with individuals and other states by act of legislature.⁵

2. Incidents of — a. SOVEREIGNTY RELINQUISHED. — When a state enters into a contract with a private individual it relinquishes its sovereign character *quoad* such transaction, and, as a general rule, can claim no exemption from the rules of law applicable to the contracts of private parties under like circumstances.⁶

b. POWER TO DEFEAT ENFORCEMENT. — There is one essential difference between the contract of a state and that of an individual — not, indeed, as to the meaning and effect of the contract itself, but as to the capacity of the state to defeat the enforcement of its contract: the state may defeat enforcement, but the individual cannot. This is the logical result of the rule that a state cannot be sued without its own consent.⁷ But it seems to be beyond controversy that the constitutional provision which denies to the state the

if so to commence suit. *Ellis v. Board of State Auditors*, 107 Mich. 528.

1. *Edwards v. Lesueur*, 132 Mo. 410.

Declaration that Certain City Is Seat of Government — Part of Constitution — How Changed. — *Livermore v. Waite*, 102 Cal. 113; *People v. Waite*, (Cal. 1894) 36 Pac. Rep. 431.

2. *Sherman v. Bellows*, 24 Oregon 553. See also *State v. Pennoyer*, 26 Oregon 205.

3. *State v. Metschan*, 32 Oregon 372, *overruling dicta* in *State v. Lord*, 28 Oregon 498.

4. **Power to Contract.** — *Piqua Branch of State Bank v. Knoop*, 16 How. (U. S.) 369; *Danolds v. State*, 89 N. Y. 36, 42 Am. Rep. 277; *State v. Smyrna Bank*, 2 Houst. (Del.) 99, 73 Am. Dec. 699.

In *Indiana v. Woram*, 6 Hill (N. Y.) 33, 40 Am. Dec. 378, it was held that a state is a corporation, and as such may be the payee of a promissory note.

For Facts Held Not to Constitute Employment by the State, see *Mullan v. State*, 114 Cal. 578.

Acceptance of Bid for State Printing — Certain Necessary Details Not Covered — Not Binding Contract. — *Capital Printing Co. v. Hoey*, 124 N. Car. 767.

For a State of Facts Held to Show a Contract for Printing at a Certain Price per Piece and not for a price to be determined subsequently, see *Metzel v. State*, 16 Wis. 347.

Printing Contract — Assignability — Liability of Sureties on Bond. — *Leader Printing Co. v. Lowry*, 9 Okla. 89.

North Carolina Statute — Public Printing. — A contract for public printing under Acts 1895, c. 20, § 1, carries the rights to all the printing, binding, etc., required by the state. *Stewart v. State*, 118 N. Car. 624.

Conditions in Regard to Payment for Labor and Materials in Contract and Bond by Contractor — Right of Officers to Require. — *Kaufmann v.*

Cooper, 46 Neb. 644. See also *Sample v. Hale*, 34 Neb. 220; *Korsmeyer Plumbing, etc., Co. v. McClay*, 43 Neb. 649.

5. *Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co.*, 4 ' ' & J. (Md.) 5.

6. **Subject to Ordinary Rules.** — *Davis v. Gray*, 16 Wall. (U. S.) 203; *Patton v. Gilmer*, 42 Ala. 548, 94 Am. Dec. 665; *Calloway v. Cossart*, 45 Ark. 81; *Chapman v. State*, 104 Cal. 690; *Carr v. State*, 127 Ind. 204, 22 Am. St. Rep. 624; *People v. Stephens*, 71 N. Y. 549; *Danolds v. State*, 89 N. Y. 36, 42 Am. Rep. 277. See also *Martin v. Roesch*, 57 Ark. 474.

Loss of Tobacco in a State Warehouse. — With a view to raising revenue, a state statute required the inspection of tobacco and the storing of it in the state tobacco warehouses for that purpose. The plaintiff stored his tobacco in conformity with that law, and while stored it was destroyed by fire. The plaintiff was empowered by special act of the legislature to bring suit therefor. He accordingly brought an action, alleging that the loss occurred through the negligence of the state. It was held on demurrer that there was no contract or obligation on the part of the state to keep the tobacco safe, and that the state was not liable for the loss as bailee or in any other capacity. *Moore v. State*, 47 Md. 467, 28 Am. Rep. 483.

Contract with State for Excavation of Waterways — Liens upon Tide and Shore Lands of State. — *Scholpp v. Forrest*, 11 Wash. 640.

7. *Carr v. State*, 127 Ind. 204, 22 Am. St. Rep. 624. See *infra*, this title, *Suits By or Against State*.

Appropriations. — Under some of the state constitutions, the states may defeat the enforcement of their obligations by the failure or refusal of their legislatures to make the necessary appropriations. *State v. Porter*, 89 Ind. 260; *May v. Rice*, 91 Ind. 546; *Rice v. State*, 95 Ind.

power to pass laws impairing the obligation of contracts, applies as well to contracts made by the state as to those made by individuals.¹

c. HOW INTENTION ASCERTAINED. — The intention of a state in making a contract must be ascertained by the acts and declarations of its constituted authorities and agents acting within the scope of their duty, and all acts which relate to the contract, and all declarations of agents which in the case of a private individual would affect the contract, must be held as in like manner affecting a contract made by the state.²

d. INTEREST. — To the general rule stated above there appears to be an exception in the matter of interest, it being held by the weight of authority that a state is not liable therefor in the absence of express contract or positive enactment.³

A General Statute providing for the payment of interest in cases where money is wrongfully withheld from a creditor is not applicable to the state.⁴ And a general act authorizing "suits against the state and regulating the procedure therein," containing no reference to any particular demand, does not create a liability for interest.⁵ Interest, however, accrues in favor of the state precisely as it does in favor of private parties.⁶

e. PROSPECTIVE PROFITS. — The state is, upon a breach of its contract, liable for prospective profits, if such profits would have constituted a proper item of damages had the contract been between private individuals.⁷

f. ILLEGALITY. — A contract by the state violative of the organic law of the Union is invalid.⁸

33; *Carr v. State*, 127 Ind. 204, 22 Am. St. Rep. 624. See also *Hans v. Louisiana*, 24 Fed. Rep. 55.

1. **Impairment of Obligation of Contract.** — *Fletcher v. Peck*, 6 Cranch (U. S.) 87; *New Jersey v. Wilson*, 7 Cranch (U. S.) 164; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 519; *Georgia Penitentiary Cos. v. Nelms*, 71 Ga. 301; *Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co.*, 4 Gill & J. (Md.) 5. And see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 15, p. 1030.

2. *Patton v. Gilmer*, 42 Ala. 548, 94 Am. Dec. 665. See *supra*, this subsection, *Sovereignty Relinquished*.

3. **State Held Not Liable for Interest.** — U. S. v. *North Carolina*, 136 U. S. 211; *State v. Thompson*, 10 Ark. 61; *Sawyer v. Colgan*, 102 Cal. 283; *Hawkins v. Mitchell*, 34 Fla. 405; *Western, etc., R. Co. v. State*, (Ga. 1891) 14 L. R. A. 438; *State v. Mayes*, 28 Miss. 706 (*modifying Swann v. Turner*, 23 Miss. 565); *Whitney v. State*, 52 Miss. 732; *Bledsoe v. State*, 64 N. Car. 392; *Atty.-Gen. v. Cape Fear Nav. Co.*, 2 Ired. Eq. (37 N. Car.) 444. See also *Molineux v. State*, 109 Cal. 378; *Davis v. State*, 121 Cal. 210.

Nonliability of State for Interest on Coupons of Indian War Bonds of 1851. — *Sawyer v. Colgan*, 102 Cal. 283, (Cal. 1894) 36 Pac. Rep. 834; *Molineux v. State*, 109 Cal. 378; *Davis v. State*, 121 Cal. 210.

State Agent. — In *Auditorial Board v. Arles*, 15 Tex. 72, it was held that a state is not bound by the contract of its agent to pay interest, unless there is a law authorizing the agent to contract to pay it.

Interests on Warrants — Right of Assignee. — *State v. Barret*, 25 Mont. 112.

State Held Liable for Interest. — But in *Res Publica v. Mitchell*, 2 Dall. (U. S.) 101, it was held that the state is liable to pay interest as well as individuals.

It has been held that where one pays money which is properly chargeable against the state, he is entitled to the interest from the time of payment, but ordinarily a demand must be made on the legislature before the state may be charged with interest. *Milne v. Republican*, 3 Yeates (Pa.) 101. As to the second part of this proposition, see also *State v. Mayes*, 28 Miss. 706.

And in *People v. Canal Com'rs*, 5 Den. (N. Y.) 401, it was held that the state is liable to pay interest upon the amount of a legal appraisal of damages for land taken for public use after a lawful demand made by the party entitled upon the officers charged by law with the duty of making payment.

In *Com. v. Lyon*, (Ky. 1903) 72 S. W. Rep. 323, it was held that where the state consents to be sued, the court may determine the question of interest just as in ordinary cases.

4. **General Statute.** — This is upon the familiar principle that a sovereign is not bound by the words of a statute unless expressly named. *State v. Board of Public Works*, 36 Ohio St. 409. To the same effect is *Carr v. State*, 127 Ind. 204, 22 Am. St. Rep. 624. And in this case it was also held that a state is not chargeable with interest upon interest unless it expressly contracts to pay such interest.

5. *Davis v. State*, 121 Cal. 210.

6. *Chevallier v. State*, 10 Tex. 315.

7. **Prospective Profits.** — *Danolds v. State*, 89 N. Y. 36, 42 Am. Rep. 277. See also *Masterton v. Mayor, etc., of Brooklyn*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38; *U. S. v. Speed*, 8 Wall. (U. S.) 77; *U. S. v. Smith*, 94 U. S. 214; *Thompson v. U. S.*, 9 Ct. of Cl. 187.

Acts Held to Constitute Abandonment by State of Work on Canal and Not "Suspension" — **Prospective Profits Recoverable by Contractors.** — *Baker v. State*, 77 N. Y. App. Div. 528.

8. *Patton v. Gilmer*, 42 Ala. 548, 94 Am. Dec.

3. State Anti-trust Law Inapplicable. — The anti-trust law of *Mississippi* is not applicable to the state or its public agencies in letting a contract for copyrighted school books in the manner provided by law.¹

X. STATUS OF STATE AS CREDITOR. — In nearly all of the states there are statutes giving preference to taxes, rates, and other debts due the state over the debts of the citizens;² but in one instance the statute directs that debts due the state shall be paid last.³ Whether a state, in the absence of positive enactment, is entitled to the priority claimed by the crown under the common law, appears to be not well settled. The prevailing opinion, however, is in favor of such priority.⁴ It has been held that a state does not lose its general priority in cases where it is entitled to it by law, by taking special security.⁵

XI. STATE AS GRANTEE OR DEVISEE. — The state has capacity to take by deed or devise,⁶ and it may take as trustee to apply the gift in executing any lawful governmental function.⁷

XII. RESPONSIBILITY FOR ACTS OF OFFICERS — 1. Limits of Responsibility —

a. IN GENERAL. — Where the Acts Are Not Within the Scope of the Officer's Authority they are not official acts, and the state is not bound thereby.⁸

665. See the title **ILLEGAL CONTRACTS**, vol. 15, p. 935.

1. *Johnson Pub. Co. v. Mills*, 79 Miss. 555, holding also that a public contract for an article below cost is not "inimical to the public welfare," within the *Mississippi* Constitution of 1890, § 198.

2. See various state statutes.

3. *Bright*, *Purd. Dig. (Pa.)*, p. 525, § 94. Unless secured by judgment. *Ramsey's Appeal*, 4 Watts (Pa.) 73.

4. See the titles **DEBTS OF DECEDENTS**, vol. 8, p. 1046 *et seq.*; **INSOLVENCY AND BANKRUPTCY**, vol. 16, p. 694.

If a Judgment Be Obtained against one in his lifetime, his executor or administrator is bound to satisfy it in preference to a debt passed to the state after such judgment. *Hollingsworth v. Patten*, 3 Har. & M. (Md.) 126.

The Priority of the State Is Lost, however, by a valid assignment of the debtor's (in this case a banking corporation's) property in trust for the equal benefit of all his creditors, and the state can only come in with the other creditors. *State v. Bank of Maryland*, 6 Gill & J. (Md.) 205, 26 Am. Dec. 561. But compare *State v. Mayor*, etc., of Baltimore, 10 Md. 504.

The language "debts due to the public" in a statute giving priority to the state as a creditor, does not comprehend a debt due to an incorporated bank, notwithstanding the entire interest in the corporation is owned by the state. *Bank of South Carolina v. Gibbs*, 3 McCord (S. Car.) 377. And so with the phrase "debts and arrearages due to the state." *Fields v. Wheatley*, 1 Sneed (Tenn.) 351.

But it is otherwise in the case of a debt due by a surety, at the time of his death, on a county treasurer's bond for a default of his principal. *Baxter v. Baxter*, 23 S. Car. 114.

5. *Lenoir v. Winn*, 4 Desaus. (S. Car.) 65, 6 Am. Dec. 597.

6. *Dikes v. Miller*, 25 Tex. Supp. 281, 78 Am. Dec. 571.

7. *Yale College's Appeal*, 67 Conn. 237; *Bedford v. Bedford*, 99 Ky. 273. See the title **CHARITIES AND TRUSTS FOR CHARITABLE USES**, vol. 5, p. 922 *et seq.*

8. State Not Bound by Unauthorized Acts of Its Officers — California. — *Mullan v. State*, 114 Cal. 578.

Georgia. — *State v. Southwestern R. Co.*, 70 Ga. 11.

Indiana. — *Julian v. State*, 140 Ind. 581, 122 Ind. 68; *McCaslin v. State*, 99 Ind. 428.

Kentucky. — *Long v. Stone*, (Ky. 1897) 39 S. W. Rep. 836.

Louisiana. — *State v. Hart*, 46 La. Ann. 40.

Michigan. — *Cahill v. Board of State Auditors*, 127 Mich. 487.

Missouri. — *State v. Hays*, 52 Mo. 578.

Nebraska. — *State v. Cornell*, 52 Neb. 25.

Nevada. — *State v. Horton*, 21 Nev. 466.

New York. — *People v. Roberts*, 153 N. Y. 70, reversing 45 N. Y. App. Div. 140; *People v. Morgan*, 45 N. Y. App. Div. 86, affirmed by memorandum decision, 161 N. Y. 643; *People v. Brandreth*, 36 N. Y. 190, 34 How. Pr. (N. Y.) 171, 3 Abb. Pr. N. S. (N. Y.) 224; *DeLafield v. Illinois*, 26 Wend. (N. Y.) 192.

North Carolina. — *State v. Bevers*, 86 N. Car. 588.

Ohio. — *Beaver v. Institution for Blind*, 19 Ohio St. 97; *Putnam County v. Auditor*, 1 Ohio St. 322.

Rhode Island. — *In re State House Constr. Loan*, 20 R. I. 704; *In re Incurring of State Debts*, 19 R. I. 610.

South Dakota. — *Stanton v. State*, 5 S. Dak. 515.

Tennessee. — *State v. Strickland*, 3 Head (Tenn.) 644.

Texas. — *Day Land, etc., Co. v. State*, 68 Tex. 526.

Washington. — *Young v. State*, 19 Wash. 634; *State v. Cheetham*, 17 Wash. 131.

Wisconsin. — *Tenney v. State*, 27 Wis. 387; *Kneeland v. Milwaukee*, 18 Wis. 411; *Randall v. State*, 16 Wis. 340; *State v. Hastings*, 12 Wis. 596; *Orton v. State*, 12 Wis. 509; *State v. Hastings*, 10 Wis. 525.

State Held Not Bound by Comptroller's Declaration to Treasurer's Surety as to Treasurer's Character. — *Sooy v. State*, 39 N. J. L. 135.

State Held Not Bound by School Fund Commissioner's Representations to Surety on School Fund Loan Bond. — *State v. Haskell*, 20 Iowa 276.

Where the Acts Are Within the Scope of the Officer's Authority the state is bound to the same extent as is a private principal by the acts of his agent.¹

The Question of the Officer's Authority Is Not for the Legislature to determine, but is a judicial question which must be determined by the courts.²

Notice to an Officer is notice to the state when the notice is given to him in his official capacity and in regard to a matter within the scope of his authority.³

b. LACHES, ERRORS, AND MISTAKES — Laches. — The state cannot be precluded by the laches of its officers from asserting any of its rights or claims.⁴

Errors and Mistakes. — Nor is the state bound by the errors and mistakes of its officers in making settlements in its behalf;⁵ nor by the mistakes or misfeasance of a tax assessor in failing to make an assessment or in making a wrongful one, the errors being subject to correction by the officer's successor.⁶ It has even been held that where a state officer, thinking that he has power so to do, wrongfully pays out the state money, the state may recover such money from the party to whom it is paid, notwithstanding the mistake thus sought to be corrected is a mistake of law.⁷

c. TORTS. — The State Is Not Liable for the torts of its officers, though committed in the discharge of official duties.⁸

Basis and Extent of Exemption. — The exemption of the state from liability for the torts of its officers does not depend upon its immunity from suit without

State Held Not Bound by Stipulation of Officer Releasing Liquors Seized by Him. — *Fries v. Porch*, 49 Iowa 351.

State Held Not Bound by Auditor's Certificate Attesting Claim against State. — *Lipton v. Paker*, (Ark. 1903) 74 S. W. Rep. 298.

State Held Not Bound by Payment to Auditor of Fees Required to Be Paid to Treasurer. — *Hartford F. Ins. Co. v. State*, 9 Kan. 211; *State v. Home Ins. Co.*, 59 Neb. 524.

State Held Not Bound by Board of Auditor's Compromise of State Claims. — *Ellis v. Board of State Auditors*, 107 Mich. 528.

State Held Not Bound by Governor's Compromise of State Claims. — *Penitentiary Co. v. Gordon*, 85 Ga. 159.

State Held Not Bound by State Engineer's Audit of Claims. — *People v. Roberts*, 163 N. Y. 70, reversing 45 N. Y. App. Div. 145.

State Held Not Bound by Surveyor General's Approval of Location under State Warrants. — *Farish v. Coon*, 40 Cal. 33.

District of Columbia Held Not Bound by Payment of Taxes with Checks. — *Koones v. District of Columbia*, 4 Mackey (D. C.) 339.

1. State Bound by Acts of Officer Within Scope of Authority. — *Slaughter v. State*, 132 Ind. 465; *People v. Stephens*, 71 N. Y. 527; *Brown v. State*, 14 S. Dak. 219; *State v. Hamilton*, 11 Humph. (Tenn.) 47; *Blount v. Ramsey*, *Coole* (Tenn.) 489.

State Held Bound by Officer's Settlement of State Claims. — *Mason, etc., Co. v. Com.*, (Ky. 1896) 36 S. W. Rep. 570; *Boyers v. Crane*, 1 W. Va. 176.

State Held Liable for Acts of State Architect in Hindering Contractor. — *State v. Farish*, 23 Miss. 483.

State Held Bound by Agent's Representations to Sureties on Official Bonds as to Character of Principal. — *Soo v. State*, 38 N. J. L. 324. It is to be noted, however, that in this case it appeared that the representations were made with the knowledge of the legislature.

2. Boyers v. Crane, 1 W. Va. 176.

3. When Notice to Officer Notice to State. — *Alexander v. State*, 56 Ga. 478.

4. State Not Precluded by Laches of Officers. — *State v. Brewer*, 64 Ala. 287; *Haehnlen v. Com.*, 13 Pa. St. 617, 53 Am. Dec. 502; *State v. Sponaugle*, 45 W. Va. 415. Compare *Com. v. Bala, etc.*, *Turnpike Co.*, 153 Pa. St. 47.

State Held Not Responsible for Officer's Negligence in Enforcing Collateral Security. — *Seymour v. Van Slyck*, 8 Wend. (N. Y.) 403.

State Held Not Responsible to Sureties on Official Bond for Negligence of Officers in Not Enforcing Claim Against Principal. — *Haehnlen v. Com.*, 13 Pa. St. 617, 53 Am. Dec. 502.

State Not Barred by Laches of Officers from Collecting Revenues. — *State v. Columbia*, (Tenn. Ch. 1899) 52 S. W. Rep. 511. See also *Terre Haute, etc., R. Co. v. State*, 159 Ind. 438.

5. State Not Bound by Errors and Mistakes of Officers. — *State v. Brewer*, 64 Ala. 287; *State v. Brewer*, 61 Ala. 318; *Timberlake v. Brewer*, 59 Ala. 108; *Long v. McDowell*, 107 Ky. 14; *Worth v. Stewart*, 122 N. Car. 258; *Com. v. Easton Bank*, 10 Pa. St. 442; *Haehnlen v. Com.*, 13 Pa. St. 617, 53 Am. Dec. 502.

6. People v. Roberts, 155 N. Y. 408.

7. Officer's Mistake of Law. — *Com. v. Carter*, (Ky. 1900) 55 S. W. Rep. 701; *Ellis v. Board of State Auditors*, 107 Mich. 528.

8. State Not Liable for Torts of Officers. — *Chapman v. State*, 104 Cal. 690; *Bourn v. Hart*, 93 Cal. 321; *Murdock Parlor Grate Co. v. Com.*, 152 Mass. 28; *Allen v. Board of State Auditors*, 122 Mich. 324; *Lewis v. State*, 96 N. Y. 71, 48 Am. Rep. 607; *Seymour v. Van Slyck*, 8 Wend. (N. Y.) 403; *Moody v. State Prison*, 128 N. Car. 12; *Clodfelter v. State*, 86 N. Car. 51, 41 Am. Rep. 440; *Billings v. State*, 27 Wash. 288; *Houston v. State*, 98 Wis. 481. Compare *State v. Farish*, 23 Miss. 483, wherein the state was held liable to a contractor for damages resulting from the state architect's interference with the work which the contractor had contracted to do for the state.

its consent, but rests upon grounds of public policy which forbid that any such liability should ever arise;¹ and a demand for damages resulting from such torts is not a "claim" against the state within the constitutional and statutory provisions conferring jurisdiction upon the courts to adjudicate "claims" against the state.²

Assumption of Liability by State. — In the absence of constitutional restrictions, the legislature may impose upon the state liability for the torts of state officers,³ even after the damages have accrued.⁴ In the latter case, however, the recompense is purely gratuitous, and is within constitutional inhibitions against gifts of the public money.⁵ Where the state has assumed liability for the negligence of its officers in regard to any particular matter placed under their control, it seems that the measure of damages is the same as in any other case, the party injured being entitled to compensation for all the damages proximately caused by the injury complained of.⁶

d. ESTOPPEL. — The State Is Never Estopped by the unauthorized acts of its officers, and may always show the truth of any transaction undertaken in its name or in its behalf.⁷

Basis of Exemption. — The exemption of the state from estoppel by the unauthorized acts of its officers is variously held to be based upon the sovereign character of the state,⁸ upon grounds of public policy,⁹ and upon the presumption that all persons have knowledge of the extent of the authority of public officers;¹⁰ but whatever be the reason of the rule, the rule itself is well settled as above stated.

2. Contracts — *a. IN GENERAL* — **Liability Always Contractual.** — The state's liability for the acts of its officers is always of a contractual nature, when there is any liability at all. As has already been seen, it is not liable either for their laches, errors, or mistakes,¹¹ or for their torts.¹² But its exemption from liability does not end here; for where the contract made by the officer is invalid, the state is liable neither upon a *quantum meruit* for the benefits which it has received under the contract,¹³ nor for money had and received by the officer

1. Exemption from Liability Based on Public Policy. — *Bourn v. Hart*, 93 Cal. 321; *Murdock Parlor Grate Co. v. Com.*, 152 Mass. 28; *Lewis v. State*, 96 N. Y. 71, 48 Am. Rep. 607; *Moody v. State Prison*, 128 N. Car. 12.

2. Demand for Damages Resulting from Officer's Torts Not a "Claim" Against the State. — *Clodfelter v. State*, 86 N. Car. 51, 41 Am. Rep. 440; *Billings v. State*, 27 Wash. 288; *Houston v. State*, 98 Wis. 481.

3. Liability May Be Assumed by Statute. — *Bourn v. Hart*, 93 Cal. 321; *Roberts v. State*, 160 N. Y. 217, affirming 30 N. Y. App. Div. 106; *Shannahan v. State*, 57 N. Y. App. Div. 239.

4. Allen v. Board of State Auditors, 122 Mich. 324.

5. Assumption of Liability After Accrual of Damages a Mere Gift. — *Bourn v. Hart*, 93 Cal. 321; *Allen v. Board of State Auditors*, 122 Mich. 324; *Chapman v. State*, 104 Cal. 690. And see *infra*, this title, *Appropriations, Funds, Debts, etc.*

6. Slavin v. State, 152 N. Y. 45.

7. Unauthorized Acts of Officers Not Estoppel — *Alabama*. — *State v. Brewer*, 64 Ala. 287.

Arkansas. — *Pulaski County v. State*, 42 Ark. 117; *Woodruff v. Berry*, 40 Ark. 251; *Woodward v. Campbell*, 39 Ark. 580.

California. — *Mullan v. State*, 114 Cal. 578.

Georgia. — *Penitentiary Co. v. Gordon*, 85 Ga. 159; *Alexander v. State*, 56 Ga. 478.

Illinois. — *Dement v. Rokker*, 126 Ill. 174; *People v. Brown*, 67 Ill. 435.

Kentucky. — *Long v. McDowell*, 107 Ky. 14.

Michigan. — *Atty.-Gen. v. Marr*, 55 Mich. 445.

North Carolina. — *State v. Bevers*, 86 N. Car. 588; *Doe v. Roe*, 4 Hawks (11 N. Car.) 116, 15 Am. Dec. 512.

Ohio. — *State v. Lake Shore, etc.*, R. Co., 2 Ohio Dec. 300.

South Carolina. — *Carolina Nat. Bank v. State*, 60 S. Car. 465.

Tennessee. — *State v. Allen*, (Tenn. Ch. 1898) 46 S. W. Rep. 303.

Texas. — *Day Land, etc., Co. v. State*, 68 Tex. 526.

West Virginia. — *State v. Chilton*, 49 W. Va. 453.

8. State v. Bevers, 86 N. Car. 588.

9. State v. Brewer, 64 Ala. 287.

10. Dement v. Rokker, 126 Ill. 174; *Day Land, etc., Co. v. State*, 68 Tex. 526.

11. See supra, this section, *Limits of Responsibility* — *Laches, Errors, and Mistakes*.

12. See supra, this section, *Limits of Responsibility* — *Torts*.

13. Quantum Meruit. — *Mulnix v. Mutual Ben. L. Ins. Co.*, 23 Colo. 71.

Compare Jewell Nursery Co. v. State, 8 S. Dak. 531, affirming 5 S. Dak. 623, wherein it was held that the state, by reason of its continued enjoyment of the benefits of the contract after notice of the circumstances under which

in its name and in its behalf under such contract.¹ It is manifest, therefore, that the state's responsibility for the acts of its officers must always be contractual in its nature.

The Extent of the State's Liability upon a contract made by its officer in its behalf is coextensive with the officer's authority to contract. If the officer acts within his authority, the state will be bound;² if he acts without authority or exceeds his authority, the state will not be bound;³ the rule being identically the same in either case as that heretofore enunciated with regard to the state's responsibility in general.⁴ *A fortiori* will the state not be bound where the contract is *ultra vires* by reason of the violation of constitutional limitations.⁵

Instances of Unauthorized Contracts made by state officers and held not-binding upon the state are set out in the notes below.⁶

b. OFFICER'S AUTHORITY TO CONTRACT. — The Officer's Authority Must Be Real as distinguished from an apparent authority arising from the general scope of his powers, the rule being an exception to the general law of agency in this regard;⁷ the reason for the exception being that all persons are presumed to know the law fixing and limiting the officer's authority, and are thus charged with notice of the extent thereof.⁸ This doctrine of constructive notice extends even to *bona fide* purchasers, so that they are in no better position

such benefits were acquired, was liable for the reasonable value of the property thus retained and enjoyed, though not for the contract price.

1. State *v.* Bevers, 86 N. Car. 588.

2. Authorized Contracts. — Danolds *v.* State, 89 N. Y. 36, 42 Am. Rep. 277; Brown *v.* State, 14 S. Dak. 219; Van Dusen *v.* State, 11 S. Dak. 318; State *v.* Dubuclet, 25 La. Ann. 161.

3. Unauthorized Contract. — New York, etc., Steam Ship Co. *v.* Harbison, 16 Fed. Rep. 688; McCaslin *v.* State, 99 Ind. 428; Long *v.* Stone, (Ky. 1897) 39 S. W. Rep. 836; State *v.* Bevers, 86 N. Car. 588; *In re* State House Constr. Loan, 20 R. I. 704; State *v.* Strickland, 3 Head (Tenn.) 644; State *v.* Cheetham, 17 Wash. 131; Kneeland *v.* Milwaukee, 18 Wis. 411; State *v.* Hastings, 12 Wis. 596.

4. See *supra*, this section, *Limits of Responsibility — In General*.

5. Unconstitutional Contracts. — State *v.* Home Ins. Co., 59 Neb. 524; State *v.* Bevers, 86 N. Car. 588; Van Dusen *v.* State, 11 S. Dak. 318; Stanton *v.* State, 5 S. Dak. 515.

6. State Held Not Bound by Governor's Employment of Agent to Collect State Claim. — Mullan *v.* State, 114 Cal. 578.

State Held Not Bound by Governor's Employment of Attorney to Assist Legislators. — Julian *v.* State, 140 Ind. 581.

State Held Not Bound by Governor's Employment of Attorney to Assist in Changing Laws. — Cahill *v.* Board of State Auditors, 127 Mich. 487.

State Held Not Bound by Governor's Employment of Attorney to Prosecute County Officer. — Randall *v.* State, 16 Wis. 340.

State Held Not Bound by Governor's Employment of Expert to Investigate State Penitentiary Accounts. — Young *v.* State, 19 Wash. 634.

State Held Not Bound by Governor's Sale of Bonds at Less than Par. — Delafield *v.* Illinois, 26 Wend. (N. Y.) 192.

State Held Not Bound by Governor's Sale of Bonds on Credit. — Delafield *v.* Illinois, 26 Wend. (N. Y.) 192.

State Held Not Bound by Governor's Purchase of Military Supplies. — State *v.* Hays, 52 Mo. 578; Stanton *v.* State, 5 S. Dak. 515.

State Held Not Bound by Attorney-General's Employment of Assistant Counsel. — Julian *v.* State, 122 Ind. 68.

Bonds Issued by State Officer Having No Authority Held Void. — State *v.* Hart, 46 La. Ann. 40.

State Held Not Bound by Unauthorized Loan to Officer. — People *v.* Brandreth, 36 N. Y. 190, 34 How. Pr. (N. Y.) 171, 3 Abb. Pr. N. S. (N. Y.) 224.

State Held Not Bound by Officer's Indorsement of Notes Belonging to State. — State *v.* Bevers, 86 N. Car. 588.

State Not Bound by Officer's Overdraft upon State Funds. — *In re* Incurring of State Debts, 19 R. I. 610.

Officer's Contract with Wrong Person Held Invalid. — People *v.* Morgan, 45 N. Y. App. Div. 86, affirmed 161 N. Y. 643.

7. Officer's Authority Must Be Real. — Woodward *v.* Campbell, 39 Ark. 580; Parsel *v.* Barnes, 25 Ark. 261; Parsel *v.* Merchants' Nat. Bank, 25 Ark. 272; Polk *v.* State, 138 Cal. 384; Mullan *v.* State, 114 Cal. 578; Butler *v.* Bates, 7 Cal. 136; Koonen *v.* District of Columbia, 4 Mackey (D. C.) 339; State *v.* McLin, (Fla. 1902) 32 So. Rep. 933; Camp *v.* McLin, (Fla. 1902) 32 So. Rep. 927; State *v.* La Grave, 22 Nev. 417; State *v.* Lake Shore, etc., R. Co., 2 Ohio Dec. 300; Carolina Nat. Bank *v.* State, 60 S. Car. 465; State *v.* Chilton, 49 W. Va. 453.

8. All Persons Charged with Notice of Extent of Officer's Authority — Alabama. — State *v.* Brewer, 64 Ala. 287.

Arkansas. — Woodruff *v.* Berry, 40 Ark. 251; Parsel *v.* Barnes, 25 Ark. 261.

District of Columbia. — Koonen *v.* District of Columbia, 4 Mackey (D. C.) 339.

Georgia. — Penitentiary Co. *v.* Gordon, 85 Ga. 159.

Illinois. — Dement *v.* Rokker, 126 Ill. 174.

Indiana. — Julian *v.* State, 140 Ind. 581.

than the party contracting with the officer, at least so far as the extent of the officer's authority is concerned. Thus, it has been held that a *bona fide* purchaser of commercial paper issued in the name of the state by an officer having no authority to issue it acquires no right as against the state, since he is charged with full notice of the officer's authority.¹ But it seems that *bona fide* purchasers of commercial paper issued by a state officer will not be charged with notice of the officer's failure to comply with the manner of issuing such paper required by the statute giving him his authority; as, for example, where the statute requires the officer to negotiate the paper for cash at par, and he negotiates it on credit for less than par, a *bona fide* purchaser may nevertheless hold the state for the full value of the paper.²

Implied Authority.—The officer need not always have express authority in order to bind the state by contract; but the implied authority which arises from the powers expressly conferred by law extends only to such matters and acts as are reasonably necessary to the exercise of such powers.³ An implied authority can never arise from the past practices and usages of the officer,⁴ nor indeed from any acts or admissions of the officer not authorized by law.⁵

Conditions Precedent to the officer's authority to contract must be fully and completely performed, the failure of a condition precedent being fatal to the validity of the contract. Thus, where the governor has power to make a contract for state supplies upon certain contingencies, a contract made by him for such supplies before such contingencies have arisen will not bind the state;⁶ likewise, where a statute requires the fees for certain services to be fixed by certain officers, and to be paid from a certain fund, the state will not be bound by a payment made by one of the officers alone and before the fund has come into existence;⁷ neither will the state be bound by a license certificate issued by the auditor prior to the payment of the required fees into the state treasury, although the auditor has previously collected such fees and thereafter pays them into the treasury;⁸ so where a statute authorizes a majority of state commissioners to act, where all cannot be present, a majority cannot act in the absence of anything to show that all cannot be present.⁹ Other examples of contracts and transactions held invalid on account of the absence of the conditions precedent to the officer's authority are stated in the notes below.¹⁰

Iowa.—State v. Haskell, 20 Iowa 276.

Louisiana.—State v. Hart, 46 La. Ann. 40.

Michigan.—Spitzer v. Blanchard, 82 Mich. 234.

Missouri.—State v. Hays, 52 Mo. 578; State v. State Bank, 45 Mo. 528.

New York.—Delafield v. Illinois, 26 Wend. (N. Y.) 192; People v. Phoenix Bank, 24 Wend. (N. Y.) 431, 35 Am. Dec. 634.

North Carolina.—State v. Bevers, 86 N. Car. 588.

Ohio.—State v. Lake Shore, etc., R. Co., 2 Ohio Dec. 300.

South Carolina.—Carolina Nat. Bank v. State, 60 S. Car. 465.

Texas.—Day Land, etc., Co. v. State, 68 Tex. 526.

West Virginia.—State v. Chilton, 49 W. Va. 453.

Wisconsin.—Tenney v. State, 27 Wis. 387; Kneeland v. Milwaukee, 18 Wis. 411; Randall v. State, 16 Wis. 340; State v. Hastings, 12 Wis. 596; Orton v. State, 12 Wis. 509; State v. Hastings, 10 Wis. 525.

1. **Commercial Paper.**—State v. Hart, 46 La. Ann. 40.

2. *Delafield v. Illinois*, 26 Wend. (N. Y.) 192.

3. **Implied Authority Limited to Acts Essential to Exercise of Express Powers.**—Lewis v. Colgan, 115 Cal. 529; Harris v. Gibbins, 114 Cal. 418; McDonald v. Norman, 95 Ky. 593; Opinion of Justices, (N. H. 1903) 54 Atl. Rep. 950; State v. Lake Shore, etc., R. Co., 2 Ohio Dec. 300; State v. Buchanan, (Tenn. Ch. 1901) 62 S. W. Rep. 287.

4. **Authority Not Implied from Usage.**—Carolina Nat. Bank v. State, 60 S. Car. 465; State v. Chilton, 49 W. Va. 453.

5. **Authority Never Implied from Officer's Acts.**—See *supra*, this section, *Limits of Responsibility*—*Estoppel*.

6. *Stanton v. State*, 5 S. Dak. 515.

7. *Long v. McDowell*, 107 Ky. 14.

8. *Hartford F. Ins. Co. v. State*, 9 Kan. 211.

9. *Lyon v. Mason, etc., Co.*, 102 Ky. 594.

10. **Contracts Held Invalid for Lack of Appropriation.**—Polk v. State, 138 Cal. 384; Butler v. Bates, 7 Cal. 136; Long v. McDowell, 107 Ky. 14; State v. Moore, 50 Neb. 88, 70 Am. St. Rep. 538; *In re State House Constr. Loan*, 20 R. I. 704; *In re New Statehouse*, (R. I. 1897) 37 Atl. Rep. 2; Van Dusen v. State, 11 S. Dak. 318; Nichols v. State, 11 Tex. Civ. App. 327.

Contracts Held Invalid for Want of Approval by Proper Officer.—Camp v. McLin, (Fla. 1902) 32

Formalities in the Execution of the Contract must be strictly and completely complied with.¹ Literal compliance, however, with statutory formalities is not always required, and where a statute has been substantially complied with the contract will not be held invalid on account of technicalities;² but the fact that the state has lost nothing by reason of the officer's failure to comply with statutory formalities will not affect the state's right to repudiate the contract.³

The Burden of Proving the Officer's Authority to make any particular contract is upon the party asserting it, there being no presumption in such case that the officer has obeyed the statute defining his duties and powers.⁴

c. RATIFICATION. — **The State May Ratify** the unauthorized contracts of its officers and thus give them the same force and effect as if they had been originally authorized;⁵ and its power in this regard is subject only to constitutional limitations.⁶

Who May Ratify. — The legislature alone can ratify the unauthorized contracts of state officers,⁷ all acts of the contracting officer being entirely ineffectual to validate the contract.⁸

Mode of Ratification. — The ratification by the legislature must have all the

So. Rep. 927; *State v. McLin*, (Fla. 1902) 32 So. Rep. 933; *State v. Hogan*, 22 Mont. 384.

Contracts Held Invalid for Want of Approval of Bond. — *Camp v. McLin*, (Fla. 1902) 32 So. Rep. 927; *State v. McLin*, (Fla. 1902) 32 So. Rep. 933.

Warrants Issued for Expenses Not Accrued Held Invalid. — *Tandy v. Norman*, (Ky. 1894) 27 S. W. Rep. 861.

Splitting of Inseparable Contract Held Invalid. — *State v. Cornell*, 52 Neb. 25.

Contract Held Invalid for Want of Official Recommendation. — *State v. Guilbert*, 58 Ohio St. 537.

What Are Conditions Precedent. — See *Camp v. McLin*, (Fla. 1902) 32 So. Rep. 927; *State v. McLin*, (Fla. 1902) 32 So. Rep. 933; *Dement v. Rokker*, 126 Ill. 174; *Striker v. Kelly*, 7 Hill (N. Y.) 9; *Marchant v. Langworthy*, 6 Hill (N. Y.) 646; *People v. Schermerhorn*, 19 Barb. (N. Y.) 558.

1. Failure to Make Public Sale When So Required Fatal to Validity of Sale. — *State v. State Bank*, 45 Mo. 528; *Osborne v. Tunis*, 25 N. J. L. 633.

Strict Compliance with Requirement as to Letting Contracts Essential. — *Woodruff v. Berry*, 40 Ark. 251; *Mulnix v. Mutual Ben. L. Ins. Co.*, 23 Colo. 71; *Dement v. Rokker*, 126 Ill. 174; *People v. Stephens*, 71 N. Y. 527; *State v. Cornell*, 52 Neb. 25; *Beaver v. Institution for the Blind*, 19 Ohio St. 97; *Nichols v. State*, 11 Tex. Civ. App. 327; *Wells v. Burnham*, 20 Wis. 112.

Strict Compliance with Requirement as to Advertising for Bids on State Work Essential. — *Woodruff v. Berry*, 40 Ark. 251; *Mulnix v. Mutual Ben. L. Ins. Co.*, 23 Colo. 71; *Peoples v. Byrd*, 98 Ga. 688; *State v. State Bank*, 45 Mo. 528; *State v. Toole*, 26 Mont. 22, 91 Am. St. Rep. 386; *Wells v. Burnham*, 20 Wis. 112.

Compliance with Requirement that Contract Must Be in Writing Essential. — *Camp v. McLin*, (Fla. 1902) 32 So. Rep. 927; *State v. McLin*, (Fla. 1902) 32 So. Rep. 933; *State v. Hogan*, 22 Mont. 384.

Where Deed Required to Be Signed, Sealing and Delivery Held Insufficient. — *Osborne v. Tunis*, 25 N. J. L. 633.

2. Literal Compliance Not Essential. — *Vickery v. Scott*, 20 Ga. 795; *People v. McDonough*, 173 N. Y. 181.

3. State v. State Bank, 45 Mo. 528.

4. Burden of Proving Officer's Authority. — *Dement v. Rokker*, 126 Ill. 174; *Osborne v. Tunis*, 25 N. J. L. 633; *Van Dusen v. State*, 11 S. Dak. 318; *Stanton v. State*, 5 S. Dak. 515; *Skobis v. Ferge*, 102 Wis. 122.

5. State May Ratify Unauthorized Contracts of Officers. — *Grogan v. San Francisco*, 18 Cal. 590; *Morton v. Comptroller Gen.*, 4 S. Car. 430; *Day Land, etc., Co. v. State*, 68 Tex. 526; *Nichols v. State*, 11 Tex. Civ. App. 327.

6. Unconstitutional Contracts Not Subject to Ratification. — *Mulnix v. Mutual Ben. L. Ins. Co.*, 23 Colo. 71; *State v. Home Ins. Co.*, 59 Neb. 524; *Van Dusen v. State*, 11 S. Dak. 318; *Houston, etc., R. Co. v. State*, (Tex. Civ. App. 1897) 41 S. W. Rep. 157; *Nichols v. State*, 11 Tex. Civ. App. 327.

In California, by virtue of a constitutional provision (art. 4, § 32), the legislature cannot give effect to a contract made by a state officer without statutory authority therefor. *Lewis v. Colgan*, (Cal. 1896) 44 Pac. Rep. 1081.

But the authority of the officer to make the contract need not be given in express terms. It will be sufficient if the contract be essential to the performance of the powers given in express terms. *Lewis v. Colgan*, 115 Cal. 529 (*reversing* (Cal. 1896) 44 Pac. Rep. 1081); *Rankin v. Colgan*, 92 Cal. 605; *Bateman v. Colgan*, 111 Cal. 587; *Harris v. Gibbins*, 114 Cal. 418.

7. Only Legislature Can Ratify. — *State v. Hays*, 52 Mo. 578; *State v. State Bank*, 45 Mo. 528; *People v. Phoenix Bank*, 24 Wend. (N. Y.) 431, 35 Am. Dec. 634; *Delafield v. Illinois*, 26 Wend. (N. Y.) 192; *Carolina Nat. Bank v. State*, 60 S. Car. 465; *State v. Allen*, (Tenn. Ch. 1898) 46 S. W. Rep. 303. *Compare In re Terrill*, (Kan. 1903) 71 Pac. Rep. 589.

8. Contracting Officer Cannot Ratify. — *State v. Hays*, 52 Mo. 578; *State v. State Bank*, 45 Mo. 528; *Delafield v. Illinois*, 26 Wend. (N. Y.) 192; *People v. Phoenix Bank*, 24 Wend. (N. Y.) 431, 35 Am. Dec. 634; *State v. Chilton*, 49 W. Va. 453.

characteristics of a valid law;¹ but it has been held that where a bill ratifying an unauthorized contract is vetoed by the governor, not on the ground of the invalidity of the contract but solely on the ground of the depleted condition of the state treasury, the act of the legislature in enacting the bill nevertheless constitutes a ratification sufficient to bind the state.² Neither is ratification in terms necessary, it being sufficient if a ratification be implied from the formal acts of the legislative body;³ but the intention to ratify must clearly appear, and will not be implied from the subsequent enactment of a statute providing for the purchase of supplies of the character covered by the unauthorized contract, but without specific reference to the supplies obtained thereunder;⁴ nor will a ratification be implied from the mere acceptance of the benefits of the unauthorized contract,⁵ nor from an appropriation by the legislature of a smaller sum than that claimed under the unauthorized contract, such appropriation being held not only no ratification but a distinct repudiation.⁶

Full Knowledge of All Material Facts is essential to the sufficiency of a ratification by the state of the unauthorized contracts of its officers, the rule being the same as in any other case of ratification by a principal of the acts of his agent.⁷

Partial Ratification. — The state may ratify a portion of an unauthorized contract made by one of its officers, and thus bind itself *pro tanto*.⁸

XIII. SUITS BY OR AGAINST STATE — 1. Suits by State — a. IN STATE COURTS — Rule Stated. — A state of the Union, as a political corporation, has the right to institute suit, whether it be required by its pecuniary interests or the general public welfare, and for this purpose its own courts,⁹ as well as those of a sister state,¹⁰ are open to it.

Subject to Ordinary Rules. — When the state enters its courts as a litigant it must be held subject to the same rules that govern other litigants.¹¹

Interest in Subject-matter. — A state, like other parties to actions, must show an interest in the subject-matter of litigation in order to entitle it to prosecute a suit and demand relief; private wrongs are remediable at the suit of the parties injured, and state interference in such controversies, either directly or

1. *Mullan v. State*, 114 Cal. 578; *Grogan v. San Francisco*, 18 Cal. 590; *Carolina Nat. Bank v. State*, 60 S. Car. 465; *Jewell Nursery Co. v. State*, 8 S. Dak. 531; *Nichols v. State*, 11 Tex. Civ. App. 327; *Young v. State*, 19 Wash. 634.

2. **Ratifying Bill Held Effective Notwithstanding Veto by Governor.** — *Jewell Nursery Co. v. State*, 4 S. Dak. 213, 5 S. Dak. 623, 8 S. Dak. 531.

3. **Implied Ratification Held Sufficient.** — *McCauley v. Brooks*, 16 Cal. 11; *Jewell Nursery Co. v. State*, 4 S. Dak. 213. See also *Jewell Nursery Co. v. State*, 5 S. Dak. 623, *affirmed* 8 S. Dak. 531.

4. *State v. Hays*, 52 Mo. 578.

5. **Acceptance of Benefits.** — *Mullan v. State*, 114 Cal. 578; *Van Dusen v. State*, 11 S. Dak. 318; *Jewell Nursery Co. v. State*, 5 S. Dak. 623, *affirmed* 8 S. Dak. 531.

6. *Julian v. State*, 122 Ind. 77, 140 Ind. 581; *Young v. State*, 19 Wash. 634.

7. *Jewell Nursery Co. v. State*, 5 S. Dak. 623, *affirmed* 8 S. Dak. 531; *State v. Allen*, (Tenn. Ch. 1898) 46 S. W. Rep. 303. See also the title *AGENCY*, vol. 1, p. 1189.

8. **State Bound by Partial Ratification.** — *State v. Buchanan*, (Tenn. Ch. 1898) 52 S. W. Rep. 480.

9. **State's Right to Sue.** — *Michigan State Bank v. Hastings*, 1 Dougl. (Mich.) 225, 41 Am. Dec. 549; *State v. Grant*, 10 Minn. 39; *People*

v. St. Louis, 10 Ill. 351, 48 Am. Dec. 339. See also *State v. Ohio Oil Co.*, 150 Ind. 21.

Under a Statutory Provision of Alabama (Code, §§ 2573, 960, subd. 4), the state may sue in all cases where under like circumstances an action would lie between individuals, may maintain an action of ejectment, and may sue in the name of a township for school lands belonging to it. *Gaston v. State*, 88 Ala. 459.

The Territory of Montana is a body politic, or artificial person, a corporation, and as such may sue upon contracts without any statute empowering it to do so. *Territory v. Hildebrand*, 2 Mont. 426. See generally the title *TERRITORIES*.

Lands — Abandonment. — Where the title to land which had been dedicated by the state to a county for court house and jail remained in the state, and the right to the use and possession had reverted to the state by reason of abandonment, suit by the state for its recovery is authorized by article 2811a, Rev. Stat. *Texas*, a specific act not being required. *State v. Travis County*, 85 Tex. 435.

Set-off by the State. — *State v. Dickinson*, 12 Smed. & M. (Miss.) 579.

10. *Delafield v. Illinois*, 2 Hill (N. Y.) 159; *Indiana v. Woram*, 6 Hill (N. Y.) 33, 40 Am. Dec. 378; *Spencer v. Brockway*, 1 Ohio 259, 13 Am. Dec. 615.

11. *State v. Washington County*, 101 Ind. 69; *State v. Zanco*, 18 Tex. Civ. App. 127.

upon the relation of private parties, should not be allowed.¹

b. IN FEDERAL COURTS. — The Federal Constitution authorizes a suit by a state against a citizen of another state in the United States Supreme Court, by reason of the character of the parties,² but not a suit by a state against its own citizens.³ A state, as plaintiff, cannot maintain a suit in the Circuit Court of the United States on the ground of the character of the parties, as such jurisdiction is vested in the Supreme Court.⁴ A suit in the Supreme Court in the nature of a quo warranto, brought in the name of the state on the relation of certain persons, is not to be regarded as a suit by the state itself so as to entitle the cause to be advanced for hearing.⁵

2. Suits Against State — *a. IN STATE COURTS* — (1) *Consent Necessary.* — A state of the Union is not liable to suit in its own courts or those of another state without its express consent.⁶

(2) *Who May Give Consent.* — The legislature is the proper body to authorize suits against the state, and it may consent to a particular suit by joint resolution as well as by bill.⁷

(3) *Effect of Consent.* — When a state permits itself to be sued and there is no constitutional or statutory provision fixing a different liability, it consents to go before its courts and have claims against it determined upon those

1. *State v. Nevada First Nat. Bank*, 4 Nev. 348; *State v. Shively*, 10 Oregon 267; *Com. v. Baldwin*, 1 Watts (Pa.) 54, 26 Am. Dec. 33; *State v. Southern Pac. R. Co.*, 24 Tex. 80; *State v. Bradish*, 34 Vt. 419. See also *State v. Poulterer*, 16 Cal. 514; *Parker v. Hughes*, 25 Ga. 374; *Fry v. State*, 27 Ind. 348.

The People of a Territory may sue upon bonds given by defendants in criminal proceedings. *People v. Bugbee*, 1 Idaho 89; *People v. Slocum*, 1 Idaho 62.

2. *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265; *Florida v. Anderson*, 91 U. S. 675; *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. (U. S.) 518; *Pennsylvania v. Quicksilver Min. Co.*, 10 Wall. (U. S.) 553; *Georgia v. Brailsford*, 2 Dall. (U. S.) 402.

3. *Pennsylvania v. Quicksilver Min. Co.*, 10 Wall. (U. S.) 553.

4. *Wisconsin v. Duluth*, 2 Dill. (U. S.) 407.

5. *Miller v. State*, 12 Wall. (U. S.) 159.

6. *Necessity for Consent — United States.* — *Cunningham v. Macon, etc., R. Co.*, 109 U. S. 446; *Board of Liquidation v. McComb*, 92 U. S. 531; *Briscoe v. Kentucky Bank*, 11 Pet. (U. S.) 257; *Beers v. Arkansas*, 20 How. (U. S.) 527.

California. — *People v. Miles*, 56 Cal. 401; *Sharp v. Contra Costa County*, 34 Cal. 284; *Hunsaker v. Borden*, 5 Cal. 288, 63 Am. Dec. 130.

Florida. — *Bloxham v. Florida Cent., etc., R. Co.*, 35 Fla. 625.

Indiana. — *Pattison v. Shaw*, 6 Ind. 377.

Kentucky. — *Tate v. Salmon*, 79 Ky. 540; *Tracy v. Hornbuckle*, 8 Bush (Ky.) 336.

Louisiana. — *State v. Hart*, 46 La. Ann. 40, 54, cited in *State v. Gaines*, 46 La. Ann. 436.

Maryland. — *State v. Baltimore, etc., R. Co.*, 34 Md. 344.

Michigan. — *Ottawa County v. Auditor Gen.*, 69 Mich. 1.

Mississippi. — *Raymond v. State*, 54 Miss. 562, 28 Am. Dec. 382.

New York. — *People v. Dennison*, 84 N. Y. 272; *Coster v. Albany*, 43 N. Y. 399; *Garr v.*

Bright, 1 Barb. Ch. (N. Y.) 157; *Kiersted v. People*, (Supm. Ct. Gen. T.) 1 Abb. Pr. (N. Y.) 392.

Pennsylvania. — *Williamsport, etc., R. Co. v. Com.*, 33 Pa. St. 288.

South Carolina. — *Treasurers v. Cleary*, 3 Rich. L. (S. Car.) 372.

Tennessee. — *Moore v. Tate*, 87 Tenn. 725, 10 Am. St. Rep. 712.

Texas. — *Hosner v. De Young*, 1 Tex. 764.

And a Territory of the United States is not liable to suit by one of its citizens. *Fisk v. Cuthbert*, 2 Mont. 593; *Langford v. King*, 1 Mont. 38. See the title TERRITORIES.

Appeal to Legislature. — The remedy of a party upon a contract with the state is by appeal to the legislature, who, it is fair to presume, will make provision for its full execution and do ample justice. *Michigan State Bank v. Hastings*, 1 Dougl. (Mich.) 225, 41 Am. Dec. 549. See also *People v. Talmage*, 6 Cal. 256.

"By Saying that the State Cannot Be Sued, it is not meant that no judicial action whatever can be taken against the state, but confining ourselves to the facts of this particular case, that a suit like that before us, whether in the form of a bill in equity or in the nature of an action of assumpsit, or for the recovery of money, does not lie against the sovereign state." *Bloxham v. Florida Cent., etc., R. Co.*, 35 Fla. 712.

7. *Com. v. Lyon*, (Ky. 1903) 72 S. W. Rep. 323; *Com. v. Haly*, 106 Ky. 719; *St. Paul, etc., R. Co. v. Brown*, 24 Minn. 517. See the title STATUTES, post, section Particular Applications of Principles of Construction — General and Special Laws.

Consent of State Officer Not Sufficient. — It has been held that the mere consent of an officer of the state, the attorney-general, for instance, by appearing and answering in the name of the state, does not bind it by the judgment or decree which may be the result of the suit. *Ex p. Dunn*, 8 S. Car. 207; *Dabney v. Bank of S. Car.*, 3 S. Car. 124. See also *Adams v. Bradley*, 5 Sawy. (U. S.) 217.

settled rules of law upon which the responsibilities of ordinary parties litigant are determined.¹ A statute authorizing suit against the state does not have the effect of creating liabilities on the part of the state, or of subjecting it to liabilities which did not exist or could not arise under the laws already existing.² An act merely authorizing a suit against the state has been held not intended to preclude the state from availing itself of whatever defense it might have had against the plaintiff's claim prior to the passage of the act.³

(4) *Consent May Be Conditional.*—If the state consents to abrogate this prerogative of sovereignty, it may prescribe the terms and conditions upon which it may be sued, and the manner in which the suit shall be conducted.⁴

(5) *Constitutional Provision Not Self-executing.*—A constitutional provision that suit may be brought against the state in such manner as the legislature may direct is not self-executing, nor does it compel that body to act; and until a statute has been passed agreeably to such provision, the state retains its immunity from suit.⁵

(6) *Construction of Statutes Authorizing Suit.*—An act authorizing suits against the state, being in derogation of its sovereignty, must be construed strictly,⁶ and the waiver must be in clear and unambiguous terms, for "to compel a state upon theories of doubtful statutory interpretation to appear as defendant suitor in its own courts, and to litigate with private parties as to whether it had abnegated its sovereignty or its right of exemption from suit, would be intolerable."⁷ Thus the privilege must be confined to those by whom it was clearly intended that it should be enjoyed,⁸ and to such claims as are clearly comprehended by the act;⁹ and if the state is made liable to suit

1. *Effect of Consent.*—*Green v. State*, 73 Cal. 29; *Jewell Nursery Co. v. State*, 8 S. Dak. 531; *Metzel v. State*, 16 Wis. 347.

Authority to sue covers the authority to prosecute the suit to judgment and to keep the judgment in force. *Carter v. State*, 49 La. Ann. 1487.

2. *State v. Hill*, 54 Ala. 67; *Todhunter v. State*, (Cal. 1887) 14 Pac. Rep. 615; *Denning v. State*, 123 Cal. 316; *Melvin v. State*, 121 Cal. 16; *Davis v. State*, 121 Cal. 210; *Chapman v. State*, 104 Cal. 690; *Green v. State*, 73 Cal. 29; *Clark v. State*, 7 Coldw. (Tenn.) 306; *Billings v. State*, 27 Wash. 288, explaining Northwestern, etc., *Bank v. State*, 18 Wash. 73.

3. *Coulterville, etc., Turnpike Co. v. State*, 104 Cal. 321.

4. *May Impose Conditions.*—*De Saussure v. Gaillard*, 127 U. S. 216; *Wright v. State Board of Liquidation*, 49 La. Ann. 1213; *Cecil v. Board of Liquidation*, 30 La. Ann. 34; *Beers v. Arkansas*, 20 How. (U. S.) 527; *Flagg v. Bradford*, 181 Mass. 315; *Clements v. State*, 77 N. Car. 142; *Bledsoe v. State*, 64 N. Car. 392; *Hosner v. De Young*, 1 Tex. 764; *Com. v. Dunlop*, 89 Va. 431; *Chicago, etc., R. Co. v. State*, 53 Wis. 509.

5. *Constitutional Authority to Legislature.*—*Galbes v. Girard*, 46 Fed. Rep. 500; *Turner v. State*, 27 Ark. 337; *People v. Talmage*, 6 Cal. 256; *Bloxham v. Florida Cent., etc., R. Co.*, 35 Fla. 625; *Sinking Fund Com'rs v. Northern Bank*, 1 Met. (Ky.) 175; *State v. Mortensen*, (Neb. 1903) 95 N. W. Rep. 831; *State v. Stout*, 7 Neb. 89; *Williams v. Register*, *Cooke* (Tenn.) 218; *Chicago, etc., R. Co. v. State*, 53 Wis. 509.

6. *Statutes Strictly Construed.*—*Raymond v. State*, 54 Miss. 562, 28 Am. Rep. 382; *State v. Lancaster County Bank*, 8 Neb. 218; *State v. White*, 7 Neb. 113; *Bradford v. State*, 7 Neb. 109; *Owen v. State*, 7 Neb. 108; *State v. Stout*,

7 Neb. 89; *Chicago, etc., R. Co. v. State*, 53 Wis. 509.

7. *Asbell v. State*, 60 Kan. 51. See also *Rose v. Governor*, 24 Tex. 496.

8. *Rose v. Governor*, 24 Tex. 496.

9. *Chicago, etc., R. Co. v. State*, 53 Wis. 509.

The Tennessee Statute Which Extended Rights to the State of Georgia with regard to the construction of a railroad in the former state authorized suits against the state of Georgia in the courts of Tennessee. *East Tennessee, etc., R. Co. v. Nashville, etc., R. Co.*, (Tenn. Ch. 1897) 51 S. W. Rep. 202.

Condemnation of State Lands.—Authority to sue the state of *Idaho* for the condemnation of state lands for a public use is granted by section 13, Act Feb. 25, 1899 (Sess. Laws 1899, p. 381). *Hollister v. State*, (Idaho 1903) 71 Pac. Rep. 541.

Suit Against the State for Unliquidated Damages arising from bad husbandry on a contract of lease not authorized by section 4248, Annot. *Code Mississippi*. *Hall v. State*, 79 Miss. 38.

The Right of Any Organized County to Institute an Action against the state has been expressly conferred by the legislature agreeably to the provisions of the constitution. *Lyman County v. State*, 9 S. Dak. 413.

A Suit for Specific Performance is not included in the case in which consent to suit has been given by section 1106, *Code Civ. Proc. of Nebraska*. *State v. Mortensen*, (Neb. 1903) 95 N. W. Rep. 831.

Scope of Wisconsin Statute.—Rev. Stat. Wis., § 3200, authorizing suits against the state, does not include a demand based upon the unlawful and tortious acts of state officers. *Houston v. State*, 98 Wis. 481; but relates only to claims which if valid render the state a debtor to the claimant. *Chicago, etc., R. Co. v. State*, 53 Wis. 509.

in a certain court, it may not be sued in another court.¹ The state may restrict its consent to be sued, to actions brought in its own courts.²

(7) *Withdrawal of Consent.* — It seems that the state may also withdraw its consent, and, in exercising this power, does not violate the prohibition of the Federal Constitution against the impairment of the obligation of contracts;³ and further, that such withdrawal has the effect of abating pending suits.⁴

(8) *Tests — Illustrative Cases.* — The principle stated above as to the state's immunity from suit is well established and universally prevalent.⁵ It is likewise absolute and may not be overthrown by indirection, as, for instance, by the institution of suits against state officers, when in effect they are suits against the state.⁶ What is a suit against the state and what is not, has been discussed exhaustively and learnedly by the federal courts with reference to the Eleventh Amendment, and tests have been established for determining the question. Those tests are applicable in this connection, and indeed have been quoted and applied by the state courts. For instance, the present doctrine of the federal courts, that the fact that the state is not named as a party to the record is not conclusive of the question, has been adopted by the state courts.⁷ Reference, therefore, is here made to a subsequent part of this title wherein these tests are set out at length.⁸ In the notes will be found many cases illustrative of what are or are not suits of the inhibited kind.⁹

1. *Ex p. Greene*, 29 Ala. 52.

2. *Smith v. Reeves*, 178 U. S. 436.

3. *Consent May Be Withdrawn — United States.* — *In re Ayers*, 123 U. S. 443; *Antoni v. Greenhow*, 107 U. S. 769; *Memphis, etc., R. Co. v. Tennessee*, 101 U. S. 337; *Beers v. Arkansas*, 20 How. (U. S.) 527.

Alabama. — *State v. Hill*, 54 Ala. 67; *Ex p. State*, 52 Ala. 231.

Louisiana. — *State v. Lanier*, 47 La. Ann. 110.

North Carolina. — *Baltzer v. State*, 104 N. Car. 265; *Horne v. State*, 84 N. Car. 362.

Tennessee. — *State v. Sneed*, 9 Baxt. (Tenn.) 476; *State v. State Bank*, 3 Baxt. (Tenn.) 395.

Virginia. — *Board of Public Works v. Gannt*, 76 Va. 455.

4. *Beers v. Arkansas*, 20 How. (U. S.) 529; *Ex p. State*, 52 Ala. 231; *Horne v. State*, 84 N. Car. 362. See also *South & N. Ala. R. Co. v. Alabama*, 101 U. S. 832.

5. See *supra*, this section, *Consent Necessary*.

6. *Suits Against State Officers.* — *People v. Dulaney*, 96 Ill. 503; *Shoemaker v. Grant County*, 36 Ind. 175; *Mills Pub. Co. v. Larrabee*, 78 Iowa 97; *Tate v. Salmon*, 79 Ky. 540; *Herr v. Central Kentucky Lunatic Asylum*, 97 Ky. 458, 53 Am. St. Rep. 444; *State v. Burke*, 33 La. Ann. 498, 97 Ky. 458, 53 Am. St. Rep. 414; *Ottawa County v. Auditor Gen.*, 69 Mich. 1; *Michigan State Bank v. Hastings*, 1 Dougl. (Mich.) 225, 41 Am. Dec. 549; *State v. Sneed*, 9 Baxt. (Tenn.) 472; *Taylor v. Hall*, 71 Tex. 206; *League v. De Young*, 2 Tex. 497; *Hosner v. De Young*, 1 Tex. 764. See also *Marshall v. Clark*, 22 Tex. 23. And see the cases in succeeding notes to this subsection.

7. *Butler v. Ellerbe*, 44 S. Car. 256; *Lowry v. Thompson*, 25 S. Car. 416.

8. See the next subdivision.

9. *If Officers of the State Inade Private Right* in a mode not authorized by statute, or under an invalid statute, the person injured has, at least, a preventive remedy, although the state may be

affected by the proceeding yet not a party to it. *Herr v. Central Kentucky Lunatic Asylum*, 97 Ky. 458, 53 Am. St. Rep. 414; *Hopkinsville Bank v. Western Kentucky Asylum*, 108 Ky. 357; *Blue Jacket Consol. Copper Co. v. Scherr*, 50 W. Va. 533. *Compare Chesapeake, etc., R. Co. v. Miller*, 19 W. Va. 408.

Unauthorized Acts of Tax Officers May Be Questioned. — *German Alliance Ins. Co. v. Van Cleave*, 191 Ill. 410.

False and Fraudulent Representations. — An action on the case will lie against a public officer for a false and fraudulent representation made by him in relation to property sold by him, and it is no answer that the sale was made in his official capacity. *Culver v. Avery*, 7 Wend. (N. Y.) 379, 22 Am. Dec. 586.

Suit Against Insurance Commissioner to Restrain Threatened Revocation of License is not of the inhibited class. *Insurance Co. v. Craig*, 106 Tenn. 621.

Suit Against Commissioners of Land Office and State Controller to Remove Cloud from Title Caused by Tax Deeds, maintainable. *Sanders v. Saxton*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 574. See also *Greenwood Cemetery Land Co. v. Routt*, 17 Colo. 156, 31 Am. St. Rep. 284; *State Board of Land Com'rs v. Carpenter*, 16 Colo. App. 436.

Enjoining State Auditor from Selling Lands under Void Mortgage. — *Welch v. Fisk*, 139 Ind. 637.

Securities Held by State Officer in Trust. — Where the state has no property or interest in certain securities held by a state officer, but they are held by him in trust for certain persons whose indebtedness is a lien upon such securities, the latter may enforce their lien and make the officer, as such custodian, a party to the action. *Kruger v. Life, etc., Assoc.*, 106 Cal. 98.

State's Indemnity Does Not Pass to State's Vendee. — *Delaware Div. Canal Co. v. Com.*, 60 Pa. St. 367, 100 Am. Dec. 570; *Pennsylvania R. Co. v. Duquesne*, 46 Pa. St. 223.

b. IN FEDERAL COURTS — ELEVENTH AMENDMENT TO CONSTITUTION —

(1) *Origin and Purpose.* — It was not the intention of the framers of the Constitution to subject sovereign states to suits by individuals, but only by proper legislation to invest the federal courts with jurisdiction to hear and determine controversies and cases between the parties designated, that were properly susceptible of litigation in courts.¹ But the Supreme Court of the United States, because the Constitution said that the judicial power shall extend to controversies "between a state and citizens of another state," felt constrained to see in this language a power to enable the individual citizens of one state to sue another state of the Union in the federal courts.² This decision caused such a shock of surprise throughout the country that at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed and was in due course adopted by the states.³

(2) *Terms and Principle of Construction.* — The Language of the Amendment is: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United

Corporation Created by the State for Certain Public Purposes May Be Sued. — *Gross v. Kentucky Board*, 105 Ky. 840.

A City in the Exercise of the Power of Eminent Domain does not represent the sovereignty of the state so as to make a suit to restrain the city from opening a street, or a suit against the state, within the *Indiana* constitution. *Terre Haute v. Farmers' L. & T. Co.*, 40 C. C. A. 117.

The Assertion by a Defendant of a Defense to an action by the state is not a suit against the state. *Rice v. Dickson Car Wheel Co.*, (Tex. Civ. App. 1901) 65 S. W. Rep. 645.

Signing Contract Already Awarded. — Where the state by its authorized agents has awarded a contract they may be compelled to sign the formal contract. *State v. Toole*, 26 Mont. 22, 91 Am. St. Rep. 386.

Set-off. — The preponderance of authority is to the effect that a set-off or counterclaim cannot be maintained against a state, in the absence of express consent, for the same reasons that forbid an original suit. See the title SET-OFF, RECOUPMENT, AND COUNTERCLAIM, vol. 25, pp. 504, 608. And see the following cases: *People v. Miles*, 56 Cal. 401; *Newport, etc., Bridge Co. v. Douglass*, 12 Bush (Ky.) 673; *State v. Northern Cent. R. Co.*, 18 Md. 193; *People v. Roberts*, 30 N. Y. App. Div. 78, affirmed 156 N. Y. 693; *People v. Dennison*, 84 N. Y. 272; *People v. Corner*, 59 Hun (N. Y.) 299, affirmed 128 N. Y. 640.

Statutes Authorizing Set-off. — See the title SET-OFF, RECOUPMENT, AND COUNTERCLAIM, vol. 25, p. 504. See also *Frier v. State*, 11 Fla. 300.

A Suit Against the North Carolina Board of Agriculture to recover money alleged to have been wrongfully collected by it as a license tax, is a suit against the state. *Lord, etc., Chemical Co. v. Board of Agriculture*, 111 N. Car. 135, distinguishing *Granville County Board of Education v. State Board of Education*, 106 N. Car. 81.

A Suit Against the Treasurer of a Metropolitan Water Board for taking lands for the purpose of a metropolitan water supply held to be a suit against a state. *Flagg v. Bradford*, 181 Mass. 315.

The State's Prison being an agent of the state

in the administration of its government cannot be sued in the absence of statute authorizing it. *Moody v. State Prison*, 128 N. Car. 12; *Granville County Board of Education v. State Board of Education*, 106 N. Car. 81.

When the State Is the Real Party in Interest as defendant, and its officers are not alleged to be acting in violation of the law which created their authority, the courts are without jurisdiction of the subject-matter. *Cope v. Hastings*, 183 Pa. St. 300.

Cross Bills. — In *Alabama* the state's exemption from suit is held to extend to cross bills seeking affirmative relief against the state. *Holmes v. State*, 100 Ala. 291.

But in *Indiana* a cross complaint to quiet title is maintainable. *State v. Portsmouth Sav. Bank*, 106 Ind. 435; *State v. Washington County*, 101 Ind. 69. See also *infra*, the next subsection, for a federal case to the same effect.

For Other Cases wherein this general subject is discussed, see the following:

California. — *Sawyer v. Colgan*, 102 Cal. 283. *Colorado.* — *In re Substitute for Senate Bill No. 83*, 21 Colo. 69.

Georgia. — *Peoples v. Byrd*, 98 Ga. 688, distinguishing *Wright v. Southwestern R. Co.*, 64 Ga. 795.

Kentucky. — *Tracy v. Hornbuckle*, 8 Bush (Ky.) 336; *Rodman v. Musselman*, 12 Bush (Ky.) 354, 23 Am. Rep. 724; *Divine v. Harvie*, 7 T. B. Mon. (Ky.) 440, 18 Am. Dec. 194; *Sinking Fund Com'r's v. Northern Bank*, 1 Met. (Ky.) 176.

South Carolina. — *Butler v. Ellerbe*, 44 S. Car. 257; *Columbia Water Power Co. v. Columbia Electric St. R., etc., Co.*, 43 S. Car. 154.

Tennessee. — *Gordon v. Weaver*, (Tenn. Ch. 1899) 53 S. W. Rep. 740; *State v. Odum*, 93 Tenn. 446; *Lynn v. Polk*, 8 Lea (Tenn.) 121.

Texas. — *Whately v. Patten*, 10 Tex. Civ. App. 77.

Virginia. — *Board of Public Works v. Gannt*, 76 Va. 455.

1. *Mr. Justice Bradley* in *Hans v. Louisiana*, 134 U. S. 1.

2. *Chisholm v. Georgia*, 2 Dall. (U. S.) 419.

3. *Mr. Justice Bradley* in *Hans v. Louisiana*, 134 U. S. 1.

States by citizens of another state or by citizens or subjects of any foreign state." ¹

Liberal Construction. — The purpose of the amendment being to prevent the subjection of a state to the coercive process of judicial tribunals at the instance of private parties, the amendment has been interpreted "not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose." ²

The Words "Commenced" and "Prosecuted" are construed as not only preventing the institution of new suits, but also as superseding depending suits. ³

(3) *Operation and Effect* — (a) **As to Parties Who May Sue** — *aa. GENERAL GOVERNMENT.* — It has been adjudged that the general government may sue a state in the Supreme Court. ⁴

bb. SISTER STATE OR FOREIGN POWER. — The inhibition applies only to citizens or subjects, and does not extend to suits by a state, or by foreign states or powers. ⁵ But one state cannot create a controversy with another state so as to bring the case within the jurisdiction of the United States courts by assuming the prosecution of debts owing by the other state to its citizens. ⁶

cc. CITIZENS OF STATE. — It must be observed that the Eleventh Amendment does not in terms declare that the judicial power of the United States shall not extend to suits against a state by citizens of such state; but the courts, in view of the manner in which the decision in *Chisholm v. Georgia* was received by the country, the adoption of the amendment, the light of history, and the reason of the thing, have so construed it. ⁷ And this notwithstanding there may be involved a question under the Federal Constitution or laws. ⁸

dd. NATIONAL CORPORATION. — The Constitution excludes from the federal judicial power suits brought against a state by a corporation created by Act of Congress. ⁹

(b) **As to What Is Suit Against State** — *aa. HOW QUESTION DETERMINED.* — The doctrine once held by the United States Supreme Court, that whether or not a suit is against the state must be determined by the fact whether or not the state is the nominal defendant of record, ¹⁰ has been qualified in some of the later decisions of that court, and now it is settled that whether a suit is within the provision of the Eleventh Amendment is not always determined by reference to the nominal parties on the record, but by a consideration of the nature of the whole case. ¹¹

1. The Supreme Court had "construed" the judicial power as extending to such a suit, and its decision was thus overruled. Mr. Justice Bradley in *Hans v. Louisiana*, 134 U. S. 1.

2. Mr. Justice Matthews in *In re Ayers*, 123 U. S. 443, quoted in *Union Trust Co. v. Stearns*, 119 Fed. Rep. 790.

3. *Hollingsworth v. Virginia*, 3 Dall. (U. S.) 378.

4. U. S. v. Texas, 143 U. S. 621.

5. **Suits by Another State.** — 1 Kent's Com. (13th ed.), p. 297; *Cherokee Nation v. Georgia*, 5 Pet. (U. S.) 1; *New Jersey v. New York*, 15 Pet. (U. S.) 284.

6. *New Hampshire v. Louisiana*, 108 U. S. 76; *New York v. Louisiana*, 108 U. S. 76.

7. *Fitts v. McGhee*, 172 U. S. 516; *Hans v. Louisiana*, 134 U. S. 1. See *infra*, this section, *As to What Is Suit Against State*.

8. *Hans v. Louisiana*, 134 U. S. 1, explaining *Cohen v. Virginia*, 6 Wheat. (U. S.) 264; *Smith v. Reeves*, 178 U. S. 436; *North Carolina v. Temple*, 134 U. S. 22.

9. *Smith v. Reeves*, 178 U. S. 436.

10. *Osborn v. U. S. Bank*, 9 Wheat. (U. S.)

738, followed in *Davis v. Gray*, 16 Wall. (U. S.) 203, and *Hancock v. Walsh*, 3 Woods (U. S.) 351; *Louisville, etc., R. Co. v. Letson*, 2 How. (U. S.) 497.

11. *In re Tyler*, 149 U. S. 164; *Fitts v. McGhee*, 172 U. S. 516; *Pennoyer v. McConaughy*, 140 U. S. 1; *In re Ayers*, 123 U. S. 443; *Cunningham v. Macon, etc., R. Co.*, 109 U. S. 446; *New Hampshire v. Louisiana*, 108 U. S. 76; *Chicago, etc., R. Co. v. Dey*, 35 Fed. Rep. 866; *Farmers' Nat. Bank v. Jones*, 105 Fed. Rep. 459.

Suggested Tests. — In *Poindexter v. Greenhow*, 114 U. S. 270, the following were suggested as tests for determining when a suit would be considered as brought against the state. That would be a suit against the state: (1) Where the state is named as a party on the record. (2) Where the action is brought directly upon the state's contract. (3) Where the suit is brought to control the discretion of an executive officer of the state. (4) Where the suit is brought for the purpose of administering funds actually in the public treasury. (5) Where the suit is in effect an attempt to compel officers of the state to do acts which constitute

bb. PERFORMANCE OR BREACH OF STATE'S CONTRACT. — A suit against the officers of a state to compel them to do acts which constitute a performance by the state of its contract, is, in effect, a suit against the state itself;¹ and the converse of this proposition must be equally true, viz., that it is a suit against the state to seek to restrain state officers by judicial process from doing acts required of them by state laws, which, when performed, would constitute a breach of the state's contract.²

cc. MINISTERIAL DUTIES OF STATE OFFICERS. — The court will enforce the performance and enjoin the violation of ministerial duties of such officers where there is involved no element of discretion to be exercised by the officer.³

dd. TORTS AGAINST PERSONS OR PROPERTY. — The court will take jurisdiction against individuals sued in tort for acts injurious to the persons or property of others, although their defense is that they acted under the orders of government.⁴

ee. MERE ASSERTION OF TITLE IN STATE. — A suit against individuals to recover the possession of property of which they have actual possession and control, is not to be considered a suit against the state merely because those individuals claim to be in rightful possession as agents of the state and assert title and right of possession in the state; but the court will inquire whether the plaintiff is in law entitled to possession, and whether the individual defendants have any right in law to withhold possession, and if it be found that the plaintiff is entitled to possession and that the claim of right of possession and title in the state is without legal foundation, will adjudge that the plaintiff recover possession.⁵

ff. CORPORATION IN WHICH STATE INTERESTED. — And the fact that a state is interested in a bank in the capacity of sole proprietor,⁶ or indeed in that of

a performance of its contract by the state. (6) Where the suit brought is such that the state is a necessary party in order that the defendant may be protected from liability to it.

1. To Compel Performance of State's Contract. — *Smith v. Reeves*, 178 U. S. 436; *Pennoyer v. McConaughy*, 140 U. S. 1; *Parsons v. Slaughter*, 63 Fed. Rep. 876; *North Carolina v. Temple*, 134 U. S. 22; *Louisiana v. Steele*, 134 U. S. 230; *Williams v. Hagood*, 98 U. S. 72; *Hagood v. Southern*, 117 U. S. 52; *Louisiana v. Jumel*, 107 U. S. 746; *Brown University v. Rhode Island College of Agriculture, etc., Arts*, 56 Fed. Rep. 55; *Yale College v. Sanger*, 62 Fed. Rep. 177.

An exhaustive treatment of the subject is to be found in *In re Ayers*, 123 U. S. 443, *per* Matthews, J.

2. *In re Ayers*, 123 U. S. 443.

3. Ministerial Duties. — *Davis v. Gray*, 16 Wall. (U. S.) 203; *Board of Liquidation v. McComb*, 92 U. S. 531; *Mutual L. Ins. Co. v. Boyle*, 82 Fed. Rep. 705, (C. C. A.) 89 Fed. Rep. 1014. See also *Rolston v. Missouri Fund Com'rs*, 120 U. S. 390; *Cunningham v. Macon, etc., R. Co.*, 109 U. S. 446; *McCauley v. Kellogg*, 2 Woods (U. S.) 113. And see *Louisiana v. Jumel*, 107 U. S. 711.

4. Torts by State Officers. — *Pennoyer v. McConaughy*, 140 U. S. 1; *McGahey v. Virginia*, 135 U. S. 662; *Poindexter v. Greenhow*, 114 U. S. 270; *White v. Greenhow*, 114 U. S. 307; *Chaffin v. Taylor*, 114 U. S. 309; *Allen v. Baltimore, etc., R. Co.*, 114 U. S. 311; *Osborn v. U. S. Bank*, 9 Wheat. (U. S.) 738; *Hancock v. Walsh*, 3 Woods (U. S.) 351; *Louisiana State Lottery Co. v. Fitzpatrick*, 3 Woods (U. S.) 223; *Parsons v. Slaughter*, 63 Fed. Rep. 876; *Piek v. Chicago, etc., R. Co.*, 6 Biss. (U. S.)

177; *Chicago, etc., R. Co. v. Dey*, 35 Fed. Rep. 866; *Preston v. Walsh*, 10 Fed. Rep. 315; *Minneapolis Brewing Co. v. McGillivray*, 104 Fed. Rep. 258; *Union Pac. R. Co. v. Alexander*, 113 Fed. Rep. 347; *Prout v. Starr*, 188 U. S. 537; *In re Tyler*, 149 U. S. 164; *Scott v. Donald*, 165 U. S. 58; *Howell v. Miller*, 62 U. S. App. 17; *Dinsmore v. South. Express Co.*, 92 Fed. Rep. 714; *Saranac Land, etc., Co. v. Roberts*, 68 Fed. Rep. 521; *Western Union Tel. Co. v. Henderson*, 68 Fed. Rep. 588; *Taylor v. Louisville, etc., R. Co.*, 60 U. S. App. 166; *Cobb v. Clough*, 83 Fed. Rep. 604; *Yale College v. Sanger*, 62 Fed. Rep. 177.

Ex Parte Ayers and Virginia Coupon Cases Distinguished. — *In Ex p. Ayers*, 123 U. S. 443, it was sought to prevent state officers from instituting suits as required by a valid state law, and the action was not maintainable. This is quite different from bringing against the officer a bill for injunction to preserve, or detain to restore, the *status quo*, or trespass for unwarranted interference with property under color of an unconstitutional law, which was allowed in the coupon cases. This distinction is expressed by Bradley, J., in delivering the opinion of the court in *McGahey v. Virginia*, 135 U. S. 662.

5. *Tindal v. Wesley*, 167 U. S. 204; *U. S. v. Peters*, 5 Cranch (U. S.) 115. See also *Clark v. Barnard*, 108 U. S. 436. The court in the first case said that it could not be doubted that the question whether a particular suit is one against the state within the meaning of the Federal Constitution, must depend upon the same principles that determine whether a particular suit is one against the United States. See the title UNITED STATES.

6. *Bank of Kentucky v. Wistar*, 2 Pet. (U. S.) 318; *Briscoe v. Bank of Ky.*, 11 Pet. (U. S.)

corporator and stockholder combined, does not have the effect of making a suit against the corporation a suit against the state.¹

gg. DEFENSE TO SUIT BY STATE. — A state, when it brings a suit against citizens or other parties, accepts all the conditions that affect ordinary suitors, except that no affirmative judgment, as for the payment of costs, can be had against it. The Eleventh Amendment imposes no disability upon the defendant so far as his right to defend is concerned.²

c. WAIVER OF IMMUNITY. — This exemption of the state is a personal privilege which it may waive at pleasure.³ In a suit, otherwise well brought, in which a state has sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States is a voluntary submission to the jurisdiction;⁴ but it is otherwise where the state expressly declines to become a party, and appears merely to protest against the exercise of jurisdiction by the court.⁵

d. ILLUSTRATIVE CASES. — What is and what is not a suit against a state has so frequently been the subject of consideration by the courts that nothing of importance remains to be suggested on either side of that question. It is only necessary to ascertain in each case as it arises, whether it falls on one side or the other of the line marked out by former decisions.⁶ In the note below are set out cases illustrative of the principles discussed above.⁷

257; *Dabney v. State Bank*, 3 S. Car. 124; *State v. State Bank*, 1 S. Car. 63.

1. *Bank of U. S. v. Planters' Bank*, 9 Wheat. (U. S.) 904.

2. *Abeel v. Cuthbertson*, 56 Fed. Rep. 329.

3. *Waiver.* — *Clark v. Barnard*, 108 U. S. 436. See also *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362.

4. *Clark v. Barnard*, 108 U. S. 436.

5. *Georgia v. Jesup*, 106 U. S. 458.

6. Mr. Justice Harlan in *Fitts v. McGhee*, 172 U. S. 516.

7. *Enjoining Superintendent of Insurance from Revoking Lease to do business in state, not suit against state.* *Metropolitan L. Ins. Co. v. McNall*, 81 Fed. Rep. 888.

A Suit Against State Railroad Commissioners for relief against freight rates as being unjust and unreasonable, is not a suit against the state. *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362. And this notwithstanding the state is a shipper of liquors and as such has an interest in the matter of rates. *Clyde v. Richmond, etc., R. Co.*, 57 Fed. Rep. 436. See also *Chicago, etc., R. Co. v. Dey*, 35 Fed. Rep. 866.

Enjoining Officers from Imposing Tax Unauthorized by Law of the State — Not Suit Against State. — *Sanford v. Gregg*, 58 Fed. Rep. 620, 65 Fed. Rep. 151; *Taylor v. Louisville, etc., R. Co.*, 60 U. S. App. 166.

Suit Against State Officers Merely to Test Constitutionality of State Statute Not Allowed. — *Fitts v. McGhee*, 172 U. S. 516; *Ball v. Rutland R. Co.*, 93 Fed. Rep. 513.

Imposing Contractual Liability — Issuance of Evidence of Debt. — A suit against officers of the state to compel them to do acts which would impose a contractual pecuniary liability upon the state, or to issue any evidence of debt, in the name of the state, which would have that result, is a suit against the state, although the state is not named a party on the record. *Farmers' Nat. Bank v. Jones*, 105 Fed. Rep. 459.

Cross Bills. — The state may be called to make defense to a cross bill filed in a suit instituted by herself. *Port Royal, etc., R. Co. v.*

South Carolina, 60 Fed. Rep. 552. And see *supra*, this section, *In State Courts — Tests — Illustrative Cases.*

Subrogation. — The fact of the state's immunity from suit is no reason why the holders of bonds indorsed by a state should not be subrogated to the rights of the state, and have the benefit of the security taken by it as indemnity against loss on account of such indorsement. *Young v. Montgomery, etc., R. Co.*, 2 Woods (U. S.) 606.

Officer Acting under Valid State Law. — "No case can be found where an injunction against a state officer has been upheld where it was conceded that such officer was proceeding under a valid state statute." Mr. Justice Shiras in *Harkrader v. Wadley*, 172 U. S. 148. See also *Arbuckle v. Blackburn*, 51 C. C. A. 122.

Law Officers of the State. — A suit to restrain the attorney-general of the state from enforcing a penal statute, is a suit against the state. *Union Trust Co. v. Stearns*, 119 Fed. Rep. 790. See also *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79.

In *Louisiana v. Lagarde*, 60 Fed. Rep. 186, a distinction was drawn between enjoining a state board of agriculture from instituting criminal prosecutions based on a law claimed to be invalid as interfering with interstate commerce, and enjoining the law officers of the state, it being held that the former might be restrained, but leaving undecided the question as to the latter. In a later case, however, the second question was decided against the power of the court. *Rhodes, etc., Mfg. Co. v. New Hampshire*, 70 Fed. Rep. 721. And in a still later case, wherein the suit was held to be not of the inhibited kind, the court emphasized the fact that the officers sought to be restrained "are specially charged with the enforcement of the state enactments under consideration and that they are not otherwise general officers of the state or charged with the enforcement of all laws generally." *Western Union Tel. Co. v. Myatt*, 98 Fed. Rep. 335.

For Other Cases discussing the subject, see

Volume XXVI.

STATE TAX. — See note 1.

STATE UNIVERSITIES. — See the title UNIVERSITIES AND COLLEGES.

STATING PART OF BILL. (See also the title BILLS IN EQUITY, 3 ENCYC. OF PL. AND PR. 341.) — See note 2.

STATION. — "In the broadest use of language no doubt the word 'station' means a place or position, and it may be said that wherever a man in pursuance of orders stays or remains he is stationed, and that if he is a military man such place becomes a military station. This word (station) has a recognized and a different meaning under different circumstances. It is a technical word in church regulations, in the science of ecclesiology, in the civil law, in surveying, in railroad language, and military science."³ To station is to place; to set; to appoint or assign to the occupation of a post, place, or office; as, to station troops on the right of an army; to station a sentinel on a rampart; to station ships on the coast of Africa.⁴

STATION AGENT. — A station agent is the agent locally in charge of a station or depot, and generally is not at the end of the road, but at some intermediate place. There may, no doubt, be a station agent at the terminus; but that name cannot apply presumptively, if at all, to any but one who has general charge at the place where he acts. On large railroads there are usually, at terminal points, distinct freight and passenger agencies, and frequently several others.⁵

STATIONARY. — See note 6.

STATIONERY. — Under the name of stationery are embraced all writing materials and implements, together with the numerous appliances of the desk and of mercantile and commercial offices. The term "fancy stationery" covers a miscellaneous assembly of leather and other goods, such as pocket-books, bags, card cases, and many kindred articles which cannot be classified.⁷

• *Haverhill Gaslight Co. v. Barker*, 109 Fed. Rep. 694; *Manchester F. Ins. Co. v. Herriott*, 91 Fed. Rep. 711; *Virginia, etc., Steel, etc., Co. v. Bristol Land Co.*, 88 Fed. Rep. 134, *following In re Tyler*, 149 U. S. 164; *Wheeler v. Chicago*, 68 Fed. Rep. 526; *Sundry African Slaves v. Madrazo*, 1 Pet. (U. S.) 110.

1. **State Tax.** — A statute provided for the assessment of a specified tax on liquor dealers, the money thereby raised to be devoted to the use of the towns, villages, and cities in which the business was carried on. It was held that this was not a *state tax*, and therefore not within a constitutional provision directing the application of "specific *state taxes*." *Youngblood v. Sexton*, 32 Mich. 413, 20 Am. Rep. 654.

2. **Stating Part of Bill.** — The *stating part of a bill* in equity "contains a narrative of the facts and circumstances of the plaintiff's case and of the wrong or grievance of which he complains, and constitutes in truth the real substance of the bill upon which the court is called to act." *Strange v. Watson*, 11 Ala. 335.

3. **Station.** — *Phisterer's Case*, 12 Ct. Cl. 106, *sub nom. U. S. v. Phisterer*, 94 U. S. 222. See also *Caldwell's Case*, 9 Ct. Cl. 96.

4. *Ft. Worth, etc., R. Co. v. Shetter*, (Tex. Civ. App. 1900) 58 S. W. Rep. 181, *quoting Webster's Dict.* In this case, in construing a statute which provided that a trusty and faithful brakeman should be permanently *stationed* on the hindmost car of every train transporting passengers and merchandise, the court said: "It is not, therefore, an unreasonable construction to say that the statute means that a trusty brakeman shall be selected and assigned per-

manently to the post or place indicated."

5. **Station Agent.** — *Detroit v. Wabash, etc., R. Co.*, 63 Mich. 714.

A person in charge of a station is commonly called the *station agent*. *Missouri, etc., R. Co. v. Belcher*, 88 Tex. 551. See also *Evans v. Cincinnati, etc., R. Co.*, 78 Ala. 341.

6. **Stationary.** — To be *stationary*, within article 9 of the English regulations of 1863 for preventing collisions at sea, a fishing vessel must not have more way on than is necessary to keep her under command while attached to her nets. If it is necessary, even for the purpose of rendering her fishing more effective, that she should have more way on, she is not *stationary*, and must carry the lights of a vessel under way. *The Dunelm*, 9 P. D. 173.

A trawler proceeding at the rate of a quarter of a knot an hour with her trawl down is *stationary*. *The Edith*, 10 Ir. R. Eq. 345. The court said: "A perfectly *stationary* condition probably could not, from the very nature of the element of water, last beyond a mere *punctum temporis*." See also the title SHIPS AND SHIPPING, vol. 25, p. 953.

7. **Stationery.** — *Oklahoma County v. Blakeley*, 5 Okla. 77, *quoting Am. Encyc. Brit.*, vol. 9, p. 5555.

Stationery means such articles as are usually sold by stationers — paper, ink, quills, etc. *Webst. Dict.*, *followed in Arapahoe County v. Koons*, 1 Colo. 161; *Knox County v. Arms*, 22 Ill. 179.

"*Stationery* is defined by Webster to mean paper, pens, inks, quills, blankbooks, etc." *Harris County v. Clarke*, 14 Tex. Civ. App. 58.

Press. — In *Trumbull County v. Hutchins*, 11 Ohio 371, in holding that a press for the seal of a court was *stationery*, the court said: "The word *stationery* embraces all things necessarily employed by the clerk for the purpose of writing and authenticating every species of writing which the law requires the clerk to write and authenticate; especially all such things as are necessarily connected with the office for such purpose. The press is an article of this description. Upon these grounds, so far as the press alluded to is involved, the clerk would be entitled to recover. But as to the seal of the Court of Common Pleas, the county commissioners are not bound to furnish it. The statute provides that the secretary of state shall furnish the seal of the several courts to their respective clerks."

Printed Blanks. — The term includes printed blanks for the use of public officers. This was

so held when a statute provided that the counties should be liable for *stationery* furnished to clerks of court. *Knox County v. Arms*, 22 Ill. 179; *Pike County v. Goldthwaite*, 35 Ala. 706. *Contra*, *Arapahoe County v. Koons*, 1 Colo. 160.

A statute provided that certain county officers should be furnished with "such books, *stationery*, including blank bail bonds and blank complaints, and office furniture as may be necessary." It was held that the term *stationery* included printed blanks. The court said: "There is nothing in this language, as we conceive, to negative the idea that the term *stationery* may include printed blanks; but, on the contrary, the expression '*stationery*, including blank bail bonds and blank complaints,' seems to us to assume that the word *stationery* does include printed blanks." *Harris County v. Clarke*, 14 Tex. Civ. App. 58.

STATIONS (RAILROAD).

BY BRISCOE BALDWIN CLARK.

- I. DEFINITION, 495.
- II. ESTABLISHMENT AND EQUIPMENT OF STATIONS, 496.
 - 1. *General Powers of Railroad Companies*, 496.
 - 2. *Common-law Obligation*, 497.
 - 3. *Legislative Power to Regulate*, 497.
 - a. *In General*, 497.
 - b. *Waiting Rooms*, 498.
 - c. *Privy Accommodations*, 499.
 - d. *Stopping Trains at Stations*, 499.
 - e. *Information as to Trains*, 499.
- III. ABANDONMENT AND CHANGE OF LOCATION, 499.
- IV. CONTRACTS TO LOCATE STATIONS, 500.
 - 1. *Validity*, 500.
 - 2. *Construction*, 502.
 - 3. *Against Whom Enforceable*, 502.
 - 4. *Remedies for Breach*, 503.
 - 5. *Measure of Damages*, 503.
- V. RULES AND REGULATIONS, 504.
 - 1. *In General*, 504.
 - 2. *Exclusive Privileges*, 505.
- VI. ACQUISITION OF LAND FOR STATION PURPOSES, 506.
- VII. INJURIES TO PERSONS AT STATIONS, 506.
 - 1. *Liability in General*, 506.
 - 2. *To Whom Duty Is Due*, 509.
 - 3. *Particular Instances*, 511.
 - a. *Lighting Stations*, 511.
 - b. *Ice and Obstructions on Platforms, Etc.*, 512.
 - c. *Holes, Excavations, and Pitfalls in Platforms and Approaches*, 512.
 - d. *Stairways*, 512.
 - e. *Guard Rails*, 513.
 - f. *Proximity of Platform to Tracks*, 513.
 - g. *Station Doors*, 513.
 - h. *Handling Baggage*, 513.
 - i. *Operation of Trains*, 514.
 - j. *Assaults by and Insulting Conduct of Employees*, 514.
 - k. *Injuries from Acts of Third Persons*, 515.
 - 4. *Contributory Negligence*, 516.
 - 5. *Stations Used by Several Companies*, 518.

CROSS-REFERENCES.

See the title *CARRIERS OF PASSENGERS*, vol. 5, p. 474, and references there given.

I. DEFINITION. — A railroad station may be defined as a place where rail road trains come to a stop for the convenience of passengers, receiving and discharging freight, and the like.¹

1. Definition. — Hood v. North Eastern R. Co., Trunk R. Co., 16 Can. L. T. 185; Illinois Cent. L. R. 5 Ch. 525; Wilson v. Northampton, etc., R. Co. v. Latimer, 28 Ill. App. 556; State v. R. Co., L. R. 9 Ch. 285; Anderson v. Grand Indiana, etc., R. Co., 133 Ind. 69; State v.

"Depot" and "Station" **Synonymous.** — The terms "depot" and "station" are, in the *United States* and *Canada*, frequently used synonymously.¹

A Freight Depot is a building in which a railroad is accustomed to deposit merchandise and keep it ready for transportation or delivery.²

A Passenger Depot is a building which a railroad maintains for the use of its passengers.³

II. ESTABLISHMENT AND EQUIPMENT OF STATIONS — 1. **General Powers of Railroad Companies.** — As a general rule railroad companies have power and discretion to determine the location of their stations.⁴

Chicago, etc., R. Co., 12 S. Dak. 305. See also Georgia Pac. R. Co. v. Robinson, 68 Miss. 643; Maxey v. Metropolitan St. R. Co., 95 Mo. App. 303.

The mere existence of a platform beside the track, Denver, etc., R. Co. v. Pickard, 8 Colo. 163; or of a switch track upon which the company has permitted the loading of freight cars, Kansas City, etc., R. Co. v. Lilly, (Miss. 1891) 8 So. Rep. 644, does not necessarily render such place a depot or station. So a mere siding at which trains may pass is not necessarily a station, though it is sometimes used by persons to get on and off trains. Beauchamp v. International, etc., R. Co., 56 Tex. 239. A place where passengers are taken on and let off may be a station though no ticket or telegraph office is maintained there. Anderson v. Grand Trunk R. Co., 16 Can. L. T. 185.

Use of Term "Station" in Particular Sense. — The term "station" may have different meanings in different statutes or in different connections. State v. Indiana, etc., R. Co., 133 Ind. 69 (statute requiring that notice of delay in trains be posted); Baldwin v. Grand Trunk R. Co., 64 N. H. 596; Carroll v. Casemore, 20 Grant Ch. (U. S.) 16 (contract to convey land next to a "station").

Military Station. — See DEPOT, vol. 9, p. 367, note 1; MILITARY STATION — MILITARY POST, vol. 20, p. 667.

"Station" Abandonment. — The term "station" in a statute prohibiting the abandonment of established stations has been held to include a place at which trains usually stopped for the receiving and delivery of passengers or freight and which was recognized by name by the railroad authorities, though it was not of sufficient importance to require a station master, and though trains did not usually stop there to take up passengers unless signaled. State v. New Haven, etc., R. Co., 37 Conn. 153. Compare State v. New Haven, etc., R. Co., 41 Conn. 134.

1. **"Depot" and "Station" Synonymous.** — See DEPOT, vol. 9, p. 366, and see State v. Indiana, etc., R. Co., 133 Ind. 69.

"Usual Stopping Place" — Texas Statute. — Texas, etc., R. Co. v. Casey, 52 Tex. 112.

2. **Freight Depot.** — Maghee v. Camden, etc., R. Co., 45 N. Y. 514, 6 Am. Rep. 124.

Station Merely for Taking or Leaving Cars Not Depot. — See Mahaska County R. Co. v. Des Moines Valley R. Co., 28 Iowa 437, stated under DEPOT, vol. 9, p. 366.

Depot Grounds. — See DEPOT GROUNDS, vol. 9, p. 367.

3. **Passenger Depot.** — In St. Louis, etc., R. Co. v. State, 61 Ark. 9, a storehouse on a railroad company's right of way, owned and occupied as a storehouse and post office, and where

also the storekeeper sold passenger tickets for the railroad company on commission, was held not to be a passenger depot within the meaning of the Arkansas statute (Sand. & H. Dig. Stat. Ark. 1894, § 6219) requiring railroad companies to provide separate waiting rooms for whites and negroes at all their passenger depots.

Ejection from Trains — "Passenger Station." — The term "passenger station" in the New Hampshire statute prohibiting the ejection of persons from trains for nonpayment of fare except at some passenger station is held to mean not less than a stopping place at which passenger tickets are ordinarily sold. See the title CARRIERS OF PASSENGERS, vol. 5, p. 608.

"Regular Station." — And the term "regular station" under a similar statute has been restricted in its meaning to the usual stopping place or platform used for the purpose of having passengers get off and on the trains, and the court refused to extend it so as to include the entire town or village in which such stopping place was located. Illinois Cent. R. Co. v. Latimer, 128 Ill. 163. See also Chicago, etc., R. Co. v. Parks, 18 Ill. 460, 68 Am. Dec. 562, where a passenger was ejected at a point forty rods or half a mile from the regular stopping place for passengers. And see REGULAR DEPOT OR STATION, vol. 24, p. 242, and the title CARRIERS OF PASSENGERS, vol. 5, p. 607.

The term "regular" depot or station within the meaning of a statute imposing penalties for refusal to receive goods for transportation tendered at such places has been discussed elsewhere in this work. See the title CARRIERS OF GOODS, vol. 5, p. 164, and see REGULAR DEPOT OR STATION, vol. 24, p. 242.

4. **Power of Company to Locate.** — Montgomery v. Louisville, etc., R. Co., 84 Ala. 127; St. Louis, etc., R. Co. v. Adcock, 52 Ark. 406, 40 Am. & Eng. R. Cas. 682; Florida Cent., etc., R. Co. v. State, 31 Fla. 482, 34 Am. St. Rep. 30, 56 Am. & Eng. R. Cas. 306; People v. Chicago, etc., R. Co., 130 Ill. 175, 40 Am. & Eng. R. Cas. 352; Chicago, etc., R. Co. v. People, 152 Ill. 230; Currie v. Natchez, etc., R. Co., 61 Miss. 725; Wells v. Alabama, G. S. R. Co., 67 Miss. 24, 40 Am. & Eng. R. Cas. 645.

Consent of Common Council of City. — Illinois Cent. R. Co. v. Chicago, 176 U. S. 646, affirming 173 Ill. 471.

Proximity to Highway — Nuisance. — State v. Morris, etc., R. Co., 25 N. J. L. 437; State v. Vermont Cent. R. Co., 27 Vt. 103. See London, etc., R. Co. v. Board of Works, 3 Kay & J. 123; City, etc., London R. Co. v. London, (1891) 2 Q. B. 513.

On Line of Other Railway. — As a general rule, directors cannot, without the consent of the stockholders, authorize the construction or

2. Common-law Obligation. — The better doctrine seems to be that the courts have no power, unless the duty has been imposed upon the railroad company by the legislature or by contract, to require railroad companies to establish stations at particular places,¹ or to construct what they may deem to be necessary buildings for the protection of passengers and freight at established stations.² A mere permissive power conferred upon a railroad company to construct suitable station buildings does not impose upon it a duty to construct necessary buildings which may be enforced by the courts.³ In some cases, however, it has been held that railroad companies, as *quasi*-public corporations, are under a common-law duty to establish stations and construct station buildings at all places where necessary for the public convenience, and that this duty, independently of legislative direction, may be enforced by the courts.⁴ Where the duty to establish and equip stations is imposed by the legislature upon railroad companies, the courts will, though not expressly authorized by the legislature, enforce such duty.⁵

3. Legislative Power to Regulate — *a. IN GENERAL.* — The legislature has undoubted power to compel railroad companies to establish stations at places necessary for the public convenience,⁶ and may require such companies to

the payment of any portion of the cost of the construction of a passenger station at a city in a state foreign to that in which the company is created, and to which its own road does not extend. Such expenditures do not fall within the ordinary scope of their powers. But where two roads in adjoining states are run jointly, and increased facilities at such place are necessary to enable the joint management to retain its extended business, the directors may contract to pay a portion of the cost of erecting such increased facilities. *Nashua, etc., R. Corp. v. Boston, etc., R. Corp.*, 136 U. S. 356, 42 Am. & Eng. R. Cas. 688.

1. No Common-law Obligation. — *South Eastern R. Co. v. Railway Com'rs*, 6 Q. B. D. 586; *Atchison, etc., R. Co. v. Denver, etc., R. Co.*, 110 U. S. 667; *Northern Pac. R. Co. v. Washington Ter.*, 142 U. S. 492, *reversing* 3 Wash. Ter. 303; *People v. Chicago, etc., R. Co.*, 130 Ill. 175, 40 Am. & Eng. R. Cas. 352; *Chicago, etc., R. Co. v. People*, 152 Ill. 230; *State v. Kansas City, etc., R. Co.*, 51 La. Ann. 200. See also *Florida Cent., etc., R. Co. v. State*, 31 Fla. 482, 34 Am. St. Rep. 30.

At Junction of Two Railroads. — *Atchison, etc., R. Co. v. Denver, etc., R. Co.*, 110 U. S. 667, 16 Am. & Eng. R. Cas. 57, *reversing* 15 Fed. Rep. 650.

2. *Page v. Louisville, etc., R. Co.*, 129 Ala. 232; *St. Louis, etc., R. Co. v. State*, 61 Ark. 9; *People v. New York, etc., R. Co.*, 104 N. Y. 58, 58 Am. Rep. 484; *Chaddick v. Lindsay*, 5 Okla. 616; *Bonham v. Columbia, etc., R. Co.*, 26 S. Car. 353. *Compare* *People v. New York, etc., R. Co.*, (Supm. Ct. Spec. T.) 17 Abb. N. Cas. (N. Y.) 304.

Waiting Room. — Under the common law, railroad companies are under no duty to maintain comfortable waiting rooms at their stations for persons proposing to become passengers on their trains. *Page v. Louisville, etc., R. Co.*, 129 Ala. 232.

The Alabama Statute (Civ. Code Ala. 1896, § 3451) conferring authority on the railroad commission to require railroad companies to maintain sufficient waiting rooms, suitably heated, etc., for the comfort of the passengers,

only imposes the duty to maintain such waiting rooms when required by the railroad commission. *Page v. Louisville, etc., R. Co.*, 129 Ala. 232.

Separate Waiting Rooms — *Arkansas Statute.* — See *St. Louis, etc., R. Co. v. State*, 61 Ark. 9.

Illinois Statute — **Population** — **Custom of Receiving and Delivering Passengers and Freight.** — *People v. Chicago, etc., R. Co.*, 130 Ill. 175, 35 Am. & Eng. R. Cas. 462.

3. *People v. New York, etc., R. Co.*, 104 N. Y. 58, 58 Am. Rep. 484.

4. *People v. Chicago, etc., R. Co.*, 130 Ill. 175, 40 Am. & Eng. R. Cas. 352, *reversing* on rehearing 35 Am. & Eng. R. Cas. 462; *State v. Republican Valley R. Co.*, 17 Neb. 647, 52 Am. Rep. 424, *reaffirmed* 18 Neb. 512; *Northern Pac. R. Co. v. Territory*, 3 Wash. Ter. 303. See also *Texas, etc., R. Co. v. Mays*, 4 Tex. App. Civ. Cas., § 159. In *State v. Republican Valley R. Co.*, 17 Neb. 647, 52 Am. Rep. 424, 22 Am. & Eng. R. Cas. 500, a station was allowed to a town of fifteen hundred inhabitants, with an ordinary amount of business, though there was another station on the same road at a town only one mile distant, and there was another road serving the town.

5. *Concord, etc., R. Co. v. Boston, etc., R. Co.*, 67 N. H. 464. See also *South Eastern R. Co. v. Railway Com'rs*, 6 Q. B. D. 587; *People v. Chicago, etc., R. Co.*, 130 Ill. 175, 35 Am. & Eng. R. Cas. 462; *Bonham v. Columbia, etc., R. Co.*, 26 S. Car. 353, 30 Am. & Eng. R. Cas. 177.

6. Power of Legislature — *United States.* — *New Haven, etc., R. Co. v. Hamersley*, 104 U. S. 1; *State v. Kansas City, etc., R. Co.*, 32 Fed. Rep. 722; *Atchison, etc., R. Co. v. Denver, etc., R. Co.*, 110 U. S. 667, 16 Am. & Eng. R. Cas. 57.

Maine. — *Railroad Com'rs v. Portland, etc., R. Co.*, 63 Me. 269, 18 Am. Rep. 208.

Massachusetts. — *Com. v. Eastern R. Co.*, 103 Mass. 254, 4 Am. Rep. 555.

Minnesota. — *State v. St. Paul, etc., R. Co.*, 40 Minn. 353.

Missouri. — *State v. Wabash, etc., R. Co.*, 83 Mo. 144, 25 Am. & Eng. R. Cas. 133.

erect station buildings necessary for the protection of passengers and freight.¹ This power falls under the police power of the state,² and its exercise is not invalid as to pre-existing corporations as an impairment of the obligation of contracts,³ nor is it subject to the objection that it takes the property of the company and appropriates it to the benefit of others without compensation, as the buildings which the company is required to construct belong to it and its compensation for the outlay is in its freights and tolls.⁴

Delegation of Power.—The power to determine what stations are required and the necessary equipment for such stations may be delegated by the legislature to railroad commissioners⁵ or to commissioners appointed by the courts.⁶

Penalties.—The legislature may impose penalties for failure to construct stations as required by the statutes.⁷

b. WAITING ROOMS.—The legislature may require railroad companies to provide suitable waiting rooms at their stations for intended passengers⁸ and

New Hampshire.—*Nashua, etc., R. Co. v. Derry*, 58 N. H. 65.

Texas.—*San Antonio, etc., R. Co. v. State*, 79 Tex. 264.

Construction of Stations at Crossing of Two Railways.—*State v. Kansas City, etc., R. Co.*, 32 Fed. Rep. 722, stated under the title CROSSINGS, vol. 8, p. 354, note.

1. *England.*—*South Eastern R. Co. v. Railway Com'rs*, 6 Q. B. D. 586; *Hastings v. South Eastern R. Co.*, 3 R. & Can. T. Cas. 179; *Harris v. London, etc., R. Co.*, 3 R. & Can. T. Cas. 331; *Caterham R. Co. v. London, etc., R. Co.*, 1 C. B. N. S. 410, 87 E. C. L. 410, 1 R. & Can. T. Cas. 32.

United States.—*State v. Kansas City, etc., R. Co.*, 32 Fed. Rep. 722.

Alabama.—Page *v. Louisville, etc., R. Co.*, 129 Ala. 232.

Illinois.—*People v. Chicago, etc., R. Co.*, 130 Ill. 175, 40 Am. & Eng. R. Cas. 352.

Maine.—*Railroad Com'rs v. Portland, etc., R. Co.*, 63 Me. 270, 18 Am. Rep. 208.

Massachusetts.—*Com. v. Eastern R. Co.*, 103 Mass. 254, 4 Am. Rep. 555.

Minnesota.—*State v. Minneapolis, etc., R. Co.*, 76 Minn. 469.

New Hampshire.—*Boothby v. Grand Trunk R. Co.*, 66 N. H. 342.

New York.—*People v. Delaware, etc., Canal Co.*, 32 N. Y. App. Div. 120.

South Dakota.—*State v. Chicago, etc., R. Co.*, 12 S. Dak. 305.

The Term "Village" as used in Laws Minn. 1897, c. 94, providing that all railroad companies shall provide "at all villages and boroughs on their respective roads depots with suitable waiting rooms for the protection and accommodation" of passengers, and freight rooms for the storage and protection of freight, must be construed as referring only to incorporated villages. *State v. Minneapolis, etc., R. Co.*, 76 Minn. 469.

2. **Police Power.**—*State v. Kansas City, etc., R. Co.*, 32 Fed. Rep. 722. And see generally the title POLICE POWER, vol. 22, p. 914.

3. **Obligation of Contracts.**—*Railroad Com'rs v. Portland, etc., R. Co.*, 63 Me. 269, 18 Am. Rep. 208; *Com. v. Eastern R. Co.*, 103 Mass. 260, 4 Am. Rep. 555. See also *New Haven, etc., R. Co. v. Hamersley*, 104 U. S. 1.

Effect of Consent of Railroad Commissioners to Abandonment.—A state statute prohibiting

the abandonment of established stations without the consent of the railroad commissioners does not render the consent of such commissioners to the abandonment of a station a contract between the state and the railroad company which would be impaired by a subsequent legislative requirement that a station be reconstructed at such a place. *New Haven, etc., R. Co. v. Hamersley*, 104 U. S. 1. See also *State v. New Haven, etc., Co.*, 43 Conn. 351.

4. *Com. v. Eastern R. Co.*, 103 Mass. 258, 4 Am. Rep. 555; *State v. Wabash, etc., R. Co.*, 83 Mo. 144.

5. **Railroad Commissioners.**—*South Eastern R. Co. v. Railway Com'rs*, 6 Q. B. D. 586; *Railroad Com'rs v. Portland, etc., R. Co.*, 63 Me. 269, 18 Am. Rep. 208; *State v. Chicago, etc., R. Co.*, 19 Neb. 476; *People v. Delaware, etc., Canal Co.*, 165 N. Y. 362, affirming 32 N. Y. App. Div. 120.

Order of Railroad Commissioners in Regard to Erection of Station Accommodations Must Be in Strict Compliance with Provisions of the Statute.—*State v. Alabama, etc., R. Co.*, 67 Miss. 647, 42 Am. & Eng. R. Cas. 681.

Instance of Improper Exercise of Power by Commissioners.—*State v. Minneapolis, etc., R. Co.*, 76 Minn. 469.

Lack of Power to Acquire Lands.—The commissioners cannot order accommodation to be provided which entails the acquisition by the company of additional land which it has no immediate power to take. *Harris v. London, etc., R. Co.*, 3 R. & Can. T. Cas. 331.

Statute Construed as Merely Authorizing Inquiry for Information.—*People v. New York, etc., R. Co.*, 104 N. Y. 58, 58 Am. Rep. 484. And see *Bonham v. Columbia, etc., R. Co.*, 26 S. Car. 353, 30 Am. & Eng. R. Cas. 177. Compare *State v. Chicago, etc., R. Co.*, 12 S. Dak. 305.

6. **Commissioners Appointed by Court.**—*Com. v. Eastern R. Co.*, 103 Mass. 258, 4 Am. Rep. 555.

7. *State v. Kansas City, etc., R. Co.*, 32 Fed. Rep. 722; *State v. Cleveland, etc., R. Co.*, 4 Ohio Cir. Dec. 372, 8 Ohio Cir. Ct. 604.

Cumulative Penalties.—*State v. Kansas City, etc., R. Co.*, 32 Fed. Rep. 722.

8. **Waiting Rooms.**—*State v. Kansas City, etc., R. Co.*, 32 Fed. Rep. 722; *Louisville, etc., R. Co. v. Com.*, 97 Ky. 207; *Illinois Cent. P. Co. v. Com.*, (Ky. 1899) 52 S. W. Rep. 818;

to keep such waiting rooms open for a reasonable time before the departure of their trains.¹

c. **PRIVY ACCOMMODATIONS.** — It would seem that in the absence of statutory requirement railroad companies are under no duty to furnish at railway stations privy accommodations for their customers,² though the imposition of such duty is undoubtedly within the power of the legislature, and statutes exercising the power have been enacted in some jurisdictions.³ Of course, such statutes have no retroactive effect.⁴ Where suitable and convenient privy accommodations are required, the accommodations must be suitable for women as well as for men, and the question whether the privy accommodations furnished are suitable and convenient is as a rule a question of fact, dependent upon the number of persons arriving at and departing from the station.⁵

d. **STOPPING TRAINS AT STATIONS.** — It is within the legislative power to require all trains of a particular class running within the state to stop at designated stations.⁶ Such legislation does not deprive the railroad company of its property without compensation or due process of law, nor is it, as applied to trains carrying mail, an improper interference with the transportation of the mails;⁷ and as applied to trains carrying interstate passengers, such legislation is not, it seems, improper as an interference with interstate commerce.⁸

e. **INFORMATION AS TO TRAINS.** — Some statutes require railroad companies to place in their passenger depots blackboards upon which shall be noted whether trains are on schedule time, and if late, how late.⁹

III. ABANDONMENT AND CHANGE OF LOCATION. — In the absence of statutory prohibition, a railroad company may change the location of established stations where the welfare of the company and its patrons requires that the change should be made;¹⁰ but such companies should not be permitted arbi-

State *v.* Wabash, etc., R. Co., 83 Mo. 144, 25 Am. & Eng. R. Cas. 133; Boothby *v.* Grand Trunk R. Co., 66 N. H. 342; Texas, etc., R. Co. *v.* Mays, 4 Tex. App. Civ. Cas., § 159.

Liability for Injuries to Intended Passenger from Exposure Due to Failure of Company to Provide Suitable Waiting Room. — Boothby *v.* Grand Trunk R. Co., 66 N. H. 342; Texas, etc., R. Co. *v.* Mays, 4 Tex. App. Civ. Cas., § 159.

1. The Kentucky statute, Stat. Ky. (1894), § 784, requiring railway companies to keep waiting rooms open for at least thirty minutes before the departure of passenger trains from every "regular passenger depot," does not require a company to keep open a waiting room for night trains stopping at a station which is maintained only as a day station. Louisville, etc., R. Co. *v.* Com., 102 Ky. 300. And see the title TICKETS AND FARES.

2. Montgomery, etc., R. Co. *v.* Thompson, 77 Ala. 448, 54 Am. Rep. 72.

3. Louisville, etc., R. Co. *v.* Com., 97 Ky. 207; Louisville, etc., R. Co. *v.* Com., (Ky. 1898) 45 S. W. Rep. 362; Louisville, etc., R. Co. *v.* Com., 103 Ky. 605.

A statute requiring a railroad company to provide "convenient and suitable" privy accommodations is not invalid for uncertainty. Louisville, etc., R. Co. *v.* Com., 103 Ky. 605.

Duty of Receiver of Railroad. — Com. *v.* Felton, 107 Ky. 330.

4. Montgomery, etc., R. Co. *v.* Thompson, 77 Ala. 448, 54 Am. Rep. 72.

5. Louisville, etc., R. Co. *v.* Com., 103 Ky. 605.

The Kentucky statute requiring railroad com-

panies to provide suitable water closets at their stations was held to be sufficiently complied with by the maintenance of water closets which were kept locked, the key being left with the station agent, who always, on request, delivered it to persons entitled to use the closets, it being shown that it was reasonably necessary to keep the closets locked in order to keep them in decent order. Louisville, etc., R. Co. *v.* Com., (Ky. 1898) 45 S. W. Rep. 362.

6. **Stopping Trains at Stations.** — Gladson *v.* Minnesota, 166 U. S. 427, affirming 57 Minn. 385; Lake Shore, etc., R. Co. *v.* Ohio, 173 U. S. 285; Chicago, etc., R. Co. *v.* People, 105 Ill. 657; Illinois Cent. R. Co. *v.* People, 143 Ill. 434; Cleveland, etc., R. Co. *v.* People, 175 Ill. 359; Davidson *v.* State, 4 Tex. App. 545, 30 Am. Rep. 166; Davis *v.* State, 6 Tex. App. 166.

In Lake Shore, etc., R. Co. *v.* Ohio, 173 U. S. 285, an Ohio statute requiring railroad companies to cause three each way of their regular trains carrying passengers, if so many are run daily, to stop at any station, city, or village of three thousand inhabitants was upheld.

7. Gladson *v.* Minnesota, 166 U. S. 427, affirming 57 Minn. 385.

8. See the title INTERSTATE COMMERCE, vol. 17, pp. 98, 99.

9. **Information as to Trains.** — Terre Haute, etc., R. Co. *v.* State, 13 Ind. App. 530; State *v.* Indiana, etc., R. Co., 133 Ind. 69; State *v.* Cleveland, etc., R. Co., 4 Ohio Cir. Dec. 372, 8 Ohio Cir. Ct. 604.

10. **General Right to Change Location.** — Northern Pac. R. Co. *v.* Washington Ter., 142 U. S. 492, 48 Am. & Eng. R. Cas. 475, reversing

trarily to abandon established stations, and if such an attempt is made, the courts, irrespective of statutory requirements, should grant relief.¹

Legislative Prohibitions.—The legislature has power to prohibit the abandonment of stations established by railroad companies, and in a number of jurisdictions statutes in this regard have been enacted,² and the determination of the question whether stations shall be abandoned or relocated has been intrusted to railroad commissioners.³ The object of such prohibitions being to prevent railroad companies from arbitrarily changing their places of business on their railroads to the prejudice of those who rely on the permanency of such places and shape their business accordingly, they should be construed fairly to carry out such object.⁴

IV. CONTRACTS TO LOCATE STATIONS — 1. Validity — General Rule.—The rule established by the weight of authority is that a contract on the part of a railroad company with an individual to maintain a station at a particular place on its line for the benefit of such individual is not *per se* illegal as against public policy, in that it is subversive of the duty of the company to the public, where the company does not bind itself not to establish other stations in the same vicinity, or elsewhere on its line, as the convenience of the public may demand,⁵ and railroad companies may make such contracts without

3 Wash. Ter. 303; *Mobile, etc., R. Co. v. People*, 132 Ill. 559, 22 Am. St. Rep. 556; *State v. Des Moines, etc., R. Co.*, 87 Iowa 644; *Kinealy v. St. Louis, etc., R. Co.*, 69 Mo. 658.

In *Mobile, etc., R. Co. v. People*, 132 Ill. 559, 22 Am. St. Rep. 556, 42 Am. & Eng. R. Cas. 671, mandamus to compel the re-establishment of a station was refused where it appeared that the new station was more convenient than the old for a majority of the residents in the community.

In *Houston, etc., R. Co. v. Molloy*, 64 Tex. 607, 25 Am. & Eng. R. Cas. 244, a property owner was allowed to recover damages for depreciation in the value of his property caused by the removal of an adjacent station. See also *Rich v. New York Cent., etc., R. Co.*, 87 N. Y. 382. See, however, *Kinealy v. St. Louis, etc., R. Co.*, 69 Mo. 658.

1. Arbitrary Abandonment.—*Baltimore, etc., R. Co. v. Compton*, 2 Gill (Md.) 20; *Northern Pac. R. Co. v. Territory*, 3 Wash. Ter. 303.

2. Legislative Prohibitions.—*New Haven, etc., R. Co. v. Hamersley*, 104 U. S. 1; *State v. New Haven, etc., R. Co.*, 37 Conn. 153, 43 Conn. 351; *Chester v. Connecticut Valley R. Co.*, 41 Conn. 348; *Atty.-Gen. v. Eastern R. Co.*, 137 Mass. 45, 21 Am. & Eng. R. Cas. 237; *Cunningham v. Railroad Com'rs*, 158 Mass. 104, 56 Am. & Eng. R. Cas. 301; *State v. Alabama, etc., R. Co.*, 68 Miss. 653, 50 Am. & Eng. R. Cas. 10; *People v. Railroad Com'rs*, 158 N. Y. 421. See also *State v. New Haven, etc., R. Co.*, 41 Conn. 134.

Relocation and Abandonment Distinguished.—*State v. Alabama, etc., R. Co.*, 68 Miss. 653.

3. Railroad Commissioners.—*Chester v. Connecticut Valley R. Co.*, 41 Conn. 348; *Atty.-Gen. v. Eastern R. Co.*, 137 Mass. 45, 21 Am. & Eng. R. Cas. 237; *People v. Railroad Com'rs*, 32 N. Y. App. Div. 158; *People v. Railroad Com'rs*, 158 N. Y. 421.

The convenience of the railroad company as well as of the public is to be considered by the commissioners in determining whether a station shall be abandoned. *People v. Railroad Com'rs*, 158 N. Y. 421.

The consent of the railway commissioners to

the abandonment of a station does not deprive the legislature of the power to require its reconstruction. *State v. New Haven, etc., R. Co.*, 43 Conn. 351, affirmed 104 U. S. 1.

Annexing Condition to Consent to Abandonment.—*Chester v. Connecticut Valley R. Co.*, 41 Conn. 348 (condition annexed held to invalidate order for abandonment). But see for a case where the order was held to be not such a conditional one as to render it invalid, *State v. New Haven, etc., R. Co.*, 42 Conn. 56.

Certiorari to Review Consent to Abandonment.—*People v. Railroad Com'rs*, 158 N. Y. 421.

4. Statutes Fairly Construed.—*State v. New Haven, etc., R. Co.*, 37 Conn. 153.

5. Contracts to Locate Stations Upheld — England.—*Hood v. North Eastern R. Co.*, L. R. 5 Ch. 525; *Wilson v. Northampton, etc., R. Co.*, L. R. 9 Ch. 279.

Canada.—*Nottawasaga Tp. v. Hamilton, etc., R. Co.*, 16 Ont. App. 52, 38 Am. & Eng. R. Cas. 697; *Jessup v. Grand Trunk R. Co.*, 7 Ont. App. 128, 28 Grant Ch. (U. C.) 583; *Goyeau v. Great Western R. Co.*, 25 Grant Ch. (U. C.) 62; *Haldiman County v. Hamilton, etc., R. Co.*, 27 U. C. C. P. 228; *Wallace Tp. v. Great Western R. Co.*, 3 Ont. App. 44, affirming 25 Grant Ch. (U. C.) 86.

United States.—*Union Pac. R. Co. v. Merriek County*, 3 Dill. (U. S.) 359.

Alabama.—*Gilmer v. Mobile, etc., R. Co.*, 79 Ala. 569, 58 Am. Rep. 623; *Mobile, etc., R. Co. v. Gilmer*, 85 Ala. 422.

Georgia.—*Georgia Southern R. Co. v. Reeves*, 64 Ga. 492.

Illinois.—*Rockford, etc., R. Co. v. Beckemeier*, 72 Ill. 267; *St. Louis, etc., R. Co. v. Mathers*, 104 Ill. 257, 9 Am. & Eng. R. Cas. 600; *People v. Louisville, etc., R. Co.*, 120 Ill. 48; *Gray v. Chicago, etc., R. Co.*, 189 Ill. 400. *Compare Mobile, etc., R. Co. v. People*, 132 Ill. 559, 22 Am. St. Rep. 556.

Indiana.—*Vannoy v. Duprez*, 72 Ind. 26; *Louisville, etc., R. Co. v. Sumner*, 106 Ind. 55, 55 Am. Rep. 719.

Iowa.—*Jenkins v. Burlington, etc., R. Co.*, 29 Iowa 255; *Courtwright v. Strickler*, 37

express authority therefor conferred by charter;¹ but an agent of a railroad company acting under a general power to procure the right of way for the road has no authority to contract for the company to locate stations at particular places.² The railroad company may be bound by the agreements of the promoters entered into before its incorporation, with regard to the location of stations.³

A Contract with an Officer of a railroad company for his private gain to locate stations at particular places is contrary to public policy and illegal, as it tends to prevent the duty of the company to the public and to its stockholders.⁴

Minority Rule. — It has been held, however, on the ground that it is the duty of railroad companies to establish their stations at points most convenient for public interests, that all contracts for the location of stations at particular points are invalid as against public policy.⁵

Inhibition Against Other Stations. — Contracts for the location of stations at particular places which contain inhibitions against the location of other stations within specified limits, as the convenience of the public may demand, are universally recognized as illegal, as tending to deprive the railroad company of the power to perform the duties it owes to the public as a *quasi*-public corporation, in order to subserve the private advantage of individuals.⁶ A

Iowa 382; Davenport, etc., R. Co. v. O'Connor, 40 Iowa 477; Burlington, etc., R. Co. v. Palmer, 42 Iowa 222; Minneapolis, etc., R. Co. v. Cox, 76 Iowa 306, 14 Am. St. Rep. 216.

Kansas. — McClure v. Missouri River, etc., R. Co., 9 Kan. 373.

Kentucky. — Owensboro, etc., R. Co. v. Griffith, 92 Ky. 137.

Michigan. — Port Huron, etc., R. Co. v. Richards, 90 Mich. 577.

Mississippi. — New Orleans, etc., R. Co. v. McDonald, 53 Miss. 240; Vicksburg, etc., R. Co. v. Ragsdale, 54 Miss. 200.

Missouri. — North Missouri R. Co. v. Miller, 31 Mo. 19; Workman v. Campbell, 46 Mo. 305; Missouri Pac. R. Co. v. Tygard, 84 Mo. 263, 54 Am. Rep. 97, 22 Am. & Eng. R. Cas. 54; Hays v. Kansas City, etc., R. Co., 108 Mo. 544; Brown v. Richards, 69 Mo. App. 423. See, however, Pacific R. Co. v. Seely, 45 Mo. 212, 100 Am. Dec. 369.

Nebraska. — Harris v. Roberts, 12 Neb. 631, 41 Am. Rep. 779.

New York. — Lawrence v. Saratoga Lake R. Co., 36 Hun (N. Y.) 467, followed in 3 N. Y. St. Rep. 743; Sayre v. New York, etc., R. Co., 3 Duer (N. Y.) 54.

Ohio. — Chamberlain v. Painesville, etc., R. Co., 15 Ohio St. 225; Pittsburg, etc., R. Co. v. Rose, 24 Ohio St. 219.

Pennsylvania. — Watterson v. Allegheny Valley R. Co., 74 Pa. St. 208; West Chester, etc., R. Co. v. Broomall, (Pa. 1886) 3 Atl. Rep. 444.

Tennessee. — Ramsey v. Edgefield, etc., R. Co., 3 Tenn. Ch. 170; Paducah, etc., R. Co. v. Parks, 86 Tenn. 554.

Texas. — Texas, etc., R. Co. v. Robards, 60 Tex. 545, 48 Am. Rep. 268; International, etc., R. Co. v. Dawson, 62 Tex. 260; Gulf, etc., R. Co. v. Newell, 73 Tex. 334, 15 Am. St. Rep. 788; Gulf, etc., R. Co. v. Jones, 82 Tex. 156; Texas, etc., R. Co. v. Fitch, 2 Tex. Unrep. Cas. 257, 12 Am. & Eng. R. Cas. 312.

Vermont. — Lamoille Valley R. Co. v. Marsh, 49 Vt. 37, 17 Am. R. Rep. 136.

Wisconsin. — Racine County Bank v. Ayres, 12 Wis. 512.

Mutuality of Contract. — A contract to convey land in consideration of the location and maintenance of a depot at a certain place cannot be avoided, after the depot has been built, on the ground that the court will not compel the other contracting party to maintain the depot at that place. Minneapolis, etc., R. Co. v. Cox, 76 Iowa 306, 14 Am. St. Rep. 216.

1. **Not Ultra Vires.** — Texas, etc., R. Co. v. Robards, 60 Tex. 546, 48 Am. Rep. 268.

2. **Agent's Authority.** — Houston, etc., R. Co. v. McKinney, 55 Tex. 176, 8 Am. & Eng. R. Cas. 723. See also Schliehauf v. Canada Southern R. Co., 28 Grant Ch. (U. C.) 236.

3. **Promoters.** — Wallace Tp. v. Great Western R. Co., 3 Ont. App. 44. And see the title PROMOTERS, vol. 23, p. 232.

4. **Contract with Officers.** — Cook v. Sherman, 4 McCrary (U. S.) 20, 20 Fed. Rep. 167, 16 Am. & Eng. R. Cas. 561; Louisville, etc., R. Co. v. Sumner, 106 Ind. 60, 55 Am. Rep. 719, 24 Am. & Eng. R. Cas. 647; Fuller v. Dame, 18 Pick. (Mass.) 472; Holladay v. Patterson, 5 Oregon 177.

5. **Minority Rule.** — Burney v. Ludeling, 47 La. Ann. 73. See also Holladay v. Patterson, 5 Oregon 177.

6. **Inhibition Against Other Stations** — Colorado. — Pueblo, etc., R. Co. v. Taylor, 6 Colo. 1, 45 Am. Rep. 512.

Florida. — Florida Cent., etc., R. Co. v. State, 31 Fla. 482, 34 Am. St. Rep. 30.

Illinois. — Marsh v. Fairbury, etc., R. Co., 64 Ill. 414, 16 Am. Rep. 564; St. Louis, etc., R. Co. v. Mathers, 71 Ill. 592, 22 Am. Rep. 122; People v. Chicago, etc., R. Co., 130 Ill. 175; Mobile, etc., R. Co. v. People, 132 Ill. 559, 22 Am. St. Rep. 556, 42 Am. & Eng. R. Cas. 671.

Indiana. — Louisville, etc., R. Co. v. Sumner, 106 Ind. 55, 55 Am. Rep. 719.

Iowa. — Williamson v. Chicago, etc., R. Co., 53 Iowa 126, 36 Am. Rep. 206.

Kansas. — St. Joseph, etc., R. Co. v. Ryan, 11 Kan. 602, 15 Am. Rep. 357.

Mississippi. — Currie v. Natchez, etc., R. Co., 61 Miss. 725.

court of equity will not specifically enforce such a contract,¹ nor can an action for damages for breach thereof be maintained,² and where land is conveyed to a railroad company, in consideration of such an agreement, a reconveyance on breach will not be adjudged.³ So where land is conveyed on a condition subsequent that a station be located thereon and nowhere else, the condition is against public policy, and its breach will not defeat the estate conveyed.⁴

2. Construction. — The general rules relating to the interpretation of contracts⁵ apply, of course, to the construction of agreements relating to the location of stations.⁶ Frequently, however, these agreements have required the construction of particular words and phrases, such as "first-class station,"⁷ "regular station,"⁸ "accommodation train,"⁹ and "removed or discontinued."¹⁰

Permanency of Station. — Agreements to establish and maintain stations at particular places in consideration of the conveyance of land for station purposes or the granting of municipal aid have been construed to require the permanent maintenance of such stations,¹¹ though in other cases the contrary view has been taken.¹²

3. Against Whom Enforceable. — Covenants by a railroad company in consideration of a conveyance of land for a right of way to maintain a station at a particular place have been considered as covenants running with the land, so as to be binding on a subsequent grantee of the rights of the company;¹³

Compare Southard v. Central R. Co., 26 N. J. L. 13; Mahaska County R. Co. v. Des Moines Valley R. Co., 28 Iowa 437, in which latter case a stipulation that "but one other depot" should be allowed between certain points was not objected to by court or counsel.

1. Specific Performance. — Marsh v. Fairbury, etc., R. Co., 64 Ill. 414, 16 Am. Rep. 564.

2. Action for Damages. — Pueblo, etc., R. Co. v. Taylor, 6 Colo. 1, 45 Am. Rep. 512; Williamson v. Chicago, etc., R. Co., 53 Iowa 126, 36 Am. Rep. 206; St. Joseph, etc., R. Co. v. Ryan, 11 Kan. 602, 15 Am. Rep. 357.

3. Reconveyance for Breach. — St. Louis, etc., R. Co. v. Mathers, 71 Ill. 592, 22 Am. Rep. 122; Williamson v. Chicago, etc., R. Co., 53 Iowa 126, 36 Am. Rep. 206.

4. Breach of Condition. — St. Louis, etc., R. Co. v. Mathers, 71 Ill. 592, 22 Am. Rep. 122; Tucker v. Allen, 16 Kan. 312.

5. Construction of Contracts. — See the title INTERPRETATION AND CONSTRUCTION, vol. 17, p. 1.

6. Construction of Particular Contracts. — Pittsburgh, etc., R. Co. v. Rose, 24 Ohio St. 219, 7 Am. R. Rep. 1.

Location of Station. — Davenport, etc., R. Co. v. O'Connor, 40 Iowa 477; McGregor, etc., R. Co. v. Foley, 38 Iowa 588.

Where a company agreed to locate its depot at the nearest "practicable" point within one mile of a court house, it was held that the word "practicable" was not synonymous with "possible." Wooters v. International, etc., R. Co., 54 Tex. 294, 4 Am. & Eng. R. Cas. 100. See also PRACTICABLE — PRACTICABLY, vol. 22, p. 1159.

To Make Village a Station. — Jenkins v. Burlington, etc., R. Co., 29 Iowa 255.

Measuring Distance. — Courtwright v. Strickler, 37 Iowa 382; Davenport, etc., R. Co. v. Rogers, 39 Iowa 298.

Time as Essence of Contract. — Minneapolis, etc., R. Co. v. Cox, 76 Iowa 306, 14 Am. St. Rep. 216.

7. First-class Station. — Hood v. North Eastern R. Co., L. R. 5 Ch. 525.

8. Regular Station. — Port Huron, etc., R. Co. v. Richards, 90 Mich. 577. And see REGULAR DEPOT OR STATION, vol. 24, p. 242.

9. Accommodation Train. — Gray v. Chicago, etc., R. Co., 189 Ill. 400.

10. "Removed or Discontinued." — Brown v. Richards, 69 Mo. App. 423.

11. Permanency of Station. — Goyeau v. Great Western R. Co., 25 Grant Ch. (U. C.) 62; Wallace Tp. v. Great Western R. Co., 3 Ont. App. 44. See also Bickford v. Chatham, 16 Can. Sup. Ct. 235, dismissing appeal from 14 Ont. App. 32, which affirmed 10 Ont. 257.

12. Jessup v. Grand Trunk R. Co., 7 Ont. App. 128, reversing 28 Grant Ch. (U. C.) 583; Texas, etc., R. Co. v. Scott, (C. C. A.) 77 Fed. Rep. 726; Jeffersonville, etc., R. Co. v. Barbour, 89 Ind. 375, 14 Am. & Eng. R. Cas. 466. See also Texas, etc., R. Co. v. Marshall, 136 U. S. 393.

In Nottawasaga Tp. v. Hamilton, etc., R. Co., 16 Ont. App. 52, 38 Am. & Eng. R. Cas. 697, the agreement was to "establish" a station. It was held that the word "establish" did not in itself mean "permanently establish," and that in view of a seven years' limitation in contracts concerning other stations, the company was not bound to maintain the particular station after seven years.

13. Covenants Running with Land. — Mobile, etc., R. Co. v. Gilmer, 85 Ala. 422; Georgia Southern R. Co. v. Reeves, 64 Ga. 492; Pitkin v. Long Island R. Co., 2 Barb. Ch. (N. Y.) 221, 47 Am. Dec. 320. See generally the title COVENANTS, vol. 8, p. 134 et seq.

Liability of Lessee. — A railroad company leasing another company's lines under a statute making it liable to all duties and obligations to which the lessor company has been subjected is not bound either at law or in equity by a covenant entered into by such lessor company with a landowner to erect a station, but will be bound, when such station is erected, to stop trains there. Churchill v. Salisbury, etc., R. Co., 23 W. R. 894, varying the decision of Bacon, V. C., 23 W. R. 534, 33 L. T. N. S. 216.

but a covenant or agreement in consideration of a money donation or stock subscription is merely the personal covenant of the railroad company, and is not binding on a purchaser of such company's rights.¹ Where a railroad company under contract obligation to maintain a station at a particular place consolidates with another, such obligation is binding on the consolidated company.²

4. Remedies for Breach. — An action for damages will, of course, lie against a railway company for breach of a contract on its part to maintain a station at a particular place,³ and a court of equity may afford relief to prevent the breach of such a contract and to compel its specific performance,⁴ provided the agreement is sufficiently definite.⁵ Where land is conveyed to a railroad company on condition that a station be maintained thereon, on breach of the condition the grantor is entitled to recover the land;⁶ but where the conveyance is in consideration of the maintenance of a station thereon, the grantor cannot, in case the station is abandoned after being maintained for some time, recover the land, as in such a case there is only a partial failure of consideration.⁷ Railroad commissioners in *New York* have no power to enforce contracts by railroad companies to establish stations at particular places.⁸

5. Measure of Damages. — The damages recoverable for the breach of an agreement to erect a depot are the proximate injuries actually sustained by the failure of the company to perform its contract,⁹ and evidence to show the increase in the value of the plaintiff's remaining land which the location of

1. *People v. Louisville, etc., R. Co.*, 120 Ill. 48; *Gulf, etc., R. Co. v. Newell*, 73 Tex. 334, 33 Am. & Eng. R. Cas. 503.

2. **Consolidation of Corporations.** — *People v. Louisville, etc., R. Co.*, 120 Ill. 48. See generally the title CONSOLIDATION OF CORPORATIONS, vol. 6, p. 818 *et seq.*

3. **Action for Damages.** — *Louisville, etc., R. Co. v. Sumner*, 106 Ind. 55, 55 Am. Rep. 719, 24 Am. & Eng. R. Cas. 641; *Paducah, etc., R. Co. v. Parks*, 86 Tenn. 554; *Texas, etc., R. Co. v. Robards*, 60 Tex. 545, 48 Am. Rep. 268; *International, etc., R. Co. v. Dawson*, 62 Tex. 260; *Haldimand County v. Hamilton, etc., R. Co.*, 27 U. C. C. P. 228; *St. Thomas v. Credit Valley R. Co.*, 15 Ont. 673, 12 Ont. App. 273, 36 Am. & Eng. R. Cas. 473.

Conveyance of Land for Depot as Condition Precedent to Action. — If the depot is to be erected on the land granted, the granting of the land is a condition precedent to the right to demand the depot; so that if the grantor disables himself to make the conveyance, he can maintain no action for failure to erect the depot. *Sayre v. New York, etc., R. Co.*, 3 Duer (N. Y.) 57.

4. **Equitable Relief.** — *Lawrence v. Saratoga Lake R. Co.*, (Supm. Ct. Gen. T.) 3 N. Y. St. Rep. 743; *Hood v. North Eastern R. Co.*, L. R. 5 Ch. 525; *Wallace Tp. v. Great Western R. Co.*, 3 Ont. App. 44, *affirming* 25 Grant Ch. (U. C.) 86.

A contract to erect "a neat, tasty, ornamental" station has been held not to be too indefinite for specific performance. *Lawrence v. Saratoga Lake R. Co.*, (Supm. Ct. Gen. T.) 3 N. Y. St. Rep. 743, *following* 36 Hun (N. Y.) 467.

Specific Performance Refused. — Specific performance of a contract by a railroad company with a landowner to erect a station at a certain point is properly denied where it appears that such point is on the side of a steep mountain, in a sparsely settled district, and approached

by a steep grade; that the station could be constructed only at a considerable expense; and that the public travel would be delayed by the stoppage of the trains, and the public convenience would not be promoted. *Conger v. New York, etc., R. Co.*, 120 N. Y. 29, 43 Am. & Eng. R. Cas. 643.

5. **Indefinite Contracts.** — *Wilson v. Northampton, etc., Junction R. Co.*, L. R. 9 Ch. 279, 43 L. J. Ch. 503, in which case a contract whereby a railroad company agreed to build a station at a particular spot, but containing no further description of the station, was held to be too indefinite to be specifically enforced; *Bickford v. Chatham*, 16 Can. Sup. Ct. 235.

6. **Recovery of Land.** — *Gray v. Chicago, etc., R. Co.*, 189 Ill. 400; *Indianapolis, etc., R. Co. v. Hood*, 66 Ind. 580; *Owensboro, etc., R. Co. v. Griffith*, 92 Ky. 137; *International R. Co. v. Dawson*, 62 Tex. 260; *Jessup v. Grand Trunk R. Co.*, 7 Ont. App. 128, *reversing* 28 Grant Ch. (U. C.) 583. See also *Horner v. Chicago, etc., R. Co.*, 38 Wis. 165.

In *Close v. Burlington, etc., R. Co.*, 64 Iowa 149, 17 Am. & Eng. R. Cas. 33, a grant of land was conditioned on the permanent location of a depot at a certain point. The depot was erected, but was burned down soon after. It was held that the grantors were not entitled to damages for failure by the company to erect another depot, but were entitled to the notes given to the company, and to a release by it of its right to the land.

7. *Berkley v. Union Pac. R. Co.*, 33 Fed. Rep. 794. See also *Ramsey v. Edgefield, etc., R. Co.*, 3 Tenn. Ch. 170; *Chicago, etc., R. Co. v. Titterton*, 84 Tex. 218, 31 Am. St. Rep. 39.

8. **Railway Commissioners.** — *People v. Railroad Com'rs*, 32 N. Y. App. Div. 158, *affirmed* 158 N. Y. 421.

9. **Measure of Damages.** — *Louisville, etc., R. Co. v. Sumner*, 106 Ind. 55, 55 Am. Rep. 719; *Rich v. New York Cent. R. Co.*, 87 N. Y. 382,

the station at the point agreed upon would have produced is generally held to be admissible,¹ though in *Illinois* the loss of anticipated increase in the value of other land of the plaintiff has been held to be too remote to be considered as an element of damage.²

V. RULES AND REGULATIONS — 1. In General. — Subject to the limitation that its regulations shall not be unreasonable, a railroad company has the right to make and enforce rules and regulations regarding the use of its stations,³ and the power which the company has to regulate its station buildings it may delegate to suitable officers.⁴ Station grounds are not in their nature public highways upon which the general public has the same right to enter and remain as upon other highways,⁵ hence a railroad company may exclude from its station grounds those who go there not to transact business with the railroad company, but from curiosity or to transact their private business with passengers or third persons.⁶ A mere implied license to persons to enter station grounds for private business, no matter how long enjoyed, for which no compensation has been paid, is revocable at any time.⁷ Thus, the company may exclude from its station grounds hackmen soliciting the carriage of passengers from stations,⁸ persons selling lunches to passengers,⁹ and hotel runners soliciting patronage for their hotels,¹⁰ and when such persons come upon the station grounds in violation of such prohibition, it may remove them, using no unnecessary force.¹¹ Of course, the company has no power to

¹¹ Am. & Eng. R. Cas. 594; *West Chester, etc., R. Co. v. Broomall*, (Pa. 1886) 3 Atl. Rep. 444, 26 Am. & Eng. R. Cas. 591.

Recovery by Municipality — Loss in Taxation. — *St. Thomas v. Credit Valley R. Co.*, 15 Ont. 673, 12 Ont. App. 273, 36 Am. & Eng. R. Cas. 473.

The Damages Are Not Limited to the Value of the Land Conveyed as the consideration of the promise to erect the station. *West Chester, etc., R. Co. v. Broomall*, (Pa. 1886) 3 Atl. Rep. 444.

1. Increase in Land Values. — *Louisville, etc., R. Co. v. Sumner*, 106 Ind. 55, 55 Am. Rep. 719, 24 Am. & Eng. R. Cas. 641; *Watterson v. Allegheny Valley R. Co.*, 74 Pa. St. 208. See also *Mobile, etc., R. Co. v. Gilmer*, 85 Ala. 422, stated under the title *COVENANTS*, vol. 8, p. 188, note; *In re Ruthin, etc., R. Co.*, 32 Ch. D. 438.

2. Rockford, etc., R. Co. v. Beckemeier, 72 Ill. 267.

3. Right to Regulate Use of Stations. — *Landrigan v. State*, 31 Ark. 50, 25 Am. Rep. 547; *Fluker v. Georgia R., etc., Co.*, 81 Ga. 461, 12 Am. St. Rep. 328; *Lucas v. Herbert*, 148 Ind. 64; *McConnell v. Pedigo*, 92 Ky. 465, 50 Am. & Eng. R. Cas. 5; *Com. v. Power*, 7 Met. (Mass.) 596, 41 Am. Dec. 465; *Old Colony R. Co. v. Tripp*, 147 Mass. 35, 9 Am. St. Rep. 661; *Cole v. Rowen*, 88 Mich. 219; *Smith v. New York, etc., R. Co.*, 149 Pa. St. 249; *Summitt v. State*, 8 Lea (Tenn.) 413, 41 Am. Rep. 637; *Harris v. Stevens*, 31 Vt. 92, 73 Am. Dec. 337.

4. Com. v. Power, 7 Met. (Mass.) 596, 41 Am. Dec. 465.

5. Harris v. Stevens, 31 Vt. 92, 73 Am. Dec. 337.

6. Jencks v. Coleman, 2 Sumn. (U. S.) 221; *Fluker v. Georgia R., etc., Co.*, 81 Ga. 461, 12 Am. St. Rep. 328, 38 Am. & Eng. R. Cas. 379; *Johnson v. Chicago, etc., R. Co.*, 51 Iowa 25; *McConnell v. Pedigo*, 92 Ky. 465, 50 Am. & Eng. R. Cas. 5; *Com. v. Power*, 7 Met. (Mass.) 596, 41 Am. Dec. 465; *Summitt v. State*, 8 Lea

(Tenn.) 413, 41 Am. Rep. 637; *Harris v. Stevens*, 31 Vt. 92, 73 Am. Dec. 337, wherein it was held that one who desires to remain on the depot premises in order to take passage on the train must exercise the right to do so in conformity with the regulations of the company as to his conduct while there. The purchase of a ticket does not entitle a person to occupy the depot for an unreasonable time before or after the arrival of his train, and if he attempts to remain longer than a reasonable time he may be ejected.

7. Fluker v. Georgia R., etc., Co., 81 Ga. 461, 12 Am. St. Rep. 328.

8. Barker v. Midland R. Co., 18 C. B. 46, 86 E. C. L. 46; *Griswold v. Webb*, 16 R. I. 649; *Summitt v. State*, 8 Lea (Tenn.) 413, 41 Am. Rep. 637.

9. In Fluker v. Georgia R., etc., Co., 81 Ga. 461, 12 Am. St. Rep. 328, 38 Am. & Eng. R. Cas. 379, a person had for nine years exercised the privilege of entering the station and supplying the passengers with lunches, without objection by the company. The company then notified him that he could no longer enjoy the privilege, it having been leased to another. He insisted upon exercising it, however, and was ejected by the company's servant, but with no greater violence than was actually necessary. In an action by him for damages for assault, the court held that the company had a right to revoke the implied license to him and to exclude him from the station; and the expulsion having been made properly, it was not liable for assault.

10. Landrigan v. State, 31 Ark. 50, 25 Am. Rep. 547; *Com. v. Power*, 7 Met. (Mass.) 596, 41 Am. Dec. 465.

Duty to Disclose Purpose. — *Com. v. Power*, 7 Met. (Mass.) 596, 41 Am. Dec. 465.

11. Ejection from Stations. — *Landrigan v. State*, 31 Ark. 50, 25 Am. Rep. 547; *Fluker v. Georgia R., etc., Co.*, 81 Ga. 461, 12 Am. St. Rep. 328; *Com. v. Power*, 7 Met. (Mass.) 596, 41 Am. Dec. 465; *Cole v. Rowen*, 88 Mich. 219; *Summitt v.*

exclude from its station grounds persons desiring to transact business with it as a common carrier,¹ and cannot unreasonably prohibit a passenger from having his carriage, whether owned by him or hired for the purpose, enter the station grounds to leave him or take him away.² A railroad company may designate the places where hackmen and baggagemen shall stand their vehicles and discharge passengers and baggage,³ may require persons passing through its gates for the purpose of taking trains to exhibit their tickets and have them punched,⁴ may prohibit passengers from boarding trains while in motion,⁵ and may eject disorderly persons from its stations.⁶

2. Exclusive Privileges.—It has been held that even where a statute expressly requires railroad companies to give all persons equal facilities for the use of their depots, such a company, as owner of its stations and station grounds, has power to grant to individuals exclusive privileges to transact business of a particular kind with persons resorting to its stations,⁷ such as the exclusive privilege of selling lunches or soliciting orders for the sale of lunches to passengers,⁸ or entering upon the cars to solicit the carriage of baggage from passengers.⁹ It has even been held that a railroad company may grant to one person the exclusive right of coming upon its station grounds to solicit from passengers the carriage of themselves and their baggage from the station, and may exclude others from coming upon the grounds for such purposes;¹⁰ but in the majority of cases the courts have denied the right of a railroad company to grant to one hackman the exclusive privilege of entering its grounds to solicit such custom,¹¹ on the ground that the recognition of such

State, 8 Lea (Tenn.) 413, 41 Am. Rep. 637. See also *McKernan v. Manhattan R. Co.*, 54 N. Y. Super. Ct. 354; *Smith v. New York, etc., R. Co.*, 149 Pa. St. 249.

Ejecting Man from Women's Room.—*Toledo, etc., R. Co. v. Williams*, 77 Ill. 354.

Unnecessary Force must not be used. *Rose v. Louisville, etc., R. Co.*, 70 Miss. 725; *McKernan v. Manhattan R. Co.*, 54 N. Y. Super. Ct. 354. See also *Johnson v. Chicago, etc., R. Co.*, 58 Iowa 348.

1. *Old Colony R. Co. v. Tripp*, 147 Mass. 35, 9 Am. St. Rep. 661; *Summitt v. State*, 8 Lea (Tenn.) 413, 41 Am. Rep. 637; *Harris v. Stevens*, 31 Vt. 79, 73 Am. Dec. 337. See also *Hall v. Power*, 12 Met. (Mass.) 482, 46 Am. Dec. 698.

2. *Griswold v. Webb*, 16 R. I. 649. See also *Barker v. Midland R. Co.*, 18 C. B. 46, 86 E. C. L. 46.

3. **Stands for Hackmen.**—See *infra*, this section, *Exclusive Privileges*.

4. **Presentation of Tickets.**—*Watkins v. Pennsylvania R. Co.*, (D. C. 1892) 52 Am. & Eng. R. Cas. 159; *Dickerman v. St. Paul Union Depot Co.*, 44 Minn. 433. See also *Chicago, etc., R. Co. v. Boger*, 1 Ill. App. 478. *Compare* *North-east Cent. R. Co. v. O'Connor*, 76 Md. 207, 35 Am. St. Rep. 422. And see the title TICKETS AND FARES.

5. **Boarding Moving Trains.**—*Dickerman v. St. Paul Union Depot Co.*, 44 Minn. 433, 45 Am. & Eng. R. Cas. 596, holding that a rule providing that no passenger should be allowed to board any train while in motion was reasonable, and to prevent a violation the company could employ such force as might be necessary for that purpose, and therefore was not liable for an assault where its agent seized hold of a passenger and detained him to prevent him from boarding a train in motion.

6. **Disorderly Persons.**—*Johnson v. Chicago,*

etc., R. Co., 51 Iowa 25; *Beeson v. Chicago, etc., R. Co.*, 62 Iowa 173. See also *McKernan v. Manhattan R. Co.*, 54 N. Y. Super. Ct. 354.

The Mere Fact that a Woman Is a Prostitute does not authorize her expulsion if she conducts herself in an orderly and proper manner. *Beeson v. Chicago, etc., R. Co.*, 62 Iowa 173. See also *Brown v. Memphis, etc., R. Co.*, 7 Fed. Rep. 51, 1 Am. & Eng. R. Cas. 247, *affirming* 5 Fed. Rep. 499.

Spitting on Floor No Cause for Ejection.—*People v. McKay*, 46 Mich. 439, 41 Am. Rep. 169, 8 Am. & Eng. R. Cas. 205.

7. **Exclusive Privileges—Statutes Against Discrimination.**—*Beadell v. Eastern Counties R. Co.*, 2 C. B. N. S. 509, 89 E. C. L. 509; *Old Colony R. Co. v. Tripp*, 147 Mass. 35, 9 Am. St. Rep. 661. *Compare* *Marriott v. London, etc., R. Co.*, 1 C. B. N. S. 499, 87 E. C. L. 499.

8. **Sale of Lunches.**—*Fluker v. Georgia R., etc., Co.*, 81 Ga. 461, 12 Am. St. Rep. 328.

9. *Barney v. Oyster Bay, etc., Steamboat Co.*, 67 N. Y. 301, 23 Am. Rep. 115 (exclusion from boat).

10. **Hackmen.**—*Painter v. London, etc., R. Co.*, 2 C. B. N. S. 702, 89 E. C. L. 702; *Beadell v. Eastern Counties R. Co.*, 2 C. B. N. S. 509, 89 E. C. L. 509; *Old Colony R. Co. v. Tripp*, 147 Mass. 35, 9 Am. St. Rep. 661. See also *Jencks v. Coleman*, 2 Sumn. (U. S.) 221. *Compare* *Marriott v. London, etc., R. Co.*, 1 C. B. N. S. 499, 87 E. C. L. 499.

11. *McConnell v. Pedigo*, 92 Ky. 465, 50 Am. & Eng. R. Cas. 5; *Kalamazoo Hack, etc., Co. v. Sootsma*, 84 Mich. 194, 22 Am. St. Rep. 693; *State v. Reed*, 76 Miss. 211, 71 Am. St. Rep. 528; *Cravens v. Rodgers*, 101 Mo. 247; *Montana Union R. Co. v. Langlois*, 9 Mont. 419, 18 Am. St. Rep. 745.

Wharves Used as Stations—Exclusive Landing Privilege.—*In Indian River Steamboat Co. v. East Coast Transp. Co.*, 28 Fla. 387, 29 Am. St.

a right would be detrimental to the public service,¹ the existence of a statute requiring all railroad companies to grant equal facilities for the transportation of passengers and freight to all persons being also considered.² Though a company has no power to grant an exclusive privilege to one hack or omnibus line to occupy the depot grounds with its vehicles and solicit the patronage of incoming passengers, it has power to designate the place abutting on the platform where the owners of competing lines shall stand their respective vehicles while awaiting the arrival and departure of trains, and where they shall receive and discharge passengers and baggage.³

VI. ACQUISITION OF LAND FOR STATION PURPOSES.—Railroad companies may acquire land for necessary stations under the power of eminent domain⁴ or by voluntary grant, the principles of law in this matter being the same as those relating to the acquisition of land for other necessary purposes, such as right of way, etc.⁵ Such companies may use for necessary station and depot facilities land acquired for a right of way.⁶ The legislature or the federal Congress may, in the absence of constitutional restrictions, donate land to railroad companies for station purposes,⁷ but it cannot authorize a railroad company to erect station buildings in streets without consent of the abutting owners and without compensation for the injuries they may thereby sustain.⁸

VII. INJURIES TO PERSONS AT STATIONS—1. **Liability in General.**—The question of liability of railroad companies for injuries to persons at their stations is a relative one, depending upon the relation between the person injured and the company and the corresponding obligation on the part of the company to protect the person from exposure to danger. It is the general duty of railroad companies to use a reasonable degree of care to keep in a safe and convenient condition, for the protection of all persons who are lawfully upon the premises for the transaction of business, their station platforms,⁹

Rep. 258, it was held that a railroad company owning a wharf at its station grounds had no right to lease the wharf to a steamboat company and prohibit rival steamboat companies from landing intended passengers for the railroad on the wharf. See also *Oregon Short Line, etc., R. Co. v. Ilwaco R., etc., Co.*, 51 Fed. Rep. 611.

1. *McConnell v. Pedigo*, 92 Ky. 465, 50 Am. & Eng. R. Cas. 5; *State v. Reed*, 76 Miss. 211, 71 Am. St. Rep. 528.

2. *Kalamazoo Hack, etc., Co. v. Sootsma*, 84 Mich. 194, 22 Am. St. Rep. 693.

3. **Regulating Stands.**—*Lucas v. Herbert*, 148 Ind. 64; *Cole v. Rowen*, 88 Mich. 219, *distinguishing* *Kalamazoo Hack, etc., Co. v. Sootsma*, 84 Mich. 194, 22 Am. St. Rep. 693; *Smith v. New York, etc., R. Co.*, 149 Pa. St. 249.

Giving Unequal Facilities to Hackmen.—*Cravens v. Rodgers*, 101 Mo. 247, 42 Am. & Eng. R. Cas. 656.

4. **Eminent Domain.**—See the title **EMINENT DOMAIN**, vol. 10, pp. 1074, 1075, and see *Lawrence v. Morgan's Louisiana, etc., R., etc., Co.*, 39 La. Ann. 427, 4 Am. St. Rep. 265, 30 Am. & Eng. R. Cas. 309.

5. See the titles **CORPORATIONS (PRIVATE)**, vol. 7, pp. 716, 717; **RAILROADS**, vol. 23, p. 695 *et seq.*

6. **Right to Use for Stations.**—*Elyton Land Co. v. South, etc., Alabama R. Co.*, 95 Ala. 631.

7. **Government Grants—Use of Streets for Stations.**—*State v. Railroad Com'rs*, 56 Conn. 308, 36 Am. & Eng. R. Cas. 510; *Jager v. Dey*, 80 Iowa 23; *Weinckie v. New York Cent., etc., R. Co.*, 61 Hun (N. Y.) 619, *affirmed* 133 N. Y. 656, 15 N. Y. Supp. 689 (granting part of street for station); *Bussian v. Milwaukee, etc., R. Co.*,

56 Wis. 325. See also the title **STATE AND PUBLIC LANDS**, *ante*.

Laws N. Y. 1869, c. 919, authorized the New York & Harlem Railroad Company, in constructing its new depot in the city of New York, to use portions of Fourth avenue and Forty-second street, and Laws 1884, c. 261, authorized the company to enlarge its passenger depot by extending it over an additional portion of Fourth avenue. It was held that any portion of the avenue which the company did not occupy remained a part of Fourth avenue, as it was before the new depot was built, and the company had no right to interfere with one using it in a lawful manner for transferring baggage. *New York, etc., R. Co. v. Jackson*, (Supm. Ct. Gen. T.) 15 N. Y. St. Rep. 167, *affirmed* 120 N. Y. 664.

Federal Land Grant in Cherokee Nation.—*Bell v. Atlantic, etc., R. Co.*, (C. C. A.) 63 Fed. Rep. 417.

8. *Barney v. Keokuk*, 4 Dill. (U. S.) 593.

9. **Platforms—United States.**—*Pennsylvania R. Co. v. Green*, 140 U. S. 49.

Alabama.—*Ensley R. Co. v. Chewning*, 93 Ala. 24; *East Tennessee, etc., R. Co. v. Watson*, 94 Ala. 634, 92 Ala. 320.

Indiana.—*Pennsylvania Co. v. Marion*, 104 Ind. 239, 123 Ind. 415, 18 Am. St. Rep. 330; *Louisville, etc., R. Co. v. Lucas*, 119 Ind. 583; *Toledo, etc., R. Co. v. Wingate*, 143 Ind. 125.

Louisiana.—*Turner v. Vicksburg, etc., R. Co.*, 37 La. Ann. 648, 55 Am. Rep. 514; *Moses v. Louisville, etc., R. Co.*, 39 La. Ann. 649, 4 Am. St. Rep. 231.

Massachusetts.—*Keefe v. Boston, etc., R.*

the approaches thereto and exits therefrom,¹ and such ways as the railroad company holds out to the public as proper approaches to its station platforms,² irrespective of the question whether the approaches are over their own premises or over premises in their possession and used in connection therewith;³ and the fact that one safe means of approach or exit is furnished does not relieve the company from liability for injuries arising from its negligence in maintaining a second approach or exit.⁴ So the fact that a safe means of egress is provided for passengers does not fulfil the entire duty of the railway company, but it must properly indicate to its patrons the way intended for their use, and if, in the absence of such indications, a patron, in ignorance of the proper exit, uses an improper way and is injured, the company may be liable.⁵ Of course, railroad companies are not required to render safe premises or ways, such as public ways, over which they have no control, though such ways are used in approaching their stations, and it has been held that where a passenger sues for an injury by reason of a defective walk near a station, he has the burden of proof to show that the walk where he received the injury was constructed by the company, and was in its possession and control as an approach to the station.⁶ A railroad company is under obligation to keep in a safe condition all portions of its station grounds where patrons might naturally resort;⁷ but this obligation does not extend to the portion of its station ground intended solely for the use of its employees, and to which the public is not expected to resort; the company is not liable for

Co., 142 Mass. 251; *Bethmann v. Old Colony R. Co.*, 155 Mass. 352.

Missouri. — *Stafford v. Hannibal, etc., R. Co.*, 22 Mo. App. 333.

New York. — *Clussman v. Long Island R. Co.*, 9 Hun (N. Y.) 618; *Dillaye v. New York Cent. R. Co.*, 56 Barb. (N. Y.) 35; *Hulbert v. New York Cent. R. Co.*, 40 N. Y. 145.

Tennessee. — *East Tennessee, etc., R. Co. v. Conner*, 15 Lea (Tenn.) 254.

Texas. — *Missouri Pac. R. Co. v. Wortham*, 73 Tex. 25.

Virginia. — *Alexandria, etc., R. Co. v. Herndon*, 87 Va. 193.

Eating-house Station. — *Watson v. Oxanna Land Co.*, 92 Ala. 320, 94 Ala. 634.

The duty imposed upon the company towards a passenger on a continuous journey, in going to and returning from the eating stations provided by the company for the accommodation of passengers, is the same as that due to ordinary passengers at the stations of their destination. *Atchison, etc., R. Co. v. Shean*, 18 Colo. 368, 58 Am. & Eng. R. Cas. 360.

1. **Approaches and Exits** — *England*. — *Girdwood v. North British R. Co.*, 3 R. & Can. T. Cas. xviii.; *Longmore v. Great Western R. Co.*, 19 C. B. N. S. 183, 115 E. C. L. 183; *Nicholson v. Lancashire, etc., R. Co.*, 3 H. & C. 534.

United States. — *Bennett v. Louisville, etc., R. Co.*, 102 U. S. 577.

Arkansas. — *Texas, etc., R. Co. v. Orr*, 46 Ark. 183; *Little Rock, etc., R. Co. v. Cavenesse*, 48 Ark. 106.

Delaware. — *Wallace v. Wilmington, etc., R. Co.*, 8 Houst. (Del.) 529.

Georgia. — *Montgomery, etc., R. Co. v. Borning*, 51 Ga. 582; *Central R. Co. v. Thompson*, 76 Ga. 770.

Maine. — *Knight v. Portland, etc., R. Co.*, 56 Me. 234, 96 Am. Dec. 449; *Quimby v. Boston, etc., R. Co.*, 69 Me. 340.

Michigan. — *Grand Rapids, etc., R. Co. v.*

Martin, 41 Mich. 667; *Cross v. Lake Shore, etc., R. Co.*, 69 Mich. 363, 13 Am. St. Rep. 399; *Collins v. Toledo, etc., R. Co.*, 80 Mich. 390.

Minnesota. — *Christie v. Chicago, etc., R. Co.*, 61 Minn. 161.

Missouri. — *Moore v. Wabash, etc., R. Co.*, 84 Mo. 481.

New Jersey. — *Delaware, etc., R. Co. v. Trautwein*, 52 N. J. L. 169, 19 Am. St. Rep. 442.

New York. — *Wolf v. Brooklyn Ferry Co.*, 54 N. Y. App. Div. 67; *Hoffman v. New York Cent., etc., R. Co.*, 75 N. Y. 605.

Oregon. — *Skottowe v. Oregon Short Line, etc., R. Co.*, 22 Oregon 430.

Pennsylvania. — *Gilmore v. Philadelphia, etc., R. Co.*, 154 Pa. St. 375.

Texas. — *Texas, etc., R. Co. v. Brown*, 78 Tex. 397; *Texas, etc., R. Co. v. McKengie*, 2 Tex. Unrep. Cas. 307.

2. *Cross v. Lake Shore, etc., R. Co.*, 69 Mich. 363, 13 Am. St. Rep. 399; *Louisville, etc., R. Co. v. Hirsch*, 69 Miss. 126; *Delaware, etc., R. Co. v. Trautwein*, 52 N. J. L. 169, 19 Am. St. Rep. 442; *Beard v. Connecticut, etc., Rivers R. Co.*, 48 Vt. 101.

3. *Quimby v. Boston, etc., R. Co.*, 69 Me. 340; *Skottowe v. Oregon Short Line, etc., R. Co.*, 22 Oregon 430. See also *Tobin v. Portland, etc., R. Co.*, 59 Me. 183, 8 Am. Rep. 415.

4. *Longmore v. Great Western R. Co.*, 19 C. B. N. S. 183, 115 E. C. L. 183.

5. *Texas, etc., R. Co. v. Brown*, 78 Tex. 397.

6. **Public Ways.** — *Quimby v. Boston, etc., R. Co.*, 69 Me. 340.

7. **Station Grounds.** — *Pearce v. Humphreys*, 34 Fed. Rep. 282; *Illinois Cent. R. Co. v. Foley*, (C. C. A.) 53 Fed. Rep. 459; *Louisville, etc., R. Co. v. Lucas*, 119 Ind. 583; *Lucas v. Pennsylvania Co.*, 120 Ind. 205, 16 Am. St. Rep. 323; *Keefe v. Boston, etc., R. Co.*, 142 Mass. 251; *Stewart v. International, etc., R. Co.*, 53 Tex. 289, 37 Am. Rep. 753.

injury to persons who resort there for their own convenience or pleasure.¹ Still the company cannot claim any exemption from its duty to protect its patrons at stations because the injured person passed over ground not intended for passengers where he did so by reason of the failure of the company to indicate properly the means of exit from its station.²

Condition of Premises. — While as regards the condition in which railroad companies should keep their platforms, approaches, etc., the courts have used various expressions, such as "safe,"³ "safe and convenient,"⁴ "safe and proper,"⁵ "safe, convenient, and proper,"⁶ "reasonably safe,"⁷ "reasonable facilities,"⁸ etc., the proper rule would seem to be that such companies are required only to have the platforms, etc., in a reasonably safe condition, and are not required to have them absolutely safe.⁹

Degree of Care. — Though in some cases it is said as a broad general rule that railroad companies are bound to keep their station platforms, approaches, etc., in a safe condition for their patrons,¹⁰ and to perform such duty they are required to use that high degree of care which a very prudent person would have used under the same circumstances,¹¹ or extraordinary care,¹² they should, it seems, be held only to the same reasonable degree of care for the safety and protection of their patrons, having regard to the nature of their business, as is demanded of other individuals upon whose premises others come by invitation or inducement for the transaction of business.¹³ The rigor of the rule which

1. *Montgomery, etc., R. Co. v. Thompson*, 77 Ala. 448, 54 Am. Rep. 72; *Heiss v. Chicago, etc., R. Co.*, 103 Iowa 590; *Frost v. Grand Trunk R. Co.*, 10 Allen (Mass.) 387, 87 Am. Dec. 668; *De Blois v. Great Northern R. Co.*, 71 Minn. 45; *Dobbins v. Missouri, etc., R. Co.*, 91 Tex. 60, 66 Am. St. Rep. 856.

2. *Wallace v. Wilmington, etc., R. Co.*, 8 Houst. (Del.) 529.

3. **Condition of Premises** — *United States*. — *Green v. Pennsylvania R. Co.*, 36 Fed. Rep. 66. *Arkansas*. — *St. Louis, etc., R. Co. v. Cantrell*, 37 Ark. 519, 40 Am. Rep. 105; *Texas, etc., R. Co. v. Orr*, 46 Ark. 182.

Indiana. — *Pennsylvania Co. v. Marion*, 123 Ind. 415, 18 Am. St. Rep. 330.

Iowa. — *McDonald v. Chicago, etc., R. Co.*, 26 Iowa 124, 96 Am. Dec. 114.

Louisiana. — *Moses v. Louisville, etc., R. Co.*, 39 La. Ann. 649, 4 Am. St. Rep. 231.

Michigan. — *Collins v. Toledo, etc., R. Co.*, 80 Mich. 390.

New Jersey. — *Delaware, etc., R. Co. v. Trautwein*, 52 N. J. L. 169, 19 Am. St. Rep. 442.

New York. — *Liscomb v. New Jersey R., etc., Co.*, 6 Lans. (N. Y.) 75; *Hulbert v. New York Cent. R. Co.*, 40 N. Y. 145; *Dillaye v. New York Cent. R. Co.*, 56 Barb. (N. Y.) 30.

Texas. — *Stewart v. International, etc., R. Co.*, 53 Tex. 289, 37 Am. Rep. 753; *Texas, etc., R. Co. v. Brown*, 78 Tex. 397.

Virginia. — *Reed v. Axtell*, 84 Va. 238; *Alexandria, etc., R. Co. v. Herndon*, 87 Va. 193.

"It is their duty to keep their stations and the approaches thereto in such condition that those who have occasion to use these premises for the purposes for which they are designated may do so with safety." *Little Rock, etc., R. Co. v. Cavenesse*, 48 Ark. 106. See also *Murch v. Concord R. Corp.*, 29 N. H. 9, 61 Am. Dec. 631.

4. *Quimby v. Boston, etc., R. Co.*, 60 Me. 340; *Hoffman v. New York Cent., etc., R. Co.*, 75 N. Y. 605.

5. *Peniston v. Chicago, etc., R. Co.*, 34 La. Ann. 780, 44 Am. Rep. 444.

6. *Patten v. Chicago, etc., R. Co.*, 32 Wis. 524.

7. *Cross v. Lake Shore, etc., R. Co.*, 69 Mich. 363, 13 Am. St. Rep. 399; *Moore v. Wabash, etc., R. Co.*, 84 Mo. 481. See also *Phillips v. Rensselaer, etc., R. Co.*, 57 Barb. (N. Y.) 644. 8. *Sturgis v. Detroit, etc., R. Co.*, 72 Mich. 619.

9. *Toomey v. London, etc., R. Co.*, 3 C. B. N. S. 146, 91 E. C. L. 146; *Welfare v. London, etc., R. Co.*, L. R. 4 Q. B. 693; *Smith v. Great Eastern R. Co.*, L. R. 2 C. P. 4; *Wabash, etc., R. Co. v. Locke*, 112 Ind. 404, 2 Am. St. Rep. 193; *Stokes v. Suffolk, etc., R. Co.*, 107 N. Car. 178; *Gulf, etc., R. Co. v. Gross*, (Tex. Civ. App. 1893) 21 S. W. Rep. 186; *Gulf, etc., R. Co. v. Butcher*, 83 Tex. 309.

Extraordinary Storms. — A railroad company is not liable for injuries occasioned by its station buildings or structures being blown down by storms where it has used the care and skill, in their structure and maintenance, which men of ordinary prudence and skill usually employ; and it is error, in such case, to charge the jury that the company was "bound to provide against storms which could reasonably have been anticipated." *Pittsburgh, etc., R. Co. v. Brigham*, 29 Ohio St. 374.

10. **Degree of Care.** — *Green v. Pennsylvania R. Co.*, 36 Fed. Rep. 66; *McDonald v. Chicago, etc., R. Co.*, 26 Iowa 124, 96 Am. Dec. 114; *White v. Cincinnati, etc., R. Co.*, 89 Ky. 478; *Union Pac. R. Co. v. Sue*, 25 Neb. 772.

11. *Grand Rapids, etc., R. Co. v. Martin*, 41 Mich. 667; *Gulf, etc., R. Co. v. Butcher*, 83 Tex. 309. *Compare Falls v. San Francisco, etc., R. Co.*, 97 Cal. 114.

12. *Johns v. Charlotte, etc., R. Co.*, 39 S. Car. 162, 39 Am. St. Rep. 709.

13. *Falls v. San Francisco, etc., R. Co.*, 97 Cal. 114; *Pennsylvania Co. v. Marion*, 104 Ind. 239.

requires a railroad company, out of considerations of public policy, to exercise the highest possible diligence for the benefit of a passenger while in the actual progress of his journey, and holds the company responsible for the slightest defect in its machinery, track, and appliances,¹ is measurably relaxed with respect to station platforms and approaches.²

Questions of Fact. — The question whether a railroad company has used the required degree of care in providing safe platforms, approaches, etc., is usually one of fact for the determination of the jury,³ and whether the necessary care has been exercised depends upon the circumstances of the case, such as the nature of the railroad, the character of the traffic, and the place where the accident occurred.⁴

2. To Whom Duty Is Due. — The duty of a railroad company with regard to the safety of persons at its stations, approaches, etc., is due not only to persons resorting to the station for the purpose of taking passage on its trains and to passengers alighting at the stations,⁵ but also to all persons who resort to the station for the transaction of legitimate business with the railroad company, such as persons on the station grounds for freight business,⁶ a stock

The measure of care due from a railroad company to its passengers whom it invites to use a sidewalk which it has laid between its station and the street is the same as that required of a municipal corporation with respect to the public sidewalks which it is required by law to maintain. *Bateman v. New York Cent., etc., R. Co.*, 47 Hun (N. Y.) 429.

1. See the title **CARRIERS OF PASSENGERS**, vol. 5, p. 520 *et seq.*

2. Relaxation of Rule as to Carriers of Passengers in Transit — *Alabama.* — *Batton v. South, etc., Alabama R. Co.*, 77 Ala. 591, 54 Am. Rep. 80.

California. — *Falls v. San Francisco, etc., R. Co.*, 97 Cal. 114.

Indiana. — *Pennsylvania Co. v. Marion*, 104 Ind. 239.

Massachusetts. — *Moreland v. Boston, etc., R. Corp.*, 141 Mass. 31.

Ohio. — *Pittsburgh, etc., R. Co. v. Brigham*, 29 Ohio St. 374.

Oregon. — *Skottowe v. Oregon Short Line, etc., R. Co.*, 22 Oregon 430.

See also the title **CARRIERS OF PASSENGERS**, vol. 5, p. 532, and see *Cornman v. Eastern Counties R. Co.*, 4 H. & N. 781; *Christie v. Chicago, etc., R. Co.*, 61 Minn. 161; *Stafford v. Hannibal, etc., R. Co.*, 22 Mo. App. 333; *Renneker v. South Carolina R. Co.*, 20 S. Car. 219. See, however, *Johns v. Charlotte, etc., R. Co.*, 39 S. Car. 162, 39 Am. St. Rep. 709.

After a passenger leaves the train, and is still on the company's grounds, the company is bound only to exercise ordinary care to prevent an injury. So where a passenger was injured by stepping on shingles on the station grounds, it was held to be error so to charge the jury as to imply that the company was bound to take every possible precaution against injury to the plaintiff, and was liable if human foresight could have prevented the injury. *Moreland v. Boston, etc., R. Corp.*, 141 Mass. 31.

3. Questions of Fact — *England.* — *Nicholson v. Lancashire, etc., R. Co.*, 3 H. & C. 534; *Longmore v. Great Western R. Co.*, 19 C. B. N. S. 183, 115 E. C. L. 183; *Toomey v. London, etc., R. Co.*, 3 C. B. N. S. 146, 91 E. C. L. 146; *Pickard v. Smith*, 10 C. B. N. S. 470, 100 E. C. L. 470.

United States. — *Illinois Cent. R. Co. v. Foley*, (C. C. A.) 53 Fed. Rep. 459.

Delaware. — *Wallace v. Wilmington, etc., R. Co.*, 8 Houst. (Del.) 529.

Iowa. — *Watson v. Wabash, etc., R. Co.*, 66 Iowa 164.

Kansas. — *Missouri Pac. R. Co. v. Neiswanger*, 41 Kan. 621, 13 Am. St. Rep. 304, 39 Am. & Eng. R. Cas. 471.

Louisiana. — *Burbank v. Illinois Cent. R. Co.*, 42 La. Ann. 1156, 45 Am. & Eng. R. Cas. 593.

Massachusetts. — *Bethmann v. Old Colony R. Co.*, 155 Mass. 352.

Minnesota. — *Christie v. Chicago, etc., R. Co.*, 61 Minn. 161.

Missouri. — *Stafford v. Hannibal, etc., R. Co.*, 22 Mo. App. 333.

North Carolina. — *Stokes v. Suffolk, etc., R. Co.*, 107 N. Car. 178.

Texas. — *Gulf, etc., R. Co. v. Fox*, (Tex. 1887) 6 S. W. Rep. 569, 33 Am. & Eng. R. Cas. 543.

4. *Falls v. San Francisco, etc., R. Co.*, 97 Cal. 114; *Wallace v. Wilmington, etc., R. Co.*, 8 Houst. (Del.) 529; *Alabama, etc., R. Co. v. Stacy*, 68 Miss. 463.

5. Alighting and Departing Passengers. — See the cases cited *supra*, this section, *Liability in General*.

Platform Leading to Telegraph Office. — *Clusman v. Long Island R. Co.*, 9 Hun (N. Y.) 618.

Evidence to Show Intended Passage — Declarations. — *Lake Shore, etc., R. Co. v. Herrick*, 49 Ohio St. 25, 50 Am. & Eng. R. Cas. 25.

6. Persons on Freight Business — *England.* — *Holmes v. North Eastern R. Co.*, L. R. 6 Exch. 123, affirming L. R. 4 Exch. 254; *Wright v. London, etc., R. Co.*, 1 Q. B. D. 252.

Illinois. — *Toledo, etc., R. Co. v. Grush*, 67 Ill. 262, 16 Am. Rep. 618.

Indiana. — *Wabash, etc., R. Co. v. Locke*, 112 Ind. 404, 2 Am. St. Rep. 193; *Pittsburgh, etc., R. Co. v. Ives*, 12 Ind. App. 602.

Iowa. — *Watson v. Wabash, etc., R. Co.*, 66 Iowa 164.

Kentucky. — *Louisville, etc., R. Co. v. Wolfe*, 80 Ky. 82; *Williams v. Louisville, etc., R. Co.*, 98 Ky. 247.

Maine. — *Ward v. Maine Cent. R. Co.*, 96 Me. 136.

owner or his agent who goes upon the platform to examine the posted list of stock killed by trains, which a statute requires the railway company to post there,¹ a person resorting to a station to mail a letter at the mail car,² a police officer who usually visits the station at the time of the arrival of trains,³ a hackman carrying passengers to the station and aiding them to alight upon the platform,⁴ and persons who accompany departing friends to the station to aid them in procuring tickets, in checking baggage, in getting on the train, and to perform kindred services, or who attend friends arriving at the station.⁵ The general rule that the owner or occupant of land is under no obligation to keep his premises in a suitable condition for those who come there for their own convenience or pleasure, and who are not expressly or impliedly invited by the owner or occupant to come thereon,⁶ applies equally to railroad companies with regard to their stations, and it is held that such companies are under no obligation to render their stations, etc., safe for persons who resort there merely for their own pleasure or convenience, and not for the transaction of business with the company.⁷ Their only obligation to such persons is to

Minnesota.—Foss v. Chicago, etc., R. Co., 33 Minn. 392.

Missouri.—Moore v. Wabash, etc., R. Co., 84 Mo. 481.

New York.—Barton v. New York Cent., etc., R. Co., 1 Thomp. & C. (N. Y.) 297.

Texas.—International, etc., R. Co. v. Neira, (Tex. Civ. App. 1894) 28 S. W. Rep. 95.

Compare McCabe v. Chicago, etc., R. Co., 88 Wis. 531.

Person on Platform for Business with Express Company.—Smith v. Texas, etc., R. Co., 2 Tex. Unrep. Cas. 329.

1. List of Stock Killed.—St. Louis, etc., R. Co. v. Fairbairn, 48 Ark. 491.

2. Mailing Letter.—Hale v. Grand Trunk R. Co., 60 Vt. 605.

3. Police Officer.—Ingalls v. Adams Express Co., 44 Minn. 128.

4. Hackman.—Tobin v. Portland, etc., R. Co., 59 Me. 183, 8 Am. Rep. 415, holding that a "hackman conveying passengers to a railroad depot for transportation and aiding them to alight upon the platform of the corporation is as rightfully upon the same as the passengers alighting. It would be absurd to protect the one from the consequences of corporate negligence and not the other." See also Griswold v. Webb, 16 R. I. 649; Hamilton v. Texas, etc., R. Co., 64 Tex. 251, 53 Am. Rep. 756.

5. Friends of Passengers.—Watkins v. Great Western R. Co., 46 L. J. C. Pl. 817; Sullivan v. Vicksburg, etc., R. Co., 39 La. Ann. 800, 4 Am. St. Rep. 239; McKone v. Michigan Cent. R. Co., 51 Mich. 601, 47 Am. Rep. 596.

See also Illinois Cent. R. Co. v. Wall, 53 Ill. App. 588; Burbank v. Illinois Cent. R. Co., 42 La. Ann. 1156; Gillis v. Pennsylvania R. Co., 59 Pa. St. 129, 98 Am. Dec. 317. And see the title CARRIERS OF PASSENGERS, vol. 5, pp. 518, 519.

Person Aiding Friend to Carry Trunk.—Langan v. St. Louis, etc., R. Co., 72 Mo. 392.

Husband Assisting Wife to Take Train.—Nichols v. Chesapeake, etc., R. Co., (Ky. 1886) 2 S. W. Rep. 181.

6. See the title NEGLIGENCE, vol. 21, p. 471 *et seq.*

7. Persons Without Business at Station.—Alabama. — Montgomery, etc., R. Co. v. Thompson, 77 Ala. 448, 54 Am. Rep. 72.

Arkansas.—St. Louis, etc., R. Co. v. Fairbairn, 48 Ark. 491, 30 Am. & Eng. R. Cas. 166.

Indiana.—Lary v. Cleveland, etc., R. Co., 78 Ind. 323, 41 Am. Rep. 572, 3 Am. & Eng. R. Cas. 498.

Louisiana.—Burbank v. Illinois Cent. R. Co., 42 La. Ann. 1156.

Massachusetts.—Barstow v. Old Colony R. Co., 143 Mass. 535; Heinlein v. Boston, etc., R. Co., 147 Mass. 136, 9 Am. St. Rep. 676; Redigan v. Boston, etc., R. Co., 155 Mass. 44, 31 Am. St. Rep. 520.

Mississippi.—Dyche v. Vicksburg, etc., R. Co., 79 Miss. 361.

Missouri.—Williams v. Kansas City, etc., R. Co., 96 Mo. 275, 37 Am. & Eng. R. Cas. 329.

Ohio.—Pittsburgh, etc., R. Co. v. Bingham, 29 Ohio St. 364, 23 Am. Rep. 751; Cincinnati, etc., R. Co. v. Aller, 64 Ohio St. 183.

Pennsylvania.—Gillis v. Pennsylvania R. Co., 59 Pa. St. 129, 98 Am. Dec. 317; Baltimore, etc., R. Co. v. Schwindling, 101 Pa. St. 261, 47 Am. Rep. 706.

Texas.—Dobbins v. Missouri, etc., R. Co., 91 Tex. 60, 66 Am. St. Rep. 856. See also Bradley v. San Antonio, etc., R. Co., 80 Tex. 84.

Virginia.—Norfolk, etc., R. Co. v. Wood, 99 Va. 156, 3 Va. Sup. Ct. Rep. 96.

See also Clark v. Howard, (C. C. A.) 88 Fed. Rep. 199. *Compare* New Orleans, etc., R. Co. v. Hanning, 15 Wall. (U. S.) 659; Ohio, etc., R. Co. v. Simms, 43 Ill. App. 260 (person going on platform to purchase paper from train newsboy); Illinois Cent. R. Co. v. Hammer, 72 Ill. 347.

Person Taking Package to Passenger.—In Clark v. Howard, (C. C. A.) 88 Fed. Rep. 199. it was held that to a person who goes to a station, not as a passenger intending to board a train nor for the purpose of transacting any business with the railroad company, but solely for the purpose of delivering a package to a departing passenger, the company owes no higher duty with respect to keeping its platform in order than a municipality owes to its citizens, and therefore the company was not liable for injuries to such person caused by his falling on ice on the platform.

Foot Traveler Taking Short Cut.—Redigan v. Boston, etc., R. Co., 155 Mass. 44, 31 Am. St. Rep. 520.

avoid injury to them through wilful or wanton acts.¹ But even to such persons, the railroad company will be liable for injuries caused by the gross negligence of its servants,² and in the operation of trains at stations, the servants of the railroad company, knowing the enhanced danger of persons constantly passing and repassing, are required to exercise as to all persons a greater degree of caution and prudence for the preservation of life and limb than at other places where persons could not be expected to resort.³ Of course a railroad company cannot, without liability therefor, maintain a dangerous excavation on its depot grounds so near to a public highway that a person traveling along the highway may without negligence stray or be driven over the highway line into such excavation.⁴

3. Particular Instances — *a. LIGHTING STATIONS.* — The rule has frequently been announced that it is the duty of a railroad company properly to light its stations, approaches, etc., before and after the departure of trains, when reasonably necessary for the safety of its patrons,⁵ and where the company fails in such duty, its patrons are not guilty of contributory negligence in attempting to use an improperly lighted station, as they are authorized in relying on the implied representation of the company that the station may be safely used without other lights.⁶

Mere Sightseers Who Resort to a Railway Platform to See a Distinguished Person Pass cannot recover for injuries caused by the breaking down of the platform under their weight. *Gillis v. Pennsylvania R. Co.*, 59 Pa. St. 129, 98 Am. Dec. 317.

Persons Taking Refuge from Storm in Freight Building. — *Lary v. Cleveland, etc., R. Co.*, 78 Ind. 323, 41 Am. Rep. 572.

Rule Applied to Children Loitering Around Stations. — *Chicago, etc., R. Co. v. McLaughlin*, 47 Ill. 265; *Lary v. Cleveland, etc., R. Co.*, 78 Ind. 323, 41 Am. Rep. 572; *Baltimore, etc., R. Co. v. Schwindling*, 101 Pa. St. 258, 8 Am. & Eng. R. Cas. 544; *Dobbins v. Missouri, etc., R. Co.*, 91 Tex. 62, 66 Am. St. Rep. 856. See also the title NEGLIGENCE, vol. 21, p. 473 *et seq.*

1. *Montgomery, etc., R. Co. v. Thompson*, 77 Ala. 448, 54 Am. Rep. 72; *Burbank v. Illinois Cent. R. Co.*, 42 La. Ann. 1156, 45 Am. & Eng. R. Cas. 593; *Heinlein v. Boston, etc., R. Co.*, 147 Mass. 136, 9 Am. St. Rep. 676.

2. *Ohio, etc., R. Co. v. Simms*, 43 Ill. App. 265; *Illinois Cent. R. Co. v. Wall*, 53 Ill. App. 588.

3. *Illinois Cent. R. Co. v. Hammer*, 72 Ill. 347; *Louisville, etc., R. Co. v. Hirsch*, 69 Miss. 126, 56 Am. & Eng. R. Cas. 291; *Moore v. Wabash, etc., R. Co.*, 84 Mo. 481.

4. *Early v. Lake Shore, etc., R. Co.*, 66 Mich. 349, 36 Am. & Eng. R. Cas. 163.

5. **Lighting Stations** — *England.* — *Martin v. Great Northern R. Co.*, 16 C. B. 179, 81 E. C. L. 179.

United States. — *Grimes v. Pennsylvania Co.*, 36 Fed. Rep. 72.

Alabama. — *Montgomery, etc., R. Co. v. Thompson*, 77 Ala. 448, 54 Am. Rep. 72; *Alabama G. S. R. Co. v. Arnold*, 80 Ala. 600; *Ensley R. Co. v. Chewning*, 93 Ala. 24, 50 Am. & Eng. R. Cas. 46.

Arkansas. — *St. Louis, etc., R. Co. v. White*, 48 Ark. 495, 30 Am. & Eng. R. Cas. 545; *For-dyce v. Merrill*, 49 Ark. 277.

Delaware. — *Wallace v. Wilmington, etc., R. Co.*, 8 Houst. (Del.) 529.

Georgia. — *Central R., etc., Co. v. Smith*, 80 Ga. 526, 34 Am. & Eng. R. Cas. 456.

Indiana. — *Lucas v. Pennsylvania Co.*, 120 Ind. 205, 16 Am. St. Rep. 323.

Louisiana. — *Peniston v. Chicago, etc., R. Co.*, 34 La. Ann. 777, 44 Am. Rep. 444; *Moses v. Louisville, etc., R. Co.*, 39 La. Ann. 649, 4 Am. St. Rep. 231.

Massachusetts. — *Wentworth v. Eastern R. Co.*, 143 Mass. 248.

Minnesota. — *Buenemann v. St. Paul, etc., R. Co.*, 32 Minn. 390.

Missouri. — *Sargent v. St. Louis, etc., R. Co.*, 114 Mo. 348.

New York. — *Osborn v. Union Ferry Co.*, 53 Barb. (N. Y.) 629; *Jarvis v. Brooklyn El. R. Co.*, 133 N. Y. 623; *Groll v. Prospect Park, etc., R. Co.*, 51 Hun (N. Y.) 643.

Oregon. — *Skotlowe v. Oregon Short Line, etc., R. Co.*, 22 Oregon 430.

South Carolina. — *Johns v. Charlotte, etc., R. Co.*, 39 S. Car. 162, 39 Am. St. Rep. 709.

Texas. — *Smith v. Texas, etc., R. Co.*, 2 Tex. Unrep. Cas. 329; *Texas, etc., R. Co. v. McKenzie*, 2 Tex. Unrep. Cas. 307; *Eddy v. Still*, 3 Tex. Civ. App. 346; *Texas, etc., R. Co. v. Brown*, 78 Tex. 397.

Virginia. — *Alexandria, etc., R. Co. v. Herndon*, 87 Va. 193.

And see the title CARRIERS OF PASSENGERS, vol. 5, p. 573.

Wisconsin. — *Patten v. Chicago, etc., R. Co.*, 32 Wis. 534, 36 Wis. 413.

Intermediate Station — **Eating Place.** — *Peniston v. Chicago, etc., R. Co.*, 34 La. Ann. 777, 44 Am. Rep. 444.

Side Opposite Platform. — The carrier is not required to have the side opposite the platform lighted, even though parties have been in the habit of getting on and off there as a matter of convenience to themselves. *Louisville, etc., R. Co. v. Ricketts*, 93 Ky. 116.

Rigid Enforcement of Rule. — It is the legal duty of the company to furnish at night sufficient lights securely to guide the way and the steps of the passengers. This is a rule which courts must rigidly enforce. *Moses v. Louisville, etc., R. Co.*, 39 La. Ann. 649, 4 Am. St. Rep. 231.

6. Contributory Negligence. — *Alabama G. S.*

b. ICE AND OBSTRUCTIONS ON PLATFORMS, ETC. — The railroad company should keep its platforms and approaches free from ice and snow¹ and other obstructions over which its patrons are liable to stumble,² and in many instances recovery has been allowed for injuries sustained because of the company's failure to perform this duty. This rule does not, of course, absolutely prohibit a railroad company from having on its platform necessary machinery of appliances for the transaction of its business, provided reasonable care is used for the protection of its patrons, and if, without negligence on the part of the company, persons are injured, the company cannot be held liable therefor.³

c. HOLES, EXCAVATIONS, AND PITFALLS IN PLATFORMS AND APPROACHES. — It is the duty of railroad companies to use reasonable care to prevent the existence of holes, excavations, and pitfalls in the platforms of and approaches to stations or in the vicinity thereof, and the liability of a company for injuries to its patrons from falling or stepping into holes in its platform⁴ or approaches,⁵ or into excavations in close proximity to its approaches, so that a person by making a false step or by stumbling might fall therein,⁶ has frequently been sustained. It has been held, however, that it is not, as a matter of law, negligence on the part of a railroad company, rendering it liable to its patrons for injuries, to permit a hole to remain in a railroad station platform,⁷ but it should be left to the jury to determine whether the hole in question was or was not dangerous, regard being had to the uses to which the platform was put. To prove negligence on the part of the railroad company in failing to repair a hole in its station platform, a declaration of its station agent that the hole should have been fixed is inadmissible;⁸ but it has been held that the opinion of a civil engineer on the question whether an excavation in proximity to an approach to a station was dangerous was admissible.⁹

d. STAIRWAYS. — The maintenance of stairways without handrails,¹⁰ or the

R. Co. v. Arnold, 80 Ala. 600. See generally *infra*, this section, *Contributory Negligence*.

1. Ice and Snow. — *Shepherd v. Midland R. Co.*, 20 W. R. 705, 25 L. T. N. S. 879; *Osborne v. London, etc., R. Co.*, 21 Q. B. D. 220; *Seymour v. Chicago, etc., R. Co.*, 3 Biss. (U. S.) 43; *Weston v. New York El. R. Co.*, 73 N. Y. 595; *Timpson v. Manhattan R. Co.*, 52 Hun (N. Y.) 489.

2. Obstructions. — *Sargent v. St. Louis, etc., R. Co.*, 114 Mo. 348.

Where a passenger is injured by falling over obstructions in a passageway leading from a station, the company is not released from liability by the fact that there was another passageway leading from the station which the plaintiff might have taken. *Delaware, etc., R. Co. v. Trautwein*, 52 N. J. L. 169, 19 Am. St. Rep. 442.

Mail Bag Thrown from Train by Postal Clerk and Left on Platform. — *Sargent v. St. Louis, etc., R. Co.*, 114 Mo. 348. See also *Old Colony R. Co. v. Slavens*, 148 Mass. 363, 12 Am. St. Rep. 558.

3. *Blackman v. London, etc., R. Co.*, 17 W. R. 769; *Cornman v. Eastern Counties R. Co.*, 4 H. & N. 781; *Potter v. Wilmington, etc., R. Co.*, 92 N. Car. 541.

Freight Piled on Platform. — *Falls v. San Francisco, etc., R. Co.*, 97 Cal. 114.

4. Holes in Platforms. — *Toledo, etc., R. Co. v. Grush*, 67 Ill. 262, 16 Am. Rep. 618; *Louisville, etc., R. Co. v. Lucas*, 119 Ind. 533; *Ohio, etc., R. Co. v. Stansberry*, 132 Ind. 583; *Louisville, etc., R. Co. v. Wolfe*, 80 Ky. 82; *Knight v. Portland, etc., R. Co.*, 56 Me. 234, 96 Am. Dec.

449; *Liscomb v. New Jersey R., etc., Co.*, 6 Lans. (N. Y.) 75; *Boyce v. Manhattan R. Co.*, 118 N. Y. 314; *Ft. Worth, etc., R. Co. v. Nesmith*, (Tex. Civ. App. 1897) 40 S. W. Rep. 1071.

5. Approaches. — *Watson v. Oxanna Land Co.*, 92 Ala. 320, 94 Ala. 634; *Gilmore v. Philadelphia, etc., R. Co.*, 154 Pa. St. 375, 56 Am. & Eng. R. Cas. 279.

Hole Left Unguarded by Contractor. — *Gilmore v. Philadelphia, etc., R. Co.*, 154 Pa. St. 375.

Open Hatchway. — *Bennett v. Louisville, etc., R. Co.*, 102 U. S. 577.

Cattle Guards. — *Winkler v. St. Louis, etc., R. Co.*, 21 Mo. App. 99; *Hoffman v. New York Cent., etc., R. Co.*, 75 N. Y. 605, *affirming* 13 Hun (N. Y.) 589; *Hulbert v. New York Cent. R. Co.*, 40 N. Y. 145; *Hartwig v. Chicago, etc., R. Co.*, 49 Wis. 358.

6. Excavations Adjoining Approaches. — *Cross v. Lake Shore, etc., R. Co.*, 69 Mich. 363, 13 Am. St. Rep. 399. See also *McKone v. Michigan Cent. R. Co.*, 51 Mich. 601, 47 Am. Rep. 596.

7. *James v. Missouri Pac. R. Co.*, 107 Mo. 480 (knot hole). Compare *Cross v. Lake Shore, etc., R. Co.*, 69 Mich. 363, 13 Am. St. Rep. 399.

8. Evidence. — *St. Louis, etc., R. Co. v. Barger*, 52 Ark. 78, 20 Am. St. Rep. 155.

9. *Cross v. Lake Shore, etc., R. Co.*, 69 Mich. 363, 13 Am. St. Rep. 399. See also *Laughlin v. Grand Rapids St. R. Co.*, 62 Mich. 220, 26 Am. & Eng. R. Cas. 377. See generally the title EXPERT AND OPINION EVIDENCE, vol. 12, p. 468 *et seq.*

10. Stairways. — *Crafter v. Metropolitan R. Co.*, L. R. 1 C. P. 300, 12 Jur. N. S. 272.

maintenance of steps edged with brass which has become smooth from use, rendering the stairs more slippery,¹ is not necessarily negligence on the part of the railway company. The company is required to maintain only such stairways as are reasonably suited to the purpose to which they are intended to be put.² Of course, if the company is negligent in maintaining defective stairways, it is liable for injuries thereby to its non-negligent patrons.³

e. GUARD RAILS. — While a company is not necessarily negligent in failing to maintain guard rails on platforms so as to prevent its patrons from falling therefrom, if without such rails the platforms are reasonably safe,⁴ still, if the maintenance of guard rails is necessary to render the platform reasonably safe, the company will be liable for injuries to non-negligent patrons caused by the want of such railings.⁵

f. PROXIMITY OF PLATFORM TO TRACKS. — The construction by a railroad company of its platform in such close proximity to its tracks that persons standing upon it may be struck by passing trains may be such negligence as to render the company liable to its non-negligent patrons injured in such manner;⁶ but it has been held not to be negligence to construct a platform in such close proximity to the track that the outermost edge could not be used with safety from passing trains.⁷ If the platform is maintained by individuals on their own ground and the company has no control over it, negligence on the part of the company cannot be predicated on the construction of the platform in too close proximity to the track.⁸

g. STATION DOORS. — It has been held that a railroad company was not negligent in failing to have a station door constructed partly of glass, so that persons using it from opposite sides would be visible to each other, and that negligence was not shown by the fact that a screw eye in such door, used to fasten back the door, projected nine-sixteenths of an inch and struck an outgoing person in the face as the door was hastily opened by one going in.⁹

h. HANDLING BAGGAGE. — Railroad companies are liable for personal injuries to their patrons at stations, caused by the negligence of their servants in handling baggage.¹⁰

1. *Crafter v. Metropolitan R. Co.*, L. R. 1 C. P. 300, 1 H. & R. 164.

2. *Johnson v. Manhattan R. Co.*, 52 Hun (N. Y.) 111.

3. *Osborne v. London, etc., R. Co.*, 21 Q. B. D. 220, 35 Am. & Eng. R. Cas. 483; *Beard v. Connecticut, etc., Rivers R. Co.*, 48 Vt. 101, 16 Am. R. Rep. 375.

In *Delaware, etc., R. Co. v. Trautwein*, 52 N. J. L. 169, 19 Am. St. Rep. 442, 41 Am. & Eng. R. Cas. 187, a passenger was injured owing to a defective stairway. It was held that the company was not absolved from the duty of keeping the stairway in repair by the fact that it provided another passageway; that the passenger was justified in using the stairway where the injury happened, as it was held out by the company as one of its passageways.

4. *Guard Rails.* — *Rigg v. Manchester, etc., R. Co.*, 12 Jur. N. S. 525. See also *Renneker v. South Carolina R. Co.*, 20 S. Car. 219.

5. *Green v. Pennsylvania R. Co.*, 36 Fed. Rep. 66; *Illinois Cent. R. Co. v. Foley*, (C. C. A.) 53 Fed. Rep. 459, 56 Am. & Eng. R. Cas. 273; *Stafford v. Hannibal, etc., R. Co.*, 22 Mo. App. 333; *Jarvis v. Brooklyn El. R. Co.*, (Brooklyn City Ct. Gen. T.) 40 N. Y. St. Rep. 825, *affirmed* 133 N. Y. 623; *Skottowe v. Oregon Short Line, etc., R. Co.*, 22 Oregon 430; *Gulf, etc., R. Co. v. Fox*, (Tex. 1887) 6 S. W. Rep. 569, 33 Am. & Eng. R. Cas. 543.

6. *Proximity of Platform to Tracks.* — *Chicago,*

etc., R. Co. v. Wilson, 63 Ill. 167 (narrow platform between two tracks); *Langan v. St. Louis, etc., R. Co.*, 72 Mo. 392 (train overlapping platform eighteen inches); *Buchanan v. West Jersey R. Co.*, 52 N. J. L. 265 (timber projecting from train so as to overlap platform); *Archer v. New York, etc., R. Co.*, 106 N. Y. 589, *affirming* 36 Hun (N. Y.) 644 (train overlapping platform several inches); *Dobiecki v. Sharp*, 88 N. Y. 203 (train overlapping platform three to five inches); *Houston, etc., R. Co. v. Reason*, 61 Tex. 613 (train overlapping platform eighteen inches).

7. *Chicago, etc., R. Co. v. Mahara*, 47 Ill. App. 208; *Matthews v. Pennsylvania R. Co.*, 148 Pa. St. 491.

8. *Barber v. Richmond, etc., R. Co.*, 34 S. Car. 444.

9. *Station Doors.* — *Graeff v. Philadelphia, etc., R. Co.*, 161 Pa. St. 230, 41 Am. St. Rep. 885, 58 Am. & Eng. R. Cas. 431.

10. *Handling Baggage.* — *Tebbutt v. Bristol, etc., R. Co.*, L. R. 6 Q. B. 75 (porter on train falling from laden truck); *Atchison, etc., R. Co. v. Johns*, 36 Kan. 769, 59 Am. Rep. 609 (sliding trunk on ice against standing persons). See also *Toledo, etc., R. Co. v. Maine*, 67 Ill. 298 (unloading freight); *Louisville, etc., R. Co. v. Shanks*, 94 Ind. 598.

Drawing Trucks. — *Keefe v. Boston, etc., R. Co.*, 142 Mass. 251.

The Giving of Warning is not the only duty

i. OPERATION OF TRAINS.—Railroad companies are liable for injuries at stations, to their non-negligent patrons, caused by the negligent operation of their trains,¹ as where a person on the station platform is struck by an unusual projection from a passing train.² So where a train standing at a station is receiving or discharging passengers, the company should use great care to avoid injury to such persons, and it has been held to be culpable negligence to run another train at a high rate of speed on a track intervening between the standing train and the station platform to and from which persons are moving.³ Similarly, for injuries to persons loading and unloading freight cars at stations, caused by the negligence of the company in running trains into such cars or on adjacent tracks, the company is liable.⁴

j. ASSAULTS BY AND INSULTING CONDUCT OF EMPLOYEES.—The rules with regard to the liability of railroad companies for assaults on and insulting

of him who draws a truck. He must move it carefully and prudently upon the platform so as not needlessly to expose any one to danger; and he should also be constantly on the alert not to strike those who for any reason are not aware of their danger. *Palmer v. Platt*, 27 Hun (N. Y.) 534, *affirmed* 98 N. Y. 628.

1. Operation of Trains—*United States*.—*Jones v. East Tennessee, etc., R. Co.*, 128 U. S. 443.

Illinois.—*Lake Shore, etc., R. Co. v. Ward*, 35 Ill. App. 423.

Louisiana.—*Sullivan v. Vicksburg, etc., R. Co.*, 39 La. Ann. 800, 4 Am. St. Rep. 239.

Massachusetts.—*Caswell v. Boston, etc., R. Corp.*, 98 Mass. 194, 93 Am. Dec. 151.

Minnesota.—*Foss v. Chicago, etc., R. Co.*, 33 Minn. 392, 19 Am. & Eng. R. Cas. 112.

Mississippi.—*Louisville, etc., R. Co. v. Hirsch*, 69 Miss. 126.

Missouri.—*Hodges v. St. Louis, etc., R. Co.*, 71 Mo. 50; *Bauer v. Kansas Pac. R. Co.*, 69 Mo. 219.

New York.—*Haskin v. New York Cent., etc., R. Co.*, 65 Barb. (N. Y.) 129, *affirmed* 56 N. Y. 608; *Gonzales v. New York, etc., R. Co.*, (Ct. App.) 39 How. Pr. (N. Y.) 407.

Texas.—*Galveston, etc., R. Co. v. Cooper*, 70 Tex. 67.

Wisconsin.—*Imhoff v. Chicago, etc., R. Co.*, 22 Wis. 681; *Whalen v. Chicago, etc., R. Co.*, 75 Wis. 654, 41 Am. & Eng. R. Cas. 558.

Canada.—*Bennett v. Grand Trunk R. Co.*, 3 Ont. 446, 13 Am. & Eng. R. Cas. 627.

2. Sullivan v. Vicksburg, etc., R. Co., 39 La. Ann. 800, 4 Am. St. Rep. 239.

3. Operation of Trains on Intervening Track—*United States*.—*Robostelli v. New York, etc., R. Co.*, 33 Fed. Rep. 796.

Colorado.—*Denver, etc., R. Co. v. Hodgson*, 18 Colo. 117; *Atchison, etc., R. Co. v. Shean*, 18 Colo. 368.

Illinois.—*Chicago, etc., R. Co. v. Kelly*, 75 Ill. App. 490, 182 Ill. 267; *Chicago, etc., R. Co. v. Ryan*, 165 Ill. 88; *Pennsylvania Co. v. Reidy*, 99 Ill. App. 477.

Louisiana.—*Peyton v. Texas, etc., R. Co.*, 41 La. Ann. 861, 17 Am. St. Rep. 430.

Michigan.—*Tubbs v. Michigan Cent. R. Co.*, 107 Mich. 108, 61 Am. St. Rep. 320.

New York.—*Armstrong v. New York Cent., etc., R. Co.*, 66 Barb. (N. Y.) 437, *affirmed* 64 N. Y. 635; *Gonzales v. New York, etc., R. Co.*, (Ct. App.) 39 How. Pr. (N. Y.) 407; *Hirsch v.*

New York, etc., R. Co., (Supm. Ct. Gen. T.) 6 N. Y. Supp. 162, *affirmed* 125 N. Y. 701; *Terry v. Jewett*, 17 Hun (N. Y.) 396, *affirmed* 78 N. Y. 338.

Texas.—*Sanchez v. San Antonio, etc., R. Co.*, 3 Tex. Civ. App. 89.

See also *Dublin, etc., R. Co. v. Slattery*, 3 App. Cas. 1155; *Caswell v. Boston, etc., R. Corp.*, 98 Mass. 194, 93 Am. Dec. 151; *Lake Shore, etc., R. Co. v. Herrick*, 49 Ohio St. 25. *Compare* *Edgerton v. Baltimore, etc., R. Co.*, 6 App. Cas. (D. C.) 516; *Indiana Cent. R. Co. v. Hudelson*, 13 Ind. 325, 74 Am. Dec. 254.

Flag Station—Flying Engine Preceding Train.

—Where a company erects its platform where passengers step to and from trains on one side of the track and its ticket office is on the other, thereby compelling passengers to cross the track, the company must keep a careful lookout for persons on the track. It is the duty of those in charge of an engine approaching at a high rate of speed, just before a passenger train is due, to slow the speed and give necessary warning signals; and this is so though the station is but a flag station in a small village. *Nichols v. Chesapeake, etc., R. Co.*, (Ky. 1886) 2 S. W. Rep. 181.

To Propel a Handcar Past a Station at the rate of fifteen miles an hour, on a down grade, without a bell or other notice, at an hour when passengers are gathering to take a train, is negligence; and the negligence is rendered more pronounced by the fact that a freight train was lying in front of the station, tending to attract attention and to some extent obscuring the view. *Conklin v. New York Cent., etc., R. Co.*, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 651.

Person Leaving Train Before It Arrives at the Station.—*Parsons v. New York Cent., etc., R. Co.*, 37 Hun (N. Y.) 128.

Train Approaching Station After Discharging Train Has Started, Not Negligence.—*Goldberg v. New York Cent., etc., R. Co.*, 133 N. Y. 561, *reversing* 60 Hun (N. Y.) 586.

4. Unloading Cars.—*Pittsburgh, etc., R. Co. v. Ives*, 12 Ind. App. 602; *Watson v. Wabash, etc., R. Co.*, 66 Iowa 164; *Spotts v. Wabash Western R. Co.*, 111 Mo. 380, 33 Am. St. Rep. 531; *Barton v. New York Cent., etc., R. Co.*, 1 Thomp. & C. (N. Y.) 297, *affirmed* 56 N. Y. 660; *International, etc., R. Co. v. Neira*, (Tex. Civ. App. 1894) 28 S. W. Rep. 96; *McCabe v. Chicago, etc., R. Co.*, 88 Wis. 531.

conduct towards passengers in transit by the railroad employees, heretofore treated, are applicable here.¹

k. INJURIES FROM ACTS OF THIRD PERSONS.—While a railroad company is liable for injuries to its patrons caused by the negligent acts of third persons whom it permits to come upon its premises, which it could have anticipated and could have been reasonably expected to prevent,² it is not liable for injuries through the acts of third persons which it could not reasonably have anticipated and provided against,³ and the duty of railroad companies to protect their patrons at stations from the acts of third persons is not so great as that imposed on such companies to protect their passengers while actually in transit.⁴ In *Texas* a railroad company was held liable for mental suffering caused to one of its patrons by the insulting and abusive language of the station agent's wife, where the station agent heard the abusive language and made no effort to protect the passenger or restrain the wife in her conduct.⁵

Injuries from Acts of Postal Agents.—Several cases have arisen in which patrons of a railroad company, while waiting on a station platform, were injured by being struck by a mail bag thrown from the postal car while the train was in motion, and the rule has been announced holding the company liable for such injuries where it has knowledge of the custom of the postal clerk so to discharge the mail, as the company is required to use reasonable diligence to protect its patrons from the acts of strangers whom it permits to come upon its premises.⁶ The gist of such liability on the part of the company, without doubt, is knowledge of such practice on the part of the postal clerk and the resulting negligence on its part in failing to take steps to protect its patrons

1. Assaults by Employees.—See the title *CARRIERS OF PASSENGERS*, vol. 5, p. 541 *et seq.*

2. Injuries from Acts of Third Persons.—*Carpenter v. Boston, etc., R. Co.*, 97 N. Y. 494, 49 Am. Rep. 540, 21 Am. & Eng. R. Cas. 331.

In *Dean v. St. Paul Union Depot Co.*, 41 Minn. 360, 16 Am. St. Rep. 703, a depot company had leased to a tenant a room in its depot where he carried on the business of storing for hire the light baggage of travelers. The plaintiff, arriving on one of the trains, went to such room to get his valise checked, and while there was assaulted and beaten by an employee of the company's tenant. It appeared that this employee was of savage and vicious propensities, and had more than once in times past attacked and beaten persons, all of which was known to the defendant company. The company was held liable for the assault on the plaintiff.

Extraordinary Crowds at Station.—"If railroads make prodigious efforts, by offering low rates and by extended and captivating advertisements, to secure a greater number of passengers to travel over their lines than they can safely and reasonably care for at their terminal points, and accidents follow, they must answer for the risks thus assumed. The traveling public may be justly subject to criticism for going in such vast numbers, and voluntarily assuming the extra hazards thereby incurred, but the railroad companies are nevertheless bound to take precautions commensurate to the risks they have imposed on the unprecedented crowds thus invited." *Taylor v. Pennsylvania Co.*, 50 Fed. Rep. 755.

In *Hogan v. South Eastern R. Co.*, 28 L. T. N. S. 271, it was held to be a question for the jury whether the company had taken proper precautions to regulate the movements of a

crowd of excursionists at its station, owing to the pressure of which a passenger was thrust off a platform and hurt.

3. Acts Not Anticipated.—*Cannon v. Midland Great Western R. Co.*, 6 L. R. Ir. 199, 3 R. & Can. T. Cas. xv.; *Batton v. South, etc., R. Co.*, 77 Ala. 591, 54 Am. Rep. 80, 23 Am. & Eng. R. Cas. 514; *Welfare v. London, etc., R. Co.*, L. R. 4 Q. B. 693.

Rape.—In *Sira v. Wabash R. Co.*, 115 Mo. 127, 37 Am. St. Rep. 386, the railroad company was held not to be liable where a woman passenger was decoyed from the station by a stranger and raped.

Protection from Stray Dogs.—In *Smith v. Great Eastern R. Co.*, L. R. 2 C. P. 4, where the plaintiff, while waiting at a station for a train, had been bitten by a stray dog, it was shown that the dog had a short time before attacked a passenger there and had been kicked out by the porter, and had not been seen again prior to its attack on the plaintiff. The court held that there was no evidence which would warrant the jury in finding that the company had been guilty of negligence.

4. Batton v. South, etc., Alabama R. Co., 77 Ala. 591, 54 Am. Rep. 80. See generally the title *CARRIERS OF PASSENGERS*, vol. 5, p. 553 *et seq.*

5. Texas, etc., R. Co. v. Jones, (Tex. Civ. App. 1897) 39 S. W. Rep. 124.

6. Mail Bag Thrown by Postal Clerk.—*Ohio, etc., R. Co. v. Simms*, 43 Ill. App. 260; *Williams v. Louisville, etc., R. Co.*, 98 Ky. 247; *Snow v. Fitchburg R. Co.*, 136 Mass. 552, 49 Am. Rep. 40, 18 Am. & Eng. R. Cas. 161; *Carpenter v. Boston, etc., R. Co.*, 97 N. Y. 494, 49 Am. Rep. 540. See also *James v. Missouri Pac. R. Co.*, 107 Mo. 480.

from the likelihood of injury therefrom.¹ So a railroad has been held to be liable for injuries resulting from its negligence in leaving a mail bag, thrown, as was the custom, by postal clerks, upon the station platform, where a passenger stumbled over it.²

4. Contributory Negligence.—Contributory negligence by a person injured at a station of course precludes any recovery against the railroad company.³

1. *Carpenter v. Boston, etc., R. Co.*, 97 N. Y. 494, 49 Am. Rep. 540.

Thus, in *Muster v. Chicago, etc., R. Co.*, 61 Wis. 325, 50 Am. Rep. 141, 18 Am. & Eng. R. Cas. 113, where the company was held not to be liable, it was on the ground that as the bag was usually thrown out at a point two hundred feet west of the depot, the company could not be charged with notice that it would be thrown out on the station platform.

2. *Sargent v. St. Louis, etc., R. Co.*, 114 Mo. 348.

3. **Contributory Negligence.**—See generally the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 368, and see the following cases pertaining specifically to injuries at railroad stations:

England.—*Watkins v. Great Western R. Co.*, 37 L. T. N. S. 193, 46 L. J. C. Pl. 817 (failure to notice plank across footbridge on level with head); *Toomey v. London, etc., R. Co.*, 3 C. B. N. S. 146, 91 E. C. L. 146.

United States.—*Seymour v. Chicago, etc., R. Co.*, 3 Biss. (U. S.) 43.

Alabama.—*Memphis, etc., R. Co. v. Cope-land*, 61 Ala. 376; *Montgomery, etc., R. Co. v. Thompson*, 77 Ala. 448, 54 Am. Rep. 72; *Alabama G. S. R. Co. v. Arnold*, 84 Ala. 159, 5 Am. St. Rep. 354.

California.—*Esrey v. Southern Pac. R. Co.*, 88 Cal. 399 (standing in narrow place between track and platform).

Delaware.—*Wallace v. Wilmington, etc., R. Co.*, 8 Houst. (Del.) 529.

Georgia.—*Central R. Co. v. Gleason*, 69 Ga. 200; *Central R. Co. v. Henderson*, 69 Ga. 715.

Illinois.—*Illinois Cent. R. Co. v. Hammer*, 72 Ill. 347; *Austin v. Chicago, etc., R. Co.*, 91 Ill. 35; *Illinois Cent. R. Co. v. Brookshire*, 3 Ill. App. 225; *Chicago, etc., R. Co. v. Mahara*, 47 Ill. App. 208.

Indiana.—*Louisville, etc., R. Co. v. Shanks*, 94 Ind. 598, 19 Am. & Eng. R. Cas. 28.

Iowa.—*Watson v. Wabash, etc., R. Co.*, 66 Iowa 164, 19 Am. & Eng. R. Cas. 114.

Kansas.—*Missouri Pac. R. Co. v. Neiswanger*, 41 Kan. 621, 13 Am. St. Rep. 304, 39 Am. & Eng. R. Cas. 471 (attempting to step from platform without steps).

Maryland.—*Baltimore, etc., R. Co. v. State*, 63 Md. 135, 21 Am. & Eng. R. Cas. 202; *Baltimore, etc., R. Co. v. Rose*, 65 Md. 485, 27 Am. & Eng. R. Cas. 125.

Massachusetts.—*Young v. Old Colony R. Co.*, 156 Mass. 178.

Michigan.—*Pzolla v. Michigan Cent. R. Co.*, 54 Mich. 273, 19 Am. & Eng. R. Cas. 334; *Kalembach v. Michigan Cent. R. Co.*, 87 Mich. 509; *French v. Detroit, etc., R. Co.*, 89 Mich. 537.

Minnesota.—*Rogstad v. St. Paul, etc., R. Co.*, 31 Minn. 208, 14 Am. & Eng. R. Cas. 648.

Missouri.—*Adams v. Missouri Pac. R. Co.*, 100 Mo. 555, 41 Am. & Eng. R. Cas. 105;

Sargent v. St. Louis, etc., R. Co., 114 Mo. 348, 58 Am. & Eng. R. Cas. 184.

New Jersey.—*Diebold v. Pennsylvania R. Co.*, 50 N. J. L. 478.

North Carolina.—*Potter v. Wilmington, etc., R. Co.*, 92 N. Car. 541, 21 Am. & Eng. R. Cas. 328 (failing to look before stepping).

Pennsylvania.—*Foreman v. Pennsylvania R. Co.*, 1 Pa. Dist. 233; *Carroll v. Pennsylvania R. Co.*, 2 Penny. (Pa.) 159.

Rhode Island.—*Chaffee v. Old Colony R. Co.*, 17 R. I. 658.

South Carolina.—*Renneker v. South Carolina R. Co.*, 20 S. Car. 219, 18 Am. & Eng. R. Cas. 149.

Texas.—*Bonner v. Glenn*, 79 Tex. 531; *Missouri Pac. R. Co. v. McKernan*, 82 Tex. 204.

Virginia.—*Reed v. Axtell*, 84 Va. 231, 33 Am. & Eng. R. Cas. 503 (walking off platform in dark).

Wisconsin.—*Olson v. Chicago, etc., R. Co.*, 81 Wis. 41.

Reasonable Attention to Personal Safety.—Persons on a station platform are required to give reasonable attention to their personal safety. *Chicago, etc., R. Co. v. Mahara*, 47 Ill. App. 208.

Passengers about a station at night when trains are passing should be observant of what is going on around them. *Sargent v. St. Louis, etc., R. Co.*, 114 Mo. 348, 58 Am. & Eng. R. Cas. 184.

Failure to Make Use of Handrail in Descending Stair.—*Foster v. New York Cent., etc., R. Co.* (Supm. Ct.) 2 How. Pr. N. S. (N. Y.) 416.

Passing in Front of Moving Train.—*Chaffee v. Old Colony R. Co.*, 17 R. I. 658, 52 Am. & Eng. R. Cas. 366.

Intoxication.—*Houston, etc., R. Co. v. Reason*, 61 Tex. 613.

Stopping on Tracks.—*Delaney v. Milwaukee, etc., R. Co.*, 33 Wis. 67.

The Neglect of a Company to Provide Suitable Lights at a station does not relieve a passenger from the duty of exercising ordinary care while in and about the place. *Sargent v. St. Louis, etc., R. Co.*, 114 Mo. 348, 58 Am. & Eng. R. Cas. 184.

Using Unlighted Stairway.—In *Bennett v. New York, etc., R. Co.*, 57 Conn. 422, 41 Am. & Eng. R. Cas. 184, it was said that a passenger using an unlighted stairway when there were lighted stairways leading to the same place must be considered to have assumed the risk of accident.

Walking on Unlighted Platform.—It is contributory negligence for a passenger who is staying at a railway station, on a dark night, when the platform lamp has been temporarily removed, to go out on the platform and walk to the end of it. *Reed v. Axtell*, 84 Va. 231, 33 Am. & Eng. R. Cas. 502.

Attempting to Pass Between Cars of a train

Thus, a disregard of the rules and regulations established by the company for the safety of its patrons at stations has been held to bar a recovery by a person for injuries received,¹ an example of which is an attempt by a person to enter or leave the station by means of a way not intended for passengers, a safe means of egress and ingress having been provided.² Contributory negligence is not imputable to a person at a station for failing to look out for a danger which, under the surrounding circumstances, he had no reason to apprehend,³ and persons at stations are justified in relying on the fact that the railroad company will take proper steps to protect them from exposure to danger, and may act accordingly without being charged with negligence.⁴ Thus, a person on a station platform failing to look out for trains approaching from the rear is not guilty of contributory negligence.⁵

Looking Out for Holes.—Passengers at stations are not required, under penalty of being held guilty of contributory negligence, to be specially on the lookout for holes in the station platform.⁶

ready to start on a track intervening between the train from which the plaintiff alighted and the station has been held to constitute such contributory negligence as to preclude recovery for injuries received from the negligent starting of the train. *Memphis, etc., R. Co. v. Copeland*, 61 Ala. 376. See also *Chicago, etc., R. Co. v. Coss*, 73 Ill. 394; *Chicago, etc., R. Co. v. Sykes*, 96 Ill. 162, reversing 1 Ill. App. 520.

But attempting to pass between cars of a freight train which has been cut in two to allow passengers to pass through to reach a train on the farther track is not contributory negligence. *Louisville, etc., R. Co. v. Thompson*, 64 Miss. 584. See also *Nichols v. Washington, etc., R. Co.*, 83 Va. 99, 5 Am. St. Rep. 257, 32 Am. & Eng. R. Cas. 27. Compare *Bertelson v. Chicago, etc., R. Co.*, 5 Dak. 313.

1. Disregard of Regulations.—*Perry v. Central R. Co.*, 66 Ga. 746; *Bancroft v. Boston, etc., R. Corp.*, 97 Mass. 275; *Michigan Cent. R. Co. v. Coleman*, 28 Mich. 440, 12 Am. R. Rep. 59; *Pennsylvania R. Co. v. Zebe*, 33 Pa. St. 327.

2. *Central R. Co. v. Henderson*, 69 Ga. 715; *Illinois Cent. R. Co. v. Brookshire*, 3 Ill. App. 226; *Pzolla v. Michigan Cent. R. Co.*, 54 Mich. 273; *Abbott v. Delaware, etc., R. Co.*, 65 N. J. L. 310; *Comly v. Pennsylvania R. Co.*, (Pa. 1888) 12 Atl. Rep. 496; *Pennsylvania R. Co. v. Zebe*, 33 Pa. St. 318; *Walker v. Great Western R. Co.*, 8 U. C. C. P. 161. See also *Wilby v. Midland R. Co.*, 35 L. T. N. S. 244.

3. *Langan v. St. Louis, etc., R. Co.*, 72 Mo. 392.

4. *United States.*—*Seymour v. Chicago, etc., R. Co.*, 3 Biss. (U. S.) 43.

Illinois.—*Chicago, etc., R. Co. v. Wilson*, 63 Ill. 167.

Indiana.—*Louisville, etc., R. Co. v. Lucas*, 119 Ind. 583; *Ohio, etc., R. Co. v. Stansberry*, 132 Ind. 533.

Louisiana.—*Sullivan v. Vicksburg, etc., R. Co.*, 39 La. Ann. 800, 4 Am. St. Rep. 239; *Moses v. Louisville, etc., R. Co.*, 39 La. Ann. 649, 4 Am. St. Rep. 231, 30 Am. & Eng. R. Cas. 556.

Maryland.—*Baltimore, etc., R. Co. v. State*, 60 Md. 449, 12 Am. & Eng. R. Cas. 149.

Michigan.—*Grand Rapids, etc., R. Co. v. Martin*, 41 Mich. 667.

New York.—*Gonzales v. New York, etc., R.*

Co., (Ct. App.) 39 How. Pr. (N. Y.) 407; *Hulbert v. New York Cent. R. Co.*, 40 N. Y. 145; *Weston v. New York El. R. Co.*, 73 N. Y. 595; *Brassell v. New York Cent., etc., R. Co.*, 84 N. Y. 241; *Archer v. New York, etc., R. Co.*, 106 N. Y. 589; *Dobiecki v. Sharp*, 88 N. Y. 203.

See also *Williams v. Louisville, etc., R. Co.*, 98 Ky. 247; *Bethmann v. Old Colony R. Co.*, 155 Mass. 352. Compare *Sargent v. St. Louis, etc., R. Co.*, 114 Mo. 348, 58 Am. & Eng. R. Cas. 184.

Passing in Rear of Track Not Protected by Snubbing Post.—It is not contributory negligence to assume that it will be safe to go through an open passage left by a railroad company to give access to its depot, even though the track ends near by and is not protected by snubbing posts. *Grand Rapids, etc., R. Co. v. Martin*, 41 Mich. 667.

Platform.—A passenger may instinctively regard a platform erected for passengers as a safe and proper place. *Archer v. New York, etc., R. Co.*, 106 N. Y. 589, affirming 36 Hun (N. Y.) 644.

Waiting on Platform.—Under ordinary circumstances a traveler is justified in going upon a platform erected for the accommodation of passengers and in waiting there to take any passing train. *Dobiecki v. Sharp*, 88 N. Y. 203, 8 Am. & Eng. R. Cas. 485.

5. *Chicago, etc., R. Co. v. Wilson*, 63 Ill. 167; *Langan v. St. Louis, etc., R. Co.*, 72 Mo. 392; *Archer v. New York, etc., R. Co.*, 106 N. Y. 589. See also *Sonier v. Boston, etc., R. Co.*, 141 Mass. 10. Compare *Pennsylvania R. Co. v. Bell*, 122 Pa. St. 58.

Question for Jury.—*Union Pac. R. Co. v. Sue*, 25 Neb. 772.

6. *Watson v. Oxanna Land Co.*, 92 Ala. 320, 94 Ala. 634; *Ohio, etc., R. Co. v. Stansberry*, 132 Ind. 533, 56 Am. & Eng. R. Cas. 285. Compare *Sargent v. St. Louis, etc., R. Co.*, 114 Mo. 348.

An instruction that "if there is an apparent defect about the appliances with which they [the passengers] come in contact, or which are in use, they must look, and unless some reasonable excuse is given, they are guilty of negligence if they do not look," was held to have been properly refused as placing a passenger in the same relation to the railroad company as its servant occupies. *Ohio, etc., R. Co. v. Stansberry*, 132 Ind. 533.

Crossing Tracks. — A passenger, while passing from his train to the platform, or *vice versa*, is not required to exercise that degree of care in crossing an intervening track, that is imposed upon other persons at other places, as he has the right to assume that the company will discharge its duty in making the way safe. Thus, where a track intervenes between a train receiving or discharging passengers and the station platform, the general obligation which rests upon a traveler on a highway to stop, look, and listen before crossing a railroad track does not apply to passengers crossing such intervening track, either to or from the train, and the failure to stop, etc., before crossing does not as a matter of law render such persons guilty of contributory negligence.¹ Whether a person is guilty of contributory negligence in alighting from a train at a station on a track running beside the train instead of upon the station platform on the opposite side has been held to be a question for the jury.² Where a safe means of crossing tracks is provided and a person is injured in attempting to cross at an improper place, he cannot recover if injured.³

Knowledge of Unsafe Condition. — The mere fact that a person, with knowledge that station platforms or approaches, etc., are in an unsafe condition makes use of them does not as a matter of law render him guilty of contributory negligence.⁴

5. Stations Used by Several Companies. — Stations used in common by two or more companies, though belonging to one of them exclusively, are to be considered as belonging to each, relative to its own operation and business and its correlative duty to protect its patrons from injuries while at such stations;⁵ and in the operation of their trains at such stations, one company

1. Crossing Tracks — *Colorado*. — Denver, etc., R. Co. v. Hodgson, 18 Colo. 117; Atchison, etc., R. Co. v. Shean, 18 Colo. 368.

Maryland. — Baltimore, etc., R. Co. v. State, 60 Md. 449.

Michigan. — Tubbs v. Michigan Cent. R. Co., 107 Mich. 108, 61 Am. St. Rep. 320.

New Jersey. — Klein v. Jewett, 26 N. J. Eq. 474; Jewett v. Klein, 27 N. J. Eq. 550.

New York. — Brassell v. New York Cent., etc., R. Co., 84 N. Y. 241; Gonzales v. New York, etc., R. Co., (Ct. App.) 39 How. Pr. (N. Y.) 407; Terry v. Jewett, 78 N. Y. 338; Hirsch v. New York, etc., R. Co., (Supm. Ct. Gen. T.) 6 N. Y. Supp. 162, affirmed 125 N. Y. 701. Compare Parsons v. New York Cent., etc., R. Co., 37 Hun (N. Y.) 128 (alighting from train before it stopped and attempting to cross intervening track).

See also Richmond, etc., R. Co. v. Powers, 149 U. S. 43; Warren v. Fitchburg R. Co., 8 Allen (Mass.) 227, 85 Am. Dec. 700; Gaynor v. Old Colony, etc., R. Co., 100 Mass. 215; Lake Shore, etc., R. Co. v. Herrick, 49 Ohio St. 25. See, however, East Tennessee, etc., R. Co. v. Kornegay, 92 Ala. 228; Ensley R. Co. v. Chewing, 93 Ala. 24, 50 Am. & Eng. R. Cas. 46; Wheelwright v. Boston, etc., R. Co., 135 Mass. 225; Connolly v. New York, etc., R. Co., 158 Mass. 8; Casey v. Canadian Pac. R. Co., 15 Ont. 574, 37 Am. & Eng. R. Cas. 172.

2. Robostelli v. New York, etc., R. Co., 33 Fed. Rep. 796. See, however, Michigan Cent. R. Co. v. Coleman, 28 Mich. 440, 12 Am. R. Rep. 59.

3. Wilby v. Midland R. Co., 35 L. T. N. S. 244.

4. Osborne v. London, etc., R. Co., 21 Q. B. D. 220, 35 Am. & Eng. R. Cas. 483 (use of slippery stairway); Pennsylvania Co. v. Marion, 123 Ind. 415, 18 Am. St. Rep. 330; White v.

Cincinnati, etc., R. Co., 89 Ky. 478; Kohler v. Pennsylvania R. Co., 135 Pa. St. 346. See also Gulf, etc., R. Co. v. Fox, (Tex. 1887) 6 S. W. Rep. 569; Reid v. New York, etc., R. Co., 63 Hun (N. Y.) 630, 17 N. Y. Supp. 801; Weston v. New York El. R. Co., 73 N. Y. 595, affirming 42 N. Y. Super. Ct. 156; Pennsylvania R. Co. v. Marion, 123 Ind. 415; International, etc., R. Co. v. Folliard, 66 Tex. 603. Compare Seymour v. Chicago, etc., R. Co., 3 Biss. (U. S.) 43.

Failure to Call for Light. — Alabama G. S. R. Co. v. Arnold, 80 Ala. 600.

5. Stations Used by Several Companies. — Seymour v. Chicago, etc., R. Co., 3 Biss. (U. S.) 43; Montgomery, etc., R. Co. v. Thompson, 77 Ala. 448, 54 Am. Rep. 72; Central R., etc., Co. v. Perry, 58 Ga. 461, 16 Am. R. Rep. 122; Louisville, etc., R. Co. v. Lucas, 119 Ind. 583; Lucas v. Pennsylvania Co., 120 Ind. 205, 16 Am. St. Rep. 323; Wabash, etc., R. Co. v. Wolff, 13 Ill. App. 437. See also Tebbutt v. Bristol, etc., R. Co., L. R. 6 Q. B. 73. And see the title UNION DEPOTS.

Agreement Between Companies Immaterial. — Where one company has the right to use a station platform belonging to another company, it is its duty to see that the platform is safe for its passengers, without any regard to the arrangement between the two companies. Seymour v. Chicago, etc., R. Co., 3 Biss. (U. S.) 43.

Joint Liability. — A joint judgment cannot be sustained against the different companies unless there is some concert of action between all the companies or concurrent neglect of a common duty resting on all. Thus, where one company owned a track and platform, but ran no trains, and a second company had the right to run trains in the road and to use the platform, and in doing so piled freight on the platform so as to leave a very narrow space between it and the track, and a third company which had the right

is under the same obligation to avoid injuries to the patrons of another company as it is to its own patrons.¹

STATUARY. — “A statuary is ‘one who professes or practices the art of carving images or making statues.’”²

STATUS. — See note 3.

STATUTE FAIR. — See note 4.

STATUTE MERCHANT. — See the title ESTATES, vol. 11, p. 382.

STATUTE MILE. — See MILE, vol. 20, p. 612.

STATUTE OF FRAUDS. — See the title VERBAL AGREEMENTS (STATUTE OF FRAUDS).

STATUTE OF JEOPAILS. — See the title JEOPAILS, 11 ENCYC. OF PL. AND PR. 756.

STATUTE OF LIMITATIONS. — See the title LIMITATION OF ACTIONS, vol. 19, p. 136.

STATUTE OF USES. — See the title USES, STATUTE OF.

STATUTE OF WILLS. — See the title WILLS.

to use the track, but not the platform, in running a train over the track struck and killed a person who was on the platform for the purpose of removing freight, it was held that the companies were not jointly liable. Chicago, etc., R. Co. v. Rolvink, 31 Ill. App. 596.

1. Haff v. Minneapolis, etc., R. Co., 4 McCrary (U. S.) 622, 14 Fed. Rep. 558.

2. Statuary. — Viti v. Tutton, 14 Fed. Rep. 246, quoting Webst. Dict.

Customs Act. — As to what is included in the term *statuary* as used in the customs act, see Tutton v. Viti, 108 U. S. 312; U. S. v. Morris European, etc., Express Co., (C. C. A.) 101 Fed. Rep. 111.

The term has been held not to include the productions of a manufacturer or mechanic. Merritt v. Tiffany, 132 U. S. 169.

Terra-cotta Bust. — See Sutton v. Ciceri, L. R. 10 App. Cas. 144.

3. **Status and Relation.** — In De La Montanya v. De La Montanya, 112 Cal. 115, it was said: “It is said that the relation of the parents to the children and their relation to each other in regard to the children is a *status*. If so, it would not help the respondent, for no such *status* was before the court. But the very meaning of the word *status*, both derivative and as defined in legal proceedings, forbids that it should be applied to a mere relation. *Status* implies relations, undoubtedly, but it is not a mere relation.”

Status and Estate. — See ESTATE, vol. 11, p. 358.

4. **Statute Fair.** — See Simpson v. Wells, L. R. 7 Q. B. 214.

STATUTES.

BY THE EDITORIAL STAFF.

I. DEFINITION, 529.

II. CLASSIFICATION, 529.

1. *In Respect to Nature and Object*, 529.
 - a. *Declaratory*, 529.
 - (1) *In General*, 529.
 - (2) *Affirmative*, 529.
 - (3) *Negative*, 529.
 - b. *Remedial*, 530.
 - c. *Penal*, 530.
2. *In Respect to Subject-matter*, 530.
 - a. *Public*, 530.
 - b. *Private*, 531.
 - c. *General*, 532.
 - d. *Local*, 532.
 - e. *Real, Personal, and Mixed*, 533.
3. *In Respect to Compliance Required*, 533.
 - a. *Mandatory*, 533.
 - b. *Directory*, 533.
 - c. *Prohibitory*, 533.
 - d. *Permissive*, 533.
4. *In Respect to Time of Passage*, 533.
5. *In Respect to Time of Taking Effect*, 533.
 - a. *Prospective*, 533.
 - b. *Retrospective*, 533.
6. *In Respect to Duration*, 534.
 - a. *Perpetual*, 534.
 - b. *Temporary*, 534.

III. ENACTMENT, 534.

1. *The Legislature*, 534.
 - a. *Constitution and Status*, 534.
 - (1) *In General*, 534.
 - (2) *Call or Proclamation for Convening Legislature*, 534.
 - (3) *Presumption of Legal Constitution*, 534.
 - (4) *De Facto Legislature*, 534.
 - (5) *Power of Courts to Examine into Status*, 535.
 - (a) *Where Legal Status of Entire Body Attacked*, 535.
 - (b) *Rule as to Election and Qualification of Legislators*, 535.
 - aa. *General Rule Stated*, 535.
 - bb. *Where Number of Members Exceeds Constitutional Limit*, 535.
 - b. *Organization*, 535.
 - (1) *In General*, 535.
 - (2) *Quorum*, 535.
 - (a) *What Constitutes*, 535.
 - (b) *Who May Be Counted to Ascertain Existence of Quorum*, 535.
 - c. *Extra Sessions*, 536.
 - (1) *In General*, 536.
 - (2) *Field of Legislation*, 536.
 - d. *Extended Sessions*, 536.

STATUTES.

2. *General Rule as to Compliance with Constitutional Requirements*, 536.
3. *Statutory Requirements*, 538.
4. *Parliamentary Rules*, 538.
5. *Introduction*, 538.
 - a. *The First Step*, 538.
 - b. *Notice of Introduction*, 538.
 - c. *Time for Introduction*, 538.
 - d. *In Which House Bills May Originate*, 539.
6. *Readings*, 539.
 - a. *Requirement of Three Readings*, 539.
 - b. *Whether Requirement Directory or Mandatory*, 539.
 - (1) *In General*, 539.
 - (2) *Provision as to Manner of Reading Bills*, 539.
 - c. *Whether Reading Must Be in Full*, 539.
 - d. *Application to Amendments*, 540.
 - e. *Application to Codification*, 540.
 - f. *Substitute Bill*, 540.
 - g. *Reading in Committee*, 540.
 - h. *Reading in Both Houses on Same Day*, 540.
 - i. *Reconsideration in House Between Readings in Senate*, 541.
 - j. *Presumption*, 541.
 - k. *Dispensing with Requirement*, 541.
7. *Reference to Committees*, 541.
8. *Printing of Bills*, 541.
9. *Passage*, 541.
 - a. *Concurrence of Both Houses Necessary*, 541.
 - b. *Vote Necessary to Pass*, 542.
 - c. *Protest Against Passage*, 543.
 - d. *Methods of Voting*, 543.
 - (1) *In General*, 543.
 - (2) *Yeas and Nays on Final Passage*, 543.
 - (a) *Constitutional Requirement*, 543.
 - (b) *To What Bills Applicable*, 543.
 - (c) *What Is the Final Passage*, 544.
 - (d) *Entry on Journal*, 544.
10. *Amendment During Passage*, 544.
 - a. *Prohibition of Amendments Changing Original Purpose*, 544.
 - b. *Printing of Amendments for Use of Legislators*, 544.
 - c. *Which House May Amend*, 545.
 - d. *Effect of Amendment*, 545.
11. *Signing by Presiding Officers*, 545.
 - a. *Constitutional Requirement*, 545.
 - b. *Whether Mandatory or Directory*, 545.
 - c. *Rule in Case of Passage Over Veto*, 545.
 - d. *Bill Must Be That Actually Passed*, 546.
 - e. *Rule in Absence of Constitutional Requirement*, 546.
 - f. *Signing by Speaker Pro Tem.*, 546.
12. *Reference of Special City Laws to Mayors*, 546.
13. *Presentation to Executive*, 547.
 - a. *In General*, 547.
 - b. *Mode of Presentation*, 547.
 - c. *Bill Presented Must Be That Actually Passed*, 547.
 - d. *Record of Presentation*, 547.
 - e. *Legislative Power of Recall*, 548.
14. *Functions of the Executive*, 548.
 - a. *In General*, 548.
 - b. *Approval*, 548.
 - (1) *In General*, 548.
 - (2) *Method of Expressing Approval*, 548.
 - (3) *Bill Must Be That Passed*, 548.

STATUTES.

- (4) *Withdrawal of Approval*, 549.
 - (5) *Approval During Recess*, 549.
 - (6) *Approval After Adjournment*, 549.
 - (7) *Return of Bill or Notification of Approval*, 549.
 - c. *Disapproval or Veto*, 549.
 - (1) *In General*, 549.
 - (2) *Veto of Part of Bill*, 549.
 - (3) *Sufficiency of Objections*, 550.
 - (4) *Return of Bill*, 550.
 - (a) *In General*, 550.
 - (b) *Mode of Return*, 550.
 - (c) *Rule in Case of Partial Veto*, 550.
 - (5) *Passage Over Veto*, 550.
 - d. *Failure to Act*, 551.
 - (1) *In General*, 551.
 - (2) *Specific Time — How Computed*, 551.
 - (3) *Veto After Expiration of Time Limited*, 551.
 - (4) *Invalid Action Within Time Limited*, 551.
 - (5) *Effect of Adjournment*, 551.
 - (a) *In General*, 551.
 - (b) *What Is Meant by Adjournment*, 551.
 - (c) *Parol Evidence of Adjournment*, 552.
 - 15. *Legislative Journal*, 552.
 - a. *Necessity for*, 552.
 - b. *Effect of Omissions*, 552.
 - c. *Amendment of Journal*, 553.
 - d. *Journal as Evidence*, 553.
 - (1) *Public Record*, 553.
 - (2) *Conclusiveness*, 553.
 - (3) *Proof*, 554.
 - (a) *In General*, 554.
 - (b) *Transcript*, 554.
 - (c) *Printed Copies*, 554.
 - 16. *Enrolled Bill*, 554.
 - a. *Definition*, 554.
 - b. *Filing of Enrolled Bills*, 554.
 - (1) *In General*, 554.
 - (2) *Effect of Filing on Functions of Executive*, 554.
 - c. *Enrolled Bill as Evidence*, 555.
 - (1) *In General*, 555.
 - (2) *Presumption*, 555.
 - (3) *Conclusiveness*, 556.
 - (a) *View that Enrolled Bill Is Conclusive*, 556.
 - (b) *View that Journal May Be Looked to*, 557.
 - (c) *Rule in Federal Courts*, 559.
 - (d) *Distinction in North Carolina*, 559.
 - 17. *Engrossed Bill*, 559.
 - a. *Definition*, 559.
 - b. *Engrossed Bill as Evidence*, 559.
 - 18. *Form of Enactment*, 560.
 - a. *Title*, 560.
 - b. *Enacting Clause*, 560.
 - c. *Re-enactment or Adoption of Existing Statute*, 560.
 - d. *Bill or Resolution*, 560.
 - 19. *Evidence of Enactment*, 561.
- ## IV. TIME OF TAKING EFFECT, 562.
- 1. *Early Rule*, 562.
 - 2. *Where No Time Is Fixed*, 562.
 - 3. *Where Time to Be Prescribed by Legislature*, 563.
 - 4. *From Passage, Immediately, and the Like*, 563.

STATUTES.

5. *From Future Day Named*, 564.
6. *From Publication*, 565.
7. *From Publication and Circulation*, 566.
8. *Upon a Contingency*, 567.
9. *When Containing Emergency Clause*, 567.
10. *Impossible Date Named*, 568.
11. *Postponement of Operation of Part*, 568.

V. CONSTITUTIONALITY, 568.

1. *General Principles*, 568.
2. *Presumption as to Constitutionality*, 569.
3. *Statutes Against Common Right*, 569.
4. *Wisdom, Propriety, or Policy of Statute*, 569.
5. *Motives of Legislature*, 569.
6. *Possibility of Unfair Enforcement*, 569.
7. *Partial Invalidity*, 570.
8. *Total Invalidity*, 571.
9. *Titles and Subjects*, 572.
 - a. *Constitutional Provisions*, 572.
 - b. *Purpose of Provisions*, 572.
 - c. *Whether Provisions Directory or Mandatory*, 572.
 - d. *To What Acts Provisions Applicable*, 573.
 - e. *How Provisions Construed*, 574.
 - f. *Singleness of Subject*, 575.
 - (1) *In General*, 575.
 - (2) *When Act Not Objectionable for Plurality*, 575.
 - (3) *When Act Objectionable for Plurality*, 578.
 - (a) *In General*, 578.
 - (b) *How Far Act Void*, 579.
 - g. *Expression of Subject in Title*, 579.
 - (1) *Discretion of Legislature in Choice of Title*, 579.
 - (2) *What a Sufficient Expression of Subject*, 579.
 - (a) *In General*, 579.
 - (b) *No Necessity to Index Contents of Act*, 581.
 - (c) *Generality of Title*, 581.
 - aa. *When Not Objectionable*, 581.
 - bb. *When Objectionable*, 582.
 - (d) *Effect of Specification of Details*, 583.
 - (3) *How Language of Title Construed*, 583.
 - (4) *What Provisions Covered by Title*, 584.
 - (a) *Matters Germane to Subject Expressed*, 584.
 - aa. *In General*, 584.
 - bb. *Means to Facilitate Accomplishment of Purpose*, 588.
 - (b) *Matters Outside Scope of Title*, 589.
 - aa. *In General*, 589.
 - bb. *Restrictive Title — Act Broader than Title*, 590.
 - cc. *Provision for Retrospective Operation*, 591.
 - (c) *Repeal of Previous Acts*, 591.
 - (5) *Amending and Supplemental Acts*, 591.
 - (a) *What a Sufficient Title*, 591.
 - aa. *In General*, 591.
 - bb. *Reference to Amended Act by Number Only*, 592.
 - (b) *Matters Covered by Title*, 593.
 - (c) *Matters Outside Scope of Title*, 594.
 - (6) *Repealing Acts*, 595.
 - (7) *How Far Defective Title Vitiates Act*, 595.
 - (a) *When Void in Part Only*, 595.
 - (b) *When Wholly Void*, 596.

10. *Other Constitutional Questions*, 596.

VI. PRINCIPLES OF INTERPRETATION AND CONSTRUCTION, 596.

1. *Meaning of Terms*, 596.
2. *Construction a Judicial Function*, 597.
3. *Object and General Scope of Doctrine*, 597.
4. *Whether Intention Deduced from Letter or Spirit of Statute*, 598.
 - a. *Where Meaning Plain, the Letter Controls*, 598.
 - (1) *General Statement*, 598.
 - (2) *Results, Motives, and Policy Not Considered*, 598.
 - (3) *Nothing Added to or Taken from Statute*, 600.
 - (a) *General Statement*, 600.
 - (b) *Casus Omissus Not Supplied*, 601.
 - b. *Where Meaning in Doubt, the Spirit Controls*, 601.
 - (1) *Effect of Ambiguous Language*, 601.
 - (2) *Intention and Object*, 602.
 - (3) *Subject-matter*, 604.
 - (4) *Expressio Unius Est Exclusio Alterius*, 604.
5. *Interpretation of Words and Phrases*, 605.
 - a. *Popular Meaning Presumed*, 605.
 - b. *Technical Words*, 606.
 - (1) *In General*, 606.
 - (2) *Legal Terms*, 607.
 - c. *Associated Words — Noscitur a Sociis*, 608.
 - d. *General Words and Their Limitation*, 608.
 - (1) *Intention Controls*, 608.
 - (2) *Ejusdem Generis Rule*, 609.
 - e. *Particular Language Construed Generally*, 610.
 - f. *Expressio Unius Est Exclusio Alterius*, 610.
 - g. *Presumption as to Meaning of Words*, 610.
 - (1) *Same Throughout Act*, 610.
 - (2) *Same as in Former Act in Pari Materia*, 611.
 - h. *To What Time Words or Descriptions Referred*, 611.
6. *Grammar and Collocation of Words*, 612.
 - a. *General Rule*, 612.
 - b. *Mala Grammatica Non Vitiat*, 612.
 - c. *Punctuation*, 612.
 - d. *Collocation*, 612.
 - (1) *In General*, 612.
 - (2) *Qualifying Phrases Confined to Next Antecedent*, 613.
 - (3) *Reddenda Singula Singulis*, 613.
7. *Implication of Incidents*, 613.
 - a. *General Doctrine*, 613.
 - b. *As to Powers and Duties*, 614.
 - c. *As to Remedies and Procedure*, 614.
 - d. *As to Conferring Jurisdiction*, 614.
8. *Construing Entire Statute as One Whole*, 616.
 - a. *All Parts Taken Together*, 616.
 - (1) *General Rule*, 616.
 - (2) *Codes or Revised Statutes*, 617.
 - (3) *Repealed or Unconstitutional Clauses*, 618.
 - b. *Every Clause to Be Given Effect*, 618.
 - (1) *General Rule*, 618.
 - (2) *General and Particular Clauses*, 618.
 - c. *Clauses Absolutely Irreconcilable*, 619.
 - d. *Enactments in Two Languages*, 620.
9. *Statutes in Pari Materia*, 620.
 - a. *General Doctrine*, 620.
 - b. *Contemporaneous Statutes*, 623.
 - c. *Subsequent Statutes*, 624.
 - d. *Expired and Repealed Statutes*, 624.
 - e. *Codes, Revisions, and Re-enactments*, 624.

STATUTES.

- f. Penal Statutes, 625.*
 - g. Private Statutes, 625.*
 - 10. *Aids to Interpretation, 625.*
 - a. Intrinsic from Incidents and Form, 625.*
 - (1) *Preamble, 625.*
 - (2) *Title, 627.*
 - (3) *Chapter Titles and Section Headings, 629.*
 - (4) *Marginal Notes, 630.*
 - (5) *Schedule, 630.*
 - (6) *Punctuation, 631.*
 - b. Extrinsic or External, 632.*
 - (1) *History, the Old Law and Mischief, 632.*
 - (2) *Contemporaneous Exposition and Long Usage, 633.*
 - (a) *General Rule, 633.*
 - (b) *Construction by Inferior Courts, 635.*
 - (c) *Practical or Executive Construction, 635.*
 - aa. *General Rule, 635.*
 - bb. *Character of Practice or Usage, 636.*
 - (3) *Stare Decisis, 636.*
 - (4) *Legislative Construction, 636.*
 - (a) *General Rule, 636.*
 - (b) *Statutory Construction Laws and Provisions, 637.*
 - (5) *Opinions and Motives of Legislators, 638.*
 - (6) *Legislative Journals and Reports of Committees, 639.*
 - 11. *Consequences to Be Guarded Against, 640.*
 - a. Conflict with General Legal Principles, 640.*
 - b. Intention to Bind Future Legislatures, 640.*
 - c. Unconstitutionality, 640.*
 - d. Disregard of International and Interstate Law, 643.*
 - (1) *In General, 643.*
 - (2) *Extraterritorial Operation, 643.*
 - e. Including Government, 644.*
 - f. Ousting Jurisdiction, 645.*
 - g. Unreason and Injustice, 646.*
 - h. Absurdity, 648.*
 - i. Inconvenience, 648.*
 - j. Ineffectiveness, 649.*
 - k. Unnecessary Change in Law, 649.*
 - (1) *In General, 649.*
 - (2) *Adopting Language of Settled Meaning, 650.*
 - (3) *Change of Phraseology, 651.*
 - 12. *Effect of Mistakes or Omissions, Substantial or Formal, 653.*
 - a. Presumption Against Mistakes in Statutes, 653.*
 - (1) *In General, 653.*
 - (2) *Statements of Fact, 653.*
 - (3) *Statements of Law, 653.*
 - b. Correction of Errors, Omissions, or Misuse of Words, 653.*
 - (1) *General Rule, 653.*
 - (2) *Interpolation and Elimination, 654.*
 - (3) *Obvious or Clerical Errors, 655.*
 - c. Statutes Void for Uncertainty, 656.*
 - 13. *Evasions, 657.*
- VII. PARTICULAR APPLICATIONS OF PRINCIPLES OF CONSTRUCTION, 657.**
- 1. *Strict and Liberal Construction, 657.*
 - a. Strict Construction, 657.*
 - (1) *Definition, 657.*
 - (2) *Penal Statutes, 658.*
 - (a) *In General, 658.*
 - (b) *Rule Applicable to Other than Strictly Criminal Statutes, 659.*

STATUTES.

- (c) *Extension of Penal Statutes to Things Not in Esse at Time of Passage*, 660.
- (d) *Where Penal Clause Is Less Comprehensive than Body of Act*, 660.
- (e) *Statutes Both Penal and Remedial*, 661.
- (3) *Statutes in Derogation of Common Right*, 661.
- (4) *Statutes in Derogation of Common Law*, 662.
 - (a) *In General*, 662.
 - (b) *Applications of Rule*, 664.
 - (c) *Abrogation of Rule by Statute*, 665.
 - (d) *Constructive Repeal of Common Law*, 665.
- (5) *Statutes Delegating Powers*, 665.
- (6) *Statutes Imposing Liabilities*, 668.
- (7) *Exemptions from Liabilities*, 668.
- (8) *Statutes Imposing Taxes*, 669.
 - (a) *In General*, 669.
 - (b) *Tariff Laws*, 669.
 - (c) *Statutes to Prevent Frauds upon the Revenue*, 670.
- (9) *Statutes Affecting Jurisdiction of Courts*, 670.
- (10) *Statutes Conferring Right to Sue State*, 670.
- (11) *Statutory Remedies and Proceedings*, 671.
- (12) *Private Acts*, 672.
 - (a) *In General*, 672.
 - (b) *Monopolies*, 674.
- b. *Liberal Construction*, 674.
 - (1) *Definition*, 674.
 - (2) *Early Application of Rule*, 674.
 - (3) *Modern Rule*, 675.
 - (4) *Remedial Statutes*, 676.
- 2. *Provisos, Exceptions, and Saving Clauses*, 678.
 - a. *Definitions*, 678.
 - b. *Construction of Proviso*, 679.
 - c. *Proviso as Aiding Construction of Enacting Clause*, 680.
 - d. *Strict Construction of Proviso*, 680.
 - e. *Harmonizing Proviso and Enacting Clause*, 681.
 - f. *General Saving Clauses Relating to Repealing Acts*, 681.
- 3. *General and Special Laws*, 682.
- 4. *Mandatory or Directory*, 688.
 - a. *In General*, 688.
 - b. *Affirmative and Negative Terms*, 689.
 - c. *Time and Mode of Proceeding by Public Officers*, 689.
 - d. *Conferring Powers, Privileges, or Immunities*, 691.
 - e. *Regulating Judicial Procedure*, 692.
 - f. *Particular Words — Shall, May, Must*, 692.
- 5. *Retrospective Laws*, 692.
 - a. *Definition*, 692.
 - b. *Scope of Section*, 692.
 - c. *General Rule of Construction*, 693.
 - d. *Statutes Affecting Judicial Procedure*, 695.
 - e. *Declaratory Statutes*, 697.
 - f. *Remedial Statutes*, 698.
 - g. *Curative Statutes*, 698.
 - h. *Statutes of Limitations*, 699.
 - i. *Mechanics' Lien Statutes*, 700.
- 6. *Adopted Statutes*, 700.
 - a. *In General*, 700.
 - b. *Limitation of Rule*, 702.

VIII. AMENDMENT, 703.

- 1. *Definition*, 703.
- 2. *Amendment of Bill Changing Original Purpose*, 703.

3. *Existence of Act Amended*, 703.
 - a. *In General*, 703.
 - b. *Acts Previously Amended*, 703.
 - c. *Acts Wholly Unconstitutional*, 704.
 - d. *Amendments Taking Effect as Independent Legislation*, 705.
4. *Identification of Act Amended*, 705.
 - a. *In General*, 705.
 - b. *Errors in Reference*, 706.
5. *Title of Amendatory Act*, 706.
6. *Form and Contents of Amendatory Act*, 706.
 - a. *In General*, 706.
 - b. *Constitutional Requirement of Recital of Act*, 707.
 - (1) *In General*, 707.
 - (2) *To What Legislation Applicable*, 707.
 - (a) *Independent and Dependent Legislation*, 707.
 - (b) *Codes and Revisions*, 707.
 - (c) *Supplements and Additions*, 708.
 - (d) *Amendments by Implication*, 708.
 - (3) *What Is Sufficient Recital*, 709.
 - (4) *Whether Mandatory or Directory*, 709.
 - (5) *Partial Invalidity of Amendatory Act*, 710.
 - c. *Extending Application of Existing Law*, 710.
 - (1) *Constitutional Provision*, 710.
 - (2) *Reference Statutes*, 711.
7. *Effect and Operation of Amendatory Acts*, 712.
 - a. *Not Usually Retroactive*, 712.
 - b. *Invalidity*, 712.
8. *Construction*, 712.
 - a. *In General*, 712.
 - b. *Amendment as Repeal or Continuation*, 713.
 - c. *Reference Statutes*, 714.

IX. REPEAL, 715.

1. *General Principles*, 715.
 - a. *Duration of Statutes in General*, 715.
 - b. *Power to Repeal Statutes*, 715.
 - c. *Time for Exercise of Power*, 716.
 - d. *Validity of Repealing Act*, 716.
2. *Modes of Repealing Statutes*, 717.
 - a. *Express Repeal*, 717.
 - (1) *Repealing Clause*, 717.
 - (2) *Identification of Act Repealed*, 718.
 - (3) *Repeal of Inconsistent Acts*, 719.
 - (4) *Repeal of Acts Within Purview*, 720.
 - (5) *Construction of Repealing Clause*, 720.
 - b. *Implied Repeal*, 720.
 - (1) *In General*, 720.
 - (2) *Repeals by Implication Not Favored*, 721.
 - (3) *How Implied Repeal Is Effected*, 723.
 - (a) *Constitutional Provisions*, 723.
 - (b) *Repugnant Acts*, 723.
 - aa. *In General*, 723.
 - bb. *Negative and Affirmative Terms*, 729.
 - (aa) *In General*, 729.
 - (bb) *Prescribing Different Powers, Privileges, or Duties*, 730.
 - (cc) *Prescribing Exclusive Rule — Conflicting Rights*, 731.
 - (c) *Acts Covering Same Subject*, 731.
 - aa. *Rule Stated*, 731.
 - bb. *Revisions, Compilations, and Re-enactments*, 733.

STATUTES.

- cc. Amendments "So as to Read,"* 735.
- dd. Supplemental Acts,* 736.
- ee. Acts Passed at Same Session,* 736.
- (d) Removing Reason of Law,* 736.
- (e) Disuse of Law,* 737.
- (4) Penal Acts,* 737.
 - (a) In General,* 737.
 - (b) Change in Nature of Offense,* 738.
 - (c) Change in Degree of Punishment,* 738.
- (5) General and Special Laws,* 739.
 - (a) Later General Act,* 739.
 - (b) Later Special Act,* 743.
 - (c) Contemporaneous General and Special Acts,* 744.
 - (d) Successive Special Acts,* 744.
- 3. Effect of Repeal,* 744.
 - a. General Rules,* 744.
 - b. Matters Affected by Repeal,* 745.
 - (1) In General,* 745.
 - (2) Interests Past and Closed,* 746.
 - (a) In General,* 746.
 - (b) Transactions Invalid under Repealed Statute,* 747.
 - (3) Interests Pending,* 747.
 - (a) Dependent on Repealed Statute,* 747.
 - aa. In General,* 747.
 - bb. Remedies,* 749.
 - cc. Contracts,* 750.
 - dd. Jurisdiction, Powers, and Privileges,* 751.
 - ee. Penalties and Forfeitures,* 753.
 - ff. Crimes and Punishments,* 755.
 - (aa) Effect in General of Repeal of Statute,* 755.
 - (bb) Saving Clause in Repealing Act,* 757.
 - (cc) General Statutes Limiting Effect of Repealing Laws,* 757.
 - (b) Connected with, but Independent of, Repealed Statute,* 758.
 - c. Repeal and Re-enactment,* 758.
 - (1) Re-enactment Without Express Repeal,* 758.
 - (2) Simultaneous Repeal and Re-enactment,* 758.
 - (a) Majority Rule,* 758.
 - (b) Minority Rule,* 759.
 - d. Repeal of Repealing Act,* 760.
 - (1) Rule at Common Law,* 760.
 - (2) Statutory Rule,* 761.

X. EVIDENCE, 762.

- 1. Proof of Statutes,* 762.
 - a. Domestic Statutes,* 762.
 - (1) Proof of Public Acts,* 762.
 - (2) Proof of Private Acts,* 762.
 - (a) Necessity for Proof,* 762.
 - (b) Mode of Proof,* 762.
 - aa. At Common Law,* 762.
 - bb. By Statute,* 762.
 - b. Foreign Statutes,* 763.
- 2. Statutes as Evidence,* 763.

CROSS-REFERENCES.

For matters of PLEADING AND PRACTICE related to this subject, see in the ENCYCLOPÆDIA OF PLEADING AND PRACTICE *the titles* FOREIGN LAWS, *vol. 9, p. 542; STATUTES, vol. 20, p. 593.*

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* see the following titles in this work: *COMMON LAW*, vol. 6, p. 268; *CONSTITUTIONAL LAW*, vol. 6, p. 882, and references at p. 888; *EX POST FACTO LAWS*, vol. 12, p. 525; *FINES AND PENALTIES*, vol. 13, p. 52; *FOREIGN LAWS*, vol. 13, p. 1050; *GOVERNOR*, vol. 14, p. 1095; *INTERPRETATION AND CONSTRUCTION*, vol. 17, p. 1; *JUDICIAL NOTICE*, vol. 17, p. 892; *ORDINANCES*, vol. 21, p. 943; *STARE DECISIS*, *ante*.

I. DEFINITION. — A statute is the written will of the legislature solemnly expressed according to the forms necessary to constitute it the law of the state.¹ In the *United States* it is an act of Congress, or of a state or territorial legislature passed and promulgated according to the constitutional requirements; in *England* it is an act of Parliament made by the sovereign by and with the advice and consent of the Lords and Commons.² In the civil law the term "statute" is applicable to any particular municipal law or usage, though resting for its authority on judicial decisions or the practice of nations.³ The term "statute" generally is used to designate the written law in contradistinction to the common or unwritten law.⁴

II. CLASSIFICATION — 1. **In Respect to Nature and Object** — *a. DECLARATORY* — (1) *In General.* — A declaratory statute is one which is passed in order to put an end to a doubt as to what is the common law or the meaning of another statute, and which declares what it is and ever has been.⁵ A statute in affirmation of the common law is to be construed as was the rule by that law.⁶ Declaratory statutes are in form either affirmative or negative.

(2) *Affirmative.* — An affirmative statute is one enacted in affirmative terms.⁷ Such a statute does not take away the common law in relation to the same matter.⁸ Nor does an affirmative statute repeal a precedent statute if effect can be given to both.⁹ A party may waive his benefit by an affirmative statute and take his remedy by the common law, which, however, does not mean that the statute is not binding, but that the party has his election to proceed upon the statute or at the common law.¹⁰ But if an affirmative statute, introductory of a new law, direct a thing to be done in a certain manner, that thing may not, even though there are no negative words, be done in any other manner.¹¹

(3) *Negative.* — A negative statute is one expressed in negative terms, and so controls the common law that it has no force in opposition to the statute.¹²

1. **Definition.** — *Bouv. L. Dict.*; *Lane v. Missoula County*, 6 Mont. 481. See also *People v. New York Cent. R. Co.*, 13 N. Y. 80. And see *LAW*, vol. 18, p. 569.

City Charter. — The *California Civil Code*, § 1622, provides that all contracts may be oral except such as are required by "statute" to be in writing. The charter of Los Angeles, to the extent of its purposes as a scheme of municipal government, is a "statute" within the meaning of that section. *Frick v. Los Angeles*, 115 Cal. 512.

2. *Century Dict.*

3. 2 Kent's Com. 456.

4. *Bouv. L. Dict.* And see the title *COMMON LAW*, vol. 6, p. 268.

5. **Declaratory Statutes.** — *Bouv. L. Dict.*

6. *Baker v. Baker*, 13 Cal. 87; *Miles v. Williams*, 1 P. Wms. 252; *Arthur v. Bokenham*, 11 Mod. 150.

7. **Affirmative Statutes.** — 1 *Bouv. Inst.* 105; *Lackland v. Walker*, 151 Mo. 262.

8. 2 Co. Inst. 200; *Fairchild v. Gwynne*, (Supm. Ct. Spec. T.) 14 Abb. Pr. (N. Y.) 126.

Thus, a statute without negative terms declaring that deeds shall have in evidence a certain

effect provided certain requisites are complied with, does not prevent their being used in evidence, though the requisites are not complied with, in the same manner as they might have been prior to the statute. *Jackson v. Bradt*, 2 Cal. (N. Y.) 169.

9. *Potter's Dwaris* 69.

An affirmative statute providing a different regulation in connection with the same specific act, covering the whole subject and evidently intended to prescribe an exclusive rule, will repeal a former statute on the same subject repugnant thereto, although it contains no repealing clause and does not in words refer to the earlier statute. *Edwards v. Denver*, etc., R. Co., 13 Colo. 59. And see *infra*, this title, *Repeal*.

10. 2 Co. Inst. 200; *Cro. Eliz.* 104.

11. *Cook v. Kelley*, (C. Pl. Spec. T.) 12 Abb. Pr. (N. Y.) 35; *District Tp. v. Dubuque*, 7 Iowa 262. See also *People v. Hutchinson*, 172 Ill. 486; *State v. Wrightson*, 56 N. J. L. 126. See *infra*, this title, VII. 4. *Mandatory and Directory*.

12. **Negative Statutes.** — *Bacon's Abr.*, *Statute* (G); *Bouv. L. Dict.*; *State v. Norton*, 23 N. J. L. 33.

A statute which is an entire revision of the subject is negative, and repeals the common law with which it is inconsistent.¹

b. REMEDIAL. — A remedial statute is one made to supply defects or abridge superfluities in the common law arising from the general imperfections of human laws, the change of time and circumstances, or from any other cause whatever. This being done either by enlarging the common law where too narrow or circumscribed, or by restraining it where too lax and luxuriant, has occasioned a subdivision of remedial statutes into enlarging and restraining statutes.² In this sense remedial statutes are contrasted with declaratory statutes. But according to modern classification remedial statutes are contradistinguished from penal; a recent definition being as follows: a remedial statute is one the main object of which appears directly beneficent by supplying some defect in the law or removing inconveniences, as distinguished from those the immediate aspect of which is to impose a punishment or penalty, which are called penal statutes.³ It has been held that where an act gives a penalty to the party aggrieved it is to be regarded as remedial,⁴ but if the penalty is given to the public it is penal.⁵

c. PENAL. — A penal statute is one which imposes a penalty or forfeiture for transgressing its provisions, or for doing a thing prohibited.⁶ But not every law which imposes a penalty or forfeiture is, legally speaking, a penal law — that is, a law to be construed with great strictness in favor of the defendant. Laws enacted for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, as, for instance, the revenue laws, are not in this sense penal laws.⁷ A statute may be partly penal and partly remedial. The effect and not the form of the statute is to be considered in determining its true nature.⁸

2. In Respect to Subject-matter — *a. PUBLIC.* — A public act, according to Blackstone, is a universal rule that regards the whole community.⁹ If by this it is meant that the act must apply to the whole territory, or the entire people subject to the legislative jurisdiction, the definition has undergone considerable modification in the *United States*, as it is now held that an act which in any wise affects the public at large, though operating within the limits of a particular locality, is as much a public act as one operating throughout the entire state.¹⁰

1. *State v. Wilson*, 43 N. H. 415, 82 Am. Dec. 163.

2. *Remedial Statutes.* — 1 Bl. Com. 86; *Freeland v. McCullough*, 1 Den. (N. Y.) 422.

3. *Cent. Dict.*; *Goodridge v. Union Pac. R. Co.*, 35 Fed. Rep. 36; *New Orleans v. New Orleans, etc., R. Co.*, 35 La. Ann. 684. See also *Freeland v. McCullough*, 1 Den. (N. Y.) 422.

4. *Ordway v. Central Nat. Bank*, 47 Md. 217, 28 Am. Rep. 455. A statute creating a right of action and recovery in individuals, or a particular class of individuals, is remedial. *Neal v. Moultrie*, 12 Ga. 104.

5. *Ordway v. Central Nat. Bank*, 47 Md. 217, 28 Am. Rep. 455. A statute authorizing a third person to recover treble the value of money lost by gaming is penal. *Cole v. Groves*, 134 Mass. 471.

6. *Penal Statutes.* — *Potter's Dwaris* 74; *Goodridge v. Union Pac. R. Co.*, 35 Fed. Rep. 36; *Ross v. New England Mortg. Security Co.*, 101 Ala. 362; *Globe Pub. Co. v. State Bank*, 41 Neb. 185; *Gardner v. New York, etc., R. Co.*, 17 R. I. 791.

7. *Taylor v. U. S.*, 3 How. (U. S.) 197.

8. *Gardner v. New York, etc., R. Co.*, 17 R. I. 790; *Diversey v. Smith*, 103 Ill. 378, 42 Am.

Rep. 14; *Globe Pub. Co. v. State Bank*, 41 Neb. 175; *Jones v. Barlow*, 62 N. Y. 209.

9. *Public Statutes.* — 1 Bl. Com. 86. And see *PUBLIC*, vol. 23, p. 303.

10. *West v. Blake*, 4 Blackf. (Ind.) 234; *Levy v. State*, 6 Ind. 281; *Pierce v. Kimball*, 9 Me. 54, 23 Am. Dec. 537; *State v. Baltimore County*, 29 Md. 516; *State v. Chambers*, 93 N. Car. 600; *Winooski v. Gokey*, 49 Vt. 282; *Hart v. Baltimore, etc., R. Co.*, 6 W. Va. 349. See also *U. S. v. Porte*, 1 Cranch (C. C.) 369; *Fall Brook Coal Co. v. Lynch*, (Supm. Ct. Spec. T.) 47 How. Pr. (N. Y.) 520.

See also *infra*, this subsection, *Local*.

"Any law affecting the public within the limits of the county or community would be a public law, though not a general law within the meaning of the *Alabama* constitution." *Holt v. Birmingham*, 111 Ala. 369. And see *infra*, this subsection, *General*.

Illustrations. — The following are illustrations of acts held to be public: Acts creating public corporations, *Young v. Alexandria Bank*, 4 Cranch (U. S.) 384; *Crawford v. Planters', etc., Bank*, 6 Ala. 289; *White Water Valley Canal Co. v. Boden*, 8 Blackf. (Ind.) 130; *Hankins v. Lawrence*, 8 Blackf. (Ind.) 266; *Russell v.*

An Act Supplementing or Amending,¹ or repealing,² a public act, is itself public.

The Terms "Public" and "General" in this connection are synonymous,³ and are opposed to "private."⁴

b. PRIVATE.—A private statute relates to, concerns, and affects particular persons, or something in which individuals or classes of persons are interested in a way and degree peculiar to themselves, and not common to the whole community.⁵ A private statute may embrace provisions of a public nature and *vice versa*,⁶ but such intermixture does not change or modify their respective natures; whether the statute or some enactment in it is private or public, is a question of law, to be determined by the court, in the absence of a statute declaring and settling its nature.⁷ The fact of the publication of a private act among the public acts will not, in legal contemplation, affect its nature.⁸

Branham, 8 Blackf. (Ind.) 277; *Stier v. Oskaloosa*, 41 Iowa 353; *Prell v. McDonald*, 7 Kan. 426, 12 Am. Rep. 423; *Louisiana State Bank v. Flood*, 3 Mart. N. S. (La.) 341; *Portsmouth Livery Co. v. Watson*, 10 Mass. 91; *Douglas v. State Bank*, 1 Mo. 24; *Utica Bank v. Smedes*, 3 Cow. (N. Y.) 662; regulating the disposal of public funds, *State v. Hoeffinger*, 31 Wis. 257; authorizing the sale of state lands, *West v. Blake*, 4 Blackf. (Ind.) 234; taxing bank stock, *Den v. Helmes*, 3 N. J. L. 600; *People v. Stephens*, (Supm. Ct.) 2 Abb. Pr. N. S. (N. Y.) 350; imposing penalties or providing for forfeitures to the state, *Rex v. Buggs*, *Skin*. 429; *Rex v. Morgan*, 2 Stra. 1066; *Rogers' Case*, 2 Me. 303; *Com. v. M'Curdy*, 5 Mass. 324; *Heridia v. Ayres*, 12 Pick. (Mass.) 334; *Jenkins v. Union Turnpike Road*, 1 Cai. Cas. (N. Y.) 86; *Burnham v. Acton*, (N. Y. Super. Ct.) 4 Abb. Pr. N. S. (N. Y.) 1; *State v. Cobb*, 1 Dev. & B. L. (18 N. Car.) 115; giving to an individual the privilege of improving a water highway, and of charging and taking tolls for its use, *Calking v. Baldwin*, 4 Wend. (N. Y.) 667, 21 Am. Dec. 168; regulating rates of railroad speed within a city, *Horn v. Chicago*, etc., R. Co., 38 Wis. 463.

1. Supplemental or Amendatory Act.—*Unity v. Burrage*, 103 U. S. 447; *State v. Bergen*, 34 N. J. L. 438; *Hawthorne v. Hoboken*, 32 N. J. L. 172; *Utica Bank v. Magher*, 18 Johns. (N. Y.) 341.

2. Repealing' Act.—*State v. Hoeffinger*, 31 Wis. 257.

3. 1 Kent's Com. 506; 1 Stephen's Com. 671; *Potter's Dwaris* 629; *Holland's Case*, 4 Coke 75; *Samuel v. Evans*, 2 T. R. 569. See also *Brooks v. Hyde*, 37 Cal. 366; *Allen v. Hirsch*, 8 Oregon 412; *Mills v. Gleason*, 11 Wis. 493, 78 Am. Dec. 721; *Rains v. Oshkosh*, 14 Wis. 372; *Clark v. Janesville*, 10 Wis. 136; *State v. Lean*, 9 Wis. 279.

In *Yellow River Imp. Co. v. Arnold*, 46 Wis. 214, the act under consideration was adjudged to be local, but the court expressly declined to say whether it is "private or general"—evidently using the latter term in the sense of public.

4. See *infra*, this subsection, *Private*.

5. Private Statutes.—*State v. Chambers*, 93 N. Car. 600; *Hart v. Baltimore*, etc., R. Co., 6 W. Va. 349.

6. *People v. Chautauqua County*, 43 N. Y. 10; *Bretz v. New York*, (N. Y. Super. Ct. Gen. T.) 4 Abb. Pr. N. S. (N. Y.) 258; *McLain v. New*

York, 3 Daly (N. Y.) 32; *Bacon's Abr.*, Statutes (F).

7. *Humphries v. Baxter*, 6 Ired. L. (28 N. Car.) 437; *State v. Wallace*, 94 N. Car. 827; *Durham v. Richmond*, etc., R. Co., 108 N. Car. 399; *Potter's Dwaris* 53. See also *infra*, this title, VII. 3. *General and Special Laws*.

A private act which contains some provisions of a public nature is *pro tanto* a public act. *New York Board of Fire Underwriters v. Metropolitan Lloyds*, (Supm. Ct. Spec. T.) 11 Misc. (N. Y.) 646, *affirmed* 87 Hun (N. Y.) 619.

8. *Durham v. Richmond*, etc., R. Co., 108 N. Car. 399.

Illustrations of Private Acts—*The charter of a private corporation*.—*Drake v. Flewellen*, 33 Ala. 106; *Clarion First Nat. Bank v. Gruber*, 87 Pa. St. 468, 30 Am. Rep. 378; *Mandere v. Bonsignore*, etc., Sav. Inst., 28 La. Ann. 415; *Durham v. Richmond*, etc., R. Co., 108 N. Car. 399; *Perdicaris v. Trenton City Bridge Co.*, 29 N. J. L. 367. (And the fact that the state is a stockholder in the corporation does not have the effect of making the act of incorporation a public act. *Durham v. Richmond*, etc., R. Co., 108 N. Car. 399; *Marshall v. Western North Carolina R. Co.*, 92 N. Car. 322; *State Bank v. Clark*, 1 Hawks (8 N. Car.) 36.)

Act authorizing one private corporation to guarantee the paper of another.—*Timlow v. Philadelphia*, etc., R. Co., 99 Pa. St. 284.

Act declaring that loans and contracts previously made by any person with a particular corporation shall not be deemed usurious by reason of the corporation's agreeing to pay more than the legal rate of interest. *Handy v. Philadelphia*, etc., R. Co., 1 Phila. (Pa.) 31, 7 Leg. Int. (Pa.) 26.

Act empowering the local authorities of a particular city or county to raise money by tax for the payment of certain claims against it. *Bretz v. New York*, (N. Y. Super. Ct. Spec. T.) 3 Abb. Pr. N. S. (N. Y.) 478.

Act authorizing the sale of property of infants and others under disability. *Croxall v. Shererd*, 5 Wall. (U. S.) 268; *Lobrano v. Nelligan*, 9 Wall. (U. S.) 295; *Moore v. Maxwell*, 18 Ark. 469; *Rice v. Parkman*, 16 Mass. 326; *Boon v. Bowers*, 30 Miss. 246, 64 Am. Dec. 159; *Stewart v. Griffith*, 33 Mo. 13, 82 Am. Dec. 148; *Carroll v. Olmsted*, 16 Ohio 251.

Act relieving a particular feme covert of the disabilities of coverture. *Ashford v. Watkins*, 70 Ala. 156.

Insolvent Debtors.—It has been held that

c. GENERAL — Certain Terms Distinguished. — As already stated,¹ the term "general" is synonymous with "public" and opposed to "private," when reference is had to the subject-matter of the statute.² When, however, regard is had to the extent of territory over which the statute operates, the term is opposed to "local," and describes a statute operative throughout the legislative jurisdiction and not confined to a particular locality.³ It is also used as contradistinguished from "special," and then it means relating to all of a class instead of to one or a part of that class.⁴

d. LOCAL. — The term "local" as applied to statutes is of modern origin;⁵ and is used to designate an act which operates only within a single city, county, or other particular division or place, and not throughout the entire legislative jurisdiction.⁶ In this sense the term "local" is the antithesis of "general."⁷

Local and Private. — By some authorities the term is considered as synonymous with "private,"⁸ but in one instance it was held that the word "private" referred to persons, and "local" to territory, both, however, as signifying a narrowing or restricting of purpose.⁹

Local and Public. — Again, "local" has been contrasted with "public,"¹⁰ but unhappily so, as a statute may be both local and public, local in its application and public in its object; indeed, statutes which operate alike and in the same degree, although within a prescribed locality, upon all individuals and classes of persons and their interests, subject to the law, where they are in the same condition and circumstances, possess this dual character.¹¹

an act of Congress for the relief of insolvent debtors in the District of Columbia is, as regards the Union at large, a private act. *Wright v. Paton*, 10 Johns. (N. Y.) 300.

1. **General Statutes.** — See *supra*, this subsection, **Public**. And see *GENERAL*, vol. 14, p. 948.

2. See *infra*, this title, VII. 3. **General and Special Laws.**

3. *People v. Cooper*, 83 Ill. 585; *King v. State*, 87 Tenn. 304; *Clark v. Janesville*, 10 Wis. 180. And see *Healey v. Dudley*, 5 Lans. (N. Y.) 115.

"A general law, as used in the *Alabama* constitution, is a law which operates throughout the state, alike upon all the people or all of a class." *Holt v. Birmingham*, 111 Ala. 369.

4. *Brooks v. Hyde*, 37 Cal. 366; *Bloxham v. Florida Cent., etc., R. Co.*, 35 Fla. 733; *Hymes v. Aydelott*, 26 Ind. 431; *Porter v. Thomson*, 22 Iowa 391; *Wheeler v. Philadelphia*, 77 Pa. St. 348; *Clark v. Janesville*, 10 Wis. 180. See also *People v. Wright*, 70 Ill. 398; *People v. Cooper*, 83 Ill. 585.

5. **Local Acts.** — *McGregor v. Baylies*, 19 Iowa 43.

6. *New York*. — *Sun Mut. Ins. Co. v. New York*, 8 N. Y. 241; *People v. Hills*, 35 N. Y. 449; *People v. O'Brien*, 38 N. Y. 193; *Gaskin v. Meek*, 42 N. Y. 186; *People v. Allen*, 42 N. Y. 378; *People v. Chautauqua County*, 43 N. Y. 15; *Kerrigan v. Force*, 68 N. Y. 381; *Sharp v. New York*, 31 Barb. (N. Y.) 572; *Pullman v. New York*, 54 Barb. (N. Y.) 169; *Gaskin v. Anderson*, 55 Barb. (N. Y.) 259.

North Carolina. — *State v. Chambers*, 93 N. Car. 600.

Ohio. — *State v. Judges*, 21 Ohio St. 1.

West Virginia. — *Groves v. Grant County* Ct., 42 W. Va. 593.

Wisconsin. — *Yellow River Imp. Co. v. Arnold*, 46 Wis. 214.

7. See *supra*, this subsection, **General**. See also *People v. O'Brien*, 38 N. Y. 193.

8. **Local and Private.** — *Bouvier* defines "local" as fixedness in a place (*Bouv. L. Dict., Local*); and at the word "Statute" he does not mention in his division of statutes those which are local, but defines private acts as those relating to any particular place, or to several particular places, or to one or several particular counties. So in his view, local and private, in this connection, would seem to be convertible terms.

And in *Dwarris's Statutes*, page 463, it is said that acts relating to any particular place, or to divers particular towns, or to one or divers particular counties, are private acts. And, again, at page 354, the author says that every bill for the particular benefit of a person or company, or a locality, in which the whole community is not interested, is, in a parliamentary sense, a private bill.

9. *People v. Chautauqua County*, 43 N. Y. 15.

10. *Abbott's L. Dict.*, Statute.

11. **For Instances of Statutes Possessing This Dual Character**, see:

United States. — *Illinois v. Illinois Cent. R. Co.*, 33 Fed. Rep. 730; *Knox County v. Aspinwall*, 21 How. (U. S.) 539.

Indiana. — *Levy v. State*, 6 Ind. 281; *Stephenson v. Doe*, 8 Blackf. (Ind.) 508, 46 Am. Dec. 489.

Kentucky. — *Covington v. Voskotter*, 80 Ky. 219.

Maine. — *Gorham v. Springfield*, 21 Me. 58; *State v. Jackson*, 39 Me. 291.

Maryland. — *State v. Baltimore County*, 29 Md. 516.

Massachusetts. — *Burnham v. Webster*, 5 Mass. 266; *Com. v. Springfield*, 7 Mass. 9.

North Carolina. — *State v. Chambers*, 93 N. Car. 600.

A Proviso Repealing a General Law, in so far as it may affect a particular locality, is itself local.¹

The Duration of a Statute has no bearing upon its character as being local or general; a local statute may be perpetual, and a general one temporary, and *vice versa*.²

e. REAL, PERSONAL, AND MIXED. — **The Civil Law Classification** of statutes is into real, personal, and mixed.

Real Statutes are those which have principally for their object property, and which do not speak of persons except in relation to property.³

Personal Statutes are those which have principally for their object the person, and treat of property incidentally merely.⁴

Mixed Statutes are those which deal with both persons and property.⁵

3. In Respect to Compliance Required — **a. MANDATORY.** — A statute is mandatory when noncompliance therewith will render the act done under it absolutely void.⁶

b. DIRECTORY. — If a statute is such that disregard of its provisions will constitute an irregularity, but one not necessarily fatal to acts done or proceedings had thereunder, it is said to be directory.⁷

c. PROHIBITORY. — A prohibitory statute is one which forbids all actions which disturb the public repose, or injury to private rights, or crimes or misdemeanors, or certain acts in relation to the transmission of estates, the capacity of persons, or other objects.⁸

d. PERMISSIVE. — A permissive statute is one which allows certain acts or things to be done without commanding them, as, for example, allowing certain persons to make wills, to vote, or the like.⁹ But the act when done is as valid as if done in obedience to a legislative command, and rights acquired thereby are entitled to the same protection.¹⁰

4. In Respect to Time of Passage. — The statutes from Magna Charta to the end of the reign of Edward II. are known as *vetera statuta*, or ancient statutes. Those passed in the reign of Edward III., and subsequently, are termed *nova statuta*.¹¹

5. In Respect to Time of Taking Effect — **a. PROSPECTIVE.** — A law is said to be prospective when it is applicable only to cases which arise after its enactment.¹²

b. RETROSPECTIVE. — It is retrospective when it applies to cases existing, as those which destroy or impair vested rights, create new obligations, impose

Oregon. — *Manning v. Klippel*, 9 Oregon 367. Compare *Allen v. Hirsch*, 8 Oregon 412.

Pennsylvania. — *Van Swartow v. Com.*, 24 Pa. St. 131.

Tennessee. — *State v. Algood*, 87 Tenn. 164. Compare *Johnson v. State*, 3 Lea (Tenn.) 469, 31 Am. Rep. 648.

Texas. — *Orr v. Rhine*, 45 Tex. 345.

Vermont. — *Winooski v. Gokey*, 49 Vt. 282.

Wisconsin. — *State v. Lean*, 9 Wis. 279; *Clark v. Janesville*, 10 Wis. 136; *Rochester v. Alfred Bank*, 13 Wis. 432, 80 Am. Dec. 746; *Burhop v. Milwaukee*, 21 Wis. 260.

Compare *Loper v. St. Louis*, 1 Mo. 681.

1. *Fire Dept. v. Bacon*, 2 Abb. App. Dec. (N. Y.) 127.

2. *People v. Wright*, 70 Ill. 398. See also *infra*, this section, *In Respect to Duration*.

3. **Real Statutes.** — Story on Conflict of Laws, § 13; *Saul v. His Creditors*, 5 Mart. N. S. (La.) 594, 16 Am. Dec. 212; *Prats v. His Creditors*, 2 Rob. (La.) 507; *Companhia de Mocambique v. British South Africa Co.*, (1892) 2 Q. B. 396.

4. **Personal Statutes.** — Story on Conflict of Laws, § 13; *Companhia de Mocambique v.*

British South Africa Co., (1892) 2 Q. B. 396; *Saul v. His Creditors*, 5 Mart. N. S. (La.) 599, 16 Am. Dec. 212.

5. **Mixed Statutes.** — Story on Conflict of Laws, § 13.

6. **Mandatory Statutes.** — Abbott's L. Dict.; Black's L. Dict. And see *infra*, this title, VII. 4. *Mandatory and Directory*.

7. **Directory Statutes.** — Black's Law Dict. And see *infra*, this title, VII. 4. *Mandatory and Directory*.

8. *Potter's Dwaris* 74; 1 Bouv. Inst. 109; *Philpott v. St. George's Hospital*, 6 H. L. Cas. 338.

9. *Potter's Dwaris* 74; 1 Bouv. Inst. 110. See also *Nicholl v. Allen*, 1 B. & S. 935, 101 E. C. L. 935; *Lackland v. Walker*, 151 Mo. 262.

10. *Slack v. Maysville, etc.*, R. Co., 13 B. Mon. (Ky.) 1.

11. Bouv. L. Dict. As to what English statutes constitute a part of the common law of the states of the Union, see the title COMMON LAW, vol. 6, p. 278.

12. Black's L. Dict.

new duties, or attach new disabilities in regard to transactions already past.¹

6. In Respect to Duration — *a.* **PERPETUAL.** — A perpetual statute is one for the continuance of which there is no time limited, although this be not expressly declared.² If, however, a statute which does not itself contain any limitation is to be governed by another which is temporary merely, the former will also be temporary and dependent upon the existence of the latter.³

b. **TEMPORARY.** — A temporary statute is one limited in duration at the time of its enactment, either expressly or by force of its character.⁴ An act may be temporary in some of its parts, and permanent in others.⁵ If a statute, temporary when enacted, is made permanent by a subsequent act, it is to be deemed permanent *ab initio*.⁶ A temporary statute is not necessarily a special statute; the limitation is merely in regard to time, and its character may be such that it is also a general statute.⁷ Rights acquired under a temporary statute may continue after its expiration.⁸

III. ENACTMENT — 1. The Legislature — *a.* CONSTITUTION AND STATUS —

(1) *In General.* — It is essential to the enactment of a valid statute that the legislature should have been constituted legally, and that it should act in conformity to constitutional provisions. Its members must have been elected and their election certified in accordance with the requirements of the constitution, and this instrument must be followed also in convening and organizing the legislature.⁹

(2) *Call or Proclamation for Convening Legislature.* — The proclamation for convening the legislature, when required by the constitution, must be issued by the proper officer,¹⁰ and the legislature having once voluntarily dispersed cannot thereafter lawfully reconvene without a call from the executive,¹¹ though if the dispersion were the result of any sudden irruption or insurrection, or of any external force, the legislature might have the power and duty to reassemble.¹²

(3) *Presumption of Legal Constitution.* — When the legislature is regularly organized, fully recognized by the political department of the government, has no rival organization, and has existed and performed duties as a legislature, it is presumed, as far as the judiciary is concerned, that such a legislature is legally constituted.¹³

(4) *De Facto Legislature.* — While it is true that a fraudulent legislature which succeeded in driving out its *de jure* rival and forcing it to retire would, by continuing in the field and performing the duties and exercising the powers of the legislature, become, when recognized, a *de facto* legislature,¹⁴ still if the *de jure* organization continues to exist and to assert its rights without cessation, it is impossible for a legislature *de facto*, though recognized by the political power in the state, to usurp and destroy its title.¹⁵

1. Society, etc., v. Wheeler, 2 Gall. (U. S.) 105. See *infra*, this title, VII. 5. *Retrospective Laws.* And see the title *Ex Post Facto Laws*, vol. 12, p. 525.

2. 1 Bouv. Inst. 113.

In Wellington, Petitioner, 16 Pick. (Mass.) 87, 26 Am. Dec. 631, it was said that all acts of legislation not in terms limited in their operation to a particular period of time are in legal contemplation perpetual; which means, until duly altered or changed by competent authority.

3. 1 Bouv. Inst. 113; Bacon's Abr., Statutes (D).

4. 1 Bouv. Inst. 112.

5. Warren v. Windle, 3 East 205.

6. Rex v. Swiney, 1 Alc. & Nap. 139.

7. People v. Wright, 70 Ill. 388.

8. Steavenson v. Oliver, 8 M. & W. 234.

9. *Status in General.* — See Gormley v. Taylor, 44 Ga. 76; State v. Judge, 29 La. Ann. 223; Rohrbacher v. Jackson, 51 Miss. 748.

10. *Proclamation.* — People v. Parker, 3 Neb. 409, 19 Am. Rep. 634.

Revocation of Proclamation. — See title GOVERNOR, vol. 14, p. 1101, note 1.

11. *Reconvening.* — People v. Hatch, 33 Ill. 9.

12. People v. Hatch, 33 Ill. 9.

13. *Presumption.* — Luther v. Borden, 7 How. (U. S.) 1; *Ex p.* Dorr, 3 How. (U. S.) 104; Hughes v. Felton, 11 Colo. 489; Gormley v. Taylor, 44 Ga. 85; State v. Judge, 29 La. Ann. 225.

14. *De Facto Legislature.* — Prince v. Skillin, 71 Me. 369, 36 Am. Rep. 325.

15. Matter of Gunn, 50 Kan. 155; Opinion of Justices, 70 Me. 612. See generally the title *DE FACTO OFFICERS*, vol. 8, p. 771.

In the Case of Dual State Governments a court will recognize that legislature which belongs to that government of which the court is a part.¹

(5) *Power of Courts to Examine into Status* — (a) *Where Legal Status of Entire Body Attacked*. — Where the legal status of the legislature — or either of its branches — as a whole is questioned, the judiciary, when the matter is properly before it, has jurisdiction to inquire into and determine whether the body referred to is legally constituted; ² or, if there are two rival organizations, to determine which of them is so constituted.³

(b) *Rule as to Election and Qualification of Legislators* — *aa. GENERAL RULE STATED*. — Of the election and qualification of its members, the legislature, after its organization, is the sole judge.⁴ And when it has determined that its members are regularly elected, the question cannot, as a rule, be raised afterwards in testing the validity of a law.⁵

bb. WHERE NUMBER OF MEMBERS EXCEEDS CONSTITUTIONAL LIMIT. — But it has been held that where it appears from the journal of the legislature itself that the number of members exceeds the constitutional limit, and that an act was passed only by the assistance of the votes of those not entitled to seats in the legislature, the court must recognize the fact and declare the act so passed invalid.⁶

b. ORGANIZATION — (1) *In General*. — It is contemplated that each house of the legislature shall be organized by the persons who are *prima facie* members thereof, as shown by the duly authenticated certificates issued by the proper canvassing officers.⁷

(2) *Quorum* — (a) *What Constitutes*. — To form a quorum for the organization of the house, the presence only of the number of members required by the constitution is necessary; and the presence of such a number of persons alone, participating in the organization, gives the necessary power without regard to the manner in which the fact is ascertained.⁸ Less than the required number of persons have no power to act in the organization; and, on the withdrawal of a major portion of the whole number of members in the body so as to leave no quorum, the power of a minority to act ceases.⁹

(b) *Who May Be Counted to Ascertain Existence of Quorum*. — In determining the

1. *Dual Governments*. — *Luther v. Borden*, 7 How. (U. S.) 40; *State v. Judge*, 29 La. Ann. 223.

2. *Where Legal Status of Entire Body Attacked*. — See *Macon*, etc., R. Co. v. Little, 45 Ga. 370; *State v. Meadows*, 1 Kan. 91.

3. *Rival Organizations*. — *Matter of Gunn*, 50 Kan. 155; *Opinion of Justices*, 70 Me. 609. See also *Hughes v. Felton*, 11 Colo. 489; *Macon*, etc., R. Co. v. Little, 45 Ga. 371.

4. *Legislature the Sole Judge of Election and Qualification of Members* — *Colorado*. — *Hughes v. Felton*, 11 Colo. 489.

Kansas. — *State v. Gilmore*, 20 Kan. 551, 27 Am. Rep. 189.

Michigan. — *People v. Mahaney*, 13 Mich. 481; *Cooley v. Fitzgerald*, 41 Mich. 2; *Royce v. Goodwin*, 22 Mich. 496; *Alter v. Simpson*, 46 Mich. 138; *Doran v. De Long*, 48 Mich. 552; *People v. Harshaw*, 60 Mich. 200, 1 Am. St. Rep. 498; *Weston v. Probate Judge*, 69 Mich. 600; *Naumann v. City Canvassers*, 73 Mich. 252.

Minnesota. — *O'Ferrall v. Colby*, 2 Minn. 180.

Montana. — *State v. Kenney*, 9 Mont. 223.

Ohio. — *Dalton v. State*, 43 Ohio St. 652.

5. *People v. Mahaney*, 13 Mich. 481; *Auditor Gen. v. Menominee County*, 89 Mich. 552.

Where the Legislature Has Failed to Determine whether or not one of its members is legally

entitled to his seat, the courts, when the question comes before them, will regard the person who has a certificate of election from the legally constituted canvassing board as being a member. *State v. Kenney*, 9 Mont. 223.

6. *Excess of Constitutional Limit*. — *State v. Francis*, 26 Kan. 737. See also *Prouty v. Stover*, 11 Kan. 238.

7. *Organization by Persons Prima Facie Members*. — *Matter of Gunn*, 50 Kan. 155; *State v. Van Camp*, 36 Neb. 9, 91.

8. *Quorum*. — *U. S. v. Ballin*, 144 U. S. 1; *Matter of Gunn*, 50 Kan. 155.

Withdrawal of Original Roll of Membership. — Where, in the organization of a house of the legislature, the constitution requires that the secretary of state shall lay before the body a roll of the names of those persons whose certificates of membership have been filed in his office, the withdrawal of the secretary of state with the roll, after having brought it to the proper place, and the subsequent use by the legislative body of a duplicate of the same roll, was held to be a sufficient compliance with the constitutional provision, so that the valid organization of the house was not affected by the failure to use the original roll. *Matter of Gunn*, 50 Kan. 155.

9. *Brown v. District of Columbia*, 127 U. S. 579; *Matter of Gunn*, 50 Kan. 155.

existence of a constitutional quorum for organization only those members can be counted who have recognized the temporary organization.¹

c. EXTRA SESSIONS — (1) In General. — An extra session of the legislature is an entire and independent session, and not a part of the preceding regular session.² Hence a constitutional provision that after a bill has been rejected no bill having the same substance shall be passed at the same session of the legislature, does not prevent the passage, at an extra session, of a bill rejected at the preceding regular session.³

(2) Field of Legislation. — In the absence of some constitutional provision limiting the same, the field of legislation at an extra session is as broad as at a regular session.⁴ But a constitutional prohibition against legislation at an extra session concerning matters not mentioned in the proclamation calling the same, or presented by the governor to the legislature for its consideration, is mandatory, and any legislation attempted in disregard of it is void.⁵

Approval of Act. — And such legislation cannot be validated by the subsequent approval of the governor, for such approval cannot have the effect of dispensing with the prerequisites that must exist in order to confer upon the legislature the authority to pass the act.⁶

d. EXTENDED SESSIONS. — The constitutions of some states prescribe that the sessions of the legislature shall not exceed a certain number of days, unless extended by a vote of two-thirds of all the members elected to each house. Where this is the case, after a session has been once properly extended, it seems that the constitutional restriction is satisfied, and a majority vote is thereafter sufficient to protract the session from time to time. In that case laws passed after the limited time are valid.⁷

2. General Rule as to Compliance with Constitutional Requirements. — It may be laid down as a general rule that in order to the enactment of a valid statute it is necessary that the legislature shall comply with all essential requirements of the constitution with regard to the mode and form of the enactment.⁸

1. Matter of Gunn, 50 Kan. 155.

2. Not a Part of Preceding Regular Session. — See *People v. Rice*, 135 N. Y. 473.

3. *Williams v. Nashville*, 89 Tenn. 487.

4. Field of Legislation at Extra Sessions. — *Morford v. Unger*, 8 Iowa 82. And see title GOVERNOR, vol. 14, p. 1101.

5. Constitutional Restrictions. — *Wells v. Missouri Pac. R. Co.*, 110 Mo. 286; *St. Louis v. Withaus*, 90 Mo. 646, 16 Mo. App. 247; *Chicago, etc., R. Co. v. Wolfe*, 61 Neb. 502; *Jones v. Theall*, 3 Nev. 233; *Davidson v. Moorman*, 2 Heisk. (Tenn.) 575; *Manor Casino v. State*, (Tex. Civ. App. 1896) 34 S. W. Rep. 769.

A Message or Communication in Writing from the Governor is necessary in order that a special session of the legislature may lawfully legislate upon a particular subject within the meaning of the constitutional provision restricting the field of legislation to matters embraced within the proclamation convening the legislature or "presented to them by the governor." *Manor Casino v. State*, (Tex. Civ. App. 1896) 34 S. W. Rep. 769.

The Entire Proclamation of the Governor Should Be Considered in determining whether any given act at a special session is germane to the objects stated in the call of the executive. *Chicago, etc., R. Co. v. Wolfe*, 61 Neb. 502.

Such Restrictions Apply Only to Legislation, and though there is no mention of such matters in the proclamation, the state legislature may at an extra session proceed with the election of a United States senator. Election of Senator

Faulkner of West Virginia, Senate Report, Fiftyeth Congress. Or may confirm appointments of the governor. *People v. Blanding*, 63 Cal. 333.

Legislation Held Within Terms of Proclamations — *Mitchell v. Franklin, etc.*, Turnpike Co., 3 Humph. (Tenn.) 456; *Baldwin v. State*, 21 Tex. App. 591; *State v. Shores*, 31 W. Va. 491, 13 Am. St. Rep. 875.

Evidence. — A statute will not be held unconstitutional on the ground that it was passed at a special session and that there was no message from the governor that authorized a law in reference to that subject, where the only evidence of the want of a sufficient message, consists of a copy of the message convening the legislature, and the senate journal, which disclosed no message on the subject. *Ball v. Presidio County*, (Tex. Civ. App. 1894) 27 S. W. Rep. 702, reversed on other grounds 88 Tex. 66. See also *Williams v. Taylor*, 83 Tex. 672.

6. Act Not Validated by Subsequent Approval. — *Manor Casino v. State*, (Tex. Civ. App. 1896) 34 S. W. Rep. 769.

7. Extended Sessions. — *Speed v. Crawford*, 3 Met. (Ky.) 214; *Mitchell v. Franklin, etc.*, Turnpike Co., 3 Humph. (Tenn.) 456.

8. Compliance with Constitutional Requirements. — See the following cases:

United States. — *Field v. Clark*, 143 U. S. 649; *South Ottawa v. Perkins*, 94 U. S. 260; *Post v. Kendall County*, 105 U. S. 667; *Gardner v. Collector*, 6 Wall. (U. S.) 499; *Luther v.*

Hence if it appears from the journals that the requirements of the constitution were not observed, the statute may not stand, even though the journals need not have shown the particular matters in which the noncompliance lay.¹ But unless the contrary appears from the journal it will, as a rule, be presumed that all essential constitutional requirements were complied with.²

Implied Requirements. — It has also been asserted that rules and usages regarding formalities for the passage of laws when settled and known at the time of the adoption of the constitution may be deemed to have been adopted into it by implication.³

Borden, 7 How. (U. S.) 38; *Walnut v. Wade*, 103 U. S. 683; *Railroad Tax Case*, 8 Sawy. (U. S.) 238.

Alabama. — *Mosely v. Tuthill*, 45 Ala. 648; *Dane v. McArthur*, 57 Ala. 454; *Sayre v. Pollard*, 77 Ala. 608; *Stein v. Leeper*, 78 Ala. 517; *Moog v. Randolph*, 77 Ala. 597; *Jones v. Hutchinson*, 43 Ala. 721; *Perry County v. Selma*, etc., R. Co., 58 Ala. 546; *Moody v. State*, 48 Ala. 115, 17 Am. Rep. 28; *State v. Buckley*, 54 Ala. 599.

Arkansas. — *Smithee v. Campbell*, 41 Ark. 471; *Webster v. Little Rock*, 44 Ark. 536; *Worthen v. Badgett*, 32 Ark. 496; *State v. Little Rock*, etc., R. Co., 31 Ark. 701; *State v. Crawford*, 35 Ark. 237; *Vinsant v. Knox*, 27 Ark. 266; *Smithee v. Garth*, 33 Ark. 17; *Burr v. Ross*, 19 Ark. 250.

California. — *Weill v. Kenfield*, 54 Cal. 111.

Colorado. — *Collier*, etc., *Lith. Co. v. Henderson*, 18 Colo. 259.

Florida. — *State v. Green*, 36 Fla. 154.

Illinois. — *Miller v. Goodwin*, 70 Ill. 659; *People v. DeWolf*, 62 Ill. 253; *People v. Loewenthal*, 93 Ill. 191; *Spangler v. Jacoby*, 14 Ill. 297, 58 Am. Dec. 571; *People v. Starne*, 35 Ill. 121, 85 Am. Dec. 348; *Ryan v. Lynch*, 68 Ill. 160; *People v. Knopf*, 198 Ill. 340.

Kansas. — *State v. Francis*, 26 Kan. 724; *Martin v. Borgman*, 21 Kan. 672; *In re Vandenberg*, 28 Kan. 243; *Weyand v. Stover*, 35 Kan. 545.

Kentucky. — *Allen v. Hall*, 14 Bush (Ky.) 85.

Maryland. — *Berry v. Baltimore*, etc., R. Co., 41 Md. 446, 20 Am. Rep. 69; *Legg v. Annapolis*, 42 Md. 203.

Michigan. — *Green v. Graves*, 1 Dougl. (Mich.) 351; *Atty.-Gen. v. Joy*, 55 Mich. 94; *People v. Mahaney*, 13 Mich. 481.

Minnesota. — *Ramsey County v. Heenan*, 2 Minn. 330; *State v. Hastings*, 24 Minn. 78; *Burt v. Winona*, etc., R. Co., 31 Minn. 472.

Nebraska. — *State v. McLelland*, 18 Neb. 236, 53 Am. Rep. 814; *State v. Liedtke*, 9 Neb. 462; *State v. Lancaster County*, 6 Neb. 479.

New Hampshire. — *Opinion of Justices*, 35 N. H. 579, 52 N. H. 622.

New York. — *People v. Highway Com'rs*, 54 N. Y. 276, 13 Am. Rep. 581; *Matter of Bernstein*, 3 Redf. (N. Y.) 20.

North Carolina. — *State v. Patterson*, 98 N. Car. 666; *Slocumb v. Fayetteville*, 125 N. Car. 362.

Oregon. — *Curry v. Southern Pac. R. Co.*, 21 Oregon 566; *State v. Rogers*, 22 Oregon 348.

South Carolina. — *State v. Platt*, 2 S. Car. 159, 16 Am. Rep. 647; *State v. Smalls*, 11 S. Car. 262; *State v. Hagood*, 13 S. Car. 46; *Walker v. State*, 12 S. Car. 200.

Tennessee. — *Williams v. State*, 6 Lea (Tenn.)

549; *Gaines v. Horrigan*, 4 Lea (Tenn.) 608; *Memphis Freight Co. v. Memphis*, 4 Coldw. (Tenn.) 419; *State v. Gaines*, 1 Lea (Tenn.) 734.

Texas. — *Houston*, etc., R. Co. v. *Odum*, 53 Tex. 343; *Blessing v. Galveston*, 42 Tex. 641; *Hunt v. State*, 22 Tex. App. 396, *overruling* *Blessing v. Galveston*, 42 Tex. 641, and *Usener v. State*, 8 Tex. App. 177.

Utah. — *Lyman v. Martin*, 2 Utah 136; *Ritchie v. Richards*, 14 Utah 345.

West Virginia. — *Boyers v. Crane*, 1 W. Va. 176; *Osburn v. Staley*, 5 W. Va. 85, 13 Am. Rep. 640.

Wisconsin. — *Meracle v. Down*, 64 Wis. 323; *Bound v. Wisconsin Cent. R. Co.*, 45 Wis. 543.

Wyoming. — *Brown v. Nash*, 1 Wyo. 85.

Mandatory and Directory Provisions. — See *State v. Mead*, 71 Mo. 271; *State v. Mason*, 155 Mo. 486; *State v. Field*, 119 Mo. 593.

Proposal of Constitutional Amendment Not Subject to Constitutional Provisions. — See title CONSTITUTIONAL LAW, vol. 6, p. 906.

An Amendment to a Local Law must be adopted by pursuing the same prerequisites and methods that are required for the adoption of the original act. *Ashbrook v. Schaub*, 160 Mo. 107.

Special Provisions with Reference to Passage of "Special City Laws" — **To What Statutes Applicable.** — See *McGrath v. Grout*, 171 N. Y. 7, *affirming* 69 N. Y. App. Div. 314, which *affirmed* 37 Misc. (N. Y.) 64; *Chrystal v. New York*, 63 N. Y. App. Div. 93; *People v. Murray*, 4 N. Y. App. Div. 185.

1. When Journal Shows Failure to Observe Constitutional Provisions. — *Perry County v. Selma*, etc., R. Co., 58 Ala. 546; *State v. Green*, 36 Fla. 154; *State v. Francis*, 26 Kan. 734; *Berry v. Baltimore*, etc., R. Co., 41 Md. 446, 20 Am. Rep. 69; *Currie v. Southern Pac. R. Co.*, 21 Oregon 566; *State v. Rogers*, 22 Oregon 348; *Brewer v. Huntingdon*, 86 Tenn. 737; *Ritchie v. Richards*, 14 Utah 345.

2. Presumption. — *Chamlee v. Davis*, 115 Ga. 266; *People v. Loewenthal*, 93 Ill. 191; *Atty.-Gen. v. Rice*, 64 Mich. 385; *People v. Chenango County*, 8 N. Y. 317. See also *Cutcher v. Crawford*, 105 Ga. 180; *State v. Mulkey*, (Idaho 1899) 59 Pac. Rep. 17; *In re Ellis*, 55 Minn. 401, 43 Am. St. Rep. 514; *State v. Long*, 21 Mont. 26; *McKinnon v. Cotner*, 30 Oregon 588; *Kilgore v. Magee*, 85 Pa. St. 412; *Ritchie v. Richards*, 14 Utah 345. And see *infra*, this section, 15. b. *Effect of Omissions.*

Presumption of Compliance with Directory Constitutional Provision. — *State v. Mason*, 155 Mo. 486.

3. Implied Requirements. — *Cooley Const. Lim.* (6th ed.) 156. See also *Field v. Clark*, 143 U. S. 649; *Pangborn v. Young*, 32 N. J. L. 33.

3. Statutory Requirements. — A statutory provision for the direction of the legislature in its action on proposed measures receives its entire force from legislative sanction and exists only at legislative pleasure. Hence an act cannot be held invalid because such statutory requirements were not complied with, or because the requirement was suspended by a vote less than that required by the statute establishing the rule.¹

4. Parliamentary Rules. — Each legislative house has power to make its own rules not in disregard of constitutional provisions, and to change and suspend them at will; and, generally, courts will not inquire whether such rules have been complied with in the enactment of a statute.²

5. Introduction — *a.* **THE FIRST STEP.** — The first step in the enactment of a statute is the introduction of the bill,³ and by the constitutions of many states no law can be passed except by bill.⁴

b. **NOTICE OF INTRODUCTION.** — Sometimes constitutions require before introduction that notice be given a certain time in advance; this requirement is limited usually to special or local bills.⁵ As a rule, courts will not inquire whether this requirement has been observed,⁶ at least where the lack of notice does not affirmatively appear by the journal, as it will be presumed, where the journals are silent as to the notice, that the constitutional requirements were complied with.⁷

c. **TIME FOR INTRODUCTION.** — In some states it is provided, in order to prevent lack of deliberation in the enactment of laws and to allow time for publicity and protest, that no bill shall be introduced after a certain specified time in the session.⁸ Attempts have been made to evade this provision by calling a new measure an amendment or substitute bill. The rule as to such bills is that when the so-called amendment or substitute bill has in view the same general object as the first bill and is germane to its purpose, it may be valid,⁹ but where the substitute has no connection with the original and relates to a subject, not germane thereto, but is a palpable attempt to evade this provision, it is invalid.¹⁰

1. Statutory Requirements. — *Sweitzer v. Territory*, 5 Okla. 297; *Jones v. Territory*, 5 Okla. 536.

2. Rules. — *St. Louis, etc., R. Co. v. Gill*, 54 Ark. 101; *McDonald v. State*, 80 Wis. 407; *In re Ryan*, 80 Wis. 414. See also *People v. Hatch*, 33 Ill. 9.

3. The Bill Is the Form or Draft of a law presented to a legislature but not yet enacted, or before it is enacted a proposed or projected law. *May v. Rice*, 91 Ind. 546.

4. See the various state constitutions.

5. Laws Held Not Within Requirement of Notice. — *State v. Crawford*, 35 Ark. 237; *State v. Duval County Com'rs*, 23 Fla. 483; *Middleton v. St. Augustine*, 42 Fla. 287; *State v. Murray*, 47 La. Ann. 1424.

In Texas the requirement of notice has been dispensed with in reference to the formation of school districts by a constitutional amendment adopted in 1883. *State v. Brownson*, 94 Tex. 436.

Statutes Not Requiring Previous Publication of Notice. — See *State v. Capdevielle*, 104 La. 561.

What Notice Must Contain. — A special act of the legislature affecting a particularly described territory is violative of the section of the New Jersey constitution requiring notice to be given of all applications for special acts if the description includes territory not described in the notice. *Atty.-Gen. v. Tuckerton*, 67 N. J. L. 120.

6. Courts Will Not Inquire as to Notice. — *Walker v. Griffith*, 60 Ala. 361; *Harrison v.*

Gordy, 57 Ala. 49; *Davis v. Gaines*, 48 Ark. 370; *Speer v. Athens*, 85 Ga. 49; *Peed v. McCrary*, 94 Ga. 487; *Day v. Stetson*, 8 Me. 365; *McClinch v. Sturgis*, 72 Me. 288; *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *Brodnax v. Grooin*, 64 N. Car. 247; *Perkins v. Philadelphia*, 156 Pa. St. 539, 554, 33 W. N. C. (Pa.) 41. But compare *Ewing Tp. v. Trenton*, 57 N. J. L. 318.

A Minority Report of a member of a senate committee is not competent evidence to prove that no notice was given. *Cutcher v. Crawford*, 105 Ga. 180.

Legislature the Sole Judge Whether Notice of Intention to Apply for Passage of Local Law Sufficient. — *Moller v. Galveston*, 23 Tex. Civ. App. 693.

7. Presumption. — *Keene v. Jefferson County*, 135 Ala. 465.

8. Atty.-Gen. v. Rice, 64 Mich. 385.

9. Same General Object. — *Renackowsky v. Water Com'rs*, 122 Mich. 613; *Detroit v. Schmid*, 128 Mich. 379; *Davock v. Moore*, 105 Mich. 120; *Toll v. Jerome*, 101 Mich. 468; *Powell v. Jackson Common Council*, 51 Mich. 131; *Atty.-Gen. v. Amos*, 60 Mich. 372; *Hart v. McElroy*, 72 Mich. 446; *Pack v. Barton*, 47 Mich. 520; *Atty.-Gen. v. Rice*, 64 Mich. 385.

10. Amendment Not Connected with Original Object. — *Sackrider v. Saginaw County*, 79 Mich. 59; *Atty.-Gen. v. Detroit, etc., Plank Road Co.*, 97 Mich. 589.

d. IN WHICH HOUSE BILLS MAY ORIGINATE.—Generally, bills may originate in either house and may be amended, altered, or rejected in the other house.¹ There is a general exception, however, to the effect that bills for raising revenue must originate in the lower house.² But this exception is generally held to apply merely to laws whose primary object is the raising of revenue, and a bill which has some other legitimate and well-defined purpose does not become a bill for raising revenue so that it must originate in the lower house merely because, as an incident to the main object, it may contain some provision for the payment of certain dues, license fees, or taxes.³

6. Readings—*a. REQUIREMENT OF THREE READINGS.*—It is a very usual constitutional requirement that a bill shall be read in each house three times on different or successive days, before being finally passed.⁴

b. WHETHER REQUIREMENT DIRECTORY OR MANDATORY—(1) *In General.*—This provision is sometimes directory,⁵ but generally mandatory, so that an act not so read is void.⁶

(2) *Provision as to Manner of Reading Bills.*—A constitutional provision that the act shall be read section by section on final passage is mandatory.⁷ But a provision requiring the reading to be "distinct" has been held merely directory, for the degree of distinctness cannot be judicially determined.⁸

c. WHETHER READING MUST BE IN FULL.—In some states the constitution expressly designates that all bills shall be read a certain number of times in full or at length;⁹ but a provision merely requiring three readings is

1. General Rule.—*People v. Knopf*, 198 Ill. 340.

Where a bill originated in the senate, and having been passed was sent to the house, where it was passed with amendments and then placed in the hands of the committee of conference for adjustment, and was reported by them with a change of title, its sections having been reduced from twenty-six to twenty-two, and some of them transposed, it was held that these changes did not make it a new bill originating in the conference committee, and that it did not violate the article of the constitution which only provided that bills may originate in either house. *Nelson v. Haywood County*, 91 Tenn. 596.

2. See *Givanovich's Succession*, 50 La. Ann. 625; *Sala's Succession*, 50 La. Ann. 1009. See also cases cited in next note, and **REVENUE**, vol. 24, p. 881.

3. When Revenue a Mere Incident.—*Twin City Nat. Bank v. Nebeker*, 167 U. S. 196, affirming 3 App. Cas. (D. C.) 190; *Geer v. Ouray County*, 97 Fed. Rep. 435, 38 C. C. A. 250; *Lumberman's Nat. Bank v. Huston*, 3 App. Cas. (D. C.) 202; *Harper v. Elberton*, 23 Ga. 566; *State v. Bernheim*, 19 Mont. 512; *State v. Wright*, 14 Oregon 365.

The Alabama Dispensary Law of 1899 is not an act for raising revenue. *Sheppard v. Dowling*, 127 Ala. 1.

A Bill Subjecting Mortgages to Taxation from which they had theretofore been exempt under previous laws is not strictly a law for raising revenue. *Mumford v. Sewall*, 11 Oregon 67, 50 Am. Rep. 462. See also *Dundee Mortg. Trust Invest. Co. v. Parrish*, 11 Sawy. (U. S.) 92.

An Act Authorizing Municipalities to Levy Taxes for certain purposes is not a bill for raising revenue. *Geib v. State*, 31 Tex. Crim. 514.

Appropriations.—The exclusive privilege of the house of representatives under the constitution to originate money bills is limited to bills that transfer money or property from the people

to the state, and does not include bills that appropriate money from the treasury of the state to particular uses of the government or bestow it upon individuals or corporations. *Opinion of Justices*, 126 Mass. 557; *Opinion of Justices*, 70 N. H. 642.

A Law That Requires a Fee to Be Paid to an Officer, and finally covered into the treasury of a county, for which the party paying the fee receives some equivalent in return other than the benefit of good government which is enjoyed by the whole community, and which the party may pay and obtain the benefits under the law, or let it alone, as he chooses, does not come within the category of an act for raising revenue. *Northern Counties Trust v. Sears*, 30 Oregon 388.

4. Requirement of Three Readings.—*Jones v. Hutchinson*, 43 Ala. 721; *Ramsey County v. Heenan*, 2 Minn. 330; *Hooker v. Greenville*, 130 N. Car. 472; *Rodman-Heath Cotton Mills v. Waxhaw*, 130 N. Car. 293.

5. Requirement Directory.—*Miller v. State*, 3 Ohio St. 475; *Pim v. Nicholson*, 6 Ohio St. 176.

6. Requirement Mandatory.—*Post v. Kendall County*, 105 U. S. 667; *South Ottawa v. Perkins*, 94 U. S. 260; *Weill v. Kenfield*, 54 Cal. 111; *Cohn v. Kingsley*, (Idaho 1897) 49 Pac. Rep. 985; *Brown v. Collister*, (Idaho 1897) 51 Pac. Rep. 417; *People v. Campbell*, 8 Ill. 466; *Ryan v. Lynch*, 68 Ill. 160; *Burritt v. State Contract Com'rs*, 120 Ill. 322; *Ramsey County v. Heenan*, 2 Minn. 330; *State v. Burlington, etc., R. Co.*, 60 Neb. 741.

7. Provision for Reading Section by Section Mandatory.—*Brown v. Collister*, (Idaho 1897) 51 Pac. Rep. 417.

8. Provision for "Distinct" Reading Directory.—*Pim v. Nicholson*, 6 Ohio St. 176.

9. Readings in Full or at Length.—In *California* it is required that the bill be read three times at length, otherwise it is void. *Weill v. Kenfield*, 54 Cal. 111.

usually held not to require that each reading shall be of the entire bill, but, provided it has been read in full, one or two of the other readings may be merely by the title.¹

Documents Referred to in Bill. — It has been considered unnecessary to read at length documents referred to in a bill, provided that the references thereto are sufficiently certain.²

d. APPLICATION TO AMENDMENTS. — The requirement of three readings does not apply to amendments proposed during the passage of the bill,³ even though something not embodied in the original bill is thereby made a law.⁴ But in *North Carolina* this has been denied in reference to acts raising money, creating a debt, or laying a tax.⁵

e. APPLICATION TO CODIFICATION. — It has been held that a constitutional provision requiring every bill to be read three times in each house before its passage does not apply to the extent of requiring, in order to the valid enactment of a statute adopting the existing statute law of the state as a code, that all of the provisions so adopted should be embodied in one act and that act read three times before its passage.⁶

f. SUBSTITUTE BILL. — It has been held that where a bill has been read and referred to a committee, who have reported favorably on a substitute bill having the same general object, it is not necessary to the valid enactment of the substitute bill that it should be considered as an original bill and read three times on three different days.⁷

g. READING IN COMMITTEE. — When a bill has been read at length in committee of the whole, the report of that fact and the recording of it upon the journal will be deemed sufficient as one of the required three readings.⁸

h. READING IN BOTH HOUSES ON SAME DAY. — It has been held in

In *Minnesota* a bill must be read twice at length prior to its passage. *Ramsey County v. Heenan*, 2 Minn. 330.

Under the *Arkansas* constitution of 1874, bills must be read at length. *Chicot County v. Davies*, 40 Ark. 200.

In the constitution of *Alabama* it is provided that no bill shall become a law unless on its final passage it be read at length. *State v. Buckley*, 54 Ala. 599.

1. Reading by Title. — *State v. Dillon*, 42 Fla. 95; *McCulloch v. State*, 11 Ind. 424; *Hart v. McElroy*, 72 Mich. 446. See also *Chicot County v. Davies*, 40 Ark. 200; *Allopathic State Board of Medical Examiners v. Fowler*, 50 La. Ann. 1358.

Suspension of Rules. — The *Arkansas* constitution of 1868 provided that under a suspension of the rules a bill could be read by its title only, and as the constitution did not require the suspension to be entered in the journal, in the absence of such entry the rules will be considered to have been suspended in a proper case. *Chicot County v. Davies*, 40 Ark. 200, *overruling Smithee v. Garth*, 33 Ark. 17, where an act read by title was held to be invalid because the rules were not suspended. See also *English v. Oliver*, 28 Ark. 317; *Worthen v. Badgett*, 32 Ark. 496.

2. References to Documents. — *Bibb County Loan Assoc. v. Richards*, 21 Ga. 592. In this case the legislature incorporated a building and loan association already organized, by a mere reference to its constitution and by-laws, without setting out or reading the constitution and by-laws.

3. Rule Not Applicable to Amendments. — *State v. Dillon*, 42 Fla. 95; *State v. Hocker*, 36

Fla. 358; *People v. Wallace*, 70 Ill. 680; *McCulloch v. State*, 11 Ind. 433; *Cleland v. Anderson*, (Neb. 1902) 92 N. W. Rep. 306; *Miller v. State*, 3 Ohio St. 476; *State v. Platt*, 2 S. Car. 150, 16 Am. Rep. 647; *State v. Brown*, 33 S. Car. 151. See also *Larrison v. Peoria*, etc., R. Co., 77 Ill. 11.

What Is an Amendment. — See *Nelson v. Haywood County*, 91 Tenn. 596.

A Defect or Imperfection in the Title of a legislative bill may be corrected by amendment at any time before the bill is put upon its passage. The constitution does not require that every bill shall be read at large on three different days in each house of the legislature under an exactly identical title. *Richards v. State*, (Neb. 1902) 91 N. W. Rep. 878. See also *Walnut v. Wade*, 103 U. S. 683.

4. *Dew v. Cunningham*, 28 Ala. 467, 65 Am. Dec. 362.

Presumption that Amendment on Same Subject as Original Bill. — *Miller v. State*, 3 Ohio St. 476. See also *Illinois Cent. R. Co. v. People*, 143 Ill. 434.

5. Act Raising Money, Creating Debt, or Laying Tax — North Carolina. — *Glenn v. Wray*, 126 N. Car. 730, *construing* Const. N. Car., art. 2, § 14.

6. Codification. — *Central of Georgia R. Co. v. State*, 104 Ga. 831. See also *Dew v. Cunningham*, 28 Ala. 466, 65 Am. Dec. 362; *Mathis v. State*, 31 Fla. 291.

7. Substitute Bill. — *Allopathic State Board of Medical Examiners v. Fowler*, 50 La. Ann. 1358; *Toll v. Jerome*, 101 Mich. 468.

8. Reading in Committee. — *Matter of Senate Rule No. —*, 9 Colo. 641.

Arkansas that there is no constitutional objection to the first reading of a bill in the senate being on the same day of its final passage in the house.¹

i. RECONSIDERATION IN HOUSE BETWEEN READINGS IN SENATE. — Where a bill was regularly read three times in the house and then reported to the senate, where it was read twice, and the house recalled the bill from the senate for reconsideration, and after again passing the bill on the reconsideration, returned it to the senate, where it had its third reading in that body, this was held sufficient.²

j. PRESUMPTION. — Where the constitution requires the three readings, but does not in terms command their entry in the journal, it will be presumed in a case where no entry in the journal appeared that the bill was read as provided for.³

k. DISPENSING WITH REQUIREMENT. — In the states where the requirement of three readings is mandatory the constitutions usually allow the rule to be dispensed with, in whole or in part, in cases of urgency, on a specified vote of the legislature,⁴ and the question whether the circumstances present a case of urgency is for the house of the legislature in which the bill is depending and not for the courts.⁵

7. Reference to Committees. — It is provided in the constitution of *Alabama* that no bill shall become a law until it shall have been referred to a committee of each house and returned therefrom, and a bill not so referred is invalid.⁶

8. Printing of Bills. — In some states the constitutions require that all bills shall be printed for the use of the members of the legislature before they are taken up for consideration or finally passed,⁷ and such provisions are usually considered to be mandatory.⁸

Bill May Be Read Before Being Printed. — The provision of the *Colorado* constitution that "no bill shall be considered or become a law unless * * * printed for the use of the members," does not require that the bill shall be printed before it is read, but is sufficiently complied with by printing a bill before it is taken up as a subject of deliberation or debate or amendment.⁹

9. Passage — *a. CONCURRENCE OF BOTH HOUSES NECESSARY.* — It is essential to the validity of an enactment that the bill shall have been actually passed by the concurrence of the number of the members of each house required by the constitution.¹⁰

1. Reading in Both Houses on Same Day. — *Chicot County v. Davies*, 40 Ark. 200.

2. Reconsideration in House Between Readings in Senate. — *State v. Crawford*, 35 Ark. 237.

3. Presumption. — *Schuyler County v. People*, 25 Ill. 181. See also *Worthen v. Badgett*, 32 Ark. 496.

4. Dispensing with Readings. — *Weill v. Kenfield*, 54 Cal. 111; *Cohn v. Kingsley*, (Idaho 1897) 49 Pac. Rep. 985; *McCulloch v. State*, 11 Ind. 429; *Ramsey County v. Heenan*, 2 Minn. 330.

Suspension of Rule as to Time of Reading. — The legislature may suspend its own rule that a bill shall not have its third reading on the last day of the session, and a bill so read and passed on that day will be valid, for the rule has not the effect of a constitutional provision. *State v. Brown*, 33 S. Car. 151.

Several Bills May Be Included in Resolution Dispensing with Requirement. — *People v. Glenn County*, 100 Cal. 419, 38 Am. St. Rep. 305. *Contra*, *Cohn v. Kingsley*, (Idaho 1897) 49 Pac. Rep. 985.

5. A Question for the Legislature. — *Weyand v. Stover*, 35 Kan. 545; *Hull v. Miller*, 4 Neb. 503. See also *People v. Glenn County*, 100 Cal. 419, 38 Am. St. Rep. 305.

The Motive of a legislator who voted to dispense with the requirement is not a subject of judicial inquiry. *People v. Glenn County*, 100 Cal. 419, 38 Am. St. Rep. 305.

Emergency Need Not Be Stated upon the Journal. — *Weyand v. Stover*, 35 Kan. 545.

6. Reference to Committees. — *State v. Buckley*, 54 Ala. 599.

7. Printing Bills. — *People v. Knopf*, 198 Ill. 340.

8. Requirement Mandatory. — *Cohn v. Kingsley*, (Idaho 1897) 49 Pac. Rep. 985; *State v. Burlington, etc.*, R. Co., 60 Neb. 741.

9. Bill May Be Read Before Being Printed. — *Massachusetts Mut. L. Ins. Co. v. Colorado L. & T. Co.*, 20 Colo. 1.

10. Concurrence of Both Houses Necessary — *United States*. — *Post v. Kendall County*, 105 U. S. 667; *South Ottawa v. Perkins*, 94 U. S. 260.

Illinois. — *Prescott v. Illinois, etc.*, Canal, 19 Ill. 324; *People v. Starne*, 35 Ill. 142, 85 Am. Dec. 348.

Maryland. — *Berry v. Baltimore, etc.*, R. Co., 41 Md. 446. 20 Am. Rep. 69; *Legg v. Annapolis*, 42 Md. 203.

New Hampshire. — *Opinion of Justices*, 52 N. H. 622.

b. VOTE NECESSARY TO PASS.—A bill cannot become a law without receiving the number of votes required by the constitution to pass it.¹ The constitutions usually require for the passage of an ordinary bill a majority vote of all elected members,² or a majority vote of a quorum.³ But it is customary for constitutions to require, on the passage of bills for a private, local, or special purpose, or bills imposing a tax, creating a charge, or making an appropriation, a two-thirds vote of the legislators, or a vote greater than a majority, and such a provision is mandatory.⁴

Ohio.—*Miller v. State*, 3 Ohio St. 475.

West Virginia.—*Osburn v. Staley*, 5 W. Va. 85, 13 Am. Rep. 640.

A Resolution Passed Only by One House, authorizing the governor to employ counsel, is void. *Field v. Auditor*, 83 Va. 882.

Bill Must Be Passed by Both Houses in Same Form.—*State v. Laiche*, 105 La. 84. See also *State v. Price*, 4 Ohio Cir. Dec. 296, 8 Ohio Cir. Ct. 25; *Burke v. Cincinnati*, 10 Ohio Dec. 542, 8 Ohio N. P. 109; *State v. Jones*, 11 Ohio Cir. Dec. 496.

Bill Must Pass Both Houses under Same Title.—*Simpson v. Union Stock Yards Co.*, 110 Fed. Rep. 799; *Fillmore v. Van Horn*, 129 Mich. 52.

An Immaterial Change in the Title after a bill has passed one house does not make the enactment void. *Plummer v. People*, 74 Ill. 361.

Statute Void in Part Only.—A statute containing sections which have not passed both houses may be void as to such sections and good as to the rest of the bill. *State v. Van Duyn*, 24 Neb. 586; *State v. Deal*, 24 Fla. 293, 12 Am. St. Rep. 204.

Concurrence in Amendments.—Where a bill was regularly passed by one branch of the legislature, and then sent to the other where it was amended and returned, the concurrence by the house first mentioned in the amendments of the other branch of the legislature was held sufficient. *McCulloch v. State*, 11 Ind. 424.

1. Constitutional Majority Necessary.—*State v. Davis*, (Neb. 1902) 92 N. W. Rep. 740.

2. Majority of All Elected Members.—*South Ottawa v. Perkins*, 94 U. S. 260 (an Illinois case); *San Francisco v. Hazen*, 5 Cal. 169 (stated under Pass, etc., vol. 22, p. 258, note); *Burritt v. State Contract Com'rs*, 120 Ill. 322; *Ramsey County v. Heenan*, 2 Minn. 330; *State v. Burlington, etc.*, R. Co., 60 Neb. 741.

Effect of Resignation of Member.—See *Osburn v. Staley*, 5 W. Va. 85, 13 Am. Rep. 640, stated under MAJORITY, vol. 19, p. 614.

De Facto Member.—Where a majority of all members elected to a board of aldermen was required to pass an ordinance, the fact that one of the eight members constituting the board was an alien or ineligible has been held to have no effect upon the requirement of five votes for a valid ordinance. *Satterlee v. San Francisco*, 23 Cal. 315.

An Act Passed by the Vote of Members Improperly Seated will not be declared void, the legislature being the judge of the qualification and election of its members. *People v. Mahaney*, 13 Mich. 489; *Auditor Gen. v. Menominee County*, 89 Mich. 552. See also *State v. Smith*, 44 Ohio St. 348.

The Court Will Take Judicial Notice of the Number of Members of the senate and house of representatives in determining whether journal

entries showing the number who voted for and against a bill show its valid passage. *State v. Mason*, 155 Mo. 486.

3. Rule for Ascertaining Whether Quorum Present.—In the absence of a constitutional provision regulating the method of ascertaining the presence of a constitutional quorum of a house of the legislature, it is proper for the house to regulate the matter by a rule of its own. *U. S. v. Ballin*, 144 U. S. 1.

"Majority of Each House."—See *House*, vol. 15, p. 773, note 1; *LEGISLATURE*, vol. 18, p. 822.

4. Vote Necessary to Pass Private, Local, or Special Acts, etc.—*Palmer v. Zumbrota Bank*, 72 Minn. 266; *Matter of New York, etc.*, *Bridge Co.*, 148 N. Y. 540; *People v. Highway Com'rs*, 54 N. Y. 276, 13 Am. Rep. 581; *Corning v. Greene*, 23 Barb. (N. Y.) 33; *Glenn v. Wray*, 126 N. Car. 730; *State v. Voris*, 10 Ohio Dec. 451, 8 Ohio N. P. 16.

An Appropriation by Joint Resolution requires the same vote as though made by bill. *Allen v. State Auditors*, 122 Mich. 324.

Compliance with Requirement—Amendment During Passage.—See *Jackson v. State*, 131 Ala. 21.

What Are Private, Local, or Special Acts within the meaning of the constitutions. See *McRae v. Shaffer*, 89 Mich. 463; *Sweet v. Syracuse*, 129 N. Y. 316; *Comstock v. Syracuse*, 129 N. Y. 643; *Rumsey v. New York, etc.*, R. Co., 130 N. Y. 88; *Purdy v. People*, 4 Hill (N. Y.) 384; *De Bow v. People*, 1 Den. (N. Y.) 9; and *supra*, this title, *Classification*.

Statute Held to Appropriate Public Money for Private Purposes so as to require a two-thirds vote. *People v. Highway Com'rs*, 54 N. Y. 276, 13 Am. Rep. 581.

Statutes Held Not to Appropriate Public Moneys or Property for Local or Private Purposes or to Create a Tax.—See *New York v. Gorman*, 26 N. Y. App. Div. 191; *People v. Murray*, 4 N. Y. App. Div. 185; *Matter of New York, etc.*, *Bridge Co.*, 90 Hun (N. Y.) 312; *People v. Chenango County*, 8 N. Y. 317.

Arkansas Constitution.—**Necessary Expense** of government is for the determination of the legislature. *State v. Sloan*, 66 Ark. 575, 74 Am. St. Rep. 106.

Creation of New County—Apportionment of Debts, etc.—In *Texas* a two-thirds vote is necessary in order to create a new county whose area is within certain limits (Const. Tex., art. 9, sect. 1, subsect. 2); but no such limitation is imposed in reference to prescribing the manner of enforcing the liability of a new county for its proportionate part of the debts of the old one. *Mills County v. Brown County*, 87 Tex. 475.

Imposing a Tax.—An act permitting persons to commute for military services by the pay-

c. PROTEST AGAINST PASSAGE. — Under the constitutions of some states any member of the legislature has the right to have his protest against the passage of any act or resolution noted, but the exercise of this right by one or more members does not affect the validity of the law,¹ though it has been intimated in *Missouri* that the fact that an objection or protest is "noted upon the journal" will rebut the presumption of regularity in the passage of the statute which would otherwise exist.²

d. METHODS OF VOTING — (1) *In General.* — Apart from a constitutional provision requiring a yeas and nays vote, the ordinary method of taking the vote upon a question is by the voices, by show of hands, or by a rising vote, affirmative and negative. It may also be done by roll call. But where the object is to ascertain the names as well as the number voting on each side, with a view to having them entered on the journals, this method, when resorted to to obtain such list of names, is denominated "taking the yeas and nays on a question."³

(2) *Yeas and Nays on Final Passage* — (a) *Constitutional Requirement.* — Constitutions usually provide, however, that the vote on the final passage of a bill⁴ shall be by yeas and nays, which shall be entered in the journal.⁵ The failure to comply with such a provision, as a rule, renders the law void.⁶

(b) *To What Bills Applicable.* — Such provisions usually by their language apply only to certain classes of bills, and then no such formalities are necessary in the passage of bills not of the character indicated by the constitution.⁷

ment of a sum of money is not an act imposing a tax. *People v. Chenango County*, 8 N. Y. 317.

Act Creating "a Debt or Charge" — **What Is.** — See *McDonald v. State*, 80 Wis. 407, stated under *CHARGE*, vol. 5, p. 887.

1. **Effect of Protest on Passage.** — *Auditor Gen. v. Menominee County*, 89 Mich. 552.

2. See *State v. Mead*; 71 Mo. 271; *State v. Mason*, 155 Mo. 486; *State v. Field*, 119 Mo. 593.

3. **Ordinary Methods of Voting.** — *Vanderburgh, J.*, in *Lincoln v. Haugan*, 45 Minn. 451.

4. **Final Passage Defined.** — *State v. Buckley*, 54 Ala. 599 (stated under *FINAL*, vol. 13, p. 20, note).

5. **Yeas and Nays on Final Passage.** — *People v. Knopf*, 198 Ill. 340.

The Purpose of the Requirement of recording the yeas and nays is to make the members of the legislature feel their responsibility, and to compel each member to bear his share therein by a record of his action. *Steckert v. East Saginaw*, 22 Mich. 104.

The Constitution of Minnesota providing that "no law shall be passed unless * * * the vote [be] entered upon the journal of each house," does not require the yeas and nays to be entered. *Lincoln v. Haugan*, 45 Minn. 451.

Adoption of Report of Committee Construed as Final Passage. — *Browning v. Powers*, (Mo. 1897) 38 S. W. Rep. 943.

In North Carolina an act to levy a tax by a town not for necessary expenses must be read three several times and passed on three different days, and the names of those voting on the second and third readings entered on the journals of the senate and house of representatives. *Hooker v. Greenville*, 130 N. Car. 472; *Rodman-Heath Cotton Mills v. Waxhaw*, 130 N. Car. 293; *New Hanover County v. De Rosset*, 129 N. Car. 275; *Glenn v. Wray*, 126 N. Car. 730; *Smathers v. Madison County*, 125 N. Car. 480; *Slocumb v. Fayetteville*, 125 N. Car. 362; *Wilkes County v. Call*, 123 N. Car. 308; *Char-*

lotte v. Shepard, 122 N. Car. 602; *Stanly County v. Snuggs*, 121 N. Car. 394; *Union Bank v. Oxford Com'rs*, 119 N. Car. 214.

6. **Requirement Mandatory** — *United States.* — *Post v. Kendall County*, 105 U. S. 667; *South Ottawa v. Perkins*, 94 U. S. 260.

Alabama. — *State v. Buckley*, 54 Ala. 605.

Idaho. — *Cohn v. Kingsley*, (Idaho 1897) 49 Pac. Rep. 985.

Illinois. — *Ryan v. Lynch*, 68 Ill. 160; *Spangler v. Jacoby*, 14 Ill. 297, 58 Am. Dec. 571; *People v. Starne*, 35 Ill. 142, 85 Am. Dec. 348; *Schuyler County v. People*, 25 Ill. 181; *Burritt v. State Contract Com'rs*, 120 Ill. 322. *Minnesota.* — *Lincoln v. Haugan*, 45 Minn. 451; *Ramsey County v. Heenan*, 2 Minn. 330.

Missouri. — *State v. McBride*, 4 Mo. 303, 29 Am. Dec. 636.

North Carolina. — *Debnam v. Chitty*, 131 N. Car. 657.

West Virginia. — *Osburn v. Staley*, 5 W. Va. 85, 13 Am. Rep. 640.

Requirement Directory Merely. — *People v. Chenango County*, 8 N. Y. 317.

Circumstances Held Sufficient Compliance. — In *Kansas* it has been held that when one house, which has properly passed an act with amendments in which the other house refuses to concur, recedes from its amendments by a yeas and nays vote properly entered on the journal, the constitution, without more, is complied with. *Division of Howard County*, 15 Kan. 194.

Concurrence in Amendments adopted in the other house must be by a yeas and nays vote entered in the journal. *Norman v. Kentucky Board of Managers*, 93 Ky. 537.

In *Alabama* this is a constitutional requirement with regard both to amendments adopted by the other house and the reports of committees of conference. *State v. Buckley*, 54 Ala. 612.

7. *Christian v. Taylor*, 96 Va. 503.

An Act Authorizing Payment of a Judgment Against the State was held not to be an act for

Receding from Amendment. — Accordingly it has been held that a constitutional provision requiring the yeas and nays to be taken and recorded on the final passage of a bill was not violated where one branch of the legislature after regularly passing a bill with certain amendments subsequently receded from one of their amendments without taking a vote thereon by yeas and nays.¹

In *Minnesota* it is held that in the absence of any constitutional or statutory provision in respect to ordering or taking the yeas and nays in particular cases, it must be regulated by the rules of each house pursuant to the constitution.²

(c) **What Is the Final Passage.** — The final passage of a bill, within the meaning of such a provision, is the vote on which each house adopts the bill after it has passed its first and second readings and after it has been read again for the purpose of being put upon its passage, and where a bill has been passed in one house and amended and passed in the other, it is not necessary that the vote on the adoption of such amendment by the house in which it was first passed shall be taken by yeas and nays and entered on the journal.³

(d) **Entry on Journal.** — The entering of the yeas and nays on the journal when required by the constitution is as essential to the validity of the legislation as the taking of the vote in the manner indicated.⁴ But while it is undoubtedly the better practice that the journal should state expressly the names of the members who voted yea and of those who voted nay, it seems probable that this is not absolutely necessary, but it would usually be considered sufficient that the journal contains data from which the names of the members voting each way can be definitely ascertained.⁵

10. Amendment During Passage — *a. PROHIBITION OF AMENDMENTS CHANGING ORIGINAL PURPOSE.* — A very usual constitutional provision is that no bill shall be so altered or amended during its passage through either house as to change its original purpose.⁶ This does not, however, prohibit the omission of provisions originally contained in the bill,⁷ or the insertion of amendments which relate to and tend to aid in the general object of the bill⁸ or merely extend the provisions or application of the original bill.⁹

b. PRINTING OF AMENDMENTS FOR USE OF LEGISLATORS. — Constitutions frequently contain a provision that all substantial amendments made to a bill during its passage shall be printed for the use of the members before the final vote is taken.¹⁰ It has been held that such provisions are mandatory¹¹ and

the appropriation of money or the creation of a debt. *Com. v. Jackson*, 5 Bush (Ky.) 680.

A Bill of a General Character requires a vote by yeas and nays on its final passage in *Tennessee*, but an act changing the judicial circuit to which certain counties belong is not within the requirement. *State v. Algood*, 87 Tenn. 163.

1. Receding from Amendment. — *State v. Corbett*, 61 Ark. 226; *People v. Chenango County*, 8 N. Y. 317.

2. Rules. — *Lincoln v. Haugan*, 45 Minn. 451. In this case it was further held that where it did not appear that the yeas and nays were called for or ordered on the passage of a particular bill, under the rules of the senate, the omission to enter the names of the members voting was not fatal.

3. Adoption of Amendments. — *State v. Dillon*, 42 Fla. 95. See also *O'Hara v. State*, 121 Ala. 28.

Substitute Bill Considered as an Amendment. — *Brake v. Callison*, 122 Fed. Rep. 722.

4. Entry on Journal Necessary. — *Post v. Kendall County*, 105 U. S. 667; *Schuyler County v. People*, 25 Ill. 181; *State v. Francis*, 26 Kan. 724. See also *Coler v. Stanley County*, 89 Fed. Rep. 257, affirmed (C. C. A.) 96 Fed. Rep. 284.

5. See the title *ORDINANCES*, vol. 21, p. 963.

In *North Carolina* it has been held that where the names of the members voting in the negative are not given it must affirmatively appear on the journal that there were none so voting. *Debnam v. Chitty*, 131 N. Car. 657; *Smathers v. Madison County*, 125 N. Car. 480; *New Hanover County v. De Rosset*, 129 N. Car. 275.

6. Amendment During Passage. — *State v. Buckley*, 54 Ala. 612; *Hall v. Steele*, 82 Ala. 562; *Matter of House Bill No. 231*, 9 Colo. 624.

Circumstances Not Showing Amendment. — See *People v. Loewenthal*, 93 Ill. 191.

7. Omission of Provisions. — *Airy v. People*, 21 Colo. 144; *State v. Mason*, 155 Mo. 486.

8. Amendments Germane to Original Purpose. — *State v. Mason*, 155 Mo. 486. See also *Vincenheller v. Reagan*, 69 Ark. 460.

9. Extending Provisions or Application. — *Hall v. Steele*, 82 Ala. 562; *In re Amendments of Legislative Bills*, 19 Colo. 356.

10. Printing of Amendments. — *People v. Knopf*, 198 Ill. 340.

11. Provision Mandatory. — *In re House Bill No. 250*, 26 Colo. 234; *State v. Burlington, etc.*, R. Co., 60 Neb. 741.

that the question whether or not a given amendment to a bill is a substantial one is for the courts to determine and not for the legislature.¹

c. WHICH HOUSE MAY AMEND. — The right of amendment during the passage of a bill may be exercised with equal freedom by either house of the legislature irrespective of the question as to the particular body in which the bill originated.²

d. EFFECT OF AMENDMENT. — Where the title of a bill which has originated and been passed in one house is amended in the other house, it does not thereby become a bill of such other house, nor is it necessary that it should begin anew its course as an original bill in the house where it was first passed, the act remaining the same; the concurrence in the amendment is sufficient.³

11. Signing by Presiding Officers — **a. CONSTITUTIONAL REQUIREMENT.** — It is frequently provided that the presiding officers of the legislative houses shall sign bills when passed.⁴

b. WHETHER MANDATORY OR DIRECTORY. — Such a provision, in those states where the enrolled bill duly authenticated is considered conclusive evidence of the valid enactment of a law, is of necessity mandatory, for in such case the signatures of the presiding officers are a part of the constitutional method of authentication.⁵ In some of the states in which the journal may be looked to for the purpose of investigating the compliance of the legislature with constitutional provisions, it is also considered essential that the signatures of the presiding officers of the legislature be affixed to bills in order to make them valid,⁶ but in other states of the latter class the requirement of the constitution regarding the signature of presiding officers is considered to be directory only.⁷

c. RULE IN CASE OF PASSAGE OVER VETO. — It has been held that the signatures of the presiding officers are unnecessary when the act has been passed over the governor's veto, as the passage through both houses with the necessary vote completes the enactment in such a case,⁸ and the legislative

1. Question for Court. — *In re* House Bill No. 250, 26 Colo. 234.

2. Either House May Amend. — *In re* Amendments of Legislative Bills, 19 Colo. 356.

3. Effect of Amendment. — *State v. Field*, 119 Mo. 593.

4. Signing by Presiding Officers. — *Burns v. Sewell*, 48 Minn. 425; *Rodman-Heath Cotton Mills v. Waxhaw*, 130 N. Car. 293; *State v. Jones*, 11 Ohio Cir. Dec. 496.

Secretary. — Where in addition to other signatures that of the secretary of the senate was required, the signature of the assistant secretary, with those of the other officers required, was held to be sufficient. *State v. Glenn*, 18 Nev. 34.

Signing in Presence of House. — *Hunt v. State*, 22 Tex. App. 396.

Presumption that Authentication Authorized. — *See Evans v. Browne*, 30 Ind. 514, 95 Am. Dec. 710.

5. Provision Mandatory — *Indiana*. — *Evans v. Browne*, 30 Ind. 523, 95 Am. Dec. 710.

Missouri. — *Pacific R. Co. v. Governor*, 23 Mo. 364, 66 Am. Dec. 673; *State v. Mead*, 71 Mo. 269.

Nevada. — *State v. Glenn*, 18 Nev. 38; *State v. Howell*, (Nev. 1901) 64 Pac. Rep. 466; *State v. Swift*, 10 Nev. 176, 21 Am. Rep. 721.

North Carolina. — *Scarborough v. Robinson*, 81 N. Car. 418. But compare *Wrought Iron Range Co. v. Carver*, 118 N. Car. 328.

Texas. — *Hunt v. State*, 22 Tex. App. 396. This case allows consultation of the journal, but has since been overruled in that particular. *See Ex p. Tipton*, 28 Tex. App. 438.

The Duty of Signing Is Legislative and may not be compelled after adjournment. It must be exercised, if at all, during the session. *Scarborough v. Robinson*, 81 N. Car. 409.

An Enrolled Bill Duly Passed and Approved Is Sufficiently Authenticated by the signatures of the presiding officers of each legislative branch and of the governor. *Wabash R. Co. v. Hughes*, 38 Ill. 185. See also *Scarborough v. Robinson*, 81 N. Car. 418; *State v. Kiesewetter*, 45 Ohio St. 258; *Speer v. Plank-Road Co.*, 22 Pa. St. 376.

6. *Burritt v. State Contract Com'rs*, 120 Ill. 322; *State v. Kiesewetter*, 45 Ohio St. 263; *State v. Platt*, 2 S. Car. 150, 16 Am. Rep. 647; *State v. State Bank*, 12 Rich. L. (S. Car.) 609. See *Jones v. Hutchinson*, 43 Ala. 721; *Moody v. State*, 48 Ala. 115, 17 Am. Rep. 28; *Legg v. Annapolis*, 42 Md. 221.

7. Provision Directory. — *Leavenworth County v. Higginbotham*, 17 Kan. 62; *State v. Robertson*, 41 Kan. 200; *Cottrell v. State*, 9 Neb. 128; *Taylor v. Wilson*, 17 Neb. 88.

A failure on the part of the presiding officer to sign a bill within two days after its passage does not defeat the act nor in any manner impair its validity if it be thereafter authenticated and approved by the governor. *Aikman v. Edwards*, 55 Kan. 751, reasoning that this would give the presiding officers a virtual veto power.

8. Signing Not Necessary in Case of Passage Over Veto. — *Evansville v. State*, 118 Ind. 426; *State v. Denny*, 118 Ind. 449. But see *contra*, *State v. Howell*, (Nev. 1901) 64 Pac. Rep. 466.

journal may be appealed to to show that an act has been vetoed and passed over the veto.¹

d. BILL MUST BE THAT ACTUALLY PASSED. — In states where the courts are permitted to look behind the enrolled statute, the bills signed by the presiding officers, to be valid, must be the bills actually passed by the legislature,² though immaterial variances will be disregarded.³

e. RULE IN ABSENCE OF CONSTITUTIONAL REQUIREMENT. — If the constitution does not require the signature of bills, it is not vital,⁴ though it seems that usage would require it in all cases.⁵

f. SIGNING BY SPEAKER PRO TEM. — A speaker *pro tempore* of the house of representatives, elected to serve during the disability of the regular speaker, is the "presiding officer," and may sign bills as such.⁶

12. Reference of Special City Laws to Mayors. — The *New York* constitution contains a provision that after any bill for a special city law⁷ relating to the property, affairs, or government of any city or cities⁸ has been passed by both branches of the legislature, the house in which it originated shall immediately transmit a certified copy thereof to the mayor of the city or cities to be affected, and within fifteen days thereafter the mayor shall return the bill with his certificate thereon stating whether the city has or has not accepted the same, and the bill when accepted is subject to the action of the governor, as are other bills.⁹ This provision relates to procedure only, and is not a restriction on the power of the legislature.¹⁰ And the failure of the city to accept

Signing by Clerk or Secretary. — Where the constitution provides that the passage of an act by a certain vote over the veto of the governor shall be officially certified by the chief clerk of the house of representatives and the secretary of the senate, and these officers are prevented from so certifying by the fact of their retirement from office, the validity of the bill would not be affected by their failure to certify its passage in the proper time, if the fact of its passage appears from the published journals of the legislature. *Houston, etc., R. Co. v. Odum*, 53 Tex. 343.

1. *Evansville v. State*, 118 Ind. 434, *distinguishing* *Evans v. Browne*, 30 Ind. 515, 95 Am. Dec. 710; *Render v. State*, 53 Ind. 254; *Madison County v. Burford*, 93 Ind. 383; *State v. Denny*, 118 Ind. 449. See also *Ex p. Wren*, 63 Miss. 535, 56 Am. Rep. 825; *Matter of Welman*, 20 Vt. 656.

2. **Bill Must Be That Actually Passed.** — *Jones v. Hutchinson*, 43 Ala. 721; *Moody v. State*, 48 Ala. 115, 17 Am. Rep. 28; *State v. Platt*, 2 S. Car. 150, 16 Am. Rep. 647.

3. **Immaterial Variances.** — *People v. Onondaga*, 16 Mich. 254.

4. **Signature Not Vital.** — *Speer v. Plank-Road Co.*, 22 Pa. St. 376.

5. **Usage.** — See *Field v. Clark*, 143 U. S. 671; *Pangborn v. Young*, 32 N. J. L. 33.

6. **Signing by Speaker Pro Tem.** — *Robertson v. State*, 130 Ala. 164.

7. **Special City Laws** are those which relate to a single city or to less than all the cities of a class. *New York Constitution of 1894*, art. 12, § 2; *Fox v. Mohawk, etc., Humane Soc.*, (Supm. Ct. Tr. T.) 20 Misc. (N. Y.) 461, *reversed* on other grounds 25 N. Y. App. Div. 26, *affirmed* 165 N. Y. 517.

8. **Only Bills Relating to the Property, Affairs, or Government of cities, or some department thereof, fall within the classification of the constitutional provision under discussion and are**

subject to its application. *People v. Sheriff*, (Supm. Ct. Spec. T.) 13 Misc. (N. Y.) 587; *Fox v. Mohawk, etc., Humane Soc.*, (Supm. Ct. Tr. T.) 20 Misc. (N. Y.) 461, *reversed* on other grounds 25 N. Y. App. Div. 26, *affirmed* 165 N. Y. 517.

Sunday Laws. — *New York Laws of 1895*, c. 823, making it a misdemeanor to carry on or engage in the work of a barber on the first day of the week, except that in the city of New York and the village of Saratoga Springs such work might be performed until one o'clock in the afternoon of such day, was not a special city law within the meaning of the constitution. *People v. Sheriff*, (Supm. Ct. Spec. T.) 13 Misc. (N. Y.) 587.

The New York Liquor Tax Law of 1896 was not a special city law, nor did it relate to the "property, affairs, or government" of any city within the meaning of this provision. *People v. Murray*, 149 N. Y. 367, *affirming* 4 N. Y. App. Div. 185.

The Dog License Law (*Laws N. Y. 1896*, c. 448) was not a special city law within the meaning of the constitution under consideration. *Fox v. Mohawk, etc., Humane Soc.*, (Supm. Ct. Tr. T.) 20 Misc. (N. Y.) 461, *reversed* on other grounds 25 N. Y. App. Div. 26, *affirmed* 165 N. Y. 517.

Laws N. Y. 1896, c. 141, providing for the application and distribution of receipts from premiums collected and to be collected from fire insurance companies doing business in the state, on insurance on property in Long Island City, was a "special city law"; and, never having been transmitted to the mayor of Long Island City, it is void. *Exempt Firemen Assoc. v. Exempt Firemen's Benev. Fund*, 34 N. Y. App. Div. 138.

9. *New York Constitution, 1894*, art. 12, § 2.

10. **Not a Restriction of Legislative Power.** — *People v. Sheriff*, (Supm. Ct. Spec. T.) 13 Misc. (N. Y.) 587.

the law does not prevent its enactment, for it is further provided that "when ever during the session at which it was passed any such bill is returned without the acceptance of the city or cities to which it relates, or within such fifteen days is not returned, it may nevertheless again be passed by both branches of the legislature, and it shall then be subject as are other bills to the action of the governor."¹

13. Presentation to Executive — *a.* IN GENERAL. — After the passage of a bill and its authentication by the signatures of the presiding officers, or by the great seal, where such authentication is required,² the bill must, as a general rule, be presented to the executive.³

b. MODE OF PRESENTATION. — As to whether this presentation must be made to the governor personally, or whether it is enough to leave the bill at his office, the authorities are not in accord. In *Massachusetts* it has been decided that the bill must be personally presented to the governor, or, in his absence from the state, to the person officially filling his position;⁴ while in *New Hampshire* the courts have held that the bill may be left at the usual office of the governor for receiving bills, with the person there in charge.⁵ In *Louisiana* it has been held that a bill which has passed both houses of the general assembly and been signed by the presiding officers thereof is presented to the governor within the meaning of the constitution when the clerk of the house of representatives or the secretary of the senate carries the same to the executive office and offers or tenders it to the governor or his secretary.⁶ Whatever the specific mode of presentation may be, it seems at least reasonable that the bill must be left with the governor, for his approval and consideration, out of the possession or control of the legislature or its messengers.⁷

c. BILL PRESENTED MUST BE THAT ACTUALLY PASSED. — The governor acts as a part of the law-making power of the state in approving bills passed by the legislature, and unless substantially the same bill that passed the two houses of the legislature is submitted to him for approval it cannot be made a law by his approval or silence, or against his approval.⁸

d. RECORD OF PRESENTATION. — The fact of the presentation of the bill to the executive ought to be somewhere preserved or recorded.⁹ An entry in the journal of the legislature is, in some states where it can be appealed to, provided for;¹⁰ in other states, where no mode of record is prescribed, the entry by the governor on the bill itself is the practice followed,¹¹ and it has

1. New York Constitution, 1894, art. 12, § 2.

2. **Authentication by Great Seal.** — In *Maryland* the constitution requires that every bill passed by the general assembly shall be sealed with the great seal of the state before it is presented to the governor; he may refuse to consider it if not so authenticated. *Hamilton v. State*, 61 Md. 14.

3. **Presentation to Executive.** — *Pickle v. McCall*, 86 Tex. 212. See also title GOVERNOR, vol. 14, p. 1101.

Time of Presentation. — It has been held in *Indiana* that the court may not look beyond the enrolled act of the legislature to ascertain whether there has been a compliance with the constitutional requirement that "no bill shall be presented to the governor within two days next previous to the final adjournment of the general assembly." *Bender v. State*, 53 Ind. 254. Compare *Evansville v. State*, 118 Ind. 434.

In *Arkansas* a bill may be presented to the governor after the adjournment of the legislature; and the return of such a bill is held to be "prevented by the adjournment" of that body. *Dow v. Beidelman*, 49 Ark. 334.

Passage by Vote Sufficient to Pass Over Veto. — See *State v. Crounse*, 36 Neb. 835 (stated under

title GOVERNOR, vol. 14, p. 1101), *disapproving* Hall v. Racine, 81 Wis. 72.

4. **Mode of Presentation.** — Opinion of Judges, 99 Mass. 636.

5. Opinion of Justices, 45 N. H. 611.

6. *State v. Michel*, 52 La. Ann. 936, 78 Am. St. Rep. 364.

7. See *Harpending v. Haight*, 39 Cal. 199, 2 Am. Rep. 432; *McKenzie v. Moore*, 92 Ky. 216.

8. **Bill Presented Must Be That Actually Passed.** — *State v. Green*, 36 Fla. 154. See also *Moody v. State*, 48 Ala. 115, 17 Am. Rep. 28; *infra*, this section, 14. *b.* (3) *Bill Must Be That Passed*, and *infra*, this title, V. 9. *g.* (1) *Discretion of Legislature in Choice of Title*, note.

9. See *Danielly v. Cabaniss*, 52 Ga. 223.

10. **Entry in Journal.** — *People v. Hatch*, 33 Ill. 149; *White v. Hinton*, 3 Wyo. 753.

The *Maryland Code* provides for an entry on the back of the bill, in the governor's presence, "of the day and hour" when it was presented for his approval, and also an entry in the journal of the house where the bill originated. *Lankford v. Somerset County*, 73 Md. 105.

11. **Entry by Governor on Bill.** — *Danielly v. Cabaniss*, 52 Ga. 223.

also been held that the record of the official acts and proceedings of the executive department kept by the secretary of state, as required by the constitution, is competent evidence to show that a bill indorsed by the secretary of the senate as having been presented on a particular day was in fact presented on a different day.¹

In Kansas it has been held that no record at all is necessary to be kept of the presentation of a bill to the governor for approval.²

c. LEGISLATIVE POWER OF RECALL.—The better rule would seem to be that after presentation of a bill to the executive, the legislature is without power to demand a recall for further consideration,³ though in practice bills have been recalled and the legality of the practice conceded.⁴

Amendment to Bill.—There is certainly no reason why the legislature may not pass an independent bill amending a bill which has been passed by both houses and sent to the governor for his action, within the ten days allowed him for its consideration and before he has taken action upon it.⁵

14. Functions of the Executive—*a. IN GENERAL.*—A bill, after passing both houses of the legislature, is submitted to the executive that he may either approve or disapprove it; but the constitutions also provide for the contingency of his failure to act upon it within a specified time.⁶

b. APPROVAL—(1) *In General.*—When the approval of the executive is required, such approval is a legislative act of the executive,⁷ which is the last requisite to the bill becoming a valid and existent statute,⁸ and it takes effect, unless some other time be expressly specified, from the time of such approval.⁹

(2) *Method of Expressing Approval.*—The usual method in which the executive expresses his approval of a bill presented to him is by signing the same,¹⁰ and it has been held that the place of signing is not material.¹¹

(3) *Bill Must Be That Passed.*—The bill approved must be that passed. A change made after the passage and before the approval invalidates the act in those states where the enrolment is not conclusive.¹² If, however, that which has been added or changed is distinguishable from and independent of

1. *Lankford v. Somerset County*, 73 Md. 105.

2. **No Record Necessary.**—*State v. Hitchcock*, 1 Kan. 178, 81 Am. Dec. 503.

3. **Legislature Cannot Recall Bill.**—*People v. Devlin*, 33 N. Y. 277, 88 Am. Dec. 377; *McKenzie v. Baker*, 88 Tex. 669; *Pickle v. McCall*, 86 Tex. 212; *Wolfe v. McCaull*, 76 Va. 876. See also *People v. Hatch*, 19 Ill. 288.

4. **Practice of Permitting Recall.**—*People v. Hatch*, 19 Ill. 288. See also *In re Senate Resolution*, 9 Colo. 630.

In *Kentucky*, where the governor, after the presentation of a bill to him, said that he should veto it, and the member who introduced it obtained leave of the house of which he was a member to withdraw the bill, and it was delivered to him by the governor, it was held that the bill did not become a law by reason of the failure of the governor to act upon it within the time limited by law. *McKenzie v. Moore*, 92 Ky. 216.

5. **Amendment to Bill.**—*McKenzie v. Baker*, 88 Tex. 669.

6. **Functions of the Executive in General.**—*Seven Hickory v. Ellery*, 103 U. S. 423; *Birdsall v. Carrick*, 3 Nev. 156. See title GOVERNOR, vol. 14, p. 1101.

7. **Approval a Legislative and Not an Executive Act.**—*Opinion of Judges*, 23 Fla. 298; *State v. Deal*, 24 Fla. 293, 12 Am. St. Rep. 204; *State v. Green*, 36 Fla. 154; *Weis v. Ashley*, 59 Neb. 494; *School Trustees v. Ormsby County*, 1 Nev.

340; *Thornburg v. Hermann*, 1 Nev. 473; *People v. Bowen*, 21 N. Y. 517. See also *People v. Hatch*, 33 Ill. 9, and the title GOVERNOR, vol. 14, p. 1101.

8. *State v. Mounts*, 36 W. Va. 186. See also *Com. v. Barnett*, 199 Pa. St. 161.

9. **Effect in General.**—See *infra*, this article, *Time of Taking Effect*.

10. **Signing.**—See the title ORDINANCES, vol. 21, pp. 965-966.

11. **Place of Signing.**—*National Land, etc., Co. v. Mead*, 60 Vt. 257. See title GOVERNOR, vol. 14, p. 1103.

12. **Bill Must Be That Passed.**—*Jones v. Hutchinson*, 43 Ala. 721; *Moog v. Randolph*, 77 Ala. 597; *Moody v. State*, 48 Ala. 115, 17 Am. Rep. 28; *Smithee v. Campbell*, 41 Ark. 471; *State v. Deal*, 24 Fla. 293, 12 Am. St. Rep. 204; *Berry v. Baltimore, etc., R. Co.*, 41 Md. 446, 20 Am. Rep. 69; *State v. Platt*, 2 S. Car. 150, 16 Am. Rep. 647; *State v. Wendler*, 94 Wis. 369. See also *Legg v. Annapolis*, 42 Md. 203; *State v. Swan*, 7 Wyo. 166, 75 Am. St. Rep. 889.

In *Mississippi* the rule in the text was upheld in *Brady v. West*, 50 Miss. 68, *overruled*, however, in *Ex p. Wren*, 63 Miss. 512, 56 Am. Rep. 825.

The "Immediate Effect" Clause Added by the Engrossing Clerk between the time of passage by the legislature and presentation to the governor, does not affect the validity of the bill. *Stow v. Grand Rapids*, 79 Mich. 595.

the rest, the statute may be good in part.¹

Unessential Words. — The omission in the enrolled bill of words not essential to its substance or effect will not render the act invalid.²

Variance in Title. — A material variance between the subject expressed in the title of the bill passed as shown by the legislative journal, and that approved, is fatal;³ otherwise if the variance is immaterial.⁴

(4) *Withdrawal of Approval.* — When the executive intentionally parts with the control and gives up the possession of a signed bill to the person authorized by law to receive and take charge of bills approved, the signature is conclusive as to the fact of approval, even though he may afterwards wish to withdraw it, as, for instance, by sending a message to the house in which the bill originated, expressing his objections to it.⁵ But until he so parts with the bill he may withdraw his approval, even though he has signed the bill.⁶

(5) *Approval During Recess.* — There is nothing in the Constitution of the United States which would prevent or make invalid the approval of a bill by the President while the two houses of Congress are in recess for a named time.⁷

(6) *Approval After Adjournment.* — It has been held that where a bill presented to the executive is approved by him within the time allowed for his action thereon, but after the adjournment of the legislature, the approval is valid,⁸ and the same is true even though the bill is not presented to him until after the adjournment of the legislature.⁹

(7) *Return of Bill or Notification of Approval.* — The return of an approved bill to the legislature or notification of the fact of approval is usually an act of courtesy rather than a legal duty.¹⁰

c. DISAPPROVAL OR VETO — (1) *In General.* — In the United States the power of the executive to veto absolutely and thereby nullify an enactment of the legislature does not exist. The power of disapproval, usually termed veto, extends merely to the noting on a bill of objections thereto and sending it back to the legislature.¹¹ This usually has the effect of requiring a greater proportion of affirmative votes to make the bill a law than were required in the first instance.¹² But in at least one state the governor's "veto" has not even this effect, but amounts to nothing more than an appeal for a reconsideration by the legislature, and a bare majority in each of the two houses may pass the bill over his veto.¹³

(2) *Veto of Part of Bill.* — As a general rule the executive must treat the

1. **Statute Good in Part.** — *State v. Deal*, 24 Fla. 293, 12 Am. St. Rep. 204; *Berry v. Baltimore, etc.*, R. Co., 41 Md. 446, 20 Am. Rep. 69; *State v. Platt*, 2 S. Car. 150, 16 Am. Rep. 647.

Bracketed Words not in the bill as it was approved by the governor have no part in the law. *Robertson v. Baxter*, 57 Mich. 127.

2. **Omission of Unessential Words.** — *Walnut v. Wade*, 103 U. S. 683; *Territory v. O'Connor*, 5 Dak. 397; *State v. Robertson*, 41 Kan. 200; *Sharp v. Merrill*, 41 Minn. 492; *State v. Rabbits*, 46 Ohio St. 178.

3. **Variance in Title.** — *Simpson v. Union Stock Yards Co.*, 110 Fed. Rep. 799; *Chicago, etc.*, R. Co. v. *Smyth*, 103 Fed. Rep. 376; *Stein v. Leeper*, 78 Ala. 517; *Weis v. Ashley*, 59 Neb. 494. See also *supra*, this section, 13. c. *Bill Presented Must Be That Actually Passed.*

4. *Plummer v. People*, 74 Ill. 361; *People v. Onondaga*, 16 Mich. 254. See also *Union Pac. R. Co. v. Sprague*, (Neb. 1903) 95 N. W. Rep. 46.

Mistake of Member in Calling Up Bill. — *Atty.-Gen. v. Parsell*, 100 Mich. 170.

5. **Withdrawal of Approval.** — *People v. Hatch*, 19 Ill. 283; *State v. Whisner*, 35 Kan. 271.

6. *People v. Hatch*, 19 Ill. 290, quoted under title GOVERNOR, vol. 14, p. 1103.

7. **Approval During Recess.** — *La Abra Silver Min. Co. v. U. S.*, 175 U. S. 423, affirming 32 Ct. Cl. 462; *U. S. v. Weil*, 29 Ct. Cl. 523.

8. **Approval After Adjournment.** — *Darling v. Boesch*, 67 Iowa 706; *Detroit v. Chapin*, 108 Mich. 136; *People v. Bowen*, 21 N. Y. 520. See further title GOVERNOR, vol. 14, p. 1102.

9. *Dow v. Beidelman*, 49 Ark. 325; *Lankford v. Somerset County*, 73 Md. 105, *distinguishing* *Hamilton v. State*, 61 Md. 14.

10. **Return of Bill or Notification of Approval Not Necessary.** — *People v. Hatch*, 19 Ill. 287; *State v. Whisner*, 35 Kan. 271; *State v. Coahoma County*, 64 Miss. 366.

In *Burns v. Sewell*, 48 Minn. 425, there is a dictum to the effect that if the governor approves a bill he shall sign and deposit it in the office of the secretary of state, and notify the house where it originated.

11. **Veto a Legislative Act.** — *Com. v. Barnett*, 199 Pa. St. 161.

Pennsylvania — Power to Veto School Appropriations. — *Com. v. Barnett*, 199 Pa. St. 161.

12. See *infra*, this subdiv. *Passage Over Veto*.

13. *State v. Mounts*, 36 W. Va. 186.

bill as a whole; he cannot approve part and object to part;¹ but in several of the states he may veto an appropriation bill in part and approve it as to the remainder.²

(3) *Sufficiency of Objections.* — The courts cannot inquire into the sufficiency of the objections of the governor to a bill, and a disapproval for any reason, however trivial or unsound, authorizes a return of the bill to the legislature, and prevents its becoming a law by lapse of time.³

(4) *Return of Bill* — (a) *In General.* — Generally it is required that the executive, if he disapproves a bill, shall return it to the house in which it originated, within a specified time, with his objections expressed in writing.⁴

(b) *Mode of Return.* — The mode of return of a bill, like that of its presentation to the governor, must be such that his time for deliberation is ended and that of the legislature begun; the bill with objections must pass from the possession and control of the executive into the possession, actual or potential, of the legislature itself, so that the latter may have the opportunity for reconsideration.⁵ In returning a bill the governor may make use of a messenger in sending it, provided the messenger properly announces his message.⁶ Where it is important that a return shall be made on a particular day, and the legislature has adjourned for that day, or taken a recess, the bill and message can be delivered to the presiding or other officer of the legislature, to be called to its attention as soon as an opportunity thereafter may occur.⁷

(c) *Rule in Case of Partial Veto.* — In *Texas*, if the governor disapproves one or more items in an appropriation bill embracing others which he approves, as under the constitution he has power to do, then he is not required to return the bill with his objections thereto to the house in which it originated; but in such case if the legislature be still in session the constitution requires the executive to append to the bill at the time of signing it a statement of the items to which he objects, and a copy of that statement must be sent to the house in which the bill originated.⁸

(5) *Passage Over Veto.* — If a bill is returned with objections from the executive, it may still become a law by passage through both houses with the necessary majority required by the constitution. In such a case the enactment is complete upon the prescribed vote of both houses, which is, however, usually larger than would be necessary for the original passage of the bill.⁹

1. *Partial Veto Not Permissible.* — *Porter v. Hughes*, (Ariz. 1893) 32 Pac. Rep. 165.

2. *Rule as to Appropriation Bills.* — *The Constitution of Mississippi* contains a provision that "The governor may veto parts of any appropriation bill and approve parts of the same, and the portions approved shall be law." This provision has been held to apply only to such bills as are made up of several parts which are separable from one another. *State v. Holder*, 76 Miss. 158.

Under the Constitution of Pennsylvania, giving the governor "power to disapprove of any item or items of any bill making appropriations of money, embracing distinct items," it has been held that where a lump sum has been appropriated for a certain purpose the governor may approve the appropriations to the extent of a certain part of the amount and disapprove it as to the remainder. *Com. v. Barnett*, 199 Pa. St. 161.

See Also, as to *Texas*. *Pickle v. McCall*, 86 Tex. 212.

3. *Sufficiency of Objections.* — *Birdsall v. Carrick*, 3 Nev. 154.

4. See *Pickle v. McCall*, 86 Tex. 212.

5. *Mode of Return.* — *Harpending v. Haight*, 39 Cal. 199, 2 Am. Rep. 432. In this case the

messenger of the governor stepped into the senate chamber with the intent to return a bill and objections to the senate, but that body having adjourned for the day he returned the bill with the objections to the governor, who kept them in his control; this was held not a proper return to prevent the bill becoming a law.

6. *Messenger.* — *Opinion of Justices*, 45 N. H. 609.

Where a bill was returned, with objections, to the proper house and given to the minute-clerk thereof, though it was not announced to the house until the next morning, such a return was considered sufficient. *U. S. v. Allen*, 36 Fed. Rep. 174.

7. *Delivery to Officer of Legislature.* — *Harpending v. Haight*, 39 Cal. 203, 2 Am. Rep. 432; *Opinion of Justices*, 45 N. H. 610; *Corwin v. Comptroller Gen.*, 6 S. Car. 399.

8. *Rule in Case of Partial Veto.* — *Pickle v. McCall*, 86 Tex. 212.

9. *Passage Over Veto.* — *Burritt v. State Contract Com'rs*, 120 Ill. 322; *Evansville v. State*, 118 Ind. 426; *State v. Denny*, 118 Ind. 449; *State v. Crounse*, 36 Neb. 835; *People v. Bowen*, 21 N. Y. 521; *Com. v. Barnett*, 199 Pa. St. 161; *Pickle v. McCall*, 86 Tex. 212.

d. FAILURE TO ACT—(1) *In General*.—It is generally provided that in case the executive fails to approve a bill or to return it to the legislature with his objections thereto within a designated time, the bill shall become a law notwithstanding his failure to act.¹ The purpose of these provisions is to prevent the possibility of the executive withholding a bill and thus preventing its becoming a law.²

(2) *Specific Time—How Computed*.—The time allowed varies generally from three days to ten.³ In computing the time the day of presentation is excluded and the last day included.⁴ An intervening *Sunday* is generally excluded, either by express provision or by judicial construction.⁵ A day, in this connection, means twenty-four hours generally beginning and ending at midnight.⁶ Whether a bill was returned in time is a question of fact.⁷

(3) *Veto After Expiration of Time Limited*.—The bill is none the less a law although the executive may have sent a veto message after the time had expired.⁸

(4) *Invalid Action Within Time Limited*.—Where the executive has acted upon a bill presented to him, but his action is invalid as being an unauthorized attempt to approve it in part and veto it in part, the bill may nevertheless become a law by his failure to act properly upon it within the time limited.⁹

(5) *Effect of Adjournment*—(a) *In General*.—The constitutional provision that in case of a failure of an executive to act upon a bill presented to him within a specified time it shall become a law is usually modified by a provision that in case of the adjournment of the legislature before the expiration of the time limited the bill shall not become a law,¹⁰ but in such case an extension of time is usually provided for.¹¹

(b) *What Is Meant by Adjournment*.—The adjournment referred to by such a provision is a final adjournment *sine die* and not a mere adjournment or recess from day to day.¹²

1. *Failure to Act Within Time Limited*.—*Danielly v. Cabaniss*, 52 Ga. 211; *Tarleton v. Peggs*, 18 Ind. 24; *Stalcup v. Dixon*, 136 Ind. 9; *McNeil v. Com.*, 12 Bush (Ky.) 727; *People v. Bowen*, 21 N. Y. 521; *Pickle v. McCall*, 86 Tex. 212. See also *Seven Hickory v. Ellery*, 103 U. S. 423; *McKenzie v. Moore*, 92 Ky. 216 (stated *supra*, this section, 13. *e*, note); *Com. v. Barnett*, 199 Pa. St. 161.

2. *Purpose of Provision*.—*Tarleton v. Peggs*, 18 Ind. 25. See also *State v. Deal*, 24 Fla. 293, 12 Am. St. Rep. 204.

3. See various state constitutions.

In Louisiana the governor must act not within five days of his reception of a bill, but within five days of its presentation to him. *State v. Michel*, 52 La. Ann. 936, 78 Am. St. Rep. 364.

4. *General Rule of Computation*.—*Iron Mountain Co. v. Haight*, 39 Cal. 540; *Price v. Whitman*, 8 Cal. 412; *Matter of Senate Resolution*, 9 Colo. 632; *McNeil v. Com.*, 12 Bush (Ky.) 727; *Beauden v. Cape Girardeau*, 71 Mo. 392; *State v. Michel*, 52 La. Ann. 936, 78 Am. St. Rep. 364; *Corwin v. Comptroller Gen.*, 6 S. Car. 390. But see *Opinion of Justices*, 45 N. H. 613. See also title TIME, COMPUTATION OF.

5. *Intervening Sunday Excluded*.—See *John V. Farwell Co. v. Matheis*, 48 Fed. Rep. 363; *Ex p. Cowert*, 92 Ala. 94; *Price v. Whitman*, 8 Cal. 412; *Matter of Senate Resolution*, 9 Colo. 633; *State v. Michel*, 52 La. Ann. 936, 78 Am. St. Rep. 364; *Detroit v. Chapin*, 108 Mich. 136. See also title GOVERNOR, vol. 14, p. 1103, and the title SUNDAYS AND HOLIDAYS.

6. *Day Means Twenty-four Hours*.—*State v. Michel*, 52 La. Ann. 936, 78 Am. St. Rep. 364;

Opinion of Justices, 45 N. H. 610. See also title DAY, vol. 8, p. 737, note.

Presentation to the Governor One Day Before Adjournment has been held to mean twenty-four hours before the hour fixed for adjournment. *Hyde v. White*, 24 Tex. 137.

7. *Sufficiency of Evidence*.—See *U. S. v. Allen*, 36 Fed. Rep. 174; *Gardner v. Collector*, 6 Wall. (U. S.) 499.

Parol Evidence Held Inadmissible.—*Sherman v. Story*, 30 Cal. 280, 89 Am. Dec. 93, *overruling* *Fowler v. Peirce*, 2 Cal. 165.

8. *Veto After Expiration of Time Limited*.—*Tarleton v. Peggs*, 18 Ind. 25; *Corwin v. Comptroller Gen.*, 6 S. Car. 390.

9. *Invalid Action Within Time Limited*.—*State v. Holder*, 76 Miss. 158.

10. *Effect of Adjournment*.—See *Darling v. Boesch*, 67 Iowa 706.

Even in the Absence of an Express Provision, the rule stated in the text has been held to apply. *Opinion of Justices*, 3 Mass. 567.

11. *Extension of Time*.—See *People v. Hatch*, 33 Ill. 9; *McKenzie v. Moore*, 92 Ky. 216; *Burns v. Sewell*, 48 Minn. 425; *State v. Coahoma County*, 64 Miss. 358; *People v. Bowen*, 21 N. Y. 520; *Arnold v. McKellar*, 9 S. Car. 335; *Pickle v. McCall*, 86 Tex. 212.

12. *Adjournment Must Be Final*.—*Harpending v. Haight*, 39 Cal. 205, 2 Am. Rep. 432; *Opinion of Justices*, 3 Mass. 567; *Opinion of Justices*, 45 N. H. 610; *Corwin v. Comptroller Gen.*, 6 S. Car. 390.

An Adjournment for Two Months has been held not sufficient where a fixed day was set for reassembling. *Miller v. Hurford*, 11 Neb. 377.

(e) **Parol Evidence of Adjournment.** — It has been held that the fact of adjournment may be shown by parol evidence.¹

15. Legislative Journal — *a.* **NECESSITY FOR.** — It is ordinarily required or at least contemplated by the various constitutions that each branch of the legislature shall keep a journal of its proceedings.²

b. **EFFECT OF OMISSIONS.** — It is to be presumed that the requirements of the constitution were followed, and an omission in the journals of matters which the constitution does not require to be entered there will not affect the validity of the statute,³ even though the matter be such as might properly be set forth.⁴ But in states where the journal may be used to impeach the enrolled bill, it is otherwise as to those matters the entry of which is required and which the journals do not show,⁵ though it has been held, in states where

What Constitutes a Final Adjournment. — See *People v. Hatch*, 33 Ill. 153.

1. Parol Evidence. — *People v. Hatch*, 33 Ill. 9.

2. Necessity for Journal. — See *People v. Knopf*, 198 Ill. 340; *State v. Mason*, 43 La. Ann. 590; *Lincoln v. Haugan*, 45 Minn. 451; *Pacific R. Co. v. Governor*, 23 Mo. 365, 66 Am. Dec. 673; *State v. Jones*, 11 Ohio Cir. Dec. 496.

Illinois — Signing and Certification Not Required. — *Miller v. Goodwin*, 70 Ill. 659.

What Constitutes the Journal. — See *JOURNAL*, vol. 17, p. 713. See also *State v. Mason*, 43 La. Ann. 590.

The Bound Volumes in which the proceedings of the house are transcribed and which are duly signed, attested, and filed, and not the notes or memoranda of each day's proceedings kept by the clerk and from which the bound volumes are made up, constitute the journal. *Montgomery Beer Bottling Works v. Gaston*, 126 Ala. 425.

A Supplement to the journal printed as part thereof by order of the legislature constitutes a portion of the journal. *Detroit v. Board of Assessors*, 91 Mich. 78.

3. Omissions — *United States*. — *Illinois v. Illinois Cent. R. Co.*, 33 Fed. Rep. 760.

Alabama. — *Hall v. Steele*, 82 Ala. 562; *Clarke v. Jack*, 60 Ala. 271; *Walker v. Griffith*, 60 Ala. 361.

Arkansas. — *Glidewell v. Martin*, 51 Ark. 559; *Webster v. Little Rock*, 44 Ark. 536; *State v. Little Rock, etc.*, R. Co., 31 Ark. 717; *English v. Oliver*, 28 Ark. 317; *Vinsant v. Knox*, 27 Ark. 279; *Chicot County v. Davies*, 40 Ark. 200; *Pelp v. Payne*, 60 Ark. 637, 30 S. W. Rep. 426; *Worthen v. Badgett*, 32 Ark. 496; *Smithee v. Garth*, 33 Ark. 17.

California. — *Hale v. McGettigan*, 114 Cal. 112; *People v. Dunn*, 80 Cal. 211, 13 Am. St. Rep. 118.

Colorado. — *Massachusetts Mut. L. Ins. Co. v. Colorado L. & T. Co.*, 20 Colo. 1.

Dakota. — *Territory v. O'Connor*, 5 Dak. 397.

Florida. — *State v. Hocker*, 36 Fla. 358; *State v. Brown*, 20 Fla. 407; *Potter v. Lainhart*, (Fla. 1902) 33 So. Rep. 251.

Georgia. — *Butler v. State*, 89 Ga. 821; *Fulington v. Williams*, 98 Ga. 807.

Illinois. — *Larrison v. Peoria, etc.*, R. Co., 77 Ill. 11; *Wabash R. Co. v. Hughes*, 38 Ill. 178; *Schuyler County v. People*, 25 Ill. 181.

Indiana. — *McCulloch v. State*, 11 Ind. 424.

Kansas. — *Weyand v. Stover*, 35 Kan. 545; *In re Taylor*, 60 Kan. 87; *State v. Francis*, 26 Kan. 724.

Louisiana. — *Hollingsworth v. Thompson*, 45 La. Ann. 222, 40 Am. St. Rep. 220; *State v. Laiche*, 105 La. 84.

Maryland. — *Berry v. Baltimore, etc.*, R. Co., 41 Md. 446, 20 Am. Rep. 69.

Minnesota. — *State v. Peterson*, 38 Minn. 143; *State v. Hastings*, 24 Minn. 78; *Miesen v. Canfield*, 64 Minn. 513; *In re Ellis*, 55 Minn. 401, 43 Am. St. Rep. 514.

Missouri. — *State v. Mead*, 71 Mo. 266; *State v. Field*, 119 Mo. 593.

Montana. — *State v. Long*, 21 Mont. 26.

Nebraska. — *State v. Wahoo*, 62 Neb. 40; *State v. Frank*, 60 Neb. 327, 61 Neb. 679; *Taylor v. Wilson*, 17 Neb. 88.

Ohio. — *Miller v. State*, 3 Ohio St. 475.

Oregon. — *Currie v. Southern Pac. R. Co.*, 21 Oregon 566; *State v. Rogers*, 22 Oregon 348; *McKinnon v. Cotner*, 30 Oregon 588.

Tennessee. — *State v. Algood*, 87 Tenn. 163; *State v. McConnell*, 3 Lea (Tenn.) 333; *Williams v. State*, 6 Lea (Tenn.) 549; *Hayes v. State*, (Tenn. 1887, not reported) cited by Snodgrass, J., in *Brewer v. Huntingdon*, 86 Tenn. 737; *Nelson v. Haywood County*, 91 Tenn. 596.

Texas. — *Hunt v. State*, 22 Tex. App. 396; *Blessing v. Galveston*, 42 Tex. 641.

Utah. — *Ritchie v. Richards*, 14 Utah 345.

4. Ex p. Howard-Harrison Iron Co., 119 Ala. 484, 72 Am. St. Rep. 928.

5. Omission of Matters Required to Be Entered — *Alabama*. — *State v. Buckley*, 54 Ala. 599; *Perry County v. Selma, etc.*, R. Co., 58 Ala. 546; *Montgomery Beer Bottling Works v. Gaston*, 126 Ala. 425; *Ex p. Howard-Harrison Iron Co.*, 119 Ala. 484, 72 Am. St. Rep. 928.

Arkansas. — *Glidewell v. Martin*, 51 Ark. 559; *Smithee v. Garth*, 33 Ark. 17.

Florida. — *State v. Green*, 36 Fla. 154.

Idaho. — *Cohn v. Kingsley*, (Idaho 1897) 49 Pac. Rep. 985.

Illinois. — *Spangler v. Jacoby*, 14 Ill. 297, 58 Am. Dec. 571; *Turley v. Logan County*, 17 Ill. 153; *People v. Starne*, 35 Ill. 131, 85 Am. Dec. 348; *Wabash R. Co. v. Hughes*, 38 Ill. 175; *People v. Knopf*, 198 Ill. 340. See also *Prescott v. Illinois, etc.*, Canal, 19 Ill. 324.

Minnesota. — *Lincoln v. Haugan*, 45 Minn. 451.

Missouri. — *Pacific R. Co. v. Governor*, 23 Mo. 364, 66 Am. Dec. 673.

Nebraska. — *Hull v. Miller*, 4 Neb. 506.

Ohio. — *Fordyce v. Godman*, 20 Ohio St. 1.

Utah. — *Ritchie v. Richards*, 14 Utah 345.

the enrolled bill is conclusive, that such an omission does not affect the validity of the statute.¹

c. AMENDMENT OF JOURNAL. — The same legislature which passed the law may correct its journals at the same or a subsequent session so as to make the truth appear.²

d. JOURNAL AS EVIDENCE — (1) *Public Record.* — The legislative journal is usually regarded as a public record of which the courts will take judicial notice, particularly in those states where it is permissible to impeach the enrolled bill by the journal,³ and while courts differ as to the propriety of resorting to the journal for the purpose of impeaching the validity of an act passed by the legislature,⁴ the courts of all states agree in asserting their right to consult the journal for the purpose of ascertaining the existence of specific facts not tending to bring in question the validity of a legislative enactment.⁵

(2) *Conclusiveness.* — Where the journal is consulted, whether to ascertain the existence of a collateral fact or, where this is permissible, to impeach directly the validity of a law, the record there found is conclusive as to the facts recited,⁶ and cannot be impeached in the courts by parol evidence for either mistake, fraud, or collusion. The legislature alone has the power to correct its record.⁷ But extrinsic evidence which does not contradict the

West Virginia. — *Osburn v. Staley*, 5 W. Va. 92, 13 Am. Rep. 640.

See also cases cited in preceding notes.

A Mere Clerical Omission from the journal will not vitiate a statute where the journal furnishes on its face the means of amendment, and it is plainly apparent from the journal that the required act was performed. *Price v. Moundsville*, 43 W. Va. 523, 64 Am. St. Rep. 878.

1. *Yolo County v. Colgan*, 132 Cal. 265.

2. **Amendment.** — *Turley v. Logan County*, 17 Ill. 151; *McCulloch v. State*, 11 Ind. 424; *Detroit v. Board of Assessors*, 91 Mich. 86; *Atty.-Gen. v. Burch*, 84 Mich. 408.

3. **A Public Record** — *United States.* — *South Ottawa v. Perkins*, 94 U. S. 260; *Gardner v. Collector*, 6 Wall. (U. S.) 499. See also *Post v. Kendall County*, 105 U. S. 667.

Alabama. — *State v. Buckley*, 54 Ala. 602; *Jones v. Hutchinson*, 43 Ala. 721; *Moody v. State*, 48 Ala. 115, 17 Am. Rep. 28.

Florida. — *State v. Hocker*, 36 Fla. 358.

Illinois. — *Illinois Cent. R. Co. v. Wren*, 43 Ill. 77; *Bedard v. Hall*, 44 Ill. 91; *Grob v. Cushman*, 45 Ill. 119; *Rockford, etc., R. Co. v. Lynch*, 67 Ill. 149; *Spangler v. Jacoby*, 14 Ill. 297, 58 Am. Dec. 571; *Turley v. Logan County*, 17 Ill. 151.

Indiana. — *McCulloch v. State*, 11 Ind. 430; *State v. Denny*, 118 Ind. 449.

Iowa. — *Koehler v. Hill*, 60 Iowa 552.

Michigan. — *People v. Mahaney*, 13 Mich. 481; *Atty.-Gen. v. Rice*, 64 Mich. 385.

Minnesota. — *Miesen v. Canfield*, 64 Minn. 513.

Nebraska. — *State v. Frank*, 61 Neb. 679.

New York. — *People v. Chenango County*, 8 N. Y. 317.

Ohio. — *Miller v. State*, 3 Ohio St. 475; *State v. Moffitt*, 5 Ohio 358; *Fordyce v. Godman*, 20 Ohio St. 1; *Burke v. Cincinnati*, 10 Ohio Dec. 542, 8 Ohio N. P. 109.

Pennsylvania. — *Southwark Bank v. Com.*, 26 Pa. St. 446.

South Carolina. — *State v. Platt*, 2 S. Car. 150, 16 Am. Rep. 647.

Texas. — *Houston, etc., R. Co. v. Odum*, 53 Tex. 343.

West Virginia. — *Osburn v. Staley*, 5 W. Va. 85, 13 Am. Rep. 640.

Wisconsin. — *McDonald v. State*, 80 Wis. 407; *In re Ryan*, 80 Wis. 414.

Wyoming. — *State v. Swan*, 7 Wyo. 166, 75 Am. St. Rep. 889.

See also the titles JUDICIAL NOTICE, vol. 17, p. 930; RECORDS, vol. 24, p. 170.

Journal Not a Record. — In other states where the enrolled bill is held to be conclusive, the journal is not a public record. See *Com. v. Martin*, 107 Pa. St. 190; *Green v. Weller*, 32 Miss. 650; *Auditor v. Haycraft*, 14 Bush (Ky.) 288 (stated under title JUDICIAL NOTICE, vol. 17, p. 930).

4. See *infra*, this section, 16. c. (3) *Conclusiveness.*

In *Ohio* the certificate of the secretary of state at the end of the annual volume of laws is not conclusive, but may be impeached by the introduction in evidence of the journals of the house and senate which show that an act was never validly passed. *State v. Price*, 4 Ohio Cir. Dec. 296, 8 Ohio Cir. Ct. 25.

5. *Field v. Clark*, 143 U. S. 678, *distinguishing* *Gardner v. Collector*, 6 Wall. (U. S.) 511; *U. S. v. Ballin*, 144 U. S. 1; *Evansville v. State*, 118 Ind. 434; *Edger v. Randolph County*, 70 Ind. 338; *Hollingsworth v. Thompson*, 45 La. Ann. 222, 40 Am. St. Rep. 220; *Strauss v. Heiss*, 48 Md. 295; *Ex p. Wren*, 63 Miss. 535, 56 Am. Rep. 825; *Pacific R. Co. v. Governor*, 23 Mo. 364, 66 Am. Dec. 673; *Southwark Bank v. Com.*, 26 Pa. St. 446.

6. **Conclusiveness.** — Where a bill appears as passed in the annual volume of laws but does not so appear by the journals of the house and senate, it is not a law, for the journals are the highest evidence and must control. *State v. Price*, 4 Ohio Cir. Dec. 296; *Burke v. Cincinnati*, 10 Ohio Dec. 542, 8 Ohio N. P. 109.

7. **Journals Cannot Be Contradicted** — *United States.* — *U. S. v. Ballin*, 144 U. S. 4; *Chicago, etc., R. Co. v. Smyth*, 103 Fed. Rep. 376; *Ames v. Union Pac. R. Co.*, 64 Fed. Rep. 165.

journal may be received to aid or explain it.¹

(3) *Proof* — (a) *In General*. — It may be stated generally that, the legislative journal being a public record, the general rules as to the proof of such records will apply when it is sought to introduce the journal in evidence.²

(b) *Transcript*. — Thus a transcript from the journal record of either house of the legislature, properly certified, is admissible in evidence to prove the facts therein recorded, and it is not necessary to produce the original minutes made by the officers of the respective houses or copies thereof.³

(c) *Printed Copies*. — The printed journals of the legislature, made up and printed pursuant to a statute of the state and published by its authority, are competent evidence of the contents of the original journals.⁴ But where the original written journals on file in the office of the secretary of state differ in any material particular from the printed journals, the originals are usually considered the authentic official records and must control.⁵

16. Enrolled Bill — a. *DEFINITION*. — The enrolled bill is the bill as copied after its final passage through both houses, and as it has passed both houses, and as presented to the governor for his signature and approval. There can be only one enrolled bill.⁶

b. *FILING OF ENROLLED BILLS* — (1) *In General*. — Under constitution, statute, or usage, it is generally the duty of that person, or body, at whose hands a bill receives its final sanction, to deliver it for filing to the officer authorized to receive and preserve it; this is usually the secretary of state.⁷

(2) *Effect of Filing on Functions of Executive*. — When the executive thus files a bill which has been presented to him, he precludes himself from changing his decision thereon, even though the time within which he might have acted has not expired.⁸

Indiana. — *McCulloch v. State*, 11 Ind. 424; *Evans v. Browne*, 30 Ind. 514, 95 Am. Dec. 710.

Iowa. — *Koehler v. Hill*, 60 Iowa 543.

Kansas. — Division of Howard County, 15 Kan. 194.

Kentucky. — *Covington v. Ludlow*, 1 Met. (Ky.) 295.

Maine. — *Weeks v. Smith*, 81 Me. 538.

Maryland. — *Berry v. Baltimore, etc.*, R. Co., 41 Md. 446, 20 Am. Rep. 69; *Annapolis v. Harwood*, 32 Md. 471, 3 Am. Rep. 161.

Massachusetts. — See *Andrews v. Boylston*, 110 Mass. 214.

Michigan. — *Auditor Gen. v. Menominee County*, 89 Mich. 552; *Atty.-Gen. v. Rice*, 64 Mich. 391; *Detroit v. Board of Assessors*, 91 Mich. 84.

Nebraska. — *State v. Frank*, 60 Neb. 327.

Nevada. — *State v. Swift*, 10 Nev. 176, 21 Am. Rep. 721.

Ohio. — *State v. Smith*, 44 Ohio St. 348; *State v. Moffitt*, 5 Ohio 363; *Miller v. State*, 3 Ohio St. 475; *Fordyce v. Godman*, 20 Ohio St. 1.

Virginia. — *Wise v. Bigger*, 79 Va. 269.

Wyoming. — *White v. Hinton*, 3 Wyo. 753.

But compare *State v. Mason*, 43 La. Ann. 625.

1. Evidence to Aid or Explain. — *U. S. v. Allen*, 36 Fed. Rep. 174; *State v. Frank*, 61 Neb. 679. See also *Gardner v. Collector*, 6 Wall. (U. S.) 499.

The Journals Can Neither Be Contradicted Nor Amplified by loose memoranda made by the clerical officers of the houses. *Ex p. Howard-Harrison Iron Co.*, 119 Ala. 484, 72 Am. St. Rep. 928.

Contents of Statute. — While the journals are controlling as regards what the legislature does

in respect to the passage of a bill, they are not necessarily so as to the contents of a statute. On the latter subject courts may look to the enrolled bill, to the engrossed bill, and to any other legitimate evidence within their reach. *Milwaukee County v. Isenring*, 109 Wis. 9.

2. See the title *RECORDS*, vol. 24, pp. 198-206.

3. *Transcript*. — *Miller v. Goodwin*, 70 Ill. 659; *Illinois Cent. R. Co. v. Wren*, 43 Ill. 77.

4. *Printed Copies*. — *Post v. Kendall County*, 105 U. S. 667; *Miller v. Goodwin*, 70 Ill. 659; *Lincoln v. Haugan*, 45 Minn. 451. See also *Bradley v. West*, 60 Mo. 33; *Root v. King*, 7 Cow. (N. Y.) 613.

Difference Between Bound Volumes and Parts Published Daily. — Where the bound volume of the journal at the end of the session differs from the parts thereof officially published from day to day during the session, it will be presumed that the differences are the result of amendment by the house, and the bound volume is held conclusive. *Detroit v. Board of Assessors*, 91 Mich. 86.

5. Original Written Journals Control. — *Santa Clara County v. Southern Pac. R. Co.*, 18 Fed. Rep. 385; *Chicot County v. Davies*, 40 Ark. 200.

6. Division of Howard County, 15 Kan. 194.

Where Original Bill Lost, Copy May Be Substituted. — *Massachusetts Mut. L. Ins. Co. v. Colorado L. & T. Co.*, 20 Colo. 1.

7. Filing of Enrolled Bill. — *Harpending v. Haight*, 39 Cal. 208, 2 Am. Rep. 432; *People v. Hatch*, 33 Ill. 9; *State v. Whisner*, 35 Kan. 280; *Pangborn v. Young*, 32 N. J. L. 33; *People v. Devlin*, 33 N. Y. 282, 88 Am. Dec. 377. See the article *RECORDS*, vol. 24, p. 169.

8. Effect of Filing on Functions of Executive. — *Tarleton v. Peggs*, 18 Ind. 24; *Corwin v. Comp-*

c. ENROLLED BILL AS EVIDENCE — (1) *In General*. — The enrolled bill is the original act.¹ It is to be looked to when the act as printed in the statute book is attacked,² and if the two differ, the bill as enrolled controls.³

(2) *Presumption*. — If the enrolled bill is properly authenticated it must be presumed, in all states, that the statute was enacted in conformity to all essential constitutional provisions, and that the enrolled bill sets forth the law as actually passed.⁴ And even when it is permissible to impeach the enrolled bill the evidence must be clear and convincing and show the defect beyond doubt, or the statute will be upheld.⁵ If, however, the enrolled bill is not properly authenticated, the presumption of regularity is gone, and the court usually looks behind the act to the journals of the legislature to ascertain the facts,⁶ and it has even been held that where an act was not authenticated as

troller Gen., 6 S. Car. 390. See *supra*, this section, 14. b. 4. *Withdrawal of Approval*.

1. *Original Act*. — Koehler v. Hill, 60 Iowa 554.

Where There Are Errors in Copies of the act, the court will inform itself by appealing to the original act on file in office of the secretary of state. State v. Clare, 5 Iowa 509.

2. Purdy v. People, 4 Hill (N. Y.) 384; De Bow v. People, 1 Den. (N. Y.) 9; Com. v. Martin, 107 Pa. St. 192.

3. Simpson v. Union Stock Yards Co., 110 Fed. Rep. 799; Epstein v. Levenson, 79 Ga. 718; Potter v. State, 92 Ala. 37.

Omission from Statute Book. — An article which in fact appears in the enrolled bill is enforced although by a mistake of the printer it has been omitted from the revised statutes as published. Williams v. Sapieha, (Tex. Civ. App. 1900) 59 S. W. Rep. 947.

4. *Presumption* — Alabama. — Jennings v. Russell, 92 Ala. 603; Walker v. Griffith, 60 Ala. 361; Harrison v. Gordy, 57 Ala. 49.

Arkansas. — Worthen v. Badgett, 32 Ark. 516; English v. Oliver, 28 Ark. 317. See also Pelp v. Payne, 60 Ark. 637, 30 S. W. Rep. 426.

Colorado. — *In re Roberts*, 5 Colo. 525; Massachusetts Mut. L. Ins. Co. v. Colorado L. & T. Co., 20 Colo. 1.

Connecticut. — Eld v. Gorham, 20 Conn. 8.

Illinois. — Spangler v. Jacoby, 14 Ill. 297, 58 Am. Dec. 571; People v. Starne, 35 Ill. 121, 85 Am. Dec. 348; Turley v. Logan County, 17 Ill. 151; Bedard v. Hall, 44 Ill. 91; Illinois Cent. R. Co. v. Wren, 43 Ill. 77; Binz v. Weber, 81 Ill. 288; Schuyler County v. People, 25 Ill. 181; Ryan v. Lynch, 68 Ill. 160; Hensoldt v. Petersburg, 63 Ill. 157; Larrison v. Peoria, etc., R. Co., 77 Ill. 11; Illinois Cent. R. Co. v. People, 143 Ill. 434.

Indiana. — McCulloch v. State, 11 Ind. 424.

Iowa. — Duncombe v. Prindle, 12 Iowa 1.

Kansas. — Chicago, etc., R. Co. v. Manhattan, 45 Kan. 419; Division of Howard County, 15 Kan. 194; *In re Vanderberg*, 28 Kan. 243; Weyand v. Stover, 35 Kan. 545; State v. Francis, 26 Kan. 724.

Louisiana. — Hollingsworth v. Thompson, 45 La. Ann. 222, 40 Am. St. Rep. 220.

Maryland. — Berry v. Baltimore, etc., R. Co., 41 Md. 446, 20 Am. Rep. 69; Legg v. Annapolis, 42 Md. 203; Annapolis v. Harwood, 32 Md. 471, 3 Am. Rep. 161.

Michigan. — Hart v. McElroy, 72 Mich. 446.

Minnesota. — State v. Hastings, 24 Minn. 78;

Lowell v. North, 4 Minn. 32; State v. Peterson, 38 Minn. 143.

Mississippi. — Brady v. West, 50 Miss. 69.

Missouri. — Bradley v. West, 60 Mo. 33; State v. Wray, 109 Mo. 594.

Nebraska. — Hull v. Miller, 4 Neb. 503; State v. Frank, 60 Neb. 327, 61 Neb. 679. See also Webster v. Hastings, 59 Neb. 563; State v. Burlington, etc., R. Co., 60 Neb. 741.

Nevada. — State v. Swift, 10 Nev. 176, 21 Am. Rep. 721.

New Hampshire. — Opinion of Justices, 35 N. H. 579; Opinion of Justices, 52 N. H. 622.

New York. — People v. Chenango County, 8 N. Y. 317; People v. Briggs, 50 N. Y. 558.

Ohio. — State v. Rabbitts, 46 Ohio St. 178; Miller v. State, 3 Ohio St. 475.

Oregon. — Currie v. Southern Pac. R. Co., 21 Oregon 566.

Pennsylvania. — Erie, etc., R. Co. v. Casey, 26 Pa. St. 287; Speer v. Plank-Road Co., 22 Pa. St. 376.

South Carolina. — State v. Brown, 33 S. Car. 151.

Tennessee. — State v. McConnell, 3 Lea (Tenn.) 332; Gaines v. Horrigan, 4 Lea (Tenn.) 608.

Texas. — Usener v. State, 8 Tex. App. 177; Blessing v. Galveston, 42 Tex. 641.

Utah. — Ritchie v. Richards, 14 Utah 345.

Wyoming. — State v. Swan, 7 Wyo. 166, 75 Am. St. Rep. 880.

If the Journals Are Lost or Destroyed, the presumption is that the act is valid. Spangler v. Jacoby, 14 Ill. 297, 58 Am. Dec. 571.

5. *Evidence Must Be Clear and Convincing*. — Chicago, etc., R. Co. v. Smyth, 103 Fed. Rep. 376; Larrison v. Peoria, etc., R. Co., 77 Ill. 18; State v. Francis, 26 Kan. 731; Chesney v. McClintock, 61 Kan. 94; Homrighausen v. Knoche, 58 Kan. 646; State v. Peterson, 38 Minn. 143; McKinnon v. Cotner, 30 Oregon 588; Nelson v. Hayward County, 91 Tenn. 596. See also Leavenworth County v. Higginbotham, 17 Kan. 62.

6. *No Presumption of Validity Where No Proper Authentication*. — Burr v. Ross, 19 Ark. 250; Leavenworth County v. Higginbotham, 17 Kan. 62; Rumsey v. New York, etc., R. Co., 130 N. Y. 92; People v. Highway Com'rs, 54 N. Y. 276, 13 Am. Rep. 581; Ewing v. Duncan, 81 Tex. 230. See also Rex v. Arundel, Hob. 110.

In the Absence of Authentication of an act, courts have refused either to enforce it or to compel its authentication. Scarborough v. Robinson, 81 N. Car. 409.

prescribed by the revised statutes, the court had no legal evidence of the existence of the law before it, and therefore would not take notice of such law or act thereon.¹

(3) *Conclusiveness* — (a) *View that Enrolled Bill Is Conclusive.* — The *English* doctrine is that when a bill has passed both houses and received the royal assent, a court of justice cannot look beyond it; the parliament roll is conclusive.² In many of the *United States* the rule has been announced that the enrolled bill properly authenticated is the sole expository of its own contents and the conclusive evidence of its existence and valid enactment, and that it is not allowable to look to the journals of the house or to other extrinsic sources for the purpose of ascertaining the history of the act, or its provisions, or of attacking the manner of its enactment.³

1. *Graves v. Alsap*, 1 Ariz. 274; *Wabash R. Co. v. Hughes*, 38 Ill. 189; *Burritt v. State Contract Com'rs*, 120 Ill. 332.

2. *English Doctrine.* — *The Edinburgh, etc., R. Co. v. Wauchope*, 8 Cl. & F. 710.

Canada. — *London, etc., Loan, etc., Co. v. Rural Municipality*, 7 Manitoba 128.

3. *Enrolled Bill Conclusive* — *California.* — In this state the doctrine of the text was first laid down in *Sherman v. Story*, 30 Cal. 253, 89 Am. Dec. 93, *overruling Fowler v. Peirce*, 2 Cal. 165. The authority of this case was *questioned* in *Railroad Tax Cases*, 13 Fed. Rep. 722, the court considering that a change in the California constitution required a change in the rule. A few later decisions seem a little unsettled on the question. See *People v. Burt*, 43 Cal. 560; *Weill v. Kenfield*, 54 Cal. 111; *Oakland Pav. Co. v. Hilton*, 69 Cal. 489; *People v. Dunn*, 80 Cal. 212. But the latest decisions recognize *Sherman v. Story*, 30 Cal. 253, 89 Am. Dec. 93, as the leading case, and hold the rule stated in the text to be firmly established in California. *People v. Harlan*, 133 Cal. 16; *Yolo County v. Colgan*, 132 Cal. 265.

Connecticut. — *Eld v. Gorham*, 20 Conn. 8. *Indiana.* — *Lewis v. State*, 148 Ind. 346; *Western Union Tel. Co. v. Taggart*, 141 Ind. 281; *State v. Boice*, 140 Ind. 506; *Evans v. Browne*, 30 Ind. 514, 95 Am. Dec. 710; *Bender v. State*, 53 Ind. 254; *Madison County v. Burford*, 93 Ind. 383; *Stout v. Grant County*, 107 Ind. 343. In *Edger v. Randolph County*, 70 Ind. 331, the rule in the text was upheld, but the journals were consulted to ascertain the intent of the legislature in passing the bill which the court was construing. In *Evansville v. State*, 118 Ind. 434, the journals were examined to ascertain if a bill had passed over the governor's veto, but the court expressly distinguished the cases recognizing the general principle in the text. The earlier cases of *Skinner v. Deming*, 2 Ind. 558, 54 Am. Dec. 463; *Coleman v. Dobbins*, 8 Ind. 156; *McCulloch v. State*, 11 Ind. 424; *Coburn v. Dodd*, 14 Ind. 347, holding the doctrine contrary to that stated in the text, have been *overruled*.

Kentucky. — *Owensboro, etc., R. Co. v. Barclay*, 102 Ky. 16; *Com. v. Hardin County Ct.*, 99 Ky. 188; *Com. v. Shelton*, 99 Ky. 120; *Lafferty v. Huffman*, 99 Ky. 80; *Waller v. Murray*, (Ky. 1899) 53 S. W. Rep. 25.

Louisiana. — *Louisiana State Lottery Co. v. Richoux*, 23 La. Ann. 743, 8 Am. Rep. 602; *Whited v. Lewis*, 25 La. Ann. 568. Compare *Hollingsworth v. Thompson*, 45 La. Ann. 222,

40 Am. St. Rep. 220. See also *State v. Mason*, 43 La. Ann. 613.

Maine. — *Weeks v. Smith*, 81 Me. 538, *relied on* in *Field v. Clark*, 143 U. S. 676.

Mississippi. — *Green v. Weller*, 32 Miss. 650; *Green v. Weller*, 33 Miss. 735; *Swann v. Buck*, 40 Miss. 268; *Ex p. Wren*, 63 Miss. 512, 56 Am. Rep. 825 (*overruling Brady v. West*, 50 Miss. 68, and *relied on* in *Field v. Clark*, 143 U. S. 676).

Nevada. — *State v. Howell*, (Nev. 1901) 64 Pac. Rep. 466; *State v. Swift*, 10 Nev. 176, 11 Am. Rep. 721; *State v. Rogers*, 10 Nev. 250, 21 Am. Rep. 738; *State v. Glenn*, 18 Nev. 34; *State v. Nye*, 23 Nev. 99; *State v. Beck*, 25 Nev. 68. Constitutional amendments, however, must be entered at length on the journals, and the compliance with this requirement will be investigated by examining the journal. *State v. Tuffy*, 19 Nev. 391, 3 Am. St. Rep. 895.

New Jersey. — *Pangborn v. Young*, 32 N. J. L. 29; *Chosen Freeholders v. Stevenson*, 46 N. J. L. 184; *Standard Underground Cable Co. v. Atty.-Gen.*, 46 N. J. Eq. 276, 19 Am. St. Rep. 394.

New York. — In this state the question of the conclusiveness of the enrolled bill seems never to have been squarely met and decided. But while the cases are not uniform the weight of opinion seems to be in favor of the rule stated in the text. See *People v. Purdy*, 2 Hill (N. Y.) 34, 4 Hill (N. Y.) 394; *De Bow v. People*, 1 Den. (N. Y.) 9; *Commercial Bank v. Sparrow*, 2 Den. (N. Y.) 97; *Thomas v. Dakin*, 22 Wend. (N. Y.) 9; *Warner v. Beers*, 23 Wend. (N. Y.) 103; *Hunt v. Van Alstyne*, 25 Wend. (N. Y.) 605; *People v. Highway Com'rs*, 54 N. Y. 276, 13 Am. Rep. 581; *Rumsey v. New York, etc., R. Co.*, 130 N. Y. 92; *People v. Petrea*, 92 N. Y. 128; *People v. Devlin*, 33 N. Y. 269, 88 Am. Dec. 377; *People v. Chenango County*, 8 N. Y. 327.

In *Matter of New York, etc., Bridge Co.*, 148 N. Y. 540, it was held that the journals of the senate and assembly were properly received in evidence to show whether an appropriation bill had received the necessary two-thirds vote of all the members elected to each branch of the legislature, where the certificates of the presiding officers of both houses attached to the original bill on file in the office of the secretary of state show only the fact that three-fifths of the members were present.

North Carolina. — *Brodnax v. Groom*, 64 N. Car. 244; *Scarborough v. Robinson*, 81 N. Car. 409, *disapproving dictum* in *Gatlin v. Tarboro*,

The Reason for This View seems to be that by most constitutions it is provided that a journal must be kept, but the particular method of keeping it and of its authentication is not generally specified; while, on the other hand, the method of authenticating and filing the enrolled bill is either so specifically prescribed or so well established¹ that it may be presumed that the framers of the constitutions intended that the authenticated bill and not the journals should constitute the solemn record,² and that the constitutional requirement that journals shall be kept is rather to insure publicity to legislative proceedings than to make the journals the best or the conclusive evidence on the question whether a bill was in fact passed.³

Absence of Enrolled Bill Conclusive Against Existence of Act. — In *Arizona* the court has held, following the doctrine just stated, that it was not competent for the court to examine the journals of the two houses of the legislature and seek there to find evidence of a certain law having been enacted and being still in force, where there was no such law among the published laws of the territory and there was no copy of such law in the office of the secretary of the territory, who was the lawful custodian of the original bills that had been passed.⁴

Lack of Authority to Pass Law. — In *Texas* the court, although recognizing the rule that the enrolled bill is conclusive and cannot be impeached, has held that although a bill was properly enrolled it might be shown that the act was such as the legislature had no power to pass, in that it was enacted at a special session and related to a subject not embraced in the proclamation of the governor calling the session or in his communications to the legislature.⁵

(b) **View that Journal May Be Looked to.** — On the other hand, in a great many of the United States the rule is established that the legislative journals may be looked to in order to ascertain whether the constitutional provision has been complied with in the passage of the statute,⁶ and whether the enrolled bill is

78 N. Car. 119; *Carr v. Coke*, 116 N. Car. 223. But see *infra*, this section, (d) *Distinction in North Carolina*, for later North Carolina cases explaining and consequently limiting these cases.

North Dakota. — *Power v. Kitching*, 10 N. Dak. 254.

Pennsylvania. — *Kilgore v. Magee*, 85 Pa. St. 412; *Com. v. Martin*, 107 Pa. St. 185; *Speer v. Plank-Road Co.*, 22 Pa. St. 376.

In *Southwark Bank v. Com.*, 26 Pa. St. 446, the journals were looked to, but not to impeach the validity of the statute.

South Dakota. — *Narregang v. Brown County*, 14 S. Dak. 357; *State v. Bacon*, 14 S. Dak. 394.

Texas. — *Houston, etc., R. Co. v. Stuart*, (Tex. Civ. App. 1898) 48 S. W. Rep. 799; *McLane v. Paschal*, 8 Tex. Civ. App. 398; *Central R. Co. v. Hearne*, 32 Tex. 546; *Blessing v. Galveston*, 42 Tex. 641; *Houston, etc., R. Co. v. Odum*, 53 Tex. 343; *Day Land, etc., Co. v. State*, 68 Tex. 526; *Usener v. State*, 8 Tex. App. 177; *Williams v. Taylor*, 83 Tex. 667, explaining *Ewing v. Duncan*, 81 Tex. 230; *Ex p. Tipton*, 28 Tex. App. 438. See also *Williams v. Sapieha*, (Tex. Civ. App. 1900) 59 S. W. Rep. 947. But see *contra*, *Hunt v. State*, 22 Tex. App. 396.

Vermont. — See *Matter of Welman*, 20 Vt. 656.

Washington. — *State v. Jones*, 6 Wash. 452.

The Certificate of the Presiding Officers of the general assembly is conclusive evidence that a bill was read, and passed three several readings in each house. *New Hanover County v. De Rosset*, 129 N. Car. 275.

1. Reasons for the View. — *Beasley, C. J.*, in *Pangborn v. Young*, 32 N. J. L. 33.

2. *Sherman v. Story*, 30 Cal. 278, 89 Am. Dec. 93; *Evans v. Browne*, 30 Ind. 523, 95 Am. Dec. 710; *Pacific R. Co. v. Governor*, 23 Mo. 363, 66 Am. Dec. 673; *Pangborn v. Young*, 32 N. J. L. 35; *Williams v. Taylor*, 83 Tex. 667.

3. *Field v. Clark*, 143 U. S. 670; *Weeks v. Smith*, 81 Me. 538; *Chosen Freeholders v. Stevenson*, 46 N. J. L. 184; *Williams v. Taylor*, 83 Tex. 667. See also *Evans v. Browne*, 30 Ind. 526, 95 Am. Dec. 710; *Ex p. Wren*, 63 Miss. 533, 56 Am. Rep. 825; *Pacific R. Co. v. Governor*, 23 Mo. 369, 66 Am. Dec. 673; *Pangborn v. Young*, 32 N. J. L. 29.

4. Absence of Enrolled Bill Conclusive Against Existence of Act. — *Graves v. Alsap*, 1 Ariz. 274.

5. Lack of Authority. — *Manor Casino v. State*, (Tex. Civ. App. 1896) 34 S. W. Rep. 769.

6. Legislative Journals May Be Looked to — *Alabama.* — *Dew v. Cunningham*, 28 Ala. 466, 65 Am. Dec. 362; *State v. Buckley*, 54 Ala. 599; *Harrison v. Gordy*, 57 Ala. 49; *Perry County v. Selma, etc., R. Co.*, 58 Ala. 546; *Walker v. Griffith*, 60 Ala. 361; *Moog v. Randolph*, 77 Ala. 597; *Sayre v. Pollard*, 77 Ala. 608; *Abernathy v. State*, 78 Ala. 411; *Stein v. Leeper*, 78 Ala. 517; *Hall v. Steele*, 82 Ala. 562; *Jones v. Hutchinson*, 43 Ala. 721; *Moody v. State*, 48 Ala. 115, 17 Am. Rep. 28; *Henderson v. State*, 94 Ala. 95.

Arkansas. — *Burr v. Ross*, 19 Ark. 250; *Vinsant v. Knox*, 27 Ark. 266; *English v. Oliver*, 28 Ark. 317; *State v. Little Rock, etc., R. Co.*, 31 Ark. 701; *Worthen v. Badgett*, 32 Ark. 496; *Smithee v. Garth*, 33 Ark. 17; *State v. Crawford*, 35 Ark. 237; *Chicot County v. Davies*, 40 Ark. 200; *Smithee v. Campbell*, 41 Ark. 471; *Webster v. Little Rock*, 44 Ark. 536;

identical with that passed,¹ and in case of an irreconcilable conflict the journals control.²

Davis v. Gaines, 48 Ark. 370; *Dow v. Beidelman*, 49 Ark. 325; *Glidewell v. Martin*, 51 Ark. 559.

Colorado.—*In re Roberts*, 5 Colo. 525; *Hughes v. Felton*, 11 Colo. 489; *Nesbit v. People*, 19 Colo. 441; *Robertson v. People*, 20 Colo. 279. *Compare In re General Appropriation Bill*, 16 Colo. 539.

Florida.—*State v. Brown*, 20 Fla. 407; *State v. Deal*, 24 Fla. 293, 12 Am. St. Rep. 204; *State v. Green*, 36 Fla. 154.

Idaho.—*Cohn v. Kingsley*, (Idaho 1897) 49 Pac. Rep. 985.

Illinois.—*Spangler v. Jacoby*, 14 Ill. 297, 58 Am. Dec. 571; *Turley v. Logan County*, 17 Ill. 151; *People v. Hatch*, 19 Ill. 283; *Prescott v. Illinois, etc., Canal*, 19 Ill. 324; *Schuyler County v. People*, 25 Ill. 181; *People v. Starne*, 35 Ill. 121, 85 Am. Dec. 348; *Wabash R. Co. v. Hughes*, 38 Ill. 174; *Illinois Cent. R. Co. v. Wren*, 43 Ill. 77; *Bedard v. Hall*, 44 Ill. 91; *Grob v. Cushman*, 45 Ill. 119; *People v. De Wolf*, 62 Ill. 253; *Hensoldt v. Petersburg*, 63 Ill. 157; *Ryan v. Lynch*, 68 Ill. 160; *Happel v. Brethauer*, 70 Ill. 166, 22 Am. Rep. 70; *Miller v. Goodwin*, 70 Ill. 659; *Plummer v. People*, 74 Ill. 361; *Larrison v. Peoria, etc., R. Co.*, 77 Ill. 11; *Binz v. Weber*, 81 Ill. 288; *People v. Loewenthal*, 93 Ill. 191; *Wenner v. Thornton*, 98 Ill. 156; *Burritt v. State Contract Com'rs*, 120 Ill. 332; *Illinois Cent. R. Co. v. People*, 143 Ill. 434; *Leach v. People*, 122 Ill. 420; *South Ottawa v. Perkins*, 94 U. S. 260; *Walnut v. Wade*, 103 U. S. 683; *Ohio v. Frank*, 103 U. S. 697; *Post v. Kendall County*, 105 U. S. 667; *People v. Knopf*, 198 Ill. 340.

Iowa.—See *Koehler v. Hill*, 60 Iowa 543, *distinguishing State v. Clare*, 5 Iowa 509, and *Duncombe v. Prindle*, 12 Iowa 1.

Kansas.—*Haynes v. Heller*, 12 Kan. 384; *Division of Howard County*, 15 Kan. 194; *Leavenworth County v. Higginbotham*, 17 Kan. 62; *Prohibitory Amendment Cases*, 24 Kan. 700; *State v. Francis*, 26 Kan. 724; *In re Vanderberg*, 28 Kan. 243; *Weyand v. Stover*, 35 Kan. 545; *State v. Robertson*, 41 Kan. 200; *Chicago, etc., R. Co. v. Manhattan*, 45 Kan. 419; *In re Taylor*, 60 Kan. 87.

Maryland.—*Berry v. Baltimore, etc., R. Co.*, 41 Md. 446, 20 Am. Rep. 69; *Legg v. Annapolis*, 42 Md. 203; *Strauss v. Heiss*, 48 Md. 292. Under the old constitution in this state the enrolled bill had been held conclusive. See *Fourke v. Fleming*, 13 Md. 392; *Annapolis v. Harwood*, 32 Md. 471, 3 Am. Rep. 161.

Michigan.—*Southworth v. Palmyra, etc., R. Co.*, 2 Mich. 287; *Green v. Graves*, 1 Dougl. (Mich.) 351; *Hurlbut v. Britain*, 2 Dougl. (Mich.) 191; *People v. Mahaney*, 13 Mich. 481; *People v. Onondaga*, 16 Mich. 254; *Steckert v. East Saginaw*, 22 Mich. 104; *Pack v. Barton*, 47 Mich. 520; *Atty.-Gen. v. Joy*, 55 Mich. 94; *Callaghan v. Chipman*, 59 Mich. 610; *Atty.-Gen. v. Rice*, 64 Mich. 385; *Hart v. McElroy*, 72 Mich. 446; *Sackrider v. Saginaw County*, 79 Mich. 59; *Stow v. Grand Rapids*, 79 Mich. 595; *Rode v. Phelps*, 80 Mich. 598; *Caldwell v. Ward*, 83 Mich. 13; *Atty.-Gen. v. Burch*, 84 Mich. 408,

Minnesota.—*Ramsey County v. Heenan*, 2 Minn. 330; *State v. Hastings*, 24 Minn. 78; *Burt v. Winona, etc., R. Co.*, 31 Minn. 472; *State v. Peterson*, 38 Minn. 143; *Lincoln v. Haugan*, 45 Minn. 451. But see *Comstock v. Tracey*, 46 Fed. Rep. 162.

Missouri.—*State v. Mead*, 71 Mo. 270, *overruling Pacific R. Co. v. Governor*, 23 Mo. 353, 66 Am. Dec. 673. See also *Bradley v. West*, 60 Mo. 33.

In an early Missouri case the journals were examined to ascertain whether a constitutional amendment received a proper majority. *State v. McBride*, 4 Mo. 303, 29 Am. Dec. 636.

Nebraska.—*Hull v. Miller*, 4 Neb. 503; *State v. Liedtke*, 9 Neb. 462; *Cottrell v. State*, 9 Neb. 125; *Ballou v. Black*, 17 Neb. 389; *State v. McLelland*, 18 Neb. 236, 53 Am. Rep. 814; *State v. Robinson*, 20 Neb. 96; *In re Groff*, 21 Neb. 647, 59 Am. Rep. 859; *State v. Van Duyn*, 24 Neb. 586; *State v. Moore*, 37 Neb. 13; *State v. Frank*, 60 Neb. 327; *State v. Abbott*, 59 Neb. 106; *State v. Burlington, etc., R. Co.*, 60 Neb. 741; *Chicago, etc., R. Co. v. Smyth*, 103 Fed. Rep. 376; *Simpson v. Union Stock Yards Co.*, 110 Fed. Rep. 799.

New Hampshire.—*Opinion of Justices*, 35 N. H. 579; *Opinion of Justices*, 45 N. H. 607; *Opinion of Justices*, 52 N. H. 622.

Ohio.—*State v. Moffitt*, 5 Ohio 358; *Miller v. State*, 3 Ohio St. 475; *Fordyce v. Godman*, 20 Ohio St. 1; *State v. Smith*, 44 Ohio St. 348; *State v. Kiesewetter*, 45 Ohio St. 254; *State v. Rabbitts*, 46 Ohio St. 178.

Oregon.—*Mumford v. Sewall*, 11 Oregon 71, 50 Am. Rep. 462; *State v. Wright*, 14 Oregon 365; *Currie v. Southern Pac. R. Co.*, 21 Oregon 566; *McKinnon v. Cotner*, 30 Oregon 588.

South Carolina.—*State v. Platt*, 2 S. Car. 150, 16 Am. Rep. 651; *State v. Smalls*, 11 S. Car. 262; *Walker v. State*, 12 S. Car. 200; *State v. Hagood*, 13 S. Car. 46.

Tennessee.—*State v. McConnell*, 3 Lea (Tenn.) 332; *Gaines v. Horrihan*, 4 Lea (Tenn.) 608; *Williams v. State*, 6 Lea (Tenn.) 549; *Brewer v. Huntingdon*, 86 Tenn. 732; *State v. Algoood*, 87 Tenn. 163; *Nelson v. Haywood County*, 91 Tenn. 596.

Utah.—*Ritchie v. Richards*, 14 Utah 345.

Virginia.—*Wise v. Bigger*, 79 Va. 269.

West Virginia.—*Osburn v. Staley*, 5 W. Va. 85, 13 Am. Rep. 640.

Wisconsin.—*Watertown v. Cady*, 20 Wis. 501; *Bound v. Wisconsin Cent. R. Co.*, 45 Wis. 543; *Meracle v. Down*, 64 Wis. 323.

Wyoming.—*State v. Swan*, 7 Wyo. 166, 75 Am. St. Rep. 889; *Brown v. Nash*, 1 Wyo. 85; *Union Pac. R. Co. v. Carr*, 1 Wyo. 96.

1. *Willard, J.*, in *State v. Platt*, 2 S. Car. 150, 16 Am. Rep. 652. See also cases cited in preceding note.

2. **Journals Control**.—*Simpson v. Union Stock Yards Co.*, 110 Fed. Rep. 799; *State v. Green*, 36 Fla. 154; *State v. Burlington, etc., R. Co.*, 60 Neb. 741; *Webster v. Hastings*, 59 Neb. 563; *Ritchie v. Richards*, 14 Utah 345. See also *Ames v. Union Pac. R. Co.*, 64 Fed. Rep. 165.

Reason for the Rule. — While this rule is more or less the result of peculiar provisions in constitutions or statutes which expressly or by implication make the journals evidence,¹ it has also been said that the mere requirement that a journal should be kept imports that it is to be kept for the purpose of affording evidence of what is passed;² and it has also been said that the rule is required by public policy.³

(c) **Rule in Federal Courts.** — The Supreme Court of the *United States* has adopted the rule that the enrolled bill is conclusive with reference to acts of Congress and of the territorial legislatures,⁴ but with respect to state statutes the federal courts will apply the rule adopted in the particular state where the statute under consideration was enacted.⁵

(a) **Distinction in North Carolina.** — The Supreme Court of *North Carolina* has indicated a distinction which appears to be most reasonable, and which may serve to a certain extent to reconcile the differences of opinion on the question of the conclusiveness of the enrolled bill. The distinction stated is this: that where the constitution contains no provision requiring entries on the journal of particular matters, such as, for example, the call of the yeas and nays on a measure in question, the enrolled act cannot in such case be impeached by the journal; but where a state constitution provides such formalities in the enactment of laws as require a record on the legislative journals, these journals are conclusive not only as against a printed statute published by authority of law, but also against a duly enrolled act.⁶

17. Engrossed Bill — *a. DEFINITION.* — An engrossed bill is the bill as copied for final passage in either house. It is the bill as copied before its passage with the amendments made up to that time, and there may be one or more engrossed bills of each bill introduced, and each of these engrossed bills may be different from any of the others, for each engrossed bill simply represents the bill as it is when it is engrossed.⁷

b. ENGROSSED BILL AS EVIDENCE. — In some states it has been held that the engrossed bill, not being a record, cannot be introduced in evidence to impeach the enrolled bill or the legislative journal,⁸ but in other states the original engrossed bill has been admitted.⁹

In *Arkansas*, where the engrossed bill is filed according to law in the office of the secretary of state, it has been held admissible.¹⁰

When the Legislative Journals Are Defective, mutilated, or incomplete, their silence will not, as against the enrolled bill on file in the office of the secretary of state, be taken as evidence that the yeas and nays on the final passage of the bill were not recorded as required by the constitution. *State v. Frank*, 60 Neb. 327.

1. Constitutional or Statutory Provisions. — See *People v. Starne*, 35 Ill. 121, 85 Am. Dec. 348; *Koehler v. Hill*, 60 Iowa 552; *Opinion of Justices*, 35 N. H. 579; *Com. v. Martin*, 107 Pa. St. 192.

2. Journals Kept to Afford Evidence. — *Chicot County v. Davies*, 40 Ark. 211; *Fowler v. Peirce*, 2 Cal. 165; *State v. Francis*, 26 Kan. 731; *Legg v. Annapolis*, 42 Md. 221; *Brady v. West*, 50 Miss. 79; *State v. McLelland*, 18 Neb. 243, 53 Am. Rep. 814; *Opinion of Justices*, 35 N. H. 580; *State v. Platt*, 2 S. Car. 150, 16 Am. Rep. 651; *Hunt v. State*, 22 Tex. App. 404; *Osburn v. Staley*, 5 W. Va. 91, 13 Am. Rep. 640.

3. Public Policy. — *Berry v. Baltimore*, etc., R. Co., 41 Md. 462, 20 Am. Rep. 69; *Rode v. Phelps*, 80 Mich. 598; *Brady v. West*, 50 Miss. 68.

4. Rule in United States. — *Field v. Clark*, 143

U. S. 649, *distinguishing* *Gardner v. Collector*, 6 Wall. (U. S.) 511; *Lyons v. Woods*, 153 U. S. 649; *Harwood v. Wentworth*, 162 U. S. 547, *affirming* (Ariz. 1895) 42 Pac. Rep. 1025.

5. Application of State Rules. — *South Ottawa v. Perkins*, 94 U. S. 260; *Walnut v. Wade*, 103 U. S. 683; *Ohio v. Frank*, 103 U. S. 697; *Post v. Kendall County*, 105 U. S. 667. See also federal cases cited *passim*, this subsection, under various states.

6. Distinction. — *Union Bank v. Oxford Com'rs*, 119 N. Car. 214; *Stanly County v. Snuggs*, 121 N. Car. 394, *distinguishing* *Carr v. Coke*, 116 N. Car. 223.

7. Division of Howard County, 15 Kan. 194.

8. Not Admissible. — *Hughes v. Felton*, 11 Colo. 489; *Division of Howard County*, 15 Kan. 194.

9. Admissible. — *Hollingsworth v. Thompson*, 45 La. Ann. 222, 40 Am. St. Rep. 220; *Berry v. Baltimore*, etc., R. Co., 41 Md. 463, 20 Am. Rep. 69; *Milwaukee County v. Isenring*, 109 Wis. 9.

10. Arkansas. — *Chicot County v. Davies*, 40 Ark. 212; *Loftin v. Watson*, 32 Ark. 414; *Haney v. State*, 34 Ark. 263; *Scott v. Clark County*, 34 Ark. 283.

18. Form of Enactment — *a. TITLE.* — It is usually required that every bill shall have a title which shall fairly express the subject of legislation.¹ The sufficiency of the title under constitutional requirements is treated elsewhere in this article.²

b. ENACTING CLAUSE. — The constitutions usually provide that all statutes shall contain an enacting clause in a certain prescribed form. In some jurisdictions such provisions have been held to be directory merely,³ but in others it has been asserted that they are mandatory and that the omission of the enacting clause or a variance from the form prescribed by the constitution renders the statute void.⁴

The Use of a Preamble is not forbidden by provisions requiring an enacting clause.⁵

Words Indicating Joint Resolution. — If the words used, besides being a variation from the constitutional style, also indicate that the will of the legislature is expressed as a joint resolution rather than as a law, the change in the phraseology is fatal to the validity of the enactment,⁶ unless it can be effective as a resolution merely.⁷

c. RE-ENACTMENT OR ADOPTION OF EXISTING STATUTE. — In some states there are constitutional provisions forbidding legislation providing that any existing law shall be made or deemed a part of the act, or which shall enact that any existing law shall be applicable except by inserting it in such act.⁸

d. BILL OR RESOLUTION. — A joint resolution is described to be "a form of legislation which is in frequent use in this country chiefly for administrative purposes of a local or temporary character."⁹ This form of legislation is

1. Necessity for Title. — *State v. Burlington*, etc., R. Co., 60 Neb. 741; *Binz v. Weber*, 81 Ill. 290, *overruling Larrison v. Peoria*, etc., R. Co., 77 Ill. 11; *Plummer v. People*, 74 Ill. 361; *Burritt v. State Contract Com'rs*, 120 Ill. 322.

2. See *infra*, this title, *Constitutionality — Titles and Subjects*.

3. Provision Directory. — *McPherson v. Leonard*, 29 Md. 377; *Cape Girardeau v. Riley*, 52 Mo. 427, 14 Am. Rep. 427. See also *Watson v. Corey*, 6 Utah 150.

Substantial Compliance Sufficient. — *Swann v. Buck*, 40 Miss. 268. In this case the decision was made to turn upon the fact that "there are no exclusive words in the constitution negating the use of any other language." See also *Mathis v. State*, 31 Fla. 291; *McPherson v. Leonard*, 29 Md. 377.

4. Provision Mandatory. — *Collier, etc., Lithographing Co. v. Henderson*, 18 Colo. 259; *Barton v. McWhinney*, 85 Ind. 487; *May v. Rice*, 91 Ind. 546; *Matter of Swartz*, 47 Kan. 157; *People v. Dettenthaler*, 118 Mich. 595; *Sjoberg v. Security Sav., etc., Assoc.*, 73 Minn. 203, 72 Am. St. Rep. 616; *State v. Rogers*, 10 Nev. 250, 21 Am. Rep. 738; *State v. Patterson*, 98 N. Car. 660; *State v. Wright*, 14 Oregon 365; *Boyers v. Crane*, 1 W. Va. 176. See also *Burritt v. State Contract Com'rs*, 120 Ill. 322; *Seat of Government Case*, 1 Wash. Ter. 115.

An Insertion of the Enacting Clause After the Statute Has Been Passed but previous to the signature by the governor is not a sufficient compliance with the constitution. *People v. Dettenthaler*, 118 Mich. 595.

It Is Not Sufficient to Show that the Statute Contained an Enacting Clause When It Passed the Legislature, where it had no enacting clause when it was sent to and was approved by the governor. *Sjoberg v. Security Sav., etc., Assoc.*, 73 Minn. 203, 72 Am. St. Rep. 616.

That the Enacting Clause Has Been Struck Out of the Enrolled Bill by passing a heavy pen stroke through the words, "Be it enacted," it not appearing that this has been done by authority, does not affect the legality of the act. *State v. Wright*, 14 Oregon 365.

Laws Adopted by Reference in a code need not be preceded by an enacting clause, where such clause precedes the whole code. *Dew v. Cunningham*, 28 Ala. 466, 65 Am. Dec. 362. See also *Mathis v. State*, 31 Fla. 291.

Publication. — Where publication of a law was necessary to put it in force, a publication omitting the enacting clause was held insufficient. *Matter of Swartz*, 47 Kan. 157.

5. Preamble. — *Barton v. McWhinney*, 85 Ind. 487.

6. Style of Resolution. — *Burritt v. State Contract Com'rs*, 120 Ill. 322; *Boyers v. Crane*, 1 W. Va. 176; *May v. Rice*, 91 Ind. 546.

7. Sustaining as Resolution. — *State v. Delesdenier*, 7 Tex. 76; *Weekes v. Galveston*, 21 Tex. Civ. App. 102. See also *State v. Bailey*, 16 Ind. 49, 79 Am. Dec. 405.

8. See *infra*, this title, VIII. 6. *c. Extending Application of Existing Laws*.

9. Definition of Joint Resolution. — *Cush. Law & Prac. Leg. Assem.*, § 2403, *quoted in Olds v. State Land Office*, (Mich. 1901) 86 N. W. Rep. 956; *May v. Rice*, 91 Ind. 546. See the title *ORDINANCES*, vol. 21, p. 947, for a discussion of the propriety of actions by resolution on the part of municipal legislative bodies.

Modes of Legislative Action. — The methods by which, under our system of parliamentary law, a legislature exercises its power and jurisdiction, each in a different way, are, 1st, by motion; 2d, by resolution; 3d, by concurrent resolution; 4th, by joint resolution; 5th, by bill. Of these methods the motion is the least comprehensive and involves the exercise of parlia-

clearly recognized by the Constitution of the United States,¹ and has also been recognized in some of the states.² In many states, however, it is held that a joint or concurrent resolution cannot have the force and effect of a law, either because of a constitutional provision that no law shall be passed except by bill,³ or because such resolutions are not passed in the form nor with the formalities required by the constitution for the enactment of a law.⁴ And, even independently of any such provisions, it would seem that, where the constitution does not recognize legislative action by joint resolution, provisions designed to be permanent and general are properly enacted in the form of a bill and not of a resolution.⁵

An Express Constitutional Prohibition against the accomplishing of certain objects by resolution is, of course, conclusive against the power to do so.⁶

Similarly a Provision that Certain Objects Must Be Accomplished by Law precludes the accomplishment of any of such objects by means of a joint resolution.⁷

19. Evidence of Enactment. — Evidence of the due and proper enactment of a statute is usually furnished, as has been seen, by the introduction of the enrolled bill,⁸ or the journals of the two houses.⁹ It has also been held that for this purpose the printed statute¹⁰ or the certificate of the secretary of state showing the proceedings is competent.¹¹ It has been said that the court has

mentary power in its simplest form. It sets the body in motion and again dissolves it, and is auxiliary merely to the ordinary work of legislation. The next in the ascending gradation of parliamentary methods is the resolution, which declares some purpose, expresses a will, or prescribes an order, or formulates a command of the legislative body, usually not incidental to the ordinary course of business. A resolution, as well as a motion, is obligatory only upon the house which adopts it, and in this respect is inferior in efficiency to both a concurrent and a joint resolution, each of which is, in its turn, less effective as the expression of legislative will than a bill where enacted into a law. *Rice v. State*, 95 Ind. 33.

The General and Most Common Use of Resolutions is the adoption of rules and orders relative to the proceedings of the legislative body. *May v. Rice*, 91 Ind. 546.

1. In Congress a joint resolution is regarded as a bill. But this is so only because of the character of the provisions of the Constitution of the United States, whereby a joint resolution is placed on the same footing as a bill, and, apparently, the same formalities in respect of the vote by which it is adopted, and the approval of the executive, are required as in the case of a bill. *Burritt v. State Contract Com'rs*, 120 Ill. 322.

2. **Constitutional Recognition.** — *Olds v. State Land Office*, (Mich. 1901) 86 N. W. Rep. 956; *State v. Dahl*, 6 N. Dak. 81.

The expression of the sovereign will of the legislature that a particular proposition or question be submitted to the people to be voted upon need not take the form of a law. It is sufficient if it be in the form of a joint resolution. *State v. Dahl*, 6 N. Dak. 81.

The *Indiana* Constitution affirmatively gives authority to act by joint resolution, but in only a few instances. See *May v. Rice*, 91 Ind. 546.

Minnesota. — See *St. Paul, etc., R. Co. v. Brown*, 24 Minn. 517.

Rhode Island. — See *Barry v. Viall*, 12 R. I. 18.

Where a Statute Requires the Concurrent Action of Both Houses, a simple resolution of the senate not concurred in by the house is not sufficient. Such resolution cannot be made to amend, modify, or vary the operation of a regularly enacted statute. *Rice v. State*, 95 Ind. 33.

3. **Resolution Cannot Have Effect of Law.** — *Mullan v. State*, 114 Cal. 578, explaining *Brooks v. Fischer*, 79 Cal. 173; *Collier, etc., Litho. Co. v. Henderson*, 18 Colo. 259 (stated under LEGISLATURE, vol. 18, p. 824, note); *May v. Rice*, 91 Ind. 546.

4. *Burritt v. State Contract Com'rs*, 120 Ill. 322; *Boyers v. Crane*, 1 W. Va. 176.

5. In *Ohio* the joint resolution of April 16, 1866 (92 Laws 787), submitting the question of calling a constitutional convention to the electors of the state, was held unconstitutional, the court saying that "the statute law of the state can neither be repealed nor amended by a joint resolution of the general assembly." *State v. Kinney*, 56 Ohio St. 721.

6. **Express Prohibitions.** — *Burritt v. State Contract Com'rs*, 120 Ill. 322.

7. **Objects to Be Accomplished by Law.** — *Reynolds v. Blue*, 47 Ala. 711.

In *California* it has been held that an inferior municipal court cannot be established solely by resolution of the legislature, not acted upon by the governor, merely because such court has been provided for in a charter adopted as provided by the constitution. *People v. Toal*, 85 Cal. 333.

8. See *supra*, this section, 16. *Enrolled Bill*.

9. See *supra*, this section, 15. *Legislative Journal*.

Necessity for Journals. — Where the constitutionality of the enactment of a statute is put in question, it is imperative that the trial court should be furnished with a copy of the legislative journals certified by the secretary of state. *State v. Boise*, (Idaho 1897) 51 Pac. Rep. 110.

10. **Printed Statutes.** — *People v. Highway Com'rs*, 54 N. Y. 276, 13 Am. Rep. 581.

11. **Certificate of Secretary of State.** — *Ryan v. Lynch*, 68 Ill. 160; *Happel v. Brethauer*, 70 Ill. 166, 22 Am. Rep. 70.

a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to the question.¹ But the best and most satisfactory evidence is required in all cases,² and hence the court cannot, in determining the constitutionality of a law, act upon a mere stipulation of the parties that the act was not passed in conformity to the requirements of the constitution.³

IV. TIME OF TAKING EFFECT — 1. Early Rule. — By the common law, statutes took effect from the first day of the session of Parliament at which they were enacted, unless another day were named.⁴ Even where an act declared that it should take effect "from and after the passing of the act," it was held to operate by legal fiction from the first day of the session.⁵ This doctrine of relation was calculated to work gross injustice—in one instance having the effect of rendering that murder which was not so at the time it was committed.⁶

Statutory Modification. — The common-law rule was followed in several of the states of the Union until changed by statute.⁷ And in *England* by Stat. 33 Geo. III., c. 13, it was declared that statutes should take effect only from the time they received the royal assent, and the former rule was abrogated, to use the words of the statute, because of "its great and manifest injustice."⁸

2. Where No Time Is Fixed. — If no time is specified when a statute shall be in force, it becomes effective from and after its passage; that is, from and after the point of time when its existence is perfected.⁹ When the governor's approval is necessary, an act is considered perfected from the time of such approval;¹⁰ if passed over his veto, then from the date of the final vote.¹¹

In *Alabama* it is held that a statute remedial in its nature is of force during the entire day of its approval.¹²

1. *Gardner v. Collector*, 6 Wall. (U. S.) 499; *Berry v. Baltimore, etc., R. Co.*, 41 Md. 446, 20 Am. Rep. 69; *Legg v. Annapolis*, 42 Md. 203.

2. See cases cited in preceding note.

3. **Stipulation of Parties.** — *Happel v. Brethauer*, 70 Ill. 166, 22 Am. Rep. 70.

4. **When Statutes Take Effect — Early Rule.** — *Rex v. Thurston*, 1 Lev. 91; *Partridge v. Strange*, 1 Plowd. 79; *Panther v. Atty.-Gen.*, 6 Bro. P. C. 553. Formerly in *England* the rolls of Parliament were strung together as one act, the only date being that of the assembling of Parliament. In that case the presumption was that the act took effect from the first day of the session, the record being the sole guide. *Latless v. Holmes*, 4 T. R. 660.

5. *Latless v. Holmes*, 4 T. R. 660.

6. *Rex v. Thurston*, 1 Lev. 91.

7. *Austin v. Nelson*, 6 N. J. L. 381; *Weeks v. Weeks*, 5 Fred. Eq. (40 N. Car.) 111, 47 Am. Dec. 358; *Hamlet v. Taylor*, 5 Jones L. (50 N. Car.) 36; *State v. State Bank*, 12 Rich. L. (S. Car.) 609.

8. *Tomlinson v. Bullock*, 4 Q. B. D. 230.

Under this statutory rule, although the act expressly declares that it shall operate from a day named therein, yet if the royal assent is not given until a later day, it will not take effect until then. *Maxwell Interp. Stat.* (3d ed.), p. 595, citing *Burn v. Carvalho*, 4 N. & M. 893, 30 E. C. L. 425, 1 Ad. & El. 883, 28 E. C. L. 226. See also *Potter's Dwarrris*, p. 170. But compare *Hardcastle Stat. Law* (3d ed.) p. 348, note.

9. **Where No Time Fixed.** — *Matthews v. Zane*, 7 Wheat. (U. S.) 164; *The Brig Ann*, 1 Gall. (U. S.) 62; *State v. Click*, 2 Ala. 26; *Weatherford v. Weatherford*, 8 Port. (Ala.) 171; *Rath-*

bone v. Bradford, 1 Ala. 312; *Heard v. Heard*, 8 Ga. 380; *Parkinson v. State*, 14 Md. 184, 74 Am. Dec. 522; *Wartman v. Philadelphia*, 33 Pa. St. 202.

Appropriation Bill. — Under the constitution of *Washington* an appropriation bill takes effect on its passage. *State v. Rogers*, 24 Wash. 417.

Legislative Intent. — The *Texas* Act of Feb. 14, 1860 (Paschal's Dig., art. 3962), which required judgment, before it could operate as a lien, to be filed for registration, took effect from its passage. The act being complete in itself, and clearly indicating the legislative intent that it should be operative from the time of its passage, such intent may not be defeated by a failure in the act to make a specific designation of the time it should go into effect as required by a pre-existing statute. *Baker v. Compton*, 52 Tex. 252.

10. **Executive Approval.** — *People v. Clark*, 1 Cal. 406; *Goodsell v. Boynton*, 2 Ill. 555; *Mallory v. Hiles*, 4 Met. (Ky.) 53; *Dowling v. Smith*, 9 Md. 242; *Matter of Kemeys*, 56 Hun (N. Y.) 117; *Logan v. State*, 3 Heisk. (Tenn.) 442; *Hill v. State*, 5 Lea (Tenn.) 725. See also *Bates v. Evans*, 7 Pa. Dist. 260.

Signature of Presiding Officers. — But in *Ohio*, where the constitution does not provide for executive approval of bills, an act is perfected when it has been signed by the presiding officers of the legislature. *State v. O'Brien*, 47 Ohio St. 464.

11. **Passage Over Veto.** — *Biggs v. McBride*, 17 Oregon 640; *Logan v. State*, 3 Heisk. (Tenn.) 442.

12. *Wood v. Fort*, 42 Ala. 641; *Young v. Polak*, 85 Ala. 439; *Turnipseed v. Jones*, 101 Ala. 593. Compare the next subdivision.

3. Where Time to Be Prescribed by Legislature. — In the constitutions of some of the states are to be found provisions that the legislature "shall prescribe the time when its acts shall be in force."¹ Such a provision does not require the naming of a day of the month, but is satisfied by the designation of an event that is certain and is ascertainable by reference to the other statutes of the states.² But it is not permissible that one section of an act shall become a law while other sections of the same act are in an inchoate and embryonic stage; the act must become a law as an entirety.³

4. From Passage, Immediately, and the Like. — There Are Three Distinct Doctrines as to the precise time of the taking effect of a statute, when, by its terms, it is declared to be in force "from its passage," "immediately," or the like.

According to One View, the day of the passage of the act is excluded, and its operation dates from the day following.⁴ It is claimed that this rule has the advantage over the one next stated in that it does not give a retroactive effect to the statute, thereby avoiding hardship and injustice in many cases; and over the third view, in that it obviates the necessity of resorting to conjecture or the uncertainty of parol proof, or anything extrinsic to the law itself, and the authenticated recorded proceeding in passing it, in order to ascertain the exact hour of executive approval.⁵

A Second View is that such a statute becomes effective from the day of its approval, and has relation to the first moment of the day — this upon the principle that the law will not take cognizance of the fractions of a day.⁶

The Third View, and the one which seems to be supported by the weight of authority, is that a bill becomes operative only from the time of its approval; that the doctrine, that in law there is no fraction of a day, is a legal fiction which may be overthrown by the fact when necessary in order to accomplish substantial justice. Accordingly, whenever a question arises as to the time when a statute took effect, the court may resort to any source of information which, in its nature, is capable of conveying to the judicial mind a clear and satisfactory answer to the question, the best and most satisfactory evidence in all cases being required.⁷

1. See for example the *Kansas Const.*, art. 2, § 19.

2. *Cherokee County v. Chew*, 44 Kan. 162, followed in *Sherrick v. Gilpin*, 54 Kan. 498. And see the next note.

3. *Miami County v. Hiner*, 54 Kan. 334; *Finnegan v. Sale*, 54 Kan. 420; *Montgomery County v. Glass*, 4 Kan. App. 286. See *State v. Newbold*, 56 Kan. 71, distinguishing the first two cases above. And compare *infra*, this title, *Constitutionality*.

4. **Excluding Day of Passage.** — *King v. Moore, Jeff. (Va.)* 9; *Parkinson v. Brandenburg*, 35 Minn. 294, 59 Am. Rep. 326; *Matter of Foley*, (Supm. Ct. Spec. T.) 8 Misc. (N. Y.) 57.

5. *Parkinson v. Brandenburg*, 35 Minn. 294, 59 Am. Rep. 326, *per Mitchell, J.* See also *Duncan v. Cobb*, 32 Minn. 460.

6. **Regarding Fractions of a Day.** — *Mallory v. Hiles*, 4 Met. (Ky.) 53; *Douglass v. Seiferd*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 188; *Matter of Howes*, 21 Vt. 619; *Matter of Welman*, 20 Vt. 654; *Matter of Boyce*, 25 Wash. 612.

No Evidence as to Precise Time. — Some cases lay down the rule that in the absence of evidence as to the precise time of approval an act operates during the entire day of its approval. *Croveno v. Atlantic Ave. R. Co.*, 150 N. Y. 225; *Krom v. Levy*, 60 N. Y. 126; *People v. Welde*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 582.

See also *Pooley v. Buffalo*, 122 N. Y. 592; *Tomlinson v. Bullock*, 4 Q. B. D. 230.

Where Two Statutes Went into Effect the Same Day, it was said that there was no doubt that they took effect the same instant. *Griswold v. Atlantic Dock Co.*, 21 Barb. (N. Y.) 225.

7. **From Time of Approval — Evidence — England.** — *Roe v. Hersey*, 3 Wils. C. Pl. 274; *Combe v. Pitt*, 3 Burr. 1423.

United States. — *Louisville Tp. v. Portsmouth Sav. Bank*, 104 U. S. 469; *Matter of Richardson*, 2 Story (U. S.) 571; *Matter of Ankrum*, 3 McLean (U. S.) 285; *U. S. v. Stoddard*, 89 Fed. Rep. 699, *affirmed* (C. C. A.) 91 Fed. Rep. 1005; *Gardner v. Collector*, 6 Wall. (U. S.) 499.

California. — *People v. Clark*, 1 Cal. 406.

Maryland. — *Strauss v. Heiss*, 48 Md. 292.

Massachusetts. — *Kennedy v. Palmer*, 6 Gray (Mass.) 316.

New York. — *Matter of Dreyfous*, (Surrogate Ct.) 28 Abb. N. Cas. (N. Y.) 27.

Ohio. — *Arrowsmith v. Hamering*, 39 Ohio St. 573.

Texas. — *Galveston, etc., R. Co. v. Lynch*, 22 Tex. Civ. App. 336.

See also *Burgess v. Salmon*, 97 U. S. 381; *U. S. v. Iselin*, 87 Fed. Rep. 194; *Metts v. Bright*, 4 Dev. & B. L. (20 N. Car.) 173, 32 Am. Dec. 683; *Savage v. State*, 18 Fla. 970; *Davis v. Whidden*, 117 Cal. 618.

In *Plowman v. Williams*, 3 Tenn. Ch. 181, it

5. From Future Day Named — Day of Passage Excluded. — When a statute is to take effect a certain number of days after its enactment, or after a day named therein, the day of enactment or the day named, as the case may be, is to be excluded in computing the time.¹

When There Is a General Law providing that statutes shall take effect a certain number of days after passage, unless a different time be named therein, and there is nothing in a given statute indicating a legislative intent that it is to be excepted from the general rule, it may not be excepted.²

is said: "A day is in legal contemplation *punctum temporis*, without fractions, yet for the ends of justice a day may be divided."

In *Lapeyre v. U. S.*, 17 Wall. (U. S.) 198, it was said that an act of Congress, unless it is otherwise declared by law, becomes operative from the first moment of the day of its passage; and, further, that "fractions of a day" are not recognized, and "an inquiry involving that subject is inadmissible." But it will be seen upon an examination of this case that the question presented for determination was not as to the fractions of a day, but whether a proclamation of the President bearing date June 24, 1865, took effect on that day or on the 27th of June, 1865, when it was first promulgated by publication in the newspapers. And in *Louisville Tp. v. Portsmouth Sav. Bank*, 104 U. S. 469, the court says that the language above quoted from the opinion must, therefore, be taken as a declaration of the general rule which obtains when the evidence does not show the necessity of regarding fractions of a day.

In *U. S. v. Norton*, 97 U. S. 170, the court, while declaring upon the authority of *Lapeyre v. U. S.*, 17 Wall. (U. S.) 198, that the President's proclamation took effect as of the beginning of June 24, 1865, and covered all the transactions of that day to which it was applicable, said: "We do not think this is a case in which fractions of a day should be taken into account." "This language of the chief justice," it is said in *Louisville Tp. v. Portsmouth Sav. Bank*, 104 U. S. 469, "implies that there are cases in which the court would regard fractions of a day. Besides there was no question in that case, nor any proof made as to the particular hour of the day when the proclamation of the President was issued."

1. From a Future Day Named. — *Handley v. Cunningham*, 12 Bush (Ky.) 402; *Bemis v. Leonard*, 118 Mass. 502, 19 Am. Rep. 470; *Bigelow v. Willson*, 1 Pick. (Mass.) 494; *Koltenbrock v. Cracraft*, 36 Ohio St. 584, distinguished in *Arrowsmith v. Hamering*, 39 Ohio St. 573.

After Adjournment. — It was provided in the act of Congress organizing the territory of Oklahoma and embodied in the organic act, that certain chapters of the Compiled Laws of Nebraska should be "extended to and put into force in the territory of Oklahoma until after the adjournment of the first session of the legislative assembly." Such adjournment occurred on Dec. 24, 1890, and it was held that the laws passed by the legislature which were to supersede the provision of the organic act did not go into effect until the next day. *Hess v. Trigg*, 8 Okla. 286.

And When a Statute Is to Take Effect Thirty Days After the Recess of the Legislature, the day

of adjournment is to be excluded in computing the time. *Simmons v. Jacobs*, 52 Me. 147.

Ninety Days After Adjournment. — A constitutional provision that no act shall go into force "until ninety days after the adjournment," has been construed to mean that such number of full days must expire between the adjournment and the taking effect of the law. *Halbert v. San Saba Springs Land, etc., Assoc.*, 89 Tex. 230.

Three Calendar Months. — By the Constitution of *Nebraska* (section 24, art. 3) "no act shall take effect until three calendar months after the adjournment," etc. By the Code of Civil Procedure (section 895) the first day is excluded and the last day included in computing the time within which an act is to be done. Accordingly, where the legislature adjourned April 8, an act would take effect on July 9 next. *McGinn v. State*, 46 Neb. 427, 50 Am. St. Rep. 617.

Ninety Days After Approval. — The *Missouri Barbers' Act* of 1899 required barbers to obtain a license "within ninety days after the approval of the act." The constitutional provision was that no act should take effect "until ninety days after the adjournment," etc. It was held that the expression "approval of the act" must be understood to mean after the act could and did constitutionally become operative, and that the ninety days first mentioned did not begin to run until ninety days after adjournment. *Ex p. Lucas*, 160 Mo. 218.

In Computing the Ninety Days Required by the West Virginia Constitution, art. 6, § 30, it is immaterial whether the day of passage is counted and the ninetieth day rejected, or whether the ninetieth day is included and the day of passage excluded. An act passed on the 27th of February, 1891, will, under said constitutional provision, take effect on the 28th day of May following. *State v. Mounts*, 36 W. Va. 179.

2. Jackman v. Garland, 64 Me. 133; *Matter of Howe*, 112 N. Y. 100.

Where There Is Nothing in a Penal Act Directing When It Should Go into Effect, it is subject to the provision of the *Crim. Code Ala.*, § 3705, that "no penal act shall take effect until thirty days after the adjournment of the general assembly at which such act was passed, unless otherwise specifically provided in the act." *Ross v. New England Mortg. Security Co.*, 101 Ala. 362.

Act Changing Judicial Circuits — Illinois. — An act passed under the clause of the Illinois constitution concerning changes in judicial circuits is an exception to the general provision that no act shall take effect until the first day of July after its passage, unless in case of emergency the legislature may otherwise direct. *People v. Rose*, 166 Ill. 422.

Reference Is to Time of Operation. — A statute passed to take effect at a future day must be understood as speaking from the time it goes into operation and not from the time of passage. Thus, the words "heretofore," "hereafter," and the like, have reference to the time the statute becomes effective as a law, and not to the time of passage.¹ Before that time no rights may be acquired under it, and no one is bound to regulate his conduct according to its terms; it is equivalent to a legislative declaration that the statute shall have no effect until the designated day.²

Taking Effect on Sunday. — The statute is not rendered inoperative by the fact that the designated day falls on Sunday, as the legislature has full power to regulate what shall be done or prohibited on that day.³

6. From Publication — Whether Day of Publication Included. — When a statute provides that it shall take effect "from and after its publication," the day of its publication is to be included in computing the time when it takes effect; but the precise time of its publication may be shown if the hour of publication affects in any wise an act done on the same day.⁴ But in *Wisconsin* in such a case the court held that the day of publication should be excluded.⁵

Publication "by Authority." — Under a constitutional provision that acts shall not take effect until published "by authority," an unauthorized publication cannot affect the period of their taking effect.⁶

How Legislative Intent Ascertained. — But where there is a legislative intent that a particular statute shall be taken out of the general rule and made operative immediately, such intent need not be affirmatively expressed; it may be inferred from the intention of the legislature in passing the statute. *Swann v. Buck*, 40 Miss. 269.

1. Effect of Words "Heretofore," "Hereafter," and the Like. — *State v. Hicks*, 48 Ark. 515; *Rogers v. Vass*, 6 Iowa 405; *Davenport v. Davenport*, etc., R. Co., 37 Iowa 624; *Evansville, etc., R. Co. v. Barbee*, 74 Ind. 169; *Jackman v. Garland*, 64 Me. 133; *Rice v. Ruddiman*, 10 Mich. 125; *Price v. Hopkin*, 13 Mich. 318; *Parsons v. Wayne County*, 37 Mich. 287; *State v. Connell*, 43 N. J. L. 106. See also *HEREAFTER* — *HERETOFORE*, vol. 15, p. 336.

"After the Passage of the Act" Equivalent to "After the Act Goes into Effect." — *Harding v. People*, 10 Colo. 387; *State v. Bemis*, 45 Neb. 724. Compare *State v. Mounts*, 36 W. Va. 179.

Existence of Law and Time of Taking Effect Distinguished. — By the *Illinois* Constitution, § 13, art. 4, no act, except in case of emergency, shall take effect until the first day of July next after its passage; by section 16, art. 5, if the governor approves a bill, "he shall sign it, and thereupon it shall become a law." It was held that an act will not go into effect until the first day of July next after its passage, but it is nevertheless a law after it receives the executive approval. *People v. Inglis*, 161 Ill. 256.

2. Santa Cruz Water Co. v. Kron, 74 Cal. 222; *Larrabee v. Talbott*, 5 Gill (Md.) 426, 46 Am. Dec. 637; *Com. v. Fowler*, 10 Mass. 290; *State v. Meares*, 116 N. Car. 592; *Evans v. George D. Cross Lumber Co.*, 11 Ohio Cir Dec. 544; *Conley v. Calhoun County*, 2 W. Va. 416.

In *Rice v. Ruddiman*, 10 Mich. 125, it was said that a law passed to take effect on a future day must be construed as if passed on that day, and ordered to take immediate effect.

Where a Statute Made an Act a Crime, a person committing the forbidden act after the passage of the statute, but before the day ap-

pointed for its operation, was held not punishable thereunder. *State v. Bond*, 4 Jones L. (49 N. Car.) 9.

Purpose of Intervening Period. — In *Price v. Hopkin*, 13 Mich. 318, it was said that the period intervening between the time of passage and the day fixed for the statute to take effect is allowed to enable the public to become acquainted with its provisions.

Notice from Date of Passage — Though Operation Postponed. — Though a general law, by its terms, is not to go into operation until a future day, all persons are required to take notice of its existence from the date of its approval, or at any rate from its publication. *Stine v. Bennett*, 13 Minn. 153.

But It Seems that a Code Regulating Proceedings in Penal Actions, which is to go into effect on a future day, operates when the day arrives upon indictments found before it. *Laughlin v. Com.*, 13 Bush (Ky.) 261.

3. Bloomingdale v. Seligman, (C. Pl. Spec. T.) 22 Abb. N. Cas. (N. Y.) 98.

4. Publication. — *Leavenworth Coal Co. v. Barber*, 47 Kan. 29.

In *Kearny County v. Vandriess*, (C. C. A.) 115 Fed. Rep. 866, 187 U. S. 642, it was held that the statute was operative during the entire day of publication in the absence of evidence as to the precise time of publication and of the performance of the act involved which was done in virtue of the statute.

True Date of Publication — Certificate of Secretary of State. — In the absence of any suggestion which might lead to a more accurate inquiry, the date of the certificate of the secretary of state appended to the published volumes of the laws will be taken to be the true date of their publication. *In re Boyle*, 9 Wis. 264; *State v. Foote*, 11 Wis. 15, 78 Am. Dec. 689; *Berliner v. Waterloo*, 14 Wis. 378; *Clark v. Janesville*, 10 Wis. 136.

5. O'Connor v. Fond du Lac, 109 Wis. 253.

6. Hendrickson v. Hendrickson, 7 Ind. 13; *McCool v. State*, 7 Ind. 378. See also *Clark v. Janesville*, 10 Wis. 136.

General Law in Volume of Private Laws. — But in one instance a general law was regarded as duly published, although on account of improper classification it was printed in the volume of private laws, and not in the volume of public laws as provided by statute.¹

Requirement as to Newspapers. — If the act is to take effect from its publication in two newspapers, it will not become effective upon publication in one only.² Where an act of the legislature is, by its express terms, not to take effect until publication in a designated newspaper, every one is charged with notice of this fact, and if before such publication municipal bonds are issued under it, the purchasers can acquire no rights thereby.³

A Mere Verbal Omission or Inaccuracy in the publication of a statute, which does not change its substance or legal meaning, does not invalidate the publication.⁴

Enacting Clause Omitted. — But the publication of a statute omitting entirely the enacting clause obviously does not constitute a valid publication.⁵

Signatures of Presiding Officers Omitted. — But it has been held that an act was duly published so as to give it effect, notwithstanding the signatures of the presiding officers of the legislature affixed thereto were not published.⁶

Joint Resolution. — In some of the states a joint resolution of a general nature requires the same publication as any other law.⁷

Where the Act Published Is a Verbatim Copy of the Original Law as filed with the secretary of state, it takes effect according to its terms as published, although the act as published subsequently in the session laws may not correspond with it.⁸

Part of Act Not Published. — If the portion of the act which actually passed the legislature, and is not included in the enrolled and published statute, has any material relation to other portions of the act, so as to modify, restrict, or extend its application, then such portions must also fall.⁹

Publication of Void Act. — Where a statute is invalid as first enacted, the circumstance that it is incorporated into the published revised statutes does not make it *prima facie* valid, in the absence of evidence of its re-enactment subsequently at a regular session of the legislature.¹⁰

7. From Publication and Circulation. — A constitutional provision that "no act shall take effect until the same shall have been published and circulated in the several counties," etc., means that such act shall not take effect in any county until it has been distributed and published in all.¹¹

Louisiana — Promulgation. — Acts done in virtue of a law before it has been promulgated as directed by the constitution are null and void. *State v. Bruno*, 48 La. Ann. 1481.

A court created by statute continues to exist until the act repealing that statute has been promulgated. And the mere publication of a legislative act in the official journal is not necessarily a promulgation of the act. Promulgation must be made by the officers, and in the manner prescribed by law. *State v. Judge*, 29 La. Ann. 223.

1. *In re Boyle*, 9 Wis. 264.

2. *Welch v. Battern*, 47 Iowa 147. In this case it was further held that the certificate of the secretary of state that the act had been published in one newspaper would not justify the inference that it had been properly published.

3. *McClure v. Oxford Tp.*, 94 U. S. 429.

Where an act prescribed that it should be published in a designated paper (different from the one in which the general laws were usually published, however), and that it should take effect "from and after its passage," such publication was sufficient and the act was operative immediately thereafter. *Mills v. Jefferson*, 20 Wis. 50.

4. *Smith v. Hoyt*, 14 Wis. 252, followed in *Mead v. Bagnall*, 15 Wis. 156.

5. *Matter of Swartz*, 47 Kan. 157.

6. *Leavenworth County v. Higginbotham*, 17 Kan. 62.

7. *State v. Management, etc., School Fund*, 4 Kan. 261.

8. *State v. Donehey*, 8 Iowa 396.

Ultimate Proof of the Law — Original Act. — In *State v. Clare*, 5 Iowa 509, it was held that the original act on file in the office of the secretary of state is the ultimate proof of the law, whatever errors there may be in what purports to be copies thereof. And see *State v. Donehey*, 8 Iowa 396.

9. *State v. Swan*, 7 Wyo. 166, 75 Am. St. Rep. 889.

10. *Bowen v. Missouri Pac. R. Co.*, 118 Mo. 541.

11. **Publication and Circulation.** — *Jones v. Cavins*, 4 Ind. 305; *State v. Bailey*, 16 Ind. 46, 79 Am. Dec. 405.

Under the former constitution of *Indiana* a statute took effect in every part of the state from the time it was published by authority at any place within the state, unless the act itself directed otherwise. *Tredway v. Gapin*, 1 Blackf. (Ind.) 298.

8. Upon a Contingency. — It is competent for the legislature to enact a law, the ultimate operation of which may, by its own terms, be made to depend upon a contingency.¹ And the contingency may be some action on the part of the legislature of another state,² or the result of a vote of the people of the locality to be affected by the law;³ indeed, it makes no essential difference what the nature of the contingency is, so it be an equal and a fair one, a moral and legal one, and so far connected with the purpose of the statute as not to be a mere idle and arbitrary one.⁴ But the statute must be a complete and absolute expression of the legislative will — a law *in præsenti*, to take effect *in futuro*.⁵ And the statute cannot be made effective before the event happens, by any acts or series of supplements passed upon the assumption that the event has happened, and that the law is in force.⁶

9. When Containing Emergency Clause. — In many of the states a discretion is vested in the legislature, in cases of emergency, to dispense with the constitutional provision fixing the time for statutes to take effect, and direct that a law shall have effect before that time. In such a case, the legislature is the sole judge of the emergency which shall induce it to anticipate the constitutional period, and its discretion may not be reviewed by the courts.⁷

Implication. — But the direction must be made in a clear, distinct, and unequivocal provision, and cannot be helped out by any sort of intendment or implication.⁸

Directory Provisions as to Form, Binding, Direction into Volumes, etc. — *State v. Bailey*, 16 Ind. 46, 79 Am. Dec. 405.

The Constitution of Maryland, art. 3, § 34, providing that every law shall be recorded, printed, published, and certified to the courts, was not intended to prevent a law from going into operation until publication thereof. *Parkinson v. State*, 14 Md. 185, 74 Am. Dec. 522.

The Revised Codes of North Dakota went into effect, as well as a system of laws, as evidence of the laws, thirty days after the governor's proclamation. *In re Hendricks*, 5 N. Dak. 114.

Governor's Proclamation — Indiana. — The Indiana Pharmacy Act of 1899 took effect according to the governor's proclamation as to the time of filing, and its operation was not postponed by reason of a provision making it unlawful to conduct a pharmacy without a license after a later day named. *State v. Indiana Board of Pharmacy*, 155 Ind. 414.

1. See the title CONSTITUTIONAL LAW, vol. 6, p. 1031. And see *Matter of Oliver*, 17 Wis. 682; *Crease v. Babcock*, 23 Pick. (Mass.) 334, 34 Am. Dec. 61; *State v. Hunter*, 38 Kan. 578; *Guild v. Chicago*, 82 Ill. 472.

2. See the title CONSTITUTIONAL LAW, vol. 6, p. 1031, note 10.

3. See the title LOCAL OPTION, vol. 19, p. 486. *State v. Parker*, 26 Vt. 357.

5. See the titles CONSTITUTIONAL LAW, vol. 6, p. 1022; LOCAL OPTION, vol. 19, p. 489.

6. *State v. Kirkley*, 29 Md. 85; *Goodale v. Sowell*, 62 S. Car. 525.

7. **Emergency Clause.** — *Wheeler v. Chubbuck*, 16 Ill. 361; *Gentile v. State*, 29 Ind. 409; *Carpenter v. Montgomery*, 7 Blackf. (Ind.) 415; *Biggs v. McBride*, 17 Oregon 640; *State v. Bacon*, 14 S. Dak. 394.

Provision for Publication — Designated Period After Adjournment. — Where the constitution provided that "all acts shall be officially published, and no act shall take effect until so published, nor until sixty days after the adjourn-

ment of the session at which it was passed, unless" the legislature shall otherwise direct, the legislature may in case of emergency direct that an act shall take effect immediately upon its approval. *State v. Reynolds*, 24 Utah 29, the court saying: "The subordinate clause introduced by the conjunction 'unless' was doubtless intended to modify both of the clauses immediately preceding."

Notwithstanding the Initiative and Referendum Clause of the South Dakota Constitution, the legislature has power to enact laws with an emergency clause whereby an act may be made effective immediately. *State v. Bacon*, 14 S. Dak. 394.

Passage Over Governor's Veto. — When an act with an emergency clause is disapproved by the executive, it nevertheless takes effect immediately when passed over his veto. *Sinking Fund Com'rs v. George*, 104 Ky. 260; *Biggs v. McBride*, 17 Oregon 640.

When Bill Becomes Law Without Executive Approval. — When the legislature, on the day of its final adjournment, in the due course of legislation sends a bill to the governor for his official action, and he on the same day and after the final adjournment of the legislature files the bill in the office of the secretary of state, without approval or objections thereto, it becomes a law, and he may not thereafter file objections, and if the bill contains an emergency clause requiring it to take effect from and after its passage, it must be deemed to be in force from and after such filing. *Tarleton v. Peggs*, 18 Ind. 24.

8. *Wheeler v. Chubbuck*, 16 Ill. 361; *Iroquois County v. Keady*, 34 Ill. 293. See also *State v. Dunning*, 9 Ind. 20. But see *Jameson v. State*, 32 Tex. Crim. 385.

A declaration by the legislature that an act shall take effect on a future day specified, is not of itself a declaration of the emergency in the constitutional sense. *Hendrickson v. Hendrickson*, 7 Ind. 13. See also *McCool v. State*, 7 Ind. 378; *Mark v. State*, 15 Ind. 98.

Requisite Vote. — Although an act contains an emergency clause in due form, this will not avail unless the act receives the vote prescribed by the constitution for such legislation.¹

Supplemental Act. — If the emergency must be declared in the preamble or body of the act it may not be incorporated with effect in a supplementary act.²

Legislative Journals. — It has been held that the fact that the legislative journals show that a bill contained an emergency clause, when the final vote in both houses was taken thereon, cannot control in the absence from the bill of such clause at the time it was signed by the executive and presiding officers of the two houses.³

10. Impossible Date Named. — Where an act declared that it should take effect on a day named, which was impossible, being two days before its passage, it was held that the act took effect upon its passage.⁴

11. Postponement of Operation of Part. — There is no legal objection to different provisions of the same statute taking effect at different times, at the will of the legislature.⁵ And there is no presumption against it where such intent is fairly deducible from the act.⁶ The circumstance that before the time appointed for the operation of the deferred parts they are rendered inoperative by the adoption of a new constitution will not affect the parts already in force.⁷

V. CONSTITUTIONALITY — 1. General Principles. — The Principle of the English Law that parliament is omnipotent, and that an act of that body delivered in clear and intelligible terms may not be questioned or its authority controlled in any court of justice,⁸ does not obtain in the *United States*, where, on the contrary, a legislative act, to have the force of law, must conform to the constitution.⁹

Implication. — A statute may be within the inhibitions of the constitution as well by implication as by expression.¹⁰

A Territorial Statute contrary to the federal constitution, or the organic act, is invalid without the express disapproval of Congress.¹¹

Where the emergency recited was that "the constitutional rule requiring bills to be read on three several days be suspended," this does not meet the requirement of the emergency clause of the *Texas* constitution (§ 39, art. 3). *Wickes-Nease v. Watts*, (Tex. Civ. App. 1902) 30 S. W. Rep. 1001. See also *Belcher v. State*, 79 Tex. Crim. 121.

1. *In re Emergency Clause*, 18 Colo. 291; *Missouri, etc., R. Co. v. McGlamory*, 92 Tex. 150.

2. *Cain v. Goda*, 84 Ind. 209.

3. *In re General Appropriation Bill*, 16 Colo. 539.

4. *McLaughlin v. Newark*, 57 N. J. L. 298.

5. **Provisions Taking Effect at Different Times.** — *State v. Bezou*, 48 La. Ann. 1386; *Plummer v. Jones*, 84 Me. 58; *Stone v. Charlestown*, 114 Mass. 214; *Osborn v. Circuit Judge*, 114 Mich. 655. See also *Clarke v. Rochester*, 24 Barb. (N. Y.) 446.

When the law becomes operative as an entirety on the date prescribed by the legislature, the fact that as to some persons or matters affected by it the law is of full operation immediately upon its passing into effect and as to others its operation is not so full and complete until a future day or event stated, is immaterial. *Hopkins v. Scott*, 38 Neb. 661; *State v. Stuhrt*, 52 Neb. 209.

6. *Osborn v. Circuit Judge*, 114 Mich. 655.

7. *People v. Whiting*, 64 Cal. 67.

8. **Parliament Omnipotent.** — 1 Bl. Com. 91, 160, 186. See also *Lee v. Bude, etc., R. Co.*, L. R. 6 C. P. 580; *Logan v. Burslem*, 4 Moo. P. C. 297; *Labrador Co. v. Reg.*, (1893) A. C. 104.

The expression "unconstitutional," as applied to an English Act of Parliament, means simply that the act in question, as, for instance, the *Irish Church Act*, 1869, is, in the opinion of the speaker, opposed to the spirit of the English constitution; it cannot mean that the act is either a breach of law or is void. *Dacey Law of the Constitution* (5th ed.), appendix, note 7, p. 449.

9. **Constitutionality — Generally.** — 1 Kent Com. 448; *Citizens' Sav., etc., Assoc. v. Topeka*, 20 Wall. (U. S.) 655; *Marbury v. Madison*, 1 Cranch (U. S.) 137. In *Com. v. Maxwell*, 27 Pa. St. 456, it is said a law is unconstitutional because it is either an assumption of power not legislative in its nature, or because it is inconsistent with some provision of the federal or state constitution.

10. *Evansville v. State*, 118 Ind. 426; *Page v. Allen*, 58 Pa. St. 338, 98 Am. Dec. 272. *Compare Com. v. Maxwell*, 27 Pa. St. 456. See generally the title **CONSTITUTIONAL LAW**, vol. 6, p. 882.

11. **Territorial Legislation.** — *Ferris v. Higley*, 20 Wall. (U. S.) 375; *Territory v. Scott*, 3 Dak.

Question Must Be Directly Involved. — Questions as to validity are decided only when necessarily involved in the case before the court.¹

2. Presumption as to Constitutionality. — This topic is discussed in a later part of this title.²

3. Statutes Against Common Right. — In several early cases, the courts declared that statutes passed against the plain and obvious principles of common right and common reason were void so far as calculated to operate in contravention thereto.³ But the more recent authorities are opposed to this view.⁴

4. Wisdom, Propriety, or Policy of Statute. — With the justice, wisdom, or policy of a statute the courts have nothing whatever to do, so long as there is no infringement of some constitutional provision.⁵ Even if a law involve an abuse of the taxing power, unless it is in conflict with some constitutional provision, either expressly or impliedly, the courts may not prevent its execution.⁶

5. Motives of Legislature. — It is not the province of the court to inquire, through the medium of the journals or otherwise, into the motives that prompted the legislature or any member thereof in the enactment of a law.⁷ Even though it appear that in the endeavors which suggested the statute considerations were presented to the lawmakers which would not be a sufficient constitutional justification for the enactment, yet the court may not consider such circumstance.⁸

6. Possibility of Unfair Enforcement. — That those charged with the duty

357; *Payne v. Davis*, 2 Mont. 382; *Browning v. Browning*, 3 N. Mex. 374; *People v. Clayton*, 4 Utah 421, 449; *Williams v. Clayton*, 6 Utah 86.

1. *Sayles v. Walla Walla County*, 30 Wash. 194.

2. See *infra*, this title, VI. II. c. *Unconstitutionality*.

3. **Statutes Against Natural Right.** — *Morrison v. Barksdale*, Harp. L. (S. Car.) 101. See also the title CONSTITUTIONAL LAW, vol. 6, p. 1087.

4. *Maxwell v. Fulton County*, 119 Ind. 23; *Townsend v. State*, 147 Ind. 624, 62 Am. St. Rep. 477; *Whittington v. Polk*, 1 Har. & J. (Md.) 236; *Hoke v. Henderson*, 4 Dev. L. (15 N. Car.) 1, 25 Am. Dec. 677; *Erie, etc., R. Co. v. Casey*, 26 Pa. St. 301; *Com. v. M'Closkey*, 2 Rawle (Pa.) 374. See also the title CONSTITUTIONAL LAW, vol. 6, p. 1087.

5. **Wisdom, Propriety, or Policy of Statute.** — *Spier v. Baker*, 120 Cal. 370; *Bloxham v. Florida Cent., etc., R. Co.*, 35 Fla. 625; *Townsend v. State*, 147 Ind. 624, 62 Am. St. Rep. 477; *People v. Mahaney*, 13 Mich. 489; *Granger v. State*, 52 Neb. 352; *People v. Lawrence*, 36 Barb. (N. Y.) 177, *affirmed* 41 N. Y. 137; *Scowden's Appeal*, 96 Pa. St. 422; *Com. v. Moir*, 199 Pa. St. 534; *Kimball v. Grantsville City*, 19 Utah 368; *Wentworth v. Racine County*, 99 Wis. 20. See also the title CONSTITUTIONAL LAW, vol. 6, p. 1086.

Public Policy. — A statute will not be declared void as against public policy, since such statute, when duly enacted, is the expressed public policy of the state upon that subject. *State v. Heldenbrand*, 62 Neb. 136.

An Objection that an Act Is Partisan presents a question with which the judicial function is not concerned. *Pearce v. Stephens*, 18 N. Y. App. Div. 101, *affirmed* 153 N. Y. 673.

Where the Terms of a Statute Express the Intention of the Legislature with Sufficient Clearness the court will not consider the reason of the law,

nor interfere with its execution on the ground of inconvenience and danger to the public which may result therefrom. *Montreal v. Standard Light, etc., Co.*, 5 Quebec Q. B. 558, *affirmed* by Privy Council, July, 1897.

6. *Pence v. Frankfort*, 101 Ky. 534; *Kimball v. Grantsville City*, 19 Utah 368. And see the title TAXATION.

7. **Legislative Motives** — *United States*. — *Fletcher v. Peck*, 6 Cranch (U. S.) 131.

California. — *Fowler v. Peirce*, 2 Cal. 168; *People v. Bigler*, 5 Cal. 24; *Sherman v. Story*, 30 Cal. 266, 89 Am. Dec. 93; *Harpending v. Haight*, 39 Cal. 202, 2 Am. Rep. 432.

Idaho. — *Wright v. Kelly*, (Idaho 1895) 43 Pac. Rep. 565; *Bellevue Water Co. v. Stockslager*, (Idaho 1895) 43 Pac. Rep. 568; *Blaine County v. Heard*, (Idaho 1896) 45 Pac. Rep. 890.

Indiana. — *Evans v. Browne*, 30 Ind. 514, 95 Am. Dec. 710.

Kansas. — *Wichita v. Burleigh*, 36 Kan. 34.

New York. — *People v. Petrea*, 92 N. Y. 139; *Waterloo Woolen Mfg. Co. v. Shanahan*, 128 N. Y. 345.

Ohio. — *State v. Smith*, 44 Ohio St. 348. See also *Miller v. State*, 3 Ohio St. 484.

Pennsylvania. — *Sunbury, etc., R. Co. v. Cooper*, 33 Pa. St. 278; *Com. v. Moir*, 199 Pa. St. 534.

Tennessee. — *Lynn v. Polk*, 8 Lea (Tenn.) 293; *Ballentine v. Pulaski*, 15 Lea (Tenn.) 634.

West Virginia. — *Slack v. Jacob*, 8 W. Va. 613.

See also the title CONSTITUTIONAL LAW, vol. 6, p. 1087, and *infra*, VI. 10. b. (5) *Opinions and Motives of Legislators*.

The Presumption of Law is in favor of the good faith of the legislature. *State v. Burris*, (Del. 1901) 49 Atl. Rep. 930.

8. *Atty.-Gen. v. Williams*, 178 Mass. 330.

of carrying out the provisions of the law may act unfairly or oppressively furnishes no ground for assailing the validity of the law.¹

7. Partial Invalidity. — Part of a Statute May Be Unconstitutional and Void and the residue constitutional and valid.

The Rule Is that where the provisions are so interdependent that one may not operate without the other, or so related in substance and object that it is impossible to suppose that the legislature would have passed the one without the other, the whole must fall; but if, when the unconstitutional portion is stricken out, that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, it must be sustained.²

1. Unfair Execution of Statute. — *Rode v. Siebe*, 119 Cal. 518; *McGovern v. Hope*, 63 N. J. L. 76; *People v. City Prison*, 144 N. Y. 529. But see the title CIVIL RIGHTS, vol. 6, p. 79.

2. Partial Invalidity — *United States*. — Railroad Companies *v. Schutte*, 103 U. S. 118; *Albany County v. Stanley*, 105 U. S. 305; *Jaehne v. New York*, 128 U. S. 189, affirming 35 Fed. Rep. 337; *Noble v. Mitchell*, 164 U. S. 367; *Loeb v. Columbia Tp.*, 179 U. S. 472; *Diamond Glue Co. v. U. S. Glue Co.*, 187 U. S. 611; *U. S. v. Freeman*, 113 Fed. Rep. 370; *Wilkes County v. Coler*, 113 Fed. Rep. 725, 51 C. C. A. 399; *Peacock v. Pratt*, (C. C. A.) 121 Fed. Rep. 772; *Busch v. Webb*, 122 Fed. Rep. 655.

Alabama. — *Ramagano v. Crook*, 85 Ala. 226; *Bluthenthal v. Trager*, 131 Ala. 639; *Randolph v. Builders', etc., Supply Co.*, 106 Ala. 501; *Kentz v. Mobile*, 120 Ala. 623; *Williams v. Board of Revenue*, 123 Ala. 432; *Sheppard v. Dowling*, 127 Ala. 1; *State v. Davis*, 130 Ala. 148; *Wilson v. State*, (Ala. 1903) 33 So. Rep. 831.

Arkansas. — *State v. Devers*, 34 Ark. 188; *Bittle v. Stuart*, 34 Ark. 224; *St. Louis, etc., R. Co. v. State*, 55 Ark. 200; *Ferguson v. Josey*, 70 Ark. 94; *Gray v. Matheny*, 66 Ark. 36.

California. — *French v. Teschemaker*, 24 Cal. 548; *Reed v. Omnibus R. Co.*, 33 Cal. 212; *Christy v. Sacramento County*, 39 Cal. 3; *Johnson v. Tautphaus*, 127 Cal. 605; *Cahen v. Wells*, 132 Cal. 447.

Colorado. — *Sipe v. People*, 26 Colo. 127.

Connecticut. — *Miller v. Colonial Forestry Co.*, 73 Conn. 500.

Delaware. — *Equitable Guarantee, etc., Co. v. Donahoe*, 3 Penn. (Del.) 191.

Florida. — *State v. Brown*, 19 Fla. 563; *Ex p. Wells*, 21 Fla. 280; *Wooten v. State*, 24 Fla. 335.

Georgia. — *Hancock v. State*, 114 Ga. 439; *Cain v. Smith*, (Ga. 1903) 44 S. E. Rep. 5.

Idaho. — *State v. Mulkey*, (Idaho 1899) 59 Pac. Rep. 17.

Illinois. — *People v. Cooper*, 83 Ill. 585; *Dupee v. Swigert*, 127 Ill. 494; *People v. Simon*, 176 Ill. 165, 68 Am. St. Rep. 175; *People v. Cook County*, 176 Ill. 576; *People v. Knopf*, 183 Ill. 410; *Noel v. People*, 187 Ill. 587; *People v. Knopf*, 198 Ill. 340; *Mathews v. People*, 202 Ill. 389.

Indiana. — *Meshmeier v. State*, 11 Ind. 482; *Wilkins v. State*, 113 Ind. 514; *State v. Krost*, 140 Ind. 41; *Smith v. McClain*, 146 Ind. 77; *State v. Fox*, 158 Ind. 126; *Swartz v. Lake County*, 158 Ind. 141; *State v. Ray*, 153 Ind. 334.

Iowa. — *State v. Santee*, 112 Iowa 1.

Kansas. — *Central Branch Union Pac. R. Co. v. Atchinson, etc., R. Co.*; 28 Kan. 453; *In re Hendricks*, 60 Kan. 796; *Hull v. Johnson*, 10 Kan. App. 565; *Hardy v. Kingman County*, 65 Kan. 111.

Kentucky. — *Norman v. Boaz*, 85 Ky. 557; *Rogers v. Jacob*, 88 Ky. 502; *Southern R. Co. v. Coulter*, (Ky. 1902) 68 S. W. Rep. 873; *Gilbert v. Paducah*, (Ky. 1903) 72 S. W. Rep. 816.

Louisiana. — *State v. Goff*, 106 La. 270; *State v. Clinton*, 28 La. Ann. 201.

Maine. — *Packard v. Lewiston*, 55 Me. 456; *Cole v. Cumberland County*, 78 Me. 532; *State v. Montgomery*, 94 Me. 192.

Maryland. — *Field v. Malster*, 88 Md. 693.

Massachusetts. — *Com. v. Petranich*, (Mass. 1903) 66 N. E. Rep. 807; *White v. Gove*, (Mass. 1903) 67 N. E. Rep. 359; *Sparhawk v. Sparhawk*, 116 Mass. 315.

Michigan. — *Atty.-Gen. v. Amos*, 60 Mich. 372; *Mathias v. Cramer*, 73 Mich. 5; *Ball v. Ridge Copper Co.*, 118 Mich. 7; *Mt. Clemens v. Eldredge*, 119 Mich. 293; *Blades v. Water Com'rs*, 122 Mich. 366; *Union Trust Co. v. Wayne Probate Judge*, 125 Mich. 487; *Atty.-Gen. v. Gramlich*, 129 Mich. 630; *Hunt v. Buhner*, (Mich. 1903) 94 N. W. Rep. 589.

Minnesota. — *O'Brien v. Krenz*, 36 Minn. 136; *McGee v. Hennepin County*, 84 Minn. 472.

Mississippi. — *Fant v. Gibbs*, 54 Miss. 396.

Missouri. — *State v. Pond*, 93 Mo. 606; *State v. Thomas*, 138 Mo. 95; *State v. Hamey*, (Mo. 1901) 65 S. W. Rep. 946; *State v. Bengsch*, 170 Mo. 81.

Montana. — *State v. Long*, 21 Mont. 26; *State v. Courtney*, 27 Mont. 378.

Nebraska. — *White v. Lincoln*, 5 Neb. 515; *Ex p. Thomason*, 16 Neb. 239; *Holmberg v. Hauck*, 16 Neb. 338; *State v. Farmers', etc., Irrigation Co.*, 59 Neb. 1; *Scott v. Flowers*, 61 Neb. 620; *Board of Education v. Moses*, 51 Neb. 288; *State v. Magney*, 52 Neb. 508; *State v. Poynter*, 59 Neb. 417; *State v. Bowen*, 54 Neb. 211; *Lincoln St. R. Co. v. Lincoln*, 61 Neb. 109; *Crawford Co. v. Hathaway*, 60 Neb. 754; *Redell v. Moores*, 63 Neb. 219; *Merrill v. State*, (Neb. 1902) 91 N. W. Rep. 418; *Logan County v. Carnahan*, (Neb. 1903) 95 N. W. Rep. 812; *Union Pac. R. Co. v. Sprague*, (Neb. 1903) 95 N. W. Rep. 46.

Nevada. — *State v. Beck*, 25 Nev. 68.

New Jersey. — *Grey v. Dover*, 62 N. J. L. 40; *Stier v. Koster*, 66 N. J. L. 155; *McArdle v. Jersey City*, 66 N. J. L. 590; *Hann v. Bedell*, 67 N. J. L. 148; *Jones v. Rushmore*, 67 N. J. L. 157; *Ross v. Chosen Freeholders*, (N. J. 1903) 53 Atl. Rep. 1042.

New York. — *People v. Bull*, 46 N. Y. 69;

Parts of Section. — The same rule obtains in relation to parts of the sections of a statute.¹

8. Total Invalidity. — An unconstitutional act is, in legal contemplation, as inoperative as though it had never been passed.² The invalidity dates from its enactment, and not from the time it is adjudged to be in conflict with the supreme law.³ A statute unauthorized by the state constitution at the time

Gordon v. Cornes, 47 N. Y. 617; People v. Briggs, 50 N. Y. 553; Matter of Middletown, 82 N. Y. 196; Matter of Metropolitan Gas-Light Co., 85 N. Y. 526; People v. Porter, 90 N. Y. 68; Skaneateles Water Works Co. v. Skaneateles, 161 N. Y. 154; Purdy v. Erie R. Co., 162 N. Y. 42; Matter of De Vaucene, (Supm. Ct. Gen. T.) 31 How. Pr. (N. Y.) 289; Darragh v. McKim, 2 Hun (N. Y.) 337; Matter of Motley, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 488; Matter of Noble, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 49; People v. Manhattan State Hospital, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 414; People v. Lane, 53 N. Y. App. Div. 531; People v. Coler, 71 N. Y. App. Div. 584; Saratoga Springs v. Van Norder, 75 N. Y. App. Div. 204; McLaughlin v. Kipp, 82 N. Y. App. Div. 413.

North Carolina. — State v. Godwin, 123 N. Car. 697; Darby v. Wilmington, 76 N. Car. 133; Rodman-Heath Cotton Mills v. Waxhaw, 130 N. Car. 293.

North Dakota. — State v. O'Connor, 5 N. Dak. 629; Angell v. Cass County, 11 N. Dak. 265.

Ohio. — Kelley v. State, 6 Ohio St. 269; State v. Sinks, 42 Ohio St. 345; Gager v. Prout, 48 Ohio St. 89; State v. Jones, 66 Ohio St. 453; Collins v. Bingham, 12 Ohio Cir. Dec. 825, 22 Ohio Cir. Ct. 533; State v. Harmon, 23 Ohio Cir. Ct. 292; Pierce v. Board of Education, 8 Ohio Dec. 648; *In re Brown*, 9 Ohio Dec. 810; Squires v. Wiener, 10 Ohio Cir. Dec. 293; *In re Brown*, 9 Ohio Dec. 810, 6 Ohio N. P. 178; Cincinnati v. Cincinnati St. R. Co., 31 Cinc. L. Bul. 308.

Pennsylvania. — Com. v. Moir, 199 Pa. St. 534; Page v. Williamsport Suspender Co., 191 Pa. St. 511.

Rhode Island. — *In re Liquors*, 15 R. I. 608; Narragansett Indians, 20 R. I. 715.

South Carolina. — Utsey v. Hiott, 30 S. Car. 360, 14 Am. St. Rep. 910; Dean v. Spartanburg County, 59 S. Car. 110.

South Dakota. — Bennett v. State, (S. Dak. 1903) 93 N. W. Rep. 643.

Tennessee. — Burkholz v. State, 16 Lea (Tenn.) 71; State v. Scott, 98 Tenn. 254; Gribble v. Wilson, 101 Tenn. 612; Weaver v. Davidson County, 104 Tenn. 315.

Texas. — *Ex p.* Towles, 48 Tex. 413; Kimberly v. Morris, 87 Tex. 637; Campbell v. Cook, (Tex. Civ. App. 1894) 24 S. W. Rep. 977; Price v. Garvin, (Tex. Civ. App. 1902) 69 S. W. Rep. 985; State v. Laredo Ice Co., (Tex. 1903) 73 S. W. Rep. 951.

Utah. — Lyman v. Martin, 2 Utah 136; State v. Beddo, 22 Utah 432.

Vermont. — *In re Conditional Discharge of Convicts*, 73 Vt. 414.

Virginia. — Black v. Trower, 79 Va. 123; Lambert v. Smith, 98 Va. 268.

Washington. — Dacres v. Oregon R., etc., Co., 1 Wash. 525; Palmer v. Laberee, 23 Wash. 409; State v. Henry, 28 Wash. 38.

Wisconsin. — Wakeley v. Mohr, 15 Wis. 609;

Slinger v. Henneman, 38 Wis. 504; Dells v. Kennedy, 49 Wis. 555, 35 Am. Rep. 786; Lombard v. Antioch College, 60 Wis. 459; *In re Linden*, 112 Wis. 523; Bittenhaus v. Johnston, 92 Wis. 588; Shaffel v. State, 97 Wis. 377.

See also the title CONSTITUTIONAL LAW, vol. 6, p. 1088.

In Construing Statutes in Part Unconstitutional, the rule is that whenever, after striking out unconstitutional portions, that which remains is so ambiguous in its meaning that the legislative intent cannot, with reasonable certainty, be ascertained, the whole act must fall. Cronly v. Tucson, (Ariz. 1899) 56 Pac. Rep. 876.

Although a Provision of a Statute Giving a Particular Section Immediate Effect Is Unconstitutional, yet if it is distinct and separable from all the other provisions it may be disregarded, without affecting the statute otherwise than to leave the time at which it shall take effect to be governed by another provision thereof. McCabe v. Jeffers, 122 Cal. 302.

Invalid Act Embodied in Code. — Though an act passed prior to the adoption of the code, and incorporated therein, be invalid, yet this would not render invalid the section of the code embodying the act. Parks v. State, 110 Ga. 760.

Statute Contemplating Two or More Objects. — If a statute attempts to accomplish two or more objects and is void as to one, it may still be in every respect complete and valid as to the other. People v. Cooper, 83 Ill. 585; Hinze v. People, 92 Ill. 406; Reid v. Morton, 119 Ill. 118; Hagerstown v. Dechert, 32 Md. 369; Parfitt v. Ferguson, 3 N. Y. App. Div. 176; Matter of New York, etc., Bridge Co., 90 Hun (N. Y.) 312, affirmed 148 N. Y. 540.

But where an act provides for the dissolution and reincorporation of a municipality, and it is clear that the dissolution was authorized only as a step looking to and a foundation for the reincorporation, if that portion which provides for the reincorporation is unconstitutional, the whole act must fail. State v. Stark, 18 Fla. 255.

See also *infra*, this section, *Titles and Subjects*.

A Law Is Entire when each part has a general influence over the rest. Second Municipality v. Morgan, 1 La. Ann. 111; Quinlon v. Rogers, 12 Mich. 168.

1. Rule Applies to Sections of Statute. — Powell v. State, 69 Ala. 10; State v. Marsh, 37 Ark. 356; Tripp v. Overocker, 7 Colo. 72; Com. v. Hitchings, 5 Gray (Mass.) 482; State v. Stuhlt, 52 Neb. 209; People v. Kenney, 96 N. Y. 294; Duryee v. New York, 96 N. Y. 477.

2. Total Unconstitutionality. — Norton v. Shelby County, 118 U. S. 441; Wyandotte County v. Kansas City, 5 Kan. App. 43. See also the title CONSTITUTIONAL LAW, vol. 6, p. 1079 *et seq.* Compare, however, the recent New Jersey case considered *infra*, this title. VIII. 3. c. Acts Wholly Unconstitutional.

3. Boales v. Ferguson, 55 Neb. 565.

of its passage may not be validated by the subsequent adoption of a constitutional amendment.¹

9. Titles and Subjects—*a.* CONSTITUTIONAL PROVISIONS.—The constitutions of the various states commonly contain a provision to the effect that no law shall embrace more than one subject, and that the subject embraced shall be expressed in the title of the act. These provisions vary slightly, sometimes using the word "object" instead of "subject," sometimes requiring the subject to be "clearly" expressed in the title, and sometimes qualifying "subject" by the addition of "and matters connected therewith." In some jurisdictions general appropriation bills are excepted from the operation of the provision, and in others the provision applies only to private and local bills. These variations, however, do not affect the construction given such provisions and need not be considered in stating the law on the subject.²

***b.* PURPOSE OF PROVISIONS.**—The object of these provisions is to prevent the joining together in one act of several independent and incongruous matters, familiarly known as "log-rolling," and to prevent deception of the public or of members of the legislature by means of provisions in bills of which the title gives no intimation.³

***c.* WHETHER PROVISIONS DIRECTORY OR MANDATORY.**—In *Ohio* the peculiar doctrine is maintained that the provision is merely directory to the

1. *State v. Tufty*, 20 Nev. 427, 19 Am. St. Rep. 374.

But it has been held that an act which is defective on constitutional grounds may be cured by subsequent enactment in the form of an amendment or supplement. *McLorinan v. Ryno*, 49 N. J. L. 603; *State v. Yard*, 42 N. J. L. 357; *Sweet v. Syracuse*, 129 N. Y. 337. See also *In re Van Vliet*, 43 Fed. Rep. 765, and *infra*, this title, *Amendment*.

2. See the constitutions of the various states.

Provisions of this nature exist in all the states except the *New England* group, and *Mississippi* and *North Carolina*. And a similar provision in regard to territorial statutes is to be found in U. S. Rev. Stat., § 1924.

3. **Purpose of Provisions.**—See opinion of Cooley, J., in *People v. Mahaney*, 13 Mich. 481, and see LOGROLLING, vol. 19, p. 521.

In *Matter of New York*, 57 N. Y. App. Div. 166, Judge Woodward gives an interesting account of the abuses which gave rise to the provision in the New York constitution.

The cases in which the purposes of these provisions and the evils at which they were designed to strike are adverted to are very numerous. Among them may be noted the following:

United States.—*South St. Paul v. Lamprecht Bros. Co.*, (C. C. A.) 88 Fed. Rep. 449; *Mexican Nat. R. Co. v. Jackson*, (C. C. A.) 118 Fed. Rep. 549.

Alabama.—*Key v. Jones*, 52 Ala. 238; *Walker v. Griffith*, 60 Ala. 369 (quoted under LOGROLLING, vol. 19, p. 521).

Florida.—*State v. Green*, 36 Fla. 154.

Georgia.—*Savannah v. State*, 4 Ga. 26; *Briswick v. Brunswick*, 51 Ga. 639, 21 Am. Rep. 240; *Hope v. Gainesville*, 72 Ga. 246.

Idaho.—*Pioneer Irrigation Dist. v. Bradbury*, (Idaho 1902) 68 Pac. Rep. 295.

Illinois.—*Allardt v. People*, 197 Ill. 501; *People v. Protestant Deaconesses Inst.*, 71 Ill. 229.

Indiana.—*Indiana Cent. R. Co. v. Potts*, 7

Ind. 681; *Hingle v. State*, 24 Ind. 28; *Henderson v. State*, 137 Ind. 552.

Iowa.—*State v. Davis County Judge*, 2 Iowa 280; *Cook v. Marshall County*, (Iowa 1903) 93 N. W. Rep. 372.

Kansas.—*Philpin v. McCarty*, 24 Kan. 393.

Kentucky.—*Smith v. Com.*, 8 Bush (Ky.) 108.

Louisiana.—*Walker v. Caldwell*, 4 La. Ann. 297; *Police Jury v. Colomb*, 20 La. Ann. 196; *Allopathic State Board of Medical Examiners v. Fowler*, 50 La. Ann. 1358.

Maryland.—*Davis v. State*, 7 Md. 151, 61 Am. Dec. 331.

Michigan.—*Davies v. Saginaw County*, 89 Mich. 295.

Missouri.—*St. Louis v. Tiefel*, 42 Mo. 578; *State v. Ranson*, 73 Mo. 78.

Montana.—*State v. Anaconda Copper-Min. Co.*, 23 Mont. 498.

Nevada.—*State v. Ah Sam*, 15 Nev. 27, 37 Am. Rep. 454; *State v. Washoe County*, 22 Nev. 399.

New Jersey.—*Bunsted v. Gövern*, 47 N. J. L. 368; *Ryno v. State*, 58 N. J. L. 238.

New York.—*Conner v. New York*, 5 N. Y. 285; *Sun Mut. Ins. Co. v. New York*, 8 N. Y. 241; *People v. Chautauqua County*, 43 N. Y. 10; *People v. Brinkerhoff*, 68 N. Y. 259; *Water Com'rs v. Dwight*, 101 N. Y. 9.

North Dakota.—*State v. Nowland*, 3 N. Dak. 427, 44 Am. St. Rep. 572.

Oregon.—*State v. Frazier*, 36 Oregon 178.

Pennsylvania.—*Com. v. Barnett*, 199 Pa. St. 161, quoted under LOGROLLING, vol. 19, p. 521.

South Dakota.—*State v. Becker*, 3 S. Dak. 29.

Texas.—*Albrecht v. State*, 8 Tex. App. 216, 34 Am. Rep. 737.

Virginia.—*Cahoon v. Iron Gate Land, etc., Co.*, 92 Va. 367.

West Virginia.—*Cutlip v. Sheriff*, 3 W. Va. 588.

Wisconsin.—*Harrison v. Milwaukee County*, 51 Wis. 645.

legislature, giving the courts no power to declare an act invalid because violative thereof,¹ and the *California* court held the same way under a former constitution in that state.² But it is somewhat difficult to conceive how any express constitutional limitation on the power of the legislature can be regarded as directory only,³ and certainly such provisions are everywhere else deemed to be mandatory, requiring the courts to pronounce invalid all statutes in violation thereof.⁴

d. To WHAT ACTS PROVISIONS APPLICABLE. — The constitutional provision does not apply to previously existing laws,⁵ nor to a bill in process of enactment,⁶ nor to the action of the legislature proposing a constitutional amendment.⁷ And where the constitution limits the operation of the provision to local and private laws, it does not apply to general provisions although they be contained in the same act with local provisions.⁸

Codes and Compilations. — Such provisions do not prohibit the legislature from adopting by a single act a code or compilation of laws.⁹ And it has been

1. Provision Directory Only — *Ohio*. — *Pim v. Nicholson*, 6 Ohio St. 176; *Steamboat Northern Indiana v. Milliken*, 7 Ohio St. 383; *Lehman v. McBride*, 15 Ohio St. 604; *State v. Covington*, 29 Ohio St. 102; *Ashe v. State*, 37 Ohio St. 500; *Weil v. State*, 46 Ohio St. 450.

2. California. — *Washington v. Page*, 4 Cal. 388; *Pierpont v. Cranch*, 10 Cal. 315. But the existing constitution closes the door on the question by providing generally that the provisions of the constitution are mandatory, unless by express words declared otherwise. *People v. Mullender*, 132 Cal. 217.

3. See the remarks of Emott, J., in *People v. Lawrence*, 36 Barb. (N. Y.) 177, and of Lumpkin, J., in *Prothro v. Orr*, 12 Ga. 36.

4. Provision Deemed Mandatory — *Alabama*. — *Weaver v. Lapsley*, 43 Ala. 224; *Montgomery Mut. Bldg., etc., Assoc. v. Robinson*, 69 Ala. 413; *Ballentyne v. Wickersham*, 75 Ala. 533.

Colorado. — *Central, etc., Road Co. v. People*, 5 Colo. 39; *People v. Fleming*, 7 Colo. 230; *Wall v. Garrison*, 11 Colo. 515; *Mitchell v. Colorado Milling, etc., Co.*, 12 Colo. App. 277.

Delaware. — *Equitable Guarantee, etc., Co. v. Donahoe*, 3 Penn. (Del.) 191.

Florida. — *Webster v. Powell*, 36 Fla. 703; *State v. Burns*, 38 Fla. 367.

Georgia. — *Prothro v. Orr*, 12 Ga. 36.

Indiana. — *Indiana Cent. R. Co. v. Potts*, 7 Ind. 681.

Kansas. — *Sedgwick County v. Bailey*, 13 Kan. 600; *Philpin v. McCarty*, 24 Kan. 393.

Kentucky. — *Phillips v. Covington, etc., Bridge Co.*, 2 Met. (Ky.) 221.

Minnesota. — *Ramsey County v. Heenan*, 2 Minn. 330.

Missouri. — *State v. Miller*, 45 Mo. 495; *State v. Heege*, 135 Mo. 112.

New Jersey. — *American Surety Co. v. Great White Spirit Co.*, 58 N. J. Eq. 526.

Nevada. — *State v. Ah Sam*, 15 Nev. 27, 37 Am. Rep. 454.

North Dakota. — *Erickson v. Cass County*, 11 N. Dak. 494; *Turnquist v. Cass County Drain Com'rs*, 11 N. Dak. 514.

New York. — *Huber v. People*, 49 N. Y. 134.

Pennsylvania. — *Union Pass. R. Co.'s Appeal*, 81* Pa. St. 91.

Tennessee. — *Cannon v. Mathes*, 8 Heisk. (Tenn.) 504.

Texas. — *Cannon v. Hemphill*, 7 Tex. 184;

Tadlock v. Eccles, 20 Tex. 782, 73 Am. Dec. 213; *San Antonio v. Gould*, 34 Tex. 49; *State v. McCracken*, 42 Tex. 383; *Gunter v. Texas Land, etc., Co.*, 82 Tex. 496.

Virginia. — *Lacey v. Palmer*, 93 Va. 159, 57 Am. St. Rep. 795.

West Virginia. — *Shields v. Bennett*, 8 W. Va. 74.

And, of course, the same ruling is necessarily implied in every case where the courts have assumed to declare a statute invalid because violative of such a provision.

5. Not Applicable to Existing Laws. — *Stewart v. Riopelle*, 48 Mich. 177; *Rogers v. Windoes*, 48 Mich. 628; *State v. Robinson*, 35 Neb. 401; *Choctaw, etc., R. Co. v. Alexander*, 7 Okla. 579.

That the original act was passed before the constitutional requirement as to title will not prevail, its amendment falling within the constitutional provision. *In re Consolidation of School Dist.*, 23 Colo. 499.

Compilation After Adoption of Constitution. — If, at the time of the passage of an act, the constitution of the state contains no provision that the object of an act shall be indicated in the title, the subsequent incorporation of such act in a compilation of laws will not render it subject to such a provision in a constitution thereafter adopted. *Auditor Gen. v. Lake George, etc., R. Co.*, 82 Mich. 426.

6. Bill in Process of Enactment. — *Detroit v. Schmid*, 128 Mich. 379, wherein it was held that, if the bill as enacted was valid, it was not material that another bill, for which it was substituted, would have violated the constitution.

As to Change in Title, see *supra*, this title, III. 13. *c. Bill Presented Must Be That Actually Passed*, and references in the note.

7. Proposal of Constitutional Amendment. — *Julius v. Callahan*, 63 Minn. 154.

8. General Provisions in Local Act. — *People v. McCann*, 16 N. Y. 58, 69 Am. Dec. 642.

9. Does Not Prohibit Codification. — *People v. King*, 127 Cal. 570; *Martin v. Johnson*, 33 Fla. 287; *Central of Georgia R. Co. v. State*, 104 Ga. 831; *Larned v. Tiernan*, 110 Ill. 173; *Cook v. Marshall County*, (Iowa 1903) 93 N. W. Rep. 372; *Porter v. Thompson*, 22 Iowa 391; *Stewart v. Riopelle*, 48 Mich. 177; *Johnson v. Harrison*, 47 Minn. 576, 28 Am. St. Rep. 382; *Tribune Printing, etc., Co. v. Barnes*, 7 N. Dak. 591;

held that the fact that an act from which a code section was taken was repugnant to the constitutional prohibition would not invalidate the section of the code, the defects having been cured by its incorporation into the code and the adoption of such code by the general assembly.¹

Municipal Ordinances.—Such constitutional provisions apply only to state legislation and not to municipal ordinances,² but similar provisions are quite commonly to be found in general statutes relative to cities or in particular charters.³

c. HOW PROVISIONS CONSTRUED.—This constitutional requirement should not be enforced in any narrow or technical spirit.⁴ It was introduced to prevent certain abuses, and it should be reasonably and liberally construed on the one hand so as to guard against these abuses,⁵ and on the other hand so as not to embarrass or obstruct needed legislation.⁶ The statute should be upheld, if possible, doubtful cases being resolved in its favor, and to justify the court in declaring it in violation of the constitutional inhibition, the objection must be serious and the conflict between the statute and the constitution plain and unmistakable.⁷

State v. McDaniel, 19 S. Car. 114; *Kaminitsky v. Northeastern R. Co.*, 25 S. Car. 63.

1. Code Section Taken from Invalid Statute.—*Barker v. State*, (Ga. 1903) 44 S. E. Rep. 874; *Daniel v. State*, 114 Ga. 533; *Central of Georgia R. Co. v. State*, 104 Ga. 831. And see *Bales v. State*, 63 Ala. 30, and *infra*, VIII. 3. *Existence of Act Amended*.

In *Missouri*, the legislature may in its discretion place a revised law in the code under whatever head it deems good. *Hennig v. Staed*, 138 Mo. 430.

Law Passed After Adoption of Code.—But the defect is not cured where the act is passed after the adoption of the code and is incorporated into such code under a legislative mandate that all laws of enactment at the session of the adoption of the code should be introduced therein. *Builders, etc., Supply Co. v. Lucas*, 119 Ala. 202.

2. Not Applicable to Ordinances.—See the title ORDINANCES, vol. 21, p. 975. See also *Green v. Indianapolis*, 25 Ind. 490; *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830; *Humboldt v. McCoy*, 23 Kan. 249.

3. Applied to Ordinances by Statute.—See the title ORDINANCES, vol. 21, p. 975. And see *Lincoln Land Co. v. Grant*, 57 Neb. 70.

4. Not Given Strained or Technical Construction.—*Otoe County v. Baldwin*, 111 U. S. 1; *South St. Paul v. Lamprecht Bros. Co.*, (C. C. A.) 88 Fed. Rep. 449; *Philpin v. McCarty*, 24 Kan. 393; *Johnson v. Higgins*, 3 Met. (Ky.) 566; *Municipality No. Three v. Michoud*, 6 La. Ann. 605.

5. Must Be Enforced Against Abuses.—*South St. Paul v. Lamprecht Bros. Co.*, (C. C. A.) 88 Fed. Rep. 449; *State v. Burns*, 38 Fla. 367; *State v. Barrett*, 27 Kan. 214; *People v. Hills*, 35 N. Y. 449; *Johnston v. Spicer*, 107 N. Y. 185.

6. Liberal Construction in Favor of Act.—*United States.*—*South St. Paul v. Lamprecht Bros. Co.*, (C. C. A.) 88 Fed. Rep. 449; *Mexican Nat. R. Co. v. Jackson*, (C. C. A.) 118 Fed. Rep. 549; *Henderson v. Jackson County*, 2 McCrary (U. S.) 615.

Alabama.—*Ballentyne v. Wickersham*, 75 Ala. 533; *Judson v. Bessemer*, 87 Ala. 240.

Colorado.—*In re Breene*, 14 Colo. 401.

Florida.—*Jacksonville v. Basnett*, 20 Fla. 525.

Illinois.—*Gaines v. Williams*, 146 Ill. 450; *Hudnall v. Ham*, 172 Ill. 76; *Manchester v. People*, 178 Ill. 285.

Kansas.—*Philpin v. McCarty*, 24 Kan. 393; *State v. Barrett*, 27 Kan. 214.

Kentucky.—*Smith v. Com.*, 8 Bush (Ky.) 108; *Johnson v. Higgins*, 3 Met. (Ky.) 566; *Phillips v. Covington, etc., Bridge Co.*, 2 Met. (Ky.) 219.

Maryland.—*Hamilton v. Carroll*, 82 Md. 326.

Michigan.—*People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103.

Minnesota.—*State v. Board of Control*, 85 Minn. 165; *Ek v. St. Paul Permanent Loan Co.*, 84 Minn. 245; *Putnam v. St. Paul*, 75 Minn. 514.

Missouri.—*State v. Whitaker*, 160 Mo. 59; *Bergman v. St. Louis, etc., R. Co.*, 88 Mo. 678.

Nebraska.—*Affholder v. State*, 51 Neb. 91.

Nevada.—*State v. Ah Sam*, 15 Nev. 27, 37 Am. Rep. 454.

New Jersey.—*Matter of Haynes*, 54 N. J. L. 6.

New York.—*People v. Banks*, 67 N. Y. 568; *People v. Briggs*, 50 N. Y. 553; *Central Cross-town R. Co. v. Twenty-third St. R. Co.*, (N. Y. Super. Ct. Spec. T.) 54 How. Pr. (N. Y.) 168; *Harris v. Niagara County*, 33 Hun (N. Y.) 279; *People v. Lawrence*, 36 Barb. (N. Y.) 177.

Pennsylvania.—*Allegheny County Home's Case*, 77 Pa. 77; *Com. v. Hazen*, 20 Pa. Super. Ct. 487; *City Sewage Utilization Co. v. Davis*, 8 Phila. (Pa.) 625.

South Dakota.—*State v. Becker*, 3 S. Dak. 29.

This rule of construction is universal, and is expressed or necessarily implied in all the decisions cited in this section.

7. In Doubtful Case Act Valid.—*Hope v. Gainesville*, 72 Ga. 245; *Gillespie v. State*, 9 Ind. 380; *Com. v. Barney*, (Ky. 1903) 74 S. W. Rep. 181; *Dorchester County v. Meekins*, 50 Md. 39; *State v. Whitaker*, 160 Mo. 59; *Ward v. Board of Equalization*, 135 Mo. 309; *Boorum v. Connelly*, 66 N. J. L. 197; *State v. Becker*, 3 S. Dak. 29; *Robinson v. State*, 15 Tex. 311; *Trehy v. Marye*, 100 Va. 40; *State v. Mines*, 38 W. Va. 125.

Long Acquiescence in the Constitutionality of an act in respect of its title is entitled to much weight in determining the sufficiency of the title.¹

f. SINGLENESSE OF SUBJECT — (1) *In General.* — The first requirement of the constitutional provision is that an act shall embrace but one subject — some constitutions using the word "object" instead of "subject," but in the same sense.² This clause of the provision is quite independent of that other one requiring the subject to be expressed in the title, although it is not unusual for judges and counsel to confuse the two, speaking of "plurality in the title" as if that would render a statute obnoxious to the constitution.³ In fact, however, the question of "unity of subject" must be determined, not from the title, but from an inspection of the body of the act,⁴ and, if that be found to embrace but one subject, the fact that the title expresses more than one does not render the act objectionable on the ground of plurality, the subject not contained in the act being treated as surplusage.⁵

(2) *When Act Not Objectionable for Plurality.* — The word "subject" as used in the constitutions is not to be taken as synonymous with "provision;"⁶ an act may properly include any number of provisions so long as they are not inconsistent with, or foreign to, its general object.⁷ This requirement of singleness of subject is not intended to embarrass honest legislation, but only to prevent the vicious practice of joining in one act incongruous and unrelated matters; and if all the parts of a statute have a natural connection and reasonably relate, directly or indirectly, to one general and legitimate subject of legislation, the act is not open to the objection of plurality, no matter how extensively or minutely it deals with the details looking to the accomplishment of the main legislative purpose.⁸

1. *Long Acquiescence in Constitutionality.* — *Continental Imp. Co. v. Phelps*, 47 Mich. 299; *Detroit City R. Co. v. Mills*, 85 Mich. 634; *Bohmer v. Haffen*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 564. See *infra*, VI. 11. *c. Unconstitutionality*, first note.

2. See *Harland v. Territory*, 3 Wash. Ter. 145, quoted under *OBJECT*, vol. 21, p. 756.

"Subject" and "Object." — In *Louisiana*, where the constitution uses the word "object," some distinction is made between its meaning and that of "subject," but the provision is given exactly the same construction as in those states where "subject" is employed. See *State v. Ferguson*, 104 La. 249; *State v. De Hart*, 109 La. 570, in which cases "object" is defined as "the aim or purpose of the enactment."

In the *Texas* constitution of 1876 "subject" was substituted for the word "object," which had been used in the earlier constitutions. Construing this provision, the court defined "subject" as "that which is to be dominated or controlled by the particular law," and was inclined to regard that word as expressing "more accurately the meaning and intent of the constitutional provision." *Day Land, etc., Co. v. State*, 68 Tex. 542.

3. *Plurality Confused with Sufficiency of Title.* — See, for example, *Ex p. Pfirman*, 134 Cal. 143; *Starnes v. Mutual Loan, etc., Co.*, 102 Ga. 597; *Blaker v. Hood*, 53 Kan. 499; *Beattyville v. Daniel*, (Ky. 1894) 25 S. W. Rep. 746; *State v. Yardley*, 95 Tenn. 546; *Bosang v. Iron Belt Bldg., etc., Assoc.*, 96 Va. 119; *McMaster v. Advance Thrasher Co.*, 10 Wash. 147.

4. *Question Determined by Body of Act.* — *Greaton v. Griffin*, (Supm. Ct. Spec. T.) 4 Abb. Pr. N. S. (N. Y.) 313; *People v. Lawrence*, 36 Barb. (N. Y.) 177; *Northern Counties Invest.*

Trust v. Sears, 30 Oregon 388; *Lacey v. Palmer*, 93 Va. 159, 57 Am. St. Rep. 795, wherein Keith. P., draws a very clear distinction between the two requirements of the provision.

5. See *infra*, this subsection, *Expression of Subject in Title — What a Sufficient Expression of Subject — Generality of Title.*

6. "Subject" Not Synonymous with "Provision." — *Mexican Nat. R. Co. v. Jackson*, (C. C. A.) 118 Fed. Rep. 549; *Campbell v. Cook*, 86 Tex. 630, 40 Am. St. Rep. 878.

7. *Act May Contain Any Number of Provisions.* — *State v. Union*, 33 N. J. L. 350; *Easton, etc., R. Co. v. Central R. Co.*, 52 N. J. L. 267; *Pioneer Irrigation Dist. v. Bradbury*, (Idaho 1902) 68 Pac. Rep. 295.

8. *Acts Containing But One General Subject* — *United States.* — *Hoboken v. Pennsylvania R. Co.*, 124 U. S. 656; *Ackley School Dist. v. Hall*, 113 U. S. 135; *Otoe County v. Baldwin*, 111 U. S. 1; *Louisiana v. Pilsbury*, 105 U. S. 278; *Woodson v. Murdock*, 22 Wall. (U. S.) 351; *Mexican Nat. R. Co. v. Jackson*, (C. C. A.) 118 Fed. Rep. 549; *Geer v. Ouray County*, 97 Fed. Rep. 435, 38 C. C. A. 250; *South St. Paul v. Lamprecht Bros. Co.*, (C. C. A.) 88 Fed. Rep. 449; *Morgan v. Des Moines*, 54 Fed. Rep. 456; *Baltimore, etc., R. Co. v. Jefferson County*, 29 Fed. Rep. 305.

Alabama. — *Mitchell v. State*, 134 Ala. 392; *Sheppard v. Dowling*, 127 Ala. 1; *State v. Crook*, 126 Ala. 600; *Hawkins v. Roberts*, 122 Ala. 130; *Benners v. State*, 124 Ala. 97; *State v. Street*, 117 Ala. 203; *Hare v. Kennerly*, 83 Ala. 508; *Tatum v. State*, 82 Ala. 5; *Block v. State*, 66 Ala. 493; *Walker v. Griffith*, 60 Ala. 361; *Key v. Jones*, 52 Ala. 238; *State v. Price*, 50 Ala. 568; *Ex p. Upshaw*, 45 Ala. 234; *Martin v. Hewitt*, 44 Ala. 433; *Gunter v. Dale County*,

Illustrations. — Further than the above governing principles, which are universally recognized, it is impracticable, if not impossible, to lay down any general rules; for the question is merely one of applying these principles to the particular facts and circumstances of the statute under consideration, and any classification of the decisions on a basis of facts would necessarily be arbitrary

44 Ala. 639; *Miles v. State*, 40 Ala. 39; *Farley v. Dowe*, 45 Ala. 326.

California. — *Ex p. Pfirman*, 134 Cal. 143; *Los Angeles County v. Spencer*, 126 Cal. 670, 77 Am. St. Rep. 217; *Hellman v. Shoulters*, 114 Cal. 136; *Perine v. Erzgraber*, 102 Cal. 234; *Dowling v. Conniff*, 103 Cal. 75; *People v. Superior Ct.*, 100 Cal. 105; *Ex p. Kohler*, 74 Cal. 38; *Ream v. Siskiyou County*, 36 Cal. 620.

Colorado. — *Mollie Gibson Consol. Min., etc., Co. v. Sharp*, 23 Colo. 259; *Farmers' Independent Ditch Co. v. Agricultural Ditch Co.*, 22 Colo. 513, 55 Am. St. Rep. 149; *Airy v. People*, 21 Colo. 144; *Harding v. People*, 10 Colo. 387; *Golden Canal Co. v. Bright*, 8 Colo. 144; *People v. Goddard*, 8 Colo. 432.

Florida. — *Brass v. State*, (Fla. 1903) 34 So. Rep. 307; *State v. Jacksonville Terminal Co.*, 41 Fla. 363; *State v. Hocker*, 36 Fla. 358.

Georgia. — *Welborne v. State*, 114 Ga. 793; *Central of Georgia R. Co. v. State*, 104 Ga. 831; *Brand v. Lawrenceville*, 104 Ga. 486; *Starnes v. Mutual Loan, etc., Co.*, 102 Ga. 597; *McCommons v. English*, 100 Ga. 653; *Columbus Southern R. Co. v. Wright*, 89 Ga. 574; *Georgia Midland, etc., R. Co. v. State*, 89 Ga. 597; *Clay v. Central R., etc., Co.*, 84 Ga. 345; *Spier v. Morgan*, 80 Ga. 581; *Brown v. State*, 73 Ga. 38; *Hope v. Gainesville*, 72 Ga. 246; *Allen v. Tison*, 50 Ga. 374.

Idaho. — *Pioneer Irrigation Dist. v. Bradbury*, (Idaho 1902) 68 Pac. Rep. 295.

Illinois. — *Meul v. People*, 198 Ill. 258; *Manchester v. People*, 178 Ill. 285; *People v. Kirk*, 162 Ill. 138, 53 Am. St. Rep. 277; *Hronek v. People*, 134 Ill. 139, 23 Am. St. Rep. 652; *Blake v. People*, 109 Ill. 504; *People v. Brislin*, 80 Ill. 423; *Belleville, etc., R. Co. v. Gregory*, 15 Ill. 20, 58 Am. Dec. 589; *Thompson v. Akin*, 81 Ill. App. 62.

Indiana. — *Isenhour v. State*, 157 Ind. 517; *Maule Coal Co. v. Partenheimer*, 155 Ind. 100; *Gustavel v. State*, 153 Ind. 613; *Central Union Telephone Co. v. Fehring*, 146 Ind. 189; *State v. Roby*, 142 Ind. 168, 51 Am. St. Rep. 174; *Henderson v. State*, 137 Ind. 552; *Rushville Gas Co. v. Rushville*, 121 Ind. 206, 16 Am. St. Rep. 388; *Crawfordsville, etc., Turnpike Co. v. Fletcher*, 104 Ind. 97; *Walker v. Dunham*, 17 Ind. 483; *Haggard v. Hawkins*, 14 Ind. 299.

Iowa. — *Richman v. Muscatine County*, 77 Iowa 513, 14 Am. St. Rep. 308; *Davis v. Woolnough*, 9 Iowa 104.

Kansas. — *Reynolds v. Board of Education*, (Kan. 1903) 72 Pac. Rep. 274; *State v. Wilcox*, 64 Kan. 789; *Ash v. Thorp*, 65 Kan. 60; *Allen v. Hopkins*, 62 Kan. 175; *In re Greer*, 58 Kan. 268; *Aikman v. Edwards*, 55 Kan. 751; *Matter of Tutt*, 55 Kan. 705; *Eudora v. Darling*, 54 Kan. 654; *Jockbeck v. Shawnee County*, 53 Kan. 780; *Blaker v. Hood*, 53 Kan. 499; *Barber County v. Smith*, 48 Kan. 331; *State v. Sanders*, 42 Kan. 228; *State v. Brown*, 38 Kan. 390; *State v. Cross*, 38 Kan. 696; *Wichita v. Burleigh*, 36 Kan. 34; *Cherokee County v. State*, 36

Kan. 337; *State v. Barrett*, 27 Kan. 213; *Phillip v. McCarty*, 24 Kan. 393; *Eureka v. Davis*, 21 Kan. 578; *Lowe v. Bourbon County*, 6 Kan. App. 603.

Kentucky. — *Arber v. Com.*, (Ky. 1903) 72 S. W. Rep. 30; *Murphy v. Louisville*, (Ky. 1903) 71 S. W. Rep. 934; *Rumbley v. Hall*, 107 Ky. 349; *Brann v. Hart*, 97 Ky. 735; *Beattyville v. Daniel*, (Ky. 1894) 25 S. W. Rep. 746; *Hake v. Com.*, 79 Ky. 573; *Allen v. Hall*, 14 Bush (Ky.) 85; *Smith v. Com.*, 8 Bush (Ky.) 108; *Phillips v. Covington, etc., Bridge Co.*, 2 Met. (Ky.) 219.

Louisiana. — *Dehon v. Lafourche Basin Levee Board*, (La. 1903) 34 So. Rep. 770; *State v. De Hart*, 109 La. 570; *Bienvenu's Succession*, 106 La. 595; *Hope v. New Orleans*, 106 La. 345; *State v. Logan*, 104 La. 254; *State v. Ackerman*, 51 La. Ann. 1213; *Allopathic State Board of Medical Examiners v. Fowler*, 50 La. Ann. 1358; *State v. Read*, 49 La. Ann. 1535; *State v. Rushing*, 49 La. Ann. 1530; *State v. Karstendiek*, 49 La. Ann. 1621; *State v. People's Slaughterhouse, etc., Co.*, 46 La. Ann. 1031; *State v. Pittsburg, etc., Coal Co.*, 41 La. Ann. 465; *State v. Brown*, 41 La. Ann. 771; *Conery v. New Orleans Water Works Co.*, 41 La. Ann. 910; *Excelsior Planting, etc., Co. v. Green*, 39 La. Ann. 455; *State v. Henderson*, 32 La. Ann. 779; *State v. Pilsbury*, 31 La. Ann. 1; *Police Jury v. Colomb*, 20 La. Ann. 196.

Maryland. — *Herbert v. Baltimore County*, (Md. 1903) 55 Atl. Rep. 376; *Stevens v. State*, 89 Md. 669; *Gaus v. Carter*, 77 Md. 1; *Catholic Cathedral Church v. Manning*, 72 Md. 116; *Baltimore v. Reitz*, 50 Md. 574.

Michigan. — *Jackson, etc., Traction Co. v. Railroad Com'rs*, 128 Mich. 164; *Fort-St. Union Depot Co. v. Railroad Com'rs*, 118 Mich. 340; *McMorran v. Great Hive, etc.*, 117 Mich. 398; *Grand Rapids v. Burlingame*, 102 Mich. 321; *People v. Brooks*, 101 Mich. 98; *Toll v. Jerome*, 101 Mich. 468; *Bissell v. Heath*, 98 Mich. 472; *People v. Taylor*, 96 Mich. 576; *Atty.-Gen. v. Sanilac County*, 71 Mich. 16; *Detroit City R. Co. v. Mills*, 85 Mich. 634; *Auditor Gen. v. Stiles*, 83 Mich. 460; *Jenking v. Osmun*, 79 Mich. 305; *Tolford v. Church*, 66 Mich. 431; *Detroit v. Wabash, etc., R. Co.*, 63 Mich. 712; *Atty.-Gen. v. Joy*, 55 Mich. 94; *Toledo, etc., R. Co. v. Dunlap*, 47 Mich. 456.

Minnesota. — *Crookston v. Polk County*, 79 Minn. 283; *Fleckten v. Lamberton*, 69 Minn. 187; *Shakopee First Nat. Bank v. How*, 65 Minn. 187; *Lynott v. Dickerman*, 65 Minn. 471; *In re Piedmont Ave. East*, 59 Minn. 522; *Willis v. Standard Oil Co.*, 50 Minn. 290; *State v. La Vagne*, 47 Minn. 106; *Johnson v. Harrison*, 47 Minn. 575, 28 Am. St. Rep. 382; *Tuttle v. Strout*, 7 Minn. 465, 82 Am. Dec. 108; *Ramsey County v. Heenan*, 2 Minn. 330.

Missouri. — *Cox v. Hannibal, etc., R. Co.*, (Mo. 1903) 74 S. W. Rep. 854; *State v. Bixman*, 162 Mo. 1; *Lynch v. Murphy*, 119 Mo. 163; *State v. Macklin*, (Mo. 1890) 13 S. W. Rep.

and would involve a great expenditure of space with but little compensation in the way of benefit to the reader. Hence it is deemed sufficient to cite by way of illustration a few instances where statutes have been held to embrace but one subject although dealing with several matters, as where an act amends a previous act in two particulars,¹ or treats of cities of two classes,² or of both

680; *State v. Miller*, 100 Mo. 439; *Bergman v. St. Louis, etc.*, R. Co., 88 Mo. 678; *Ewing v. Hoblitzelle*, 85 Mo. 64; *Hannibal v. Marion County*, 69 Mo. 571.

Montana. — *Jobb v. Meagher County*, 20 Mont. 424.

Nebraska. — *Merrill v. State*, (Neb. 1902) 91 N. W. Rep. 418; *Wenham v. State*, (Neb. 1902) 91 N. W. Rep. 421; *State v. Cornell*, 60 Neb. 276; *Granger v. State*, 52 Neb. 352; *State v. Moore*, 48 Neb. 870; *Hopkins v. Scott*, 38 Neb. 661; *Van Horn v. State*, 46 Neb. 62; *Kansas City, etc., R. Co. v. Frey*, 30 Neb. 790; *State v. Page*, 12 Neb. 386; *Dawson County v. McNamar*, 10 Neb. 276.

Nevada. — *State v. Ruhe*, 24 Nev. 251; *State v. Humboldt county*, 21 Nev. 235; *Ex p. Livingston*, 20 Nev. 282; *State v. Atherton*, 19 Nev. 332; *Klein v. Kinkead*, 16 Nev. 194; *State v. Ah Sam*, 15 Nev. 27, 37 Am. Rep. 454.

New Jersey. — *State v. Sussex County Lake, etc., Commission*, (N. J. 1902) 53 Atl. Rep. 612; *Brinkerhoff v. Newark, etc., Traction Co.*, 66 N. J. L. 478; *Kennedy v. Belmar*, 61 N. J. L. 20; *Newark v. Mt. Pleasant Cemetery Co.*, 58 N. J. L. 168; *Easton, etc., R. Co. v. Central R. Co.*, 52 N. J. L. 267; *In re Elizabeth*, 49 N. J. L. 488; *Bergen County Sav. Bank v. Union Tp.*, 44 N. J. L. 599; *State v. Union*, 33 N. J. L. 350.

New York. — *People v. Coler*, 173 N. Y. 103, 71 N. Y. App. Div. 584; *Perkins v. Heert*, 158 N. Y. 306, 5 N. Y. App. Div. 335; *Curtin v. Barton*, 139 N. Y. 505; *Astor v. Arcade R. Co.*, 113 N. Y. 93; *People v. Squire*, 107 N. Y. 593, 1 Am. Rep. 893; *People v. Whitlock*, 92 N. Y. 191; *Rogers v. Stephens*, 86 N. Y. 623; *Matter of Lackett, etc., Sts.*, 74 N. Y. 95; *Harris v. People*, 59 N. Y. 599; *People v. Briggs*, 50 N. Y. 553; *Conner v. New York*, 5 N. Y. 285; *New York v. Garman*, 26 N. Y. App. Div. 191; *People v. Oneida County*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 597, *affirmed* 68 N. Y. App. Div. 650; *People v. Coleman*, (Supm. Ct. Gen. T.) 4 N. Y. Supp. 417; *Wrought-Iron Bridge Co. v. Attica*, 49 Hun (N. Y.) 513; *Bailey v. New York Arcade R. Co.*, (Supm. Ct. Gen. T.) 1 N. Y. Supp. 304; *Fort v. Cummings*, 90 Hun (N. Y.) 481; *Utica Water Works Co. v. Utica*, 31 Hun (N. Y.) 426; *More v. Deyoe*, 22 Hun (N. Y.) 208; *People v. Lawrence*, 36 Barb. (N. Y.) 177; *Matter of Van Antwerp*, 1 Thomp. & C. (N. Y.) 423; *Greaton v. Griffin*, (Supm. Ct. Spec. T.) 4 Abb. Pr. N. S. (N. Y.) 313; *Central Crosstown R. Co. v. Twenty-third St. R. Co.*, (N. Y. Super. Ct. Spec. T.) 54 How. Pr. (N. Y.) 168; *Matter of Bernstein*, 3 Redf. (N. Y.) 20.

North Dakota. — *State v. North Dakota Children's Home Soc.*, 10 N. Dak. 493; *Eaton v. Guarantee Co.*, 11 N. Dak. 79; *Tribune Printing, etc., Co. v. Barnes*, 7 N. Dak. 591; *State v. Haas*, 2 N. Dak. 202.

Oregon. — *Lawrey v. Sterling*, 41 Oregon 518; *Northern Counties Invest. Trust v. Sears*,

30 Oregon 388; *Simon v. Northup*, 27 Oregon 487.

Pennsylvania. — *Rodebaugh v. Philadelphia Traction Co.*, 190 Pa. St. 358; *Dorrance v. Dorranceton*, 181 Pa. St. 164; *Com. v. Lloyd*, 178 Pa. St. 308; *Lloyd v. Smith*, 176 Pa. St. 213; *Myers v. Com.*, 110 Pa. St. 217; *Focht v. Reading Stove Works*, 21 Pa. Co. Ct. 524; *Com. v. Moir*, 7 Lack. Leg. N. (Pa.) 50; *Com. v. Charity Hospital*, 31 Pittsb. Leg. J. N. S. (Pa.) 11.

South Dakota. — *State v. Ayers*, 8 S. Dak. 517.

Tennessee. — *Condon v. Maloney*, 108 Tenn. 82; *Carroll v. Alsup*, 107 Tenn. 257; *State v. Hoskins*, 106 Tenn. 430; *State v. McMinnville*, 106 Tenn. 384; *State v. Schlitz Brewing Co.*, 104 Tenn. 715, 78 Am. St. Rep. 941; *State v. Brown*, 103 Tenn. 449; *Illinois Cent. R. Co. v. Crider*, 91 Tenn. 489; *State v. Yardley*, 95 Tenn. 546; *Cole Mfg. Co. v. Falls*, 90 Tenn. 466; *Luehrman v. Taxing Dist.*, 2 Lea (Tenn.) 425; *Cannon v. Mathes*, 8 Heisk. (Tenn.) 504.

Texas. — *Missouri, etc., R. Co. v. Hannig*, (Tex. Civ. App. 1897) 41 S. W. Rep. 196; *Peavy v. Goss*, 90 Tex. 89; *McMeans v. Finley*, 88 Tex. 515; *Mills County v. Brown County*, 87 Tex. 475; *Campbell v. Cook*, 86 Tex. 630, 40 Am. St. Rep. 878; *Looney v. Bagley*, (Tex. 1887) 7 S. W. Rep. 360; *Day Land, etc., Co. v. State*, 68 Tex. 526; *Stone v. Brown*, 54 Tex. 330; *State v. Dietz*, 30 Tex. 511; *Tadlock v. Eccles*, 20 Tex. 782, 73 Am. Dec. 213; *Houston, etc., R. Co. v. State*, (Tex. Civ. App. 1901) 62 S. W. Rep. 114; *German Ins. Co. v. Luckett*, 12 Tex. Civ. App. 139; *Augustine v. State*, 41 Tex. Crim. 59; *Fahey v. State*, 27 Tex. App. 146, 11 Am. St. Rep. 182; *Ex p. Mabry*, 5 Tex. App. 93.

Virginia. — *Bosang v. Iron Belt Bldg., etc., Assoc.*, 96 Va. 119; *Lacey v. Palmer*, 93 Va. 159, 57 Am. St. Rep. 795; *Com. v. Brown*, 91 Va. 762; *Com. v. Drewry*, 15 Gratt. (Va.) 1.

Washington. — *State v. Hall*, 24 Wash. 255; *Merritt v. Corey*, 22 Wash. 444; *Bogue v. Seattle*, 19 Wash. 396; *McMaster v. Advance Thresher Co.*, 10 Wash. 147; *Baker v. Seattle*, 2 Wash. 576.

Wyoming. — *In re Baulter*, 5 Wyo. 329.

In the Arkansas Constitution the only provision of this nature is one requiring all appropriations, not general, to be made by separate bills which shall each embrace but one subject. The general rule stated in the text is held to apply to this provision; that is, a single bill may embrace appropriations for several purposes so long as they are all germane to the main subject of the bill. *Vincenheller v. Reagan*, 60 Ark. 460; *State v. Sloan*, 66 Ark. 575, 74 Am. St. Rep. 106.

1. Amendment in Two Particulars. — *State v. Brown*, 41 La. Ann. 771.

2. Cities of Two Classes. — *Murphy v. Louisville*, (Ky. 1903) 71 S. W. Rep. 934.

counties and cities,¹ or of state and county funds,² or of taxation on property and privileges,³ or of taxes levied before, as well as levied after, the passage of the act,⁴ or of the abolition of one office and the creation of another,⁵ or of the compensation of several public officers,⁶ or of two judicial districts,⁷ or of both roads and bridges,⁸ or of telegraph and telephone companies,⁹ or of lands and levees.¹⁰ So an act may incorporate a railroad company and authorize municipal aid in its behalf,¹¹ or incorporate a city and authorize it to issue bonds to build a bridge across a river,¹² or give it any other proper and usual powers.¹³ Nor is an act plural because it defines a crime and also imposes a punishment for its commission,¹⁴ or prescribes the punishment for several different crimes,¹⁵ or changes an existing crime and creates a new one,¹⁶ or creates an offense and specifies the different things which shall constitute it,¹⁷ or defines and imposes a punishment for two related offenses such as arson and attempted arson.¹⁸

(3) *When Act Objectionable for Plurality* — (a) *In General*. — Although the courts are thus careful not to hamper legitimate legislation, yet they always bear in mind the mischief aimed at by the constitutional provision; and if, after giving the act the benefit of all doubts, it is clearly apparent that two or more independent and incongruous subjects are embraced therein, the act will be declared unconstitutional and void.¹⁹ And for an act to stand against the

1. **Counties and Cities.** — *Ex p. Pfirman*, 134 Cal. 143.

2. **State and County Funds.** — *Hopkins v. Scott*, 38 Neb. 661.

3. **Taxation on Property and Privileges.** — *Cannon v. Mathes*, 8 Heisk. (Tenn.) 504. See also the title **OCCUPATION, ETC., TAXES**, vol. 21, p. 806.

4. **Taxes Levied Before and After Passage of Act.** — *In re Elizabeth*, 49 N. J. L. 488.

5. **Abolition of One Office and Creation of Another.** — *Lloyd v. Smith*, 176 Pa. St. 213. See also *Leake v. Colgan*, 125 Cal. 413.

6. **Compensation of Several Public Officers.** — *Conner v. New York*, 5 N. Y. 285.

7. **Two Judicial Districts.** — *State v. Hocker*, 36 Fla. 358.

8. **Roads and Bridges.** — *State v. Street*, 117 Ala. 203. And see *Fletcher v. Oliver*, 25 Ark. 289.

9. **Telegraph and Telephone Companies.** — *Central Union Telephone Co. v. Fehring*, 146 Ind. 189.

10. **Lands and Levees.** — *Police Jury v. Colomb*, 20 La. Ann. 196.

11. **May Incorporate Railroad and Authorize Municipal Aid.** — *Baltimore, etc., R. Co. v. Jefferson County*, 29 Fed. Rep. 305.

12. **Authority in City Charter to Build Bridge.** — *South St. Paul v. Lamprecht Bros. Co.*, (C. C. A.) 88 Fed. Rep. 449.

13. **Municipal Incorporation.** — *State v. Ruhe*, 24 Nev. 251; *Harris v. People*, 59 N. Y. 599.

14. **Crime — Definition and Punishment.** — *State v. De Hart*, 109 La. 570.

15. **Punishment Prescribed for Several Crimes.** — *Miles v. State*, 40 Ala. 39; *Matter of Tutt*, 55 Kan. 705.

16. **Changing Existing Crime and Creating New One.** — *State v. Brown*, 103 Tenn. 449.

17. **Creating Offense and Specifying Modes of Accomplishment.** — *State v. Rushing*, 49 La. Ann. 1530; *State v. Logan*, 104 La. 254.

18. **Arson and Attempted Arson.** — *State v. Hall*, 24 Wash. 255.

19. **Acts Void for Plurality** — *Alabama*. — *Builders, etc., Supply Co. v. Lucas*, 119 Ala. 202; *Rice v. Westcott*, 108 Ala. 353; *Ex p. Reynolds*, 87 Ala. 138; *Ballentyne v. Wickersham*, 75 Ala. 533; *Weaver v. Lapsley*, 43 Ala. 224.

California. — *People v. Parks*, 58 Cal. 624.

Georgia. — *King v. Banks*, 61 Ga. 20; *Ex p. Conner*, 51 Ga. 571; *Brieswick v. Brunswick*, 51 Ga. 639, 21 Am. Rep. 240.

Illinois. — *Allardt v. People*, 197 Ill. 501; *Kennedy v. Le Moyne*, 188 Ill. 255.

Kansas. — *State v. Sholl*, 58 Kan. 507.

Kentucky. — *Hind v. Rice*, 10 Bush (Ky.) 528.

Louisiana. — *State v. Atkins*, 104 La. 37; *State v. Ferguson*, 104 La. 249; *Klein v. State Treasurer*, 42 La. Ann. 174; *Moore v. Police Jury*, 32 La. Ann. 1013; *State v. Harrison*, 11 La. Ann. 722; *Maranthe v. Hunter*, 11 La. Ann. 734.

Michigan. — *Grand Rapids v. Burlingame*, 93 Mich. 469; *Skinner v. Wilhelm*, 63 Mich. 568; *People v. Denahy*, 20 Mich. 349.

Minnesota. — *Winona, etc., R. Co. v. Waldron*, 11 Minn. 515, 88 Am. Dec. 100.

Missouri. — *In re Goode*, 3 Mo. App. 226.

Nebraska. — *State v. Cornell*, 60 Neb. 276.

Nevada. — *State v. Washoe County*, 22 Nev. 399.

New Jersey. — *Daubman v. Smith*, 47 N. J. L. 200.

New York. — *Astor v. Arcade R. Co.*, 113 N. Y. 93; *People v. Chautauqua County*, 43 N. Y. 10; *Smith v. New York*, (N. Y. Super. Ct. Spec. T.) 34 How. Pr. (N. Y.) 508.

Pennsylvania. — *Payne v. School Dist.*, 168 Pa. St. 386; *West Philadelphia Pass. R. Co. v. Union Pass. R. Co.*, 9 Phila. (Pa.) 495, 29 Leg. Int. (Pa.) 196; *Com. v. Dickinson*, 9 Phila. (Pa.) 561, 29 Leg. Int. (Pa.) 404.

Tennessee. — *State v. McCann*, 4 Lea (Tenn.) 1; *Murphy v. State*, 0 Lea (Tenn.) 373.

Texas. — *State v. Shadle*, 41 Tex. 404.

West Virginia. — *Cutlip v. Sheriff*, 3 W. Va. 588.

objection of plurality, the connection between its various parts must be apparent and not dependent on subtle reasoning.¹

That Both Subjects Are Expressed in the Title will not prevent a plural act from being obnoxious to the constitution.²

(b) *How Far Act Void.* — Under the well-settled doctrine³ that where a statute is unconstitutional in part only the court is not authorized to declare it wholly void, unless the provisions are so connected together in subject-matter, meaning, or purpose, that it cannot be presumed the legislature would have passed the one without the other, the courts will sometimes sustain a plural act as to one of the subjects embraced, if the subjects are separable and there is anything to indicate which is the principal subject of the act. Thus, where the title expresses but one of the subjects, that may be taken as a guide and the statute may be allowed to stand as to that subject.⁴ But where there is no way to determine which is the controlling or principal subject, as where the title is also plural, the act will be declared void *in toto*.⁵

g. EXPRESSION OF SUBJECT IN TITLE — (1) *Discretion of Legislature in Choice of Title.* — The requirement that the subject shall be "expressed" in the title relates to substance and not to form. The choice of language is a matter within the discretion of the legislature, and the constitution is satisfied if the title fairly indicates the scope and purposes of the act and is not calculated to mislead, although it be not the most appropriate that could have been selected.⁶

(2) *What a Sufficient Expression of Subject* — (a) *In General* — *Expression of General Subject Sufficient.* — If a title fairly indicates the general subject of the act, is comprehensive enough in its scope reasonably to cover all the provisions thereof, and is not calculated to mislead either the legislature or the public, this is a sufficient compliance with the constitutional requirement.⁷

1. *Connection Must Be Apparent.* — *State v. Washoe County*, 22 Nev. 399.

2. *Both Subjects in Title.* — *Ballentyne v. Wickersham*, 75 Ala. 533.

3. See *supra*, this section, 7. *Partial Invalidity.*

4. *Act Plural* — *Title Single.* — *People v. Parks*, 58 Cal. 624; *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315; *State v. Kohuke*, 109 La. 838; *Baltimore v. Reitz*, 50 Md. 574; *People v. Briggs*, 50 N. Y. 553; *People v. Chautauqua County*, 43 N. Y. 10; *Parfitt v. Ferguson*, 3 N. Y. App. Div. 176; *Bohmer v. Haffen*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 565; *State v. Becker*, 3 S. Dak. 29. And see *Webb v. New York*, (Supm. Ct. Spec. T.) 64 How. Pr. (N. Y.) 10.

In *Tennessee*, however, an act containing more than one subject is held to be void, although but one subject be expressed in the title. *State v. McCann*, 4 Lea (Tenn.) 1; *Murphy v. State*, 9 Lea (Tenn.) 373.

5. *Act Wholly Void.* — *Builders', etc., Supply Co. v. Lucas*, 119 Ala. 202; *Pioneer Irrigation Dist. v. Bradbury*, (Idaho 1902) 68 Pac. Rep. 295; *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315; *State v. Barrett*, 27 Kan. 213; *Hind v. Rice*, 10 Bush (Ky.) 528; *State v. Harrison*, 11 La. Ann. 722; *Maranthe v. Hunter*, 11 La. Ann. 734; *State v. Atkins*, 104 La. 37; *State v. Ferguson*, 104 La. 249; *Baltimore v. Reitz*, 50 Md. 574; *Skinner v. Wilhelm*, 63 Mich. 568; *Cutlip v. Sheriff*, 3 W. Va. 588.

6. *Choice of Title in Discretion of Legislature* — *Alabama.* — *State v. Rogers*, 107 Ala. 444; *Tal-lasse Mfg. Co. v. Glenn*, 50 Ala. 489.

Indiana. — *Coffman v. Keightley*, 24 Ind. 509; *Miami County v. Bearss*, 25 Ind. 110.

Kansas. — *State v. Barrett*, 27 Kan. 214; *Woodruff v. Baldwin*, 23 Kan. 491; *Higgins v. Mitchell County*, 6 Kan. App. 314.

Maryland. — *Mealey v. Hagerstown*, 92 Md. 741.

Minnesota. — *State v. Board of Control*, 85 Minn. 165.

Missouri. — *Hannibal v. Marion County*, 69 Mo. 571.

Nebraska. — *Union Pac. R. Co. v. Sprague*, (Neb. 1903) 95 N. W. Rep. 46; *State v. Bemis*, 45 Neb. 724; *Paxton, etc., Irrigating Canal, etc., Co. v. Farmers', etc., Irrigation, etc., Co.*, 45 Neb. 884, 50 Am. St. Rep. 585; *People v. McCallum*, 1 Neb. 182.

New Jersey. — *State v. Union*, 33 N. J. L. 350.

New York. — *People v. Coler*, 173 N. Y. 103; *Matter of Public Parks*, 86 N. Y. 437; *People v. Banks*, 67 N. Y. 568; *People v. Briggs*, 50 N. Y. 553.

Wisconsin. — *Verges v. Milwaukee County*, (Wis. 1903) 93 N. W. Rep. 44; *Julien v. Model Bldg., etc., Co.*, (Wis. 1902) 92 N. W. Rep. 561; *Diana Shooting Club v. Lamoreux*, 114 Wis. 44.

Change of Title During the Passage of the Act will not vitiate it, if the subject of the bill is sufficiently expressed both before and after the change. *State v. Green*, 36 Fla. 154; *Price v. Moundsville*, 43 W. Va. 523, 64 Am. St. Rep. 878. See also *supra*, III. 13. *c. Bill Presented Must Be That Actually Passed.*

7. *Expression of General Subject Sufficient* — *United States.* — *Roberts v. Brooks*, (C. C. A.) 78 Fed. Rep. 411; *Preston v. Finley*, 72 Fed. Rep. 850; *Gibson County v. Pullman Southern Car Co.*, 42 Fed. Rep. 572; *Pelham v. The B. F. Woolsey*, 16 Fed. Rep. 418.

Subject Not Expressed — Misleading Title. — But the title must at least give a reasonable intimation of the subject dealt with, and the courts do not hesitate to declare void an act whose title is misleading in that it does not express the real subject of the act so as to put the legislature and those persons who are to be affected thereby on inquiry into its contents.¹ To quote a distinguished

Alabama. — *State v. McCary*, 12? Ala. 139; *White v. Burgin*, 113 Ala. 170; *Davenport v. State*, 112 Ala. 49; *Montgomery v. National Bldg., etc., Assoc.*, 108 Ala. 336; *Dean v. State*, 100 Ala. 102; *State v. Harrub*, 95 Ala. 176, 36 Am. St. Rep. 195.

California. — *People v. Cobb*, 133 Cal. 74; *People v. Mullender*, 132 Cal. 217; *Jones v. Fallvella*, 126 Cal. 24.

Colorado. — *Merwin v. Boulder County*, 29 Colo. 169; *Cardillo v. People*, 26 Colo. 355; *Mollie Gibson Consol. Min., etc., Co. v. Sharp*, 23 Colo. 259.

Florida. — *State v. Green*, 36 Fla. 154.

Georgia. — *Mattox v. State*, 115 Ga. 212; *Americus v. Perry*, 114 Ga. 871; *Welborne v. State*, 114 Ga. 793; *McCommons v. English*, 100 Ga. 653.

Idaho. — *Andrews v. Ada County*, (Idaho 1900) 63 Pac. Rep. 592.

Illinois. — *Meul v. People*, 198 Ill. 258; *Danville v. Danville Water Co.*, 180 Ill. 235.

Indiana. — *State v. Menaugh*, 151 Ind. 260.

Kansas. — See *Ireton v. Laubner*, 9 Kan. App. 561.

Kentucky. — *White v. Com.*, (Ky. 1899) 50 S. W. Rep. 678.

Louisiana. — *State v. Bolden*, 107 La. 116; *State v. Wynne*, 106 La. 400; *Bienvenu's Succession*, 106 La. 595; *Buras Levee Dist. v. Mialegrich*, 52 La. Ann. 1292; *Allopathic State Board of Medical Examiners v. Fowler*, 50 La. Ann. 1358; *Alexandria v. White*, 46 La. Ann. 449; *State v. People's Slaughterhouse, etc., Co.*, 46 La. Ann. 1031.

Maryland. — *Phinney v. Sheppard, etc., Hospital*, 88 Md. 633; *Parkinson v. State*, 14 Md. 184, 74 Am. Dec. 522.

Michigan. — *Crane v. Waldron*, (Mich. 1903) 94 N. W. Rep. 593; *People v. Rotter*, (Mich. 1902) 91 N. W. Rep. 167; *Shearer v. Bay County*, 128 Mich. 552; *Sunderlin v. Ionia County*, 119 Mich. 535; *People v. Worden Grocer Co.*, 118 Mich. 604; *Jackson v. Weinhold*, 117 Mich. 305; *People v. Kelly*, 99 Mich. 82; *Detroit City R. Co. v. Mills*, 85 Mich. 634; *Continental Imp. Co. v. Phelps*, 47 Mich. 299.

Minnesota. — *State v. Board of Control*, 85 Minn. 165; *State v. Justus*, 85 Minn. 279; *Ek v. St. Paul Permanent Loan Co.*, 84 Minn. 245; *Lien v. Norman County*, 80 Minn. 58; *Benz v. St. Paul*, 77 Minn. 375; *Flynn v. Little Falls Electric, etc., Co.*, 74 Minn. 180; *Deering v. Peterson*, 75 Minn. 118; *Bausher v. St. Paul*, 72 Minn. 539; *Anderson v. Seymour*, 70 Minn. 358.

Missouri. — *State v. Mason*, 155 Mo. 486; *State v. Firemen's Fund Ins. Co.*, 152 Mo. 1; *State v. Murlin*, 137 Mo. 297.

Nebraska. — *State v. Heldenbrand*, 62 Neb. 136; *Little v. State*, 60 Neb. 749; *Ream v. State*, 52 Neb. 727; *State v. Moore*, 48 Neb. 870; *Van Horn v. State*, 46 Neb. 62.

New Jersey. — *Morris, etc., Dredging Co. v. Jersey City*, 64 N. J. L. 587; *Drew v. West*

Orange Tp., 64 N. J. L. 481; *Hickman v. State*, 62 N. J. L. 499, 63 N. J. L. 666; *Johnson v. Asbury Park*, 60 N. J. L. 427; *State v. Crusius*, 57 N. J. L. 279.

New York. — *Wrought Iron Bridge Co. v. Attica*, 119 N. Y. 204; *Matter of Public Parks*, 86 N. Y. 437; *Matter of New York*, 57 N. Y. App. Div. 166, *affirmed* 167 N. Y. 624; *People v. Sutphin*, 53 N. Y. App. Div. 613; *Potter v. Collis*, 19 N. Y. App. Div. 392; *Dunton v. Hume*, 15 N. Y. App. Div. 122; *Central Cross-town R. Co. v. Twenty-third St. R. Co.*, (N. Y. Super. Ct. Spec. T.) 54 How. Pr. (N. Y.) 168.

North Dakota. — *Power v. Kitching*, 10 N. Dak. 254.

Pennsylvania. — *Rose v. Beaver County*, 204 Pa. St. 372; *Hood v. Norton*, 202 Pa. St. 114; *In re Campbell*, 197 Pa. St. 581; *Pinkerton v. Pennsylvania Traction Co.*, 193 Pa. St. 229; *Page v. Williamsport Suspender Co.*, 191 Pa. St. 511; *Rodebaugh v. Philadelphia Traction Co.*, 190 Pa. St. 358; *Seabolt v. Northumberland County*, 187 Pa. St. 318; *Com. v. Lloyd*, 178 Pa. St. 308; *Com. v. Keystone Ben. Assoc.*, 171 Pa. St. 465; *Bruce v. Pittsburgh*, 166 Pa. St. 152; *Allegheny County Home's Case*, 77 Pa. St. 77; *State Line, etc., R. Co.'s Appeal*, 77 Pa. St. 429; *New Brighton v. Biddell*, 14 Pa. Super. Ct. 207; *Overseers of Poor v. Armstrong County*, 11 Pa. Super. Ct. 175; *McGarry v. McGarry*, 9 Pa. Super. Ct. 71; *Com. v. Muir*, 1 Pa. Super. Ct. 578; *Com. v. Dillon*, 17 Pa. Co. Ct. 227; *Mink v. Mink*, 16 Pa. Co. Ct. 189; *Com. v. Wilkes-Barre, etc., R. Co.*, 14 Pa. Co. Ct. 205; *Com. v. Barnett*, 9 Pa. Dist. 517; *March v. Smith*, 11 York Leg. Rec. (Pa.) 42.

South Dakota. — *Walling v. Lummis*, (S. Dak. 1902) 92 N. W. Rep. 1063; *Miles v. Benton Tp.*, 11 S. Dak. 450.

Tennessee. — *Carroll v. Alsop*, 107 Tenn. 257.

Texas. — *Linden v. Finley*, 92 Tex. 451; *Mills County v. Brown County*, 87 Tex. 475; *Childress County Land, etc., Co. v. Baker*, 23 Tex. Civ. App. 451; *German Ins. Co. v. Luckett*, 12 Tex. Civ. App. 139; *Gulf, etc., R. Co. v. Calvert*, 11 Tex. Civ. App. 297; *Ex p. Brown*, 38 Tex. Crim. 295, 70 Am. St. Rep. 743.

Virginia. — *Com. v. Brown*, 91 Va. 762.

Washington. — *Lewis County v. Gordon*, 20 Wash. 80; *Skagit County v. McLean*, 20 Wash. 92; *Bettman v. Cowley*, 19 Wash. 207; *Swimburne v. Mills*, 17 Wash. 611, 61 Am. St. Rep. 932; *Lancey v. King County*, 15 Wash. 9.

Wisconsin. — *Diana Shooting Club v. Lamoireux*, 114 Wis. 44.

The Motive That Actuated the Legislature in passing the act cannot affect the validity of the title if it fairly expresses the subject actually legislated upon. *Com. v. Keystone Ben. Assoc.*, 171 Pa. St. 465. See *supra*, this section, 5. *Motives of Legislation.*

1. **Subject Not Adequately Expressed** — *Iowa.*

— *Rex Lumber Co. v. Reed*, 107 Iowa 111.

Kansas. — *Atchison, etc., R. Co. v. Kearny County*, 58 Kan. 19.

New York judge: "Where the title is such that it gives no hint of the real subject of the enactment; where it furnishes no particle of truthful information; and he who reads it is not bound to know or suspect that the actual enactment does or may exist; and where, as a consequence, the title is misleading and deceptive, it is safe and right to apply the constitutional prohibition."¹

(b) **No Necessity to Index Contents of Act.** — The constitution does not contemplate that the title shall employ anything more than general terms leading to an inquiry into the body of the act; it need not go into details or furnish an abstract, synopsis, or index of the contents of the act.²

(c) **Generality of Title** — *aa.* WHEN NOT OBJECTIONABLE. — Generality or comprehensiveness in the title is no objection, provided the title is not misleading or deceptive and fairly directs the mind to the subject of the law in a way calcu-

Michigan. — *Davies v. Saginaw County*, 89 Mich. 295.

Minnesota. — *State v. Sullivan*, 73 Minn. 378.

Missouri. — *In re Goode*, 3 Mo. App. 226.

Nebraska. — *State v. Tibbets*, 52 Neb. 228, 66 Am. St. Rep. 492.

Nevada. — *State v. Stone*, 24 Nev. 308.

New Jersey. — *Cooper v. Springer*, 65 N. J. L. 161.

New York. — *Matter of Paul*, 94 N. Y. 497; *Matter of Greene*, 55 N. Y. App. Div. 475.

North Dakota. — *Erickson v. Cass County*, 11 N. Dak. 494; *Turnquist v. Cass County Drain Com'rs*, 11 N. Dak. 514; *Richard v. Stark County*, 8 N. Dak. 392; *State v. Nomland*, 3 N. Dak. 427, 44 Am. St. Rep. 572.

Oregon. — *Charles E. Spaulding Logging Co. v. Independence, etc., Lumber, etc., Co.*, 42 Oregon 394.

Pennsylvania. — *Dailey v. Potter County*, 203 Pa. St. 593; *Stegmaier v. Jones*, 203 Pa. St. 47; *Gackenbach v. Lehigh County*, 166 Pa. St. 448; *Colley Tp. v. Sullivan County*, 22 Pa. Super. Ct. 482; *Frankford, etc., Plank Road, etc.*, 8 Pa. Dist. 166; *Easton v. Potter County*, 7 Pa. Dist. 189; *Com. v. Nihil*, 4 Pa. Dist. 582; *Mayer v. Mayer*, 16 Lanc. L. Rev. 49.

South Carolina. — *State v. Crosby*, 51 S. Car. 247.

Local Act — Necessity to State Locality. — In *Durkee v. Janesville*, 26 Wis. 697, a title relating to street improvements was held defective because not indicating the localities to be improved. See also *Anderton v. Milwaukee*, 82 Wis. 279. But this doctrine was *disapproved* in *Neuendorff v. Duryea*, 69 N. Y. 557, 25 Am. Rep. 235.

Defective Title Not Cured by Amendment. — Where an act is unconstitutional because of a defective title, it cannot be rendered constitutional by a subsequent act merely amending the title. The act never became a valid law, and must be re-enacted to become effective. *Teepie v. Wayne County*, 23 Pa. Co. Ct. 361; *Shear v. Potter County*, 9 Pa. Dist. 289.

1. *Per Finch, J.*, in *Matter of Paul*, 94 N. Y. 497.

2. **Title Need Not Index Provisions** — *United States.* — *Carter County v. Sinton*, 120 U. S. 517; *Skinner v. Garnett Gold-Min. Co.*, 96 Fed. Rep. 735.

Alabama. — *Montgomery Mut. Bldg., etc., Assoc. v. Robinson*, 69 Ala. 413; *Adler v. State*, 55 Ala. 16; *Watson v. State*, 55 Ala. 158; *Lock-*

hart v. Troy, 48 Ala. 579; *Falconer v. Robinson*, 46 Ala. 340.

California. — *People v. Linda Vista Irrigation Dist.*, 128 Cal. 477; *Hellman v. Shoulters*, 114 Cal. 136.

Georgia. — *Green v. Savannah, R. M. Charlt.* (Ga.) 368; *Martin v. Broach*, 6 Ga. 21, 50 Am. Dec. 306; *Welborne v. State*, 114 Ga. 816.

Illinois. — *Arms v. Ayer*, 192 Ill. 601.

Indiana. — *Swartz v. Lake County*, 158 Ind. 141; *Pittsburgh, etc., R. Co. v. Montgomery*, 152 Ind. 1, 71 Am. St. Rep. 301.

Iowa. — *State v. Forkner*, 94 Iowa 1.

Kansas. — *Matter of Sanders*, 53 Kan. 191; *State v. Barrett*, 27 Kan. 214.

Louisiana. — *Dehon v. Lafourche Basin Levee Board*, (La. 1903) 34 So. Rep. 770; *Compagnie Francaise, etc. v. State Board of Health*, 51 La. Ann. 645, 72 Am. St. Rep. 458; *State v. Rushing*, 49 La. Ann. 1530; *Stewart's Succession*, 41 La. Ann. 128; *State v. Daniel*, 28 La. Ann. 38.

Maryland. — *Baltimore v. Reitz*, 50 Md. 574; *Parkinson v. State*, 14 Md. 184, 74 Am. Dec. 522.

Michigan. — *Crane v. Waldron*, (Mich. 1903) 94 N. W. Rep. 593.

Minnesota. — *State v. Kinsella*, 14 Minn. 524.

Missouri. — *State v. Bengsch*, 170 Mo. 81; *State v. Marion County Ct.*, 128 Mo. 427, 447.

Nebraska. — *State v. Aitken*, 62 Neb. 428; *Nebraska Loan, etc., Assoc. v. Perkins*, 61 Neb. 254; *Kleckner v. Turk*, 45 Neb. 176; *Singer Mfg. Co. v. Fleming*, 39 Neb. 679, 42 Am. St. Rep. 613; *People v. McCallum*, 1 Neb. 182.

New Jersey. — *State v. Union*, 33 N. J. L. 350.

New York. — *People v. Tax, etc., Com'rs*, 47 N. Y. 501; *People v. Lawrence*, 41 N. Y. 137, 36 Barb. (N. Y.) 177; *Van Brunt v. Flatbush*, 59 Hun (N. Y.) 192; *Wrought-Iron Bridge Co. v. Attica*, 49 Hun (N. Y.) 513.

Pennsylvania. — *Rose v. Beaver County*, 204 Pa. St. 372; *New Brighton v. Biddell*, 201 Pa. St. 96; *Carothers v. Philadelphia Co.*, 118 Pa. St. 468; *Allegheny County Home's Case*, 77 Pa. St. 77; *State Line, etc., R. Co.'s Appeal*, 77 Pa. St. 429; *Com. v. Green*, 58 Pa. St. 226; *Com. v. Hazen*, 20 Pa. Super. Ct. 487.

Tennessee. — *State v. Wilson*, 12 Lea (Tenn.) 246.

Washington. — *State v. Sharpless*, (Wash. 1903) 71 Pac. Rep. 737; *State v. Whittlesey*, 17 Wash. 447.

West Virginia. — *McEldowney v. Wyatt*, 44 W. Va. 711.

lated to attract the attention truly to the matter which is proposed to be legislated upon.¹

Title Broader than Act. — The constitutional requirement as to the title is that it shall adequately express the subject of the act, not that it shall not express more; and where the title fairly suggests all the provisions of the act, it is not invalid merely because the body of the act is narrower than it might have been under such a title.² Thus, where the title expresses two subjects and the act itself embraces but one, that one not contained in the act may be discarded as surplusage,³ and mere duplicity or surplusage in the title may be disregarded.⁴

bb. WHEN OBJECTIONABLE. — But while generality is not objectionable so long as the subject of the legislation is fairly suggested, yet where the title is so very vague and general as not to furnish any intimation at all of the actual contents of the act, and is therefore calculated to mislead the legislature and the public, it will be declared unconstitutional.⁵ And in *New Jersey* the courts have carried this doctrine a step further, holding acts to be violative of the constitution whose titles profess to extend to all of a certain class of things while the enacting provisions in fact are confined to certain members of such class,⁶ as, for instance, where the title indicated that the act was to

1. Generality of Title No Objection — *United States*. — *Daws v. Elmwood*, 34 Fed. Rep. 114.
Alabama. — *Mobile Transp. Co. v. Mobile*, 128 Ala. 335; *State v. Crook*, 126 Ala. 600; *Judson v. Bessemer*, 87 Ala. 240; *Montgomery Mut. Bldg., etc., Assoc. v. Robinson*, 69 Ala. 413.

California. — *Jackson v. Baehr*, 138 Cal. 266.
Colorado. — *Cardillo v. People*, 26 Colo. 355.
Idaho. — *Pioneer Irrigation Dist. v. Bradbury*, (Idaho 1902) 68 Pac. Rep. 295.

Indiana. — *State v. Bailey*, 157 Ind. 324.
Kansas. — *Division of Howard County*, 15 Kan. 194; *State v. Haun*, 7 Kan. App. 509.

Michigan. — *People v. Worden Grocer Co.*, 118 Mich. 604; *People v. Phippin*, 70 Mich. 6.

Missouri. — *State v. Marion County Ct.*, 128 Mo. 427, 128 Mo. 447.

Nebraska. — *State v. Power*, 63 Neb. 496; *State v. Heldenbrand*, 62 Neb. 136; *State v. Stuht*, 52 Neb. 209; *Paxton, etc., Irrigating Canal, etc., Co. v. Farmers', etc., Irrigation, etc., Co.*, 45 Neb. 884, 50 Am. St. Rep. 585.

New Jersey. — *Anderson v. Camden*, 58 N. J. L. 515; *State v. Union*, 33 N. J. L. 350.

New York. — *Wilcox v. Baker*, 22 N. Y. App. Div. 299.

Oregon. — *State v. Frazier*, 36 Oregon 178.
Tennessee. — *State v. Wilson*, 12 Lea (Tenn.) 246.

Texas. — *Floek v. State*, 34 Tex. Crim. 314.
Washington. — *State v. Whittlesey*, 17 Wash. 447.

2. Title Broader than Act Not Invalid — *Alabama*. — *State v. Crook*, 126 Ala. 600; *Judson v. Bessemer*, 87 Ala. 240.

Colorado. — *Cardillo v. People*, 26 Colo. 355.
Iowa. — *Davis v. Woolnough*, 9 Iowa 104.
Kansas. — *Ash v. Thorp*, 65 Kan. 60.

Michigan. — *Boyer v. Grand Rapids F. Ins. Co.*, 124 Mich. 455.

Nebraska. — *State v. Heldenbrand*, 62 Neb. 136.

New Jersey. — *Johnson v. Asbury Park*, 60 N. J. L. 427; *Kennedy v. Belmar*, 61 N. J. L. 20.

Oregon. — *State v. Frazier*, 36 Oregon 178.
Tennessee. — *State v. Schlitz Brewing Co.*,

104 Tenn. 715, 78 Am. St. Rep. 941; *Powers v. McKenzie*, 90 Tenn. 167.

Provision Narrowing Scope of Act. — Where the title expresses a general subject, a provision merely narrowing the scope of the act by excepting certain things does not introduce matter foreign to the title. *State v. Schlitz Brewing Co.*, 104 Tenn. 715, 78 Am. St. Rep. 941.

3. Plurality in Title but Not in Act. — *Beatrice v. Masslich*, (C. C. A.) 108 Fed. Rep. 743; *Hawkins v. Roberts*, 122 Ala. 130; *State v. Crook*, 126 Ala. 600; *State v. Hyde*, 129 Ind. 296; *Ash v. Thorp*, 65 Kan. 60; *Van Horn v. State*, 46 Neb. 62; *State v. Trolson*, 21 Nev. 419; *Eaton v. Guarantee Co.*, 11 N. Dak. 79; *State v. Becker*, 3 S. Dak. 29. See also *Dronberger v. Reed*, 11 Ind. 420.

4. Surplusage Disregarded. — *Beatrice v. Masslich*, (C. C. A.) 108 Fed. Rep. 743; *Thomas v. State*, 124 Ala. 48; *Strauss v. Heiss*, 48 Md. 292; *Matter of Haynes*, 54 N. J. L. 6; *Eaton v. Guarantee Co.*, 11 N. Dak. 79.

5. Title Bad for Generality. — *Lewis v. Dunne*, 134 Cal. 291; *Clark v. Wallace County*, 54 Kan. 634; *State v. Walker*, 105 La. 492; *In re Snyder*, 108 Mich. 48; *Union Tp. Committee v. Rader*, 39 N. J. L. 515; *Com. v. Moore*, 16 Pa. Co. Ct. 481; *Com. v. Lehr*, 16 Pa. Co. Ct. 532; *McNeeley v. South Penn. Oil Co.*, 52 W. Va. 616.

In *State v. Bailey*, 157 Ind. 324, it was said that such titles as "An act to promote the general welfare of the state," or "An act to promote good morals" would be bad because too general, such titles not expressing proper subjects of legislation. See also *Indiana Cent. R. Co. v. Potts*, 7 Ind. 681.

6. New Jersey — Act Narrower than Title. — *Burnet v. Dean*, 63 N. J. Eq. 253; *State v. Steelman*, 66 N. J. L. 518; *Grey v. Newark Plank-Road Co.*, 65 N. J. L. 51; *Sneath v. Mager*, 64 N. J. L. 94; *Johnson v. Asbury Park*, 60 N. J. L. 427; *Ryno v. State*, 58 N. J. L. 238; *Coutier v. New Brunswick*, 44 N. J. L. 58.

Defect Cured by Amendment. — An amendment extending the operation of the act to the entire class indicated by the title is held to re-

operate "in the cities of this state," but the body of the act dealt only with cities of the "third class."¹

(a) **Effect of Specification of Details — Redundancy.** — Where a general expression of the subject in the title, sufficient to cover all the provisions of the act, is followed by specifications of the particular branches of the subject with which it proposes to deal, the scope of the act is not limited nor the validity of the title impaired, except as to such portions of the general subject as legislators and others would naturally and reasonably be led by the qualifying words to suppose would not be affected by the act.²

(3) **How Language of Title Construed.** — The courts will not resort to a critical construction of the title in order to hold a statute unconstitutional. On the contrary the language of the title is in all cases given a liberal interpretation, and the largest scope accorded to the words employed that reason will permit in order to bring within the purview of the title all the provisions of the act.³

Words Taken in Popular Sense. — Where a word used in the title has both a popular and a technical meaning, it will generally be taken in its popular sense.⁴

Clerical Errors do not vitiate the title if they do not destroy its meaning.⁵

move the invalidity. *Smith v. Howell*, 60 N. J. L. 384. Compare *Teeple v. Wayne County*, 23 Pa. Co. Ct. 361.

Doctrine Disapproved. — These *New Jersey* cases are hard to reconcile with the rule that a title is not defective merely because it is broader than the act. The doctrine is disapproved by the *Colorado* Supreme Court in *Cardillo v. People*, 26 Colo. 355.

1. *Beverly v. Waln*, 57 N. J. L. 143.

2. **Specification of Details Does Not Vitate Title** — *Alabama*. — *Mitchell v. State*, 134 Ala. 392.

Colorado. — *Hecht v. Wright*, (Colo. 1903) 72 Pac. Rep. 48; *Frost v. Pfeiffer*, 26 Colo. 338; *Dallas v. Redman*, 10 Colo. 297.

Indiana. — *Isenhour v. State*, 157 Ind. 517.

Kentucky. — *Allen v. Hall*, 14 Bush (Ky.) 85.

New Jersey. — *Matter of Haynes*, 54 N. J. L. 6.

New York. — *Greaton v. Griffin*, (Supm. Ct. Spec. T.) 4 Abb. Pr. N. S. (N. Y.) 310.

Pennsylvania. — *Sugar Notch*, 192 Pa. St. 349; *Read v. Clearfield County*, 12 Pa. Super. Ct. 419.

3. **Title Liberally Construed** — *Alabama*. — *State v. Sayre*, 118 Ala. 1; *State v. Stripling*, 113 Ala. 120.

California. — *Ex p. Pfirrmann*, 134 Cal. 143.

Florida. — *Florida, etc., R. Co. v. Hazel*, (Fla. 1901) 31 So. Rep. 272.

Illinois. — *Meul v. People*, 198 Ill. 258.

Indiana. — *State v. Roby*, 142 Ind. 168, 51 Am. St. Rep. 174; *State v. Arnold*, 140 Ind. 628; *Walker v. Dunham*, 17 Ind. 483.

Iowa. — *Beresheim v. Arnd*, 117 Iowa 84.

Kansas. — *State v. Dunn*, (Kan. 1903) 71 Pac. Rep. 811; *Otto Gas-Engine Works v. Hare*, 64 Kan. 78; *Board of Education v. State*, 64 Kan. 6.

Maryland. — *Baltimore v. Keeley Inst.*, 81 Md. 106; *Drennen v. Banks*, 80 Md. 310.

Michigan. — *Burrows v. Delta Transp. Co.*, 106 Mich. 582.

Minnesota. — *State v. Board of Control*, 85 Minn. 165.

Missouri. — *Lynch v. Murphy*, 119 Mo. 163.

Montana. — *Western Ranches v. Custer County*, (Mont. 1903) 72 Pac. Rep. 659.

Nebraska. — *Affholder v. State*, 51 Neb. 91.

New York. — *People v. Fitch*, 147 N. Y. 355; *Matter of Public Parks*, 86 N. Y. 437.

Pennsylvania. — *Com. v. Lorman*, 21 Pa. Co. Ct. 481; *Pennsylvania R. Co. v. Montgomery County Pass. R. Co.*, 14 Pa. Co. Ct. 88.

Texas. — *Houston Printing Co. v. Dement*, 18 Tex. Civ. App. 30.

West Virginia. — *State v. Mines*, 38 W. Va. 125.

Wisconsin. — *Julien v. Model Bldg., etc., Co.*, (Wis. 1902) 92 N. W. Rep. 561.

The Title and the Body of the Act must be construed together in determining whether or not the title is sufficient. *State v. Crook*, 126 Ala. 600.

4. **"Municipal Corporations" Includes Townships.** — *West Plains Tp. v. Sage*, (C. C. A.) 69 Fed. Rep. 943; *Rathbone v. Hopper*, 57 Kan. 240. Compare *Howard v. Schneider*, 10 Kan. App. 137, in which the words "joint tenancy" were held not to include estates in entirety.

"Saloons" Means Groghshops. — *Cardillo v. People*, 26 Colo. 355.

"Personal Injuries" Embraces Libel and Slander. — *Houston Printing Co. v. Dement*, 18 Tex. Civ. App. 30.

"Surgery and Obstetrics" are, in the popular sense, within the meaning of "practice of medicine." *Little v. State*, 60 Neb. 749.

"Purchase." — Where the word "purchase" was used in a title it was taken in its popular sense of acquisition for value by voluntary agreement, and not in its technical and larger sense of acquisition by any other mode than descent. *Enterprise v. Smith*, 62 Kan. 815.

See generally *infra*, VI. 5. a. **Popular Meaning Presumed.**

5. **Clerical Errors.** — *People v. Onondaga Tp.*, 16 Mich. 257; *State v. Elvins*, 32 N. J. L. 362; *McElwee v. McElwee*, 97 Tenn. 649; *State v. McCracken*, 42 Tex. 383.

Misplaced Quotation Marks. — *Com. v. Taylor*, 159 Pa. St. 451.

Meaningless Words may be discarded by construction, and if, after such elimination, the title clearly expresses the subject of the act, it is sufficient.¹

The Court Cannot Reconstruct a Title, however, but must take it as it appears and consider it accordingly.²

"And for Other Purposes." — The words "and for other purposes" frequently suffixed to the title of a statute imply purposes not named in the title, and therefore are generally rejected as being without force or effect, and insufficient to indicate matters not otherwise indicated by the title.³ But the phrase may be given meaning when employed, not to indicate other subjects than that expressed in the title, but in connection with a subsidiary clause in the title defining the ends sought to be reached.⁴

"And So Forth" — "Et Cetera." — So, also, the words "and so forth" or "et cetera" will not be given meanings to extend the scope of the title, and nothing which the act might not embrace without them can be brought in with their aid.⁵ But the *ejusdem generis* rule may be applied where the words are merely used in summarizing the details affected by the act, since in such case they do not seek to cover a subject different from that stated in the title.⁶

(4) **What Provisions Covered by Title** — (a) **Matters Germane to Subject Expressed** — *aa. IN GENERAL.* — As has been shown above, the title need not do more than express the general subject of the act and is not required to index its contents. From this follows the rule, settled beyond controversy, that a title which reasonably expresses the general subject is sufficient to cover all incidental and subsidiary provisions legitimately connected with such general subject and germane or cognate thereto — in short, all matters which may naturally and reasonably be expected to be found under such a title.⁷ It can readily

The Inadvertent Use of the Word "village" in the title, instead of the word "town," will not invalidate provisions as to the "town" in the body of the act. *State v. Lake City*, 25 Minn. 404.

1. **Meaningless Words Discarded.** — *Allen v. Hopkins*, 62 Kan. 175; *Brook v. Blue Mound*, 61 Kan. 185.

2. **Cannot Reconstruct Title.** — *Schmalz v. Wooley*, 56 N. J. Eq. 649, wherein it was held that part of the title could not be rejected for the purpose of saving the act.

3. **"For Other Purposes."** — *Spier v. Baker*, 120 Cal. 370; *Pitkin County v. Aspen Min.*, etc., Co., 3 Colo. App. 223; *Shepherd v. Helmers*, 23 Kan. 504; *State v. Garrett*, 29 La. Ann. 637; *Ryerson v. Utley*, 16 Mich. 269; *State v. Murray*, 41 Minn. 123; *St. Louis v. Tiefel*, 42 Mo. 578; *Johnston v. Spicer*, 107 N. Y. 185; *Fishkill v. Fishkill*, etc., *Plank Road Co.*, 22 Barb. (N. Y.) 634.

In Georgia the courts attempt to give some meaning to the phrase by construing it as covering incidental provisions which are germane to, and bear a generic relation to, the general subject expressed in the title. *Burns v. State*, 104 Ga. 544; *Butner v. Boifeuillet*, 100 Ga. 743; *Martin v. Broach*, 6 Ga. 21, 50 Am. Dec. 306. However, such provisions are, by the universal rule of construction, deemed to fall within the scope of the title independently of such phrase. See *infra*, this section, *What Provisions Covered by Title*.

4. *Childress County Land*, etc., Co. *v. Baker*, 23 Tex. Civ. App. 451. In this case the title was "An act attaching certain counties therein named to the counties of J. and M. for judicial and other purposes." The court construed the words "and other purposes" as meaning "other governmental purposes."

5. **"And So Forth" — "Et Cetera."** — *State v. Hackett*, 5 La. Ann. 93; *McKeesport v. Dunshree*, 29 Pittsb. Leg. J. N. S. (Pa.) 88; *Lacey v. Palmer*, 93 Va. 159, 57 Am. St. Rep. 795.

If the Title Is Sufficient Without such words, they may be rejected as surplusage and the act held valid. *State v. Arnold*, 140 Ind. 628.

6. *Com. v. Clark*, 3 Pa. Super. Ct. 141, wherein the title was "An act to protect fruit, gardens, growing crops, grass, et cetera, and punish trespass."

Garvin v. State, 13 Lea (Tenn.) 162, wherein the title was "An act to punish as felons all parties who may engage in the keeping or conducting of halls or houses for conduct of games of keno, faro, three-card monte, and mustang, etc."

7. **Title Covers Germane Matters** — *United States*. — *Detroit v. Detroit Citizens' St. R. Co.*, 184 U. S. 368; *Otoe County v. Baldwin*, 111 U. S. 1; *Jonesboro v. Cairo*, etc., R. Co., 110 U. S. 192; *Montclair v. Ramsdell*, 107 U. S. 147; *San Antonio v. Mehaffy*, 96 U. S. 312; *Woodson v. Murdock*, 22 Wall. (U. S.) 351; *Pickens Tp. v. Post*, (C. C. A.) 99 Fed. Rep. 659; *Tabor v. Commercial Nat. Bank*, (C. C. A.) 62 Fed. Rep. 383; *Richards v. Bellingham Bay Land Co.*, (C. C. A.) 54 Fed. Rep. 209; *Illinois v. Illinois Cent. R. Co.*, 33 Fed. Rep. 730; *Ex p. Yung Jan*, 28 Fed. Rep. 308; *Farmers' L. & T. Co. v. Oregon*, etc., R. Co., 24 Fed. Rep. 407; *National Bank v. Chester County*, 14 Fed. Rep. 239; *Henderson v. Jackson County*, 2 McCrary (U. S.) 619; *Mayer v. Cahalin*, 5 Sawy. (U. S.) 355.

Alabama. — *Jackson v. State*, (Ala. 1903) 33 So. Rep. 888; *Ellis v. Miller*, (Ala. 1903) 33 So. Rep. 890; *State v. Griffin*, 132 Ala. 47; *Montgomery v. Birdsong*, 126 Ala. 632; *Sheppard v. Dowling*, 127 Ala. 1; *Alabama G. S. R. Co. v.*

be understood that any attempt to show what provisions have been held to be germane to the very numerous and varied titles which have been judicially construed would lead too far afield for the scope of this article. Each

Reed, 124 Ala. 253; *Williams v. Board of Revenue*, 123 Ala. 432; *Lewis v. State*, 123 Ala. 84; *Ex p. Birmingham*, 116 Ala. 186; *Mobile, etc., R. Co. v. Pike County*, 97 Ala. 105; *Barnhill v. Teague*, 96 Ala. 207; *Judson v. Bessemer*, 87 Ala. 240; *Tatum v. State*, 82 Ala. 5; *Ex p. Moore*, 62 Ala. 471; *Lockhart v. Troy*, 48 Ala. 579.

Arkansas.—*Worthen v. Badgett*, 32 Ark. 496; *Perkins v. Du Val*, 31 Ark. 238.

California.—*Carpenter v. Furrey*, 128 Cal. 665; *Los Angeles County v. Spencer*, 126 Cal. 670, 77 Am. St. Rep. 217; *Clarke v. Police, etc., Ins. Board*, 123 Cal. 24; *Thompson v. Alameda County*, 111 Cal. 553; *Gieseke v. San Joaquin County*, 109 Cal. 489; *Kings County v. Johnson*, 104 Cal. 198; *People v. San Francisco*, 100 Cal. 105; *San Francisco v. Kiernan*, 98 Cal. 614; *Heffernan v. San Francisco*, (Cal. 1893) 33 Pac. Rep. 725; *Francais v. Soms*, 92 Cal. 503; *Davies v. Los Angeles*, 86 Cal. 37; *Abuel v. Clark*, 84 Cal. 226; *People v. Henshaw*, 76 Cal. 436; *Longan v. Solano County*, 65 Cal. 122; *De Witt v. San Francisco*, 2 Cal. 289; *Vernon School Dist. v. Board of Education*, 125 Cal. 593.

Colorado.—*People v. Wright*, (Colo. 1902) 71 Pac. Rep. 365; *Liggett v. People*, 26 Colo. 364; *Heilman v. Ludington*, 26 Colo. 326; *Farmers Independent Ditch Co. v. Agricultural Ditch Co.*, 22 Colo. 513, 55 Am. St. Rep. 149; *Burton v. Snyder*, 22 Colo. 173; *Jones v. Aspen Hardware Co.*, 21 Colo. 263, 52 Am. St. Rep. 220; *In re Pratt*, 19 Colo. 138; *Stockman v. Brooks*, 17 Colo. 248; *Edwards v. Denver, etc., R. Co.*, 13 Colo. 59; *Dallas v. Redman*, 10 Colo. 297; *People v. Goddard*, 8 Colo. 432; *Mollie Gibson Consol. Min., etc., Co. v. Sharp*, 5 Colo. App. 321.

Florida.—*Florida, etc., R. Co. v. Hazel*, (Fla. 1901) 31 So. Rep. 272; *State v. Hocker*, 36 Fla. 358; *Duval County v. Jacksonville*, 36 Fla. 196; *Smith v. State*, 29 Fla. 408; *Holton v. State*, 28 Fla. 308; *Jacksonville v. Basnett*, 20 Fla. 525.

Georgia.—*Stapleton v. Perry*, (Ga. 1903) 43 S. E. Rep. 996; *Chamlee v. Davis*, 115 Ga. 266; *Welborne v. State*, 114 Ga. 793; *Collins v. Russell*, 107 Ga. 423; *Burns v. State*, 104 Ga. 544; *Butner v. Boifeuillet*, 100 Ga. 743; *Carson v. Forsyth*, 94 Ga. 617; *Maynard v. Marshall*, 91 Ga. 840; *McCook v. State*, 91 Ga. 740; *McGhee v. State*, 92 Ga. 21; *Stewart v. Collier*, 91 Ga. 117; *Macon, etc., R. Co. v. Gibson*, 85 Ga. 1, 21 Am. St. Rep. 135; *Brown v. State*, 73 Ga. 38; *Smith v. Bohler*, 72 Ga. 546; *Howell v. State*, 71 Ga. 224, 51 Am. Rep. 259; *Seay v. Rome Bank*, 66 Ga. 609; *Goldsmith v. Rome R. Co.*, 62 Ga. 473; *Davis v. Fulton Bank*, 31 Ga. 69; *Denham v. Holeman*, 26 Ga. 193.

Idaho.—*State v. Doherty*, 2 Idaho 1105.

Illinois.—*People v. Gordon*, 194 Ill. 560; *In re St. Louis Loan, etc., Co.*, 194 Ill. 609; *Boehm v. Hertz*, 182 Ill. 154; *Bobel v. People*, 173 Ill. 19, 64 Am. St. Rep. 64; *Hudnall v. Ham*, 172 Ill. 76; *West Chicago Park Com'rs v. Sweet*, 167 Ill. 326; *Flvnn v. Coakley*, 164 Ill. 470; *McChesney v. Chicago*, 150 Ill. 223; *Hutchinson v. Self*, 153 Ill. 542; *Gaines v. Wil-*

liams, 146 Ill. 450; *McGurn v. Board of Education*, 133 Ill. 122; *People v. Nelson*, 133 Ill. 565; *People v. Blue Mountain Joe*, 129 Ill. 370; *Sykes v. People*, 127 Ill. 117; *People v. Hazelwood*, 116 Ill. 319; *Mix v. Illinois Cent. R. Co.*, 116 Ill. 592; *Larned v. Tiernan*, 110 Ill. 173; *Blake v. People*, 109 Ill. 504; *Potwin v. Johnson*, 108 Ill. 77; *Guild v. Chicago*, 82 Ill. 472; *Prescott v. Chicago*, 60 Ill. 121; *Neifing v. Pontiac Tp.*, 56 Ill. 172; *Erlinger v. Boneau*, 51 Ill. 94; *O'Leary v. Cook County*, 28 Ill. 534.

Indiana.—*Garrigus v. Howard County*, 157 Ind. 103; *Clarke v. Darr*, 156 Ind. 692; *Maule Coal Co. v. Partenheimer*, 155 Ind. 100; *Pennsylvania Co. v. Ebaugh*, 152 Ind. 531; *Pittsburgh, etc., R. Co. v. Montgomery*, 152 Ind. 1, 71 Am. St. Rep. 301; *Shea v. Muncie*, 148 Ind. 14; *State v. Gerhardt*, 145 Ind. 439; *Henderson v. State*, 137 Ind. 552; *State v. Kolsen*, 130 Ind. 434; *Benson v. Christian*, 129 Ind. 535; *Nitche v. Earle*, 117 Ind. 270; *Jarrard v. State*, 116 Ind. 98; *Indianapolis v. Huegele*, 115 Ind. 581; *Hunt v. Lake Shore, etc., R. Co.*, 112 Ind. 69; *Barnett v. Harshbarger*, 105 Ind. 410; *Ross v. Davis*, 97 Ind. 79; *Wishmier v. State*, 97 Ind. 160; *Warren v. Bretton*, 84 Ind. 14; *Bitters v. Fulton County*, 81 Ind. 125; *Kane v. State*, 78 Ind. 103; *Jett v. Richmond*, 78 Ind. 316; *O'Kane v. State*, 69 Ind. 183; *Hunter v. Burnsville Turnpike Co.*, 56 Ind. 217; *Williams v. State*, 48 Ind. 306; *Bergman v. Ashdill*, 48 Ind. 489; *McCaslin v. State*, 44 Ind. 151; *Hines v. Aydelotte*, 29 Ind. 518; *Murray v. Kelly*, 27 Ind. 42; *Bright v. McCullough*, 27 Ind. 223; *State v. Montgomery County*, 26 Ind. 522; *Wheeler v. Calvert*, 25 Ind. 365; *Hingle v. State*, 24 Ind. 28; *Grubbs v. State*, 24 Ind. 295; *Crist v. Glidewell*, 25 Ind. 396; *Robinson v. Skipworth*, 23 Ind. 316; *Sturgeon v. Hitchens*, 22 Ind. 109; *Central Plank Road Co. v. Hannaman*, 22 Ind. 485; *Hall v. Bunte*, 20 Ind. 304; *Brandon v. State*, 16 Ind. 197; *Thomasson v. State*, 15 Ind. 449; *State v. Bowers*, 14 Ind. 195; *Clinton Tp. v. Draper*, 14 Ind. 295; *State v. Adamson*, 14 Ind. 296; *Haggard v. Hawkins*, 14 Ind. 299; *Jasper County v. Spitler*, 13 Ind. 235; *Reilly v. Ellsworth*, 11 Ind. 222; *Madison, etc., R. Co. v. Whitenack*, 8 Ind. 217; *Indiana Cent. R. Co. v. Potts*, 7 Ind. 681.

Iowa.—*Beebe v. Tolerton, etc., Co.*, 117 Iowa 593; *Guaranty Sav., etc., Assoc. v. Ascherman*, 108 Iowa 150; *Christie v. Life Indemnity, etc., Co.*, 82 Iowa 360; *State v. Snow*, 81 Iowa 642; *Farmer's Ins. Co. v. Highsmith*, 44 Iowa 330; *State v. Squires*, 26 Iowa 345; *McAnnich v. Mississippi, etc., R. Co.*, 20 Iowa 341; *Whiting v. Mt. Pleasant*, 11 Iowa 482; *Morford v. Unger*, 8 Iowa 83; *State v. Davis County Judge*, 2 Iowa 280.

Kansas.—*Wilson v. Herink*, 64 Kan. 607; *Hardy v. Kingman County*, 65 Kan. 111; *Leavenworth v. Leavenworth City, etc., Water Co.*, 62 Kan. 643; *Aikman v. Edwards*, 55 Kan. 751; *Jockheck v. Shawnee County*, 53 Kan. 780; *State v. Campbell*, 50 Kan. 433; *Barber County v. Smith*, 48 Kan. 331; *Matter of Pinkney*, 47 Kan. 89; *State v. Bush*, 45 Kan. 138; *Missouri Pac. R. Co. v. Harrelson*, 44 Kan. 253;

statute stands practically on its own bottom, and, further than the foregoing general principles, it is impracticable to deduce rules to regulate the application of such principles to the facts of any particular act. To quote a dis-

State v. Stunkle, 41 Kan. 459; *State v. Kiowa County*, 41 Kan. 630; *Missouri Pac. R. Co. v. Merrill*, 40 Kan. 407; *Washburn v. Shawnee County*, 37 Kan. 217; *Weyand v. Stover*, 35 Kan. 545; *Durein v. Pontious*, 34 Kan. 353; *Marion County v. Winkley*, 29 Kan. 36; *Smith v. Emporia*, 27 Kan. 528; *State v. Barrett*, 27 Kan. 214; *Bennett v. Wolverton*, 24 Kan. 284; *Woodruff v. Baldwin*, 23 Kan. 491; *Martin v. Borgman*, 21 Kan. 672; *Bowman v. Cockrill*, 6 Kan. 311; *State v. Owens*, 9 Kan. App. 595; *Mitchell v. Topeka*, (Kan. App. 1898) 54 Pac. Rep. 292; *Lowe v. Bourbon County*, 6 Kan. App. 603.

Kentucky.—*Rumbley v. Hall*, 107 Ky. 349; *Raubold v. Com.*, (Ky. 1899) 54 S. W. Rep. 17; *Nunn v. Citizens' Bank*, 107 Ky. 262; *McTigue v. Com.*, 99 Ky. 66; *Conley v. Com.*, 98 Ky. 125; *Walters v. Richardson*, 93 Ky. 374; *Owensboro, etc., R. Co. v. Logan County*, (Ky. 1889) 11 S. W. Rep. 76; *Ader v. Newport*, (Ky. 1888) 6 S. W. Rep. 577; *Rogers v. Jacob*, 88 Ky. 502; *Kentucky Union R. Co. v. Bourbon County*, 85 Ky. 98; *Graham v. Conger*, 85 Ky. 582; *McArthur v. Nelson*, 81 Ky. 67; *Com. v. Bailey*, 81 Ky. 397; *Howland Coal, etc., Works v. Brown*, 13 Bush (Ky.) 681; *McReynolds v. Smallhouse*, 8 Bush (Ky.) 447; *Chiles v. Drake*, 2 Met. (Ky.) 146, 74 Am. Dec. 406; *Louisville, etc., Turnpike Co. v. Ballard*, 2 Met. (Ky.) 165.

Louisiana.—*Grinage v. Times-Democrat Pub. Co.*, 107 La. 121; *Hope v. New Orleans*, 106 La. 345; *Morgan's Louisiana, etc., Co. v. Barton*, 51 La. Ann. 1338; *State v. Karstendiek*, 49 La. Ann. 1621; *Naturalization of Osthoff*, 48 La. Ann. 1094; *Soniat v. Supple*, 48 La. Ann. 296; *State v. Wright*, 45 La. Ann. 57; *State v. Dubois*, 39 La. Ann. 676; *Edwards v. Police Jury*, 39 La. Ann. 855; *Mississippi, etc., R. Co. v. Wooten*, 36 La. Ann. 441; *State v. Taylor*, 34 La. Ann. 978; *McGregor v. Allen*, 33 La. Ann. 870; *State v. Carter*, 33 La. Ann. 1214; *State v. White*, 33 La. Ann. 1221; *State v. State Auditor*, 32 La. Ann. 89; *State v. Judges*, 32 La. Ann. 778; *State v. Daniel*, 28 La. Ann. 38; *New Orleans v. Cazelar*, 27 La. Ann. 156; *Crescent City Gaslight Co. v. New Orleans Gaslight Co.*, 27 La. Ann. 138; *City Nat. Bank v. Mahan*, 21 La. Ann. 752; *Bridgeford v. Hall*, 18 La. Ann. 218; *State v. Henry*, 15 La. Ann. 297; *Bossier v. Steele*, 13 La. Ann. 433; *State v. Leovy*, 21 La. Ann. 538; *Arnoult v. New Orleans*, 11 La. Ann. 54; *Aaron's Succession*, 11 La. Ann. 671; *Lanzetti's Succession*, 9 La. Ann. 329; *Municipality No. Three v. Michoud*, 6 La. Ann. 605.

Maryland.—*Hamilton v. Carroll*, 82 Md. 326; *State v. Applegarth*, 81 Md. 293; *Bond v. State*, 78 Md. 523; *Calvert County v. Hellen*, 72 Md. 603; *State v. Norris*, 70 Md. 91; *Slymer v. State*, 62 Md. 237; *State v. Fox*, 51 Md. 412; *Keller v. State*, 11 Md. 525, 69 Am. Dec. 226.

Michigan.—*St. Mary's Power Co. v. Chandler-Dunbar Water Power Co.*, (Mich. 1903) 95 N. W. Rep. 554; *Atty.-Gen. v. Lowrey*, (Mich. 1902) 92 N. W. Rep. 289; *State Tax Com'rs v. Board of Assessors*, 124 Mich. 491; *McMorran*

v. Great Hive, etc., 117 Mich. 398; *People v. McGlaughlin*, 108 Mich. 516; *In re Yell*, 107 Mich. 228; *Messenger v. Teagan*, 106 Mich. 654; *Toil v. Jerome*, 101 Mich. 468; *Tillotson v. Gage*, 97 Mich. 585; *Van Husan v. Heames*, 96 Mich. 504; *McPherson v. Blacker*, 92 Mich. 377, 31 Am. St. Rep. 587; *Frary v. Allen Tp.*, 91 Mich. 666; *Hall v. Burlingame*, 88 Mich. 438; *People v. Miller*, 88 Mich. 383; *Ripley v. Evans*, 87 Mich. 217; *Fort St. Union Depot Co. v. Morton*, 83 Mich. 265; *Campbell v. Kalamazoo*, 80 Mich. 655; *Tice v. Bar City*, 78 Mich. 209; *Wardle v. Townsend*, 75 Mich. 385; *Plummer v. Kennedy*, 72 Mich. 295; *People v. O'Neil*, 71 Mich. 325; *Hartford F. Ins. Co. v. Raymond*, 70 Mich. 485; *Hall v. Slaybaugh*, 69 Mich. 484; *Gillett v. McLaughlin*, 69 Mich. 547; *Hargrave v. Weber*, 66 Mich. 59; *Boyce v. Sebring*, 66 Mich. 210; *Chippewa County v. Auditor-Gen.*, 65 Mich. 408; *Atty.-Gen. v. Amos*, 60 Mich. 372; *Continental Imp. Co. v. Phelps*, 47 Mich. 299; *Schehr v. Detroit*, 45 Mich. 626; *People v. Bradley*, 36 Mich. 447; *People v. Hurlbut*, 24 Mich. 55, 9 Am. Rep. 103; *People v. State Ins. Co.*, 19 Mich. 392; *Inkster v. Carver*, 16 Mich. 484; *People v. Mahaney*, 13 Mich. 481.

Minnesota.—*State v. Renville County*, 83 Minn. 65; *Winters v. Duluth*, 82 Minn. 127; *Crookston v. Polk County*, 79 Minn. 283; *Putnam v. St. Paul*, 75 Minn. 514; *State v. West Duluth Land Co.*, 75 Minn. 456; *O'Brien v. St. Croix Boom Corp.*, 75 Minn. 343; *State v. Red Lake County*, 67 Minn. 352; *State v. Honerud*, 66 Minn. 32; *Lynott v. Dickerman*, 65 Minn. 471; *State v. Anderson*, 63 Minn. 208; *Finnegan v. Noerenberg*, 52 Minn. 239, 38 Am. St. Rep. 552; *State v. Starkey*, 49 Minn. 503; *Johnson v. Harrison*, 47 Minn. 578, 28 Am. St. Rep. 382; *Boyle v. Vanderhoof*, 45 Minn. 31; *State v. Madson*, 43 Minn. 438; *State v. Donaldson*, 41 Minn. 74; *Minnesota L. & T. Co. v. Beebe*, 40 Minn. 7; *Winona v. School-Dist. No. 82*, 40 Minn. 13, 12 Am. St. Rep. 687; *Allen v. Pioneer Press Co.*, 40 Minn. 117, 12 Am. St. Rep. 707; *State v. Brachvogel*, 38 Minn. 265; *Butler v. Chambers*, 36 Minn. 69, 1 Am. St. Rep. 638; *Atkinson v. Duffy*, 16 Minn. 45.

Missouri.—*Cox v. Hannibal, etc., R. Co.*, (Mo. 1903) 74 S. W. Rep. 854; *Elting v. Hickman*, 172 Mo. 237; *State v. Bengsch*, 170 Mo. 81; *State v. Bixman*, 162 Mo. 1; *State v. Whitaker*, 160 Mo. 59; *De Both v. Rich Hill Coal, etc., Co.*, 141 Mo. 497; *State v. Bockstruck*, 136 Mo. 335; *State v. Slover*, 134 Mo. 10; *Lynch v. Murphy*, 119 Mo. 163; *State v. Blackstone*, 115 Mo. 424; *State v. Bronson*, 115 Mo. 271; *State v. Morgan*, 112 Mo. 202; *State v. Kingsley*, 108 Mo. 135; *State v. Burgoerfer*, 107 Mo. 1; *State v. Dolan*, 93 Mo. 467; *State v. Brassfield*, 81 Mo. 151, 51 Am. Rep. 234; *State v. Mead*, 71 Mo. 266; *Frost v. Wilson*, 70 Mo. 664; *State v. Miller*, 45 Mo. 495; *State v. State Bank*, 45 Mo. 528; *St. Louis v. Tiefel*, 42 Mo. 578; *State v. Macklin*, 41 Mo. App. 335; *State v. Hermann*, 11 Mo. App. 43; *St. Louis v. Green*, 7 Mo. App. 472.

Montana.—*State v. Anaconda Copper-Min.*

tinguished jurist: "Adjudicated cases do not, as a general rule, afford us much assistance in passing upon questions of this character, other than in a general way, as each case must be adjudged according to its own peculiar

Co., 23 Mont. 498; *Snook v. Clark*, 20 Mont. 230.

Nebraska.—*Chadron Loan, etc., Assoc. v. O'Linn*, (Neb. 1901) 95 N. W. Rep. 368; *Wenham v. State*, (Neb. 1902) 91 N. W. Rep. 421; *Nebraska Loan, etc., Assoc. v. Perkins*, 61 Neb. 254; *Little v. State*, 60 Neb. 749; *Bryant v. Dakota County*, 53 Neb. 755; *Western Union Tel. Co. v. Lourey*, 32 Neb. 732; *Poffenbarger v. Smith*, 27 Neb. 788; *Herold v. State*, 21 Neb. 50; *State v. Ream*, 16 Neb. 681; *Bonorden v. Krig*, 13 Neb. 121.

Nevada.—*State v. Storey County*, 17 Nev. 96; *Esser v. Spaulding*, 17 Nev. 289; *State v. Ah Sam*, 15 Nev. 27, 37 Am. Rep. 454; *State v. Silver*, 9 Nev. 227; *Humboldt County v. Churchill County*, 6 Nev. 30.

New Jersey.—*State v. Sussex County Lake, etc., Commission*, (N. J. 1902) 53 Atl. Rep. 612; *Brinkerhoff v. Newark, etc., Traction Co.*, 66 N. J. L. 478; *Boorum v. Connelly*, 66 N. J. L. 197; *Coward v. North Plainfield*, 63 N. J. L. 61; *Hickman v. State*, 62 N. J. L. 499; *Newark v. Mt. Pleasant Cemetery Co.*, 58 N. J. L. 168; *Wood v. Atlantic City*, 56 N. J. L. 232; *Newark v. Orange*, 55 N. J. L. 514; *Paterson R. Co. v. Grundy*, 51 N. J. Eq. 213; *Stockton v. Central R. Co.*, 50 N. J. Eq. 52; *Matter of Sewer Assessment*, 54 N. J. L. 156; *Clark Thread Co. v. Hudson County*, 54 N. J. L. 265; *Davis v. Cherry*, 53 N. J. L. 173; *Warner v. Hoagland*, 51 N. J. L. 62; *French v. East Orange Tp.*, 49 N. J. L. 401; *Govern v. Bumstead*, 48 N. J. L. 612; *Hill v. Morrison*, 46 N. J. L. 488; *Snipe v. Shriner*, 44 N. J. L. 206; *Payne v. Mahan*, 44 N. J. L. 213; *Colwell v. Chamberlin*, 43 N. J. L. 387; *Van Ripper v. North Plainfield Tp.*, 43 N. J. L. 349; *State v. Hammer*, 42 N. J. L. 435; *State v. Union*, 33 N. J. L. 354; *Gifford v. New Jersey R., etc., Co.*, 10 N. J. Eq. 171; *Board of Health v. Diamond Mills Paper Co.*, 63 N. J. Eq. 111, *affirmed* (N. J. 1902) 53 Atl. Rep. 1125; *Devine v. Franks*, (N. J. 1900) 47 Atl. Rep. 228; *Mortland v. State*, 52 N. J. L. 521; *Kirkpatrick v. New Brunswick*, 40 N. J. Eq. 46.

New York.—*People v. Sutphin*, 166 N. Y. 163; *Parker v. Elmira, etc., R. Co.*, 165 N. Y. 274; *Sweet v. Syracuse*, 129 N. Y. 316; *Ensign v. Barse*, 107 N. Y. 329; *Water Com'rs v. Dwight*, 101 N. Y. 9; *Matter of Knaust*, 101 N. Y. 188; *Matter of Upson*, 89 N. Y. 67; *Matter of Public Parks*, 86 N. Y. 437; *Sweet v. Buffalo, etc., R. Co.*, 79 N. Y. 293; *People v. Brinkerhoff*, 68 N. Y. 259; *Billings v. New York*, 68 N. Y. 413; *Harris v. People*, 59 N. Y. 599; *People v. Rochester*, 50 N. Y. 525; *Sun Mut. Ins. Co. v. New York*, 8 N. Y. 241; *Conner v. New York*, 5 N. Y. 285; *People v. Lane*, 53 N. Y. App. Div. 531; *New York v. Gorman*, 26 N. Y. App. Div. 191; *People v. Backus*, 11 N. Y. App. Div. 147; *New York Board of Fire Underwriters v. Whipple*, 2 N. Y. App. Div. 361; *People v. Carson*, (Supm. Ct.) 10 Misc. (N. Y.) 237; *Jamaica v. Denton*, (Supm. Ct. Spec. T.) 70 N. Y. Supp. 837; *In re Malone Water-Works Co.*, (Supm. Ct. Spec. T.) 15 N. Y. Supp. 654; *People v. Wilber*, (Supm. Ct. Gen.

T.) 15 N. Y. Supp. 435; *People v. Wilson*, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 326; *Wilson v. New York Cent., etc., R. Co.*, (Supm. Ct. Gen. T.) 2 N. Y. Supp. 65; *People v. Duffy*, 49 Hun (N. Y.) 276; *Matter of One Hundred and Thirty-eighth St.*, (Supm. Ct. Spec. T.) 60 How. Pr. (N. Y.) 290; *Matter of Tappen*, (Supm. Ct. Gen. T.) 36 How. Pr. (N. Y.) 390; *Prentice v. Weston*, 47 Hun (N. Y.) 121; *Gloversville v. Howell*, 7 Hun (N. Y.) 345; *People v. Partidge*, (Brooklyn City Ct. Gen. T.) 13 Abb. N. Cas. (N. Y.) 410; *Sharp v. New York*, 31 Barb. (N. Y.) 572; *Mosier v. Hilton*, 15 Barb. (N. Y.) 657; *People v. Squire*, 14 Daly (N. Y.) 154, *affirmed* 107 N. Y. 593.

North Dakota.—*State v. North Dakota Children's Home Soc.*, 10 N. Dak. 493; *Paine v. Dickey County*, 8 N. Dak. 581; *State v. Woodmansee*, 1 N. Dak. 246.

Oklahoma.—*Choctaw, etc., R. Co. v. Alexander*, 7 Okla. 591.

Oregon.—*Ladd v. Holmes*, 40 Oregon 167; *Nottage v. Portland*, 35 Oregon 539; *Clemmens v. Peterson*, 35 Oregon 47; *Ex p. Mon Luck*, 29 Oregon 421, 54 Am. St. Rep. 804; *Simon v. Northrup*, 27 Oregon 487; *State v. Linn County*, 25 Oregon 503; *State v. Shaw*, 22 Oregon 287; *O'Keefe v. Weber*, 14 Oregon 55; *Simpson v. Bailey*, 3 Oregon 515.

Pennsylvania.—*Com. v. Charity Hospital*, 198 Pa. St. 270; *Sugar Notch*, 192 Pa. St. 349; *Hays v. Cumberland County*, 186 Pa. St. 109; *Com. v. Muir*, 180 Pa. St. 47; *Com. v. Henderson*, 172 Pa. St. 135; *Lackawanna Tp.*, 160 Pa. St. 494; *Brown's Estate*, 152 Pa. St. 401; *Washington v. McGeorge*, 146 Pa. St. 248; *Com. v. Depuy*, 148 Pa. St. 201; *James H. Hawes Mfg. Co.'s Appeal*, (Pa. 1889) 17 Atl. Rep. 219; *Com. v. Morningstar*, 144 Pa. St. 103; *Com. v. Wyman*, 137 Pa. St. 508; *Millvale v. Evergreen R. Co.*, 131 Pa. St. 1; *Bradley v. Pittsburgh*, 130 Pa. St. 475; *Carothers v. Philadelphia Co.*, 118 Pa. St. 468; *Com. v. Martin*, 107 Pa. St. 189; *Com. v. Green*, 58 Pa. St. 226; *Blood v. Mercelliot*, 53 Pa. St. 391; *Leger v. Rice*, 8 Phila. (Pa.) 167; *City Sewage Utilization Co. v. Davis*, 8 Phila. (Pa.) 625; *Com. v. Dickinson*, 13 Phila. (Pa.) 585, 30 Leg. Int. (Pa.) 53; *Pierie v. Philadelphia*, 27 W. N. C. (Pa.) 285; *Goebeler v. Wilhelm*, 17 Pa. Super. Ct. 432; *Middletown Road*, 15 Pa. Super. Ct. 167; *Read v. Clearfield County*, 12 Pa. Super. Ct. 419; *Pittsburg v. Daly*, 5 Pa. Super. Ct. 528; *Com. v. Curry*, 4 Pa. Super. Ct. 356; *Com. v. Lloyd*, 2 Pa. Super. Ct. 6; *Com. v. Morton*, 23 Pa. Co. Ct. 386; *Merrill v. Thorpe*, 22 Pa. Co. Ct. 181; *Smith v. Baker*, 14 Pa. Co. Ct. 65; *Com. v. Frutchey*, 11 Pa. Co. Ct. 112; *Com. v. Reynolds*, 8 Pa. Co. Ct. 568; *Re South Chester*, 4 Lack. Leg. N. (Pa.) 20.

South Carolina.—*Ex p. Bacot*, 36 S. Car. 125; *Barksdale v. Laurens*, 58 S. Car. 413; *State v. Chester*, 18 S. Car. 464; *Morton v. Comptroller Gen.*, 4 S. Car. 430.

South Dakota.—*Stuart v. Kirley*, 12 S. Dak. 245; *State v. Morgan*, 2 S. Dak. 32.

Tennessee.—*State v. McMinnville*, 106 Tenn. 384; *Peterson v. State*, 104 Tenn. 127; *State v.*

facts, and the directness or remoteness, as the case may be, of its provisions to matters in consonance with its title." ¹

bb. MEANS TO FACILITATE ACCOMPLISHMENT OF PURPOSE. — A title fairly expressing the general subject covers provisions for all proper means and instrumentalities which will or may facilitate the accomplishment or enforcement of the purpose expressed, ² such, for instance, as a provision prohibiting violations of the act, ³ or prescribing a penalty or other punishment for such violations. ⁴

Brown, 103 Tenn. 449; *Frazier v. East Tennessee, etc., R. Co.*, 88 Tenn. 138; *Truss v. State*, 13 Lea (Tenn.) 311; *Garvin v. State*, 13 Lea (Tenn.) 162; *State v. Whitworth*, 8 Lea (Tenn.) 594; *Luehrman v. Taxing Dist.*, 2 Lea (Tenn.) 425; *State v. Lasater*, 9 Baxt. (Tenn.) 584.

Texas. — *Snyder v. Compton*, 87 Tex. 374; *Brown v. State*, 32 Tex. Crim. 119; *Magee v. Merriman*, 85 Tex. 105; *Werner v. Galveston*, 72 Tex. 22; *Duncan v. Taylor*, 63 Tex. 645; *International, etc., R. Co. v. Smith County*, 54 Tex. 10; *Houston, etc., R. Co. v. Odum*, 53 Tex. 343; *Murphey v. Menard*, 11 Tex. 673; *Nalle v. Austin*, 23 Tex. Civ. App. 595; *Houston, etc., R. Co. v. State*, 24 Tex. Civ. App. 117; *Smith v. Grayson County*, 18 Tex. Civ. App. 153; *Thornburgh v. Tyler*, 16 Tex. Civ. App. 439; *Peavy v. Goss*, (Tex. Civ. App. 1896) 37 S. W. Rep. 990; *Fielder v. State*, 40 Tex. Crim. 184; *Washington v. State*, 28 Tex. App. 411; *Johnson v. State*, 9 Tex. App. 249; *Albrecht v. State*, 8 Tex. App. 216, 34 Am. Rep. 737.

Utah. — *In re Monk*, 16 Utah 100.

Virginia. — *Trehy v. Marye*, 100 Va. 40; *Morgan v. Com.*, 98 Va. 812; *Bosang v. Iron Belt Bldg., etc., Assoc.*, 96 Va. 119; *Prison Assoc. v. Ashby*, 93 Va. 667; *Ingles v. Straus*, 91 Va. 209; *Lescallett v. Com.*, 89 Va. 878; *Morriss v. Virginia Ins. Co.*, 85 Va. 588.

Washington. — *State v. Sharpless*, (Wash. 1903) 71 Pac. Rep. 737; *Bogue v. Seattle*, 19 Wash. 396; *Johnston v. Wood*, 19 Wash. 441; *State v. Rusk*, 15 Wash. 403; *Seymour v. Tacoma*, 6 Wash. 138; *Maling v. Crummev*, 5 Wash. 222; *State v. Spokane Falls*, 2 Wash. 40; *Gasch v. Davies*, 1 Wash. 290; *Van Houten v. Routhe*, 1 Wash. 306; *Yesler v. Seattle*, 1 Wash. 308; *Dacres v. Oregon R., etc., Co.*, 1 Wash. 525; *Matter of Rafferty*, 1 Wash. 382; *Baker v. Prewett*, 3 Wash. Ter. 474.

West Virginia. — *State v. Mines*, 38 W. Va. 125; *State v. Brookover*, 38 W. Va. 141; *State v. Wirt County*, 37 W. Va. 808; *Slack v. Jacob*, 8 W. Va. 612; *Shields v. Bennett*, 8 W. Va. 74.

Wisconsin. — *Verges v. Milwaukee County*, (Wis. 1903) 93 N. W. Rep. 44; *Julien v. Model Bldg., etc., Co.*, (Wis. 1902) 92 N. W. Rep. 561; *Diana Shooting Club v. Lamoreux*, 114 Wis. 44; *Harrison v. Milwaukee County*, 51 Wis. 645; *Mills v. Charleton*, 29 Wis. 400, 9 Am. Rep. 578; *Evans v. Sharp*, 29 Wis. 564.

Wyoming. — *Farm Invest. Co. v. Carpenter*, 9 Wyo. 110; *In re Fourth Judicial Dist.*, 4 Wyo. 133.

Improper Classification will not invalidate provisions fairly within the title. *Robinson v. State*, 15 Tex. 311.

That Provisions Seem Unjust is no reason for declaring them invalid if they are fairly within the title. *Mayer v. Cahalin*, 5 Sawy. (U. S.) 355.

1. *Per Burgess, J.*, in *Witzmann v. Southern*

R. Co., 131 Mo. 616. See also *Power v. Kitching*, 10 N. Dak. 254, where Wallin, C. J., said: "For the purposes of a decision each case must stand upon the language employed by the legislature and must be governed by its own peculiar facts and conditions."

Legislative Policy and the Course of Judicial Decision must be considered in determining what provisions are germane to the title; that is, weight will be given to the fact that certain matters have usually been regarded as consonant with certain titles. *Hardy v. Kingman County*, 65 Kan. 111.

2. **Means to Accomplish Purpose Expressed** — *United States.* — *San Antonio v. Mehaffy*, 96 U. S. 312; *Skinner v. Garnett Gold-Min. Co.*, 96 Fed. Rep. 735; *Travelers' Ins. Co. v. Oswego Tp.*, (C. C. A.) 59 Fed. Rep. 58.

Alabama. — *Jackson v. State*, (Ala. 1903) 33 So. Rep. 888.

California. — *People v. Lovren*, 119 Cal. 88, 72 Am. St. Rep. 902.

Florida. — *Florida, etc., R. Co. v. Hazel*, (Fla. 1901) 31 So. Rep. 272; *State v. Jacksonville Terminal Co.*, 41 Fla. 363.

Iowa. — *Duncombe v. Prindle*, 12 Iowa 1.

Kansas. — *Rogers v. Morrill*, 55 Kan. 737.

Kentucky. — *Collins v. Henderson*, 11 Bush (Ky.) 74.

Louisiana. — *Edwards v. Police jury*, 39 La. Ann. 855; *Hammond v. Lesseps*, 31 La. Ann. 337.

Michigan. — *People v. Mahaney*, 13 Mich. 481.

New Jersey. — *Johnson v. Asbury Park*, 58 N. J. L. 604; *McLaughlin v. Newark*, 57 N. J. L. 298.

New York. — *People v. Coler*, 173 N. Y. 103; *People v. Sutphin*, 166 N. Y. 163; *Water Com'rs v. Dwight*, 101 N. Y. 9; *Matter of Knaust*, 101 N. Y. 188; *People v. Lawrence*, 41 N. Y. 137; *Brewster v. Syracuse*, 19 N. Y. 116.

North Dakota. — *Martin v. Tyler*, 4 N. Dak. 278.

Oregon. — *State v. Steele*, 39 Oregon 419.

Tennessee. — *Memphis v. American Express Co.*, 102 Tenn. 336; *State v. Yardley*, 95 Tenn. 546.

Utah. — *In re Monk*, 16 Utah 100.

Washington. — *Callvert v. Winsor*, 26 Wash. 368.

Wisconsin. — *Diana Shooting Club v. Lamoreux*, 114 Wis. 44.

3. **Prohibition of Violations.** — *People v. Jap- inga*, 115 Mich. 222; *Osborn v. Corbett*, 114 Mich. 655.

4. **Punishment for Violation** — *Georgia.* — *Morris v. State*, (Ga. 1903) 43 S. E. Rep. 368; *Plumb v. Christie*, 103 Ga. 686; *Brown v. State*, 73 Ga. 38.

Illinois. — *Cohn v. People*, 149 Ill. 486, 41 Am. St. Rep. 304; *Thompson v. Akin*, 81 Ill. App. 62.

(b) **Matters Outside Scope of Title** — *aa. IN GENERAL.* — While it is true that a title expressing the general subject will cover a great variety of related matters, yet it cannot support a provision foreign to such subject. Therefore an act containing provisions neither expressed in or suggested by the title, nor germane or cognate to the subject expressed therein — in brief, matters not reasonably to be anticipated under such a title — is to that extent repugnant to the constitution.¹ And the connection between the provisions of the act and

Indiana. — Republic Iron, etc., Co. v. State, (Ind. 1903) 66 N. E. Rep. 1005.

Michigan. — People v. Huntley, 112 Mich. 569; Hartford F. Ins. Co. v. Raymond, 70 Mich. 485.

Montana. — State v. Bernheim, 19 Mont. 512. *Nebraska.* — State v. Power, 63 Neb. 496.

New Jersey. — State v. Diamond Paper Mills Co., (N. J. 1902) 53 Atl. Rep. 1125; State v. Carson, 67 N. J. L. 178.

Oregon. — State v. Koshland, 25 Oregon 178. *Pennsylvania.* — Com. v. Jones, 4 Pa. Super. Ct. 362.

Washington. — Hathaway v. McDonald, 27 Wash. 659.

1. Provisions Outside Scope of Title — *United States.* — Thomas v. Wabash, etc., R. Co., 40 Fed. Rep. 126.

Alabama. — Thompson v. Luverne, 125 Ala. 366; State v. Davis, 130 Ala. 148; Yahn v. Merritt, 117 Ala. 485; Sanders v. Elmore County, 117 Ala. 543; Pierce v. Elmore County, 117 Ala. 569; Bell v. State, 115 Ala. 87; Brown v. State, 115 Ala. 74; White v. Burgin, 113 Ala. 170; *Ex p.* Gayles, 108 Ala. 514; Randolph v. Builders, etc., Supply Co., 106 Ala. 501; Yerby v. Cochrane, 101 Ala. 541; Woolf v. Taylor, 98 Ala. 254; *Ex p.* Cowert, 92 Ala. 94; Glenn v. Lynn, 89 Ala. 608; Montgomery v. State, 88 Ala. 141; Ballentyne v. Wickersham, 75 Ala. 533; Boyd v. State, 53 Ala. 601; Moses v. Mobile, 52 Ala. 198.

California. — Pratt v. Browne, 135 Cal. 649; Spier v. Baker, 120 Cal. 375; Fatjo v. Pfister, 117 Cal. 83; Lewis v. Colgan, (Cal. 1896) 44 Pac. Rep. 1081; Doane v. Weil, 58 Cal. 334; People v. Parks, 58 Cal. 624.

Colorado. — Rio Grande County v. Whelen, 28 Colo. 435; Lamar Canal Co. v. Amity Land, etc., Co., 26 Colo. 370, 77 Am. St. Rep. 261; Mulnix v. Mutual Ben. L. Ins. Co., 23 Colo. 71; Brooks v. People, 14 Colo. 413; *In re* Breene, 14 Colo. 401; People v. Fleming, 7 Colo. 230; Mitchell v. Colorado Milling, etc., Co., 12 Colo. App. 277.

Florida. — Webster v. Powell, 36 Fla. 703; State v. Palmes, 23 Fla. 620; Carr v. Thomas, 18 Fla. 736.

Georgia. — Harris v. State, 110 Ga. 887; Frazier v. Georgia R., etc., Co., 101 Ga. 77; Sasser v. State, 99 Ga. 54; Dempsey v. State, 94 Ga. 766; Blair v. State, 90 Ga. 326, 35 Am. St. Rep. 206; Johnson v. Jones, 87 Ga. 85; McDuffie v. State, 87 Ga. 687; Brown v. State, 79 Ga. 324; Brieswick v. Brunswick, 51 Ga. 639, 21 Am. Rep. 240.

Illinois. — Allardt v. People, 197 Ill. 501; Woodruff v. Kellyville Coal Co., 182 Ill. 480; Ritchie v. People, 155 Ill. 98, 46 Am. St. Rep. 315; Snell v. Chicago, 133 Ill. 413; Dolese v. Pierce, 124 Ill. 140; Leach v. People, 122 Ill. 420; People v. Protestant Deaconesses' Inst., 71 Ill. 229; Taylor v. Kirby, 31 Ill. App. 658.

Indiana. — Madison County v. Baker, 80 Ind. 374; State v. Young, 47 Ind. 150; Grubbs v. State, 24 Ind. 295; Lauer v. State, 22 Ind. 461; Igoe v. State, 14 Ind. 239; Spaugh v. Huffer, 14 Ind. 305; Foley v. State, 9 Ind. 365; Gillespie v. State, 9 Ind. 380.

Iowa. — Williamson v. Keokuk, 44 Iowa 88.

Kansas. — Topeka v. Wood, 62 Kan. 809; State v. Lewin, 53 Kan. 679; Wilkerson v. Belknap Sav. Bank, 52 Kan. 718; Norton County v. Snow, 45 Kan. 332; State v. Wabaunsee County, 45 Kan. 731; Matter of Wood, 34 Kan. 645; Missouri, etc., R. Co. v. Long, 27 Kan. 684.

Kentucky. — Parkland v. Gaines, 88 Ky. 562; Wulftange v. McCollom, 83 Ky. 361.

Louisiana. — State v. Pierson, 44 La. Ann. 90; Irwin's Succession, 33 La. Ann. 63; State v. Baum, 33 La. Ann. 981; State v. Everage, 33 La. Ann. 123; Crescent City Gaslight Co. v. New Orleans Gaslight Co., 27 La. Ann. 138; State v. Clinton, 27 La. Ann. 40; Wisner v. Monroe, 25 La. Ann. 598; State v. St. Louis Cathedral, 23 La. Ann. 720; State v. Harrison, 11 La. Ann. 722; Maranthe v. Hunter, 11 La. Ann. 734; Duverge v. Salter, 5 La. Ann. 94.

Maryland. — State v. Schultz Gas-Fixture, etc., Co., 83 Md. 58; Ellicott v. Search, 72 Md. 22; Scharf v. Tasker, 73 Md. 378.

Michigan. — Blades v. Water Com'rs, 122 Mich. 366; Lansing v. State Auditors, 111 Mich. 327; People v. Congdon, 77 Mich. 351; Ellis v. Hutchinson, 70 Mich. 154; Sanilae County v. Auditor Gen., 68 Mich. 659; Losch v. St. Charles, 65 Mich. 555; Church v. Detroit, 64 Mich. 571; People v. Gadway, 61 Mich. 285, 1 Am. St. Rep. 578; Northwestern Mfg. Co. v. Chambers, 58 Mich. 381, 55 Am. Rep. 693; Stewart v. Young Men's Father Mathew Total Abstinence Benev. Soc. No. 1, 41 Mich. 67.

Minnesota. — Winters v. Duluth, 82 Minn. 127; State v. Sullivan, 73 Minn. 382; State v. Sullivan, 72 Minn. 126; State v. Oftedal, 72 Minn. 498; Simard v. Sullivan 71 Minn. 517; State v. Chapel, 63 Minn. 535; State v. Porter, 53 Minn. 279; State v. Murray, 41 Minn. 123; State v. Kinsella, 14 Minn. 524.

Missouri. — Shively v. Lankford, (Mo. 1903) 74 S. W. Rep. 835; Witzmann v. Southern R. Co., 131 Mo. 612; State v. Jackson County Ct., 102 Mo. 531; State v. Persinger, 76 Mo. 346.

Nebraska. — Union Pac. R. Co. v. Sprague, (Neb. 1903) 95 N. W. Rep. 46; Haverly v. State, 63 Neb. 83; Lincoln Land Co. v. Grant, 57 Neb. 70; State v. Douglas County, 47 Neb. 428; Sheasley v. Keens, 48 Neb. 57; State v. Holcomb, 46 Neb. 612; Weigel v. Hastings, 29 Neb. 379; Messenger v. State, 25 Neb. 674; Holmberg v. Hauck, 16 Neb. 337; *Ex p.* Thomason, 16 Neb. 238; Ives v. Norris, 13 Neb. 252; Burlington, etc., R. Co. v. Saunders County, 9 Neb. 507; White v. Lincoln, 5 Neb. 505; Smails v. White, 4 Neb. 353.

the subject stated in the title must be so obvious that ingenious reasoning is not requisite to show it; it should be apparent to the ordinary intellect as well as to the trained legal mind.¹

bb. RESTRICTIVE TITLE — ACT BROADER THAN TITLE. — Where the language employed in the title is such as would lead a reasonable man to suppose that the legislature intended to restrict the scope of the act within certain limits specified in the title, such act is unconstitutional so far as concerns any provisions outside the limits thus marked out, even though such provisions might properly have been included in the act under a broader title.²

Nevada. — *State v. Hoadley*, 20 Nev. 317; *State v. Hallock*, 19 Nev. 384.

New Jersey. — *Hawkins v. American Copper Extraction Co.*, (N. J. 1903) 54 Atl. Rep. 523; *George Jonas Glass Co. v. Ross*, (N. J. 1902) 53 Atl. Rep. 675; *Hayes v. Storms*, 64 N. J. L. 514; *State v. Orange*, 61 N. J. L. 620; *Schenck v. State*, 60 N. J. L. 381; *Golden Star Fraternity v. Martin*, 59 N. J. L. 207; *Grossman v. Hancock*, 58 N. J. L. 139; *Falkner v. Dorland*, 54 N. J. L. 409; *Jersey City v. Elmendorf*, 47 N. J. L. 283; *Grover v. Ocean Grove Camp-Meeting Assoc.*, 45 N. J. L. 399; *Shivers v. Newton*, 45 N. J. L. 469; *Payne v. Mahon*, 41 N. J. L. 292; *Union Tp. Committee v. Rader*, 39 N. J. L. 509.

New York. — *Bohmer v. Haffen*, 161 N. Y. 390; *Coxe v. State*, 144 N. Y. 396; *Johnston v. Spicer*, 107 N. Y. 185; *Matter of Blodgett*, 89 N. Y. 392; *People v. Chautauqua County*, 43 N. Y. 10; *People v. Allen*, 42 N. Y. 404; *Rochester v. Bloss*, 77 N. Y. App. Div. 28, *affirmed* (N. Y. 1903) 66 N. E. Rep. 1105; *Wenk v. New York*, 82 N. Y. App. Div. 584; *McCabe v. Kenny*, 52 Hun (N. Y.) 518; *People v. Highway Com'rs*, 53 Barb. (N. Y.) 70; *Smith v. New York*, (N. Y. Super. Ct. Spec. T.) 34 How. Pr. (N. Y.) 508; *People v. Brooklyn*, (Supm. Ct. Gen. T.) 13 Abb. Pr. N. S. (N. Y.) 121; *Gaskin v. Meek*, (Ct. App.) 8 Abb. Pr. N. S. (N. Y.) 312; *Murray v. New York*, 43 N. Y. Super. Ct. 164.

North Dakota. — *Divet v. Richland County*, 8 N. Dak. 65.

Oregon. — *Simon v. Northup*, 27 Oregon 487; *State v. Wright*, 14 Oregon 365.

Pennsylvania. — *Dailey v. Potter County*, 203 Pa. St. 593; *In re Otto Tp. Road*, 181 Pa. St. 390, 38 W. N. C. (Pa.) 289; *Evans v. Willistown Tp.*, 168 Pa. St. 578; *Com. v. Samuels*, 163 Pa. St. 283; *Quinn v. Cumberland County*, 162 Pa. St. 55; *Perkins v. Philadelphia*, 156 Pa. St. 539; *La Plume v. Gardner*, 148 Pa. St. 192; *In re Carbondale, etc., Turnpike, etc., Road*, (Pa. 1888) 13 Atl. Rep. 913; *Com. v. Frantz*, 135 Pa. St. 389; *Sewickley v. Sholes*, 118 Pa. St. 165; *McGee's Appeal*, 114 Pa. St. 470; *Union Pass. R. Co.'s Appeal*, 81 Pa. St. 91; *Dorsey's Appeal*, 72 Pa. St. 192; *Mansfield's Case*, 22 Pa. Super. Ct. 224; *Com. v. Montross*, 8 Pa. Super. Ct. 237; *Baker v. Warren County*, 22 Pa. Co. Ct. 205; *Com. v. Hough*, 22 Pa. Co. Ct. 440; *Mauch Chunk v. Betzler*, 19 Pa. Co. Ct. 27; *Com. v. Hartman*, 19 Pa. Co. Ct. 97; *Com. v. Hartzell*, 17 Pa. Co. Ct. 91; *Sanders v. Cambria County*, 16 Pa. Co. Ct. 94; *Poor Dist. v. Clearfield County*, 16 Pa. Co. Ct. 554; *Com. v. Severn*, 15 Pa. Co. Ct. 249, *affirmed* 164 Pa. St. 462; *Com. v. Weir*, 15 Pa. Co. Ct. 425; *Com. v. Grier*, 9 Pa. Co. Ct. 444; *Com. v. Moorhead*, 7 Pa. Co. Ct. 513; *Com. v. Bender*, 7 Pa. Co. Ct. 620; *Com. v. Hudusko*, 10 Pa. Dist. 230; *Adams v.*

Sweden Tp., 9 Pa. Dist. 450; *York City School Dist. v. West Manchester School Dist.*, 8 Pa. Dist. 97; *Kussel v. Erie*, 8 Pa. Dist. 105; *Com. v. Darlington*, 8 Pa. Dist. 237; *Conyngham Tp. Poor Dist. v. Luzerne County*, 8 Kulp (Pa.) 9; *Dillon v. Metropolitan L. Ins. Co.*, 7 Kulp (Pa.) 507; *Com. v. Howell*, 5 Lack. Leg. N. (Pa.) 369; *Com. v. Scranton Board of Control*, 4 Lack. Leg. N. (Pa.) 47.

Tennessee. — *Saunders v. Savage*, 108 Tenn. 340; *State v. Craig*, (Tenn. Ch. 1901) 64 S. W. Rep. 326; *Kennedy v. Montgomery County*, 98 Tenn. 165; *Third Nat. Bank v. Divine Grocery Co.*, 97 Tenn. 603; *Ragio v. State*, 86 Tenn. 272; *Knoxville v. Lewis*, 12 Lea (Tenn.) 180; *State v. McCann*, 4 Lea (Tenn.) 1.

Texas. — *Adams v. San Angelo Water Works Co.*, 86 Tex. 485; *Roby v. State*, 41 Tex. Crim. 152.

Utah. — *Ritchie v. Richards*, 14 Utah 345.

Virginia. — *Lacey v. Palmer*, 93 Va. 159, 57 Am. St. Rep. 795; *Cahoon v. Iron Gate Land, etc., Co.*, 92 Va. 367; *Fidelity Ins., etc., Co. v. Shenandoah Valley R. Co.*, 86 Va. 1, 19 Am. St. Rep. 858; *Henrico County v. McGruder*, 84 Va. 828.

Washington. — *State v. Macdonald*, 25 Wash. 122; *Howlett v. Cheetham*, 17 Wash. 626; *Perceival v. Cowychee, etc., Irrigation Dist.*, 15 Wash. 480; *Anderson v. Whatcom County*, 15 Wash. 47; *Van Houten v. Routhen*, 1 Wash. 306.

Wisconsin. — *Wagner v. Milwaukee County*, 112 Wis. 601; *Anderton v. Milwaukee*, 82 Wis. 279.

1. **Connection Should Be Obvious.** — *Lamar Canal Co. v. Amity Land, etc., Co.*, 26 Colo. 370, 77 Am. St. Rep. 261.

2. **Act Broader than Title — Restrictive Title — United States.** — *Crowther v. Fidelity Ins., etc., (C. C. A.)* 85 Fed. Rep. 41; *Fidelity Ins., etc., Co. v. Shenandoah Iron Co.*, 42 Fed. Rep. 372; *Bugher v. Prescott*, 23 Fed. Rep. 29; *Oregon, etc., Trust, etc., Co. v. Rathbun*, 5 Sawy. (U. S.) 32.

Colorado. — *Van Houten v. People*, 22 Colo. 53. See also *In re Consolidation of School Dist.*, 23 Colo. 499.

Delaware. — *Equitable Guarantee, etc., Co. v. Donahoe*, 3 Penn. (Del.) 191.

Florida. — *State v. Burns*, 38 Fla. 367.

Georgia. — *Harris v. State*, 110 Ga. 887.

Illinois. — *People v. Martin*, 178 Ill. 611.

Indiana. — *State v. Commercial Ins. Co.*, 158 Ind. 680; *Mewherter v. Price*, 11 Ind. 199.

Kansas. — *State v. Barrett*, 27 Kan. 213.

Maryland. — *Luman v. Hitchens Bros. Co.*, 90 Md. 14; *Steenken v. State*, 88 Md. 708; *Whitman v. State*, 80 Md. 410.

Michigan. — *Citizens' Sav. Bank v. Auditor Gen.*, 123 Mich. 511; *Niles v. Steere*, 102 Mich.

cc. PROVISION FOR RETROSPECTIVE OPERATION. — Where a statute is intended to operate retrospectively, the title should indicate such intent, for otherwise it is liable to operate as a surprise.¹

(c) *Repeal of Previous Acts.* — The title need not indicate a repeal by implication,² nor need it mention a clause or section in the act repealing previous laws which are germane to the general subject expressed in the title.³

When Not Covered. — But if the repealing clause profess to repeal acts dealing with a subject not expressed in the title or germane to the subject there expressed, it is, to that extent, invalid.⁴

(5) *Amending and Supplemental Acts* — (a) *What a Sufficient Title* — *aa. IN GENERAL.* — The title of an act professing to be an amendment or supplement of an existing law is sufficient if it refers with certainty to the law amended,⁵ and if

328; *Wilcox v. Paddock*, 65 Mich. 23; *Ryerson v. Utley*, 16 Mich. 269.

Minnesota. — *Hamilton v. Minneapolis Desk Mfg. Co.*, 78 Minn. 3; *Palmer v. Zumbrota Bank*, 72 Minn. 266.

Missouri. — *State v. Great Western Coffee, etc., Co.*, 171 Mo. 634; *State v. Borden*, 164 Mo. 221; *State v. Baker*, 129 Mo. 482.

Nebraska. — *Union Pac. R. Co. v. Sprague*, (Neb. 1903) 95 N. W. Rep. 46; *State v. Lancaster County*, 6 Neb. 474.

Nevada. — *State v. Washoe County*, 22 Nev. 399.

New Jersey. — *Hawkins v. American Copper Extraction Co.*, (N. J. 1903) 54 Atl. Rep. 523; *George Jonas Glass Co. v. Ross*, (N. J. 1902) 53 Atl. Rep. 675; *Kreigh v. Chosen Freeholders*, 62 N. J. L. 178; *Conklin v. Jersey City*, 62 N. J. L. 168; *Allen v. Taxation Com'rs*, 57 N. J. L. 303.

New York. — *Matter of Paul*, 94 N. Y. 497; *Gaskin v. Meek*, (Ct. App.) 8 Abb. Pr. N. S. (N. Y.) 312; *Gaskin v. Anderson*, 55 Barb. (N. Y.) 259; *Baldwin v. New York*, 42 Barb. (N. Y.) 549.

Pennsylvania. — *Payne v. School Dist.*, 168 Pa. St. 386.

Tennessee. — *State v. Bradt*, 103 Tenn. 584.

Virginia. — *Alexandria County v. Alexandria*, 95 Va. 469; *Martin v. South Salem Land Co.*, 94 Va. 28.

1. *Retrospective Operation Must Be Indicated.* — *Lindsay v. U. S. Savings, etc., Assoc.*, 120 Ala. 156; *Thomas v. Collins*, 58 Mich. 64.

2. *Repeal by Implication.* — *Union Trust Co. v. Trumbull*, 137 Ill. 146; *Com. v. Godshaw*, 92 Ky. 435; *State v. Gallagher*, 42 Minn. 449.

3. *Repeal of Germane Laws.* — *Northern Pac. Exp. Co. v. Metschan*, (C. C. A.) 90 Fed. Rep. 80; *Hawkins v. Roberts*, 122 Ala. 130; *Trackman v. People*, 22 Colo. 83; *State v. Duval County*, 23 Fla. 483; *Timm v. Harrison*, 109 Ill. 594; *Burke v. Monroe County*, 77 Ill. 610; *Cassell v. Lexington, etc., Turnpike Road Co.*, (Ky. 1888) 9 S. W. Rep. 502; *Washington County v. Franklin R. Co.*, 34 Md. 159; *Union Pac. R. Co. v. Sprague*, (Neb. 1903) 95 N. W. Rep. 46; *Com. v. Moir*, 199 Pa. St. 534.

4. *Repeal Not Expressed in Title.* — *Northern Pac. Exp. Co. v. Metschan*, (C. C. A.) 90 Fed. Rep. 80; *Los Angeles v. Hance*, 122 Cal. 77; *Bryan v. Board of Education*, 90 Ky. 322; *Com. v. Moir*, 199 Pa. St. 534; *Ridge Ave. Pass. R. Co. v. Philadelphia*, 124 Pa. St. 219; *Howlett v. Cheetham*, 17 Wash. 626.

5. *Amending Act — Reference to Original Act Sufficient.* — *United States.* — *Northern Pac.*

Exp. Co. v. Metschan, (C. C. A.) 90 Fed. Rep. 80; *In re Moore*, 81 Fed. Rep. 356; *Loomis v. Runge*, (C. C. A.) 66 Fed. Rep. 856; *The Borrowdale*, 39 Fed. Rep. 376.

California. — *People v. Parvin*, 74 Cal. 549; *Lewis v. Dunne*, 134 Cal. 291.

Florida. — *Lester v. State*, 37 Fla. 382.

Georgia. — *Murray v. State*, 112 Ga. 7.

Idaho. — *Pioneer Irrigation Dist. v. Bradbury*, (Idaho 1902) 68 Pac. Rep. 295.

Indiana. — *Udell v. Citizens' St. R. Co.*, 152 Ind. 507, 71 Am. St. Rep. 336. But see *Lingquist v. State*, 153 Ind. 542, and *infra*, this title, *Amendment — Form and Contents of Amendatory Act.*

Louisiana. — *State v. Read*, 49 La. Ann. 1535; *State v. Brown*, 41 La. Ann. 771; *State v. Garrett*, 29 La. Ann. 637; *Arnoult v. New Orleans*, 11 La. Ann. 56.

Maryland. — *Garrison v. Hill*, 81 Md. 551; *Second German American Bldg. Assoc. v. Newman*, 50 Md. 62.

Michigan. — *People v. Howard*, 73 Mich. 10. *Minnesota.* — *State v. Olson*, 58 Minn. 1.

Missouri. — *State v. Heege*, 135 Mo. 112.

Montana. — *State v. Courtney*, 27 Mont. 378.

Nebraska. — *Van Duzer v. Mellinger*, (Neb. 1902) 92 N. W. Rep. 738; *State v. Stewart*, 52 Neb. 243; *Muldoon v. Levi*, 25 Neb. 457; *State v. Babcock*, 23 Neb. 128; *State v. Berka*, 20 Neb. 375; *Miller v. Hurford*, 13 Neb. 13; *Dogge v. State*, 17 Neb. 140; *Ballou v. Black*, 17 Neb. 392.

New Jersey. — *Schmalz v. Wooley*, 56 N. J. Eq. 649; *Rahway Sav. Inst. v. Rahway*, 53 N. J. L. 48.

New York. — *Dyker Meadow Land, etc., Co. v. Cook*, 3 N. Y. App. Div. 164; *In re McAdam*, (Supm. Ct. Gen. T.) 7 N. Y. Supp. 454.

Pennsylvania. — *Millers v. Brown*, 22 Pa. Co. Ct. 109; *Com. v. Wilkes-Barre, etc., R. Co.*, 162 Pa. St. 614; *Com. v. Philadelphia, etc., Coal, etc., Co.*, 162 Pa. St. 623.

Texas. — *English, etc., Mortg., etc., Co. v. Hardy*, 93 Tex. 289; *Womack v. Garner*, (Tex. 1895) 31 S. W. Rep. 358.

Virginia. — *Com. v. Brown*, 91 Va. 762.

Washington. — *Karasek v. Peier*, 22 Wash. 419.

West Virginia. — *Heath v. Johnson*, 36 W. Va. 782.

Need Not Specify Particular Section Amended. — The title, "An act to amend an act entitled 'An act to establish the municipality of J.,"' is sufficient to sustain a provision purporting to amend not the entire act, but only a particular

the title of the latter act be sufficient to support the amendment, it is unnecessary to inquire whether the title of the amendatory act would be independently sufficient.¹

Trivial Errors in Describing the Title of the act amended will not vitiate the title of the amending act where the meaning is clear and there is no tendency to mislead.²

bb. REFERENCE TO AMENDED ACT BY NUMBER ONLY. — In some states it has been held that the title of an amending act is not sufficient which identifies the act amended merely by number, without quoting its title or otherwise stating its purpose.³ By the weight of authority, however, a mere reference by chapter and section or in any other way whereby the original act is clearly identified is sufficient.⁴ But, in any event, the act to be amended must be clearly and distinctly pointed out,⁵ and a title has been held insufficient which expressed

section thereof. *State v. Duval County*, 23 Fla. 483. See also *Nobles v. State*, 38 Tex. Crim. 330; *Dickinson v. State*, 38 Tex. Crim. 472.

An act whose purpose is to harmonize and revise generally the sections on municipal corporations both of the Montana Political Code and of a prior act of the legislature, and which states that purpose in its title, is constitutional and valid, although it fails to mention one of the sections of the Political Code displaced by it. *Matter of Ryan*, 20 Mont. 64.

The Use of "Repeal" for "Amend" in the title of the amending act is unimportant, where the rest of the title clearly points out the provisions affected. *State v. Page*, 20 Mont. 238.

Attempt at Particularity Not Required Treated as Surplusage. — *Laramie County v. Stone*, 7 Wyo. 280.

1. *Brandon v. State*, 16 Ind. 197; *Roby v. Sheppard*, 42 W. Va. 286. See also *Steele County v. Erskine*, (C. C. A.) 98 Fed. Rep. 215, 87 Fed. Rep. 630.

2. **Trivial Errors in Description of Title.** — *Northern Pac. Exp. Co. v. Metschan*, (C. C. A.) 90 Fed. Rep. 80; *Heller v. People*, 2 Colo. App. 459; *Jones v. Lake View*, 151 Ill. 663; *Citizens St. R. Co. v. Haugh*, 142 Ind. 254; *State v. Bailey*, 157 Ind. 324; *Baker v. Agricultural Land Co.*, 62 Kan. 79; *People v. Howard*, 73 Mich. 10; *American Surety Co. v. Great White Spirit Co.*, 58 N. J. Eq. 526; *State v. Robinson*, 32 Oregon 43; *Ex p. Segars*, 32 Tex. Crim. 553. See also *Stone v. State*, (Ala. 1903) 34 So. Rep. 629; *State v. Long*, 21 Mont. 26.

Misplaced Quotation Marks in the title will not vitiate it where the sense is not affected. *Com. v. Taylor*, 159 Pa. St. 451.

Fatal Error. — But where the amendatory statute refers to the act amended by a wrong number and misrecites its title, the amendatory act is void altogether. *State v. Looker*, 54 Kan. 227.

3. **Reference by Number Insufficient.** — *The Borrowdale*, 39 Fed. Rep. 376; *Webster v. Powell*, 36 Fla. 703; *Boring v. State*, 141 Ind. 640.

Tennessee. — In *Memphis St. R. Co. v. State*, (Tenn. 1903) 75 S. W. Rep. 730, the court reviews at length all its prior decisions on this subject and concludes that "We are constrained to hold that such reference to chapter and volume is not a compliance with the constitutional requirement, in that there is no recital of the

title or substance of the act desired to be amended."

In *Washington* it was held in some early cases that such a title was not a sufficient expression of the subject. *Harland v. Territory*, 3 Wash. Ter. 131; *Rumsey v. Territory*, 3 Wash. Ter. 332. But this doctrine was overruled in *Mars-ton v. Humes*, 3 Wash. 267, which latter case has since been followed in that state. *Karasek v. Peier*, 22 Wash. 419; *In re Moore*, 81 Fed. Rep. 356. See also *State v. Halbert*, 14 Wash. 306; *Speck v. Gray*, 14 Wash. 589.

4. **Reference by Number Sufficient** — *United States.* — *In re Moore*, 81 Fed. Rep. 356.

Louisiana. — *State v. Brown*, 41 La. Ann. 771; *State v. Read*, 49 La. Ann. 1535; *State v. Bazile*, 50 La. Ann. 21.

Maryland. — *Garrison v. Hill*, 81 Md. 551; *Second German American Bldg. Assoc. v. New-man*, 50 Md. 62.

Michigan. — *People v. Howard*, 73 Mich. 10. *Minnesota.* — *State v. Olson*, 58 Minn. 1; *Hall v. Leland*, 64 Minn. 71.

Missouri. — *State v. Marion County Ct.*, 128 Mo. 427; *State v. Heege*, 135 Mo. 112.

Nebraska. — *State v. Babcock*, 23 Neb. 128; *Muldoon v. Levi*, 25 Neb. 457; *State v. Stewart*, 52 Neb. 243; *Van Duzer v. Mellinger*, (Neb. 1902) 92 N. W. Rep. 738.

Oregon. — *Ex p. Howe*, 26 Oregon 181.

Texas. — *Nichols v. State*, 32 Tex. Crim. 391; *Womack v. Garner*, (Tex. 1895) 31 S. W. Rep. 358; *English, etc., Mortg., etc., Co. v. Hardy*, 93 Tex. 298. But see *Gunter v. Texas Land, etc., Co.*, 82 Tex. 496.

Virginia. — *Com. v. Brown*, 91 Va. 762.

Washington. — *Karasek v. Peier*, 22 Wash. 419.

West Virginia. — *Heath v. Johnson*, 36 W. Va. 782.

Wyoming. — *Laramie County v. Stone*, 7 Wyo. 280.

Construction of Reference. — A reference to a given article of a code in the title of an amending act will be construed as made to the article of the code as published and not to the article of the same number reported by the revisers but not adopted by the legislature. *English, etc., Mortg., etc., Co. v. Hardy*, 93 Tex. 289.

5. **Insufficient Identification of Act Amended.** — *State v. Mitchell*, 17 Mont. 67; *Hearn v. Louttit*, 42 Oregon 572.

Reference in the title of the amending act to a single section of the act to be amended has

a purpose to amend a specified chapter of the laws of a previous year where such chapter consisted of various sections subject to distinct amendments.¹

(b) **Matters Covered by Title — Provisions Germane to Original Title.** — Where the title of the amending act clearly identifies the act amended, it covers, without specifically referring to them, all provisions germane to the subject expressed in the original title.² And this is true although the amending act have

been held insufficient. *O'Mara v. Wabash R. Co.*, 150 Ind. 648.

1. **Reference to Chapter Only Insufficient.** — *People v. Hills*, 35 N. Y. 449.

2. **Covers Provisions Germane to Original Title — United States.** — *National Bank v. Chester County*, 14 Fed. Rep. 239.

Alabama. — *Street v. Hooten*, 131 Ala. 492; *Mobile, etc., R. Co. v. Pike County*, 97 Ala. 105. *Arkansas.* — *Norman v. Curry*, 27 Ark. 440.

California. — *Carpenter v. Furrey*, 128 Cal. 665; *People v. Parvin*, 74 Cal. 549; *People v. Dobbins*, 73 Cal. 257.

Colorado. — *Heller v. People*, 2 Colo. App. 459.

Florida. — *Potter v. Lainhart*, (Fla. 1902) 33 So. Rep. 251; *Saunders v. Provisional Municipality*, 24 Fla. 226; *Gibson v. State*, 16 Fla. 291.

Georgia. — *Dallis v. Griffin*, (Ga. 1903) 43 S. E. Rep. 758; *Hart v. State*, 113 Ga. 939; *Macon v. Hughes*, 110 Ga. 795; *Newman v. State*, (Ga. 1897) 28 S. E. Rep. 1005; *Clay v. Central R., etc., Co.*, 84 Ga. 345; *Alberson v. Hamilton*, 82 Ga. 30; *Atlanta v. Gate City St. R. Co.*, 80 Ga. 276; *Jones v. Columbus*, 25 Ga. 610; *Robinson v. Darien Bank*, 18 Ga. 89.

Idaho. — *Pioneer Irrigation Dist. v. Bradbury*, (Idaho 1902) 68 Pac. Rep. 295.

Illinois. — *Gage v. Chicago*, 203 Ill. 26; *Morrison v. People*, 196 Ill. 454; *Park v. Modern Woodmen*, 181 Ill. 214.

Indiana. — *Chicago, etc., R. Co. v. State*, 153 Ind. 134; *Lewis v. State*, 148 Ind. 346; *Bell v. Maish*, 137 Ind. 226; *Brandon v. State*, 16 Ind. 197; *Reed v. State*, 12 Ind. 641.

Iowa. — *Iowa Sav., etc., Assoc. v. Selby*, 111 Iowa 402; *State v. Aulman*, 76 Iowa 624; *Morford v. Unger*, 8 Iowa 82.

Kansas. — *John v. Reaser*, 31 Kan. 406.

Kentucky. — *Board of Trustees v. Maysville, etc., R. Co.*, 97 Ky. 145; *Bierly v. Quick Run, etc., Turnpike Road Co.*, (Ky. 1895) 29 S. W. Rep. 874; *Rosenham v. Com.*, (Ky. 1886) 2 S. W. Rep. 230; *Covington v. Voskottter*, 80 Ky. 219; *O'Bannon v. Louisville, etc., R. Co.*, 8 Bush (Ky.) 350.

Louisiana. — *Fullilove v. Police Jury*, 51 La. Ann. 359; *Lafon v. Dufrocq*, 9 La. Ann. 350.

Maryland. — *Annapolis v. State*, 30 Md. 119; *Second German American Bldg. Assoc. v. Newman*, 50 Md. 62.

Michigan. — *Atty.-Gen. v. Bolger*, 128 Mich. 355; *Chipman v. Wayne County Auditors*, 127 Mich. 490; *Fort-St. Union Depot Co. v. Railroad Com'rs*, 118 Mich. 340; *Detroit v. Donovan*, 112 Mich. 317; *Soukup v. Van Dyke*, 109 Mich. 679; *Auditor Gen. v. Bay County*, 106 Mich. 662; *Wardle v. Cummings*, 86 Mich. 395; *Holden v. Osceola County*, 77 Mich. 202; *People v. Pond*, 67 Mich. 98; *People v. Gadway*, 61 Mich. 285, 1 Am. St. Rep. 578; *Powell v. Jackson*, 51 Mich. 129; *Harrington v. Wands*, 23 Mich. 385.

Minnesota. — *McCollister v. Bishop*, 78 Minn.

228; *O'Brien v. St. Croix Boom Corp.*, 75 Minn. 343; *State v. Phillips*, 73 Minn. 77; *Kelly v. Minneapolis*, 57 Minn. 294, 47 Am. St. Rep. 605; *State v. Browne*, 56 Minn. 269; *State v. Bigelow*, 52 Minn. 307; *Willis v. Mabon*, 48 Minn. 140, 31 Am. St. Rep. 626; *State v. Smith*, 35 Minn. 257; *Hoffman v. Parsons*, 27 Minn. 236.

Missouri. — *Cox v. Hannibal, etc., R. Co.*, (Mo. 1903) 74 S. W. Rep. 854; *De Both v. Rich Hill Coal, etc., Co.*, 141 Mo. 497; *Ward v. Board of Equalization*, 135 Mo. 309; *State v. Bennett*, 102 Mo. 356; *State v. Laughlin*, 75 Mo. 358; *State v. Ranson*, 73 Mo. 78; *St. Louis v. Tiefert*, 42 Mo. 578.

Montana. — *State v. Anaconda Copper-Min. Co.*, 23 Mont. 498; *Dowty v. Pittwood*, 23 Mont. 113; *Jobb v. Meagher County*, 20 Mont. 424.

Nebraska. — *State v. Askew*, (Neb. 1902) 90 N. W. Rep. 629; *Howard v. Clay County*, 54 Neb. 443; *State v. Cornell*, 50 Neb. 526; *In re White*, 33 Neb. 812; *Perry v. Gross*, 25 Neb. 826. See also *State v. Kearney*, 49 Neb. 325.

New Jersey. — *McGovern v. Hope*, 63 N. J. L. 76; *Paterson R. Co. v. Grundy*, 51 N. J. Eq. 213; *Lane v. State*, 49 N. J. L. 673; *Vail v. Easton, etc., R. Co.*, 44 N. J. L. 237.

New York. — *Bohmer v. Haffen*, 161 N. Y. 390; *People v. Whitlock*, 92 N. Y. 191; *People v. Kent*, 83 N. Y. App. Div. 554; *People v. Willsea*, 60 N. Y. 507; *Wilcox v. Baker*, 22 N. Y. App. Div. 299; *People v. Webster*, (Supm. Ct. Spec. T.) 8 Misc. (N. Y.) 133.

North Dakota. — *Erickson v. Cass County*, 11 N. Dak. 494; *Eaton v. Guarantee Co.*, 11 N. Dak. 79.

Oregon. — *Ex p. Howe*, 26 Oregon 181; *David v. Portland Water Committee*, 14 Oregon 98.

Pennsylvania. — *Franklin v. Hancock*, 204 Pa. St. 110; *Com. v. Gilligan*, 195 Pa. St. 504; *In re Rodgers*, 192 Pa. St. 97; *Page v. Williamsport Suspender Co.*, 191 Pa. St. 511; *Sugar Notch*, 192 Pa. St. 349; *Com. v. Morgan*, 178 Pa. St. 198; *Com. v. Edgerton Coal Co.*, 164 Pa. St. 284; *Washington v. McGeorge*, 146 Pa. St. 248; *Millvale v. Evergreen R. Co.*, 131 Pa. St. 1; *In re East Grant St.*, 121 Pa. St. 596; *Craig v. Pittsburgh First Presby. Church*, 88 Pa. St. 42, 32 Am. Rep. 417; *State Line, etc., R. Co.'s Appeal*, 77 Pa. St. 429; *Wilson v. Downing*, 40 W. N. C. (Pa.) 342; *Franklin v. Hancock*, 18 Pa. Super. Ct. 398; *Hoffa v. Person*, 1 Pa. Super. Ct. 357.

South Carolina. — *State v. County Treasurer*, 4 S. Car. 520.

Tennessee. — *Ryan v. Louisville, etc., Terminal Co.*, 102 Tenn. 111.

Texas. — *English, etc., Mortg., etc., Inv. Co. v. Hardy*, 93 Tex. 289; *Werner v. Galveston*, 72 Tex. 22; *Johnson v. Martin*, 75 Tex. 33; *Austin v. Austin Gas Light, etc., Co.*, 69 Tex. 180; *Womack v. Gardner*, 10 Tex. Civ. App. 367; *Fieldier v. State*, 40 Tex. Crim. 184; *Fehr v.*

different objects and purposes from those of the act amended.¹

That the Amended Act Is Unconstitutional can have no bearing on the validity of the amending act, so far as relates to the sufficiency of its title.²

Amendment of Both Title and Body of Act. — Where the title of the amending act expresses a purpose to amend the title as well as the body of the original act, it covers all provisions germane to such title as amended.³

Independent Title to Amending Act. — If the title of the amending act itself expresses the subject dealt with, it is sufficient independently of the original title.⁴

(c) **Matters Outside Scope of Title.** — On the other hand, an amending act which embraces independent legislation not suggested by or germane to its own title or that of the act amended is to that extent repugnant to the constitutional provision.⁵

Restricted Title to Amending Act. — Where the title of the amending act contains language making its scope narrower than that of the original act, it will not cover provisions outside such narrowed scope even though they be germane to the subject stated in the original title.⁶ If the title states a purpose to amend

State, 36 Tex. Crim. 93; *Tabor v. State*, 34 Tex. Crim. 631, 53 Am. St. Rep. 726.

Virginia. — *Morgan v. Com.*, 98 Va. 812.

Wisconsin. — *Yellow River Imp. Co. v. Arnold*, 46 Wis. 214; *Mills v. Charleton*, 29 Wis. 400, 9 Am. Rep. 578.

The Repeal of Previous Germane Acts need not be alluded to in the title of the amending act. *Burke v. Monroe County*, 77 Ill. 610; *Gabbert v. Jeffersonville R. Co.*, 11 Ind. 365, 71 Am. Dec. 358; *New Orleans v. Dunbar*, 28 La. Ann. 722; *Washington County v. Franklin R. Co.*, 34 Md. 159; *Yellow River Imp. Co. v. Arnold*, 46 Wis. 214.

1. Purposes of Amending Act Different from Act Amended. — *Clay v. Central R., etc., Co.*, 84 Ga. 345; *Erickson v. Cass County*, 11 N. Dak. 494.

2. Amended Act Unconstitutional. — *Street v. Hooten*, 131 Ala. 492.

3. When Title of Act Amended. — *Beatrice v. Edminson*, (C. C. A.) 117 Fed. Rep. 427. See also *Dyker Meadow Land, etc., Co. v. Cook*, 3 N. Y. App. Div. 164.

But an amendment germane to the title of the amendatory act is valid, although the title of the original act is not amended to correspond. *Cunningham v. Griffin*, 107 Ga. 690.

4. Independent Title. — *Schmalz v. Wooley*, 57 N. J. Eq. 303; *Com. v. Gilligan*, 10 Kulp (Pa.) 117. And see *Morris, etc., R. Co. v. Jersey City*, 63 N. J. Eq. 45.

5. Matters Outside Scope of Title. — *United States.* — *Omaha v. Union Pac. R. Co.*, (C. C. A.) 73 Fed. Rep. 1013; *Case v. Loftus*, 43 Fed. Rep. 839.

Alabama. — *Mobile v. Louisville, etc., R. Co.*, 124 Ala. 132; *Harper v. State*, 109 Ala. 28; *Rice v. Westcott*, 108 Ala. 353; *Wolf v. Taylor*, 98 Ala. 254; *Ex p. Cowert*, 92 Ala. 94.

California. — *People v. Curry*, 130 Cal. 82; *In re Werner*, 129 Cal. 567.

Colorado. — *People v. Fleming*, 7 Colo. 230.

Florida. — *Webster v. Powell*, 36 Fla. 703.

Georgia. — *Johnson v. Jones*, 87 Ga. 85.

Iowa. — *Rex Lumber Co. v. Reed*, 107 Iowa 111; *Williamson v. Keokuk*, 44 Iowa 88.

Kansas. — *Shepherd v. Shepherd*, 4 Kan. App. 546.

Kentucky. — *Parkland v. Gaines*, 88 Ky. 562; *Wulftonge v. McCollom*, 83 Ky. 361.

Louisiana. — *State v. Everage*, 33 La. Ann. 123.

Michigan. — *Grosvenor v. Duffy*, 121 Mich. 220; *Fish v. Stockdale*, 111 Mich. 46; *Eaton v. Walker*, 76 Mich. 579; *Ellis v. Hutchinson*, 70 Mich. 154; *Losch v. St. Charles*, 65 Mich. 555; *Church v. Detroit*, 64 Mich. 571; *Stewart v. Young Men's Father Mathew Total Abstinence Ben. Soc. No. 1*, 41 Mich. 67.

Missouri. — *State v. Heege*, 135 Mo. 112.

Nebraska. — *Tecumseh v. Phillips*, 5 Neb. 305; *White v. Lincoln*, 5 Neb. 506; *Burlington, etc., R. Co. v. Saunders County*, 9 Neb. 507; *West Point Water Power, etc., Imp. Co. v. State*, 49 Neb. 223; *State v. Cornell*, 50 Neb. 526; *State v. Bowen*, 54 Neb. 211; *Webster v. Hastings*, 59 Neb. 563; *Armstrong v. Mayer*, 60 Neb. 423; *Union Pac. R. Co. v. Sprague*, (Neb. 1903) 95 N. W. Rep. 46.

Nevada. — *State v. Washoe County*, 22 Nev. 399.

New Jersey. — *Hann v. Bedell*, 67 N. J. L. 148; *Walling v. Deckertown*, 64 N. J. L. 203; *Plainfield v. Hall*, 61 N. J. L. 437; *Schmalz v. Wooley*, 56 N. J. Eq. 649; *Mack v. State*, 60 N. J. L. 28; *Falkner v. Dorland*, 54 N. J. L. 409; *Montclair Tp. v. New York, etc., R. Co.*, 45 N. J. Eq. 436.

New York. — *Parfitt v. Furguson*, 159 N. Y. 111; *Rochester v. Bloss*, 77 N. Y. App. Div. 28; *Rogers v. Union R. Co.*, (Supm. Ct. Spec. T.) 10 Misc. (N. Y.) 57.

Oregon. — *State v. Wright*, 14 Oregon 365.

Pennsylvania. — *Mt. Joy v. Lancaster, etc., Turnpike Co.*, 182 Pa. St. 581; *Payne v. School Dist.*, 168 Pa. St. 386; *Davey v. Ruffell*, 162 Pa. St. 443; *Union Pass. R. Co.'s Appeal*, 81* Pa. St. 91; *Sugar Notch Div.*, 7 Pa. Super. Ct. 4; *South Bethlehem v. Hemingway*, 16 Pa. Co. Ct. 103; *Hamburger v. Freedman*, 20 Pa. Co. Ct. 1, 6 Pa. Dist. 693; *Com. v. Hudusko*, 10 Pa. Dist. 230; *Purefoy v. Brown*, 2 Pa. Dist. 821.

Texas. — *Adams v. San Angelo Waterworks Co.*, 86 Tex. 485.

Washington. — *Percival v. Cowychee, etc., Irrigation Dist.*, 15 Wash. 480.

6. Restricted Title to Amending Act. — *In re Consolidation of School Dist.*, 23 Colo. 499; *State v. Tibbets*, 52 Neb. 228, 66 Am. St. Rep. 492; *Corscadden v. Haswell*, (Supm. Ct. Spec.

a specified section of a prior act, it will not cover a provision foreign to the subject of that section although such provision be germane to the general subject of the act.¹

(6) *Repealing Acts*. — An act whose title expresses a purpose merely to repeal previous statutes cannot embrace in its body new and affirmative legislation.² But, of course, this is permissible where the title expresses a purpose to include such legislation.³

(7) *How Far Defective Title Vitiates Act* — (a) *When Void in Part Only*. — In some of the constitutional provisions it is declared that an act whose title does not sufficiently express its subject shall be void only as to the part not expressed in the title.⁴ This declaration, however, does not affect the force of the provision, since the courts are accustomed to hold, whether or not the constitution so directs, that those provisions which fall within the scope of the title are valid, unless so connected with the invalid part in subject-matter, meaning, or purpose that it cannot be presumed the legislature would have passed the one without the other.⁵

T.) 41 Misc. (N. Y.) 61; Rochester v. Bloss, 77 N. Y. App. Div. 28; Philadelphia v. Spring Garden Farmers' Market Co., 161 Pa. St. 522.

1. *Amendment of Specified Section*. — State v. Davis, 130 Ala. 148; State v. Bankers', etc., Mut. Ben. Assoc., 23 Kan. 499; Wisner v. Monroe, 25 La. Ann. 598; State v. Tibbetts, 52 Neb. 228, 66 Am. St. Rep. 492.

2. *Cannot Contain Affirmative Legislation*. — Chicago, etc., R. Co. v. Smyth, 103 Fed. Rep. 376; *Ex p.* Upshaw, 45 Ala. 234; People v. Mellen, 32 Ill. 181; State v. Sholl, 58 Kan. 507; *In re* Winn, 8 Kan. App. 858, 54 Pac. Rep. 516; State v. Benzinger, 83 Md. 481; Stiefel v. Maryland Inst. for Blind, 61 Md. 144. Compare Talbot County v. Queen Anne's County, 50 Md. 245.

The Date of Approval or Passage of the Act Repealed need not be inserted in the title of the repealing act. Moore v. Burdett, 62 N. J. L. 163.

3. *New Provisions Indicated in Title*. — McGrath v. State, 46 Md. 631.

4. See the constitutional provisions. And see, for example, Donnersberger v. Prendergast, 128 Ill. 229; Indiana Cent. R. Co. v. Potts, 7 Ind. 681; Clark v. Finley, 93 Tex. 171; Shields v. Bennett, 8 W. Va. 74.

5. *Void Only as to Provisions Outside Title* — United States. — Skinner v. Garnett Gold-Min. Co., 96 Fed. Rep. 735.

Alabama. — State v. Davis, 130 Ala. 148; *Ex p.* Cowert, 92 Ala. 94; *Ex p.* Moore, 62 Ala. 471; Boyd v. State, 53 Ala. 601; Walker v. State, 49 Ala. 329.

California. — Johnson v. Tautphaus, 127 Cal. 605.

Delaware. — Equitable Guarantee, etc., Co. v. Donahoe, 3 Penn. (Del.) 191.

Florida. — State v. Palmes, 23 Fla. 620. See also State v. Green, 36 Fla. 154.

Georgia. — Savannah v. State, 4 Ga. 26; Prothro v. Orr, 12 Ga. 36.

Illinois. — Donnersberger v. Prendergast, 128 Ill. 234; Welch v. Post, 99 Ill. 471; Middleport v. Atna L. Ins. Co., 82 Ill. 562.

Kansas. — *In re* Winn, 8 Kan. App. 858, 54 Pac. Rep. 516.

Kentucky. — Fuqua v. Mullen, 13 Bush (Ky.) 467; Jones v. Thompson, 12 Bush (Ky.) 394; Chiles v. Monroe, 4 Met. (Ky.) 72.

Louisiana. — State v. Kohnke, 109 La. 838; State v. Read, 49 La. Ann. 1535; Williams v. Payson, 14 La. Ann. 7; Municipality No. Three v. Michoud, 6 La. Ann. 605.

Maryland. — Baltimore v. Reitz, 50 Md. 574; Stiefel v. Maryland Inst. for Blind, 61 Md. 144.

Michigan. — Manistee, etc., R. Co. v. Railroad Com'rs, 118 Mich. 349; Graham v. Fleming, 116 Mich. 571.

Minnesota. — State v. Sullivan, 72 Minn. 126.

Montana. — State v. Courtney, 27 Mont. 378.

Nebraska. — Union Pac. R. Co. v. Sprague, (Neb. 1903) 95 N. W. Rep. 46; Wenham v. State, (Neb. 1902) 91 N. W. Rep. 421; State v. Stuhrt, 52 Neb. 209; Tecumseh v. Phillips, 5 Neb. 305.

Nevada. — State v. Beck, 25 Nev. 68.

New Jersey. — Hickman v. State, 62 N. J. L. 499, affirmed 63 N. J. L. 666; Van Riper v. North Plainfield Tp., 43 N. J. L. 349; Union Tp. v. Rader, 39 N. J. L. 509.

New York. — Bohmer v. Haffen, 161 N. Y. 390; Matter of Metropolitan Gas-light Co., 85 N. Y. 526; Matter of Sackett, etc., Sts., 74 N. Y. 95; People v. Briggs, 50 N. Y. 553; Huber v. People, 49 N. Y. 132; People v. O'Brien, 38 N. Y. 193; Harris v. Niagara County, 33 Hun (N. Y.) 279; People v. Morgan, 65 Barb. (N. Y.) 473; Smith v. New York, (N. Y. Super. Ct. Spec. T.) 34 How. Pr. (N. Y.) 508; Phillips v. New York, 1 Hilt. (N. Y.) 483.

Pennsylvania. — Com. v. Moir, 199 Pa. St. 534; Union Pass. R. Co.'s Appeal, 81* Pa. St. 91; Allegheny County Home's Case, 77 Pa. St. 77; Dorsey's Appeal, 72 Pa. St. 192; Com. v. Ayers, 17 Pa. Super. Ct. 352; Com. v. Hartman, 19 Pa. Co. Ct. 97.

Texas. — Clark v. Finley, 93 Tex. 171; Albrecht v. State, 8 Tex. App. 216, 34 Am. Rep. 737.

Utah. — Ritchie v. Richards, 14 Utah 345.

Virginia. — Lacey v. Palmer, 93 Va. 159, 57 Am. St. Rep. 795; Cahoon v. Iron Gate Land, etc., Co., 92 Va. 367.

Washington. — Jolliffe v. Brown, 14 Wash. 155, 53 Am. St. Rep. 868.

In Tennessee, however, it seems to be the rule that if any provisions of the act are outside the scope of the title, the whole act is void. Third Nat. Bank v. Divine Grocery Co., 97 Tenn. 603; Murphy v. State, 9 Lea (Tenn.) 373; State v.

(b) **When Wholly Void.** — But the part of the act within the title cannot be allowed to stand unless by so doing the legislative intent will be carried out. Where the invalid portion cannot be separated as a distinct thing, or it is apparent that without such portion the legislature would not have enacted the remainder, the whole act must be declared void.¹

Where Subject Not Expressed at All. — And so, where the title is so misleading as not to express at all the object of the act, the whole must fall, since, in such case, it cannot be said that any of the act is within the title.²

Where the Act Contains but a Single Provision which is broader than the title, the court cannot narrow and change the ordinary meaning of the words employed in the act so as to sustain it as to cases falling within the title.³

10. Other Constitutional Questions. — A number of questions involving the constitutionality of statutes when considered in regard to particular provisions of constitutions are considered in other parts of this title.⁴

VI. PRINCIPLES OF INTERPRETATION AND CONSTRUCTION — 1. Meaning of Terms. — The technical distinction sometimes taken between the meanings of the words "construction" and "interpretation" has already been explained,⁵ but no practical benefit seems to flow from retaining a distinction rarely observed by the courts or text writers, and in this title the terms will be used indifferently to signify the process of getting at the meaning of a statute, whether by a study of the words of the act itself, or, when this does not suffice, by the employment of external aids which throw light on its true sense.

A Canon or Rule of Construction has been said never to create an inflexible rule of law, but merely to raise a presumption in favor of a particular meaning in case of ambiguity, and to be always capable of expression in this form: "If a given proposition or phrase A may mean B, C, or D, it must be taken to mean B when occurring in an act relating to a particular subject, unless the context (or the circumstances under which the act was passed so far as they may be proved or judicially noticed) exclude that meaning."⁶

McCann, 4 Lea (Tenn.) 1; Knoxville v. Lewis, 12 Lea (Tenn.) 180. And see Bugher v. Prescott, 23 Fed. Rep. 20, which follows the Tennessee decisions.

1. Whole Act Void When Not Separable — *Alabama.* — Randolph v. Builders, etc., Supply Co., 106 Ala. 501; *Yerby v. Cochran*, 101 Ala. 541.

Georgia. — Elliott v. State, 91 Ga. 694.

Illinois. — People v. Martin, 178 Ill. 611.

Louisiana. — State v. Walker, 105 La. 492.

Maryland. — State v. Benzinger, 83 Md. 481.

Michigan. — Blades v. Water Com'rs, 122 Mich. 366.

Nebraska. — State v. Lancaster County, 6 Neb. 474.

New Jersey. — Hann v. Bedell, 67 N. J. L. 148.

New York. — Webb v. New York, (Supm. Ct. Spec. T.) 64 How. Pr. (N. Y.) 10.

Repealing Act Containing Affirmative Legislation. — Where the title of an act stated that its sole object was to repeal existing laws, but affirmative legislation was contained in the body of the act, it was held that such portion being void because not expressed in the title, the repealing clause must also fall, since to allow it to stand would result in striking down all the laws on the subject, leaving nothing in their stead, which was obviously not the intention of the legislature. *State v. Benzinger*, 83 Md. 481.

2. Subject Not Expressed at All. — *State v. Walker*, 105 La. 492.

3. Court Cannot Narrow Meaning of Words. — *Matter of Paul*, 94 N. Y. 497. In this case the title used the expression "tenement houses," but the body of the act professed to deal with all "dwelling houses." The court held that the act was wholly void and could not be narrowed to the case of tenement houses.

4. Such, for instance, are, under constitutional provisions, the constitutionality of acts amending and repealing general and special laws. See *infra*, this title, VIII. *Amendment*; IX. *Repeal*; and VII. 3. *General and Special Laws*.

5. See CONSTRUCTION, vol. 7, p. 2; and the titles CONSTITUTIONAL LAW, vol. 6, p. 920; INTERPRETATION AND CONSTRUCTION, vol. 17, p. 2.

The Construction of Various Words and Phrases Used in Statutes will be found under appropriate heads throughout this work.

6. Nature of Rules of Construction. — *Hardcastle Stat. Law* (3d ed.), p. 10. See also *Elphinstone Interp. of Deeds*, preface, and *infra*, this section, *Object and General Scope of Doctrine*.

"A rigid rule of construction is a contradiction in terms. If it does not yield to an evident contrary intention, it is a rule of law and not of construction." Sir F. Pollock, 4 Law Quar. Rev. 488.

It has been said to be "safer to abstain from imposing with regard to acts of Parliament any further canons of construction than those applicable to all documents." Bowen, L. J., in *Lamplugh v. Norton*, 22 Q. B. D. 459.

2. Construction a Judicial Function. — It is the province of courts to decide what the law is or has been, and to determine its application to particular facts in the decision of causes.¹ They must declare the law as it is, but they should not under a pretense of construction encroach upon the legislative function of making laws for the future.²

3. Object and General Scope of Doctrine. — The object of all interpretation and construction of statutes is to ascertain and carry out the intention of the lawmakers, and when the intention is ascertained it must always govern.³ The intention of the legislature must be sought in the statute itself,⁴ and it is only when the act is of doubtful or ambiguous meaning that the province of construction or interpretation begins.⁵ The whole of the following pages dealing with construction is but an amplification of these principles.

1. Construction for Court. — *Fairbanks v. Woodhouse*, 6 Cal. 434; *Ratliffe v. Anderson*, 31 Gratt. (Va.) 107, 31 Am. Rep. 716; *State v. Superior Ct.*, 25 Wash. 271; *Shepherd v. Wheeling*, 30 W. Va. 479. See also the titles CONSTITUTIONAL LAW, vol. 6, pp. 1052, 1053, and note 2; EVIDENCE, vol. 11, p. 496; and *infra*, this section, 10. b. (2) *Contemporaneous Exposition and Long Usage*; (4) *Legislative Construction*.

In Thayer's Preliminary Treatise on Evidence, p. 215, it is said: "So far as the phrases to be defined occur in contracts or similar writings, they become subject to the rule already mentioned, that the construction of writings is matter for the court. So far as they are found in statutes or our American constitutions, the courts have control of the definition not merely on this ground, but on another, namely, that it is one of those incidental questions, relating to a law, which, being attracted to the main one, are themselves regarded as questions of law." See also *op. cit.* 193.

2. Courts Must Not Legislate. — *Henry, etc., Co. v. Evans*, 97 Mo. 47. See also the title CONSTITUTIONAL LAW, vol. 6, p. 1032, and *infra*, this section, *Object and General Scope of Doctrine*.

3. Legislative Intent the Object of Interpretation — *England*. — *Mountjoye's Case*, 5 Coke 6; *Pray v. Edie*, 1 T. R. 313.

United States. — *U. S. v. Fisher*, 2 Cranch (U. S.) 399; *Eureka Consol. Min. Co. v. Richmond Min. Co.*, 4 Sawy. (U. S.) 302.

Arkansas. — *Ex p. Trapnall*, 6 Ark. 9, 42 Am. Dec. 676.

California. — *Tynan v. Walker*, 35 Cal. 634, 95 Am. Dec. 152; *French v. Teschemaker*, 24 Cal. 553.

Connecticut. — *State v. McMahon*, 53 Conn. 407, 55 Am. Rep. 140.

Georgia. — *Keener v. State*, 18 Ga. 194, 63 Am. Dec. 269.

Illinois. — *Anderson v. Chicago, etc.*, R. Co., 117 Ill. 26.

Indiana. — *Spencer v. State*, 5 Ind. 56; *Taylor v. Washington County*, 67 Ind. 383; *Clare v. State*, 68 Ind. 17; *State v. Forkner*, 70 Ind. 241; *Robinson v. Schenck*, 102 Ind. 307; *Storms v. Stevens*, 104 Ind. 46; *Middleton v. Greenson*, 106 Ind. 18; *Miller v. State*, 106 Ind. 415; *Evansville v. Summers*, 108 Ind. 192.

Iowa. — *Noble v. State*, 1 Greene (Iowa) 325.

Kansas. — *Fitzpatrick v. Gebhart*, 7 Kan. 35.

Louisiana. — *Denton v. Reading*, 22 La. Ann. 607.

Maryland. — *Hess v. Poultney*, 10 Md. 257; *Scaggs v. Baltimore, etc.*, R. Co., 10 Md. 268; *Parkinson v. State*, 14 Md. 184, 74 Am. Dec. 522.

Massachusetts. — *Cleaveland v. Norton*, 6 Cush. (Mass.) 380; *Com. v. Kimball*, 24 Pick. (Mass.) 366.

Mississippi. — *New Orleans, etc.*, R. Co. v. Hemphill, 35 Miss. 17; *Bonds v. Greer*, 56 Miss. 716.

Missouri. — *Ex p. Marmaduke*, 91 Mo. 228, 60 Am. Rep. 250; *Grimes v. Reynolds*, 94 Mo. App. 584.

Nevada. — *Virginia, etc.*, R. Co. v. Lyon County, 6 Nev. 68.

New York. — *Burch v. Newbury*, 10 N. Y. 390; *McCluskey v. Cromwell*, 11 N. Y. 601; *People v. New York Cent. R. Co.*, 13 N. Y. 78; *Smith v. People*, 47 N. Y. 330; *People v. Tax Com'rs*, 95 N. Y. 554; *Purdy v. People*, 4 Hill (N. Y.) 397; *Waller v. Harris*, 20 Wend. (N. Y.) 561, 32 Am. Dec. 590.

Ohio. — *Slingluff v. Weaver*, 66 Ohio St. 621.

For Statements and Illustrations of This Rule, see AND, vol. 2, p. 333 *et seq.* ("or" read "and" or *vice versa*), and the titles EXEMPTIONS (FROM EXECUTION), vol. 12, p. 75; HOME-STEAD, vol. 15, p. 533.

4. Courts Must Find the Intent of the Legislature in the Statute Itself. — *U. S. v. Trans-Missouri Freight Assoc.*, 166 U. S. 318; *State v. Lancashire F. Ins. Co.*, 66 Ark. 466; *Tynan v. Walker*, 35 Cal. 634, 95 Am. Dec. 152.

"Intention of the legislature" is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact it. In a court of law or equity, what the legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication." Lord Watson in *Salomon v. Salomon*, (1897) A. C. 38.

5. The First General Maxim of Interpretation is, that it is not permitted to interpret what has no need of interpretation. Vattel, *Law of Nations*, b. 2, § 263.

When applied to a statute whose "meaning is unequivocally expressed, the necessity for rules of construction disappears and reaches its vanishing point." Bowen, L. J., in *London, etc.*, R. Co. v. Evans, (1893) 1 Ch. 27.

In *Hamilton v. Rathbone*, 175 U. S. 421,

4. Whether Intention Deduced from Letter or Spirit of Statute — a. WHERE MEANING PLAIN, THE LETTER CONTROLS — (1) *General Statement.* — In order to ascertain the legislative intention, the primary rule is that a statute is to receive that meaning which the ordinary reading of its language warrants,¹ words not technical being taken in their ordinary, familiar acceptation, with regard to their general and popular use; and the meaning thus arrived at must be adopted when it involves no absurdity, if from a view of the whole law and other laws *in pari materia* no different legislative intent is apparent.²

(2) *Results, Motives, and Policy Not Considered.* — If the language is clear and admits but one meaning, the legislature should be intended to mean what it has plainly expressed, and there is no room for construction.³ The

Brown, J., said: "The cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary."

Any Departure by the Courts from the Language Used would be an unjustifiable assumption of legislative power. *Foley v. People*, 1 Ill. 57; *Frye v. Chicago, etc., R. Co.*, 73 Ill. 399; *Newell Universal Mill Co. v. Muxlow*, 115 N. Y. 170. And it is the function of the courts to interpret legislation according to the real sense of the words employed; not to supply its omissions, or to render the sense reasonable. *Everett v. Wells*, 2 Scott N. R. 531; *Biffin v. Yorke*, 6 Scott N. R. 234, 5 M. & G. 428, 44 E. C. L. 228; *Joseph v. Montreal*, 10 Quebec Super. Ct. 536; *Barstow v. Smith, Walk. (Mich.)* 394; *McCluskey v. Cromwell*, 11 N. Y. 601; *Woodbury v. Berry*, 18 Ohio St. 462; *Gorham v. Steinau*, 10 Ohio Dec. 131, 7 Ohio N. P. 478; *In re School Directors*, 5 Pa. Dist. 751.

Speculation Not Admissible Beyond Import of Words. — "What the legislative intention was can be derived only from the words they have used, and we cannot speculate beyond the reasonable import of these words; the spirit of the act must be extracted from the words of the act and not from conjectures *alunde*." *Per Story, J., in Gardner v. Collins*, 2 Pet. (U. S.) 93; *Brewer v. Blougher*, 14 Pet. (U. S.) 178; *People v. Greene County*, (Supm. Ct. Spec. T.) 13 Abb. N. Cas. (N. Y.) 424.

1. Ordinary Reading of Statute Controls Primarily. — *Anglo-American Provision Co. v. Davis Provision Co.*, 169 N. Y. 565, 88 Am. St. Rep. 608; *People v. Keller*, 35 N. Y. App. Div. 500.

2. Words to Be Taken in Ordinary Acceptation — *England.* — *Rex v. Pease*, 4 B. & Ad. 31, 24 E. C. L. 17; *Rex v. Turvey*, 2 B. & Ald. 522; *Becke v. Smith*, 2 M. & W. 195; *Everett v. Wells*, 2 M. & G. 269, 40 E. C. L. 366; *Smith v. Lindo*, 4 C. B. N. S. 409, 93 E. C. L. 409; *Macdougall v. Paterson*, 11 C. B. 755, 73 E. C. L. 755; *Mallan v. May*, 13 M. & W. 511; *Mattison v. Hart*, 14 C. B. 385, 78 E. C. L. 385; *Grey v. Pearson*, 6 H. L. Cas. 106; *Abbott v. Middleton*, 7 H. L. Cas. 68; *Atty.-Gen. v. Mutual Tontine Westminster Chambers Assoc.*, 1 Ex. D. 476; *Cull v. Austin*, L. R. 7 C. P. 234; *Reg. v. Castro*, L. R. 9 Q. B. 360.

United States. — *U. S. v. Fisher*, 2 Cranch (U. S.) 399; *Levy v. M'Cartee*, 6 Pet. (U. S.) 102; *Maillard v. Lawrence*, 16 How. (U. S.) 251; *Martin v. Hunter*, 1 Wheat. (U. S.) 326;

Schrieffer v. Wood, 5 Blatchf. (U. S.) 215; *U. S. v. Collier*, 3 Blatchf. (U. S.) 332.

California. — *Quigley v. Gorham*, 5 Cal. 418, 63 Am. Dec. 139; *Weill v. Kenfield*, 54 Cal. 111.

Georgia. — *Keener v. State*, 18 Ga. 194, 63 Am. Dec. 269.

Illinois. — *Steele v. Brownell*, 124 Ill. 27.

Indiana. — *Evansville v. Summers*, 108 Ind. 192.

Kentucky. — *Bailey v. Com.*, 11 Bush (Ky.) 688.

Maryland. — *Parkinson v. State*, 14 Md. 184, 74 Am. Dec. 522; *Clark v. Baltimore*, 29 Md. 283.

New Jersey. — *State v. Engle*, 21 N. J. L. 354; *State v. Brewster*, 42 N. J. L. 125.

New York. — *Johnson v. Hudson River R. Co.*, 49 N. Y. 455; *People v. Tax Com'rs*, 95 N. Y. 554; *Jackson v. Lewis*, 17 Johns. (N. Y.) 475; *People v. Tighe*, 5 Hun (N. Y.) 26; *Clark v. Utica*, 18 Barb. (N. Y.) 451.

Oregon. — *Baker v. Payne*, 22 Oregon 335.

Pennsylvania. — *Gyger's Estate*, 65 Pa. St. 311; *Fisher v. Connard*, 100 Pa. St. 63.

South Carolina. — *Cummings v. Coleman*, 7 Rich. Eq. (S. Car.) 509, 62 Am. Dec. 402.

Tennessee. — *State v. Clarksville, etc., Turnpike Co.*, 2 Sneed (Tenn.) 88.

Texas. — *Murray v. State*, 21 Tex. App. 620, 57 Am. Rep. 623.

Utah. — *Miles v. Wells*, 22 Utah 55.

See also *infra*, this section, 5. a. *Popular Meaning Presumed.*

3. Unambiguous Meaning Must Be Enforced — *England.* — *York, etc., R. Co. v. Reg.*, 1 El. & Bl. 864, 72 E. C. L. 864; *Rex v. Banbury*, 1 Ad. & El. 142, 28 E. C. L. 57.

Canada. — *Kinney v. Plunkett*, 26 Nova Scotia 158.

United States. — *U. S. v. Fisher*, 2 Cranch (U. S.) 386; *Clay v. Erhardt*, 48 Fed. Rep. 293; *U. S. v. Hartwell*, 6 Wall. (U. S.) 395; *U. S. v. Wiltberger*, 5 Wheat. (U. S.) 95; *Swarts v. Siegel*, (C. C. A.) 117 Fed. Rep. 13; *Johnson v. Southern Pac. R. Co.*, (C. C. A.) 117 Fed. Rep. 462.

California. — *Tynan v. Walker*, 35 Cal. 634, 95 Am. Dec. 152.

District of Columbia. — *Western Union Tel. Co. v. Hewett*, 4 Mackey (D. C.) 424.

Florida. — *Pitt v. Acosta*, 18 Fla. 270.

Illinois. — *Deere v. Chapman*, 25 Ill. 610, 79 Am. Dec. 350; *Stuart v. Hamilton*, 66 Ill. 253; *Frye v. Chicago, etc., R. Co.*, 73 Ill. 399; *Beardstown v. Virginia*, 76 Ill. 34; *Martin v. Swift*, 120 Ill. 489.

plain and sound principle is to declare *ita lex scripta est*, although so understood the statute leads to absurd and mischievous results, or to consequences not contemplated by the legislature; for courts are not to inquire as to the motive of the legislature, nor to depart from a meaning clearly conveyed in unambiguous words, because the statute, as literally understood, appears to lead to unwise consequences or to contravene public policy.¹ *A fortiori*,

Indiana.—Case *v. Wildridge*, 4 Ind. 51.
Kansas.—Matter of Hinkle, 31 Kan. 712.
Kentucky.—Gains *v. Gains*, 2 A. K. Marsh. (Ky.) 190, 12 Am. Dec. 375.

Louisiana.—Walker *v. Vicksburg*, etc., R. Co., (La. 1903) 34 So. Rep. 749.

Maine.—Swift *v. Luce*, 27 Me. 285; Davis *v. Randall*, 97 Me. 36.

Maryland.—Allen *v. Mutual F. Ins. Co.*, 2 Md. 111; Maxwell *v. State*, 40 Md. 293; Cearfoss *v. State*, 42 Md. 403; Smith *v. State*, 66 Md. 215.

Massachusetts.—Pearce *v. Atwood*, 13 Mass. 324.

Michigan.—Bidwell *v. Whitaker*, 1 Mich. 479.

Mississippi.—Kilpatrick *v. Byrne*, 25 Miss. 571; Green *v. Weller*, 32 Miss. 652; Koch *v. Bridges*, 45 Miss. 252.

Missouri.—Selden *v. Hall*, 21 Mo. App. 452; St. Louis, etc., R. Co. *v. Clark*, 53 Mo. 214.

Nevada.—Virginia, etc., R. Co. *v. Lyon County*, 6 Nev. 68.

New Jersey.—Camden, etc., R., etc., Co. *v. Commissioners of Appeal*, 18 N. J. L. 71; Townsend *v. Brown*, 24 N. J. L. 80; Rudderow *v. State*, 31 N. J. L. 512; Douglass *v. Chosen Freeholders*, 38 N. J. L. 214; Dodge *v. Love*, 49 N. J. L. 235; Woodruff *v. State*, (N. J. 1902) 52 Atl. Rep. 294.

New York.—Newell *v. People*, 7 N. Y. 97; McCluskey *v. Cromwell*, 11 N. Y. 601; Johnson *v. Hudson River R. Co.*, 49 N. Y. 455; Benton *v. Wickwire*, 54 N. Y. 226; Rosenplaenter *v. Roessle*, 54 N. Y. 262; Furey *v. Gravesend Tp.*, 104 N. Y. 405; People *v. Schoonmaker*, 63 Barb. (N. Y.) 49.

Ohio.—Woodbury *v. Berry*, 18 Ohio St. 456; Slingluff *v. Weaver*, 66 Ohio St. 621.

Oklahoma.—Patterson *v. Wilson*, 11 Okla. 79.

Pennsylvania.—Rich *v. Keyser*, 54 Pa. St. 86; Bradbury *v. Wagenhorst*, 54 Pa. St. 182.

Wisconsin.—Encking *v. Simmons*, 28 Wis. 272.

1. **When Meaning Plain, Consequences and Motives Not to Be Considered**—*England*.—Palmer *v. Thatcher*, 3 Q. B. D. 353; Richards *v. McBride*, 8 Q. B. D. 119; Reg. *v. Tonbridge Overseers*, 13 Q. B. D. 342; Reg. *v. Damarell*, L. R. 3 Q. B. 50; Green *v. Wood*, 7 Q. B. 185, 53 E. C. L. 185; Reg. *v. Skeen*, 28 L. J. M. C. 91; Richards *v. McBride*, 8 Q. B. D. 119, 51 L. J. M. C. 15; Culverson *v. Melton*, 12 Ad. & El. 753, 40 E. C. L. 184; Henry *v. Trinity House*, 8 El. & Bl. 723, 92 E. C. L. 723; Coxhead *v. Mullis*, 3 C. P. D. 439; Abel *v. Lee*, L. R. 6 C. P. 371; *In re British Farmers' Pure Linseed Cake Co.*, 48 L. J. Ch. 56; Nixon *v. Phillips*, 7 Exch. 192; Abley *v. Dale*, 11 C. B. 391, 73 E. C. L. 391; Rex *v. Watson*, 7 East 214; Rex *v. Shropshire*, 7 East 549; Rex *v. Staffordshire*, 12 East 572; Archer *v. James*, 2 B. & S. 87, 110 E. C. L. 87; Reg. *v. Sussex*, 4 B. & S. 966, 116

E. C. L. 966; Rex *v. Hodnett*, 1 T. R. 100; Pray *v. Edie*, 1 T. R. 313; Miller *v. Salomons*, 7 Exch. 475; *Ex p. Attwater*, 5 Ch. D. 30; Ornamental Pyrographic Woodwork Co. *v. Brown*, 2 H. & C. 63; Biffin *v. Yorke*, 5 M. & G. 437; Crawford *v. Spooner*, 6 Moo. P. C. 9; Rothes *v. Kirkcaldy*, etc., Water-works Com'rs, 7 App. Cas. 702; Municipal Permanent Invest. Bldg. Soc. *v. Kent*, 9 App. Cas. 273; Philpott *v. St. George's Hospital*, 6 H. L. Cas. 338; Rex *v. Barham*, 8 B. & C. 104, 15 E. C. L. 157; Notley *v. Buck*, 8 B. & C. 164, 15 E. C. L. 178; Gwynne *v. Burnell*, 6 Bing. N. Cas. 453, 37 E. C. L. 451; Labrador Co. *v. Reg.*, (1893) A. C. 123.

Canada.—Re Goodhue, 19 Grant Ch. (U. C.) 384; Toronto, etc., R. Co. *v. Crookshank*, 4 U. C. Q. B. 318.

United States.—U. S. *v. Fisher*, 2 Cranch (U. S.) 399; St. Paul, etc., R. Co. *v. Phelps*, 137 U. S. 528; Bate Refrigerating Co. *v. Sulzberger*, 157 U. S. 1; Union Pac. R. Case, 10 Ct. Cl. 548; Hadden *v. Collector*, 5 Wall. (U. S.) 107; Doe *v. Considine*, 6 Wall. (U. S.) 458; Sturges *v. Crownshield*, 4 Wheat. (U. S.) 202; Calder *v. Bull*, 3 Dall. (U. S.) 399; Priestman *v. U. S.*, 4 Dall. (U. S.) 28; U. S. *v. Warner*, 4 McLean (U. S.) 463; Webber *v. St. Paul City R. Co.*, (C. C. A.) 97 Fed. Rep. 140; Southern R. Co. *v. Machinists' Local Union No. 14*, 111 Fed. Rep. 49; Union Cent. L. Ins. Co. *v. Champlin*, (C. C. A.) 116 Fed. Rep. 858.

Alabama.—Horton *v. Mobile School Com'rs*, 43 Ala. 598; Maxwell *v. State*, 89 Ala. 150.

Arkansas.—Scott *v. State*, 22 Ark. 369; Bennett *v. Worthington*, 24 Ark. 494; Reynolds *v. Holland*, 35 Ark. 56.

Colorado.—Cooke *v. School Dist. No. 12*, 12 Colo. 458; Cheyenne County *v. Bent County*, 15 Colo. 326.

Connecticut.—Farrel Foundry *v. Dart*, 26 Conn. 376.

Georgia.—Flint River Steamboat Co. *v. Foster*, 5 Ga. 194, 48 Am. Dec. 248; Winter *v. Jones*, 10 Ga. 190, 54 Am. Dec. 379.

Illinois.—St. Louis, etc., R. Co. *v. Postal Tel. Co.*, 173 Ill. 528; McGann *v. People*, 97 Ill. App. 591.

Indiana.—Bepley *v. State*, 4 Ind. 264, 58 Am. Dec. 628; Wright *v. Defrees*, 8 Ind. 298.

Iowa.—Burlington, etc., R. Co. *v. Dey*, 82 Iowa 312, 31 Am. St. Rep. 477.

Kansas.—Dudley *v. Reynolds*, 1 Kan. 285; Fitzpatrick *v. Gebhart*, 7 Kan. 35.

Kentucky.—Sneed *v. Com.*, 6 Dana (Ky.) 339; Bosley *v. Mattingly*, 14 B. Mon. (Ky.) 73.

Maine.—Coffin *v. Rich*, 45 Me. 507, 71 Am. Dec. 559; Clark *v. Maine Shore Line R. Co.*, 81 Me. 477.

Maryland.—Collins *v. Carman*, 5 Md. 530; Hawbecker *v. Hawbecker*, 43 Md. 516.

Massachusetts.—Langdon *v. Potter*, 3 Mass. 221; Gore *v. Brazier*, 3 Mass. 539, 3 Am. Dec. 182; Ayers *v. Knox*, 7 Mass. 306; Adams *v. Howe*, 14 Mass. 341, 7 Am. Dec. 216; Com. *v.*

there can be no departure from the terms of the statute where no absurdity or inconvenience will follow from a literal interpretation.¹

(3) *Nothing Added to or Taken from Statute* — (a) **General Statement.** — The principle just stated includes implicitly the further rule that it is the duty of a court neither to add anything to nor to take anything from a statute, unless good grounds appear for thinking that the legislature intended something which it has failed precisely to express.²

Hitchings, 5 Gray (Mass.) 486; *Pitman v. Flint*, 10 Pick. (Mass.) 504; *Putnam v. Longley*, 11 Pick. (Mass.) 487; *Doane v. Phillips*, 12 Pick. (Mass.) 223.

Michigan. — *Leoni Tp. v. Taylor*, 20 Mich. 148; *Flint, etc., Plank-Road Co. v. Woodhull*, 25 Mich. 99, 12 Am. Rep. 233; *Reithmiller v. People*, 44 Mich. 280; *Handy v. Meridian Tp.*, 114 Mich. 457.

Minnesota. — *Taylor v. Taylor*, 10 Minn. 107.

Mississippi. — *Koch v. Bridges*, 45 Miss. 259.

Nebraska. — *State v. Liedtke*, 9 Neb. 468; *Goble v. Simeral*, (Neb. 1903) 93 N. W. Rep. 235.

Nevada. — *State v. Washoe County*, 6 Nev. 104.

New Jersey. — *Jersey City, etc., R. Co. v. Jersey City, etc., Horse R. Co.*, 20 N. J. Eq. 61; *Jersey City Gas-light Co. v. Consumers' Gas Co.*, 40 N. J. Eq. 427; *Douglass v. Chosen Freeholders*, 38 N. J. L. 216.

New York. — *Niagara County v. People*, 7 Hill (N. Y.) 513; *Cruger v. Cruger*, 5 Barb. (N. Y.) 225; *People v. Lawrence*, 36 Barb. (N. Y.) 177; *Neuendorff v. Duryea*, (C. Pl. Gen. T.) 52 How. Pr. (N. Y.) 267; *People v. Huntingdon*, 4 N. Y. Leg. Obs. 187; *Macomber v. New York*, (N. Y. Super. Ct.) 17 Abb. Pr. (N. Y.) 35; *Hyatt v. Taylor*, 42 N. Y. 259; *People v. Briggs*, 50 N. Y. 553; *Rosenplaenter v. Roessle*, 54 N. Y. 262; *People v. Keller*, 35 N. Y. App. Div. 500; *People v. Williams*, 47 N. Y. App. Div. 92.

Pennsylvania. — *Com. v. Shopp*, 1 Woodw. (Pa.) 123; *Weister v. Hade*, 52 Pa. St. 474; *Bradbury v. Wagenhorst*, 54 Pa. St. 182; *Dame's Appeal*, 62 Pa. St. 417; *Howard Assoc.'s Appeal*, 70 Pa. St. 344.

Rhode Island. — *Baxter v. Tripp*, 12 R. I. 310.

South Carolina. — *Blake v. Heyward*, Bailey Eq. (S. Car.) 211.

South Dakota. — *Witte v. Koeppen*, 11 S. Dak. 598, 74 Am. St. Rep. 826.

Tennessee. — *Miller v. Childress*, 2 Humph. (Tenn.) 320.

Texas. — *Matter of Griffin*, 25 Tex. Supp. 633.

Vermont. — *In re Powers*, 25 Vt. 265; *State v. Franklin County Sav. Bank, etc., Co.*, 74 Vt. 246.

Virginia. — *Bull v. Read*, 13 Gratt. (Va.) 78.

Wisconsin. — *Rossmiller v. State*, 114 Wis. 169.

Wyoming. — *Rock Springs First Nat. Bank v. Ludvigsen*, 8 Wyo. 230, 80 Am. St. Rep. 928.

Although a Literal Construction May Defeat the Object of an Act, "it is better to abide by this consequence than to put upon it a construction not warranted by the words of the act in order to give effect to what we may suppose to have been the intention of the legislature." *Per Lord Tenterden* in *Rex v. Barham*, 8 B. & C. 99, 15 E. C. L. 157. To the same effect see:

England. — *Rex v. Stoke Damerel*, 7 B. & C. 563, 14 E. C. L. 99; *Midland R. Co. v. Pye*, 10

C. B. N. S. 179, 100 E. C. L. 179; *Atty.-Gen. v. Lockwood*, 9 M. & W. 395; *Rex v. Mabe*, 3 Ad. & El. 531, 30 E. C. L. 145; *Rex v. Poor Law Com'rs*, 6 Ad. & El. 1, 33 E. C. L. 11; *Woodward v. Watts*, 2 El. & Bl. 452, 75 E. C. L. 452. *Illinois*. — *Frye v. Chicago, etc., R. Co.*, 73 Ill. 399.

Maryland. — *Smith v. State*, 66 Md. 215.

Missouri. — *Hicks v. Jamison*, 10 Mo. App. 35.

North Carolina. — *Hines v. Wilmington, etc., R. Co.*, 95 N. Car. 434, 59 Am. Rep. 250; *Harris v. Scarborough*, 110 N. Car. 232.

Pennsylvania. — *Pennsylvania R. Co. v. Pittsburgh*, 104 Pa. St. 543, 17 Am. & Eng. R. Cas. 438.

Wisconsin. — *Goodno v. Oshkosh*, 31 Wis. 130.

Even where the intention of the legislature is undoubted, yet the clear unequivocal language of the statute must be enforced although the apparent object is defeated. *Coe v. Lawrence*, 1 El. & Bl. 516, 72 E. C. L. 516; *Woodbury v. Berry*, 18 Ohio St. 462.

A clear meaning overcomes the motive of the legislature. *Coe v. Lawrence*, 1 El. & Bl. 516, 72 E. C. L. 516; *Rex v. Barham*, 8 B. & C. 99, 15 E. C. L. 157; *Soon Hing v. Crowley*, 113 U. S. 703; *Farmers' L. & T. Co. v. Chicago, etc., R. Co.*, 39 Fed. Rep. 143; *Harpending v. Haight*, 39 Cal. 189, 2 Am. Rep. 432; *Green v. Cheek*, 5 Ind. 107; *Sunbury, etc., R. Co. v. Cooper*, 33 Pa. St. 287. See also *Lebanon v. Creel*, 109 Ky. 363.

Illustration — Statutes of Limitations. — This rule finds familiar illustration in the construction of statutes of limitation when in general the statute as it stands will be applied however inequitable the special circumstances of the case may render its application. See the title LIMITATION OF ACTIONS, vol. 19, p. 212 *et seq.*

1. When No Ill Consequences Follow, Literal Construction Observed — *England*. — *Woodward v. Watts*, 2 El. & Bl. 452, 75 E. C. L. 452; *Hinton v. Dibbin*, 2 O. B. 646, 42 E. C. L. 847; *Rex v. Ramsgate*, 6 B. & C. 712, 13 E. C. L. 302; *Rex v. Turvey*, 2 B. & Ald. 521.

Georgia. — *Ezekiel v. Dixon*, 3 Ga. 146.

Illinois. — *Martin v. Swift*, 120 Ill. 488; *Ohio, etc., R. Co. v. People*, 123 Ill. 467.

Kansas. — *Ayers v. Trego County*, 37 Kan. 240.

Missouri. — *Hicks v. Jamison*, 10 Mo. App. 35.

New Jersey. — *Douglass v. Chosen Freeholders*, 38 N. J. L. 214; *State v. Brewster*, 42 N. J. L. 125.

New York. — *Cruger v. Cruger*, 5 Barb. (N. Y.) 225.

Oklahoma. — *Choctaw, etc., R. Co. v. Alexander*, 7 Okla. 501.

2. Court May Not Add to or Take from Statute. — *Per Tindal*, C. J., in *Everett v. Wells*, 2 M. & G. 277, 40 E. C. L. 369, 2 Scott N. R. 531; *Rex v. Pereira*, 2 Ad. & El. 375, 29 E. C. L. 122; *In re Cherry*, 4 De G. F. & J. 332, 31 L. J. Ch.

Exceptions and General Words. — Thus an exception out of the general provisions of a statute will never be implied in favor of particular persons or cases, unless they are expressly mentioned,¹ for general words in a statute must receive a general construction unless there is something in it to restrain them.²

(b) *Casus Omissus* Not Supplied. — Where the language of a statute is clear, it is not for the court to say that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions; a *casus omissus* can in no case be supplied, for that would be to make laws.³

b. WHERE MEANING IN DOUBT, THE SPIRIT CONTROLS — (1) *Effect of Ambiguous Language.* — Language is rarely so free from ambiguity as to be incapable of being used in more than one sense, and the literal interpretation of a statute may lead to an absurdity, or evidently fail to give the real intent of the legislature.⁴ When this is the case, resort is had to the principle that the spirit of a law controls the letter, so that a thing which is within the intention of a statute is as much within the statute as if it were within the

351; *Ex p. St. Sepulchres*, 33 L. J. Ch. 373; *Sturgis v. Darell*, 4 H. & N. 629; *Ezekiel v. Dixon*, 3 Ga. 146; *Alexander v. Worthington*, 5 Md. 485; *Hamilton v. St. Louis County Ct.*, 15 Mo. 3; *Lane v. Schomp*, 20 N. J. Eq. 82; *Com. v. Gouger*, 21 Pa. Super. Ct. 217; *Lacey v. Moore*, 6 Coldw. (Tenn.) 348. See also *Laird v. Briggs*, 19 Ch. D. 33; *Hull v. Hull*, 2 Strobb. Eq. (S. Car.) 174; and the title *EXEMPTIONS (FROM EXECUTION)*, vol. 12, p. 75.

1. Limitations or Exceptions Not to Be Imported into Statute — *England.* — *Stowel v. Zouch*, Plowd. 353; *Reg. v. Dean*, 12 M. & W. 39 (stated and quoted under *EVERY*, vol. 11, p. 455); *Beckford v. Wade*, 17 Ves. Jr. 93; *Pike v. Hoare*, 2 Eden 184.

United States. — *U. S. v. Coombs*, 12 Pet. (U. S.) 72; *Ogden v. Strong*, 2 Paine (U. S.) 584; *M'Iver v. Ragan*, 2 Wheat. (U. S.) 25; *Lake County v. Rollins*, 130 U. S. 662.

California. — *Tynan v. Walker*, 35 Cal. 634, 95 Am. Dec. 152.

Georgia. — *Hopkins v. Long*, 9 Ga. 261.

Illinois. — *Chicago, etc., R. Co. v. Dumser*, 109 Ill. 402.

Maryland. — *Collins v. Carman*, 5 Md. 525.

Mississippi. — *Box v. Stanford*, 13 Smed. & M. (Miss.) 93, 51 Am. Dec. 142; *Robertson v. Alford*, 13 Smed. & M. (Miss.) 512; *Kilpatrick v. Byrne*, 25 Miss. 571; *Thornton v. Crisp*, 14 Smed. & M. (Miss.) 54.

New York. — *Bradley v. Buffalo, etc., R. Co.*, 34 N. Y. 427 (stated and quoted under *ALL*, vol. 2, p. 141, note); *Hyatt v. Taylor*, 42 N. Y. 259.

North Carolina. — *Hamilton v. Shepperd*, 3 Murph. (7 N. Car.) 115.

Pennsylvania. — *Oliver's Appeal*, 101 Pa. St. 299; *In re Bloomfield First Presb. Church*, 107 Pa. St. 543; *Butler County v. Leibold*, 107 Pa. St. 407 (stated under title *REWARDS*, vol. 24, p. 947); *Erie County v. Erie Water Works*, 113 Pa. St. 368; *Pittsburgh v. Kalchthaler*, 114 Pa. St. 547.

Tennessee. — *Cocke v. M'Ginnis*, Mart. & Y. (Tenn.) 361, 17 Am. Dec. 809.

Virginia. — *Callis v. Waddy*, 2 Munf. (Va.) 511.

Where Sale of Liquors Is Prohibited Generally by Statute, an exception as to sale for medical purposes has been held not implied, though de-

cisions *contra* are found. See title *INTOXICATING LIQUORS*, vol. 17, pp. 359, 360.

Exceptions Implied. — Certain exceptions to the statute of limitations based on necessity seem to qualify the principle of the text. See the title *LIMITATION OF ACTIONS*, vol. 19, p. 213 *et seq.* And in *Com. v. Kimball*, 24 Pick. (Mass.) 370, Shaw, C. J., said: "Where any particular construction would lead to an absurd consequence, it will be presumed that some exception or qualification was intended by the legislature to avoid such conclusion."

2. General Words. — *Harrington v. Smith*, 28 Wis. 60. See further *infra*, this section, *Interpretation of Words and Phrases* — *General Words and Their Limitation.*

3. Omissions Not Supplied — *England.* — *Rex v. Davie*, 6 Ad. & El. 375, 33 E. C. L. 90; *Rex v. Burrell*, 12 Ad. & El. 460, 40 E. C. L. 96; *Jones v. Smart*, 1 T. R. 52; *Lamond v. Eiffé*, 3 Q. B. 910, 43 E. C. L. 1032; *Rex v. Vandeleer*, 1 Stra. 69; *Bloxam v. Elsee*, 6 B. & C. 169, 13 E. C. L. 133; *Nettleton v. Burrell*, 8 Scott N. R. 738; *Wanklyn v. Woollett*, 4 C. B. 86, 56 E. C. L. 86; *Reg. v. Ashburton*, 8 Q. B. 871, 55 E. C. L. 871; *Higgs v. Schrader*, 3 C. P. D. 252; *Newton v. Boodle*, 3 C. B. 795, 54 E. C. L. 795; *Reg. v. Arnold*, 5 B. & S. 322, 117 E. C. L. 322, *sub nom. Ex p. Sharp*, 10 Jur. N. S. 1018.

United States. — *Denn v. Reid*, 10 Pet. (U. S.) 524; *U. S. v. Breed*, 1 Sumn. (U. S.) 160; *Smith v. Rines*, 2 Sumn. (U. S.) 354.

Georgia. — *Edmondson v. Dyson*, 7 Ga. 515; *Southwestern R. Co. v. Cohen*, 49 Ga. 627.

Illinois. — *Steere v. Brownell*, 124 Ill. 27.

Maine. — *Swift v. Luce*, 27 Me. 285.

Ohio. — *Woodbury v. Berry*, 18 Ohio St. 462.

4. Failure of Literal Interpretation. — "The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted, 'that whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II., which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire — 'for he is not to be hanged because he would not stay to be burnt.'"

letter, and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers, and the statute should be so construed as to advance the remedy and suppress the mischief contemplated by its framers.¹ But it is only in cases of ambiguity that courts exercise this power of controlling the language of a statute.²

(2) *Intention and Object.* — The intention of the legislature and the object aimed at, being the fundamental inquiry in judicial construction, are to control the literal interpretation of particular language in a statute,³ and language capable of more than one meaning is to be taken in that sense which will harmonize with such intention and object, and effect the purpose of the enactment.⁴ Thus to conform to the legislative intention clerical errors will

U. S. v. Kirby, 7 Wall. (U. S.) 487, *per* Field, J.; State v. Bolden, 107 La. 118. See also 1 Bl. Com. 59, 60.

Ambiguity Arising from Comparison with Whole Act. — Words which when taken alone are free from ambiguity, when read in connection with the whole act or the purpose to be accomplished may become ambiguous, so that a need for construction may arise. *People v. Williams*, 47 N. Y. App. 92.

1. *Where the Letter Fails to Give the Sense* — *England.* — *Hollingworth v. Palmer*, 4 Exch. 281; *Waugh v. Middleton*, 8 Exch. 352; *Direct U. S. Cable Co. v. Anglo-American Tel. Co.*, 2 App. Cas. 412; *Edinburgh St. Tramways Co. v. Torbain*, 3 App. Cas. 58; *Caledonian R. Co. v. North British R. Co.*, 6 App. Cas. 114; *Grey v. Pearson*, 6 H. L. Cas. 106; *Abley v. Dale*, 11 C. B. 390, 73 E. C. L. 390.

United States. — *U. S. v. Buchanan*, 9 Fed. Rep. 689; *Rigney v. Plaster*, 88 Fed. Rep. 686.

Illinois. — *Castner v. Walrod*, 83 Ill. 171, 25 Am. Rep. 369; *Perry County v. Jefferson County*, 94 Ill. 214; *People v. Hoffman*, 97 Ill. 234.

Indiana. — *Maxwell v. Collins*, 8 Ind. 38; *Miller v. State*, 106 Ind. 415; *Middleton v. Greeson*, 106 Ind. 18; *Western Union Tel. Co. v. Wilson*, 108 Ind. 308.

Louisiana. — *Bathurst v. Course*, 3 La. Ann. 260; *State v. Poydras*, 9 La. Ann. 165.

Massachusetts. — *Green v. Kemp*, 13 Mass. 515, 7 Am. Dec. 169; *Burlingame v. Bell*, 16 Mass. 318; *Staniels v. Raymond*, 4 Cush. (Mass.) 314; *Mendon v. Worcester County*, 10 Pick. (Mass.) 235; *Com. v. Cambridge*, 20 Pick. (Mass.) 267; *Brown v. Pendergast*, 7 Allen (Mass.) 427.

Minnesota. — *Taylor v. Taylor*, 10 Minn. 107.

Missouri. — *Riddick v. Walsh*, 15 Mo. 519.

New Jersey. — *Brown v. Wright*, 13 N. J. L. 240; *Associates of Jersey Co. v. Davison*, 29 N. J. L. 415.

New York. — *Tonnele v. Hall*, 4 N. Y. 140; *Lake Shore, etc., R. Co. v. Roach*, 80 N. Y. 339; *Delafield v. Brady*, 108 N. Y. 524; *Riggs v. Palmer*, 115 N. Y. 506, 12 Am. St. Rep. 819; *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358, 8 Am. Dec. 243; *Jackson v. Collins*, 3 Cow. (N. Y.) 89; *Murray v. New York Cent. R. Co.*, 3 Abb. App. Dec. (N. Y.) 339.

Ohio. — *Doyle v. Doyle*, 50 Ohio St. 330; *Gorham v. Steinau*, 10 Ohio Dec. 131.

Pennsylvania. — *Greensburg v. Laird*, 8 Pa. Co. Ct. 608.

South Carolina. — *Blake v. Heyward*, Bailey Eq. (S. Car.) 208.

Texas. — *Chapman v. State*, 16 Tex. App. 76.

Utah. — *People v. Hill*, 3 Utah 344.

Wisconsin. — *Gilkey v. Cook*, 60 Wis. 133.

Lord Wensleydale's "Golden Rule." — In *River Wear Comrs v. Adamson*, 2 App. Cas. 764, Lord Blackburn said: "I believe that it is not disputed that what Lord Wensleydale used to call the golden rule is right, viz., that we are to take the whole statute together, and construe it all together, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the court that the intention could not have been to use them in their ordinary signification, and to justify the court in putting on them some other signification, which, though less proper, is one which the court thinks the words will bear."

As to Difference between Strict and Liberal Construction, see *infra*, this title, VII. 1. *Strict and Liberal Construction.*

2. **Only Where There Is Ambiguity.** — *Farrel Foundry v. Dart*, 26 Conn. 376; *Burlington, etc., R. Co. v. Dey*, 82 Iowa 312, 31 Am. St. Rep. 477, 45 Am. & Eng. R. Cas. 391; *Matter of King*, 105 Iowa 320; *Cearfoss v. State*, 42 Md. 403; *Bidwell v. Whitaker*, 1 Mich. 469; *Barstow v. Smith*, Walk. (Mich.) 394; *Lane v. Ruhl*, 103 Mich. 43; *Hyatt v. Taylor*, 42 N. Y. 259; *Leavitt v. Blatchford*, 5 Barb. (N. Y.) 9; *Bradbury v. Wagenhorst*, 54 Pa. St. 180.

3. **Case Must Be Clear to Justify Departure from Letter.** — To justify a departure from literal construction, it is not enough that a statute is not promotive of the best interests of society or individuals. See *supra*, this section, 4. a. (2) *Results, Motives, and Policy Not Considered.* The case must be clear, and there must be a moral conviction, based on the unreasonableness of the application sought to be made, that the legislative mind could not have intended such a result. *Napier v. Foster*, 80 Ala. 370. See also *Holbrook v. Holbrook*, 1 Pick. (Mass.) 248; *State v. Whealey*, 5 S. Dak. 430.

4. **Intention and Object Regarded** — *England.* — *Wiltshire v. Willett*, 11 C. B. N. S. 240, 103 E. C. L. 240; *Reg. v. Edmundson*, 2 El. & El. 77, 105 E. C. L. 77; *Hawkins v. Gathercole*, 6 De G. M. & G. 1; *Rex v. Stoke Damerel*, 7 B. & C. 563, 14 E. C. L. 99; *Reniger v. Fogossa*, Plowd. 18; *Eyston v. Studd*, Plowd. 459; *Rex v. Younger*, 5 T. R. 449; *Margate Pier Co. v. Hannam*, 3 B. & Ald. 266, 5 E. C. L. 278; *Edwards v. Dick*, 4 B. & Ald. 212, 6 E. C. L. 455; *Caledonian R. Co. v. North British R. Co.*, 6 App. Cas. 122; *Reg. v. Midland R. Co.*, L. R. 10 Q. B. 389; *Freme v. Clement*, 44 L. T. N. S.

399; *Ex p. Walton*, 17 Ch. D. 746; *Hotham v. Sutton*, 15 Ves. Jr. 320; *Michell v. Michell*, 5 Madd. 72; *Taylor v. Goodwin*, 4 Q. B. D. 228 (stated and quoted under title *BICYCLES*, vol. 4, p. 17; *CARRIAGE*, vol. 5, p. 151).

Canada.—*Watson v. Maze*, 15 Quebec Super. Ct. 268; *Kinney v. Plunkett*, 26 Nova Scotia 158.

United States.—*Minor v. Mechanics' Bank*, 1 Pet. (U. S.) 46; *Wilkinson v. Leland*, 2 Pet. (U. S.) 662; *Binney v. Chesapeake, etc.*, Canal Co., 8 Pet. (U. S.) 201; *Brewer v. Blougher*, 14 Pet. (U. S.) 198; *U. S. v. Kirby*, 7 Wall. (U. S.) 482 (see *POSTAL LAWS*, vol. 22, p. 1079); *The Emily*, 9 Wheat. (U. S.) 381; *Holy Trinity Church v. U. S.*, 143 U. S. 457 (stated under *CONTRACT LABOR LAW*, vol. 7, p. 84); *Lau Ow Bew v. U. S.*, 144 U. S. 59; *Collins v. New Hampshire*, 171 U. S. 30; *Brown v. Barry*, 3 Dall. (U. S.) 365; *U. S. v. Freeman*, 3 How. (U. S.) 563; *U. S. v. Bassett*, 2 Story (U. S.) 399; *Southern R. Co. v. North Carolina Corp. Commission*, 97 Fed. Rep. 518; *Commercial Bank v. Sandford*, 103 Fed. Rep. 100; *In re Matthews*, 109 Fed. Rep. 617; *Union Cent. L. Ins. Co. v. Champlin*, (C. C. A.) 116 Fed. Rep. 858.

Alabama.—*Kennedy v. Kennedy*, 2 Ala. 573; *Thompson v. State*, 20 Ala. 54; *Sprowl v. Lawrence*, 33 Ala. 674; *Horton v. Mobile School Com'rs*, 43 Ala. 604; *Blakeney v. Blakeney*, 6 Port. (Ala.) 109, 30 Am. Dec. 574.

Arkansas.—*Wassell v. Tunnah*, 25 Ark. 102; *McNair v. Williams*, 28 Ark. 200; *Reynolds v. Holland*, 35 Ark. 56; *State v. Smith*, 40 Ark. 431; *Doles v. Hilton*, 48 Ark. 308.

California.—*Smith v. Randall*, 6 Cal. 47, 65 Am. Dec. 475; *Ex p. Ellis*, 11 Cal. 222; *People v. Dana*, 22 Cal. 11; *Sherman v. Buick*, 32 Cal. 241, 91 Am. Dec. 577; *Helm v. Chapman*, 66 Cal. 291.

Colorado.—*Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 27 Colo. 15 (quoted under *INTERSECT*, vol. 17, p. 33); *Brewer v. Harrison*, 27 Colo. 352; *Troy Laundry, etc., Co. v. Denver*, 11 Colo. App. 368.

Georgia.—*Erwin v. Moore*, 15 Ga. 361; *George v. Board of Education*, 33 Ga. 344; *Columbus Southern R. Co. v. Wright*, 89 Ga. 574.

Illinois.—*Anderson v. Chicago, etc., R. Co.*, 117 Ill. 26; *People v. Harrison*, 191 Ill. 257, affirming 92 Ill. App. 643; *People v. Blackwelder*, 21 Ill. App. 254; *Gilbert v. Morgan*, 98 Ill. App. 281; *People v. Ballhorn*, 100 Ill. App. 571.

Indiana.—*Spencer v. State*, 5 Ind. 41; *Murphy v. Barlow*, 5 Ind. 230; *State v. Tucker*, 46 Ind. 355; *Taylor v. Washington County*, 67 Ind. 383; *Clare v. State*, 68 Ind. 25; *Krug v. Davis*, 87 Ind. 590; *Humphries v. Davis*, 100 Ind. 274, 50 Am. Rep. 788; *Evansville v. Summers*, 108 Ind. 189; *Crawfordsville, etc., Turnpike Co. v. Fletcher*, 104 Ind. 97; *Connecticut Mut. L. Ins. Co. v. Talbot*, 113 Ind. 373, 3 Am. St. Rep. 655.

Iowa.—*Nims v. Boone County*, 66 Iowa 272 (stated under title *BRIDGES*, vol. 4, p. 919).

Kentucky.—*Harrison v. Com.*, 83 Ky. 162; *Lawrence v. Conner*, (Ky. 1890) 14 S. W. Rep. 77.

Louisiana.—*Commercial Bank v. Foster*, 5 La. Ann. 516; *State v. Poydras*, 9 La. Ann. 165; *State v. Judge*, 12 La. Ann. 777; *Lake v. Caddo*

Parish, 37 La. Ann. 788; *Barnard v. Gall*, 43 La. Ann. 959.

Maine.—*Winslow v. Kimball*, 25 Me. 495; *Berry v. Clary*, 77 Me. 484; *Gray v. Cumberland County*, 83 Me. 429.

Maryland.—*Milburn v. State*, 1 Md. 17; *Baltimore v. Green Mount Cemetery*, 7 Md. 517 (stated under title *EXEMPTIONS (FROM TAXATION)*, vol. 12, p. 315); *New England Car Spring Co. v. Baltimore, etc., R. Co.*, 11 Md. 90, 69 Am. Dec. 181; *Frazier v. Warfield*, 13 Md. 279; *Johnson v. Heald*, 33 Md. 372; *Browning v. Loraw*, 58 Md. 524; *Green v. State*, 59 Md. 130, 43 Am. Rep. 542; *State v. Boyd*, 2 Gill & J. (Md.) 365; *Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co.*, 4 Gill & J. (Md.) 1; *Beall v. Harwood*, 2 Har. & J. (Md.) 167, 3 Am. Dec. 532.

Massachusetts.—*Opinion of Justices*, 7 Mass. 523; *Somerset v. Dighton*, 12 Mass. 383; *Pearce v. Atwood*, 13 Mass. 343; *Whitney v. Whitney*, 14 Mass. 92; *Hayden v. Foster*, 13 Pick. (Mass.) 496; *Com. v. Kimball*, 24 Pick. (Mass.) 370.

Michigan.—*Whipple v. Saginaw Circuit Ct.*, 26 Mich. 342; *Jones v. Water Com'rs*, 34 Mich. 273.

Minnesota.—*Taylor v. Taylor*, 10 Minn. 107; *Winters v. Duluth*, 82 Minn. 127.

Mississippi.—*Ingraham v. Speed*, 30 Miss. 413; *New Orleans, etc., R. Co. v. Hemphill*, 35 Miss. 17; *McIntyre v. Ingraham*, 13 Pick. (Mass.) 496; *Com. v. Corley*, 43 Miss. 696.

Missouri.—*Riddick v. Governor*, 1 Mo. 147; *Ruggles v. Washington County*, 3 Mo. 496; *State v. Canton*, 43 Mo. 48; *State v. King*, 44 Mo. 283; *St. Louis v. Lane*, 110 Mo. 254.

Montana.—*Power v. Choteau County*, 7 Mont. 82.

Nebraska.—*People v. Weston*, 3 Neb. 312; *Little v. State*, 60 Neb. 749.

New Jersey.—*State v. Paterson*, 35 N. J. L. 196.

New York.—*Burch v. Newbury*, 10 N. Y. 389; *People v. New York Cent. R. Co.*, 13 N. Y. 78; *Oswego Starch Factory v. Dolloway*, 21 N. Y. 461; *People v. Tax Com'rs*, 95 N. Y. 558; *People v. Lacombe*, 99 N. Y. 43; *Bell v. New York*, 105 N. Y. 139; *Spencer v. Myers*, 150 N. Y. 275, 55 Am. St. Rep. 675; *Jackson v. Collins*, 3 Cow. (N. Y.) 89; *Riggs v. Palmer*, 115 N. Y. 506, 12 Am. St. Rep. 819; *Crocker v. Crane*, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228; *Donaldson v. Wood*, 22 Wend. (N. Y.) 397; *Watervliet Turnpike Co. v. M'Kean*, 6 Hill (N. Y.) 619; *Barnes v. Buck*, 1 Lans. (N. Y.) 268; *Weltman v. Posenecker*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 593, 26 Civ. Pro. (N. Y.) 241; *People v. Lovell*, (County Ct.) 21 Misc. (N. Y.) 571.

North Dakota.—*Vermont L. & T. Co. v. Whithed*, 2 N. Dak. 82.

Ohio.—*Allen v. Parish*, 3 Ohio 198.

Oregon.—*Keith v. Quinney*, 1 Oregon 364.

Pennsylvania.—*Com. v. Montrose*, 52 Pa. St. 391; *Moyer v. Pennsylvania Slate Co.*, 71 Pa. St. 293; *Eshleman's Appeal*, 74 Pa. St. 46; *Greensburg v. Laird*, 8 Pa. Co. Ct. 608; *Sattazahan v. Lebanon County*, 21 Pa. Co. Ct. 576.

Rhode Island.—*Lippitt v. Huston*, 8 R. I. 415, 94 Am. Dec. 175.

South Carolina.—*Carolina Sav. Bank v. Evans*, 28 S. Car. 521.

be corrected,¹ words may be rejected and others substituted,² the policy of the legislature may be considered,³ and such construction of apparently conflicting provisions will be adopted as will best promote the harmonious operation of the law as a whole.⁴

(3) *Subject-matter*. — An application, or different statement of the foregoing principle, is found in the rule that words are to be interpreted with reference to the subject-matter of the statute in which they are used, for the legislative intention may often be deduced from a consideration of the subject-matter and the purpose of an act.⁵

(4) *Expressio Unius Est Exclusio Alterius*. — The maxim, "the expression of one thing is the exclusion of another" is of frequent application in the construction of statutes.⁶

South Dakota. — *State v. Whealey*, 5 S. Dak. 430.

Texas. — *Edwards v. Morton*, 92 Tex. 152.

Vermont. — *Simonds v. Powers*, 28 Vt. 354;

Ryegate v. Wardsboro, 30 Vt. 746.

Washington. — *Cherry Point Fish Co. v. Nelson*, 25 Wash. 558.

West Virginia. — *Mack v. Prince*, 40 W. Va. 326; *Hunter v. Berkeley Springs*, 47 W. Va. 347.

Wisconsin. — *Clark v. Janesville*, 10 Wis. 136; *Wisconsin Industrial School v. Clark County*, 103 Wis. 651.

See also the title *HOMESTEAD*, vol. 15, p. 533, *et seq.*

General and Special Intent Harmonized. — When a general intention is expressed in a statute, and also a particular intention incompatible therewith, the particular intention is to be considered in the nature of an exception. *Stockett v. Bird*, 18 Md. 484.

Intent May Be Gathered from a Comparison of Acts in Pari Materia. — *Loeb v. Columbia Tp.*, 91 Fed. Rep. 37.

1. **Clerical Errors.** — To give effect to the legislative intent words inadvertently omitted may be supplied, *Landrum v. Flannigan*, 60 Kan. 436; and purely clerical errors may be corrected, *McKee Land, etc., Co. v. Swikehard*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 21, *affirmed* 63 N. Y. App. Div. 553, 173 N. Y. 630; *Parrish v. Wilkes Barre*, 9 Kulp (Pa.) 201. See also *infra*, this section, 12. *Effect of Mistakes or Omissions, Substantial or Formal*.

2. **Words Rejected and Substituted.** — *Iuka v. Schlosser*, 97 Ill. App. 222. See also *Com. v. Grinstead*, (Ky. 1900) 55 S. W. Rep. 720.

3. **Policy of Legislature.** — *Jewell v. Ithaca*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 499, *affirmed* 72 N. Y. App. Div. 220.

4. **Conflicting Provisions.** — *Blaschko v. Wurster*, 156 N. Y. 442; *Matter of School Board*, 157 N. Y. 566, *affirming* 34 N. Y. App. Div. 49. See also *infra*, this section, 8. *Construing Entire Statute as One Whole*.

5. **Words Interpreted by Subject-matter** — *England*. — *Rex v. Hall*, 1 B. & C. 136, 8 E. C. L. 59, *per* Abbott, C. J.; *Lion Mut. Marine Ins. Assoc. v. Tucker*, 12 Q. B. D. 186; *Rein v. Lane*, L. R. 2 Q. B. 151; *Reg. v. Collingwood*, 12 Q. B. 686, 64 E. C. L. 686; *Miller v. Salomons*, 7 Exch. 475; *House of Lords*, 3 Bing. 193, 11 E. C. L. 93; *River Wear Com'rs v. Adamson*, 2 App. Cas. 743, 1 Q. B. D. 546; *Jolliffe v. Rice*, 6 C. B. 1, 60 E. C. L. 1.

United States. — *Brewer v. Blougher*, 14 Pet.

(U. S.) 198. See also *U. S. v. Caldwell*, 19 Wall. (U. S.) 264.

Arkansas. — *Woodruff v. State*, 3 Ark. 285; *Wassell v. Tunnah*, 25 Ark. 101.

California. — *People v. Dana*, 22 Cal. 11.

Colorado. — *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 27 Colo. 15 (*quoted under INTERSECT*, vol. 17, p. 33).

Florida. — *Jones v. Dexter*, 8 Fla. 276.

Maryland. — *Green v. State*, 59 Md. 123, 43 Am. Rep. 542.

Massachusetts. — *Opinion of Justices*, 7 Mass. 523.

Mississippi. — *Green v. Weller*, 32 Miss. 650; *Olive v. Walton*, 33 Miss. 114.

Missouri. — *Ruggles v. Washington County*, 3 Mo. 504; *State v. Whitaker*, 160 Mo. 59.

New Jersey. — *State v. Paterson*, 35 N. J. L. 196; *Broome v. New York, etc., Telephone Co.*, 49 N. J. L. 624.

New York. — *People v. Allen*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 123.

Pennsylvania. — *Com. v. Bryan*, 6 S. & R. (Pa.) 81; *Small v. Small*, 129 Pa. St. 366.

Vermont. — *Catlin v. Hull*, 21 Vt. 152.

6. **Expressio Unius Est Exclusio Alterius** — *England*. — *Dewhurst v. Feilden*, 7 M. & G. 182, 49 E. C. L. 182; *Rex v. Cunningham*, 5 East 478.

United States. — *U. S. v. Macon County*, 99 U. S. 582; *Johnson v. Southern Pac. Co.*, (C. C. A.) 117 Fed. Rep. 462.

Alabama. — *Page v. Bartlett*, 101 Ala. 193.

Arkansas. — *Watkins v. Wassell*, 20 Ark. 410.

Illinois. — *Feldman v. Morrison*, 1 Ill. App. 460.

Indiana. — *Doctor v. Hartman*, 74 Ind. 221; *State v. Arnold*, 140 Ind. 632.

Indian Territory. — *McFadden v. Blocker*, 2 Indian Ter. 260.

Mississippi. — *Koch v. Bridges*, 45 Miss. 247.

Missouri. — *Quincy, etc., R. Co. v. Kellogg*, 54 Mo. 334; *Howell v. Stewart*, 54 Mo. 400; *State v. Jaeger*, 63 Mo. 403.

New York. — *Weeks's Estate*, (Surrogate Ct.) 1 Civ. Pro. (N. Y.) 164.

Ohio. — *Scovern v. State*, 6 Ohio St. 288.

Pennsylvania. — *Brocket v. Ohio, etc., R. Co.*, 14 Pa. St. 241, 53 Am. Dec. 534; *Miller v. Kirkpatrick*, 29 Pa. St. 226; *Miller v. Miller*, 44 Pa. St. 170; *Page v. Allen*, 58 Pa. St. 338, 98 Am. Dec. 272; *Fowler v. Scully*, 72 Pa. St. 456, 13 Am. Rep. 699; *Olive Cemetery Co. v. Philadelphia*, 93 Pa. St. 129, 39 Am. Rep. 732.

Vermont. — *Sherwin v. Bugbee*, 16 Vt. 439.

May Not Overrule Legislative Intent. — The maxim should be applied only where it appears to point to the legislative intent; it is useful as an aid to discover that intent, but it should never override a different purpose plainly indicated.¹

Where the Language of the Statute May Fairly Embrace Many Different Cases, and some only are expressly mentioned merely by way of example, others of a similar nature are not thereby excluded.²

And Where There Is Some Necessity for Mentioning a Particular Thing but none for mentioning another thing, to regard the mention of the former as intended to exclude the latter would be an exceedingly unnatural and unreasonable rule of interpretation.³

Again, Where the Words of the Law-maker Are General and the statute is merely declaratory of the common law, it may extend to persons and things other than those actually named.⁴

But when the Law Is in the Affirmative that a thing should be done by certain persons or in a certain manner, this affirmative matter contains a negative that it shall not be done by other persons or in another manner.⁵

It Has Been Said that the Maxim Is Too General, and subject to too many exceptions in its application. to govern the construction of criminal statutes.⁶

Converse of Rule. — And *e converso*, the exclusion of one subject or thing in a statute is, as a general rule, the inclusion of all others. For example, the exclusion of the power of a court to impose a fine of less than a specified amount gives, by implication, the power to impose a fine for more than that sum.⁷

5. Interpretation of Words and Phrases — *a.* **POPULAR MEANING PRESUMED.** — The courts approach the interpretation of a statute with the presumption that words and phrases therein are used in their familiar and popular sense,⁸ and without any forced, subtle, or technical construction to limit or extend their meaning.⁹

1. *McFarland v. Missouri*, etc., P. Co., 94 Mo. App. 336.

2. *Scaggs v. Baltimore*, etc., R. Co., 10 Md. 268; *Broom's Leg. Max.* (8th ed.) 664.

3. *Brown v. Buzan*, 24 Ind. 194.

4. 2 Insts. 256; *Potter's Dwaris* 221; *Broom's Legal Maxims* (8th ed.) 664.

5. *People v. Hutchinson*, 172 Ill. 486; *State v. Wrightson*, 56 N. J. L. 126.

6. *State v. Connor*, 7 La. Ann. 379.

7. *Hankins v. People*, 106 Ill. 628. See also *Drake v. State*, 5 Tex. App. 649.

8. The Popular Sense of language is that sense which people conversant with the subject-matter with which the statute is dealing would attribute to it. *Grenfell v. Inland Revenue Com'rs*, 1 Ex. D. 248, *per* Pollock, B.

In *Cargo ex Schiller*, 2 P. D. 161, James, L. J., said: "I base my decision on the words of the statute as they would be understood by plain men who know nothing of the technical rule of the court of admiralty, or of flotsam, lagan, and jetsam."

9. **Presumption that Words Used in Popular Sense** — *England.* — *Roddy v. Fitzgerald*, 6 H. L. Cas. 877; *Rex v. Turney*, 2 B. & Ald. 522; *Cull v. Austin*, L. R. 7 C. P. 234; *Philpott v. St. George's Hospital*, 6 H. L. Cas. 338; *Johnson v. Harris*, 15 C. B. 357, 80 E. C. L. 357; *Rex v. Wooldridge*, 1 Leach (C. C.) 307; *Board of Works v. United Telephone Co.*, 13 Q. B. D. 914; *In re Amos*, (1891) 3 Ch. 159 (stated under PURCHASE — PURCHASER; vol. 23, p. 462).

Canada. — *Washington v. Grand Trunk R. Co.*, 28 Can. Sup. Ct. 189.

United States. — *Georgia v. Atkins*, 1 Abb.

(U. S.) 22; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 188; *U. S. v. Clayton*, 2 Dill. (U. S.) 219; *Massachusetts L. & T. Co. v. Hamilton*, (C. C. A.) 88 Fed. Rep. 588; *Corning v. Meade County*, 102 Fed. Rep. 57, 42 C. C. A. 154.

Alabama. — *Favers v. Glass*, 22 Ala. 621, 58 Am. Dec. 272; *Wetumpka v. Winter*, 29 Ala. 660.

California. — *Gross v. Fowler*, 21 Cal. 392; *People v. Reis*, 76 Cal. 269.

Connecticut. — *Strong v. Birchard*, 5 Conn. 357.

Indiana. — *Massey v. Dunlap*, 146 Ind. 358.

Louisiana. — *New Orleans Canal Co. v. Shroeder*, 7 La. Ann. 615; *State v. Berard*, 40 La. Ann. 172.

Maryland. — *Medley v. Williams*, 7 Gill & J. (Md.) 71; *Allen v. Mutual F. Ins. Co.*, 2 Md. 111.

Massachusetts. — *Avery v. Pixley*, 4 Mass. 460.

Mississippi. — *Green v. Weller*, 32 Miss. 650. *Missouri.* — *McFarland v. Missouri*, etc., R. Co., 94 Mo. App. 336.

Nebraska. — *State v. Byrum*, 60 Neb. 384.

New York. — *Waller v. Harris*, 20 Wend. (N. Y.) 555, 32 Am. Dec. 590.

North Carolina. — *State v. Gupton*, 8 Ired. L. (30 N. Car.) 273.

Pennsylvania. — *Weister v. Hade*, 52 Pa. St. 474; *Philadelphia, etc., R. Co. v. Catawissa R. Co.*, 53 Pa. St. 59; *Pennsylvania R. Co. v. Pittsburgh*, 104 Pa. St. 522; *Fox's Appeal*, 112 Pa. St. 337; *School Directors v. Carlisle Bank*, 8 Watts (Pa.) 289; *Com. v. Wetherill*, 8 Pa. Dist. 654, 23 Pa. Co. Ct. 61.

b. TECHNICAL WORDS — (1) In General. — But as words are to be construed with regard to the purpose and subject-matter of the statute, the rule has arisen that, if technical words are used therein in reference to the subject as to which they have acquired a technical meaning, they are to be taken in a technical sense,¹ unless a contrary intention appears.²

The Term "Technical" in this rule must relate not only to terms of art properly so called, but to words which have received a well-recognized meaning in any art, science, industry, or department of business or trade.³

South Dakota. — *State v. Whealey*, 5 S. Dak. 430.

Texas. — *Barker v. State*, 12 Tex. 273; *Robinson v. Varnell*, 16 Tex. 382; *Engelking v. Von Wamel*, 26 Tex. 469; *McGregor v. State*, 4 Tex. App. 599 (stated under *CHILD — CHILDREN*, vol. 5, p. 1083).

West Virginia. — *Daniel v. Simms*, 49 W. Va. 555.

Wisconsin. — *State v. Mann*, 21 Wis. 684; *Rupp v. Swineford*, 40 Wis. 28.

See also *supra*, this section, 4. *Whether Intention Deduced from Letter or Spirit of Statute — General Statement.*

Intention Controls. — Interpretation and construction aim "to ascertain the intention of the lawmakers, and this is generally accomplished by a literal reading of the words used." *People v. Tax Com'rs*, 95 N. Y. 554, *per* Earl, J.

Where the enactment is neither ambiguous nor obscure, the plain, natural, usual import of the words and phrases present the surest and safest index of the will of the legislature. *Cross's Case*, 5 Ct. Cl. 91, *per* Casey, C. J.

Where giving a word its popular meaning contravenes the manifest intention of the legislature, effect must be given to the intention. *Favers v. Glass*, 22 Ala. 621, 58 Am. Dec. 272 (stated and quoted under *CART*, vol. 5, p. 746, and the title *EXEMPTIONS (FROM EXECUTION)*, vol. 12, p. 128).

Words and Phrases. — For the definitions of particular words and phrases as used in statutes and other instruments, see the words and phrases in their proper alphabetical arrangement throughout this work.

1. Technical Words Taken Technically — England. — *Unwin v. Hanson*, (1891) 2 Q. B. 115; *Evans v. Stevens*, 4 T. R. 462; *Morrall v. Sutton*, 1 Phil. 533; *Jesson v. Wright*, 2 Bligh 2; *Doe v. Harvey*, 4 B. & C. 610, 10 E. C. L. 419; *Abbott v. Middleton*, 7 H. L. Cas. 68; *Boucicault v. Chatterton*, 5 Ch. D. 275; *Laird v. Briggs*, 19 Ch. D. 34.

United States. — *Lawrence v. Allen*, 7 How. (U. S.) 785; *U. S. v. Weise*, 2 Wall. Jr. (C. C.) 72; *Elliott v. Swartwout*, 10 Pet. (U. S.) 137; *Lee v. Lincoln*, 1 Story (U. S.) 613; *U. S. v. Breed*, 1 Summ. (U. S.) 159; *Arthur v. Morrison*, 96 U. S. 108; *U. S. v. Patterson*, 150 U. S. 68.

Indiana. — *State v. Dorsey*, 118 Ind. 167, 10 Am. St. Rep. 111.

Maryland. — *State v. Mace*, 5 Md. 337.

Massachusetts. — *Ex p. Hall*, 1 Pick. (Mass.) 261.

Missouri. — *State v. Murlin*, 137 Mo. 306.

New York. — *Clark v. Utica*, 18 Barb. (N. Y.) 451; *People v. Hulse*, 3 Hill (N. Y.) 309.

Pennsylvania. — *Brocket v. Ohio*, etc., R. Co., 14 Pa. St. 241, 53 Am. Dec. 534.

South Carolina. — *De Veaux v. De Veaux*, 1 Strobb. Eq. (S. Car.) 283.

Tennessee. — *State v. Smith*, 5 Humph. (Tenn.) 394.

Where Words Have Been Long Used in a Technical Sense and have been judicially construed to have a certain meaning, they are to be construed in that sense, although it may differ from their strict literal meaning. *Ruckmaboye v. Mottichund*, 8 Moo. P. C. 4.

The Terms "Medicine" and "Practicing Medicine" Are Used Technically in the *Alabama* statute regulating the practice of medicine, and include those who diagnose disease and prescribe or apply a therapeutic agent for its cure, even without the administration of drugs, and so include practitioners of osteopathy. *Bragg v. State*, 134 Ala. 165. But see *OSTEOPATHY*, vol. 21, p. 1011, and the title *PHYSICIANS AND SURGEONS*, vol. 22, p. 786.

2. "When a Word Has Both a Popular and a Technical Meaning," the court will give it effect according to the popular signification if it was so used by the legislature, and the context may be referred to in ascertaining the sense in which it was used. *Green v. Weller*, 32 Miss. 650; *Cummings v. Coleman*, 7 Rich. Eq. (S. Car.) 509, 62 Am. Dec. 402; *People v. Tighe*, 5 Hun (N. Y.) 25; *State v. Barnes*, 24 Fla. 153; *Southern Bell Telephone*, etc., Co. v. *D'Alemberte*, 39 Fla. 39 (stated under *LINE*, vol. 19, p. 389).

Where a Word Has Two Technical Meanings that should be adapted which upholds the act. *Colorado Milling*, etc., Co. v. *Mitchell*, 26 Colo. 284, *reversing* 12 Colo. App. 277.

"Student" Given Popular Meaning. — In *Morse v. State*, 6 Conn. 9, it was contended that as by the laws of a college no person could be a member of the institution until he is matriculated, a person attending the college, not having matriculated, was not a "student," within a law framed for the protection of minor students. But the court held otherwise, having regard to the intention of the law, saying that "he was under the government of the authority presiding over this institution, and required the same control and protection as if he had been entitled to the highest privileges."

3. See Hardcastle Stat. Law (3d ed.) 176: "The term 'technical' can only mean term[s] of the particular art or subject-matter to which they relate."

The Burden of Proof is on those who say that any word is a "term of art" for which no equivalent can be substituted to show that it has been so held. *Mansell v. Reg.*, 8 El. & Bl. 109, 92 E. C. L. 109, *per* Willes, J.

Thus, in **Revenue Laws**, words are in general to be interpreted in their commercial sense.¹

(2) **Legal Terms.** — When a word which has a known legal meaning is used in a statute it must be assumed that the term is used in its legal sense, in the absence of an indication of a contrary intent.² But peculiar meanings which have been generally applied for a number of years, at the time of the making of an act, to words having a well-settled legal use, have been recognized in the construction of statutes.³

1. **Revenue Laws.** — *Atty.-Gen. v. Bailey*, 1 Exch. 281; *Two Hundred Chests Tea*, 9 Wheat. (U. S.) 438 (stated and quoted under **BOHEA**, vol. 4, p. 613). See also **REVENUE LAWS**, vol. 24, p. 889, where the commercial meaning of words is fully discussed.

2. **Legal Terms** — *England.* — *Reg. v. Ellis*, C. & M. 565, 41 E. C. L. 307; *Williams v. Lear*, L. R. 7 Q. B. 285; *Sheppard v. Gosnold*, Vaugh. 159; *Ruckmaboye v. Mottichund*, 8 Moo. P. C. 4; *Stephenson v. Higginson*, 3 H. L. Cas. 638; *Rex v. Hickman*, 1 Moody 34.

United States. — *U. S. v. Smith*, 5 Wheat. (U. S.) 153; *U. S. v. Furlong*, 5 Wheat. (U. S.) 184; *Rice v. Minnesota*, etc., R. Co., 1 Black (U. S.) 358; *McCool v. Smith*, 1 Black (U. S.) 459; *U. S. v. Gilmore*, 8 Wall. (U. S.) 330; *The Abbottsford*, 98 U. S. 440; *U. S. v. Magill*, 1 Wash. (U. S.) 463; *U. S. v. Jones*, 3 Wash. (U. S.) 209; *U. S. v. Wilson*, Baldw. (U. S.) 78. See also *The Kate Heron*, 6 Sawy. (U. S.) 106.

Alabama. — *Spencer v. State*, 20 Ala. 24; *Ex p. Vincent*, 26 Ala. 145, 62 Am. Dec. 714; *Daily v. Burke*, 28 Ala. 328.

Arkansas. — *Buckner v. Real Estate Bank*, 4 Ark. 440.

Connecticut. — *Hillhouse v. Chester*, 3 Day (Conn.) 211, 3 Am. Dec. 265.

Florida. — *Williams v. Dickenson*, 28 Fla. 99.

Indiana. — *Bloom v. Franklin L. Ins. Co.*, 97 Ind. 478, 49 Am. Rep. 469; *Western Union Tel. Co. v. Scirelle*, 103 Ind. 229.

Kansas. — *Gordon v. State*, 4 Kan. 489.

Kentucky. — *Halbert v. McCulloch*, 3 Met. (Ky.) 456, 79 Am. Dec. 556.

Maine. — *Campbell v. Thompson*, 16 Me. 117.

Massachusetts. — *Merchants Bank v. Cook*, 4 Pick. (Mass.) 405; *Macy v. Raymond*, 9 Pick. (Mass.) 285; *Snell v. Bridgewater Cotton Gin Mfg. Co.*, 24 Pick. (Mass.) 299.

New York. — *Perkins v. Smith*, 116 N. Y. 448; *Matter of Ehrsam*, 37 N. Y. App. Div. 274.

North Carolina. — *Adams v. Turrentine*, 8 Ired. L. (30 N. Car.) 147; *Kitchen v. Tyson*, 3 Murph. (7 N. Car.) 314.

Tennessee. — *Apple v. Apple*, 1 Head (Tenn.) 348.

Illustrations — *Crime.* — *Lehigh County v. Schock*, 113 Pa. St. 373 (stated and quoted under **CRIME**, vol. 8, p. 251).

Heir. — Where a statute uses the word "heir" it will be received in its legal sense, unless it clearly appears that a different sense was intended. *State v. Engle*, 21 N. J. L. 347.

Infamous Crime. — *Com. v. Shaver*, 3 W. & S. (Pa.) 338 (stated and quoted under **CRIMINAL LAW**, vol. 8, p. 277).

Land. — *Brocket v. Ohio*, etc., R. Co., 14 Pa. St. 241, 53 Am. Dec. 534 (stated and quoted under **LAND**, vol. 18, pp. 141, 142).

Month. — *Rives v. Guthrie*, 1 Jones L. (46 N. Car.) 88; *Hale v. Finch*, 1 Wash. Ter. 517. This case, construing "month" to mean a lunar month, is stated under **MONTH**, vol. 20, p. 870, where, however, at p. 869, a calendar month is said to be usually intended in modern statutes.

In Interpreting Criminal Statutes the common-law definitions of crimes are binding. See the title **CRIMINAL LAW**, vol. 8, p. 276, and *U. S. v. Trans-Missouri Freight Assoc.*, (C. C. A.) 58 Fed. Rep. 58; *Ex p. Vincent*, 26 Ala. 145, 62 Am. Dec. 714. But see, as to the modification of this rule in *Louisiana*, *State v. Smith*, 30 La. Ann. 846; *State v. Gaster*, 45 La. Ann. 636.

The Intent and Context May Rebut the Use of Words in a Legal Sense. — *Schrieffer v. Wood*, 5 Blatchf. (U. S.) 215; *Parkinson v. State*, 14 Md. 184, 74 Am. Dec. 522; *People v. Tighe*, 5 Hun (N. Y.) 25. So in the following instances:

Action. — *McBride's Appeal*, 72 Pa. St. 480, and *Jackman Will Case*, 27 Wis. 412, stated under **ACTION**, vol. 1, p. 581.

Conviction. — *In re Fraser*, 13 Nova Scotia 354 (stated under **CONVICTION**, vol. 7, p. 503).

Dwelling House. — *In Wright v. Wallasey Local Board*, 18 Q. B. D. 783, and *Wells v. Somerset*, etc., R. Co., 47 Me. 347, the term was held not to include the curtilage as it did at common law. See cases stated under **DWELLING**, vol. 10, p. 354, and see under same heading at p. 356, *In re Lammer*, 7 Biss. (U. S.) 269, stated and quoted.

Give. — *Com. v. Davis*, 12 Bush (Ky.) 241, stated under **GIFT**, vol. 14, p. 1070.

Outlaw. — *Dale County v. Gunter*, 46 Ala. 118, stated under **OUTLAW**, vol. 21, p. 1021.

Purchaser. — *Cummings v. Coleman*, 7 Rich. Eq. (S. Car.) 509, 62 Am. Dec. 402, stated under **PURCHASE**, vol. 23, p. 462.

Reconsideration. — See **RECONSIDERATION**, vol. 24, p. 71.

Where a Technical Construction Would Defeat the Statute Altogether, its terms must receive such a reasonable and liberal construction as gives it effect in accordance with its spirit and intention. *Robinson v. Varnell*, 16 Tex. 382, holding that a statutory limitation on an "action of debt" applied to an action on a breach of contract, the distinction between all forms of action having been abolished. But see **LIMITATIONS OF ACTIONS**, vol. 19, p. 268.

3. **Peculiar Meanings Recognized.** — *Cruiger v. Hudson River R. Co.*, 12 N. Y. 198, where a meaning of "jury" different from the universally accepted meaning at common law, but which had been in general use for a period of twenty years immediately preceding the sitting of the convention, was recognized as being the proper one in the construction of a clause of the New York constitution.

c. ASSOCIATED WORDS — *NOSCITUR A SOCIIS*. — It is a fundamental principle in the construction of statutes that the meaning of a word or phrase may be ascertained by reference to the meaning of other words or phrases with which it is associated. The rule is embodied in the familiar maxim *noscitur a sociis*.¹

d. GENERAL WORDS AND THEIR LIMITATION — (1) *Intention Controls* — Clear Intention May Restrain General Words. — Language, though apparently general, may be limited in its operation and effect, where it may be gathered from the intent and purpose of the statute that it was designed to apply only to certain persons or things, or was to operate only under certain conditions.²

General Words *Prima Facie* Taken Generally. — But in the absence of some clear indication that the language is to receive a limited signification, general words will receive their general and natural meaning;³ and courts should put no

1. Associated Words — General Rule — *England*. — *Rex v. Harris*, 7 C. & P. 446, 32 E. C. L. 578; *Reg. v. Lichfield*, 2 Q. B. 693, 42 E. C. L. 870; *Muir v. Keay*, L. R. 10 Q. B. 594; *Rex v. Stevens*, 1 Moody 409; *Biggs v. Mitchell*, 2 B. & S. 523, 110 E. C. L. 523; *Hadley v. Perks*, L. R. 1 Q. B. 444; *Isitt v. Beeston*, L. R. 4 Exch. 159; *Cotton v. James*, M. & M. 273, 22 E. C. L. 305; *Bridger v. Richardson*, 2 M. & S. 568; *Rex v. Mallinson*, 2 Burr. 679; *Kearns v. Cordwainers' Co.*, 6 C. B. N. S. 388, 95 E. C. L. 388; *Shuttleworth v. Le Fleming*, 19 C. B. N. S. 687, 115 E. C. L. 687; *Crespigny v. Wittenoom*, 4 T. R. 790; *St. Paul's v. Lincoln*, 4 Price 65; *In re Jones*, 7 Exch. 586; *Reg. v. Brown*, 17 Q. B. 833, 79 E. C. L. 833; *Sewell v. Taylor*, 7 C. B. N. S. 160, 97 E. C. L. 160; *Skinner v. Usher*, L. R. 7 Q. B. 423; *De London's Case*, 2 East P. C. 1098; *Wiseman v. Cotton*, 1 Lev. 80; *Rex v. Manchester, etc.*, *Water Works Co.*, 1 B. & C. 630, 8 E. C. L. 266; *Woodward v. London, etc.*, R. Co., 3 Ex. D. 121.

Canada. — *Reg. v. Taylor*, 36 U. C. Q. B. 198. *United States*. — *Arthur v. Moller*, 97 U. S. 368; *U. S. v. Weise*, 2 Wall. Jr. (C. C.) 72. *Massachusetts*. — *Carter v. Peak*, 138 Mass.

439. *Pennsylvania*. — *Harper's Appeal*, 64 Pa. St. 315; *Com. v. Monongahela Nav. Co.*, 66 Pa. St. 81; *Schenley's Appeal*, 70 Pa. St. 98; *Ballentine v. White*, 77 Pa. St. 20; *Hilke v. Eisenbeis*, 104 Pa. St. 514; *Holman's Appeal*, 106 Pa. St. 502. This, it has been observed in reference to *Rex v. Mellings*, 1 Vent. 225, was a rule adopted by Lord Hale, and was no pedantic or inconsiderate expression in falling from him, but was intended to convey, in short terms, the grounds upon which he formed his judgments. *Broom's Leg. Max.* (8th ed.) 588.

2. General Language Limited — *England*. — *Stradling v. Morgan*, Plowd. 204; *Cope v. Doherty*, 2 De G. & J. 614; *Minet v. Leman*, 20 Beav. 278; *Wagh v. Middleton*, 8 Exch. 357; *Hills v. Shepherd*, 1 F. & F. 191; *Robinson v. Collingwood*, 17 C. B. N. S. 777, 112 E. C. L. 777, 34 L. J. C. Pl. 18; *Jefferys v. Boosey*, 4 H. L. Cas. 815; *East, etc.*, *India Dock Co. v. Hill*, 22 Ch. D. 14, 9 App. Cas. 453; *Railton v. Wood*, 15 App. Cas. 366.

United States. — *U. S. v. Trans-Missouri Freight Assoc.*, 166 U. S. 320; *U. S. v. Saunders*, 22 Wall. (U. S.) 492; *Reiche v. Smythe*, 13 Wall. (U. S.) 162; *Brewer v. Blougher*, 14 Pet. (U. S.) 198; *Moore v. American Transp. Co.*, 24 How. (U. S.) 1 (stated under *INLAND*, vol. 16, p. 502).

California. — *Oakland v. Oakland Water Front Co.*, 118 Cal. 160.

Indiana. — *Maxwell v. Collins*, 8 Ind. 40.

Kansas. — *State v. Smiley*, 65 Kan. 240.

Kentucky. — *Covington v. McNickle*, 18 B. Mon. (Ky.) 286.

Maine. — *Jones v. Jones*, 18 Me. 308, 36 Am. Dec. 723.

Maryland. — *Stockett v. Bird*, 18 Md. 484.

New York. — *People v. Allen*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 123; *Keavey v. De Rago*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 108.

North Carolina. — *Starnes v. Hill*, 112 N. Car. 23.

Virginia. — *Orange, etc., R. Co. v. Alexandria*, 17 Gratt. (Va.) 182.

See also *infra*, this section, 8. *Construing Entire Statute as One Whole*, subdiv. b. (2) *General and Particular Clauses*.

In *Stradling v. Morgan*, Plowd. 199, the court sums up the rule on this subject as follows: "The judges of the law in all times past have so far pursued the intent of the makers of statutes that they have expounded acts which were general in words to be but particular where the intent was particular . . . Those statutes which comprehend all things in the letter, they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded on the intent of the legislature, which they have collected sometimes by considering the cause and necessity of making the act, sometimes by comparing one part of the act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the legislature, which they have always taken according to the necessity of the matter and according to that which is consonant to reason and good discretion." This exposition is cited with approval in *Cox v. Hakes*, 15 App. Cas. 518; *In re Standard Mfg. Co.*, (1891) 1 Ch. 646.

3. General Words Taken Generally — *England*. — *Scott v. Legg*, 2 Ex. D. 42; *Rex v. Hodnett*, 1 T. R. 96.

Georgia. — *Henderson v. Alexander*, 2 Ga. 88; *Booth v. Williams*, 2 Ga. 255; *Ragland v. Justices*, 10 Ga. 71; *Torrance v. McDaugald*, 12 Ga. 526; *Shumate v. Williams*, 34 Ga. 251.

greater restriction on the language used than the nature of the provision and the subject-matter to which it relates necessarily impose.¹

Other Illustrations of phrases which have received their natural and extended meaning or have been restrained, in conformity with legislative intent, are collected in the note.²

(2) *Ejusdem Generis Rule*. — The most frequent application of this rule is found where specific and generic terms of the same nature are employed in the same act, the latter following the former. While, in the abstract, general terms are to be given their natural and full signification,³ yet where they follow specific words of a like nature they take their meaning from the latter, and are presumed to embrace only things or persons of the kind designated by them.⁴

It Is Immaterial, It Has Been Held, Whether the Generic Term Precedes or Follows the specific terms which are used. In either case the general word must take its

Illinois. — *Burke v. Monroe County*, 77 Ill. 614.

Maine. — *Jones v. Jones*, 18 Me. 308, 36 Am. Dec. 723, stated in title DIVORCE, vol. 7, ENCYC. OF PL. AND PR., p. 61.

Maryland. — *Milburn v. State*, 1 Md. 17; *Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co.*, 4 Gill & J. (Md.) 152.

Massachusetts. — *Whitney v. Whitney*, 14 Mass. 92; *Holbrook v. Holbrook*, 1 Pick. (Mass.) 248.

New York. — *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 142, 8 Am. Dec. 467.

Wisconsin. — *Woodbury v. Shackleford*, 19 Wis. 60; *Harrington v. Smith*, 28 Wis. 60; *Lindsay v. Fay*, 28 Wis. 177; *Van Steenwyck v. Washburn*, 59 Wis. 483, 48 Am. Rep. 532 (stated in title EQUITABLE ELECTION, vol. 11, p. 79); *Purtell v. Chicago Forge, etc., Co.*, 74 Wis. 134 (stated under ANY, vol. 2, p. 416).

See also *infra*, this section, 8. *Construing Entire Statute as One Whole*, subdiv. b. (2) *General and Particular Clauses*.

This is especially the case where a limited interpretation would render the statute nugatory. *Reg. v. Pembroke*, 3 Q. B. 901, 43 E. C. L. 1028, where the word "preferred," used in an indictment, was held to include "trial," and to be equivalent to "carried on."

Contracts "in Restraint of Trade." — These terms in the Federal Anti-Trust Act (26 U. S. Stat. at L. 209), it has been held by the Supreme Court of the United States, should be taken in their ordinary and general sense, including such restraints whether reasonable or unreasonable, valid or invalid by the common law, and that to limit the words so as to include only unreasonable restraints, as was done in the courts below, would be to read into the statute without sufficient reason "an exception which alters the natural meaning of the language used." *U. S. v. Trans-Missouri Freight Assoc.*, 166 U. S. 290, reversing (C. C. A.) 58 Fed. Rep. 578. See also the title MONOPOLIES AND TRUSTS, vol. 20, p. 860 *et seq.*

1. *Sullivan v. Mitcalfe*, 5 C. P. D. 460.

Reasonable Interpretation. — In the construction of statutes, general terms are to receive such reasonable interpretation as leaves the provisions of the statute practically operative. *Electro-Magnetic Min., etc., Co. v. Van Auken*, 9 Colo. 204.

2. Enlarged Meaning in Accordance with Legislative Intent — Immediate Danger. — *Bailey v. Com.*, 11 Bush (Ky.) 688, stated under IMMEDIATE, vol. 15, p. 1022.

Neighborhood or Family. — *Noe v. People*, 39 Ill. 96 (includes a woman living alone), case stated under title FAMILY, vol. 12, p. 867.

Single Woman. — *Reg. v. Collingwood*, 12 Q. B. 681, 64 E. C. L. 681 (includes married women), case stated under SINGLE, vol. 25, p. 1069.

Occupier of Land. — *Reg. v. Warwick*, 8 Q. B. 926, 55 E. C. L. 926 (includes licensee of occupier). See also OCCUPANCY, etc., vol. 21, p. 766, for statute and other cases.

Words Restricted — Any Person. — *Proctor v. Hannibal, etc., R. Co.*, 64 Mo. 112 (held not to include fellow servant injured by coemployee), case stated under ANY, vol. 2, p. 418.

Inhabitants. — *Walnut v. Wade*, 103 U. S. 683 (restricted to legal voters), case stated under title ELECTIONS, vol. 10, p. 589.

Instances of Holdings Both in an Enlarged and a Restricted Sense may be found under INHABITANT — INHABITANT, vol. 16, p. 328; **LABOR — LABORER**, vol. 18, p. 71; the title PERSON, vol. 22, p. 738, and numerous other words and phrases throughout this work.

"Lot" in Homestead Laws. — See the title HOMESTEAD, vol. 15, p. 604.

"Competent to Dispose by Will." — *Atty.-Gen. v. Hallett*, 2 H. & N. 368, stated under COMPETENT, vol. 6, p. 371.

3. *Cork, etc., R. Co. v. Goode*, 13 C. B. 836, 76 E. C. L. 836; *Jeffries v. Evans*, 19 C. B. N. S. 264, 115 E. C. L. 264.

4. *Ejusdem Generis Rule.* — *Townsend Gas, etc., Co. v. Hill*, 24 Wash. 469. See the titles OTHER, vol. 21, p. 1012; OTHERWISE, vol. 21, p. 1016, where a large collection of cases, and many illustrations, will be found. And see the titles GAMING, vol. 14, pp. 684, 685; GAMING HOUSES, vol. 14, p. 710.

Thus, an act declaring that certain affidavits shall not be invalidated by "clerical or other defects," refers to clerical or formal defects of like description only. *Duanesburgh v. Jenkins*, 40 Barb. (N. Y.) 574.

So an act exempting from execution the tools, etc., of any "mechanic, miner, or other person," does not include a judgment debtor who is a farmer. *Bevitt v. Crandall*, 19 Wis. 581.

meaning and be presumed to embrace only things or persons of the kind designated in the specific words.¹

Legislative Intent. — But the object of the rule in question being not to defeat, but to ascertain and effectuate the legislative intent, it will not be applied where the application would be in the face of the evident meaning of the framers of the law.² In other words, the maxim has no application where there is no room for construction, but only when the meaning is not apparent from the language itself.³

Subjects of Different Nature. — Nor does the rule obtain where the specific words signify subjects greatly different from one another, for here the general expression might very consistently add one more variety; in such case, the general term must receive its natural and wide meaning.⁴

When Whole Genus Exhausted. — Nor does it apply when the particular words exhaust a whole genus; in that case the general term is held to refer to a larger class.⁵

Inferior Does Not Include Superior. — Statutes which treat of persons or things of an inferior degree cannot, by any general words, be extended to those of a superior degree.⁶ Where, however, the consequence of thus restricting the general words would be that they would have no effect at all, they must be construed to extend to persons or things superior in degree to those enumerated. Upon this principle, a statute limiting the time for the institution of "every possessory, ancestral, mixed, or other action," has been held to include a real action.⁷

e. PARTICULAR LANGUAGE CONSTRUED GENERALLY. — When the expression in a statute is special or particular, but the reason is general, the expression should be deemed general.⁸

f. EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS. — The maxim "the expression of one thing is the exclusion of another" may explain the meaning and content of words in a statute,⁹ but its chief use is to aid in ascertaining the whole scope of a law, and it has been considered already.¹⁰

g. PRESUMPTION AS TO MEANING OF WORDS — (1) *Same Throughout Act.* — There is a *prima facie* presumption that the meaning of a word

1. Reg. v. France, 7 Quebec Q. B. 83.

2. **Intent.** — Glasgow v. Glasgow Tramway, etc., Co., (1898) A. C. 634; Foster v. Blount, 18 Ala. 687; Maxwell v. People, 158 Ill. 255; Willis v. Mabon, 48 Minn. 140, 31 Am. St. Rep. 626; Shropshire v. Glascock, 4 Mo. 536, 31 Am. Dec. 189; Boynton v. Curle, 4 Mo. 599; Eubanks v. State, 5 Mo. 450; Hayden v. Little, 35 Mo. 418; State v. Williams, 35 Mo. App. 541; Woodworth v. State, 26 Ohio St. 196; State v. Williams, 2 Strobb. L. (S. Car.) 474; Com. v. Percavil, 4 Leigh (Va.) 686.

3. Brown v. Chicago, etc., R. Co., 102 Wis. 137.

4. Reg. v. Payne, L. R. 1 C. C. 27.

5. McKeon v. Wolf, 77 Ill. App. 335. See also Fenwick v. Schmalz, L. R. 3 C. P. 316, per Willes, J. See the next subdivision.

6. **Inferior Does Not Include Superior.** — Lyndon v. Standbridge, 2 H. & N. 51; Ailesbury v. Pattison, 1 Dougl. 28; Woodworth v. Paine, 1 Ill. 374; Hall v. Byrne, 2 Ill. 140; Broom's Legal Maxims (8th ed.) 650; Canterbury Case, 2 Coke 46b; Copland v. Powell, 1 Bing. 373, 8 E. C. L. 554; Casher v. Holmes, 2 B. & Ad. 592, 22 F. C. L. 146.

7. Chapman v. Woodruff, 34 Ga. 98; Ellis v. Murray, 28 Miss. 129.

8. **Words Special, Reason General.** — Beawage's Case, 10 Coke 101b; Brown v. Pendergast, 7 Allen (Mass.) 429; Eshleman's Appeal,

74 Pa. St. 47. But see *infra*, this title, VII. 1. b. (2) *Early Application of Rule.*

The statement of this rule is sometimes limited to the construction of remedial statutes. Brown v. Pendergast, 7 Allen (Mass.) 429.

Illustrations. — In Winslow v. Kimball, 25 Me. 493, a statute rendering bequests to subscribing witnesses void, was held to include the case of a bequest to the husband of a subscribing witness. See also the title LEGACIES AND DEVISES, vol. 18, p. 739.

In Crane v. Alling, 14 N. J. L. 593, a statute which extended in its terms to "the executors or administrators of such deceased plaintiff or defendant" was held to be extended by the reason thereof to an administrator *de bonis non*.

9. Thus the statute of uses (27 Hen. VIII., c. 10) declares that when "any person or persons" is seized to the use of "any person or persons or of any body politic," the latter person or body politic shall be deemed to be seized. Lord Bacon, in explaining that a corporation may not be a feoffee to uses, says: "Because of the letter of this statute, which, in any clause when it speaketh of the feoffee, resteth only upon the word 'person,' but when it speaketh of *cestui que use*, it addeth person or body politic." Bacon Reading on Stat. Uses 43. See Maxwell Interp. Stat. (3d ed.), p. 460.

10. See *supra*, this section, 4. b. (4) *Expressio Unius Est Exclusio Alterius*.

repeatedly used in a statute is identical in all places, unless there is something to show that another meaning is intended.¹ This presumption, however, is never deemed conclusive, and indeed is generally considered of little weight.²

(2) *Same as in Former Act in Pari Materia*. — Words in a subsequent act are to be given the recognized meaning they had in a former act *in pari materia* in the absence of anything to show a contrary intent,³ and judicial decisions construing one of such acts form a sound rule of construction for the other.⁴

h. To WHAT TIME WORDS OR DESCRIPTIONS REFERRED. — A statute must be construed with reference to the time of the passage thereof, or with reference to its going into effect. That meaning must be given to words which they had at the date of the act,⁵ and descriptive matter therein must refer to things as they existed at the time of its passage.⁶ But words of

1. Presumption that Word Is Used with Same Meaning Throughout Statute. — *Courtauld v. Legh*, L. R. 4 Exch. 126; *Reg. v. Poor Law Com'rs*, 6 Ad. & El. 68, 33 E. C. L. 12; *In re Kirkstall Brewery Co.*, 5 Ch. D. 535; *Pitte v. Shipley*, 46 Cal. 161; *State v. Knowles*, 90 Md. 654; *Postal Tel.-Cable Co. v. Farmville, etc.*, R. Co., 96 Va. 661. See also *Gunning v. People*, 86 Ill. App. 179. *Compare* *Bones v. Booth*, 2 W. Bl. 1226; *U. S. v. Central Pac. R. Co.*, 118 U. S. 235; *Den v. Schenck*, 8 N. J. L. 34; *Den v. Dubois*, 16 N. J. L. 293; *Raymond v. Cleveland*, 42 Ohio St. 529.

Amending Statutes Are to Be Construed as a Part of the Original Statute within the meaning of this rule. *Browne v. Turner*, 174 Mass. 162. See also *infra*, this title, VIII. *Amendment*, 8. *u.*

Rule Stated and Limited. — Where the same word or phrase is used more than once in the same act, especially in the same section and in the same sentence, in relation to the same subject-matter and looking to the same general purpose, it is a fundamental rule of statutory construction that if in one connection the meaning is clear and in the other it is otherwise doubtful or obscure, it is in the latter case to be construed the same as in the former. *Rhodes v. Weldy*, 46 Ohio St. 242, 15 Am. St. Rep. 584.

If the same word is used in different connections and in different statutes, there is no rule of construction requiring the same meaning to be attached to it. *Rupp v. Swineford*, 40 Wis. 28.

2. Presumption of Little Weight. — *Reg. v. Kent*, 2 Q. B. 692, 42 E. C. L. 869; *Angell v. Angell*, 9 Q. B. 353, 58 E. C. L. 353; *Reg. v. Lewis, Dears. & B.* 182; *Reg. v. Allen*, L. R. 1 C. C. 367; *State v. Knowles*, 90 Md. 654; *Henry v. Trustees*, 48 Ohio St. 671.

3. Words in Act to Be Given the Same Meaning as in Former Act in Pari Materia. — *Greaves v. Tofield*, 14 Ch. D. 571; *Clark v. Wallond*, 52 L. J. Q. B. 322; *Reiche v. Smythe*, 13 Wall. (U. S.) 162; *Greenleaf v. Goodrich*, 101 U. S. 281; *Robbins v. Omnibus R. Co.*, 32 Cal. 472; *County-Seat of Linn County*, 15 Kan. 500; *Den v. Matlack*, 17 N. J. L. 93; *State v. Garthwaite*, 23 N. J. L. 143; *Whitcomb v. Rood*, 20 Vt. 49. See also *Hart v. Reynolds*, 1 Heisk. (Tenn.) 208, and the title *CONSTITUTIONAL LAW*, vol. 6, p. 1035; also *infra*, this section, 11. *h.* (2) *Adopting Language of Settled Meaning*.

But with regard to a claim that a statute should be so construed as to be harmonious

with a previous one, the court said: "It is true that statutes relating to the same subject are to be construed together, but this rule does not go to the extent of controlling the language of subsequent statutes by any supposed policy of previous ones." *Goodrich v. Russell*, 42 N. Y. 184.

4. Decisions under One Act in Pari Materia Apply under Another. — *Rex v. Mason*, 2 T. R. 586, *per* Buller, J.; *Sturgis v. Darell*, 4 H. & N. 622; *Greaves v. Tofield*, 14 Ch. D. 571; *Hersha v. Brennenman*, 6 S. & R. (Pa.) 2; *Eshleman's Appeal*, 74 Pa. St. 42. See also *Briscoe v. Rich*, 20 Utah 349, and *infra*, this section, 10. *b.* (2) *Contemporaneous Exposition and Long Usage*.

Decisions on an English act apply to a colonial act *in pari materia*. *Catterall v. Sweetman*, 9 Jur. 954. See also *Trimble v. Hill*, 5 App. Cas. 342. But such decisions do not apply between separate local acts. *Strachan v. Thompson*, 13 Dunlop (Sc.) 279; *Hardcastle Stat. Laws* (3d ed.) 146.

5. Meaning of Words as at Time of Passage of Act. — *Board of Works v. United Telephone Co.*, 13 Q. B. D. 914; *Aerated Bread Co. v. Gregg*, L. R. 8 Q. B. 355, with which *compare* *Reg. v. Wood*, L. R. 4 Q. B. 559; *Smith v. Lindo*, 4 C. B. N. S. 406, 93 E. C. L. 406 *per* Crowder, J., 409 *per* Willes, J.; *Massey v. Dunlop*, 146 Ind. 358.

"The words of a statute must be construed as they would have been the day after the statute was passed." Lord Esher in *Sharpe v. Wakefield*, 22 Q. B. D. 242.

So in the Use of Trade Terms. — *Gaslight, etc., Co. v. Hardy*, 17 Q. B. D. 621.

Trespass in an old English statute (4 Edw. III., c. 7) is to be taken as synonymous with wrong. *Per* Lawrence, J., in *Wilson v. Knubley*, 7 East 128.

6. Descriptive Matter. — "In matters of description a statute must necessarily refer to things as they exist at the time of its passage." *Griswold v. Atlantic Dock Co.*, 21 Barb. (N. Y.) 228. See also *Mobile v. Eslava*, 16 Pet. (U. S.) 234; *Pontchartrain R. Co. v. Lafayette, etc.*, R. Co., 10 La. Ann. 741; *Morris Canal, etc., Co. v. State*, 24 N. J. L. 62; *Com. v. Erie, etc.*, R. Co., 27 Pa. St. 353, 67 Am. Dec. 471.

Phrases referring apparently to a state of things existing at the time of the act, may also include cases where such a state of things subsequently arises. *People v. Hinrichsen*, 161 Ill. 223; *State v. Atlantic City*, 56 N. J. L. 232.

time are usually to be construed as spoken when the act takes effect.¹

6. Grammar and Collocation of Words — *a. GENERAL RULE.* — The language of an act is to be read in the first instance in accordance with the ordinary rules of grammar, but the grammatical sense must be modified in accordance with plain legislative intention so far as to avoid inconsistency, absurdity, or repugnancy.²

b. MALA GRAMMATICA NON VITIAT. — The rule that bad grammar will not defeat the operation of a statute is old and well settled.³

c. PUNCTUATION. — The effect of punctuation on the interpretation of statutes is treated in a subsequent subsection.⁴

d. COLLOCATION — (1) *In General.* — The arrangement of words in an act must be observed, and they must be given "that sense which is their natural import in the order in which they are placed."⁵ Yet where it is necessary to give effect to a statute imperfectly expressed, words may be transposed in

1. Words of Time. — *Jackman v. Garland*, 64 Me. 133. See also *Reg. v. Canada Sugar Refining Co.*, 27 Can. Sup. Ct. 402 ("when such goods are imported into Canada"); *Briscoe v. Rich*, 20 Utah 349, and the title *TIME (COMPUTATION OF)*.

Thus, references in a bill to the time of its "passage" refer to the time when it takes effect. *Charles v. Lamberson*, 1 Iowa 442, 63 Am. Dec. 457; *Rogers v. Vass*, 6 Iowa 408; *Thompson v. Independent School Dist.*, 102 Iowa 94. See also *PASS — PASSING — PASSAGE*, vol. 22, p. 258, note.

Existing. — *Barrows v. People's Gas Light, etc., Co.*, 75 Fed. Rep. 794; *Rogers v. Vass*, 6 Iowa 405. But see *Indianapolis, etc., R. Co. v. Blackman*, 63 Ill. 117, in which a general statute applicable to "all existing railroad corporations" was held to apply to railroads incorporated after as well as to those incorporated before its passage. See also *EXISTENCE — EXISTING*, vol. 12, p. 391.

Hereafter — Heretofore. — See *HEREAFTER — HERETOFORE*, vol. 15, p. 336, and *supra*, this title, IV. 5. *From Future Day Named.*

Existing and Future Legislation Included. — Where a statute referred to certain powers "which may be by law given," etc., it was held that the meaning was to include existing as well as future legislation. *Simpson v. North Adams*, 171 Mass. 451.

2. Rules of Grammar. — *England.* — *Eyston v. Studd*, 2 Plowd. 463; *Reg. v. Frost*, 9 C. & P. 129, 38 E. C. L. 70; *Wright v. Williams*, 1 M. & W. 99; *Becke v. Smith*, 2 M. & W. 195; *Atty.-Gen. v. Lockwood*, 9 M. & W. 378; *Smith v. Bell*, 10 M. & W. 378; *Ruther v. Harris*, 1 Ex. D. 97; *Hollingworth v. Palmer*, 4 Exch. 267; *Miller v. Salomons*, 7 Exch. 475; *Waugh v. Middleton*, 8 Exch. 356; *Abel v. Lee*, L. R. 6 C. P. 371; *Cull v. Austin*, L. R. 7 C. P. 234; *Ex p. Rashleigh*, 2 Ch. D. 13; *Macdougall v. Paterson*, 11 C. B. 755, 73 E. C. L. 755; *Christopherson v. Loting*, 15 C. B. N. S. 809, 109 E. C. L. 809; *Everett v. Wells*, 2 M. & G. 269, 40 E. C. L. 366; *Warburton v. Loveland*, 1 Hud. & Br. 648; *Richards v. McBride*, 8 Q. B. D. 119.

United States. — *Brown v. Barry*, 3 Dall. (U. S.) 365; *Denn v. Reid*, 10 Pet. (U. S.) 526; *Minis v. U. S.*, 15 Pet. (U. S.) 446; *Home L. Ins. Co. v. Dunn*, 19 Wall. (U. S.) 224; *U. S. v. Lacher*, 134 U. S. 626; *U. S. v. Seventy-Six Thousand One Hundred and Twenty-Five Ci-*

gars, 18 Fed. Rep. 149; *Heller v. Magone*, 38 Fed. Rep. 911; *Reiley v. U. S.*, (C. C. A.) 106 Fed. Rep. 900. See also *Farmers', etc., Nat. Bank v. Dearing*, 91 U. S. 33; *Lake County v. Rollins*, 130 U. S. 670; *The Saratoga*, 9 Fed. Rep. 326; *Singer Mfg. Co. v. McCollock*, 24 Fed. Rep. 667, *per* Caldwell, J.; *Gwathmay v. Clisby*, 31 Fed. Rep. 222.

Georgia. — *George v. Board of Education*, 33 Ga. 344.

Indiana. — *State v. Myers*, 146 Ind. 38.

Kansas. — *State v. Duell*, 63 Kan. 814.

Kentucky. — *Maysville, etc., R. Co. v. Her- 13*

rick, 13 Bush (Ky.) 123.

Montana. — *Jay v. School Dist. No. 1*, 24 Mont. 219.

New York. — *Newell v. People*, 7 N. Y. 97;

People v. Gates, 56 N. Y. 387; *Jackson v. Top- 19*

ping, 1 Wend. (N. Y.) 388, 19 Am. Dec. 515.

Pennsylvania. — *Dame's Appeal*, 62 Pa. St.

422; *Gyger's Estate*, 65 Pa. St. 311; *Fisher v. 69*

Connard, 100 Pa. St. 69.

Utah. — *People v. Hill*, 3 Utah 334.

See also *Murray v. State*, 21 Tex. App. 620,

57 Am. Rep. 623.

The Lawmaker Is Presumed to Know the rules

of grammar. *U. S. v. Goldenberg*, 168 U. S.

103.

The Strictest Grammatical Rules are not to

govern construction. *Sullivan v. Robertson*, 37

Fed. Rep. 779. See also *Heydenfeldt v. Daney*

Gold, etc., Min. Co., 93 U. S. 638; *Griffith v.*

Bogert, 18 How. (U. S.) 163.

The Interpretations of "And" and "Or" illus-

trate these rules; see *AND*, vol. 1, p. 333 *et seq.*

See also the following cases: *Thomas v. Grand*

Junction, 13 Colo. App. 80; *Ayers v. Chicago*

Title, etc., Co., 187 Ill. 42; *State v. Myers*, 146

Ind. 36; *Douglass v. State*, 18 Ind. App. 289;

Barker v. Esty, 19 Vt. 140.

3. Bad Grammar Does Not Defeat Statutes. —

Kelly v. McGuire, 15 Ark. 588; *French v.*

Teschemaker, 24 Cal. 553; *Garrigus v. Parke*

County, 39 Ind. 76; *Murray v. State*, 21 Tex.

App. 620, 57 Am. Rep. 623. See as to private

writings the title *INTERPRETATION AND CON-*

STRUCTION, vol. 17, p. 20.

4. See *infra*, this section, *Aids to Interpretation* —

Intrinsic from Incidents and Form —

Punctuation.

5. Order of Words Regarded. — *Rex v. Rams-*

gate, 6 B. & C. 715, 13 E. C. L. 302, *per*

Bayley, J.

accordance with the legislative intent,¹ or the structure of sentences changed.²

Associated Words. — The rules for ascertaining the meaning of words from their position in association with other words have been examined already.³

Expressio Unius, Exclusio Alterius. — The principle that "the expression of one thing is the exclusion of another" has likewise been considered.⁴

(2) **Qualifying Phrases Confined to Next Antecedent.** — In accordance with strict grammatical construction, it is said that qualifying words and phrases should be confined to their next antecedent,⁵ but this rule is frequently neglected and is always subservient to the legislative intent.⁶

(3) **Reddenda Singula Singulis.** — Words or clauses in a statute, where the sense requires it, and in furtherance of the legislative intention, are to be taken distributively, *reddenda singula singulis*.⁷ They are thus applied to the subject-matter to which they appear by the context most properly to relate, and to which they are indeed most applicable.⁸

7. Implication of Incidents — *a.* **GENERAL DOCTRINE.** — When the intention of the legislature as gathered from all legitimate sources is taken into consideration, terms and provisions not expressly declared may be introduced into a statute by necessary or plain implication from what is directly or expressly declared. By "necessary implication" is not meant an implication that points to a result so as to leave no possible escape and to exclude every other imaginable conclusion, but one that leads to such a conclusion as, under

1. Changing Order of Words. — The imperfect meaning of phrases may be corrected in order to give effect to a statute, by changing the order of the words. *Lyde v. Barnard*, 1 M. & W. 101. So the phrase "current expenses of the year" was read "expenses of the current year." *Babcock v. Goodrich*, 47 Cal. 488. See also *Doe v. Considine*, 6 Wall. (U. S.) 458; *State v. Deuel*, 63 Kan. 814; *Matthews v. Com.*, 18 Gratt. (Va.) 989.

2. See *infra*, this section, *Effect of Mistakes or Omissions, Substantial or Formal — Correction of Errors, Omissions, or Misuse of Words*.

3. See *supra*, this section, *Interpretation of Words and Phrases — Expressio Unius Est Exclusio Alterius*.

4. See *supra*, this section, *Whether Intention Deduced from Letter or Spirit of Statute — b.* *Expressio Unius Est Exclusio Alterius*.

5. Qualifying Words and Phrases — England. — *Staniland v. Hopkins*, 9 M. & W. 178.

United States. — *U. S. v. Lacher*, 134 U. S. 624; *U. S. v. Pelletreau*, 14 Blatchf. (U. S.) 126; *U. S. v. Falkenhainer*, 21 Fed. Rep. 624. See also *Caha v. U. S.*, 152 U. S. 214; *Waters v. Campbell*, 4 Sawy. (U. S.) 121.

Massachusetts. — *Cushing v. Worrick*, 9 Gray (Mass.) 385. See also *Dearborn v. Brookline*, 97 Mass. 469 (stated under *EXCEED*, vol. 11, p. 554); *Quinn v. Lowell Electric Light Corp.*, 140 Mass. 106.

Tennessee. — *State v. Brown*, 3 Heisk. (Tenn.) 1.

Wisconsin. — See *State v. Conklin*, 34 Wis. 21.

See also *Fowler v. Tuttle*, 24 N. H. 22; *Fisher v. Connard*, 100 Pa. St. 63.

6. Yields to Intent. — *Hart v. Kennedy*, (Supm. Ct. Gen. T.) 15 Abb. Pr. (N. Y.) 290; *Coxson v. Doland*, 2 Daly (N. Y.) 66; *State v. Jernigan*, 3 Murph. (7 N. Car.) 18; *Gyger's Estate*, 65 Pa. St. 311; *Eby's Appeal*, 70 Pa. St. 311.

The punctuation, as indicating legislative intent, may prevent the application of this rule.

Seiler v. State, (Ind. 1903) 67 N. E. Rep. 448.

The act establishing the metropolitan police provided that "no person holding office under this act shall be liable to military or jury duty, nor to arrest on civil process, or the service of subpoenas from civil courts, whilst actually on duty." In *Hart v. Kennedy*, (Supm. Ct. Spec. T.) 14 Abb. Pr. (N. Y.) 432, it was held that this provision should be read as meaning, "nor whilst actually on duty to arrest on civil process, or to service of subpoenas from civil courts."

Qualifying Words May Be Extended to Other Sections to effectuate the intent. *U. S. v. Bab-bitt*, 1 Black (U. S.) 55; *State v. Forney*, 21 Neb. 226; *State v. Zanesville*, etc., Turnpike Road Co., 16 Ohio St. 320; *Matthews v. Com.*, 18 Gratt. (Va.) 989.

Effect of Position of General Qualifying Words.

— It seems to be the rule in construction that general words and expressions at the end of a sentence qualify the whole. *Rex v. Shipton*, 8 B. & C. 94, 15 E. C. L. 155; *Great Western R. Co. v. Swindon*, etc., Extension R. Co., 9 App. Cas. 808; *Coxson v. Doland*, 2 Daly (N. Y.) 68, where Daly, J., adds: "While if they are in the middle of the sentence, and sensibly apply to a particular branch of it, they are not to be extended to that which follows."

7. Reddenda Singula Singulis. — *Reg. v. Cumberworth Half*, 5 Q. B. 484, 48 E. C. L. 484; *Stacey v. Nelson*, 12 M. & W. 533; *Rex v. Bristol Dock Co.*, 6 B. & C. 181, 13 E. C. L. 139; *U. S. v. Simms*, 1 Cranch (U. S.) 253; *Coffin v. Hussey*, 12 Pick. (Mass.) 289; *Com. v. Cooke*, 50 Pa. St. 201. See also *Com. v. Jordan*, 18 Pick. (Mass.) 228.

In *McIntyre v. Ingraham*, 35 Miss. 25, it is said that it is one of the best settled rules of construction that words in different parts of a statute must be referred to their appropriate connection, giving to each in its place its proper force, *reddenda singula singulis*, and if possible rendering none of them useless or superfluous.

8. Potter's Dwaris 230.

the circumstances, a reasonable view compels the court to take, the contrary of which would be improbable or absurd.¹ In order to import terms into a statute by implication, the legislative intent must clearly appear, and the intent itself will not be imputed and then by further implication consequences deduced;² but when the intention is clear, what is implied in a statute is as much a part of it as what is expressed.³

A Statute Which Imposes a Penalty for doing an act by implication renders the act unlawful,⁴ and a penalty for the nonperformance of an act implies the duty of performance.⁵

b. AS TO POWERS AND DUTIES.—Where a power is conferred by a statute everything necessary to carry out the power and make it effectual and complete will be implied.⁶ In the same way a power may imply a correlative duty.⁷

c. AS TO REMEDIES AND PROCEDURE.—When an affirmative statute introductory of a new law directs a thing to be done in a certain manner, that thing shall not, even in the absence of negative words, be done in any other manner; but when the statute merely provides a new remedy for a pre-existing right, and contains no negative express or implied of the old remedy, the new remedy is merely cumulative.⁸

d. AS TO CONFERRING JURISDICTION.—Acts which give justices and

1. **Necessary Implication.**—*Gilbert v. Craddock*, (Kan. 1903) 72 Pac. Rep. 869.

2. **Intent Not Imputed.**—*Newhall v. Sanger*, 92 U. S. 765; *Northern Pac. R. Co. v. U. S.*, 36 Fed. Rep. 287; *Massachusetts L. & T. Co. v. Hamilton*, (C. C. A.) 88 Fed. Rep. 596; *People v. Lacombe*, 99 N. Y. 49.

The rules of construction governing literal interpretation and construction by reference to the legislative intent have been fully treated already; see *supra*, this section, 4. a. (1) *General Statement*; and 4. b. (1) *Effect of Ambiguous Language*.

3. **Matter Implied Is Part of Law.**—*U. S. v. Babbitt*, 95 U. S. 334, 1 Black (U. S.) 61; *Hanchett v. Weber*, 17 Ill. App. 117. See also the references in the last note, *supra*.

How Conclusion of Implication Reached.—In drawing a conclusion that certain matters are included in a statute by implication, courts may read the entire act, as well as past acts in *pari materia*, and take into consideration the purposes and scope of the act, the inconveniences, inconsistencies, and absurdities of a contrary view, and the general policy and character of the institutions of the state. *Gilbert v. Craddock*, (Kan. 1903) 72 Pac. Rep. 869.

A Felony by Statute Has All the Incidents of a common-law felony. *U. S. v. Wilson, Baldw.* (U. S.) 104. See also titles *ACCESSORY*, vol. 1, p. 260; *AIDER AND ABETTOR*, vol. 2, p. 30.

4. **Penalty for Act.**—*Griffith v. Wells*, 3 Den. (N. Y.) 226; *Mitchell v. Smith*, 1 Binn. (Pa.) 110, 2 Am. Dec. 417. See also the titles *FINES AND PENALTIES*, vol. 13, p. 57; *ILLEGAL CONTRACTS*, vol. 15, p. 939; *PHYSICIANS AND SURGEONS*, vol. 22, p. 795.

5. *The Steamship Hibernian*, 1 Quebec 319; *Chester v. Chester First Nat. Bank*, 9 Pa. Super. Ct. 517.

6. **Implied Powers.**—*Gelpcke v. Dubuque*, 1 Wall. (U. S.) 220; *Wilson County v. National Bank*, 103 U. S. 770; *Hughes v. Northern Pac. R. Co.*, 18 Fed. Rep. 106; *Budd v. Budd*, 59 Fed. Rep. 741; *Custer County v. Anderson*, (C.

C. A.) 68 Fed. Rep. 344; *Little Rock v. U. S.*, (C. C. A.) 103 Fed. Rep. 420; *Conn. v. Cass County*, 151 Ind. 525; *Studabaker v. Studabaker*, 152 Ind. 96; *Beallsville School Dist.*, 21 Pa. Co. Ct. 642.

This rule is illustrated in a variety of subjects, as, for instance, in regard to the implied powers of corporations (see the title *CORPORATIONS*, vol. 7, pp. 71, 726, 746, 755, 815, and *passim*, and titles treating particular corporations); of public officers (see the title *PUBLIC OFFICERS*, vol. 23, p. 364); of municipal corporations (see the title *MUNICIPAL CORPORATIONS*, vol. 20, p. 1139); in respect to the power of eminent domain (see the title *EMINENT DOMAIN*, vol. 10, pp. 1055, 1095).

An appropriation by Congress for the salary of a consul at a place where there has previously been only a consular agency, is sufficient warrant for the President to appoint a consul there. *Sampson v. U. S.*, 30 Ct. Cl. 365.

Authority for the Election of a Mayor may be drawn by necessary implication from an act of the legislature relating to the government of cities of a certain class. *Gilbert v. Craddock*, (Kan. 1903) 72 Pac. Rep. 869.

7. Thus a municipal corporation is under the obligation of keeping its highways in repair. See the title *HIGHWAYS*, vol. 15, p. 420.

The Duty of a School Board to Collect Implies a Duty of a Teacher to Pay a fee imposed by law. *Hammond v. Muskegon*, 109 Mich. 676.

Implied Limitation on Powers Conferred.—When an act confers powers, it impliedly requires that they shall be exercised only for the purposes for which they were given and subject to the conditions which it prescribed and in a way to prevent needless injury. *Jones v. Bird*, 5 B. & Ald. 837, 7 E. C. L. 277.

As to how far a legislative grant may confer power to maintain a nuisance, see the title *NUISANCE*, vol. 21, p. 726. See also *Franklyn v. People's Heat, etc., Co.*, 32 Nova Scotia 44.

8. See *infra*, this title, VII. 1. a. (11) *Statutory Remedies and Proceedings*.

other inferior tribunals jurisdiction in certain cases are understood in general, when silent on the subject, as not affecting the power of control and supervision which the superior courts exercise over the proceedings of such tribunals.¹

The Creation of a New Jurisdiction is not to be presumed, in the absence of adequate language,² and all doubts are to be solved in favor of the tribunal exercising the jurisdiction at the time.³ Effect, however, must be given to the intention, where a statute without conferring jurisdiction in express terms does so by plain and necessary implication.⁴

1. Grant of Jurisdiction to Inferior Tribunal — Supervising Power. — *Jacobs v. Brett*, L. R. 20 Eq. 1; *Hawes v. Paveley*, 1 C. P. D. 418; *Bridge v. Branch*, 1 C. P. D. 633; *Oram v. Brearey*, 2 Ex. D. 346; *Overseers of Poor v. Smith*, 2 S. & R. (Pa.) 363; *Com. v. M'Closkey*, 2 Rawle (Pa.) 369; *Burginhofen v. Martin*, 3 Yeates (Pa.) 479. See also *Wakefield v. State*, 5 Ind. 195; *O'Brian v. State*, 12 Ind. 369; *Walker v. Wynne*, 3 Yerg. (Tenn.) 62; and *infra*, this section, 11. *f. Ousting Jurisdiction*, and this title, VII. 1. a. (9) *Statutes Affecting Jurisdiction of Courts*.

2. Creation of New Jurisdiction Not Presumed. — *Warwick v. White*, Bunb. 106; *Kite's Case*, 1 B. & C. 107, 8 E. C. L. 46; *Reg. v. Baines*, 2 Ld. Raym. 1269; *Reg. v. Cotton*, 1 El. & El. 203, 102 E. C. L. 203; *Ex p. Story*, 3 Q. B. D. 166; *Pierce v. Hopper*, 1 Stra. 260; *James v. South Western R. Co.*, L. R. 7 Exch. 296; *Matter of Hersom*, 39 Me. 476; *Pitman v. Flint*, 10 Pick. (Mass.) 506; *Street v. Rothschild*, 12 Daly (N. Y.) 95; *In re Contested Election*, 111 Pa. St. 235; *Druse v. Horter*, 57 Wis. 644.

A statute providing that arbitrations may determine "in case of dispute as to the amount" of damage from the construction of public works confers no jurisdiction where the liability is disputed. *Reg. v. Metropolitan Sewer Com'rs*, 1 El. & Bl. 694, 72 E. C. L. 694; *Bradby v. Local Board of Health*, 4 El. & Bl. 1014, 82 E. C. L. 1014; *Reg. v. Burslem Local Board of Health*, 1 El. & El. 1077, 102 E. C. L. 1077.

Extension of Jurisdiction. — Nor will a construction be adopted which enlarges the jurisdiction of courts, in the absence of express words or necessary implication. *Ex p. Story*, 3 Q. B. D. 166; *Kite's Case*, 1 B. & C. 107, 8 E. C. L. 46; *Thomas v. Adams*, 2 Port. (Ala.) 188; *Grove v. Peoria*, 20 Ill. 532; *Kertler v. State*, 4 Greene (Iowa) 293; *Thompson v. Cox*, 8 Jones L. (53 N. Car.) 311; *Daffin v. State*, 11 Tex. App. 76; *Druse v. Horter*, 57 Wis. 644; *Pringle v. Carter*, 1 Hill L. (S. Car.) 53.

Statute of One Jurisdiction Conferring Powers on Courts of Another. — A statute of one jurisdiction will not be construed as conferring powers on the courts of another jurisdiction in the absence of clear words to that effect. So statutes of the *United States* have been held not to confer jurisdiction on state courts though the words were large and general. *Matter of Bruni*, 1 Barb. (N. Y.) 209. See also *Houston v. Moore*, 5 Wheat. (U. S.) 1, where a state statute conferring powers on United States officials to deal with delinquent militiamen was upheld; and *Matter of Shearzie*, 1 Woodb. & M. (U. S.) 66, holding that state magistrates might execute the provisions of a treaty with Great Britain, though not compellable to do so,

and citing other cases of powers conferred on state courts.

The statutes of the *United States* empower state courts to naturalize aliens. See title CITIZENSHIP, vol. 6, p. 21.

3. Kansas City v. Summerwell, 58 Mo. App. 246.

4. The English County Court Acts of 1868 and 1869 merely conferred on those courts a portion of the existing admiralty jurisdiction, and did not confer on them any jurisdiction as "admiralty jurisdiction" which the court of admiralty did not before possess, nor "by inference and indirect enactment" enlarge the jurisdiction of the latter court. *Mersey Docks, etc., Board v. Turner*, (1893) A. C. 468; *Pugsley v. Ropkins*, (1892) 2 Q. B. 184; *Reg. v. Judge*, (1892) 1 Q. B. 273; *Allen v. Garbutt*, 6 Q. B. D. 165; *Gunnestad v. Price*, L. R. 10 Exch. 65; *Simpson v. Blues*, L. R. 7 C. P. 290; *The Dowse*, L. R. 3 A. & E. 135; *Everard v. Kendall*, L. R. 5 C. P. 428. Although cases taking a different view exist. *The Alina*, 5 Ex. D. 227; *Gaudet v. Brown*, L. R. 5 P. C. 134; *The Swan*, L. R. 3 A. & E. 314.

Rule Applied to Justices of the Peace. — Instances of *English* statutes held to confer jurisdiction by implication are *Cullen v. Trimble*, L. R. 7 Q. B. 416 (person declared guilty of offense unless he shows to the "justices before whom he is charged," etc., and giving an appeal if aggrieved "by the adjudication of justices"); *Johnson v. Colam*, L. R. 10 Q. B. 544; *Rex v. St. James*, 2 Ad. & El. 241, 29 E. C. L. 79. See also the title JUSTICES OF THE PEACE, vol. 18, pp. 17, 37.

An Erroneous Belief of the Legislature that Jurisdiction Exists in certain cases cannot give jurisdiction, yet where such a jurisdiction is assumed and "explicit provision made as to the form and mode of its exercise, the authority to proceed in that form and mode carries with it, by necessary implication, jurisdiction of the proceedings." *State v. Miller*, 23 Wis. 634; *Ross v. Blake*, 28 Nova Scotia 543.

Where one statute expressly excludes certain cases from the jurisdiction of a court, a subsequent one which indicates that the court is then supposed to have jurisdiction of them is insufficient to confer it. *Ludington's Case*, 15 Ct. Cl. 454.

But in *Postmaster-Gen. v. Early*, 12 Wheat. (U. S.) 136, the provision of an act that "the district courts shall have cognizance concurrent with the courts and magistrates of the several states and the circuit courts of the United States of all suits," etc., was held to confer jurisdiction on the circuit courts, although it did not previously exist. *Marshall, C. J.*, saying that the words "concurrent with" "perhaps mani-

8. Construing Entire Statute as One Whole — a. ALL PARTS TAKEN TOGETHER — (1) General Rule. — The whole statute and all of its parts are to be taken together, and the intention so ascertained will prevail over its literal import and strict letter.¹

In Construing a Section of an Act regard must first be had to the language of the clause itself and second to other clauses in the same act, and that construction should be adopted which makes the whole act stand consistently together or reduces the inconsistency to the smallest possible limits.²

fest the opinion of the legislature that the jurisdiction was in the circuit courts; but ought, we think, to be construed to give it, if it did not previously exist."

1. All Parts of Statute Construed Together — *England.* — Beckford v. Wade, 17 Ves. Jr. 92; Rex v. Palmer, 1 Leach C. C. 352, Co. Litt. 381a; Lincoln Colledge Case, 3 Coke 59b; Auckland v. Westminster Dist. Board of Works, L. R. 7 Ch. 597; Fitzpatrick v. Kelly, L. R. 8 Q. B. 337; Core v. James, L. R. 7 Q. B. 135; Nuth v. Tamplin, 8 Q. B. D. 253; Atty.-Gen. v. Lunsdale, 86 L. T. N. S. 822.

United States. — Pennington v. Cox, 2 Cranch (U. S.) 33; Adams v. Woods, 2 Cranch (U. S.) 336; U. S. v. Fisher, 2 Cranch (U. S.) 358; Martin v. Hunter, 1 Wheat. (U. S.) 326; Rice v. Minnesota, etc., R. Co., 1 Black (U. S.) 358; Atkins v. Fibre Disintegrating Co., 18 Wall. (U. S.) 272; U. S. v. Landram, 118 U. S. 81; Georgia v. Atkins, 1 Abb. (U. S.) 22; Strode v. Stafford, 1 Brock. (U. S.) 162; The Sloop Elizabeth, 1 Paine (U. S.) 11; Ogden v. Strong, 2 Paine (U. S.) 584; Blanchard v. Sprague, 3 Sumn. (U. S.) 279; Rigney v. Plaster, 88 Fed. Rep. 686.

Alabama. — Brooks v. Mobile School Com'rs, 31 Ala. 227.

Arkansas. — Wilson v. Biscoe, 11 Ark. 44; Scott v. State, 22 Ark. 369; Wheat v. Smith, 50 Ark. 266.

California. — San Francisco v. Hazen, 5 Cal. 169; Smith v. Randall, 6 Cal. 47, 65 Am. Dec. 475; Taylor v. Palmer, 31 Cal. 240; Gates v. Salmon, 35 Cal. 576, 95 Am. Dec. 139; Nicolson Pavement Co. v. Painter, 35 Cal. 708; San Diego v. Granniss, 77 Cal. 511.

Georgia. — Torrance v. McDougald, 12 Ga. 526; State v. Atkins, 35 Ga. 319.

Illinois. — Williams v. People, 17 Ill. App. 274; Belleville, etc., R. Co. v. Gregory, 15 Ill. 20, 58 Am. Dec. 589; Thompson v. Bulson, 78 Ill. 277; People v. Gault, 149 Ill. 39; South Park Com'rs v. Chicago First Nat. Bank, 177 Ill. 238; Standard Radiator Co. v. Fox, 85 Ill. App. 389; Iuka v. Schlosser, 97 Ill. App. 222; Gilbert v. Morgan, 98 Ill. App. 281.

Indiana. — Green v. Cheek, 5 Ind. 105; State v. Williams, 8 Ind. 191; Crone v. State, 49 Ind. 538; Storms v. Stevens, 104 Ind. 46; Wasson v. Indianapolis First Nat. Bank, 107 Ind. 206; Lutz v. Crawfordsville, 109 Ind. 466; May v. Hoover, 112 Ind. 458; Parvin v. Wimberg, 130 Ind. 561, 30 Am. St. Rep. 254.

Iowa. — Davey v. Burlington, etc., R. Co., 31 Iowa 553.

Kansas. — Wenger v. Taylor, 39 Kan. 754.

Kentucky. — Nichols v. Wells, Sneed (Ky.) 255.

Louisiana. — Hebert's Succession, 5 La. Ann. 121; State v. Judge, 12 La. Ann. 777.

Maine. — Berry v. Clary, 77 Me. 482.

Maryland. — Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co., 4 Gill & J. (Md.) 4; Magruder v. Carroll, 4 Md. 335; Alexander v. Worthington, 5 Md. 471; Parkinson v. State, 14 Md. 184, 74 Am. Dec. 522.

Massachusetts. — Ayers v. Knox, 7 Mass. 306; Green v. Com., 12 Allen (Mass.) 155; Holbrook v. Holbrook, 1 Pick. (Mass.) 248; Mendon v. Worcester County, 10 Pick. (Mass.) 235; Com. v. Cambridge, 20 Pick. (Mass.) 267; Opinion of Justices, 22 Pick. (Mass.) 571; Com. v. Robertson, 5 Cush. (Mass.) 438; Com. v. Alger, 7 Cush. (Mass.) 53.

Michigan. — Atty.-Gen. v. State Bank, Harr. (Mich.) 315; Bidwell v. Whitaker, 1 Mich. 479; Atty.-Gen. v. Detroit, etc., Plank Road Co., 2 Mich. 138; Wass v. Board of Examiners, 123 Mich. 544.

Minnesota. — St. Peter's Church v. Scott County, 12 Minn. 395; Hurst v. Martinsburg, 80 Minn. 42.

Mississippi. — McIntyre v. Ingraham, 35 Miss. 25; Ellison v. Mobile, etc., R. Co., 36 Miss. 572.

Missouri. — Ruggles v. Washington County, 3 Mo. 496; State v. Weigel, 48 Mo. 29; Ex p. Marmaduke, 91 Mo. 228, 60 Am. Rep. 250.

Nebraska. — Lincoln v. Janesch, 63 Neb. 707.

Nevada. — Leet v. John Dare Silver Min. Co., 6 Nev. 218.

New Jersey. — Matter of Murphy, 23 N. J. L. 180; State v. Paterson, 35 N. J. L. 197; Van Riper v. Essex Public Road Board, 38 N. J. L. 23.

New York. — Ansonia Brass, etc., Co. v. New Lamp Chimney Co., 53 N. Y. 125, 13 Am. Rep. 476.

Pennsylvania. — Com. v. Conyngham, 66 Pa. St. 99; Holl v. Deshler, 71 Pa. St. 299; Com. v. Duane, 1 Binn. (Pa.) 601, 2 Am. Dec. 497; Small v. Small, 129 Pa. St. 366.

Texas. — Albrecht v. State, 8 Tex. App. 313.

Vermont. — Catlin v. Hull, 21 Vt. 152; Ryegate v. Wardsboro, 30 Vt. 746.

Exception as to Private Acts. — In construing an act of a private or local character, special clauses frequently embodied in it are to be treated as isolated and foreign to the rest of the act, and, contrary to the general rule, cannot be regarded as throwing any light on the construction of such act. East London R. Co. v. Whitechurch, L. R. 7 H. L. 81.

2. Construing Section of Statute. — Atty.-Gen. v. Sillem, 2 H. & C. 515, per Pollock, C. B. See also Canada Sugar Refining Co. v. Reg., (1898) A. C. 741; Holbrook v. Holbrook, 1 Pick. (Mass.) 250.

Clause Construed in Light of Whole Act. — The consideration of a whole act may expand or restrict the terms of a particular clause. Stowel

(2) *Codes or Revised Statutes.* — A general code or statutory revision is to be construed as intended to form one system of statute laws contemporaneous in time.¹ The sections of such a code dealing with the same subject-matter are to be construed together as one statute.²

v. Zouch, Plowd. 365; *Arthur v. Bokenham*, 11 Mod. 161; *Fredericks v. Howie*, 1 H. & C. 381; *Cope v. Doherty*, 2 De G. & J. 614; *Colquhoun v. Brooks*, 14 App. Cas. 493; *San Diego v. Granniss*, 77 Cal. 511; *Electro-Magnetic Min., etc., Co. v. Van Auken*, 9 Colo. 204; *Stockett v. Bird*, 18 Md. 484; *Maple Lake v. Wright County*, 12 Minn. 403; *Wheeling Gas Co. v. Wheeling*, 8 W. Va. 320; *Williams v. McDonal*, 4 Chand. (Wis.) 65. See also *In re Meyers*, (1899) 1 Am. Bankr. Rep. 10; *Givens v. Taylor*, 6 Tex. 315, stated under title GARNISHMENT, vol. 14, p. 747.

General Words Limited. — Thus, general words whose application is difficult in a full literal sense may be limited or qualified in accordance with the use of words of like import in other sections of the same act. *Blackwood v. Reg.*, 8 App. Cas. 94; *Rex v. Poor Law Com'rs*, 6 Ad. & El. 1, 33 E. C. L. 11; *Covington v. McNickle*, 18 B. Mon. (Ky.) 286.

If one section of an act, for instance, requires that "notice" should be "given," a verbal notice would probably be sufficient; but if a subsequent section provided that it should be "served" on a person, or "left" with him in a particular manner, this would obviously show that a written notice was intended. *Moyle v. Jenkins*, 8 Q. B. D. 116, 51 L. J. Q. B. 112; *Wilson v. Nightingale*, 8 Q. B. 1034, 55 E. C. L. 1034. See also *Reg. v. Stroulger*, 17 Q. B. D. 327.

General Expressions Construed to Govern. — On the other hand, where more general expressions are used in one part of an act than in another, it will be the duty of the court to give effect to the larger expressions if upon an examination of the whole act the more extensive language declares the real intention of the legislature. *Doe v. Brandling*, 7 B. & C. 660, 14 E. C. L. 108; *State v. Jennings*, 27 Ark. 419; *Torrance v. McDougald*, 12 Ga. 526; *State v. Wilson*, 3 Ill. 225; *Reynolds v. Baldwin*, 1 La. Ann. 162.

In *Burke v. Monroe County*, 77 Ill. 610, the language used in the first part of an act was "all incorporated towns and cities," while in another part the act used only the word "city," and the court held that even though the word "city" was not sufficiently comprehensive to embrace "incorporated towns," yet under this principle it could not be doubted that the larger and more extensive signification was intended.

The Meaning of a Word, said Jessel, M. R., must be first determined from the section in which it occurs; but, if that is impossible, other sections must be looked at to fix the sense in which it is used. *Spencer v. Metropolitan Board of Works*, 22 Ch. D. 142.

A Word Omitted in One Section May Be Supplied by a consideration of other parts of the statute. *Brinsfield v. Carter*, 2 Ga. 143.

Mistake Corrected. — A plain mistake apparent on the face of an act may be corrected by a consideration of other language in the act. *Blanchard v. Sprague*, 3 Sumn. (U. S.) 282, *per Story*, J.

1. *General Code Treated as One Contemporaneous System.* — *Groff v. Miller*, 20 App. Cas. (D. C.) 353; *Ashley v. Harrington*, 1 D. Chip. (Vt.) 348, 12 Am. Dec. 690. See also *Ferguson v. Monroe County*, 71 Miss. 524; *Barnes v. Buck*, 1 Lans. (N. Y.) 269.

The Charter of Greater New York is one statute and is so regarded by the law. The division into chapters and sections is but formal. *People v. Kane*, 43 N. Y. App. Div. 472, citing *People v. Willis*, 158 N. Y. 397.

But Where an Irreconcilable Conflict Remains after every effort at reconciliation, the time of enactment of the several sections may be examined to determine the legislative will in accordance with its latest expression. *Gibbons v. Brittenum*, 56 Miss. 249, *per Chalmers*, J.

Where a Single Section of One Act Is Introduced into Another, it must be read as if in the original act from which it was taken, and the whole of the latter act must be examined. *Portsmouth v. Smith*, 10 App. Cas. 371, *per Lord Blackburn*. See also *Knill v. Towse*, 24 Q. B. D. 195.

Enactment Including Several Distinct Acts. — The Merchant Shipping Act, 1854, was divided into several parts, each of which related to a different branch of merchant shipping law. *Turner, L. J.*, said that each part must be considered a distinct act and construed without reference to the other parts. *Cope v. Doherty*, 2 De G. & J. 622. See also *O'Neal v. Robinson*, 45 Ala. 534, where *Peters, J.*, said that the connection and separation of a code "into parts, titles, chapters, articles, and sections, is one of the instrumentalities by which it is to be construed;" "it is not all one law."

The fact that statutes are included under one chapter in a code does not make them one general scheme for the purpose of construing one by reference to the other. *Weatherly v. Capital City Water Co.*, 115 Ala. 156.

2. *Sections of Code Construed as One Statute.* — *Nashville, etc., R. Co. v. Comans*, 45 Ala. 437; *O'Neal v. Robinson*, 45 Ala. 534; *Mobile, etc., R. Co. v. Malone*, 46 Ala. 391; *Thompson v. Bulson*, 78 Ill. 277; *Stockett v. Bird*, 18 Md. 484; *Bryant v. Livermore*, 20 Minn. 313; *Congdon v. Butte Consol. R. Co.*, 17 Mont. 481; *Gallegos v. Pino*, 1 N. Mex. 410; *Brooks v. U. S.*, 6 N. Mex. 75. See also *State Bank v. Farrar*, 1 La. Ann. 54. See also *infra*, this section, 9. *Statutes in Pari Materia.*

A section of a revision is not to be construed as a legislative interpretation of a former act, where the revision and the former act differ widely from one another. *Mancy v. Providence, etc., R. Co.*, 161 Mass. 283.

In California the Four Codes Are to Be Construed as One Statute passed on the same day, provision being made for conflicts. *Pol. Code Cal.*, § 4480 *et seq.*; *Clarke v. Mead*, 102 Cal. 516. See also *Earle v. Board of Education*, 55 Cal. 489.

In Texas, the sections of the Revised Civil Code *in pari materia* with a section of the Revised Penal Code, enacted contemporaneously,

(3) *Repealed or Unconstitutional Clauses.* — Repealed clauses of a statute may be considered in construing the provisions that remain,¹ and the same principle applies to unconstitutional provisions in an act.²

b. EVERY CLAUSE TO BE GIVEN EFFECT — (1) *General Rule.* — That construction is favored which gives effect to every clause and every part of the statute, thus producing a consistent and harmonious whole. A construction which would leave without effect any part of the language used should be rejected if an interpretation can be found which will give it effect.³

(2) *General and Particular Clauses.* — It is an old and familiar rule that

may be looked to in construing the latter. *Braun v. State*, 40 Tex. Crim. 236.

Where a Code of Procedure Is Broken Up and Its Sections Distributed in a general revision of the statutes, the same interpretation is to be given to its provisions as when they constituted one chapter or title. *Buckstaff v. Hanville*, 14 Wis. 77; *State v. Messmore*, 14 Wis. 115; *Smith v. Smith*, 19 Wis. 522. See also *Judd v. State*, 25 Tex. Civ. App. 418.

1. **Repealed Clauses.** — *Atty.-Gen. v. Lamplough*, 3 Ex. D. 227; *Savings Bank v. Collector*, 3 Wall. (U. S.) 495; *Ex p. Crow Dog*, 109 U. S. 556; *Ogden City v. Boreman*, 20 Utah 98; *Daniel v. Simms*, 49 W. Va. 555. See also *Cortez v. Territory*, 7 N. Mex. 97, and *infra*, this section, *q. Statutes in Pari Materia*.

Repealed Definition. — A repealed section which defines a term does not change the meaning of the term when found elsewhere in the original connection, and the section repealed may be referred to to determine the meaning. *U. S. v. Le Bris*, 121 U. S. 278.

2. **Unconstitutional Provisions.** — *Swift v. Callan*, 102 Iowa 206, 63 Am. St. Rep. 443; *Com. v. Potts*, 79 Pa. St. 164.

3. **Construction to Give Effect to Every Part of Act** — *England.* — *Powlter's Case*, 11 Coke 32a; *Reg. v. West Riding of Yorkshire*, 1 Q. B. 329, 41 E. C. L. 563; *Gaudet v. Brown*, L. R. 5 P. C. 134; *The Alina*, 5 P. D. 138; *Clementson v. Mason*, L. R. 10 C. P. 209.

United States. — *The Emily*, 9 Wheat. (U. S.) 381; *Montclair v. Ramsdell*, 107 U. S. 147; *Ogden v. Strong*, 2 Paine (U. S.) 584; *U. S. v. Warner*, 4 McLean (U. S.) 463; *Cook v. Hamilton County*, 6 McLean (U. S.) 112; *In re Matthews*, 109 Fed. Rep. 615.

Alabama. — *Brooks v. Mobile School Com'rs*, 31 Ala. 227.

Alaska. — *Chambers v. Solner*, 1 Alaska 271; *Brace v. Solner*, 1 Alaska 361.

Arkansas. — *Wilson v. Biscoe*, 11 Ark. 44; *Scott v. State*, 22 Ark. 369; *Hawkins v. Filkins*, 24 Ark. 321; *Little Rock, etc., R. Co. v. Howell*, 31 Ark. 119; *Wheat v. Smith*, 50 Ark. 266.

California. — *San Francisco v. Hazen*, 5 Cal. 169; *French v. Teschemaker*, 24 Cal. 557; *People v. King*, 28 Cal. 265; *Gates v. Salmon*, 35 Cal. 576, 95 Am. Dec. 139; *San Diego v. Granniss*, 77 Cal. 511.

Colorado. — *Simmons v. California Powder Works*, 7 Colo. 285.

Connecticut. — *Rawson v. State*, 19 Conn. 292. *District of Columbia.* — *District of Columbia v. Sisters of Visitation*, 15 App. Cas. (D. C.) 307.

Florida. — *Sams v. King*, 18 Fla. 557.

Illinois. — *Williams v. People*, 17 Ill. App. 274; *Root v. Sinnock*, 24 Ill. App. 537, *affirmed*

120 Ill. 350, 60 Am. Rep. 558; *People v. Mount*, 87 Ill. App. 194.

Indiana. — *Green v. Cheek*, 5 Ind. 105; *Stayton v. Hulings*, 7 Ind. 145; *Palmer v. Stumph*, 29 Ind. 333; *State v. Blair*, 32 Ind. 313; *Humphries v. Davis*, 100 Ind. 274, 50 Am. Rep. 788; *State v. Casteel*, 110 Ind. 174; *Hutchen v. Niblo*, 4 Blackf. (Ind.) 148.

Iowa. — *Leversee v. Reynolds*, 13 Iowa 310; *Patterson v. Spearman*, 37 Iowa 42; *Knowles v. Pickett*, 46 Iowa 503; *Burlington, etc., R. Co. v. Dey*, 82 Iowa 312, 31 Am. St. Rep. 477.

Kansas. — *Judd v. Driver*, 1 Kan. 455; *Wenger v. Taylor*, 39 Kan. 754; *Noecker v. Noecker*, (Kan. 1903) 71 Pac. Rep. 815.

Louisiana. — *Montesquieu v. Heil*, 4 La. 51, 23 Am. Dec. 471; *Gee v. Thompson*, 11 La. Ann. 657; *State v. Callahan*, 47 La. Ann. 444.

Maine. — *State v. Stinson*, 17 Me. 154.

Maryland. — *Parkinson v. State*, 14 Md. 184, 74 Am. Dec. 522; *Baltimore v. Howard*, 6 Har. & J. (Md.) 383.

Massachusetts. — *Com. v. Alger*, 7 Cush. (Mass.) 89; *Coffin v. Hussey*, 12 Pick. (Mass.) 289; *Com. v. Jordan*, 18 Pick. (Mass.) 228; *Opinion of Justices*, 22 Pick. (Mass.) 571; *Dearborn v. Brookline*, 97 Mass. 466; *Com. v. Barber*, 143 Mass. 560; *Browne v. Turner*, 174 Mass. 160.

Michigan. — *Atty.-Gen. v. Detroit, etc., Plank Road Co.*, 2 Mich. 138; *People v. Burns*, 5 Mich. 114; *Swartwout v. Michigan Air Line R. Co.*, 24 Mich. 389.

Minnesota. — *Hurst v. Martinsburg*, 80 Minn. 43.

Mississippi. — *Martin v. O'Brien*, 34 Miss. 21.

Missouri. — *State v. Richardson*, 35 Mo. 385; *St. Louis v. Lane*, 110 Mo. 258; *Morse v. West Port*, 110 Mo. 508; *Westport v. Jackson*, 69 Mo. App. 153.

Montana. — *State v. Cave*, 20 Mont. 468.

Nebraska. — *McCann v. McLennan*, 2 Neb. 286; *Hagenbuck v. Reed*, 3 Neb. 24; *State v. Babcock*, 21 Neb. 602; *Western Travellers' Acc. Assoc. v. Taylor*, 62 Neb. 783.

Nevada. — *Torreyson v. Board of Examiners*, 7 Nev. 19.

New Jersey. — *Den v. Dubois*, 16 N. J. L. 285.

New York. — *Matter of New York, etc., Bridge*, 72 N. Y. 530; *People v. McGloin*, 91 N. Y. 241; *People v. Matsell*, 94 N. Y. 179.

Ohio. — *In re McCreight*, 9 Ohio Dec. 453.

Pennsylvania. — *Com. v. Benson*, 15 Pa. Co. Ct. 236; *Mauch Chunk v. McGee*, 81 Pa. St. 438.

Tennessee. — *Lacey v. Moore*, 6 Coldw. (Tenn.) 348.

Texas. — *Chapman v. State*, 16 Tex. App. 76.

Utah. — *Miles v. Wells*, 22 Utah 55.

Virginia. — *Postal Tel.-Cable Co. v. Farm-*

where there is in the same statute a particular enactment and also a general one, which in its most comprehensive sense would include what is embraced in the former, the particular enactment must be operative and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment.¹ But this rule is subordinate to the principle just stated, that statutes are to be so construed that if possible full effect shall be given to all parts thereof. This rule must be applied to ascertain wherein language which is specific necessarily comes in conflict with language which is general, and it is only when on such construction the repugnancy of specific provisions to the general language is plainly manifested that the intent of the legislature as declared in the general enacting part of the statute is superseded.²

c. CLAUSES ABSOLUTELY IRRECONCILABLE. — Where there is an irreconcilable conflict between different parts of the same act, the last in order of position must control,³ or the clause which is directed specially to the matter

ville, etc., R. Co., 96 Va. 661; *Smith v. Bryan*, 100 Va. 199.

Washington. — *Dennis v. Moses*, 18 Wash. 537.

West Virginia. — *Mack v. Prince*, 40 W. Va. 324.

Wisconsin. — *Nichols v. Halliday*, 27 Wis. 406.

This principle is illustrated in the construction of revenue laws. See the title **REVENUE LAWS**, vol. 24, p. 890.

An Amendment is to be construed as one statute with the original act within this rule. *U. S. v. Central Pac. R. Co.*, 118 U. S. 235; *Harrell v. Harrell*, 8 Fla. 46. See also *Van Riper v. Essex Public Road Board*, 38 N. J. L. 23, as to act and supplement, and *infra*, this title, **Amendment — Construction — In General**.

1. General and Particular Clauses — England. — *In re Watson*, (1893) 1 Q. B. 21; *Standen v. University d'Oxon*, W. Jones 26; *In re Renaud*, 14 Quebec Super. Ct. 452; *Churchill v. Crease*, 5 Bing. 180, 15 E. C. L. 409; *Rex v. Armagh*, 8 Mod. 8; *Pretty v. Solly*, 26 Beav. 606; *De Winton v. Brecon*, 26 Beav. 533; *Taylor v. Oldham*, 4 Ch. D. 395; *Atty.-Gen v. Lamplough*, 3 Ex. D. 214.

United States. — *Pennington v. Cox*, 2 Cranch (U. S.) 52; *Adams v. Woods*, 2 Cranch (U. S.) 341; *In re Rouse*, (C. C. A.) 91 Fed. Rep. 96; *U. S. v. Garretson*, 42 Fed. Rep. 22; *U. S. v. Buffalo Park*, 16 Blatchf. (U. S.) 190; *Seeley v. Koox*, 2 Woods (U. S.) 370; *Rodgers v. U. S.*, 36 Ct. Cl. 266.

California. — *People v. Wells*, 11 Cal. 329.

Indiana. — *Pittsburgh, etc., R. Co. v. Vining*, 27 Ind. 518.

Kentucky. — *Covington v. McNickle*, 18 B. Mon. (Ky.) 262.

Louisiana. — *Rogers v. Beiller*, 3 Mart. (La.) 672; *St. Martin v. New Orleans*, 14 La. Ann. 114.

Maryland. — *Stockett v. Bird*, 18 Md. 484.

Missouri. — *State v. Green*, 24 Mo. App. 227.

Nebraska. — *McCann v. McLennan*, 2 Neb. 286; *Albertson v. State*, 9 Neb. 429; *Richardson County v. Miles*, 14 Neb. 311; *State v. Kearney*, 49 Neb. 325; *Kountze v. Omaha*, 63 Neb. 52.

New Jersey. — *State v. Trenton*, 38 N. J. L. 64.

New York. — *People v. Krank*, 46 Hun (N. Y.) 626; *People v. Industrial Ben. Assoc.*, 92

Hun (N. Y.) 311; *Hoey v. Gilroy*, 129 N. Y. 132; *Poughkeepsie v. Quintard*, 136 N. Y. 275; *Weltman v. Posenecker*, (Supm. Ct. App. T.) 26 Civ. Pro. (N. Y.) 240; *Wormser v. Brown*, 149 N. Y. 170.

Pennsylvania. — *Kolb v. Reformed Episcopal Church*, 18 Pa. Super. Ct. 477.

South Carolina. — *Ex p. Chase*, 62 S. Car. 373.

Wisconsin. — *Felt v. Felt*, 19 Wis. 193; *State v. Goetze*, 22 Wis. 363; *State v. Hobe*, 106 Wis. 411.

Revenue Laws. — *Homer v. Collector*, 1 Wall. (U. S.) 486; *Arthur v. Lahey*, 96 U. S. 112; *Arthur v. Stephani*, 96 U. S. 125; *Arthur v. Rheims*, 96 U. S. 143; *Robertson v. Glendenning*, 132 U. S. 158; *Seeburger v. Cahn*, 137 U. S. 97; *American Net, etc., Co. v. Worthington*, 141 U. S. 468; *Chung Yune v. Kelly*, 14 Fed. Rep. 643.

2. State v. Railroad Taxation Com'rs, 37 N. J. L. 228, affirmed in 38 N. J. L. 472.

In *Faw v. Marsteller*, 2 Cranch (U. S.) 10, Marshall, C. J., said: "In searching for the literal construction of an act it would seem to be generally true that positive and explicit provisions, comprehending in terms a whole class of cases, are not to be restrained by applying to those cases an implication drawn from subsequent words unless that implication be very clear, necessary, and irresistible."

3. Last Clause Governs — United States. — *In re Richards*, (C. C. A.) 96 Fed. Rep. 939.

Alabama. — *Hand v. Stapleton*, 135 Ala. 162.

California. — *Matter of Yick Wo*, 68 Cal. 304; *People v. Dobbins*, 73 Cal. 259.

Colorado. — *Branagan v. Dulaney*, 8 Colo. 408; *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 27 Colo. 14.

Florida. — *Sams v. King*, 18 Fla. 557.

Indiana. — *Quick v. White Water Tp.*, 7 Ind. 570.

Kansas. — *Kansas Pac. R. Co. v. Wyandotte County*, 16 Kan. 594.

Mississippi. — *Gibbons v. Brittenum*, 56 Miss. 232.

Missouri. — *Westport v. Jackson*, 69 Mo. App. 153.

Montana. — See *State v. Courtney*, 27 Mont. 378, citing Pol. Code Mont., § 5165.

Nebraska. — *Ryan v. State*, 5 Neb. 282; *Albertson v. State*, 9 Neb. 429.

in preference to others mentioning it incidentally only.¹

d. ENACTMENTS IN TWO LANGUAGES. — In *Quebec* where the statutes are enacted in both French and English, the two versions are primarily of equal authority, but when one version appears to represent the intention of the legislature (determined by the ordinary views of interpretation) more perfectly than the other, the one conforming to the intention must be followed.² In *Louisiana* likewise, during the territorial period, enactments were in both French and English versions, which were of equal authority and construed together as parts of one whole; but with the adoption of a constitution providing that statutes and legislative proceedings should be promulgated, preserved, and conducted in English, although the laws were still published in English and French, the latter was considered a translation and the former the authoritative text. Where the two texts differ, therefore, the English prevailed, but in cases of ambiguity in the English text resort might be had to the French version to explain doubts.³

9. Statutes in *Pari Materia* — *a. GENERAL DOCTRINE.* — In arriving at the intent of the legislature in enacting a statute, not only must the whole statute and every part of it be considered,⁴ but where there are several statutes *in pari materia*, they are all, whether referred to or not, to be taken together and one part compared with another in the construction of any material provision.⁵

Nevada. — *Ex p. Hewlett*, 22 Nev. 333.

New York. — *Harrington v. Rochester*, 10 Wend. (N. Y.) 553.

Ohio. — *State v. Shelby County*, 36 Ohio St. 326.

Pennsylvania. — *Packer v. Sunbury, etc.*, *R. Co., 19 Pa. St. 211; *Brown v. Philadelphia County*, 21 Pa. St. 42.

Canada. — *Potts v. Potts*, 31 Ont. 452.

An Exception Has Been Recognized in the Case of a Statute Granting Land, the same rule governing here as in cases of private grants (see the title INTERPRETATION AND CONSTRUCTION, vol. 17, p. 8), and the first of two repugnant granting clauses prevails. *Fore v. Williams*, 35 Miss. 533.

This Principle Is One of Last Resort, and not to be applied when one part conforms "to the obvious policy and intent of the legislature." *Sanis v. King*, 18 Fla. 557. See also *Hall v. State*, 39 Fla. 637. Or where one clause is in harmony with other general statutes dealing with the same or kindred subjects. *Kansas Pac. R. Co. v. Wyandotte County*, 16 Kan. 594.

1. Section Treating Specifically of Matter Prevails as to It. — Where one section of a statute treats specially and solely of a matter, that section prevails in reference to that matter over other sections in which only incidental reference is made thereto, because the legislative mind having been in the one section directed to this matter must be presumed to have there expressed its intention, rather than in other sections where its attention was turned to other things. *Long v. Culp*, 14 Kan. 412, citing *Griffith v. Carter*, 8 Kan. 565.

2. Quebec — French and English Statutes. — *Coaticook v. People's Telephone Co.*, 19 Quebec Super. Ct. 535. See also *Davis v. Montreal*, 27 Can. Sup. Ct. 539.

When a difference occurs between the two versions, there is uncertainty as to the intention of the legislature, and one or other of the versions must prevail according to the following rules: (1) If the variance occurs in a statute

consolidating the previous statutes or in a statute founded upon the pre-existing law, that version must prevail which is the more consistent with the former law; (2) if the variance occurs in a statute changing the law, that version shall prevail which is the more consistent with the intention of the legislature, and the ordinary rules of legal interpretation shall apply to determine such intention. Thus, where in a penal statute the French version is restrictive and the English not, the French must be followed. *Roy v. Davidson*, 15 Quebec Super. Ct. 83.

Where a statute creates a charge, that version which makes the charge less onerous should prevail. *Thivierge v. Cinquars*, 13 Quebec Super. Ct. 398.

If the Two Versions Are Each Clear, but Are Absolutely Contradictory, they annul one another. *Lacerte v. Verrault*, 16 Quebec Super. Ct. 230.

3. French and English Version in Louisiana. — *Hudson v. Grieve*, 1 Mart. (La.) 143; *State v. Dupuy*, 2 Mart. (La.) 176; *Breedlove v. Turner*, 9 Mart. (La.) 353; *Chretien v. Theard*, 2 Mart. N. S. (La.) 582; *Borel v. Borel*, 3 La. 30; *Durnford v. Clark*, 3 La. 199; *State v. Moore*, 8 Rob. (La.) 518; *State v. Mix*, 8 Rob. (La.) 549; *State v. Ellis*, 12 La. Ann. 390; *State v. Judge*, 22 La. Ann. 581; *Lafourche Parish v. Terrebonne Parish*, 34 La. Ann. 1233.

Where Parts of the Code Are Re-enactments of Provisions Originally in Both Languages, both texts of the former enactment may be taken into consideration, but the English will prevail in case they differ. *Viterbo v. Friedlander*, 120 U. S. 726.

4. See *supra*, this section, 8. *Construing Entire Statute as One Whole.*

5. Statutes in *Pari Materia* Construed Together — *England.* — *Rex v. Loxdale*, 1 Burr. 445; *Anonymous*, Loft 398; *Ailesbury v. Pattison*, 1 Dougl. 30; *Rex v. Palmer*, 1 Leach C. C. 352; *Doe v. Yarborough*, 7 Moo. 258. 1 Bing. 24, 8 E. C. L. 384; *Murray v. Thorniley*, 2 C. B. 225, 52 E. C. L. 225; *Heelis v. Blain*, 18 C. B. N. S.

Statutes Are in Pari Materia which relate to the same person or thing or to the same class of persons or things, and the phrase is applicable to public statutes or general laws made at different times and in reference to the same subject.

106, 114 E. C. L. 106; *Webster v. Ashton-under-Lyne Overseers*, L. R. 8 C. P. 281, L. R. 8 C. P. 306; *Smith v. Brown*, L. R. 6 Q. B. 731; *Atty.-Gen. v. Moore*, 3 Ex. D. 276; *Reg. v. Tonbridge Overseers*, 13 Q. B. D. 342.

Canada.—*Reg. v. The Ship Shelby*, 5 Can. Exch. 5.

United States.—*Pennington v. Cox*, 2 Cranch (U. S.) 33; *Alexander v. Alexandria*, 5 Cranch (U. S.) 7; *Doe v. Winn*, 11 Wheat. (U. S.) 386; *Pollard v. Kibbe*, 14 Pet. (U. S.) 366; *U. S. v. Freeman*, 3 How. (U. S.) 564; *Converse v. U. S.*, 21 How. (U. S.) 463; *U. S. v. Walker*, 22 How. (U. S.) 299; *U. S. v. Babbit*, 1 Black (U. S.) 55; *The Distilled Spirits*, 11 Wall. (U. S.) 356; *Reiche v. Smythe*, 13 Wall. (U. S.) 162; *Ryan v. Carter*, 93 U. S. 77; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727; *U. S. v. Central Pac. R. Co.*, 118 U. S. 235; *Chicago, etc., R. Co. v. U. S.*, 127 U. S. 406; *Vane v. Newcombe*, 132 U. S. 235; *Frost v. Wenie*, 157 U. S. 46; *Butler v. Russel*, 3 Cliff. (U. S.) 255; *The Sloop Elizabeth*, 1 Paine (U. S.) 11; *Black v. Scott*, 2 Brock. (U. S.) 329; *Dubois v. McLean*, 4 McLean (U. S.) 489; *Gordon v. South Fork Canal Co.*, 1 McAll. (U. S.) 517; *Le Roy v. Chabolla*, 2 Abb. (U. S.) 448; *U. S. v. Collier*, 3 Blatchf. (U. S.) 332; *U. S. v. Benson*, 31 Fed. Rep. 896; *Seward County v. Ætna L. Ins. Co.*, (C. C. A.) 90 Fed. Rep. 222. But see *U. S. v. The Schooner Penelope*, 2 Pet. Arm. 447.

Alabama.—*Ex p. Ray*, 45 Ala. 15; *Crawford v. Tyson*, 46 Ala. 299; *State v. Sloss*, 83 Ala. 93.

Alaska.—*Brace v. Solner*, 1 Alaska 362.

Arkansas.—*McFarland v. State Bank*, 4 Ark. 410; *State v. Watts*, 23 Ark. 308; *Duncan v. Owens*, 47 Ark. 388.

California.—*Harley v. Heyl*, 2 Cal. 481; *Merrill v. Gorham*, 6 Cal. 41; *People v. Phoenix*, 6 Cal. 93; *Wilson v. Broder*, 10 Cal. 488; *People v. Wells*, 11 Cal. 329; *Lick v. Madden*, 25 Cal. 207; *People v. Jackson*, 30 Cal. 427; *People v. Broadway Wharf Co.*, 31 Cal. 34; *McMinn v. Bliss*, 31 Cal. 122; *McQuade v. Whaley*, 31 Cal. 526; *Robbins v. Omnibus R. Co.*, 32 Cal. 472; *Matter of Yick Wo*, 68 Cal. 304.

District of Columbia.—*Grant v. Cooke*, 7 D. C. 165; *U. S. v. Marble*, 2 Mackey (D. C.) 12.

Florida.—*Bryan v. Dennis*, 4 Fla. 445; *Mitchell v. Duncan*, 7 Fla. 13; *Spencer v. McBride*, 14 Fla. 403; *Doggett v. Walter*, 15 Fla. 367; *Ex p. O'Donovan*, 24 Fla. 281; *Ferrari v. Board of Health*, 24 Fla. 390.

Georgia.—*Harrison v. Walker*, 1 Ga. 32; *McDougald v. Dougherty*, 14 Ga. 674; *Roff v. Johnson*, 40 Ga. 555.

Idaho.—*Chandler v. Lee*, 1 Idaho 349.

Illinois.—*Bruce v. Schuyler*, 9 Ill. 221, 46 Am. Dec. 447; *Ottawa v. La Salle County*, 12 Ill. 341; *Turney v. Wilton*, 36 Ill. 393; *Fowler v. Perkins*, 77 Ill. 274; *Young v. Stearns*, 91 Ill. 221; *Holton v. Daly*, 106 Ill. 139; *People v. Hazelwood*, 116 Ill. 323; *Hunt v. Chicago Horse, etc., R. Co.*, 121 Ill. 644; *South Park Com'rs v. Chicago First Nat. Bank*, 177 Ill. 234; *Dunaway v. Goodall*, 3 Ill. App. 201.

Indiana.—*State v. Rackley*, 2 Blackf. (Ind.) 249; *Williams v. New Albany, etc., R. Co.*, 5

Ind. 111; *McMahon v. Cincinnati, etc., Short-Line R. Co.*, 5 Ind. 413; *State v. Springfield Tp.*, 6 Ind. 83; *La Grange County v. Cutler*, 6 Ind. 354; *Indiana Cent. Canal Co. v. State*, 53 Ind. 583; *Hutts v. Hutts*, 62 Ind. 246; *Taylor v. Washington County*, 67 Ind. 384; *Wright v. Tipton County*, 82 Ind. 335; *Carver v. Smith*, 90 Ind. 227, 46 Am. Rep. 210; *Crawfordsville, etc., Turnpike Co. v. Fletcher*, 104 Ind. 97; *Stout v. Grant County*, 107 Ind. 343; *Daniels v. State*, 150 Ind. 357; *State v. Gerhardt*, 145 Ind. 439.

Iowa.—*Lorimer v. Lewis, Morr.* (Iowa) 253, 39 Am. Dec. 461; *State v. Shaw*, 28 Iowa 67; *Davey v. Burlington, etc., R. Co.*, 31 Iowa 553; *State v. Sherman*, 46 Iowa 415; *Rhode v. Bank*, 52 Iowa 375; *Central Iowa R. Co. v. Wright County*, 67 Iowa 199.

Kansas.—*Linn County Seat*, 15 Kan. 500; *Kansas Pac. R. Co. v. Wyandotte County*, 16 Kan. 594; *Matter of Hall*, 38 Kan. 670; *State v. Deuel*, 63 Kan. 811; *Gilbert v. Craddock*, (Kan. 1903) 72 Pac. Rep. 869.

Kentucky.—*Wallace v. Young*, 5 T. B. Mon. (Ky.) 157; *Scarborough v. Watkins*, 9 B. Mon. (Ky.) 550, 50 Am. Dec. 528; *Nazareth Literary, etc., Inst. v. Com.*, 14 B. Mon. (Ky.) 214; *Nunes v. Wellisch*, 12 Bush (Ky.) 363; *Danville v. Boyle County*, 106 Ky. 608.

Louisiana.—*De Armas' Case*, 10 Mart. (La.) 172; *Montesquieu v. Heil*, 4 La. 56, 23 Am. Dec. 471; *Gayle v. Williams*, 7 La. 162; *Rouanet v. Hunt*, 17 La. 407; *Gas Light, etc., Co. v. Nuttall*, 19 La. 451; *Phelps v. Rightor*, 9 Rob. (La.) 531; *Desban v. Pickett*, 16 La. Ann. 350; *Richardson v. Richardson*, 38 La. Ann. 641.

Maine.—*Merrill v. Crossman*, 68 Me. 412.

Maryland.—*Baltimore v. Howard*, 6 Har. & J. (Md.) 383; *Baltzell v. Foss*, 1 Har. & J. (Md.) 504; *Kiersted v. State*, 1 Gill & J. (Md.) 231; *Hays v. Richardson*, 1 Gill & J. (Md.) 366; *Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co.*, 4 Gill & J. (Md.) 152; *State v. Baltimore, etc., R. Co.*, 12 Gill & J. (Md.) 399, 38 Am. Dec. 319; *Dugan v. Gittings*, 3 Gill (Md.) 138, 43 Am. Dec. 306; *Ranoul v. Griffie*, 3 Md. 54; *State v. Mister*, 5 Md. 11; *Bolgiano v. Cooke*, 19 Md. 392; *Billingslea v. Baldwin*, 23 Md. 106.

Massachusetts.—*Terry v. Foster*, 1 Mass. 150, 2 Am. Dec. 6; *Church v. Crocker*, 3 Mass. 21; *Holland v. Makepeace*, 8 Mass. 423; *Somerset v. Dighton*, 12 Mass. 385; *Com. v. Martin*, 17 Mass. 362; *Holbrook v. Holbrook*, 1 Pick. (Mass.) 254; *Haynes v. Jenks*, 2 Pick. (Mass.) 176; *Mendon v. Worcester County*, 10 Pick. (Mass.) 244; *Com. v. Cambridge*, 20 Pick. (Mass.) 271; *Goddard v. Boston*, 20 Pick. (Mass.) 409; *Com. v. Sylvester*, 13 Allen (Mass.) 248.

Michigan.—*Sibley v. Smith*, 2 Mich. 492; *Whipple v. Judge*, 26 Mich. 342; *Simpkins v. Ward*, 45 Mich. 559.

Mississippi.—*Scott v. Searles*, 1 Smed. & M. (Miss.) 590; *State v. Dickinson*, 12 Smed. & M. (Miss.) 583; *White v. Johnson*, 23 Miss. 68; *House v. State*, 41 Miss. 737; *Eskridge v. McGruder*, 45 Miss. 294; *Clements v. Anderson*, 46 Miss. 581.

Missouri.—*Hannibal, etc., R. Co. v. Shack-*

The word *par* is not to be confounded with the term *similis*; it is used in opposition to it, as in the expression *magis pares sunt quam similes*, implying not likeness merely but identity.¹

lett, 30 Mo. 557; State v. Clark, 54 Mo. 216; Matter of Bomino, 83 Mo. 441; Powell v. Sherwood, 162 Mo. 605; Springfield v. Starke, 93 Mo. App. 70; Grimes v. Reynolds, 94 Mo. App. 584.

Montana.—Peters v. Vawter, 10 Mont. 210. *Nebraska.*—People v. Weston, 3 Neb. 324; White v. Blum, 4 Neb. 561; Hendrix v. Rieman, 6 Neb. 516; State v. Babcock, 21 Neb. 599; Chicago, etc., R. Co. v. Zernecke, 59 Neb. 689; Logan County v. Carnahan, (Neb. 1903) 95 N. W. Rep. 812.

Nevada.—State v. Donnelly, 20 Nev. 216. *New Hampshire.*—Hayes v. Hansom, 12 N. H. 284; Robinson v. Tuttle, 37 N. H. 248; Wakefield v. Phelps, 37 N. H. 295.

New Jersey.—State Bank v. New Brunswick Bank, 3 N. J. Eq. 270; Wallace v. Wallace, 3 N. J. Eq. 619; Peoples' Bank v. Paterson Sav. Bank, 10 N. J. Eq. 17; Clement v. Kaighn, 15 N. J. Eq. 56; Jersey v. Demarest, 27 N. J. Eq. 301; Barraccliff v. Griscom, 1 N. J. L. 224; Austin v. Nelson, 6 N. J. L. 383; White v. Hunt, 6 N. J. L. 417; Brown v. Wright, 13 N. J. L. 242; Vroom v. Smith, 14 N. J. L. 482; Overseers of Poor v. Overseers of Poor, 19 N. J. L. 180; Den v. Wade, 20 N. J. L. 293; Rudderow v. State, 31 N. J. L. 515; New Jersey Ins. Co. v. Meeker, 37 N. J. L. 304; Koch v. Vanderhoof, 49 N. J. L. 621; Gartner v. Cohen, 51 N. J. L. 125.

New York.—Rogers v. Bradshaw, 20 Johns. (N. Y.) 744; Bowen v. Lease, 5 Hill (N. Y.) 225; M'Cartee v. Orphan Asylum Soc., 9 Cow. (N. Y.) 507, 18 Am. Dec. 516; People v. French, 51 Hun (N. Y.) 347; Kilbourne v. Sullivan County, 62 Hun (N. Y.) 217; People v. England, 91 Hun (N. Y.) 152; Fort v. Burch, 6 Barb. (N. Y.) 69; Waterford, etc., Turnpike Co. v. People, 9 Barb. (N. Y.) 161; Rexford v. Knight, 15 Barb. (N. Y.) 627; People v. Gaul, 44 Barb. (N. Y.) 103; Plummer v. Murray, 51 Barb. (N. Y.) 202; Perkins v. Perkins, 62 Barb. (N. Y.) 531; People v. Draper, 15 N. Y. 567; Powers v. Shepard, 48 N. Y. 540; Chase v. Lord, 77 N. Y. 18; People v. New York Catholic Protector, 106 N. Y. 614; Matter of Livingston, 121 N. Y. 104.

North Carolina.—Bowles v. Cochran, 93 N. Car. 398; Wortham v. Basket, 99 N. Car. 70.

Ohio.—Dodge v. Gridley, 10 Ohio 173; Manuel v. Manuel, 13 Ohio St. 464; Jones v. Carr, 16 Ohio St. 428; Seely v. Thomas, 31 Ohio St. 304; Malone v. Toledo, 34 Ohio St. 548; State v. Cincinnati Cent. R. Co., 37 Ohio St. 170; Lowden v. Cincinnati, 2 Disney (Ohio) 207.

Oregon.—McLaughlin v. Hoover, 1 Oregon 31; Winter v. Norton, 1 Oregon 42.

Pennsylvania.—Pittsburgh, etc., Pass. R. Co.'s Appeal, 1 Penny. (Pa.) 449; Union Canal Co. v. O'Brien, 4 Rawle (Pa.) 358; Neeld's Road Case, 1 Pa. St. 355; Davis's Appeal, 34 Pa. St. 256; Black v. Tricker, 59 Pa. St. 13; Keeling's Road, 59 Pa. St. 358; Howard Assoc.'s Appeal, 70 Pa. St. 344; Com. v. Potts, 79 Pa. St. 164; Bourguignon Bldg. Assoc. v. Com., 98 Pa. St. 64; Koontz v. Howsare, 100 Pa. St. 508; Chilcoat's Appeal, 101 Pa. St. 26;

Linton's Appeal, 104 Pa. St. 239; Boyle v. Horner, 104 Pa. St. 379; Jacoby v. Shafer, 105 Pa. St. 614; Booz's Appeal, 109 Pa. St. 592; Keystone Bridge Co.'s Appeal, (Pa. 1887) 7 Atl. Rep. 580; Whitmire v. Muncy Creek Tp., 17 Pa. Super. Ct. 399.

Tennessee.—Coleman v. Davidson Academy, Cooke (Tenn.) 261; Smith v. Hickman, Cooke (Tenn.) 338; Hart v. Reynolds, 1 Heisk. (Tenn.) 208; Graham v. Gunn, 87 Tenn. 458.

Texas.—Fowler v. Poor, Dall. (Tex.) 401; Neil v. Keese, 5 Tex. 23, 51 Am. Dec. 746; Bryan v. Sundberg, 5 Tex. 418; Cannon v. Vaughan, 12 Tex. 402; Scooby v. Sweatt, 28 Tex. 727; Napier v. Hodges, 31 Tex. 295; Austin v. Gulf, etc., R. Co., 45 Tex. 234; Berry v. State, 10 Tex. App. 315.

Vermont.—Henry v. Tilson, 17 Vt. 479; Isham v. Bennington Iron Co., 19 Vt. 230; Whitcomb v. Root, 20 Vt. 49; Highgate v. State, 59 Vt. 46.

Virginia.—Warder v. Arell, 2 Wash. (Va.) 282, 1 Am. Dec. 488.

Washington.—Davidson v. Carson, 1 Wash. Ter. 307.

West Virginia.—Daniel v. Simms, 49 W. Va. 555.

Wisconsin.—Storm v. Cotzhausen, 38 Wis. 139.

See also *infra*, this section, 10. *Aids to Interpretation*—*Extrinsic or External*—*History, the Old Law and Mischief.*

A Remedy Provided by One Statute will in many instances be extended to cases arising on the same subject-matter under a subsequent statute. Rogers v. Bradshaw, 20 Johns. (N. Y.) 744. See also *supra*, this section, 7. *Implication of Incidents.*

In Construing Laws of Sister State, Acts in Pari Materia must be taken together. Wabash R. Co. v. Fox, 64 Ohio St. 133.

Legislative Knowledge of a Former Law May Sometimes Be Presumed.—State v. Higgins, (Iowa 1903) 95 N. W. Rep. 244.

Repeal by Implication because of repugnance between two acts in *pari materia* is never favored. See *infra*, this title, *Repeal.*

1. Meaning of in Pari Materia.—United Soc. v. Eagle Bank, 7 Conn. 469, *per* Hosmer, C. J. See also O'Neal v. Robinson, 45 Ala. 535; Waterford, etc., Turnpike Co. v. People, 9 Barb. (N. Y.) 169; Plummer v. Murray, 51 Barb. (N. Y.) 202 (quoted under IN, vol. 16, p. 129); People v. Aichinson, (Oyer & T. Ct.) 7 How. Pr. (N. Y.) 245; Highgate v. State, 59 Vt. 46.

Statutes are in *pari materia* when they have a common purpose which they are the means of carrying into effect. Pargoud's Case, 4 Ct. Cl. 337.

It is sometimes said that "statutes which are not inconsistent with each other, and which relate to the same subject-matter, are in *pari materia*, and should be construed together and effect be given to them all." See South Park Com'rs v. Chicago First Nat. Bank, 177 Ill. 234; Fuelhart v. Blood, 21 Pa. Co. Ct. 603. But the limitation that such acts must be "not inconsistent" would seem to refer to the effect

Where Meaning Clear, Resort to Other Statutes Generally Improper. — It has been said that the doctrine that statutes *in pari materia* are to be taken together and construed as one act is resorted to only in cases of doubt and that it is never applicable where a statute is plain and unambiguous;¹ but clearly this statement is too sweeping, for a resort to other statutes may be necessary to determine the legislative intent in case of a repugnancy between the statutes,² or may be used to strengthen conclusions founded on the language of the statute.³

b. CONTEMPORANEOUS STATUTES. — Especially does this rule apply to statutes passed at the same session of the legislature. If such statutes are *in pari materia*, they must be construed together and, if possible, all must be allowed to stand and effect must be given to each of them, regard being had to the intention of the legislature.⁴ So contemporaneous legislation, not

of construction, and is not essential to their being *in pari materia*.

Illustrations of Statutes Held in *Pari Materia*. — *The Sections of a Code Referring to the Same Subject-matter* are to be construed as a single statute. *Mitchell v. Long*, 74 Ga. 96; *Stidham v. Sims*, 74 Ga. 187; *State v. Boswell*, 104 Ind. 547; *Moriarty v. Central Iowa R. Co.*, 64 Iowa 700; *Burger v. Frakes*, 67 Iowa 467; *Hunt v. Farmers' Ins. Co.*, 67 Iowa 742; *Depas v. Riez*, 2 La. Ann. 30; *Childers v. Johnson*, 6 La. Ann. 638; *Gibbons v. Brittenum*, 56 Miss. 251; *St. Joseph v. Porter*, 29 Mo. App. 605; *State v. Ebbs*, 89 Mo. App. 95; *Rexford v. Knight*, 15 Barb. (N. Y.) 627; *Gillin v. Canary*, 26 Civ. Pro. (N. Y.) 233, 19 Misc. (N. Y.) 597; *Wishek v. Becker*, (Supm. Ct. App. T.) 10 N. Dak. 63; *Roberts v. Briscoe*, 44 Ohio St. 600; *Cincinnati v. Guckenberger*, 60 Ohio St. 353; *Postal Tel. Cable Co. v. Farmville, etc.*, R. Co., 96 Va. 661. See also *supra*, this section, 8. *Construing Entire Statute as One Whole* — *Codes or Revised Statutes*.

Act and Supplement. — *Union Canal Co. v. O'Brien*, 4 Rawle (Pa.) 358.

Attachment and Garnishment Statutes. — *Wallace v. Seales*, 36 Miss. 53; *Storm v. Cotzhausen*, 38 Wis. 139.

Acts as to Exemptions from Execution. — See the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 77.

Homestead Laws. — See the title HOMESTEAD, vol. 15, p. 535.

Statutes Protecting Estates of Married Women. — *Perkins v. Perkins*, 62 Barb. (N. Y.) 531.

Laws Relating to Public Lands. — Act for relief, etc., 2 Op. Atty.-Gen. 46.

Revenue Laws. — See the title REVENUE LAWS, vol. 24, p. 888. But see *Inland Revenue Com'rs v. Forrest*, 15 App. Cas. 353.

Laws Relating to the Common-school System. — *Bissell v. Davidson*, 65 Conn. 183; *Gerhard v. Packer Tp. School Dist.*, 9 Pa. Dist. 723, 24 Pa. Co. Ct. 344.

Acts as to Soldiers' Bounties. — *Philbrook's Case*, 8 Ct. Cl. 523.

Not in *Pari Materia* are the statute of frauds and the bankruptcy act. *Humble v. Mitchell*, 11 Ad. & El. 205, 39 E. C. L. 46 (stated under Goods, vol. 14, p. 1083, notes, par. Stocks).

An act against furious driving and a toll act. *Williams v. Ellis*, 5 Q. B. D. 175. This case, determining whether a bicycle is a carriage, is stated under CARRIAGE, vol. 5, p. 151.

An act requiring confinement of animals and one regulating the liability of railroads for stock killed. *Central R. Co. v. Hamilton*, 71 Ga. 465.

An act regulating voluntary dissolution of corporations and one relating to dissolution by adversary proceedings. *Weatherly v. Capital City Water Co.*, 115 Ala. 156.

Enactments Emanating from Different Legislative Bodies (for instance, an act of Parliament and an act of the legislature of Ontario) cannot be said to be *in pari materia*, and the provincial act cannot be considered in construing the act of Parliament. *Grand Trunk R. Co. v. Washington*, (1899) A. C. 280.

1. When Act Clear, No Resort to Other Statutes — *Ex p. Blaiberg*, 23 Ch. D. 258, *per Jessel, M. R.*; *State v. Cram*, 16 Wis. 347. See also *Cortsey v. Territory*, 7 N. Mex. 95.

When an act uses such a word, for example, as "fees," a particular meaning is not to be given to it merely because it has been used in that sense in prior acts, where the terms of the act under consideration are clear and unambiguous. *Feagin v. Comptroller*, 42 Ala. 522.

2. Principle Limited. — *McFarland v. State Bank*, 4 Ark. 416, where a later general statute regulating the rate of interest was held consistent with an earlier special statute on the same subject.

3. *Robinson v. Tuttle*, 37 N. H. 243, where construing certain sections of the Revised Statutes relative to descent and distribution the act from which those sections were taken was examined, the court saying that such a resort was proper "in order to ascertain the meaning of any particular section, even when the words are unambiguous."

4. Acts in *Pari Materia* Passed at Same Session. — *Florida, etc.*, R. Co. v. Pensacola, etc., R. Co., 10 Fla. 160; *State v. Rackley*, 2 Blackf. (Ind.) 250; *State v. Fransham*, 19 Mont. 273; *Blackwell v. Albuquerque First Nat. Bank*, 10 N. Mex. 555; *Hess v. Trigg*, 8 Okla. 290; *Brooke v. Kaufman*, 6 Pa. Dist. 513; *Gerhard v. Packer Tp. School Dist.*, 9 Pa. Dist. 723; *Sprague v. Baldwin*, 18 Pa. Co. Ct. 568. See also *Hill v. Mitchell*, 5 Ark. 608.

Two Acts on Same Subject Passed the Same Day. — *Nazareth Literary Inst. v. Com.*, 14 B. Mon. (Ky.) 214.

Where Acts Passed at the Same Session Are Irreconcilable, the latest prevails. *Wright v. Tipton County*, 82 Ind. 337; *Gibbons v. Britte-*

precisely *in pari materia* with the statute to be construed, may be referred to on the question of intent.¹

c. **SUBSEQUENT STATUTES.** — Not only may contemporaneous and prior statutes be considered in construing a given act, but a subsequent statute may often aid in the interpretation of a prior one.²

d. **EXPIRED AND REPEALED STATUTES.** — Expired and repealed acts *in pari materia* with the statute to be construed may also be considered in the interpretation thereof.³

e. **CODES, REVISIONS, AND RE-ENACTMENTS.** — In construing codifications, revisions, or re-enactments in which the language is doubtful or ambiguous,

num, 56 Miss. 249. See also *infra*, this title, *Repeal*.

Primary Interest of Public Policy Prevails. — In *Hill v. Mitchell*, 5 Ark. 614, the court say: "We lay down this general principle upon the subject. If two statutes passed at the same time *in pari materia* are opposed to each other, and one of them relates to a primary interest of public policy, and the other to a secondary consideration, that which is greater in principle must govern."

1. **Contemporaneous Statutes Not in Pari Materia.** — **Intent.** — *Prather v. Jeffersonville*, etc., R. Co., 52 Ind. 16; *Middleton v. Greeson*, 106 Ind. 22; *Stout v. Grant County*, 107 Ind. 344; *Smith v. People*, 47 N. Y. 333; *Matter of Rochester Water Com'rs*, 66 N. Y. 422; *Chase v. Lord*, 77 N. Y. 18; *People v. England*, 91 Hun (N. Y.) 152. See also *Vane v. Newcombe*, 132 U. S. 235; *State v. Summers*, 142 Mo. 586.

2. **Subsequent Statutes.** — *England.* — *Clarke v. Powell*, 4 B. & Ad. 846, 24 E. C. L. 174; *Smith v. Lindo*, 4 C. B. N. S. 404, 93 E. C. L. 404; *Grill v. General Iron Screw Collier Co.*, L. R. 1 C. P. 611; *Battersby v. Kirk*, 2 Bing. N. Cas. 584, 29 E. C. L. 432; *Dickenson v. Fletcher*, L. R. 9 C. P. 2; *Rolle v. Whyte*, L. R. 3 Q. B. 298; *Morgan v. London General Omnibus Co.*, 12 Q. B. D. 207.

United States. — *Alexander v. Alexandria*, 5 Cranch (U. S.) 7; *U. S. v. Freeman*, 3 How. (U. S.) 564; *Cape Girardeau County Ct. v. Hill*, 118 U. S. 72.

Georgia. — *Georgia Penitentiary Co. No. 2 v. Nelms*, 65 Ga. 67.

Illinois. — *Lawrence v. People*, 188 Ill. 413.

Massachusetts. — *Com. v. Sylvester*, 13 Allen (Mass.) 247.

New York. — *Matter of Livingston*, 121 N. Y. 104; *Corhen v. Methodist Protestant Church*, 32 N. Y. App. Div. 239.

Pennsylvania. — *Moyer v. Gross*, 2 P. & W. (Pa.) 172; *Bear v. Bear*, 33 Pa. St. 530.

Tennessee. — *Hart v. Reynolds*, 1 Heisk. (Tenn.) 208.

See also *Cannon v. Vaughan*, 12 Tex. 402, and *compare Ward v. Folkestone Waterworks Co.*, 24 Q. B. D. 334, 62 L. T. N. S. 325; *Inghalls v. Cole*, 47 Me. 540.

See also *infra*, this section, *Aids to Interpretation* — *Extrinsic or External* — *Legislative Construction*.

3. **Expired and Repealed Acts Considered.** — *England.* — *Rex v. Loxdale*, 1 Burr. 445; *Goldsmid v. Hampton*, 5 C. B. N. S. 94, 94 E. C. L. 94; *Ex p. Copeland*, 2 De G. M. & G. 914; *Mitchell v. Simpson*, 25 Q. B. D. 183.

United States. — *U. S. v. Bowen*, 100 U. S. 508; *Viterbo v. Friedlander*, 120 U. S. 707; *In*

re Meyers, 1 Am. Bankr. Rep. 7; *In re Southern Pac. Co.*, 82 Fed. Rep. 313.

Florida. — *Ferrari v. Board of Health*, 24 Fla. 410.

Georgia. — *Harrison v. Walker*, 1 Ga. 32.

Illinois. — *Bruce v. Schuyler*, 9 Ill. 230, 46 Am. Dec. 447.

Indiana. — *Prather v. Jeffersonville*, etc., R. Co., 52 Ind. 16; *Middleton v. Greeson*, 106 Ind. 22; *Stout v. Grant County*, 107 Ind. 348; *State v. Harrison*, 116 Ind. 300.

Maine. — *Coffin v. Rich*, 45 Me. 513, 71 Am. Dec. 559.

Maryland. — *Baltimore v. Howard*, 6 Har. & J. (Md.) 383; *State v. Baltimore*, etc., R. Co., 12 Gill & J. (Md.) 399, 38 Am. Dec. 319.

Massachusetts. — *Church v. Crocker*, 3 Mass. 21; *Eaton v. Green*, 22 Pick. (Mass.) 532; *Medbury v. Watson*, 6 Met. (Mass.) 246, 39 Am. Dec. 726; *Holbrook v. Bliss*, 9 Allen (Mass.) 75; *Com. v. Bailey*, 13 Allen (Mass.) 545; *Hamilton v. Boston*, 14 Allen (Mass.) 478; *Ham v. Board of Police*, 142 Mass. 94.

Mississippi. — *Grand Gulf Bank v. Archer*, 8 Smed. & M. (Miss.) 151.

New Hampshire. — *Wakefield v. Phelps*, 37 N. H. 304.

Pennsylvania. — *Daniels v. Com.*, 7 Pa. St. 373.

Tennessee. — *Coleman v. Davidson Academy*, *Cooke* (Tenn.) 261.

Texas. — *Steadman v. Merchants', etc., Bank*, 69 Tex. 53.

West Virginia. — *Forgueran v. Donnally*, 7 W. Va. 114; *Daniel v. Simms*, 49 W. Va. 554.

Wisconsin. — *Kollock v. Madison*, 84 Wis. 458; *Flanders v. Merrimack*, 48 Wis. 567.

See also *supra*, this section, *Construing Entire Statute as One Whole* — *Repealed or Unconstitutional Clauses*, that a repealed clause may be considered in construing a statute.

Caution. — In *Bradlaugh v. Clarke*, 8 App. Cas. 380, Lord Watson said: "It appears to me to be an extremely hazardous proceeding to refer to provisions which have been absolutely repealed, in order to ascertain what the legislature meant to enact in their room and stead. There may possibly be occasions on which such a reference would be legitimate." See also *Cortesy v. Territory*, 7 N. Mex. 94, *quoting Potter's Dwar. Stat.*, p. 191.

Consolidation Acts, collecting and arranging the statutes on a given subject, may be construed in accordance with this rule, and decisions under the repealed acts are applicable to any sections in which their terms are reproduced. *Mitchell v. Simpson*, 25 Q. B. D. 183; *Smith v. Baker*, (1891) A. C. 349; *Hardcastle Stat. Law* (3d ed.) 143.

former statutes therein embodied are to be considered, but courts may not look to such former statutes where the meaning of the revision is plain.¹ Nor can they be guided by the construction of the prior acts where the alteration made in revision is so extensive as to indicate that the intention of the legislature was to introduce a change in meaning,² but a mere change in phraseology is not indicative of such intention.³

f. PENAL STATUTES. — The foregoing rules of construction as to acts *in pari materia* are applicable also to penal statutes.⁴

g. PRIVATE STATUTES. — Private acts conferring special privileges and the general acts on the same subject are also to be construed together and effect is to be given to both, if possible,⁵ but separate private acts are not to be taken as *in pari materia*, at least when they do not relate to the same persons and subject-matter.⁶

10. Aids to Interpretation — *a.* INTRINSIC FROM INCIDENTS AND FORM —

(1) *Preamble.* — The preamble is no part of the statute, but, as setting out

1. *Construction of Code or Statutory Revision* — *United States.* — *Savings Bank v. Collector*, 3 Wall. (U. S.) 495; *U. S. v. Bowen*, 100 U. S. 508; *Myer v. Western Car Co.*, 102 U. S. 1; *Vietor v. Arthur*, 104 U. S. 498; *Baldwin v. Franks*, 120 U. S. 678; *Viterbo v. Friedlander*, 120 U. S. 707; *U. S. v. Le Bris*, 121 U. S. 278; *U. S. v. Lacher*, 134 U. S. 624; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1; *U. S. v. North American Commercial Co.*, 74 Fed. Rep. 145.

Alabama. — *Nicholson v. Mobile, etc., R. Co.*, 49 Ala. 205; *Gunter v. State*, 83 Ala. 96.

District of Columbia. — *U. S. v. Butterworth*, 3 Mackey (D. C.) 229; *In re Spencer, MacArthur & M.* (D. C.) 433.

Georgia. — *Comer v. State*, 103 Ga. 69.

Louisiana. — *Desban v. Pickett*, 16 La. Ann. 351.

Maryland. — *Hooper v. Creager*, 84 Md. 196.

Massachusetts. — *Pratt v. Street Com'rs*, 139 Mass. 563.

Ohio. — *State v. Brewster*, 44 Ohio St. 252; *Heck v. State*, 44 Ohio St. 537.

Texas. — *Braun v. State*, 40 Tex. Crim. 236.

To Solve, Not to Create, an Ambiguity, prior acts may be resorted to in construing a revision. *Hamilton v. Rathbone*, 175 U. S. 414.

The Order in Which Statutes Are Consolidated when formed into a single section of a code cannot affect the meaning of the component statutes as originally enacted. *Hooper v. Creager*, 84 Md. 196.

That the Different Sections of a Code Dealing with the Same Subject are in *pari materia*, see *supra*, p. 623, note.

2. *Alteration in Acts Consolidated.* — In *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, the court held that such alterations were introduced in a certain act as made it plain upon the face thereof that it was more than a mere revision or consolidation of previous statutes, and that therefore it was the duty of the court to construe the act as it stood without reference to prior acts incorporated in it.

In *Rich v. Keyser*, 54 Pa. St. 89, it was held that the fact that words in a statute differ from those in a prior statute on the same subject, is an intimation that they are to have a different and not the same construction. See also cross-reference in the following note.

3. *Mere Change in Phraseology.* — See *infra*,

this section, *Consequences to Be Guarded Against* — *Unnecessary Change in Law.*

4. *Penal Statutes* — *United States.* — The *Schooner Harriet*, 1 Story (U. S.) 251.

Arkansas. — *Morrison v. State*, 40 Ark. 448; *State v. Sewell*, 45 Ark. 391.

Colorado. — *Kollenberger v. People*, 9 Colo. 233.

Indiana. — *State v. Boswell*, 104 Ind. 547; *State v. Wells*, 112 Ind. 237.

Iowa. — *Harriman v. State*, 2 Greene (Iowa) 274; *State v. Smith*, 7 Iowa 244.

Kentucky. — *Com. v. English*, 2 Bibb (Ky.) 81.

Massachusetts. — *Green v. Com.*, 12 Allen (Mass.) 166; *Com. v. Bailey*, 13 Allen (Mass.) 545; *Com. v. Griffin*, 105 Mass. 187.

Mississippi. — *House v. State*, 41 Miss. 746.

New Jersey. — *State v. Garthwaite*, 23 N. J. L. 143.

New York. — *Smith v. People*, 47 N. Y. 330.

North Carolina. — *State v. Bell*, 3 Ired. L. (25 N. Car.) 508.

Pennsylvania. — *Daniels v. Com.*, 7 Pa. St. 373.

Rhode Island. — *State v. Wilbor*, 1 R. I. 204, 36 Am. Dec. 245.

South Carolina. — *State v. Baldwin*, 2 Bailey L. (S. Car.) 541; *State v. Fields*, 2 Bailey L. (S. Car.) 554; *State v. Mooty*, 3 Hill L. (S. Car.) 187; *State v. Williams*, 13 S. Car. 558.

Texas. — *Cain v. State*, 20 Tex. 362; *Taylor v. State*, 3 Tex. App. 169.

5. *Private Acts Conferring Privilege and General Acts.* — *McFarland v. State Bank*, 4 Ark. 410; *People v. Wells*, 11 Cal. 333; *Martin v. San Francisco*, 126 Cal. 404; *La Grange County v. Cutler*, 6 Ind. 354; *Maysville Turnpike Road Co. v. How*, 14 B. Mon. (Ky.) 342; *Crane v. Reeder*, 22 Mich. 322; *State v. Macon County Ct.*, 41 Mo. 460; *Excise Com'rs v. Burtis*, 103 N. Y. 136; *Mt. Holly Paper Co.'s Appeal*, 99 Pa. St. 513; *New Brighton, etc., R. Co.'s Appeal*, 105 Pa. St. 13. See also *Mersey Docks, etc., Board v. Henderson*, 13 App. Cas. 599.

6. *Two Special Acts Not in Pari Materia.* — *United Soc. v. Eagle Bank*, 7 Conn. 469; *New Haven v. New Haven Water Co.*, 44 Conn. 105; *Thomas v. Mahan*, 4 Me. 513 (when the two acts do not relate to the same parties and the same subject-matter). See also *Strachan v. Thompson*, 13 Dunlop (Sc.) 279.

the object and intention of the legislature, it is considered in the construction of an act.¹ Therefore, whenever there is ambiguity, or wherever the words of the act have more than one meaning, or there is doubt as to the subject-matter to which they are to be applied, the preamble may be consulted.²

May Restrict Act. — Although it has frequently been said that the preamble may extend but not restrain the enacting part of a statute,³ yet there are numerous cases in which a resort to the preamble as an aid to construction

An Act Consolidating Two Boom Companies Chartered by Special Acts does not affect their liabilities as determined by their charters. *Gould v. Langdon*, 43 Pa. St. 365.

When Two Acts Are Passed Conferring Certain Powers on the Trustees of a Town, and the second recites the first and omissions therein and proceeds to remedy them, the two may be considered together. *Covington v. McNickle*, 18 B. Mon. (Ky.) 286.

Detecting Misprint. — In *Levering v. Philadelphia*, etc., R. Co., 8 W. & S. (Pa.) 459, in construing an act of incorporation, the court resorted to other similar acts to show that "or" in a proviso should be read "on."

1. Preamble No Part of Act, but States Intention — *England.* — *Halton v. Cove*, 1 B. & Ad. 538, *Adm. Statutes*, A; *Potter's Dwar*. 265; *Fellowes v. Clay*, 4 Q. B. 338, 45 E. C. L. 338.

United States. — *Yazoo*, etc., R. Co. v. *Thomas*, 132 U. S. 174.

Illinois. — *Edwards v. Pope*, 4 Ill. 465.

Pennsylvania. — *Erie*, etc., R. Co., v. *Casey*, 26 Pa. St. 288; *Com. v. Marshall*, 69 Pa. St. 328.

As to the meaning of preamble, see **PREAMBLE**, vol. 22, p. 1161.

Lord Coke declares (*Co. Litt.* 79a) that the "preamble of a statute is a good meane to find out the meaning of the statute, and as it were a key to open the understanding thereof." The preamble, said Chief Justice Dyer, is "a key to open the minds of the makers of the act and the mischiefs which they intended to redress." *Stowel v. Zouch*, *Plowd.* 369.

In Quebec the Preamble Forms a Part of the Act by statute and "assists in explaining its purport and object." *Joseph v. Montreal*, 10 Quebec Super. Ct. 536, *citing Rev. Stat. Que.*, § 12.

2. Resort to Preamble Where Meaning Doubtful — *England.* — *Halton v. Cove*, 1 B. & Ad. 538, 20 E. C. L. 440; *Rex v. Gwenop*, 3 T. R. 133; *Crespigny v. Wittenoom*, 4 T. R. 793; *Atty.-Gen. v. Powis*, *Kay* 186; *Crowder v. Stewart*, 16 Ch. D. 370; *Mystery of Salters v. Jay*, 3 Q. B. 109, 43 E. C. L. 654; *Nash v. Allen*, 4 Q. B. 784, 45 E. C. L. 784; *Boulton v. Bull*, 2 H. Bl. 500; *Sutton's Hospital*, 10 Coke 24b; *Edwards v. Rusholme*, L. R. 4 Q. B. 554; *Emanuel v. Constable*, 3 Russ. 436; *Doe v. Roe*, 1 Dowd. 274; *Carr v. Royal Exch. Assur. Corp.*, 5 B. & S. 941, 117 E. C. L. 941; *In re Masters*, 33 L. J. Q. B. 146; *Mills v. Wilkins*, 6 Mod. 62; *Mason v. Armitage*, 13 Ves. Jr. 36; *Greig v. Bendeno*, El. Bl. & El. 133, 96 E. C. L. 133; *Reg. v. Bateman*, 8 El. & Bl. 584, 92 E. C. L. 584; *West Ham v. Iles*, 9 App. Cas. 387.

United States. — *Beard v. Rowan*, 9 Pet. (U. S.) 317; *Yazoo*, etc., R. Co. v. *Thomas*, 132 U. S. 174; *Price v. Forrest*, 173 U. S. 427; *U. S. v. Webster*, *Davies* (U. S.) 38; *Hahn v. Salmon*, 20 Fed. Rep. 801.

Alabama. — *Bartlett v. Morris*, 9 Port. (Ala.) 266.

Connecticut. — *Fowler v. State*, 5 Day (Conn.) 81.

Illinois. — *Edwards v. Pope*, 4 Ill. 465.

Kentucky. — *Nichols v. Wells*, *Sneed* (Ky.) 255.

Louisiana. — *Montesquieu v. Heil*, 4 La. 51, 23 Am. Dec. 471; *State v. Cazeau*, 8 La. Ann. 114.

Maryland. — *Davidson v. Clayland*, 1 Har. & J. (Md.) 546; *Chesapeake*, etc., Canal Co. v. *Baltimore*, etc., R. Co., 4 Gill & J. (Md.) 1; *Lucas v. McBlair*, 12 Gill & J. (Md.) 1.

Massachusetts. — *Cleaveland v. Norton*, 6 Cush. (Mass.) 383.

New Jersey. — *James v. Dubois*, 16 N. J. L. 285.

New York. — *Jackson v. Gilchrist*, 15 Johns. (N. Y.) 89; *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358, 8 Am. Dec. 243; *Constantine v. Van Winkle*, 6 Hill (N. Y.) 184; *Hart v. Albany*, 9 Wend. (N. Y.) 571, 24 Am. Dec. 165.

North Carolina. — *Blue v. McDuffie*, *Busb. L.* (44 N. Car.) 131.

Pennsylvania. — *Dedrick v. Wood*, 15 Pa. St. 9; *Erie*, etc., R. Co. v. *Casey*, 26 Pa. St. 287; *Com. v. Marshall*, 69 Pa. St. 328; *York County v. Crafton*, 100 Pa. St. 619.

Rhode Island. — *Tripp v. Goff*, 15 R. I. 299.

South Carolina. — *Bynum v. Clark*, 3 McCord L. (S. Car.) 298, 15 Am. Dec. 633; *State v. Stephenson*, 2 Bailey L. (S. Car.) 334.

Texas. — *Sutherland v. De Leon*, 1 Tex. 250, 46 Am. Dec. 100.

Wisconsin. — *Nazro v. Merchants' Mut. Ins. Co.*, 14 Wis. 295.

Doubt Not Arising from Particular Words but from Scope of Statute. — In *Coosaw Min. Co. v. South Carolina*, 144 U. S. 563, *Harlan, J.*, said the preamble was particularly helpful in the case of an ambiguity which "is not simply that arising from the meaning of particular words, but such as may arise in respect to the general scope and meaning of a statute."

To Fix Subject-matter. — It is admitted that the preamble of an act may be legitimately used to ascertain and fix the subject-matter to which the enacting part is to be applied, and even in some cases to control and cut down the enacting part. *Fellowes v. Clay*, 4 Q. B. 339, 45 E. C. L. 339. See also *Com. v. Marshall*, 69 Pa. St. 328.

3. Dicta that Preamble May Extend but Not Restrict. — *Rex v. Athos*, 8 Mod. 144; *Copeman v. Gallant*, 1 P. Wms. 320; *Walker v. Richardson*, 2 M. & W. 889; *Heyman v. Flewker*, 13 C. B. N. S. 519, 106 E. C. L. 519; *Drummond v. Drummond*, L. R. 2 Ch. 44; *Kearns v. Cordwainers' Co.*, 6 C. B. N. S. 388, 95 E. C. L. 388. See also *Trueman v. Lambert*, 4 M. & S. 238.

has been followed by a restricted interpretation of the language used in the enactment clause.¹

When Words Clear, Resort to Preamble Improper. — But when the words of an enactment are clear and positive, and there is no doubt as to their meaning or as to the scope of the enactment or the subject-matter to which it applies, the preamble cannot be invoked to create any uncertainty as to the meaning of the statute.² Thus, when the preamble recites a particular mischief, and the legislature provides a remedy for that mischief and others as well, the enacting clause is to prevail, if from the whole act the intention is clear, notwithstanding the less extensive import of the preamble.³ And where the preamble is more general than the enacting clause, the enacting clause must prevail, if it is free from doubt and ambiguity.⁴

(2) *Title.* — The rule was formerly general that the title of an act was no part of the act,⁵ and in *England* it was frequently said that in the construc-

1. Preamble Restricting Enacting Part of Statute. — *Ryall v. Rolle*, 1 Atk. 174, 1 Ves. 365; *Rex v. Gwenop*, 3 T. R. 133; *Reg. v. Bateman*, 8 El. & Bl. 584, 92 E. C. L. 584; *Edwards v. Rusholme*, L. R. 4 Q. B. 554; *Emanuel v. Constable*, 3 Russ. 436; *Reg. v. Manchester*, 7 El. & Bl. 453, 90 E. C. L. 453; *Bryan v. Child*, 5 Exch. 368; *Salkeld v. Johnston*, 1 Hare 196; *Hughes v. Chester*, etc., R. Co., 1 Drew. & Sm. 524; *Wigan v. Fowler*, 1 Stark. 459, 2 E. C. L. 177. See also *Seidenbender v. Charles*, 4 S. & R. (Pa.) 166, 8 Am. Dec. 682.

2. No Resort to Preamble When Meaning Plain — *England.* — *Powell v. Kempton Park Race-course Co.*, (1899) A. C. 157; *Caledonian R. Co. v. North British R. Co.*, 6 App. Cas. 114; *Kearns v. Cordwainers' Co.*, 6 C. B. N. S. 388, 95 E. C. L. 388; *Sutton v. Sutton*, 22 Ch. D. 521; *Hughes v. Chester*, etc., R. Co., 1 Drew. & Sm. 524; *Copland v. Davies*, L. R. 5 H. L. 358; *Mace v. Cammel*, Lofft 783; *Doe v. Brandling*, 7 B. & C. 643, 14 E. C. L. 108; *Pattison v. Banks*, 2 Cowp. 543; *Crespigny v. Wittenoom*, 4 T. R. 793; *Mason v. Armitage*, 13 Ves. Jr. 36; *Lees v. Summersgill*, 17 Ves. Jr. 508; *Taylor v. Oldham*, 4 Ch. D. 395; *Wilson v. Knubley*, 7 East 128.

United States. — *Yazoo*, etc., R. Co. v. *Thomas*, 132 U. S. 174; *U. S. v. Oregon*, etc., R. Co., 164 U. S. 541.

Georgia. — *Eastman v. McAlpin*, 1 Ga. 157.
Indiana. — *Coverdale v. Edwards*, 155 Ind. 382.

Kentucky. — *Covington v. McNickle*, 18 B. Mon. (Ky.) 262.

Maryland. — *Kent v. Somervell*, 7 Gill & J. (Md.) 265; *Laidler v. Young*, 2 Har. & J. (Md.) 69.

Massachusetts. — *Holbrook v. Holbrook*, 1 Pick. (Mass.) 248.

Missouri. — *Lackland v. Walker*, 151 Mo. 264.

New Jersey. — *James v. Dubois*, 16 N. J. L. 285.

New York. — *Jackson v. Gilchrist*, 15 Johns. (N. Y.) 89; *Hart v. Albany*, 9 Wend. (N. Y.) 571, 24 Am. Dec. 165.

North Carolina. — *Blue v. McDuffie*, Busb. L. (44 N. Car.) 131.

Pennsylvania. — *Kirk v. Dean*, 2 Binn. (Pa.) 341; *Seidenbender v. Charles*, 4 S. & R. (Pa.) 151, 8 Am. Dec. 682; *Erie*, etc., R. Co. v. *Casey*, 26 Pa. St. 288.

Rhode Island. — *Tripp v. Goff*, 15 R. I. 299.

South Carolina. — *Bynum v. Clark*, 3 McCord L. (S. Car.) 298, 15 Am. Dec. 633; *State v. Findley*, 1 Brev. (S. Car.) 107; *State v. Butler*, 3 McCord L. (S. Car.) 383.

3. Preamble Reciting Particular Mischief — *England.* — *Fellowes v. Clay*, 4 Q. B. 349, 45 E. C. L. 349; *Doe v. Brandling*, 7 B. & C. 660, 14 E. C. L. 108; *St. Peter v. Middleburgh*, 2 Y. & J. 214; *Salkeld v. Johnston*, 1 Macn. & G. 264, 1 Hare 196; *Mace v. Cammel*, Lofft 782; *Coleman v. Cooke*, Willes 395; *Rex v. Pierce*, 3 M. & S. 62; *Willis v. Gippes*, 5 Moo. P. C. 379; *Hughes v. Done*, 1 Q. B. 301, 41 E. C. L. 550; *Rex v. Marks*, 3 East 157.

Indiana. — *State v. Ohio Oil Co.*, 150 Ind. 32.
Maryland. — *Laidler v. Young*, 2 Har. & J. (Md.) 69.

Massachusetts. — *Holbrook v. Holbrook*, 1 Pick. (Mass.) 251.

New York. — *Jackson v. Gilchrist*, 15 Johns. (N. Y.) 89.

4. Preamble More General than Enacting Clause. — *Wilson v. Knubley*, 7 East 128; *Farley v. Briant*, 3 Ad. & El. 839, 30 E. C. L. 239; *Jenkins v. Briant*, 6 Sim. 603; *Morse v. Tucker*, 5 Hare 79; *Francis v. Maas*, 3 Q. B. D. 341; *Market Harborough v. Kettering Highway Board*, L. R. 8 Q. B. 308.

5. Title No Part of Act — *England.* — *Mills v. Wilkins*, 6 Mod. 62; *Atty.-Gen. v. Weymouth*, Amb. 22; *Rex v. Williams*, 1 W. Bl. 95; *Chance v. Adams*, 1 Ld. Raym. 77; *Shrewsbury v. Scott*, 6 C. B. N. S. 1, 95 E. C. L. 1; *Jefferys v. Boosey*, 4 H. L. Cas. 982; *Morant v. Taylor*, 1 Ex. D. 194.

United States. — *Hadden v. Collector*, 5 Wall. (U. S.) 110; *Ogden v. Strong*, 2 Paine (U. S.) 584; *U. S. v. McCrory*, (C. C. A.) 119 Fed. Rep. 861.

California. — *Cohen v. Barrett*, 5 Cal. 195.

Georgia. — *Eastman v. McAlpin*, 1 Ga. 157.

Illinois. — *Plummer v. People*, 74 Ill. 361.

Indiana. — *Garrigus v. Parke County*, 39 Ind. 66.

Md. — *Bradford v. Jones*, 1 Md. 351.

North Carolina. — *State v. Welsh*, 3 Hawks (10 N. Car.) 404.

Ohio. — *Burgett v. Burgett*, 1 Ohio 469, 13 Am. Dec. 634.

Pennsylvania. — *Com. v. Slifer*, 53 Pa. St. 71.

South Carolina. — *State v. Stephenson*, 2 Bailey L. (S. Car.) 334.

In *England* ancient statutes were generally

tion of statutes the title should not be taken into account.¹ But in spite of this rule the title was now and then resorted to in special cases,² and at the present day, in consequence it seems of a change in parliamentary practice by which the title has become a part of the act, courts may resort to the title in the construction of a statute.³ In *Canada* the title appears to be a part of the act, and as such may be consulted in construction.⁴

In the *United States*, where the meaning of an act is doubtful, recourse has frequently been had to the title for explanation, and it is regarded as a legitimate aid in determining the intention of the legislature.⁵

without title until 11 Hen. VII. (Bacon Abr., title Statutes, A.; see also Barrington's Obs. on the More Ancient Stats., p. 449), or 5 Hen. VIII. (4 Reeve's Hist. Eng. Law, p. 412; see also 1 Bl. Com. 183). Consequently the title in modern editions of the old statutes is without any effect in construction. *Birtwhistle v. Vardill*, 7 Cl. & F. 929; *Powtler's Case*, 11 Coke 33.

1. **England** — Title No Aid in Construction. — *Hunter v. Nockolds*, 1 Macn. & G. 640; *Mills v. Wilkins*, 6 Mod. 62; Atty.-Gen. v. Weymouth, Amb. 22; *Rex v. Williams*, 1 W. Bl. 95.

2. **England** — Title Formerly Sometimes Consulted. — *Brett v. Brett*, 3 Add. Ecc. 210; *Rex v. Wright*, 1 Ad. & El. 446, 28 E. C. L. 123; *Alexander v. Newman*, 2 C. B. 141, 52 E. C. L. 141; *Wilmot v. Rose*, 3 El. & Bl. 570, 77 E. C. L. 570; *Taylor v. Newman*, 4 B. & S. 93, 116 E. C. L. 93; *Bentley v. Rotherham*, etc., Local Board of Health, 4 Ch. D. 588; *Rawley v. Rawley*, 1 Q. B. D. 466; *Shaw v. Ruddin*, 9 Ir. C. L. 214; *Reg. v. Mallow Union*, 12 Ir. C. L. 35.

In *Salkeld v. Johnson*, 2 Exch. 283, it was said that the title, "though it has occasionally been referred to as aiding in the construction of an act, is certainly no part of the law, and in strictness ought not to be taken into consideration at all." See also *Claydon v. Green*, L. R. 3 C. P. 522, where Willes, J., spoke of the title as a *temporanea expositio*, which, "though useful as a guide to a hasty inquirer, ought not to be relied upon" in construction.

3. **England** — Title Now Part of Act. — In *Fielding v. Morley*, (1899) 1 Ch. 3, Lindley, M. R., said: "I read the title advisedly, because now, and for some years past, the title of an act of parliament has been part of the act. In old days it used not to be so, and in the old law books we were told not so to regard it; but now the title is an important part of the act, and is so treated in both houses of parliament." See also *Coomber v. Berks*, 9 Q. B. D. 33; *Sutton v. Sutton*, 22 Ch. D. 513; *Dartford Rural Dist. Council v. Bexley Heath R. Co.*, (1898) A. C. 213; Atty.-Gen. v. *Margate Pier Proprietors*, (1900) 1 Ch. 752 (where this statement is limited to the "long title"). But compare *Powell v. Kempton Park Racecourse Co.*, (1897) 2 Q. B. 289, where Rigby, L. J., said: "There is a great preponderance of authority in favor of the proposition that the title forms no part of the act and cannot even be looked at for the purpose of construing the act."

As to the former method of legislation with regard to titles, see 1 Bl. Com. 183; Barrington's Observations on the More Ancient Stats., p. 449. As to the modern methods, see Ilbert, *Legislative Methods and Forms* 268, 269; *Hardcastle Stat. Law* (2d ed.) 201, citing *May's Parliamentary Practice* (10th ed.) 462, 493.

4. **Canada**. — In *O'Connor v. Nova Scotia Telephone Co.*, 22 Can. Sup. Ct. 292, Sedge-*wick, J.*, doubted whether any general rule on this subject existed, but he said that colonial legislatures had "always been under a constitutional obligation, by virtue of express instructions from the crown, to take care that no clause shall be inserted in any act, foreign to what the title of it imports," and he went on to detail the practice in the Nova Scotia legislature. See also *Washington v. Grand Trunk R. Co.*, 28 Can. Sup. Ct. 188.

5. **United States Rule** — Title Consulted — *United States*. — U. S. v. *Union Pac. R. Co.*, 91 U. S. 72; *Platt v. Union Pac. R. Co.*, 99 U. S. 48; *Myer v. Western Car Co.*, 102 U. S. 1; *Holy Trinity Church v. U. S.*, 143 U. S. 457; *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550; *Wilson v. Spaulding*, 19 Fed. Rep. 304; *U. S. v. Union Pac. R. Co.*, 37 Fed. Rep. 551; *Oregon, etc., R. Co. v. U. S.*, 67 Fed. Rep. 650, 29 U. S. App. 507.

Alabama. — *Blakeney v. Blakeney*, 6 Port. (Ala.) 109, 30 Am. Dec. 574.

California. — *Cohen v. Barrett*, 5 Cal. 195; *Barnes v. Jones*, 51 Cal. 303; *Matter of Boston Min., etc., Co.*, 51 Cal. 624; *Ex p. Kohler*, 74 Cal. 38.

Georgia. — *Eastman v. McAlpin*, 1 Ga. 157.

Illinois. — *South Park Com'rs v. Chicago First Nat. Bank*, 177 Ill. 238; *Martin v. Martin*, 187 Ill. 202.

Indiana. — *Smith v. State*, 28 Ind. 321; *Garrigus v. Parke County*, 39 Ind. 66; *Rushville v. Rushville Natural Gas Co.*, 132 Ind. 575.

Kansas. — *State v. Wilson*, 61 Kan. 40.

Maryland. — *Bradford v. Jones*, 1 Md. 351; *Clark v. Baltimore*, 29 Md. 285; *State v. Archer*, 73 Md. 44; *Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co.*, 4 Gill & J. (Md.) 1.

Massachusetts. — *Field v. Gooding*, 106 Mass. 310.

Missouri. — *State v. Whitaker*, 160 Mo. 69.

Nevada. — *Torreyson v. Board of Examiners*, 7 Nev. 19.

New Jersey. — *Camden, etc., R., etc., Co. v. Briggs*, 22 N. J. L. 644; *Stockton v. Central R. Co.*, 50 N. J. Eq. 52; *Jones v. Morristown*, 66 N. J. L. 488.

New York. — *People v. Molyneux*, 40 N. Y. 113; *Smith v. People*, 47 N. Y. 330; *People v. Davenport*, 61 N. Y. 574; *People v. Spicer*, 99 N. Y. 233; *Bell v. New York*, 105 N. Y. 139; *People v. O'Brien*, 111 N. Y. 1, 7 Am. St. Rep. 684; *Cumines v. Jefferson County*, 63 Barb. (N. Y.) 201; *Brick v. Gannar*, 36 Hun (N. Y.) 55; *Matter of Kellum*, 6 Lans. (N. Y.) 2.

North Carolina. — *Hines v. Wilmington, etc., R. Co.*, 95 N. Car. 434, 59 Am. Rep. 250.

Resorted to Only in Case of Ambiguity. — If there is no ambiguity in the statute itself, there can be no necessity for resort to the title.¹ It cannot be used to extend or restrain positive provisions contained in the statute,² nor can it control express words in the statute.³

Effect of Constitutional Requirement that Subject Be Expressed in Title. — Especially may the title be consulted as an aid to interpretation where, as is the case in many states, the constitution provides that the subject of the act shall be expressed in the title,⁴ for under such constitutional provisions, the title becomes a part of the act itself,⁵ and, upon the principle that an act will not be construed into unconstitutionality if another construction is possible, may be a limitation upon the enacting part of the law.⁶

(3) **Chapter Titles and Section Headings** — **Heading So Used as to Be Part of Subsequent Sections.** — Headings to certain groups of clauses in statutes of such a

Ohio. — *Burgett v. Burgett*, 1 Ohio 469, 13 Am. Dec. 634.

Oklahoma. — *Territory v. Hopkins*, 9 Okla. 133.

Pennsylvania. — *Com. v. Slifer*, 53 Pa. St. 71. *South Carolina.* — *State v. Smith*, Cheves L. (S. Car.) 157; *State v. Stephenson*, 2 Bailey L. (S. Car.) 334; *State v. Fields*, 2 Bailey L. (S. Car.) 554.

South Dakota. — *Lovett v. Ferguson*, 10 S. Dak. 50 (joint resolution).

In *U. S. v. Fisher*, 2 Cranch (U. S.) 386, Marshall, C. J., said: "Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived, and in such case the title claims a degree of notice, and will have its due share of consideration;" and again in *U. S. v. Palmer*, 3 Wheat. (U. S.) 610: "The title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislature."

In *Connecticut Mut. L. Ins. Co. v. Albert*, 39 Mo. 183, it was said: "It is not safe to rely alone upon the title of a statute, and it has been declared to be 'not a safe exposition of the law;' but the better rule, as we think, is to presume that the true intent and meaning is to be found in the title, unless it is plainly contradicted by the express terms of the body of the act."

1. When Statutes Plain, Title Not Resorted To. — *Hunter v. Nockolds*, 1 Macn. & G. 640; *U. S. v. McArdle*, 2 Sawy. (U. S.) 367; *U. S. v. McCrory*, (C. C. A.) 119 Fed. Rep. 861; *Matter of Boston Min.*, etc., Co., 51 Cal. 624; *Eastman v. McAlpin*, 1 Ga. 157; *State v. Archer*, 73 Md. 44; *Bell v. New York*, 105 N. Y. 139; *Hines v. Wilmington*, etc., R. Co., 95 N. Car. 434, 59 Am. Rep. 250; *Territory v. Hopkins*, 9 Okla. 133; *Com. v. Slifer*, 53 Pa. St. 71; *Barr's Estate*, 21 Pa. Co. Ct. 225.

Entitled to Little Weight. — In *Hadden v. Collector*, 5 Wall. (U. S.) 107, Field, J., says: "The title of an act furnishes little aid in the construction of its provisions. * * * It is only when the meaning of these is doubtful that resort may be had to the title, and even then it has little weight. It is seldom the subject of special consideration by the Legislature."

2. Cannot Extend or Restrict Positive Provisions. — *The New York*, (C. C. A.) 108 Fed. Rep. 109; *Hadden v. Collector*, 5 Wall. (U. S.) 107; *Flynn v. Abbott*, 16 Cal. 358; *Matter of Boston*

Min., etc., Co., 51 Cal. 624; *State v. Cazeau*, 8 La. Ann. 114.

Where the Words of the Enacting Clause Are Larger than Those of the Title, the former must prevail. *U. S. v. Briggs*, 9 How. (U. S.) 351; *Blue v. McDuffie*, Busb. L. (44 N. Car.) 131.

3. Cannot Control Express Words. — *U. S. v. Palmer*, 3 Wheat. (U. S.) 610; *U. S. v. Fisher*, 2 Cranch (U. S.) 386; *U. S. v. McCrory*, (C. C. A.) 119 Fed. Rep. 861; *Hadden v. Collector*, 5 Wall. (U. S.) 107; *Bartlett v. Morris*, 9 Port. (Ala.) 266; *Flynn v. Abbott*, 16 Cal. 358; *State v. Cazeau*, 8 La. Ann. 114; *Chesapeake*, etc., Canal Co. v. *Baltimore*, etc., R. Co., 4 Gill & J. (Md.) 90; *Stevens v. Lake George*, etc., R. Co., 82 Mich. 430. See also *People v. McCann*, 16 N. Y. 68, 67 Am. Dec. 642.

4. Where Constitution Provides that Title Must Express Subject. — *Myer v. Western Car Co.*, 102 U. S. 1; *Pennsylvania R. Co. v. Riblet*, 66 Pa. St. 164, 5 Am. Rep. 360; *Halderman's Appeal*, 104 Pa. St. 251; *Com. v. Sponsler*, 16 Pa. Co. Ct. 119. Even under such a provision it has been said that it may be resorted to only in cases of ambiguity. *Garrigus v. Parke County*, 39 Ind. 71.

Where This Constitutional Provision Is Held Directory Merely, the common-law rule remains in force, and the title can only be resorted to in case of ambiguity. *Matter of Boston Min.*, etc., Co., 51 Cal. 624. See also *supra*, this title, V. 9. c. *Whether Provisions Directory or Mandatory*.

5. Under Such Provision Title Part of Act. — *Dodd v. State*, 18 Ind. 66; *Wilcoxon v. Bluffton*, 153 Ind. 276; *Howland Coal*, etc., Works v. *Brown*, 13 Bush (Ky.) 681; *State v. Bolden*, 107 La. 120, 90 Am. St. Rep. 280; *Dobbins v. Northampton Tp.*, 50 N. J. L. 496; *Eby's Appeal*, 70 Pa. St. 314; *Halderman's Appeal*, 104 Pa. St. 251; *Nazro v. Merchants' Mut. Ins. Co.*, 14 Wis. 295. See generally *supra*, this title, V. 6. *Titles and Subjects*.

6. Title May Limit Act. — *Orvis v. Park Com'rs*, 88 Iowa 674, 45 Am. St. Rep. 252; *State v. Banks*, 106 La. 481; *Hendrickson v. Fries*, 45 N. J. L. 555; *O'Hara v. National Biscuit Co.*, (N. J. 1903) 54 Atl. Rep. 241; *Jones v. Morristown*, 66 N. J. L. 488.

That all presumptions are in favor of the constitutionality of an act, see *supra*, this title, V. 2. *Presumption as to Constitutionality*, and *infra*, this section, *Consequences to Be Guarded Against* — *Unconstitutionality*.

character as to permit of the headings being read into the clauses placed under them have been occasionally used in England.¹ They constitute an important part of the act itself, and may be read not only as explaining the sections which immediately follow them, as a sort of preamble thereto, but as affording a better key to these sections than a mere preamble.²

Headings Are Commonly Used in the United States to classify the divisions of extended acts or codes, but they are grammatically separate from the sections or classes placed under them. This method of grouping sections was introduced in *England* in 1854, the practice being adopted, it is said, from the code of New York.³ Such headings have been declared in the *United States* to be a part of the statute and to be inserted "to control the scope and general application of the general words used in" the sections grouped under them,⁴ although cases are found refusing to give them much or any weight.⁵ In *England* they are generally considered a part of the enactment and, in cases of doubt, may be referred to and may control the following sections.⁶

(4) *Marginal Notes*. — Marginal notes, under the *English* system of printing statutes, are said to be nothing more than abstracts of the clauses, intended to catch the eye, and may not be used in construing statutes.⁷ At the present day, however, they appear on the vellum copies of the acts printed for official preservation,⁸ and instances occur of the courts having consulted them in cases of obscurity.⁹ In the *United States* there seems little authority on the subject.¹⁰

(5) *Schedule*. — In modern *English* legislation the tendency is to place in the body of an act merely general rules or statements of principle and to

1. Hardcastle Stat. Law (3d ed.) 214.

2. **Heading Grammatically a Part of Following Sections**. — *Eastern Counties, etc.*, R. Co. v. Marriage, 9 H. L. Cas. 41; *Hammersmith, etc.*, R. Co. v. Brand, L. R. 4 H. L. 171; *Bryan v. Child*, 5 Exch. 368.

3. **Headings Grammatically Distinct from Following Sections**. — Hardcastle Stat. Law (3d ed.) 216, citing Thring's *Prac. Legislation*, pp. 18 and 19.

4. *Barnes v. Jones*, 51 Cal. 303; *People v. Molineux*, 53 Barb. (N. Y.) 15, affirmed 40 N. Y. 113.

5. An act suspending the "statute of limitation" does not suspend a dormant judgment act placed under the chapter "Statutes of Limitation" in the *Georgia Code*. *Battle v. Shivers*, 39 Ga. 495.

Very little reliance can be placed on the headings under which a particular section of the code is placed. *State v. Popp*, 45 Md. 437.

The inclusion of a law in a particular chapter of the Revised Statutes by the persons appointed to prepare the revision cannot enlarge the operation of the law. *Compton v. Holmes*, 94 Tex. 578.

6. *Latham v. Lafone*, L. R. 2 Exch. 119; *Lang v. Kerr*, 3 App. Cas. 529; *Reg. v. Local Government Board*, 10 Q. B. D. 309; *Inglis v. Robertson*, (1898) A. C. 616. See also *Union Steamship Co. v. Melbourne Harbour Trust Com'rs*, 9 App. Cas. 369.

7. **Marginal Notes**. — Hardcastle Stat. Law (3d ed.) 205; *Claydon v. Green*, L. R. 3 C. P. 511; *Atty.-Gen. v. Great Eastern R. Co.*, 11 Ch. D. 449; *Sutton v. Sutton*, 22 Ch. D. 513, correcting *dictum* in *In re Venour*, 2 Ch. D. 522. See *Birtwhistle v. Vardill*, 7 Cl. & F. 929, that marginal notes in modern editions of ancient statute are of no authority.

8. Hardcastle Stat. Law (3d ed.) 206.

9. *Rex v. Milverton*, 5 Ad. & El. 854, 31 E. C. L. 454; *Sheffield Waterworks Co. v. Bennett*, L. R. 7 Exch. 409 (where Cleasby, J., said that one may "refer to the marginal reference in considering the general sense in which words are used" in an act of Parliament); *In re Venour*, 2 Ch. D. 522.

10. In *Knowlton v. Moore*, 178 U. S. 65, the court, after quoting the marginal note to section 29 of the War Revenue Act of June, 1898, said: "This, whilst not conclusive, is proper to be considered in interpreting the statute, when ambiguity exists and a literal interpretation will work out wrong or injury." Several cases referring to the general headings of acts are then cited.

In *Calhoun v. Little*, 106 Ga. 336, 71 Am. St. Rep. 254, the marginal note to a section of the code showing the source from which the section was codified was referred to by the court.

"There can be no particular importance attached to the subdivisional heads [marginal headings or notes] in this bill, for the act itself is not consistent with such subdivisional heads in many instances." *State v. Bridges*, 19 Wash. 431.

In *Rhode Island* the court has refused to give any weight to a marginal note not sustained by the section of the General Laws to which it was attached. Here the resolution ordering the publication of the General Laws declared that "the several sections shall have side notes briefly indicating the contents thereof." But it was said: "It can hardly be claimed that the legislature thereby gave its sanction to the correctness of notes which were to be prepared afterwards. They were to be merely abstracts for convenience, and as much outside of legislative responsibility as the index." *Mutual F. Ins. Co. v. Place*, 21 R. I. 248.

relegate all details either to schedules or to statutory rules.¹ Such a schedule is a part of the act and may be referred to in construing it or may itself require construction,² but, it seems, may not enlarge the act.³

(6) *Punctuation*. — In *England*, enrolled statutes were never punctuated before 1849,⁴ so that punctuation formed no part of the act and was not considered in construction.⁵ Since the introduction of the modern system under which the official copies are punctuated,⁶ there appears to be no authority on the question of the effect of punctuation on construction. In the *United States*, likewise, punctuation is usually held to be no part of a statute,⁷ being generally the act of clerk or printer, and courts will, in construction, disregard the punctuation or repunctuate, if need be.⁸ Yet the punctuation of a statute may be resorted to when all other means fail, and may have some weight in determining the real meaning and intention of the lawmakers.⁹

1. *Schedules*. — Ilbert *Legislative Methods & Forms* 268.

These schedules usually contain in tabulated form a list of statutes repealed by the act, and sometimes forms for use or lists of fees and dues under the statute, rules for administration, etc.

2. *Atty.-Gen. v. Lamplough*, 3 Ex. D. 229.

Loose Expressions in a schedule cannot repeal a former enactment. *Allen v. Flicker*, 10 Ad. & El. 640, 37 E. C. L. 204, 3 Jur. 1029.

Forms in Schedules are to be implicitly followed only as far as the circumstances of the case permit. *Bartlett v. Gibbs*, 5 M. & G. 96, 44 E. C. L. 60; *Bartlett v. Gibbs*, 5 M. & G. 96, 44 E. C. L. 60; *Davison v. Gill*, 1 East 64. See also *Liverpool Borough Bank v. Turner*, 1 Johns. & H. 174; *Dean v. Green*, 8 P. D. 89; *Reg. v. Baines*, 12 Ad. & El. 226, 40 E. C. L. 48; *Hennah v. Whyman*, 2 C. M. & R. 239; *Reg. v. Russell*, 13 Q. B. 237, 66 E. C. L. 237; *Reg. v. Epsom*, 4 El. & Bl. 1003, 82 E. C. L. 1003.

3. *Laird v. Clyde Nav. Trustees*, 6 Rettie (Sc.) 756. So held with regard to a private act.

4. *Punctuation*. — *Barrington's Obs. on More Ancient Stats.*, p. 438, note (x); 1 Bl. Com. 183.

5. *Doe v. Martin*, 4 T. R. 65; *Barrow v. Wadkin*, 24 Beav. 327; *Tunstall v. Lloyd*, 1 B. & S. 106, 101 E. C. L. 106.

6. *Maxwell Interp. Stat.* (3d ed.) 58, citing *May's Parl. Pr.* (10th ed.) 486.

7. *Punctuation Part of Act in Certain States*. — In some states, under modern constitutional and statutory provisions requiring bills to be printed before their final passage, the punctuation has become a part of the act as passed, and though it is never allowed to control the plain meaning of language, when the language is doubtful resort may be had thereto and material aid derived therefrom. *Highway Com'rs v. Ellwood*, 193 Ill. 308; *Tyrrell v. New York*, 159 N. Y. 242.

8. *Punctuation Disregarded*. — *United States*. — *In re Irwine*, 1 Pa. L. J. Rep. 82, 1 Pa. L. J. 291, 13 Fed. Cas. No. 7,086; *U. S. v. Isham*, 17 Wall. (U. S.) 496; *Bates v. Clark*, 95 U. S. 204; *Hammock v. Farmers' L. & T. Co.*, 105 U. S. 77; *U. S. v. Oregon*, etc., R. Co., 164 U. S. 541; *Stephens v. Cherokee Nation*, 174 U. S. 480; *Gwathmay v. Clisby*, 31 Fed. Rep. 221.

California. — *French v. Teschemaker*, 24 Cal. 556; *Randolph v. Bayue*, 44 Cal. 366.

Idaho. — *Holmberg v. Jones*, (Idaho 1901) 65 Pac. Rep. 563.

Kansas. — *State v. Deuel*, 63 Kan. 811.

Maryland. — *Manger v. Board of State Medical Examiners*, 90 Md. 659.

Massachusetts. — *Martin v. Gleason*, 139 Mass. 187; *Cushing v. Worrick*, 9 Gray (Mass.) 382; *Browne v. Turner*, 174 Mass. 160.

Montana. — *State v. Pilgrim*, 17 Mont. 311.

New York. — *Matter of Olmsted*, (Surrogate Ct.) 17 Abb. N. Cas. (N. Y.) 320.

Ohio. — *Price v. Price*, 10 Ohio St. 316; *Hamilton v. The Steamboat R. B. Hamilton*, 16 Ohio St. 433; *Shriedley v. State*, 23 Ohio St. 130; *Allen v. Russell*, 39 Ohio St. 337; *Albright v. Payne*, 43 Ohio St. 15; *Slingluff v. Weaver*, 66 Ohio St. 621.

Oregon. — *State v. Payne*, 22 Oregon 335.

Pennsylvania. — *Gyger's Estate*, 65 Pa. St. 311.

Utah. — *Union Refrigerator Transit Co. v. Lynch*, 18 Utah 378.

"For the purpose of arriving at the true meaning of a statute, courts read with such stops as are manifestly required." *U. S. v. Lacher*, 134 U. S. 624, *per Fuller*, C. J.

Quotation Marks Disregarded. — *U. S. v. Rossvally*, 3 Ben. (U. S.) 157.

Parentheses or Brackets are punctuation marks, but they are made with forethought, and have been considered of more weight, than commas. *In re Schilling*, (C. C. A.) 53 Fed. Rep. 81, where *Shipman*, Circ. J., said: "An inference could be drawn from the history of the statute before it reached the committees of conference, but, in view of the manifest limitation by the parenthesis, such an inference would not be controlling."

9. *Resort to Punctuation*. — *U. S. v. Three Railroad Cars*, 1 Abb. (U. S.) 210; *Seiler v. State*, (Ind. 1903) 67 N. E. Rep. 448; *State v. McNally*, 34 Me. 210, 56 Am. Dec. 650; *Caston v. Brock*, 14 S. Car. 106; *Morrill v. State*, 38 Wis. 434, 20 Am. Rep. 12.

"*Punctuation Is a Most Fallible Standard* by which to interpret a writing; it may be resorted to when all other means fail; but the court will first take the instrument by its four corners in order to ascertain its true meaning; if that is apparent on judicially inspecting the whole, the punctuation will not be suffered to change it." *Ewing v. Burnet*, 11 Pet. (U. S.) 54. *per Baldwin*, J.

Punctuation of Original Act. — In *McPhail v. Gerry*, 55 Vt. 174, the punctuation of the original act was allowed to be shown and was held

b. EXTRINSIC OR EXTERNAL — (1) *History, the Old Law and Mischief*. — It is difficult and often impossible to construe correctly a statute without a full knowledge of the existing legislation upon the subject when it was enacted, and of the mischief it was passed to prevent or remove.¹ For this purpose the court should put itself in the place, at the time of its enactment, of the legislature which passed it, investigating the then existing state of the common or statutory law on the subject, contemporaneous circumstances, and the external or historical facts which led to its enactment, and make such application of the provisions of the statute as will best promote the object of the legislation.² But it has been declared that it is only when the statute or its

to govern the punctuation of the printed copy. To the same effect is Howard Sav. Inst. v. Newark, 63 N. J. L. 551, where the court said: "The punctuation of a legislative act will not control its evident meaning. But punctuation is one of the means for discovering the legislative intent."

But the punctuation of a printed act which had been accepted by the legislature has been preferred to the punctuation of the enrolled act. Ward v. Beale, 91 Ky. 60.

Punctuation Cannot Have Controlling Effect. — *Pancoast v. Ruffin*, 1 Ohio 385; *Com. v. Shopp*, 1 Woodw. (Pa.) 123; *Archer v. Ellison*, 28 S. Car. 238; *Murray v. State*, 21 Tex. App. 620, 57 Am. Rep. 623; *Bradstreet Co. v. Gill*, 72 Tex. 115, 13 Am. St. Rep. 768. See also *Kelly v. McGuire*, 15 Ark. 588.

In a Criminal Case it is unsafe to rely on a mere matter of punctuation for the condemnation of the accused. *U. S. v. Voorhees*, 9 Fed. Rep. 143. See also *U. S. v. Pelletreau*, 14 Blatchf. (U. S.) 126; *U. S. v. Falkenhainer*, 21 Fed. Rep. 624.

1. Evil to Be Remedied. — *In re Clerkship*, etc., 90 Fed. Rep. 251.

Mischief to Be Remedied — Construction to Advance Remedy and Suppress Mischief. — This ancient canon of construction is thus stated in Heydon's Case, 3 Coke 8: "That for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered. (1) What was the common law before [the making of] the act. (2) What was the mischief and defect for which the common law did not provide. (3) What remedy the parliament hath resolved and appointed to cure the disease of the commonwealth. (4) The true reason and remedy. And then the office of all the judges is always to make such construction as shall repress the mischief and advance the remedy."

2. State of Law at Passage of Act and Matters of History Examined — *England*. — *Miller v. Salomons*, 7 Exch. 475; *Hawkins v. Gathercole*, 6 De G. M. & G. 1; *Matter of Lister's Hospital*, 6 De G. M. & G. 186; *Reg. v. Castro*, L. R. 9 Q. B. 350; *River Wear Com'rs v. Adamson*, 2 App. Cas. 743; *Holme v. Guy*, 5 Ch. D. 903; *Young v. Royal Leamington Spa*, 8 App. Cas. 526; *Taff Vale R. Co. v. Davis*, (1894) 1 Q. B. 51.

United States. — *Preston v. Browder*, 1 Wheat. (U. S.) 121; *Aldridge v. Williams*, 3 How. (U. S.) 24; *U. S. v. Union Pac. R. Co.*, 91 U. S. 79; *American Net, etc., Co. v. Worthington*, 141 U. S. 473; *The Delaware*, 161 U. S.

471; *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197; *U. S. v. Eaton*, 169 U. S. 342; *U. S. v. Wong Kim Ark*, 169 U. S. 649; *In re Wahl*, 42 Fed. Rep. 826; *U. S. v. Oregon, etc., R. Co.*, 57 Fed. Rep. 426; *U. S. v. Trans-Missouri Freight Assoc.*, (C. C. A.) 58 Fed. Rep. 58; *Massachusetts L. & T. Co. v. Hamilton*, (C. C. A.) 88 Fed. Rep. 588; *In re Richards*, (C. C. A.) 96 Fed. Rep. 940; *In re Matthews*, 109 Fed. Rep. 617; *Pacific Coast Steamship Co. v. U. S.*, 33 Ct. Cl. 36; *Dunlap v. U. S.*, 33 Ct. Cl. 135.

Alabama. — *Garland v. Board of Revenue*, 87 Ala. 225.

Arkansas. — *Hill v. Mitchell*, 5 Ark. 608; *Wassell v. Tunnah*, 25 Ark. 103; *Wallis v. Smith*, 29 Ark. 354; *Davis v. Tarwater*, 13 Ark. 58; *McKenzie v. Murphy*, 24 Ark. 155.

Georgia. — *Western, etc., R. Co. v. State*, (Ga. 1891) 14 L. R. A. 446.

Indiana. — *Spencer v. State*, 5 Ind. 54; *Hedrick v. Kramer*, 43 Ind. 362; *Walter A. Wood Mowing, etc., Mach. Co. v. Caldwell*, 54 Ind. 279, 23 Am. Rep. 641; *State v. Denny*, 67 Ind. 155; *State v. Forkner*, 70 Ind. 245; *Bell v. Davis*, 75 Ind. 314; *Krug v. Davis*, 87 Ind. 590; *Middleton v. Greeson*, 106 Ind. 22; *Hunt v. Lake Shore, etc., R. Co.*, 112 Ind. 75; *May v. Hoover*, 112 Ind. 458; *State v. Ohio Oil Co.*, 150 Ind. 33.

Iowa. — *Woods v. Mains*, 1 Greene (Iowa) 292; *Fidelity L. & T. Co. v. Douglas*, 104 Iowa 539.

Louisiana. — *State v. Nicholls*, 30 La. Ann. 982; *Richard v. Lazard*, 108 La. 540.

Maine. — *Winslow v. Kimball*, 25 Me. 495. *Maryland*. — *Alexander v. Worthington*, 5 Md. 485; *Cearfoss v. State*, 42 Md. 408.

Michigan. — *Green v. Graves*, 1 Dougl. (Mich.) 354; *Sibley v. Smith*, 2 Mich. 487.

Minnesota. — *Taylor v. Taylor*, 10 Minn. 107.

Missouri. — *State v. Canton*, 43 Mo. 48; *Lackland v. Walker*, 151 Mo. 263; *Westport v. Jackson*, 69 Mo. App. 152; *Grimes v. Reynolds*, 94 Mo. App. 577.

New Hampshire. — *Mayo v. Wilson*, 1 N. H. 55.

New Jersey. — *Keyport, etc., Steamboat Co. v. Farmers Transp. Co.*, 18 N. J. Eq. 24.

New York. — *Donaldson v. Wood*, 22 Wend. (N. Y.) 396; *Mohawk Bridge Co. v. Utica, etc., R. Co.*, 6 Paige (N. Y.) 561; *Tonnele v. Hall*, 4 N. Y. 140; *People v. Columbia County*, 43 N. Y. 130; *People v. Essex County*, 70 N. Y. 228; *Smith v. Helmer*, 7 Barb. (N. Y.) 421; *People v. Schoonmaker*, 63 Barb. (N. Y.) 48; *Fairchild v. Gwynne*, (Supm. Ct. Gen. T.) 16 Abb. Pr. (N. Y.) 23.

phraseology is ambiguous and such as to admit of two meanings that a historical investigation of this kind is permissible.¹

(2) *Contemporaneous Exposition and Long Usage* — (a) **General Rule.** — Courts, in construing or interpreting a statute, give much weight to the interpretation put upon it at the time of its enactment and since by those whose duty it has been to construe, execute, and apply it.² Particularly is this true where the

Ohio. — *Tracy v. Card*, 2 Ohio St. 441; *Cincinnati Gas Light, etc., Co. v. Avondale*, 43 Ohio St. 267; *Slingluff v. Weaver*, 66 Ohio St. 621.

Oregon. — *Keith v. Quinney*, 1 Oregon 364.

Pennsylvania. — *Big Black Creek Imp. Co. v. Com.*, 94 Pa. St. 450.

Texas. — *Croomes v. State*, 40 Tex. Crim. 672.

Virginia. — *Delaplane v. Crenshaw*, 15 Gratt. (Va.) 457.

West Virginia. — *Daniel v. Simms*, 49 W. Va. 555.

Wisconsin. — *Clark v. Janesville*, 10 Wis. 165.

Court Takes Judicial Notice of Historical and Geographical Facts. — See the title JUDICIAL NOTICE, vol. 17, p. 892.

The History of a Country, Its Topography and Condition, enter into the construction of the laws which are made to govern, and the courts notice these facts judicially. *Williams v. State*, 64 Ind. 555.

Certain General Facts of Common Knowledge may be taken into consideration under a principle similar to that under which in construing a private contract the circumstances may be shown to enable the court to see the situation of the parties. *Browne v. Turner*, 174 Mass. 159.

To Determine Whether Retroactive or Prospective. — The occasion of the enactment of a law may be looked into in determining its character as retrospective or prospective. *People v. Columbia County*, 43 N. Y. 130; *People v. Essex County*, 70 N. Y. 237.

Criminal Statute Creating New Offense. — In *Atty.-Gen. v. Sillem*, 2 H. & C. 509, Pollock, C. B., said: "It is altogether a mistake to apply the resolutions in *Heydon's Case*, 3 Coke 7, to a criminal statute which creates a new offense."

Sources Which Court May Consult. — In *Read v. Lincoln*, (1892) A. C. 644, it was held that a court in investigating a question of ancient ecclesiastical law had a right to consult "ancient authors, historical and theological works, pictures, engravings, and a variety of documents, of which undoubtedly any careful and competent historian would avail himself."

Testimony Admissible to Identify Boundaries of Town. — Where an act of incorporation defined the limits of the town by metes and bounds, it was held that the testimony of a surveyor was admissible to identify the boundaries of the town with those defined in the charter. *State v. Hoff*, (Tex. Civ. App. 1895) 29 S. W. Rep. 672.

1. Resort to Extrinsic Facts Only Where There Is Ambiguity. — *Reg. v. Most*, 7 Q. B. D. 251; *Webber v. St. Paul City R. Co.*, (C. C. A.) 97 Fed. Rep. 140; *Clark v. U. S.*, 37 Ct. Cl. 60; *Stout v. Grant County*, 107 Ind. 348; *State v. St. Paul*, 81 Minn. 391. See also *Heydenfeldt v. Daney Gold, etc.*, Min. Co., 93 U. S. 638;

Wassell v. Tunnah, 25 Ark. 101; *Barker v. Esty*, 19 Vt. 131; *Daniel v. Simms*, 49 W. Va. 555.

In *U. S. v. Chase*, 135 U. S. 261, it was said: "This court has repeatedly held that this rule [of construing statutes with reference to the evil to be suppressed] does not apply to instances which are not embraced in the language employed in the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress. *U. S. v. Sheldon*, 2 Wheat. (U. S.) 119; *U. S. v. Wiltberger*, 5 Wheat. (U. S.) 95; *U. S. v. Morris*, 14 Pet. (U. S.) 475; *U. S. v. Hartwell*, 6 Wall. (U. S.) 385; *U. S. v. Reese*, 92 U. S. 214."

2. Contemporaneous Exposition and Usage — *England.* — *Blankley v. Winstanley*, 3 T. R. 286; *Reg. v. Cutbush*, L. R. 2 Q. B. 379; *Cox v. Leigh*, L. R. 9 Q. B. 340; *Reg. v. Canterbury*, 11 Q. B. 581, 63 E. C. L. 581.

United States. — *Cohen v. Virginia*, 6 Wheat. (U. S.) 418.

California. — *Matter of Warfield*, 22 Cal. 51, 83 Am. Dec. 49.

Illinois. — *Bruce v. Schuyler*, 9 Ill. 221, 46 Am. Dec. 447; *People v. Loewenthal*, 93 Ill. 191.

Indiana. — *Fall v. Hazelrigg*, 45 Ind. 576, 15 Am. Rep. 278.

Indian Territory. — *McCurtain v. Grady*, 1 Indian Ter. 107.

Kentucky. — *Auditor of Public Accounts v. Cain*, (Ky. 1901) 61 S. W. Rep. 1016.

Louisiana. — *State v. Comptoir Nat. D'Escompte de Paris*, 51 La. Ann. 1272.

Maryland. — *Harrison v. State*, 22 Md. 468, 85 Am. Dec. 658.

Massachusetts. — *Com. v. Parker*, 2 Pick. (Mass.) 556; *Opinion of Justices*, 3 Pick. (Mass.) 517.

Minnesota. — *O'Connor v. Gertgens*, 85 Minn. 481.

Missouri. — *Fischer v. Max*, 49 Mo. 404.

North Carolina. — *Atty.-Gen. v. Cape Fear Bank*, 5 Ired. Eq. (40 N. Car.) 72.

Ohio. — *Chesnut v. Shane*, 16 Ohio 599, 47 Am. Dec. 387.

Pennsylvania. — *Philadelphia, etc., R. Co. v. Catawissa R. Co.*, 53 Pa. St. 20; *Graham's Appeal*, 1 Dall. (Pa.) 136; *Leh's Contested Election*, 6 Pa. Dist. 152.

Tennessee. — *Scruggs v. Brackin*, 4 Yerg. (Tenn.) 532.

Virginia. — *Smith v. Bryan*, 100 Va. 199.

In *Packard v. Richardson*, 17 Mass. 143, 9 Am. Dec. 123, *Parker, C. J.*, says: "A contemporaneous [construction] is generally the best construction of a statute. It gives the sense of a community, of the terms made use of by a legislature. If there is ambiguity in the language, the understanding and application of it when the statute first comes into operation, sanctioned by long acquiescence on the part of the legislature and judicial tribunals, is the

statute is an ancient one, and the construction that of contemporaries who had special knowledge of the subject.¹

Where Rights of Property Depend on Established Usage. — The construction of a statute in accordance with established practice will be especially followed by the courts in cases where departure from such construction would result in great mischief, or where property rights would be disturbed.²

Rule Not Applied Where Language Unambiguous. — The rule of usage followed in the interpretation of a statute has been said to apply only to cases where the language is ambiguous; where it is plain and unambiguous, it is said that a practical construction in conflict with it must be corrected.³ But if the legislature by its inaction has long sanctioned a certain construction, language apparently unambiguous may receive from the courts that construction, especially if the usage has been public and authoritative.⁴

strongest evidence that it has been rightly explained in practice."

Maxims. — *Contemporanea expositio est fortissima in lege.* Coke's 2d Inst. 1., 136.

Optima legum interpretis consuetudo. Cromwell's Case, 2 Coke 81a; Coke's 2d Inst. 18. See also Coke Litt. 186a: "*Communis opinio* is of good authority in law."

The Constitutionality of a Statute Will Be Presumed where it has been acted upon for a long time by the courts without questioning its validity. *State v. Bosworth*, 13 Vt. 402. See also *People v. Hutchinson*, 172 Ill. 502.

But this presumption is not conclusive. *Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572.

See also *infra*, this section, *Consequences to Be Guarded Against* — *Unconstitutionality*.

1. Ancient Statutes — England. — *Morgan v. Crawshaw*, L. R. 5 H. L. 304; *Mansell v. Reg.*, 8 El. & Bl. 111, 92 E. C. L. 111; *The Anna*, 1 P. D. 259; *Migneault v. Malo*, L. R. 4 P. C. 136.

United States. — *Martin v. Hunter*, 1 Wheat. (U. S.) 351; *Gardner v. Collins*, 2 Pet. (U. S.) 85; *Pease v. Peck*, 18 How. (U. S.) 595.

Alabama. — *Ex p. Hardy*, 68 Ala. 303; *Moog v. Randolph*, 77 Ala. 606.

Colorado. — *Brown v. State*, 5 Colo. 496.

Georgia. — *Wanet v. Corbet*, 13 Ga. 441.

Maryland. — *Catholic Cathedral Church v. Manning*, 72 Md. 116; *State v. Chase*, 5 Har. & J. (Md.) 303.

Michigan. — *People v. May*, 3 Mich. 598; *Atty.-Gen. v. Preston*, 56 Mich. 181; *Frey v. Michie*, 68 Mich. 323.

New York. — *Matter of Breslin*, 45 Hun (N. Y.) 210.

Ohio. — *Chesnut v. Shane*, 16 Ohio 599, 47 Am. Dec. 387.

Wisconsin. — *Dean v. Borchsenius*, 30 Wis. 236.

Age of Statutes. — *Clyde Nav. v. Laird*, 8 App. Cas. 673, where Lord Watson said: "Such usage as has in this case been termed *contemporanea expositio* is of no value in construing a British statute of the year 1858. When there are ambiguous expressions in an act passed one or two centuries ago, it may be legitimate." See also *Smith v. Lindo*, 4 C. B. N. S. 410, 93 E. C. L. 410, *per* Byles, J. But compare *Aerated Bread Co. v. Gregg*, L. R. 8 Q. B. 355; *Reg. v. Inland Revenue Comrs.* (1891) 1 Q. B. 489.

2. Where Rights of Property Have Grown Up on Long Usage — United States. — *M'Keen v. Delancy*, 5 Cranch (U. S.) 32.

California. — *Matter of Warfield*, 22 Cal. 51, 83 Am. Dec. 492.

Colorado. — *Brown v. State*, 5 Colo. 496; *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 27 Colo. 9.

Illinois. — *People v. Loewenthal*, 93 Ill. 192.

Maryland. — *State v. Mayhew*, 2 Gill (Md.) 497.

Massachusetts. — *Rogers v. Goodwin*, 2 Mass. 477 (quoted under *Dispose*, vol. 9, p. 540).

Michigan. — *Continental Imp. Co. v. Phelps*, 47 Mich. 299.

Montana. — See *Hilburn v. St. Paul, etc.*, R. Co., 23 Mont. 249.

New York. — *Troup v. Haight, Hopk.* (N. Y.) 239.

Ohio. — *Chestnut v. Shane*, 16 Ohio 603, 47 Am. Dec. 387.

Pennsylvania. — *Steiner v. Cox*, 4 Pa. St. 13.

3. Language Must Be Ambiguous — England. — *Reg. v. Canterbury*, 11 Q. B. 581, 63 E. C. L. 581; *Dunbar v. Roxburghe*, 3 Cl. & F. 354; *Rex v. Hogg*, 1 T. R. 728; *Gwyn v. Hardwicke*, 1 H. & N. 53; *Pochin v. Duncombe*, 1 H. & N. 856.

United States. — *U. S. v. Graham*, 110 U. S. 219; *Merritt v. Cameron*, 137 U. S. 551; *Studebaker v. Perry*, 184 U. S. 258, *affirming* 102 Fed. Rep. 947; *McClaghry v. Deming*, 186 U. S. 49, *affirming* 113 Fed. Rep. 639.

Maine. — *Ham v. Sawyer*, 38 Me. 37.

Montana. — *Hilburn v. St. Paul, etc.*, R. Co., 23 Mont. 249.

New Hampshire. — *Bailey v. Rolfe*, 16 N. H. 247.

New York. — *Matter of Manhattan Sav. Inst.*, 82 N. Y. 142.

North Carolina. — *Atty.-Gen. v. Cape Fear Bank*, 5 Ired. Eq. (40 N. Car.) 72.

Where the Language of the Statute Is Obscure, contemporaneous and long-continued usage controls. *Gorham v. Exeter*, 15 Q. B. 73, 69 E. C. L. 73.

"If a construction of this act of parliament, manifestly erroneous, had hitherto prevailed, we should have been bound to correct it; though, indeed, had the words of the statute been very doubtful, the contemporary and subsequent uniform usage would have had great weight." *Rex v. Scot*, 3 T. R. 604, *per* Lord Kenyon.

4. Long Usage Followed though Apparently Erroneous — England. — *Reg. v. Scaife*, 17 Q. B. 238, 79 E. C. L. 238; *Leigh v. Kent*, 3 T. R. 362; *Dyer v. Best*, L. R. 1 Exch. 152; *Clay v.*

(b) **Construction by Inferior Courts.**—The long-continued construction of a doubtful statute by inferior courts will generally be followed by a higher court;¹ but where the statute is not doubtful, a prior construction by an inferior court will not be regarded;² so if prior constructions are conflicting it cannot be said that there is a contemporary exposition, and the court must look to the statute itself.³

(c) **Practical or Executive Construction**—*aa. GENERAL RULE.*—The contemporaneous and long-continued practice of officers required to execute or take special cognizance of a statute is strong evidence of its true meaning and should not be disregarded except for cogent reasons.⁴ But, though strong, it is not con-

Sudgrave, 1 Salk. 33; *Smith v. Tilly*, 1 Keb. 712; *Migneault v. Malo*, L. R. 4 P. C. 123; *Inland Revenue Com'rs v. Harrison*, L. R. 7 H. L. 9; *Ex p. Willey*, 23 Ch. D. 127.

United States.—*Stuart v. Laird*, 1 Cranch (U. S.) 299; *M'Keen v. Delancy*, 5 Cranch (U. S.) 22; *U. S. v. The Ship Recorder*, 1 Blatchf. (U. S.) 223.

Florida.—See *Bloxham v. Consumers' Electric Light, etc.*, R. Co., 36 Fla. 519, 51 Am. St. Rep. 44.

Kentucky.—*Harrison v. Com.*, 83 Ky. 171.

Louisiana.—*State v. Board of Assessors*, 52 La. Ann. 223.

Maryland.—*State v. Chase*, 5 Har. & J. (Md.) 303.

Pennsylvania.—*McFerran v. Powers*, 1 S. & R. (Pa.) 105.

Where a statute organizing a criminal court authorized "two or more" of the judges to try offenses, it was construed as authorizing a single judge (all being constructively present) to try offenses, such having been the inveterate practice. *Levenson v. Reg.*, L. R. 4 Q. B. 394.

1. Long-continued Construction by Inferior Courts.—*The Anna*, 1 P. D. 253; *Plummer v. Plummer*, 37 Miss. 185. See also *Graham's Appeal*, 1 Dall. (Pa.) 136.

2. Where Statute Not in Doubt.—*Hamilton v. Baker*, 14 App. Cas. 221; *Bailey v. Rolfe*, 16 N. H. 247.

Courts are very loth to disturb decisions construing an act which has been acquiesced in for a number of years. *Amhurst v. Skynner*, 12 East 263; *Lucas v. Dixon*, 22 Q. B. D. 359. See also the title *STARE DECISIS*, *ante*.

3. Prior Decisions Conflicting.—*Rex v. Leek Wootton*, 16 East 122.

4. Practical Construction Strong Evidence of Meaning.—*England.*—*Buccleuch v. Metropolitan Board of Works*, L. R. 5 Exch. 221; *Evanturel v. Evanturel*, L. R. 2 P. C. 462; *Income Tax Com'rs v. Pemsell*, (1891) A. C. 590.

United States.—*Stuart v. Laird*, 1 Cranch (U. S.) 299; *Edwards v. Darby*, 12 Wheat. (U. S.) 206; *U. S. v. State Bank*, 6 Pet. (U. S.) 29; *Cooley v. Board of Wardens*, 12 How. (U. S.) 299; *Union Ins. Co. v. Hoge*, 21 How. (U. S.) 35; *Havemeyer v. Iowa County*, 3 Wall. (U. S.) 294; *U. S. v. Gilmore*, 8 Wall. (U. S.) 330; *U. S. v. Moore*, 95 U. S. 760; *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53; *Brown v. U. S.*, 113 U. S. 568; *The Laura*, 114 U. S. 411; *U. S. v. Philbrick*, 120 U. S. 52; *U. S. v. Hill*, 120 U. S. 169; *U. S. v. Johnston*, 124 U. S. 236; *Schell v. Fauche*, 138 U. S. 572; *Heath v. Wallace*, 138 U. S. 573; *Pennoyer v.*

McConaughy, 140 U. S. 1; *U. S. v. Alabama G. S. R. Co.*, 142 U. S. 615; *Swift's Case*, 14 Ct. Cl. 208; *Hahn's Case*, 14 Ct. Cl. 305; *Sells v. U. S.*, 36 Ct. Cl. 94; *U. S. v. The Ship Recorder*, 1 Blatchf. (U. S.) 223; *U. S. v. Lytle*, 5 McLean (U. S.) 9.

Alabama.—*Wetmore v. State*, 55 Ala. 198.

California.—*Matter of Warfield*, 22 Cal. 71, 83 Am. Dec. 49.

Colorado.—*Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 27 Colo. 22.

District of Columbia.—*U. S. v. Bliss*, 12 App. Cas. (D. C.) 485.

Florida.—*Bloxham v. Consumer's Electric Light, etc.*, R. Co., 36 Fla. 519, 51 Am. St. Rep. 44.

Georgia.—*Solomon v. Cartersville*, 41 Ga. 157; *Wellborn v. Estes*, 70 Ga. 390; *Howell v. State*, 71 Ga. 229.

Illinois.—*Bruce v. Schuyler*, 9 Ill. 221, 46 Am. Dec. 447; *Mathews v. Shores*, 24 Ill. 27; *People v. Loewenthal*, 93 Ill. 191; *Harrison v. People*, 97 Ill. App. 421; *Himrod Coal Co. v. Stevens*, 104 Ill. App. 639.

Indiana.—*Franklin County v. Bunting*, 111 Ind. 143; *Parvin v. Wimberg*, 130 Ind. 561, 30 Am. St. Rep. 254.

Kentucky.—*Harrison v. Com.*, 83 Ky. 162; *Clark's Run, etc., Turnpike Road Co. v. Com.*, 96 Ky. 525; *Louisville v. Louisville Water Co.*, 105 Ky. 754.

Louisiana.—*Kernion v. Hills*, 1 La. Ann. 419.

Maine.—*French v. Cowan*, 79 Me. 426.

Maryland.—*State v. Mayhew*, 2 Gill (Md.) 487.

Massachusetts.—*Rogers v. Goodwin*, 2 Mass. 475.

Michigan.—*Malonny v. Mahar*, 1 Mich. 26; *Johnson v. Ballou*, 28 Mich. 379; *Westbrook v. Miller*, 56 Mich. 148.

Missouri.—*State v. Severance*, 49 Mo. 401. *New York.*—*People v. Dayton*, 55 N. Y. 377; *Matter of Board of St. Opening*, (Supm. Ct.) 12 Misc. (N. Y.) 526.

Oregon.—*Kelly v. Multnomah County*, 18 Oregon 356.

Pennsylvania.—*Com. v. Mann*, 168 Pa. St. 290.

South Carolina.—*Morrison v. Barksdale*, Harp. L. (S. Car.) 101; *Simpson v. Willard*, 14 S. Car. 195.

Tennessee.—*Nelson v. Allen*, 1 Yerg. (Tenn.) 366; *Harrison v. Willis*, 7 Heisk. (Tenn.) 40, 19 Am. Rep. 604.

Virginia.—*Smith v. Bryan*, 100 Va. 199; *Com. v. Posey*, 4 Call (Va.) 109, 2 Am. Dec. 560.

trolling upon the courts, and cases are not wanting, especially where the practice is not one of long standing, where courts have refused to follow such construction.¹

bb. CHARACTER OF PRACTICE OR USAGE. — The usage or practice must have been general and public; it must have been acted upon in general practice and must not be a mere speculative theory.²

Local or Special Custom. — As a universal law cannot have different interpretations in different localities, the construction of a general statute cannot be aided by a local or special usage, even for the locality where such usage prevails.³ But words in a statute applicable to a particular place, when doubtful, may be construed by reference to the usage prevailing there.⁴

(3) *Stare Decisis.* — The principles of *stare decisis* are treated in a separate title.⁵

(4) *Legislative Construction* — (a) *General Rule.* — It is the duty of the legisla-

West Virginia. — *Daniel v. Simms*, 49 W. Va. 555.

Wisconsin. — *Dean v. Borchsenius*, 30 Wis. 236; *Scanlan v. Childs*, 33 Wis. 663; *State v. Timme*, 54 Wis. 340; *Wright v. Forrestal*, 65 Wis. 341.

When a practical construction of an act as to the organization of a school district has been acquiesced in for a number of years it will be presumed to have been legally organized. See the title *SCHOOLS*, vol. 25, p. 33.

In the *Construction of Constitutions*, the same principle applies. See the title *CONSTITUTIONAL LAW*, vol. 6, p. 932; *Kenny v. Hudspeth*, 59 N. J. L. 533.

The Uniform Opinion and Practice of the Bar as to the practical construction of a statute is of great weight. *In re Ford*, 10 Ch. D. 370; *Basset v. Basset*, 3 Atk. 208; *Russell v. Rumsey*, 35 Ill. 364; *Venable v. Wabash Western R. Co.*, 112 Mo. 125; *Tompkins v. Horton*, 25 N. J. Eq. 294. See also *Matz v. Chicago*, etc., R. Co., 85 Fed. Rep. 180.

The Construction of a Patent Act by the Commissioner of Patents acquiesced in for a number of years will not be disturbed by the Supreme Court. *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1.

Construction of Revenue Laws by Treasury Department. — See the title *REVENUE LAWS*, vol. 24, p. 891.

Construction of Land Laws by Land Department. — See the title *STATE AND PUBLIC LANDS*, ante.

1. *Not Controlling.* — U. S. *v. Dickson*, 15 Pet. (U. S.) 161; *Floyd Acceptance Case*, 1 Ct. Cl. 270; *Com. v. Owensboro*, etc., R. Co., 95 Ky. 60; *Ewing v. Ainger*, 97 Mich. 381; *Van Loon v. Lyons*, 61 N. Y. 22, reversing 4 Daly (N. Y.) 149; *Matter of Manhattan Sav. Inst.*, 82 N. Y. 142; *Albright v. Bedford County*, 106 Pa. St. 582; *Simpson v. Willard*, 14 S. Car. 195; *Travelers' Ins. Co. v. Fricke*, 94 Wis. 258; *State v. Fricke*, 102 Wis. 107. See also *Clov v. Harper*, 3 Fx. D. 108; *Dollar Sav. Bank v. U. S.*, 19 Wall. (U. S.) 227; *Goldsborough v. U. S.*, Taney (U. S.) 80; *Employers' Liability Assur. Co. v. Insurance Com'rs*, 64 Mich. 614.

Acts of Congress — Departmental Construction Not Binding on Courts. — In *Robertson v. Downing*, 127 U. S. 607, it is said: "The regulation of a department of the government is not, of

course, to control the construction of an act of Congress when its meaning is plain; but when there has been a long acquiescence in a regulation, and by it rights of parties for many years have been determined and adjusted, it is not to be disregarded without the most cogent and persuasive reasons."

"A regulation of a department, however, cannot repeal a statute; neither is a construction of a statute by a department charged with its execution to be held conclusive and binding upon the courts of the country, unless such construction has been continuously in force for a long time." *Merritt v. Cameron*, 137 U. S. 551. See also *U. S. v. Graham*, 110 U. S. 219.

2. *Usage Must Be Long and Uniform.* — *Ishewood v. Oldknow*, 3 M. & S. 396; *In re Ford*, 10 Ch. D. 370; *Feather v. Reg.*, 6 B. & S. 257, 118 E. C. L. 257.

Penal Statutes Construed by Offenders and Their Beneficiaries. — Where a statute rendered discriminations in rates by common carriers unlawful, it was held that a construction put upon it by such common carriers and their beneficiaries was not such a practical construction as the court would follow. *State v. Southern R. Co.*, 122 N. Car. 1052.

3. *Local or Special Custom Cannot Control General Statute.* — *Rex v. Hogg*, 1 T. R. 728; *Noble v. Durell*, 3 T. R. 271; *R. v. Saltren*, Cald. 444; *Evans v. Myers*, 25 Pa. St. 114.

Where the words "dead timber" were used in a public statute, evidence of the custom of lumbermen in a given locality to speak of living trees under certain circumstances as "dead timber" was excluded. *U. S. v. Pine River Logging, etc., Co.*, (C. C. A.) 89 Fed. Rep. 915, the court saying: "The evidence concerning the usage ought to show that it was prevalent in all sections where the law was to become operative, and was so far universal in the sections where it prevailed as to leave no room for doubt that the usage was known to the law-maker, and that the statute which it serves to modify was enacted with reference thereto."

In construing the word "corral" in a statute, its usage among stockmen may be shown. *People v. Borda*, 105 Cal. 636.

4. *Local Statute Controlled by Local Custom.* — *Love v. Hinckley*, Abb. Adm. 436. See also *Delanlane v. Crenshaw*, 15 Gratt. (Va.) 457; *Fraser v. Warfield*, 12 Md. 270.

5. See the title *STARE DECISIS*, ante.

ture to enact laws, not to expound or interpret them.¹ Yet while an expression of the legislative view as to the proper construction of another law is of no judicial force,² it is nevertheless entitled to some weight in the construction of doubtful language.³ Ordinarily a retrospective operation is not to be given to expository, directory, or declaratory statutes.⁴

(b) **Statutory Construction Laws and Provisions.** — Definitions and rules of grammatical⁵ and occasionally of general⁶ interpretation are sometimes enacted in codes and general revisions of statutes or in laws for statutory construction of universal application.⁷ Clauses of the same character (known in *England* as "interpretation clauses") are frequently added to single acts, and are confined to the interpretation of the acts to which they are attached.⁸ Definitions and rules in such provisions are confined in their scope to the

1. **Interpretation Not for Legislature.** — *Ingalls v. Cole*, 47 Me. 530; *Allen v. Mutual F. Ins. Co.*, 2 Md. 117; *Bingham v. Winona County*, 8 Minn. 441; *McCulloch v. Stone*, 64 Miss. 378. See also *supra*, this section, 2. **Construction a Judicial Function**, and the title **CONSTITUTIONAL LAW**, vol. 6, pp. 1032 *et seq.*, 1052.

Canada. — Interpretation by the legislature of an act previously passed by itself, may be disregarded in order to uphold the validity of the act. *Hamilton Powder Co. v. Lambe*, 1 Mont-real Q. B. 466.

2. **Legislative Construction Not Authoritative.** — *Catholic Cathedral Church v. Manning*, 72 Md. 125; *Robertson v. Baxter*, 57 Mich. 127; *State v. Armstrong*, 4 Minn. 335; *Bingham v. Winona County*, 8 Minn. 441; *Jackson v. Washington County*, 34 Neb. 680. See also *infra*, this title, VIII. 8. b. **Amendment as Repeal or Continuation**, where *Matter of Allison*, 172 N. Y. 431, is cited and quoted.

An Erroneous Legislative Interpretation of a Pre-existing Statute is not binding. *Read v. Storey*, 6 H. & N. 423; *Coverdale v. Charlton*, 4 Q. B. D. 116; *Rolls v. St. George*, 14 Ch. D. 785; *Reg. v. Keyn*, 2 Ex. D. 163; *Van Norman v. Jackson Circuit Judge*, 45 Mich. 204; *Salters v. Tobias*, 3 Paige (N. Y.) 338. See also *infra*, this section, 12. a. (3) **Statements of Law**.

3. **Legislative Construction Respectfully Considered.** — *Rex v. Loxdale*, 1 Burr. 445; *Salomons v. Miller*, 8 Exch. 778; *Koshkonong v. Burton*, 104 U. S. 678; *Robertson v. Baxter*, 57 Mich. 132; *Pike v. Megoun*, 44 Mo. 491; *Coutant v. People*, 11 Wend. (N. Y.) 511; *Salters v. Tobias*, 3 Paige (N. Y.) 338; *Dunlap v. Crawford*, 2 McCord Eq. (S. Car.) 171; *Henry v. Tilson*, 17 Vt. 479. See also the title **CONSTITUTIONAL LAW**, vol. 6, p. 1036.

In the Construction of Constitutions the same principle prevails. See the title **CONSTITUTIONAL LAW**, vol. 6, pp. 931, 932; *People v. Le Fevre*, 21 Colo. 218; *Frost v. Pfeiffer*, 26 Colo. 338; *Kenny v. Hudspeth*, 59 N. J. L. 533.

4. **Declaratory Act Not Retroactive.** — *Stockdale v. Atlantic Ins. Co.*, 20 Wall. (U. S.) 323; *Koshkonong v. Burton*, 104 U. S. 678; *Singer Mfg. Co. v. McCulloch*, 24 Fed. Rep. 667; *Stebbins v. Pueblo County*, 4 Fed. Rep. 282; *Municipality No. One v. Wheeler*, 10 La. Ann. 747; *Smith v. Syracuse*, 17 N. Y. App. Div. 63; *Matter of Harbeck*, 43 N. Y. App. Div. 188; *Westervelt v. People*, 20 Wend. (N. Y.) 416; *Rodwell v. Harrison*, 132 N. Car. 45; *Erhard v. Clearfield Creek Coal Co.*, 5 Pa. Dist. 611; *Smith v. Westerly*, 19 R. I. 437; *Dunlap v.*

Crawford, 2 McCord Eq. (S. Car.) 171. See also the title **CONSTITUTIONAL LAW**, vol. 6, p. 1033. Sometimes by their terms such acts are only prospective. *U. S. v. Gilmore*, 8 Wall. (U. S.) 330.

A Declaration of the Legislature as to the Meaning of a Prior Statute can have no retroactive effect under the constitutional system of the United States. *Bingham v. Winona County*, 8 Minn. 441; *Dash v. Van Kleeck*, 7 Johns. (N. Y.) 508.

5. **Words Importing Singular May Be Applied to Plural.** — *Garrigus v. Parke County*, 39 Ind. 70, where the court says that this statutory rule is to be applied only where the plain meaning of the words of a statute makes such a construction necessary to give effect to intention. See also *Hogan v. State*, 36 Wis. 226.

This rule is not to be applied where its application leads to an absurdity. *South Park Com'rs v. Chicago First Nat. Bank*, 177 Ill. 243.

"Man" to Include "Woman." — *Smith v. Allen*, 31 Ark. 268 (stated under **MAN**, vol. 19, p. 705). But see *Chorlton v. Lings*, L. R. 4 C. P. 374 (stated under **MAN**, vol. 19, p. 705); *Reg. v. Harrauld*, L. R. 7 Q. B. 362, where the popular meaning was given to "man" in spite of a statute containing the above provision.

6. **In Some States It Is Provided that Penal Statutes shall be so construed as to arrive at the intention and not strictly.** *People v. Soto*, 49 Cal. 70; *State v. Whealey*, 5 S. Dak. 430.

A Statute Requiring Acts Against Gaming to Be Construed Remedially will not apply to a subsequent act making faro playing a felony. *McGowan v. State*, 9 Yerg. (Tenn.) 197.

Statutory Definition of "Year" Applied. — *Garfield Tp. v. Hubbell*, 9 Kan. App. 785.

7. See *People v. Harrison*, 191 Ill. 257.

Some of these statutes expressly provide that in subsequent acts on certain subjects terms shall be interpreted as in prior acts "unless the contrary intention appears." *English Interpretation Act*, 1889 (52 and 53 Vict., c. 63), § 31. See also *People v. New York Cent., etc., R. Co.*, 156 N. Y. 570, construing the *New York Statutory Construction Act*, which is held to apply "to all future legislation."

8. **Interpretation Clauses Have Called Forth Expressions of Disfavor from English judges.** See *Reg. v. Justices*, 7 Ad. & El. 480, 34 E. C. L. 147; *Ely v. Bliss*, 2 De G. M. & G. 471; *Local Board of Health v. West Riding, etc., R. Co.*, 6 B. & S. 801, 118 E. C. L. 801; *Lindsay v. Cundy*, 1 Q. B. D. 358; *Bradley v. Baylis*, 8 Q. B. D. 230; *Reg. v. Boiler Explosions Act*

interpretation of statutes, and must be understood in accordance with legislative intention.¹ They are not to be applied to the construction of other instruments.² While they are binding upon the courts in questions arising under the statutes to which they apply,³ they are not controlling as to prior or subsequent statutes.⁴

(5) *Opinions and Motives of Legislators.* — The opinions of individual legislators as to the object and effect of a statute are of little or no weight on questions of construction, and are generally inadmissible.⁵ Nor may the intention of the draughtsman nor the motives of members who voted for the

Com'rs, (1891) 1 Q. B. 703; *Portsmouth v. Smith*, 10 App. Cas. 374. But compare *Reg. v. Ingham*, 5 B. S. 277, 117 E. C. L. 277.

England—Construction of Interpretation Clauses. — An interpretation clause applies only to the words used in the act and enables them to be used of things which they would not ordinarily include "when there is nothing in the context or subject-matter to the contrary." *Robinson v. Local Board*, 8 App. Cas. 801. See also *Meux v. Jacobs*, L. R. 7 H. L. 493. It applies only to words which are ambiguous and is not applicable to disturb the meaning of such as are plain. *London School Board v. Jackson*, 7 Q. B. D. 502; *Reg. v. Pearce*, 5 Q. B. D. 389. It does not apply to every use of the word in the act. *Reg. v. Justices*, 7 Ad. & El. 491, 34 E. C. L. 147. For other applications of interpretation clauses, see *Wakefield Local Board of Health v. West Riding, etc.*, R. Co., L. R. 1 Q. B. 84; *Ex p. Ferguson*, L. R. 6 Q. B. 280; *Nutter v. Accrington Local Board of Health*, 4 Q. B. D. 384; *Allsopp v. Day*, 7 H. & N. 463; and the title *EMINENT DOMAIN*, vol. 10, p. 1101, where several *English* cases construing the word "land" in the interpretation clauses of the Lands Clauses Consolidation and Railway Clauses Consolidation Acts are stated and quoted.

1. Intention Controlling Legislative Definition. — In *Drennan v. People*, 10 Mich. 173, a provision of the Revised Statutes that felony "when used in this title or in any other statute" shall have a certain meaning, was held, to apply only to those provisions where neither an offense nor its grade is otherwise indicated than by the term "felony." See also *Garrigus v. Parke County*, 39 Ind. 70; *State v. Wapello County*, 13 Iowa 397 (stated under *ROAD*, vol. 24, p. 988); *Buhl v. Kenyon*, 11 Mich. 251, 83 Am. Dec. 738; *People v. Knight*, 13 Mich. 424; *Brown v. McCormick*, 28 Mich. 215; *Hogan v. State*, 36 Wis. 226.

2. Confined to Interpretation of Statutes. — *Alabama Warehouse Co. v. Lewis*, 56 Ala. 514; *State v. Canterbury*, 28 N. H. 228, where the court remarks: "The meaning of language depends on popular usage, which is not and cannot, unless in a very slight degree, be affected by legislation." The last cited case is stated under the title *BRIDGES*, vol. 4, p. 920.

Such Definitions Are Not Applicable to Indictments. — *State v. Canterbury*, 28 N. H. 228; *State v. Adams*, 51 N. H. 569; *Jones v. Surprise*, 64 N. H. 245.

In *Depas v. Riez*, 2 La. Ann. 30, it was said that definitions incorporated in the code must be construed with reference to its positive enactments *in pari materia*, and have no meaning beyond them.

3. Binding on Court. — *Com. v. Curry*, 4 Pa. Super. Ct. 356; *Snyder v. Compton*, 87 Tex. 374; *Rossmiller v. State*, 114 Wis. 169, 91 Am. St. Rep. 910. See also the title *CONSTITUTIONAL LAW*, vol. 6, p. 1035.

A statutory declaration contained in the body of an act declaring the meaning thereof as well as the intent of the legislature in enacting it, is mandatory and controlling on the courts. *Farmers' Bank v. Hale*, 59 N. Y. 53.

4. Not Controlling as to Subsequent Statutes. — *Allsopp v. Day*, 7 H. & N. 463; *Drennan v. People*, 10 Mich. 173; *McGowan v. State*, 9 Yerg. (Tenn.) 197.

While not controlling, however, such clauses have weight; see the last paragraph *supra*, and the title *CONSTITUTIONAL LAW*, vol. 6, p. 1035.

5. Opinions of Individual Legislators Generally Inadmissible—England. — *Atty.-Gen. v. Sillem*, 2 H. & C. 521; *Matter of York*, 2 Q. B. 34, 42 E. C. L. 559; *Martin v. Hemming*, 10 Exch. 478; *Cameron v. Cameron*, 2 Myl. & K. 289; *Hemstead v. Phoenix Gas Light, etc.*, Co., 3 H. & C. 745.

United States. — *U. S. v. Trans-Missouri Freight Assoc.*, 166 U. S. 318; *Aldridge v. Williams*, 3 How. (U. S.) 24; *U. S. v. Union Pac. R. Co.*, 91 U. S. 79; *American Net, etc., Co. v. Worthington*, 141 U. S. 473; *Carter v. Hobbs*, 92 Fed. Rep. 600, 1 Am. Bankr. Rep. 228; *Pacific Coast Steamship Co. v. U. S.*, 33 Ct. Cl. 36; *U. S. v. Wilson*, 58 Fed. Rep. 768.

Arkansas. — *State v. Lancashire F. Ins. Co.*, 66 Ark. 472.

California. — *Leese v. Clark*, 20 Cal. 387.

Georgia. — *Stewart v. Atlanta Beef Co.*, 93 Ga. 12, 44 Am. St. Rep. 119.

Illinois. — *Belleville, etc., R. Co. v. Gregory*, 15 Ill. 20, 58 Am. Dec. 589.

Massachusetts. — *Browne v. Turner*, 174 Mass. 159.

Minnesota. — *Taylor v. Taylor*, 10 Minn. 107.

New Jersey. — *Keyport, etc., Steamboat Co. v. Farmers Transp. Co.*, 18 N. J. Eq. 13.

Pennsylvania. — *Cumberland County v. Boyd*, 113 Pa. St. 57.

Texas. — *State v. Hoff*, (Tex. Civ. App. 1895) 29 S. W. Rep. 672.

Remarks of Legislators on the passage of an act and debates in the legislature are too uncertain to serve as a guide in construction. *Reg. v. Whittaker*, 2 C. & K. 636, 61 E. C. L. 636; *Gorham v. Exeter*, 5 Exch. 630; *U. S. v. Trans-Missouri Freight Assoc.*, 166 U. S. 290; *U. S. v. Union Pac. R. Co.*, 91 U. S. 79; *U. S. v. Oregon, etc., R. Co.*, 57 Fed. Rep. 426; *Barnes v. Mobile*, 19 Ala. 707; *McGarrahan v. Maxwell*, 28 Cal. 95; *District of Columbia v. Washington Market Co.*, 3 MacArthur (D. C.) 559; *Forrest v. Forrest*, 10 Barb. (N. Y.) 46.

act be taken into consideration in its construction.¹ Reference, however, occasionally has been made to what individual members of the legislature understood the enactment to mean, but little weight probably was attached to their opinions, and the rule may be said to be settled as above.²

(6) *Legislative Journals and Reports of Committees* — **Legislative Journals.** — While it is unquestionably a general rule that what may be called the legislative history of an act³ is not admissible to explain its meaning,⁴ yet in cases of doubt and ambiguity the journals of the legislature may be examined for the intent of the lawmakers to ascertain facts of which such journals are evidence.⁵ Some cases are found laying down a looser and broader rule as to

1. **Motives of Individual Legislators Not Considered** — *England.* — *M'Master v. Lomax*, 2 Myl. & K. 32; *Cameron v. Cameron*, 2 Myl. & K. 289.

United States. — *Aldridge v. Williams*, 3 How. (U. S.) 9; *Soon Hing v. Crowley*, 113 U. S. 703; *Kountze v. Omaha*, 5 Dill. (U. S.) 443.

Illinois. — *Belleville, etc., R. Co. v. Gregory*, 15 Ill. 20, 58 Am. Dec. 589.

New Jersey. — *Keyport, etc., Steamboat Co. v. Farmers Transp. Co.*, 18 N. J. Eq. 24.

Virginia. — *Richmond v. Henrico County*, 83 Va. 212.

2. **Opinions of Individual Legislators Sometimes Referred to.** — *Hebbert v. Purchas*, L. R. 3 P. C. 649; *Ridsdale v. Clifton*, 2 P. D. 322; *Hedworth v. Primate*, *Hardres* 318; *Mounsey v. Ismay*, 3 H. & C. 486, 34 L. J. Exch. 56; *Drummond v. Drummond*, L. R. 2 Ch. 45; *Hudson v. Tooth*, 3 Q. B. D. 46; *Ash v. Abdy*, 3 Swanst. 664; *Ex p. Farley*, 40 Fed. Rep. 66; *U. S. v. Wilson*, 58 Fed. Rep. 768; *Moyer v. Gross*, 2 P. & W. (Pa.) 171. See also *Starnes v. Hill*, 112 N. Car. 27, note.

Thus, *Hengham, C. J.*, said that he knew better than counsel the meaning of the statute of 2 Westminster, as he had drawn it. *Year Book*, 33 Edw. I., p. 31. And so in *Ash v. Abdy*, 3 Swanst. 664, *Lord Nottingham* said that he should know the meaning of the statute of frauds, as it was first introduced by him into the House of Lords. And in *Rex v. Wallis*, 5 T. R. 379, *Lord Kenyon* supported his construction of the Stat. of 9 Anne, c. 20, by the argument that so accurate a lawyer as Mr. Justice Powell, who had drawn it, never would have used several words where one sufficed. See *Maxwell Int. Stat.* (3d ed.) 36.

3. **An Original Bill Which Shows on Its Face Amendments** made in the course of legislation (such amendments having been written in on the printed copy which was filed among the archives of the state) may be consulted, and the court may take into consideration the purpose and effect of such amendments, in coming to a conclusion as to the proper construction to be given to clauses of doubtful meaning, and clauses inconsistent with one another, in the act as finally adopted. *Mason v. Cranbury Tp.*, (N. J. 1902) 52 Atl. Rep. 568.

4. **Legislative History Not Generally Admissible.** — *Maxwell Int. Stat.* (3d ed.) 38. See also *supra*, this subsection, *Opinions and Motives of Legislators*.

As to the Purpose of an Act. — In *Pennsylvania Bank v. Com.*, 19 Pa. St. 156, the question was whether an act incorporating a bank exempted it from taxation, and "the journals

of the house of representatives and the reports of its committees" were offered in evidence. But the evidence was rejected, on the ground that "it was not only of no value, but it was delusive and dangerous."

That proceedings in Congress may be referred to in the construction of revenue laws, to ascertain the exigencies of the interests involved and the reasons for fixing a given duty, see the title *REVENUE LAWS*, vol. 24, p. 891.

Debates in Constitutional Conventions are subject to the same rules. See the title *CONSTITUTIONAL LAW*, vol. 6, p. 930; *State v. Cloksey*, 5 Sneed (Tenn.) 482.

New Jersey — Journals Rigidly Excluded. — Legislative journals cannot be resorted to to impeach an act or to show "that it was passed in another form, or to show the course of legislation through which the bill passed, or the order in which amendments were introduced, or the form of words used in the amendments." *Mason v. Cranbury Tp.*, (N. J. 1902) 52 Atl. Rep. 568.

Legislative Journals Are Not Admissible to Show Punctuation different from the enrolled bill. *State v. Under-ground Cable Co.*, (N. J. 1889) 18 Atl. Rep. 581, *affirmed sub nom.* *Standard Underground Cable Co. v. Atty.-Gen.*, 46 N. J. Eq. 276, 19 Am. St. Rep. 394.

5. **General Rule — Identifying Act.** — In *Southwark Bank v. Com.*, 26 Pa. St. 446, the legislative journals were held to be clearly evidence for the purpose of identifying a bill referred to in another act, and on the general question of the admissibility of such evidence, the court said: "The constitution directs each house to keep a journal of its proceedings, and in cases where the governor omits to return an act within the time prescribed, and where he returns it with his objections and it is passed by two-thirds of each house, the journals are the highest evidence of the enactment of the law. So if the governor should by mistake sign a bill which had never been enacted by either house, the journals may be resorted to to correct the mistake. He has no power to give the force of a law to bills which have never been passed or presented to him by the legislature. * * * The journals of Congress and of the state legislatures are likewise admissible evidence for all legal purposes. *Miles v. Stevens*, 3 Pa. St. 42, 45 Am. Dec. 621; *Watkins v. Holman*, 16 Pet. (U. S.) 56; *Albertson v. Robeson*, 1 Dall. (Pa.) 9."

Validity of Statute in Question. — When the question before the court is the existence or validity of the act and not its construction, resort may be had to the legislative journals to determine the facts of its passage. *Gardner v.*

consulting legislative journals.¹

Reports of Committees. — While reports and proceedings before committees of the legislature will not be considered in construing a statute,² yet sometimes because of the peculiar relations of such reports³ or because of the facts which they embody they may be admissible.⁴

11. Consequences to Be Guarded Against — *a.* **CONFLICT WITH GENERAL LEGAL PRINCIPLES.** — A statute should be so construed as not to conflict with the general principles of law, which it may be presumed the legislature would not intend to disregard or change.⁵

b. **INTENTION TO BIND FUTURE LEGISLATURES.** — A statute will not be presumed to have been enacted with the intention of binding future legislatures, since such an intent must be ineffective.⁶

c. **UNCONSTITUTIONALITY.** — There is a presumption in favor of the constitutionality of a statute, and in accordance therewith, when a statute is susceptible of two constructions, one of which supports the act and gives it effect and the other renders it unconstitutional and void, the former will be adopted, even though the latter may be the more natural interpretation of the language used.⁷

Collector, 6 Wall. (U. S.) 499; Division of Howard County, 15 Kan. 194; Warner v. Beers, 23 Wend. (N. Y.) 103. See also *supra*, this title, *Enactment*.

History of an Amendment. — Thus the journals may be consulted to ascertain the mode in which embarrassing words not in the original act were introduced by an amendment. Blake v. National City Bank, 23 Wall. (U. S.) 307; Matthews v. Com., 18 Gratt. (Va.) 995. See also Hebbert v. Purchas, L. R. 3 P. C. 648; Walter A. Wood Mowing, etc., Mach. Co. v. Caldwell, 54 Ind. 280, 23 Am. Rep. 641; Brown v. Phillips, 71 Wis. 252.

Time When Act Becomes Operative. — Legislative journals may be consulted to determine the proper construction of a phrase providing for the time when an enactment goes into effect by determining the date when it was passed and when it received the signature of the presiding officers. Fosdick v. Perrysburg, 14 Ohio St. 472.

1. Broader Rule. — Where a statute "is susceptible of several widely differing constructions, we know of no better means for ascertaining the will and intention of the legislature, than that which is afforded in this case by the history of the statute, as found in the journals of the two legislative bodies." Edgar v. Randolph County, 70 Ind. 338, citing Walter A. Wood Mowing, etc., Mach. Co. v. Caldwell, 54 Ind. 270, 23 Am. Rep. 641. The opinion in neither of these cases shows what use was made of the journals in arriving at the legislative intent.

2. Committees of the Legislature. — Steele v. Midland R. Co., L. R. 1 Ch. 282; Donegall v. Layard, 8 H. L. Cas. 460; Atty.-Gen. v. Sillem, 2 H. & C. 431; State v. Burk, 88 Iowa 661; Pennsylvania Bank v. Com., 19 Pa. St. 156.

The Reports of Committees Appointed by Parliament are inadmissible. Salkeld v. Johnson, 2 C. B. 749, 52 E. C. L. 749; Farley v. Bonham, 2 Johns. & H. 177; Matter of York, 2 Q. B. 1, 42 E. C. L. 543; Martin v. Hemming, 18 Jur. 1002; Ewart v. Williams, 3 Drew. 21.

3. Committee Report Regarded as Preamble. — In Second Municipality v. Morgan, 1 La. Ann. 111, the report of a committee, which was presented and adopted with an ordinance, was re-

garded as a preamble showing the reasons for the ordinance.

4. Embodying Contemporary History. — The report of the Committee on Interstate and Foreign Commerce to the House of Representatives, was admitted by the Supreme Court in the construction of an act of Congress, as a part of the history of the times, where it embodied a petition addressed by the Glasgow Corn Trade Association to the Marquis of Salisbury in which the exigencies which led to the passage of the act were graphically set forth. The Delaware, 161 U. S. 472.

5. Conformity with Legal Principles. — State v. Bolden, 107 La. 118, 90 Am. St. Rep. 280; Manuel v. Manuel, 13 Ohio St. 465; Fuellhart v. Blood, 21 Pa. Co. Ct. 604. See also *infra*, this subsection, *Unnecessary Change in Law*.

Statutes Conferring Jurisdiction on Justices of the Peace are construed with reference to general principles of law, as that a justice must act in his own jurisdiction, must not be disqualified by interest, etc. Matter of Peerless, 1 Q. B. 153, 41 E. C. L. 480; Rex v. Fylingdales, 7 B. & C. 438, 14 E. C. L. 76; Reg. v. Cheltenham, 1 Q. B. 467, 41 E. C. L. 628; Bonham's Case, 8 Coke 118a; Rex v. Sainsbury, 4 T. R. 456.

6. Attempt to Bind Future Legislature Not Presumed. — Fletcher v. Peck, 6 Cranch (U. S.) 125; Files v. Fuller, 44 Ark. 273; Wall v. State, 23 Ind. 150; State v. Oskins, 28 Ind. 364; Casey v. Harned, 5 Iowa 1 (see FOREVER, vol. 13, p. 1073); Gilleland v. Schuyler, 9 Kan. 569; Swift v. Newport, 7 Bush (Ky.) 37; Mongeon v. People, 55 N. Y. 613; Oleson v. Green Bay, etc., R. Co., 36 Wis. 383. See also *supra*, this section, 10. b. (5) *Opinions and Motives of Legislators*; *infra*, this subsection, *Unconstitutionality*; and *infra*, this title, *Repeal*.

7. All Presumptions in Favor of Constitutionality — United States. — U. S. v. Coombs, 12 Pet. (U. S.) 75; Grenada County v. Brogden, 112 U. S. 261; U. S. v. Central Pac. R. Co., 118 U. S. 235; Singer Mfg. Co. v. McCollock, 24 Fed. Rep. 667; Missouri v. Kansas City, etc., R. Co., 32 Fed. Rep. 722.

Alabama. — Zeigler v. South, etc., Alabama R.

Doubt Resolved in Favor of Statute. — If doubt exists as to the constitutionality

Co., 58 Ala. 594; South, etc., Alabama R. Co. v. Morris, 65 Ala. 193; Edwards v. Williamson, 70 Ala. 145; Quartlebaum v. State, 79 Ala. 1.

Arkansas. — State v. Lancashire F. Ins. Co., 66 Ark. 466.

California. — French v. Teschemaker, 24 Cal. 518; People v. Hayne, 83 Cal. 111, 17 Am. St. Rep. 217.

Connecticut. — Ferguson v. Stamford, 60 Conn. 432.

Delaware. — Bailey v. Philadelphia, etc., R. Co., 4 Harr. (Del.) 389, 44 Am. Dec. 593.

Georgia. — Winter v. Jones, 10 Ga. 190, 54 Am. Dec. 379; Boston v. Cummins, 16 Ga. 102, 60 Am. Dec. 717; Cutts v. Hardee, 38 Ga. 350; Scoville v. Calhoun, 76 Ga. 263; Clayton v. Calhoun, 76 Ga. 270.

Illinois. — People v. Hutchinson, 172 Ill. 486.

Indiana. — Brown v. Buzan, 24 Ind. 197; Phenix Ins. Co. v. Burdett, 112 Ind. 204; Wilkins v. State, 113 Ind. 514; State v. Insurance Co. of North America, 115 Ind. 257.

Iowa. — State v. County Judge, 2 Iowa 280; Duncombe v. Prindle, 12 Iowa 1; Iowa Homestead Co. v. Webster County, 21 Iowa 221.

Kansas. — Beach v. Leahy, 11 Kan. 28; State v. Wilson, 61 Kan. 40.

Louisiana. — Boisdere v. Citizens' Bank, 9 La. 506, 29 Am. Dec. 453; New Orleans v. Salamander Ins. Co., 25 La. Ann. 650.

Maine. — Deering v. York, etc., R. Co., 31 Me. 172; State v. Intoxicating Liquors, 80 Me. 57.

Maryland. — Wright v. Wright, 2 Md. 429, 56 Am. Dec. 723; Temmick v. Owings, 70 Md. 246.

Massachusetts. — Wellington, Petitioner, 16 Pick. (Mass.) 95, 26 Am. Dec. 631.

Michigan. — Inkster v. Carver, 16 Mich. 484; Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308.

Mississippi. — Marshall v. Grimes, 41 Miss. 31; Sykes v. Columbus, 55 Miss. 143.

Missouri. — State v. Able, 65 Mo. 362; State v. Addington, 77 Mo. 110; State v. Pond, 93 Mo. 606.

Montana. — Custer County v. Yellowstone County, 6 Mont. 39.

New Hampshire. — Rich v. Flanders, 39 N. H. 304.

New Jersey. — Colwell v. May's Landing Water Power Co., 19 N. J. Eq. 245; Atlantic City Water Works Co. v. Consumers Water Co., 44 N. J. Eq. 427.

New York. — People v. Briggs, 50 N. Y. 554; Matter of New York El. R. Co., 70 N. Y. 342; Bertholf v. O'Reilly, 74 N. Y. 509, 30 Am. Rep. 323; People v. Comstock, 78 N. Y. 356; McDougall v. State, 109 N. Y. 73; Buffalo East Side R. Co. v. Buffalo St. R. Co., 111 N. Y. 139; Curtin v. Barton, 139 N. Y. 513; Kip v. Hirsch, (Ct. App.) 18 Abb. N. Cas. (N. Y.) 174; Beardsley v. New York, etc., R. Co., (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 259; Clarke v. Rochester, 24 Barb. (N. Y.) 471; Roosevelt v. Godard, 52 Barb. (N. Y.) 533.

North Carolina. — McGwigan v. Wilmington, etc., R. Co., 95 N. Car. 428, 59 Am. Rep. 247.

Pennsylvania. — Craig v. Pittsburgh First Presb. Church, 88 Pa. St. 46, 32 Am. Rep. 417; Com. v. Bennett, 16 S. & R. (Pa.) 243.

Tennessee. — Dugger v. Mechanics', etc., Ins. Co., 95 Tenn. 250.

Texas. — Sutherland v. De Leon, 1 Tex. 250, 46 Am. Dec. 100; Robinson v. State, 15 Tex. 311; Galveston, etc., Narrow-Gauge R. Co. v. Gross, 47 Tex. 428; Rosenberg v. Weekes, 67 Tex. 578; Barker v. Torrey, 69 Tex. 7.

Virginia. — Martin v. South Salem Land Co., 97 Va. 349.

West Virginia. — Osburn v. Staley, 5 W. Va. 85, 13 Am. Rep. 640.

Wisconsin. — Bigelow v. West Wisconsin R. Co., 27 Wis. 478; Palms v. Shawano County, 61 Wis. 211; Johnson v. Milwaukee, 88 Wis. 389.

See also the title CONSTITUTIONAL LAW, vol. 6, p. 1085 *et seq.*, and *supra*, this title, *Constitutionality*.

As to Canada, see the title DOMINION OF CANADA, vol. 10, p. 63.

A Prospective Construction will be favored where to construe a statute retroactively would render it unconstitutional. Newland v. Marsh, 19 Ill. 384; Millay v. White, 86 Ky. 170; New York, etc., Midland R. Co. v. Van Horn, 57 N. Y. 473; Kerrigan v. Force, 68 N. Y. 381. See *infra*, this title, VII. 5. *Retrospective Laws*.

Tax Laws Construed to Favor Equality. — Where a constitutional provision requires uniformity in the imposition of taxes, such a construction of a tax law must be adopted as will avoid duplicate taxes, unless a contrary interpretation is compelled by some express provision or necessary implication of the statute. Rice County v. Citizens' Nat. Bank, 23 Minn. 280; Hennepin County v. St. Paul, etc., R. Co., 33 Minn. 534. See also the title TAXES.

Construction Against Exercise of Doubtful Power. — That construction of a statute which attributes to the legislature the exercise of a doubtful power, will not, in the absence of direct words, be readily adopted. Mardre v. Felton, Phil. L. (61 N. Car.) 279. See also Sykes v. Columbus, 55 Miss. 143.

Federal Courts Construing State Statutes. — The presumption of constitutionality "is one that commends itself to the federal courts with great force in all cases where they are called upon to expound and apply state legislation, and with more than ordinary persuasiveness in cases in which these courts are asked to overthrow the revenue law of the states." Dillon, J., in St. Louis Nat. Bank v. Papin, 4 Dill. (U. S.) 29.

Unquestioning Acquiescence in the Constitutionality of a statute for a number of years is entitled to some weight in determining the question of constitutionality. Mollie Gibson Consol. Min., etc., Co. v. Sharp, 23 Colo. 262; Continental Imp. Co. v. Phelps, 47 Mich. 302. See also *supra*, this section, 10. b. (2) *Contemporaneous Exposition and Long Usage*.

The Injustice of a Law Does Not Affect Its Constitutionality, unless it is in conflict with some express provision of the constitution. People v. Hutchinson, 172 Ill. 486. See also the title CONSTITUTIONAL LAW, vol. 6, p. 1087, where authorities are collected, and some of them shown to be *contra*, and *supra*, this title, *Constitutionality*.

An Act of a Territorial Legislature must be

of the statute, the benefit of the doubt is to be given to the law.¹ The doubt may arise as to the true meaning of the constitution² or as to whether the statute is in conformity with its provisions.³

Strict and Broad Construction. — A restricted construction of a statute should be adopted where one more broad would bring the statute in conflict with the constitution;⁴ and, on the other hand, if a restricted construction would reduce the statute to a nullity, as being in contravention of the fundamental law, courts will favor a broader interpretation.⁵

construed, so far as possible, as not to conflict with the provisions of acts of Congress. *Codlin v. Kohlhausen*, 9 N. Mex. 565. See also *In re Wynn-Johnson*, 1 Alaska 635.

1. **Benefit of Doubt Given to Statute** — *United States*. — *Fletcher v. Peck*, 6 Cranch (U. S.) 87; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518; *Missouri v. Kansas City*, etc., R. Co., 32 Fed. Rep. 722.

California. — *Miller v. Dunn*, 72 Cal. 462, 1 Am. St. Rep. 67.

Illinois. — *People v. Auditor*, 3 Ill. 567; *Bunn v. People*, 45 Ill. 411; *People v. Omaha*, 170 Ill. 449.

Indiana. — *Clare v. State*, 68 Ind. 17; *Phoenix Ins. Co. v. Burdett*, 112 Ind. 204; *Wilkins v. State*, 113 Ind. 514; *State v. Insurance Co. of North America*, 115 Ind. 257.

Iowa. — *Stewart v. Polk County*, 30 Iowa 9, 1 Am. Rep. 238; *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56; *Gates v. Brooks*, 59 Iowa 510; *Central Iowa R. Co. v. Wright County*, 67 Iowa 199; *Burlington*, etc., R. Co. v. Dey, 82 Iowa 312, 31 Am. St. Rep. 477.

Louisiana. — *Boisdere v. Citizens' Bank*, 9 La. 506, 29 Am. Dec. 453.

Maine. — *State v. Intoxicating Liquors*, 80 Me. 57.

Maryland. — *Baltimore v. State*, 15 Md. 453.

Mississippi. — *Burnham v. Sumner*, 50 Miss. 520.

New York. — *People v. Draper*, 15 N. Y. 543; *People v. Budd*, 117 N. Y. 29; *Sweet v. Syracuse*, 129 N. Y. 350; *People v. Rice*, 135 N. Y. 473; *Roosevelt v. Godard*, 52 Barb. (N. Y.) 545; *Beardsley v. New York*, etc., R. Co., (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 259.

North Carolina. — *King v. Wilmington*, etc., R. Co., 66 N. Car. 277; *State v. Moore*, 104 N. Car. 714, 17 Am. St. Rep. 696.

Pennsylvania. — *Pennsylvania R. Co. v. Riblet*, 66 Pa. St. 164, 5 Am. Rep. 360; *Com. v. Butler*, 99 Pa. St. 535; *Com. v. Keary*, 198 Pa. St. 500.

West Virginia. — *Bridges v. Shallcross*, 6 W. Va. 575; *State v. Mines*, 38 W. Va. 125; *State v. Brookover*, 38 W. Va. 141.

Wisconsin. — *Lawton v. Waite*, 103 Wis. 244.

See also title CONSTITUTIONAL LAW, vol. 6, p. 1085.

An act of the legislature need not specify the conditions on which its validity depends, but the court will assume the existence of such conditions until it is apparent that they do not exist. *Owen v. Sioux City*, 91 Iowa 190.

The attitude of the court is not one of hostility to acts whose constitutionality is attacked; on the contrary the presumptions are in their favor, as courts are not to be astute in finding

or sustaining objections. *Sugar Notch Borough*, 192 Pa. St. 355.

2. **Doubt as to Meaning of Constitution.** — *Sun Mut. Ins. Co. v. New York*, 5 Sandf. (N. Y.) 10, affirmed 8 N. Y. 241; *Contant v. People*, 11 Wend. (N. Y.) 511; *Farmers'*, etc., Bank v. Smith, 3 S. & R. (Pa.) 72.

3. **Doubt as to Conformity of Statute to Constitution.** — *People v. Hutchinson*, 172 Ill. 508; *People v. New York Cent. R. Co.*, 34 Barb. (N. Y.) 138. See also *Cooley Const. Limit.*, p. 219.

4. **Restricted Construction.** — *Cook v. Hamilton County*, 6 McLean (U. S.) 112; *Woodward v. Fruitvale Sanitary Dist.*, 99 Cal. 554; *Hogan v. Akin*, 181 Ill. 448, reversing 81 Ill. App. 62; *Stanley v. Wabash*, etc., R. Co., 100 Mo. 435; *People v. Board of Education*, 13 Barb. (N. Y.) 400; *Com. v. Butler*, 99 Pa. St. 535; *Osburn v. Staley*, 5 W. Va. 85, 13 Am. Rep. 640 (stated under MAJORITY, vol. 19, p. 614).

"When a statute may constitutionally operate upon certain persons, or in certain cases, and was not evidently intended to conflict with the constitution, it is not to be held unconstitutional merely because there may be persons to whom, or cases in which, it cannot constitutionally apply; but it is to be deemed constitutional, and to be construed not to apply to the latter persons or cases, on the ground that courts are bound to presume that the legislature did not intend to violate the constitution." Opinion of Justices, 41 N. H. 555.

A statute declaring that a trust shall be deemed discharged after the lapse of years, may, to sustain its constitutionality, be construed to make the lapse of time merely *prima facie* evidence of a discharge. *Kip v. Hirsch*, (Ct. App.) 18 Abb. N. Cas. (N. Y.) 167.

Where to interpret the word "owner" in a statute, rendering the owner of a vehicle liable for treble damages for failure to turn to the right, would result in arbitrarily confiscating his property and depriving him of due process of law, it will be interpreted as meaning "the person in possession and control" of the vehicle, for "courts will be astute in giving a construction to a statute that shall save it from invalidity." *Camp v. Rogers*, 44 Conn. 291.

5. **When Broad Construction Favored.** — *Clare v. State*, 68 Ind. 26; *Seneca County v. Allen*, 99 N. Y. 532; *Com. v. Butler*, 99 Pa. St. 535; *Farmers'*, etc., Bank v. Smith, 3 S. & R. (Pa.) 63; *Monongahela Nav. Co. v. Coons*, 6 W. & S. (Pa.) 101.

Contingency of Constitutional Change. — A statute may be sustained by the courts as adopted with reference to the contingency of a constitutional change, at least when the consummation of that change rests with the legislature alone. *Galveston*, etc., Narrow-Gauge R. Co. v. Gross, 47 Tex. 436.

Implication and Forced Construction. — Courts may resort to implication to sustain a statute, but not to destroy it.¹ A forced construction, however, will not be resorted to to sustain the constitutionality of a statute. If the language will not support any construction consistent with the constitution, it is the duty of the court to declare the statute void.²

d. DISREGARD OF INTERNATIONAL AND INTERSTATE LAW—(1) In General. — Every statute is to be interpreted, as far as its language admits, as not violating the rules of international law, and as not being inconsistent with the comity of nations.³

Where Intention Clear. — If the language of the statute is unambiguous, and the intention of the legislature is clear, although the act is in conflict with international law, whatever may be the responsibility incurred by the government to foreign powers in executing the statute, there can be no doubt that courts of justice are bound to obey and administer it.⁴

(2) Extraterritorial Operation. — Thus, in the absence of an intention expressed or inferred, the presumption is that the legislature does not design a statute to operate beyond the territorial limits of its jurisdiction.⁵

1. Implication to Sustain Statute. — *Cooper v. Telfair*, 4 Dall. (U. S.) 14; *People v. San Francisco*, etc., R. Co., 35 Cal. 617; *Colwell v. May's Landing Water Power Co.*, 19 N. J. Eq. 249; *Atlantic City Water Works Co. v. Consumers Water Co.*, 44 N. J. Eq. 427. See also *Cochran v. Van Surlay*, 20 Wend. (N. Y.) 381, 32 Am. Dec. 570.

2. Forced Construction Not Allowed. — *French v. Teschemaker*, 24 Cal. 518; *People v. San Francisco*, etc., R. Co., 35 Cal. 606; *Bailey v. Philadelphia*, etc., R. Co., 4 Harr. (Del.) 389, 44 Am. Dec. 593; *Tabor v. Cook*, 15 Mich. 322; *Bigelow v. West Wisconsin R. Co.*, 27 Wis. 478; *Atty.-Gen. v. Eau Claire*, 37 Wis. 400.

For example, a statute making railroad companies liable for all animals killed on the tracks cannot be made constitutional by assuming the construction that the killing should 'be only *prima facie* evidence of liability. *Bielenberg v. Montana Union R. Co.*, 8 Mont. 271.

3. Presumption that Principles of International Law Observed. — *The Parlement Belge*, 5 P. D. 197; *Leroux v. Brown*, 12 C. B. 801, 74 E. C. L. 801; *Murray v. Schooner Charming Betsy*, 2 Cranch (U. S.) 118; *U. S. v. Fisher*, 2 Cranch (U. S.) 390. See also the title INTERNATIONAL LAW, vol. 16, p. 1133 *et seq.*

4. Clear Intent Must Be Enforced. — *In re A. B.*, (1900) 1 Q. B. 544; *Cope v. Doherty*, 2 De G. & J. 624; *The Zollverein*, Swabey 96; *The Joseph Somes*, Swabey 188; *The Le Louis*, 2 Dods. 245; *Leroux v. Brown*, 12 C. B. 821, 74 E. C. L. 821; *The Marianna Flora*, 11 Wheat. (U. S.) 40.

In *Lopez v. Burslem*, 4 Moo. P. C. 300, Lord Campbell said: "If a law were made, working oppression and injustice to the subjects of a foreign state, that state might make representations and remonstrances against this law to our government; but while it remains in force, judges have no choice but to give it effect."

An English Criminal Statute Directed Against the Slave Trade Applies to British subjects on the coasts of Africa. *Reg. v. Zulueta*, 1 C. & K. 215, 47 E. C. L. 215; *Santos v. Illidge*, 6 C. B. N. S. 841, 95 E. C. L. 841.

5. Against Extraterritoriality — *England*. — *Ex p. Blain*, 12 Ch. D. 522; *Rosseter v. Cahlmann*, 8 Exch. 361; *The Zollverein*, Swabey 96;

Rex v. Sawyer, 2 C. & K. 101, 61 E. C. L. 101; *Madrado v. Willes*, 3 B. & Ald. 353, 5 E. C. L. 313; *Bulkeley v. Schultz*, L. R. 3 P. C. 764.

United States. — *Rose v. Himely*, 4 Cranch (U. S.) 241; *Bond v. Jay*, 7 Cranch (U. S.) 350; *U. S. v. Wiltherger*, 5 Wheat. (U. S.) 76; *Farnum v. Blackstone Canal Corp.*, 1 Sumn. (U. S.) 46; *U. S. v. Howard*, 3 Wash. (U. S.) 344.

Kansas. — *McCarthy v. Chicago*, etc., R. Co., 18 Kan. 46, 26 Am. Rep. 742.

Kentucky. — *Taylor v. Pennsylvania Co.*, 78 Ky. 350, 39 Am. Rep. 244.

Massachusetts. — *Davis v. New York*, etc., R. Co., 143 Mass. 304, 58 Am. Rep. 138.

Michigan. — *Robertson v. Baxter*, 57 Mich. 127.

Missouri. — *Stanley v. Wabash*, etc., R. Co., 100 Mo. 435.

New Hampshire. — *Merrill v. Boston*, etc., R. Co., 63 N. H. 259.

New York. — *Beardsley v. New York*, etc., R. Co., (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 259; *Beach v. Bay State Steamboat Co.*, 30 Barb. (N. Y.) 433.

From another point of view this rule will be found treated under PRIVATE INTERNATIONAL LAW, vol. 22, p. 1314. See also the title FOREIGN CORPORATIONS, vol. 13, p. 837.

"If any construction otherwise be possible, an act will not be construed as applying to foreigners, in respect to acts done by them outside the dominions of the sovereign power enacting. That is a rule based on international law by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory." *Per* Lord Russell, C. J., in *Reg. v. Jameson*, (1896) 2 Q. B. 430.

The legislature is presumed to intend that its statutes shall not apply to acts or contracts done or effected beyond the limits of the state and having no reference to or effect upon persons or property in the state. *State v. Lancashire F. Ins. Co.*, 66 Ark. 466.

Any Statute Which Regulates the Formalities and Ceremonials of Marriage is in general limited in effect to the territorial jurisdiction of the legislature. *Scrimshire v. Scrimshire*, 2 Hag. Cons. 395. See also the title MARRIAGE, vol. 19, p. 1213.

General Words Restrained. — To avoid such consequences general words in a statute will be restricted.¹

e. INCLUDING GOVERNMENT: — In *England* and *Canada* the crown is not bound by a statute unless it is included by express words or by necessary implication.² In the *United States* the states and national government are not bound by a provision of a general statute which affects their prerogatives, rights, or interests, unless expressly named or included by necessary implication.³ It is said that this presumption does not apply when the act is made

Statutes Regulating Vessels Are Territorial Only.

— *Noble v. Steamboat St. Anthony*, 12 Mo. 262; *Twitchell v. The Steamboat Missouri*, 12 Mo. 412; *Champion v. Jantzen*, 16 Ohio 91; *Good-sill v. The Brig St. Louis*, 16 Ohio 178.

1. General Terms Restricted to Avoid Such Consequence. — *The Le Louis*, 2 Dods. 229; *The Constitution*, 4 P. D. 39; *Jefferys v. Boosey*, 4 H. L. Cas. 815 (see title COPYRIGHT, vol. 7, pp. 543, 544); *The Schooner Exchange v. M'Faddon*, 7 Cranch (U. S.) 116; *U. S. v. Palmer*, 3 Wheat. (U. S.) 610; *State v. Lancashire F. Ins. Co.*, 66 Ark. 466.

"The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. * * * However general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction to places and persons upon which the legislature have authority and jurisdiction." *The Apollon*, 9 Wheat. (U. S.) 362, *per Story*, J.

Thus it was held that statute 24 and 25 Vict., c. 100, § 10 (see title MURDER AND MANSLAUGHTER, vol. 21, p. 128), did not authorize a trial of a foreigner who inflicted a wound at sea in a foreign ship, of which the sufferer died in England. *Reg. v. Lewis, Dears. & B.* 182. And see *Rex v. Depardo*, 1 Taunt. 26; *Rex v. Mattos*, 7 C. & P. 458, 32 E. C. L. 584; *Mga Hoong v. Reg.*, 7 Cox C. C. 489; *Reg. v. Bjornsen, L. & C.* 545, 34 L. J. M. C. 180.

Piracy on the high seas on board a foreign vessel is not within the jurisdiction of the United States, although an act of Congress provided that any person committing robbery in any vessel on the high seas should be guilty of piracy. *U. S. v. Kessler, Baldw.* (U. S.) 15. See also the title PIRACY, vol. 22, p. 828.

Real Property. — As real property is subject to the *lex rei sitæ*, an English bankruptcy act dealing with real estate in general terms will not be extended to the bankrupt's lands in another jurisdiction. *Selkirk v. Davies*, 2 Dow. 250, 2 Rose 97, 291; *Cockerell v. Dickens*, 3 Moo. P. C. 133; *Waite v. Bingley*, 21 Ch. D. 674. See also *Sill v. Worswick*, 1 H. Bl. 672; *Philips v. Hunter*, 2 H. Bl. 402; *Hunter v. Potts*, 4 T. R. 182; *Freke v. Carbery*, L. R. 16 Eq. 461; *Drayton's Appeal*, 61 Pa. St. 172.

2. Prerogatives Not Taken Away Except by Necessary Implication — *England*. — *Magdalen College Case*, 11 Coke 74; *Atty.-Gen. v. Donaldson*, 10 M. & W. 117; *Theberge v. Laundry*, 2 App. Cas. 102; *Ex p. Post Master Gen.*, 10 Ch. D. 595; *Wheaton v. Maple*, (1893) 3 Ch. 64.

Canada. — *Reg. v. Pouliot*, 2 Can. Exch. 49, where statutes of various Canadian provinces to this effect are cited.

The King May Take the Benefit of Any Particular Act, though he be not especially named.

¹ Bl. Com. 262, citing *Case of Fine Levied by the King*, etc., 7 Coke 32.

3. States and United States Not Bound by General Words in Statute — *United States*. — *Dollar Sav. Bank v. U. S.*, 19 Wall. (U. S.) 227; *U. S. v. Shaw*, 39 Fed. Rep. 433; *Gilman v. Sheboygan*, 2 Black (U. S.) 510; *U. S. v. Hewes, Crabbe* (U. S.) 307; *U. S. v. Hoar*, 2 Mason (U. S.) 314; *U. S. v. Greene*, 4 Mason (U. S.) 427; *U. S. v. Davis*, 3 McLean (U. S.) 483; *U. S. v. Williams*, 5 McLean (U. S.) 133.

Arkansas. — *Cole v. White County*, 32 Ark. 45.

Georgia. — *Doe v. Deavors*, 11 Ga. 79.
Maryland. — *State v. Milburn*, 9 Gill (Md.) 105; *State v. State Bank*, 6 Gill & J. (Md.) 216, 26 Am. Dec. 561; *Swearingen v. U. S.*, 11 Gill & J. (Md.) 373.

New Hampshire. — *State v. Kinne*, 41 N. H. 241.

New Jersey. — *Morris, etc., R. Co. v. Newark*, 10 N. J. Eq. 352; *Water Com'rs v. Hudson*, 13 N. J. Eq. 420; *Greenwich Tp. v. Easton, etc.*, R. Co., 24 N. J. Eq. 217; *Warren R. Co. v. State*, 29 N. J. L. 353.

New York. — *People v. Rossiter*, 4 Cow. (N. Y.) 143; *People v. Herkimer*, 4 Cow. (N. Y.) 345, 15 Am. Dec. 379.

North Carolina. — *State v. Garland*, 7 Ired. L. (29 N. Car.) 50.

Pennsylvania. — *Com. v. Johnson*, 6 Pa. St. 136; *Com. v. Hutchinson*, 10 Pa. St. 466; *Jones v. Tatham*, 20 Pa. St. 398; *Com. v. Baldwin*, 1 Watts. (Pa.) 54, 26 Am. Dec. 33.

West Virginia. — *Bennett v. McWhorter*, 2 W. Va. 441.

For Statutes Conferring Right to Sue the State, see *infra*, this title, *Particular Applications of Principles of Construction* — *Strict Construction*.

Whether the Term "Person" Includes the Government, etc. — See the titles GARNISHMENT, vol. 14, p. 814; PERSON, vol. 22, p. 740. See also *Banton v. Griswold*, 95 Me. 445.

Counties. — "Counties, which are component and essential parts of the state and the necessary agencies of its government, embodiments of the public, are no more embraced in the general words of the statute than the state itself." *Cole v. White County*, 32 Ark. 51. But see title LIMITATION OF ACTIONS, vol. 19, p. 191.

A Discharge in Bankruptcy Is No Bar to Government. — See the title INSOLVENCY AND BANKRUPTCY, vol. 16, p. 778.

Under the Power of Eminent Domain property already devoted to public purposes cannot be taken for new uses, unless such power is given expressly or by necessary implication. See the title EMINENT DOMAIN, vol. 10, p. 1094 *et seq.*

Statutes of Limitations do not in general bar governments. See the title LIMITATION OF ACTIONS, vol. 19, p. 188 *et seq.*

for the public good, advancement of learning, religion, and justice, relief of the poor, prevention of fraud, or suppression of injury and wrong,¹ and when an intent to bind the state appears, effect must be given to such intent.²

f. **ousting Jurisdiction.** — There is a presumption against an intention on the part of the legislature to oust courts of their jurisdiction, and any construction leading to such a result is to be avoided if possible.³

The Jurisdiction of Superior Courts Can Be Taken Away only by express words or by necessary implication.⁴ Thus, where equitable jurisdiction is conferred upon

1. When State Is Bound. — Case of Ecclesiastical Persons, 5 Coke 14a; *Rex v. Wright*, 1 Ad. & El. 436, 28 E. C. L. 117; *Ex p. Postmaster-Gen.*, 10 Ch. D. 595; *Doe v. Deavors*, 11 Ga. 79 (stated in title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 179); *Com. v. Garrigues*, 28 Pa. St. 12, 70 Am. Dec. 103. See also U. S. v. Knight, 14 Pet. (U. S.) 315.

Statutes Exempting from Execution bind the state according to the weight of authority. See the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 179.

Homestead Exemptions apply against the state. See the title HOMESTEAD, vol. 15, p. 615.

Statutes Establishing General Rules of Procedure in Civil Actions have been held to bind the government. *Green v. U. S.*, 9 Wall. (U. S.) 655; *Fink v. O'Neil*, 106 U. S. 272. See also *Atty.-Gen. v. Radloff*, 10 Exch. 84.

Alteration of Records. — The state is a "person" within a statute forbidding the fraudulent alteration of records with intent to defraud "any person." *Martin v. State*, 24 Tex. 68. See also the title PERSON, vol. 22, p. 740.

2. When the Subject-matter of a Statute Is One in Which the State Is the Chief Party in Interest, so that were the state not included the statute would be practically inoperative, the intent that the state shall be bound plainly appears. *Com. v. Garrigues*, 28 Pa. St. 12, 70 Am. Dec. 103.

When a State Enters into Business in concert or in competition with her citizens, she goes divested of her sovereignty, and the reason for the maxim *nullum tempus occurrit regi* no longer applies. *Calloway v. Cossart*, 45 Ark. 81, wherein it was so held with regard to a state lending its credit to a bank.

When General Rights Are Declared and Remedies Given they include the commonwealth though not named. *Com. v. Boston, etc.*, R. Co., 3 Cush. (Mass.) 45.

3. No Intent to Oust Jurisdiction Presumed — *England.* — *Crisp v. Bunbury*, 8 Bing. 394, 21 E. C. L. 333; *Hartley v. Hooker*, 2 Cowp. 523; *Cates v. Knight*, 3 T. R. 442; *Shipman v. Henbest*, 4 T. R. 109; *Albon v. Pyke*, 4 M. & G. 424, 43 E. C. L. 222; *Rex v. London*, 9 B. & C. 31, 17 E. C. L. 325; *Scott v. Avery*, 5 H. L. Cas. 811; *Rochdale Canal Co. v. King*, 14 Q. B. 122, 68 E. C. L. 122; *Atty.-Gen. v. Guardians of Poor*, 17 Sim. 6; *Jacobs v. Brett*, L. R. 20 Eq. 6; *Birley v. Chorlton-upon-Medlock*, 3 Beav. 499; *Smith v. Whitmore*, 2 De G. J. & S. 297; *Oram v. Brearey*, 2 Ex. D. 348.

United States. — *Fidelity Trust Co. v. Gill Car. Co.*, 25 Fed. Rep. 737.

Missouri. — *State v. St. Louis County*, 38 Mo. 402; *Tackett v. Vogler*, 85 Mo. 480; *Lackland v. Walker*, 151 Mo. 262.

New York. — *People v. Vanderbilt*, (Supm. Ct. Gen. T.) 24 How. Pr. (N. Y.) 301; *White v. Meday*, 2 Edw. (N. Y.) 486; *People v. Lovell*, (County Ct.) 21 Misc. (N. Y.) 570; *Lyman v. Gramercy Club*, 28 N. Y. App. Div. 30.

Pennsylvania. — *Com. v. Betts*, 76 Pa. St. 471; *In re Opening Twenty-eighth St.*, 102 Pa. St. 140; *Overseers of Poor v. Smith*, 2 S. & R. (Pa.) 366.

4. Jurisdiction of Superior Courts Ousted Only by Express Words or Necessary Implication — *England.* — *Rex v. Abbot*, 2 Dougl. 553, note; *Crisp v. Bunbury*, 8 Bing. 394, 21 E. C. L. 333; *Shipman v. Henbest*, 4 T. R. 116; *Jacobs v. Brett*, L. R. 20 Eq. 6.

United States. — *Fidelity Trust Co. v. Gill Car. Co.*, 25 Fed. Rep. 737.

Alabama. — *Dement v. Boggess*, 13 Ala. 143; *Gould v. Hayes*, 19 Ala. 450.

Florida. — *Allen v. Ingram*, 39 Fla. 242.

Iowa. — *Wright v. Marsh*, 2 Greene (Iowa) 94; *Hummer v. Hummer*, 3 Greene (Iowa) 42.

Kentucky. — *March v. Com.*, 12 B. Mon. (Ky.) 25.

Missouri. — *State v. St. Louis County*, 38 Mo. 403; *Dodson v. Scroggs*, 47 Mo. 285; *Pearce v. Calhoun*, 59 Mo. 271; *State v. Wister*, 62 Mo. 592; *Tackett v. Vogler*, 85 Mo. 480.

New York. — *Lyman v. Gramercy Club*, 28 N. Y. App. Div. 30.

North Carolina. — *Barnawell v. Threadgill*, 5 Ired. Eq. (40 N. Car.) 86.

Pennsylvania. — *Com. v. M'Closkey*, 2 Rawle (Pa.) 369; *Overseers of Poor v. Smith*, 2 S. & R. (Pa.) 363; *Burginhofen v. Martin*, 3 Yeates (Pa.) 479; *Kline v. Wood*, 9 S. & R. (Pa.) 298.

Rhode Island. — *State v. Drowne*, 20 R. I. 306.

Tennessee. — *Murfree v. Leeper*, 1 Overt. (Tenn.) 1.

Wisconsin. — *Catlin v. Wheeler*, 49 Wis. 507.

In holding that an act conferring certain jurisdiction on justices of the peace did not affect the pre-existing jurisdiction in the court of common pleas over the same subject, *Shaw, C. J.*, said: "There must be words of limitation to take the jurisdiction away, either by using the word 'exclusive,' or by repealing the former act giving jurisdiction." *Com. v. Hudson*, 11 Gray (Mass.) 64. See also *State v. Kempf*, 69 Wis. 470, 2 Am. St. Rep. 753.

Instances of Jurisdiction Ousted by Necessary Implication. — *Cates v. Knight*, 3 T. R. 442; *New London Northern R. Co. v. Boston, etc.*, R. Co., 102 Mass. 386, where the court said: "Even the jurisdiction of a superior court may be ousted by necessary implication, as well as by express words."

courts at law by affirmative words, this alone will not deprive chancery of its jurisdiction in like cases.¹

g. **UNREASON AND INJUSTICE.** — Where the meaning of a statute is doubtful the construction most agreeable to reason and justice should be adopted as embodying the intention of the lawmakers, for it will not be presumed that the legislature contemplated unreason or injustice.² It follows

1. **Grant in Affirmative Words of Equity Jurisdiction on Courts of Law** — *England.* — *Collins v. Blantern*, 2 Wils. C. Pl. 349; *Hanington v. Du Chatel*, 1 Bro. C. C. 124; *Atkinson v. Leonard*, 3 Bro. C. C. 218; *Ex p. Greenway*, 6 Ves. Jr. 812; *Bromley v. Holland*, 7 Ves. Jr. 28; *Kemp v. Pryor*, 7 Ves. Jr. 237; *East India Co. v. Boddam*, 9 Ves. Jr. 464; *Hartley v. Hooker*, 2 Comp. 524.

Alabama. — *Waldron v. Simmons*, 28 Ala. 629; *Cannon v. McNab*, 48 Ala. 99; *Lambert v. Mallett*, 50 Ala. 73.

Arkansas. — *Burton v. Hynson*, 14 Ark. 32; *King v. Payan*, 18 Ark. 583; *Ryan v. Boyd*, 33 Ark. 778.

California. — *People v. Houghtaling*, 7 Cal. 348.

Illinois. — *Howell v. Moores*, 127 Ill. 68.

Maryland. — *Union Pass. R. Co. v. Baltimore*, 71 Md. 238; *Crain v. Barnes*, 1 Md. Ch. 151.

Mississippi. — *Payne v. Bullard*, 23 Miss. 88, 55 Am. Dec. 74; *Mitchell v. Otey*, 23 Miss. 236; *Millsaps v. Pfeiffer*, 44 Miss. 805.

Missouri. — *Dobyns v. McGovern*, 15 Mo. 662.

New Hampshire. — *Wells v. Pierce*, 27 N. H. 503; *Heath v. Derry Bank*, 44 N. H. 174.

New Jersey. — *Irick v. Black*, 17 N. J. Eq. 189; *Force v. Elizabeth*, 27 N. J. Eq. 408; *Sweeny v. Williams*, 36 N. J. Eq. 627.

New York. — *Varet v. New York Ins. Co.*, 7 Paige (N. Y.) 560; *Post v. Kimberly*, 9 Johns. (N. Y.) 470; *Rathbone v. Warren*, 10 Johns. (N. Y.) 587; *King v. Baldwin*, 17 Johns. (N. Y.) 384, 8 Am. Dec. 415.

North Carolina. — *Barnawell v. Threadgill*, 5 Ired. Eq. (40 N. Car.) 88; *Smith v. Hays*, 1 Jones Eq. (54 N. Car.) 321.

Ohio. — *Cram v. Green*, 6 Ohio 429; *Darst v. Phillips*, 41 Ohio St. 514.

Oregon. — *Phipps v. Kelly*, 12 Oregon 213.

Pennsylvania. — *Biddle v. Moore*, 3 Pa. St. 161; *Wesley Church v. Moore*, 10 Pa. St. 273; *Dick's Appeal*, 106 Pa. St. 589.

Tennessee. — *Bright v. Newland*, 4 Sneed (Tenn.) 440; *McKoin v. Cooley*, 3 Humph. (Tenn.) 559.

Vermont. — *Viele v. Hoag*, 24 Vt. 46.

Wisconsin. — *Catlin v. Wheeler*, 49 Wis. 507.

Thus the Provision of a Legal Remedy Does Not Affect the Power of Equity to entertain a bill for contribution between sureties. *Couch v. Terry*, 12 Ala. 225; *Mitchell v. Sproul*, 5 J. J. Marsh. (Ky.) 264; to contest a will, *Raudebaugh v. Shelley*, 6 Ohio St. 307; for a distribution of shares against executors and administrators, *Decouche v. Savetier*, 3 Johns. Ch. (N. Y.) 190, 8 Am. Dec. 478; to impeach the consideration of a specialty, *Case v. Fishback*, 10 B. Mon. (Ky.) 40 (see also *Wood v. Kendall*, 7 J. J. Marsh. (Ky.) 212); to relieve on the ground of "payment after day" against a judgment, *Whittington v. Roberts*, 4 T. B. Mon. (Ky.) 175; *Harlan v. Wingate*, 2 J. J. Marsh. (Ky.)

138; to recover on a lost note, *Crawford v. Childress*, 1 Ala. 482; *Hardeman v. Battersby*, 53 Ga. 36 (lost warehouse receipts for cotton); *Patton v. Campbell*, 70 Ill. 72. See also title **LOST PAPERS AND RECORDS**, vol. 19, p. 564.

2. **Presumption Against Unreason and Injustice** — *England.* — *Reg. v. Brackenridge*, L. R. 1 C. C. 133; *Atty.-Gen. v. Hackney Local Board*, L. R. 20 Eq. 626; *The Englishman*, 3 P. D. 18; *River Wear Com'rs v. Adamson*, 2 App. Cas. 743; *Smith v. Great Western R. Co.*, 3 App. Cas. 165; *Matter of Endowed School Acts*, 3 App. Cas. 872; *Dixon v. Caledonian, etc., R. Co.*, 5 App. Cas. 827; *Metropolitan Asylum Dist. v. Hill*, 6 App. Cas. 208; *Re Lewis*, 1 Q. B. D. 725; *Wright v. London General Omnibus Co.*, 2 Q. B. D. 271; *Verdin v. Wray*, 2 Q. B. D. 608; *Board of Works v. Spackman*, 13 Q. B. D. 878; *Ex p. Thoday*, 2 Ch. D. 229; *Ex p. Learoyd*, 10 Ch. D. 5; *Ex p. Corbett*, 14 Ch. D. 129; *Ex p. Walton*, 17 Ch. D. 746; *Reg. v. Morris*, L. R. 1 C. C. 90; *Pike v. Nicholas*, L. R. 5 Ch. 251; *Ex p. O'Loghlen*, L. R. 6 Ch. 406; *Rex v. Justices*, 7 T. R. 103; *Rochfort v. Atherley*, 1 Ex. D. 511; *Tottenham Local Board of Health v. Rowell*, 1 Ex. D. 514; *Graves's Case*, L. R. 4 Q. B. 715; *Reg. v. Sevenoaks*, 7 Q. B. 136, 53 E. C. L. 136; *Overseers of Poor v. Shaw*, 10 Q. B. 868, 59 E. C. L. 868; *Reg. v. Trafford*, 15 Q. B. 200, 69 E. C. L. 200; *Matter of Williams*, 2 El. & Bl. 84, 75 E. C. L. 84; *Reg. v. Eastern Counties R. Co.*, 5 El. & Bl. 974, 85 E. C. L. 974; *Reg. v. Justices*, El. Bl. & El. 256, 96 E. C. L. 256; *Reg. v. Justices*, El. Bl. & El. 713, 96 E. C. L. 713; *Ex p. May*, 2 B. & S. 426, 110 E. C. L. 426; *Reg. v. Higginson*, 2 B. & S. 471, 110 E. C. L. 471; *Reg. v. Justices*, 4 B. & S. 966, 116 E. C. L. 966; *Reg. v. Linford*, 7 El. & Bl. 950, 90 E. C. L. 950; *Rex v. Finnis*, 1 El. & El. 935, 102 E. C. L. 935, 28 L. J. M. C. 201; *Pickering v. Marsh*, 43 L. J. M. C. 143; *Rex v. Croke*, 1 Cowp. 30; *Chapman v. Robinson*, 1 El. & El. 25, 102 E. C. L. 25; *Thompson v. Gibson*, 8 M. & W. 288; *Page v. Pearce*, 8 M. & W. 677; *Rex v. Justices*, 1 Dougl. 193; *Rex v. Justices*, 15 East 200; *Rex v. Justices*, 1 B. & Ald. 210; *Rex v. Thackwell*, 4 B. & C. 62, 10 E. C. L. 277; *Reg. v. Chichester*, 2 El. & El. 209, 105 E. C. L. 209, 29 L. J. Q. B. 23; *Hollis v. Marshall*, 2 H. & N. 755; *Boyce v. Higgins*, 14 C. B. 1, 78 E. C. L. 1; *Rex v. Justices*, 6 M. & S. 279, 3 B. & Ad. 938, 23 E. C. L. 223; *Reg. v. Watts*, 7 Ad. & El. 461, 34 E. C. L. 146; *Wood v. Heath*, 4 M. & G. 918, 43 E. C. L. 473; *Beckham v. Drake*, 2 H. L. Cas. 579; *Chatterton v. Cave*, 2 C. P. D. 42; *Bradbury v. Hotten*, L. R. 8 Exch. 1; *Planche v. Braham*, 4 Bing. N. Cas. 17, 33 E. C. L. 269; *D'Almaine v. Boosey*, 1 Y. & C. Exch. 301; *Bridge v. Branch*, 1 C. P. D. 633.

United States. — *Murray v. Gibson*, 15 How. (U. S.) 421; *U. S. v. The Hunter*, Pet. (C. C.) 10; *Mills v. Scott*, 99 U. S. 25; *Ex p. Crow Dog*, 109 U. S. 556.

that where a literal interpretation leads to unreasonable or unjust consequences, and an intention to enact a reasonable statute may be fairly inferred, the court will adopt a sensible construction such as will effectuate the legislative intention and avoid the objectionable consequences.¹ Where, however, the language used is plain and unambiguous, courts are not to consult consequences in its construction;² and it has been said that injustice, to be of

Arkansas.—*Buckner v. Real Estate Bank*, 5 Ark. 536, 41 Am. Dec. 105; *Wassell v. Tunnah*, 25 Ark. 101; *Haney v. State*, 34 Ark. 263.

California.—*In re Mitchell*, 120 Cal. 384.

Colorado.—*Bradley v. People*, 8 Colo. 599.

Connecticut.—*Wolcott v. Pond*, 19 Conn. 597.

Georgia.—*Allen v. Savannah*, 9 Ga. 286; *Moravian Seminary v. Atwood*, 50 Ga. 382; *Lombard v. Young Men's Library Assoc. Fund*, 73 Ga. 322.

Idaho.—*Chandler v. Lee*, 1 Idaho 349.

Illinois.—*People v. Admire*, 39 Ill. 251; *Perry County v. Jefferson County*, 94 Ill. 214; *Loverin v. McLaughlin*, 161 Ill. 433.

Indiana.—*Jeffersonville v. Weems*, 5 Ind. 547; *Smith v. Moore*, 90 Ind. 305; *Storms v. Stevens*, 104 Ind. 46; *Hunt v. Lake Shore, etc.*, R. Co., 112 Ind. 69.

Kentucky.—*Samuels v. Com.*, 10 Bush (Ky.) 491.

Louisiana.—*Foley v. Bourg*, 10 La. Ann. 129.

Maine.—*Chase v. Dwinall*, 7 Me. 134, 20 Am. Dec. 352; *Watts v. Somerset, etc.*, R. Co., 47 Me. 345.

Maryland.—*Bell v. Jones*, 10 Md. 322.

Massachusetts.—*Wales v. Stetson*, 2 Mass. 146, 3 Am. Dec. 39; *Church v. Crocker*, 3 Mass. 21; *Richards v. Dagget*, 4 Mass. 537; *Stanwood v. Peirce*, 7 Mass. 458; *Com. v. Bailey*, 13 Allen (Mass.) 545; *Gibson v. Jenney*, 15 Mass. 205; *Holbrook v. Holbrook*, 1 Pick. (Mass.) 248; *Com. v. Cambridge*, 20 Pick. (Mass.) 272; *Eaton v. Green*, 22 Pick. (Mass.) 526.

Michigan.—*Kephart v. Farmers', etc., Bank*, 4 Mich. 602; *People v. Burns*, 5 Mich. 114; *Harris v. Haynes*, 30 Mich. 140; *Van Fleet v. Van Fleet*, 49 Mich. 610.

Minnesota.—*Coy v. Coy*, 15 Minn. 119.

Mississippi.—*Learned v. Corley*, 43 Miss. 687.

Missouri.—*Neenan v. Smith*, 50 Mo. 525; *Fusz v. Spaunhorst*, 67 Mo. 256; *State v. Hayes*, 81 Mo. 574; *Potter v. Douglas County*, 87 Mo. 239.

Nebraska.—*Kelley v. Gage County*, (Neb. 1903) 93 N. W. Rep. 194.

New Jersey.—*State v. Clark*, 29 N. J. L. 96; *Associates of Jersey Co. v. Davidson*, 29 N. J. L. 415.

New York.—*Cleveland Fire Alarm Tel. Co. v. Metropolitan Fire Com'rs*, 55 Barb. (N. Y.) 288; *Whedon v. Champlin*, 59 Barb. (N. Y.) 61; *Johnson v. Bush*, 3 Barb. Ch. (N. Y.) 238; *People v. Fay*, 3 Lans. (N. Y.) 398; *Smith v. People*, 47 N. Y. 330; *Varick v. Briggs*, 6 Paige (N. Y.) 323.

Ohio.—*Moore v. Given*, 39 Ohio St. 661; *Sawyer v. State*, 45 Ohio St. 343.

Pennsylvania.—*Nicholas v. Phelps*, 15 Pa. St. 36; *Welch v. Kline*, 57 Pa. St. 432; *Grant v. Hickox*, 64 Pa. St. 334; *Philadelphia v. Edwards*, 78 Pa. St. 62; *Com. v. Mitchell*, 82 Pa. St. 343; *Findley v. Pittsburgh*, 82 Pa. St. 351; *Seymour v. Hubert*, 83 Pa. St. 346; *Clohesy v.*

Roedelheim, 99 Pa. St. 56; *Com. v. Lentz*, 106 Pa. St. 643; *Halderman v. Young*, 107 Pa. St. 324; *Douglass v. Com.*, 108 Pa. St. 559; *Klinginsmith v. Nole*, 3 P. & W. (Pa.) 119; *Downey v. Ferry*, 2 Watts (Pa.) 304; *McCloskey v. McConnell*, 9 Watts (Pa.) 17; *Stewart v. Keemle*, 4 S. & R. (Pa.) 72; *Kelly Tp. v. Union Tp.*, 5 W. & S. (Pa.) 535.

South Carolina.—*Ham v. M'Claws*, 1 Bay (S. Car.) 98.

Texas.—*McLelland v. Shaw*, 15 Tex. 319; *Robinson v. Varnell*, 16 Tex. 382; *State v. De Gress*, 53 Tex. 387.

Vermont.—*McFarland v. Stone*, 17 Vt. 173, 44 Am. Dec. 325; *Ryegate v. Wardsboro*, 30 Vt. 746.

West Virginia.—*Dickey v. Smith*, 42 W. Va. 809.

Wisconsin.—*Easley v. Whipple*, 57 Wis. 485; *Gilkey v. Cook*, 60 Wis. 133; *Haseltine v. Hewitt*, 61 Wis. 121.

See also *supra*, this section, 4. *Whether Intention Deduced from Letter or Spirit of Statute*—*Where Meaning in Doubt, the Spirit Controls*.

1. Sensible Construction to Avoid Unreasonable and Unjust Consequences.—*Lau Ow Bew v. U. S.*, 144 U. S. 47; *Iuka v. Schlosser*, 97 Ill. App. 222; *Gibson v. Jenney*, 15 Mass. 205 (stated under EXEMPTIONS (FROM EXECUTION), vol. 12, p. 127); *Parker v. Nothomb*, (Neb. 1903) 93 N. W. Rep. 851. *affirming* (Neb. 1902) 91 N. W. Rep. 395; *Briggs v. Easterly*, 62 Barb. (N. Y.) 60. See also the reference at the end of last preceding note.

In *Varick v. Briggs*, 6 Paige (N. Y.) 323, the court, by Walworth, C., said: "In construing statutes; however, it is not reasonable to presume that the legislature intended to violate a settled principle of natural justice or to destroy a vested title to property. Courts, therefore, in construing statutes, will always endeavor to give such an interpretation to the language used as to make it consistent with reason and justice."

A statute which throws on a railroad liability for stock injured through its failure to fence its right of way is not to be so construed as to render it liable when the injury occurs through sudden and unavoidable destruction of a fence. *Murray v. New York Cent. R. Co.*, 3 Abb. App. Dec. (N. Y.) 342.

An Amendment or New Charter Granted to an Existing Municipal Corporation will be presumed to intend the continuance of the old corporation with its rights and liabilities, although different powers are possessed under the new charter, and different officers administer its affairs; to suppose otherwise would be to impute to the state an insensibility to the claims of morality and justice. *Broughton v. Pensacola*, 93 U. S. 266.

2. See also *supra*, this section, 4. *Whether Intention Deduced from Letter or Spirit of Statute*—*Results, Motives, and Policy Not Considered*.

weight in the construction of a statute, must be a manifest injustice, so that it must have been present to the minds of those who were passing the statute.¹

h. **ABSURDITY.** — Under like limitations there is a strong presumption against absurdity in a statute, and when the language of an act is susceptible of two senses, that sense will be adopted which will not lead to absurd consequences.²

i. **INCONVENIENCE.** — The same principles apply in the case of an ambiguous statute, one construction of which will lead to great inconvenience; and the courts, presuming that such a consequence could not have been intended, will, if possible, adopt some other construction.³ But here, as always, the plain meaning of unambiguous words cannot be disregarded.⁴

1. Injustice Must Be Manifest. — *Reg. v. Monck*, 2 Q. B. D. 555.

2. Presumption Against Absurdity — England. — *Grey v. Pearson*, 6 H. L. Cas. 61; *River Wear Com'rs v. Adamson*, 2 App. Cas. 743; *Ex p. Walton*, 17 Ch. D. 752; *Woodward v. Watts*, 2 El. & Bl. 452, 75 E. C. L. 452.

United States. — *U. S. v. Fisher*, 2 Cranch (U. S.) 400; *Sturges v. Crownshield*, 4 Wheat. (U. S.) 202; *Oates v. Montgomery First Nat. Bank*, 100 U. S. 239; *Holy Trinity Church v. U. S.*, 143 U. S. 457; *U. S. v. Hogg*, 112 Fed. Rep. 909, 50 C. C. A. 608, *affirming* 111 Fed. Rep. 293; *Tsoi Sim v. U. S.*, (C. C. A.) 116 Fed. Rep. 920.

Alabama. — *Sprowl v. Lawrence*, 33 Ala. 674.

California. — *San Diego v. Granniss*, 77 Cal. 511.

Colorado. — *Murray v. Hobson*, 10 Colo. 66.

Illinois. — *Perry County v. Jefferson County*, 94 Ill. 214; *People v. Gault*, 149 Ill. 39; *South Park Com'rs v. Chicago First Nat. Bank*, 177 Ill. 243.

Indiana. — *Jeffersonville v. Weems*, 5 Ind. 547.

Kentucky. — *Bailey v. Com.*, 11 Bush (Ky.) 688 (stated under IMMEDIATE, vol. 15, p. 1022); *Bird v. Kenton County*, 95 Ky. 195; *Bosley v. Mattingly*, 14 B. Mon. (Ky.) 72.

Massachusetts. — *Com. v. Loring*, 8 Pick. (Mass.) 370 (stated under title DEAD BODY, vol. 8, p. 840).

Michigan. — *Alvord v. Lent*, 23 Mich. 372.

Nebraska. — *Logan County v. Carnahan*, (Neb. 1903) 95 N. W. Rep. 812, *affirming* (Neb. 1903) 92 N. W. Rep. 984.

New Jersey. — *State v. Clark*, 29 N. J. L. 96 (where an act forbidding wilful destruction of property was held not to include the owner thereof; see title MALICIOUS MISCHIEF, vol. 19, p. 44); *Douglass v. Essex County*, 38 N. J. L. 214.

New York. — *People v. Davenport*, 91 N. Y. 574; *People v. Lovell*, (County Ct.) 21 Misc. (N. Y.) 571.

Pennsylvania. — *Com. v. Wetherill*, 8 Pa. Dist. 654, 23 Pa. Co. Ct. 60; *Philadelphia v. Ridge Ave. Pass. R. Co.*, 102 Pa. St. 197.

Rhode Island. — *State v. Drowne*, 20 R. I. 302.

Vermont. — *Henry v. Tilson*, 17 Vt. 479.

Wisconsin. — *Malloy v. Chicago*, etc., R. Co., 109 Wis. 29.

In *Reg. v. Judge*, (1892) 1 Q. B. 290, Lord Esher, M. R., said: "If the words of an act are clear, you must follow them, even though they lead to a manifest absurdity. The court has

nothing to do with the question whether the legislature has committed an absurdity. In my opinion, the rule has always been this; if the words of an act admit of two interpretations, then they are not clear; and if one interpretation leads to an absurdity, and the other does not, the court will conclude that the legislature did not intend to lead to an absurdity, and will adopt the other interpretation."

By an Absurdity Is Meant that which is to be regarded as morally impossible, which is contrary to reason, or, in other words, which could not be attributed to men in their right senses. *Potter v. Douglas County*, 87 Mo. 239.

The Law Does Not Require Impossibilities, and where a literal construction of a statute leads to such a result, it should be avoided. *The Generous*, 2 Dods. 322; *People v. Admire*, 39 Ill. 251; *Potter v. Douglas County*, 87 Mo. 239.

3. Presumption Against Inconvenience — England. — *Gatty v. Fry*, 2 Ex. D. 265; *Rex v. Beeston*, 3 T. R. 594; *Patten v. Rhymer*, 3 El. & El. 1, 107 E. C. L. 1; *Corbet v. Haigh*, 5 C. P. D. 50; *Iles v. Assessment Committee*, 8 Q. B. D. 69; *Reg. v. Tonbridge Overseers*, 13 Q. B. D. 342; *Whistler v. Forster*, 14 C. B. N. S. 248, 108 E. C. L. 248; *Austin v. Bunyard*, 6 B. & S. 687, 118 E. C. L. 687.

United States. — *U. S. v. Fisher*, 2 Cranch (U. S.) 386; *Knowlton v. Moore*, 178 U. S. 41.

Illinois. — *People v. Illinois*, etc., Canal, 4 Ill. 153.

Kentucky. — *Divine v. Harvie*, 7 T. B. Mon. (Ky.) 444, 18 Am. Dec. 194.

Maryland. — *Baltimore v. Root*, 8 Md. 95, 63 Am. Dec. 692.

New Jersey. — *Water Com'rs v. Hudson*, 13 N. J. Eq. 420; *Associates of Jersey Co. v. Davison*, 29 N. J. L. 415.

New York. — *Smith v. People*, 47 N. Y. 336.

Pennsylvania. — *Kerlin v. Bull*, 1 Dall. (Pa.) 178; *Bulkley v. Eckert*, 3 Pa. St. 368, 45 Am. Dec. 650; *Wagener's Estate*, 191 Pa. St. 571.

South Carolina. — *Carolina Sav. Bank v. Evans*, 28 S. Car. 521.

4. Ambiguity Must Be Present — England. — *Rex v. Beeston*, 3 T. R. 594; *Biffin v. Yorke*, 5 M. & G. 436, 44 E. C. L. 232.

Kansas. — *Dudley v. Reynolds*, 1 Kan. 285.

Massachusetts. — *Thaxter v. Jones*, 4 Mass. 574; *Putnam v. Longley*, 11 Pick. (Mass.) 489.

Michigan. — *Bidwell v. Whitaker*, 1 Mich. 479.

New Jersey. — *Douglass v. Essex County*, 38 N. J. L. 216.

New York. — *People v. New York Cent. R. Co.*, 13 N. Y. 78; *Hyatt v. Taylor*, 42 N. Y. 262;

j. **INEFFECTIVENESS.** — Where an act or word is susceptible of two meanings, the court will give it such construction as will render the law effective and not nugatory,¹ and, unless the contrary intention be plainly manifest, no sentence, clause, or word is to be disregarded or treated as superfluous or insignificant.²

k. **UNNECESSARY CHANGE IN LAW** — (1) *In General.* — The presumption is that the legislature does not intend to change or modify the law beyond what it declares, either in express terms or by unmistakable implication.³ At the same time, as to the express declarations of a statute, it will be presumed to have been intended to effect some alteration in the law, and not to be a mere repetition of the previous law as to which no doubt or question existed.⁴

Application of Presumption to Codes. — In *England* it has been finally decided that this presumption is not applicable to the construction of codes, that is, to acts which aim to reduce to statutory form the whole law on a given topic, whether found in pre-existing statutes or in the decisions of courts declaring the common law. In the case of such a statute the courts should examine the language of the act and deduce therefrom its natural meaning uninfluenced by any considerations derived from the previous state of the law or by any presumption that no alteration was intended.⁵ But in the *United States*

Jackson v. Lewis, 17 Johns. (N. Y.) 475; *Ludewig v. Pariser*, (N. Y. Super. Ct. Spec. T.) 4 Abb. N. Cas. (N. Y.) 246.

South Carolina. — *Carolina Sav. Bank v. Evans*, 28 S. Car. 521.

Wisconsin. — *Appleton Waterworks Co. v. Appleton*, (Wis. 1903) 93 N. W. Rep. 262.

1. Construction Against Ineffectiveness. — *Mack v. Prince*, 40 W. Va. 326. See also *supra*, this subsection, *c. Unconstitutionality*.

2. Effect Given to Every Part of Act. — See *supra*, this section, 8. *Construing Entire Statute as One Whole — Every Clause to Be Given Effect.*

3. Law Not Changed Except as Specified — *England.* — *River Wear Com'rs v. Adamson*, 1 Q. B. D. 554; *Minet v. Leman*, 20 Beav. 278; *Rex v. Butler*, 1 W. Bl. 649; *Arthur v. Bokenham*, 11 Mod. 150; *Washer v. Elliott*, 1 C. P. D. 169.

Canada. — *Thivierge v. Cinquars*, 13 Quebec Super. Ct. 398; *Wallace v. Lea*, 28 Can. Sup. Ct. 595, reversing 33 N. Bruns. 492.

United States. — *U. S. v. Fisher*, 2 Cranch (U. S.) 358; *Shaw v. Merchants' Nat. Bank*, 101 U. S. 557.

Connecticut. — *Duffield v. Pike*, 71 Conn. 521.

Illinois. — *Cadwallader v. Harris*, 76 Ill. 372.

Kentucky. — *Lee v. Forman*, 3 Met. (Ky.) 114.

Maryland. — *Keech v. Baltimore, etc., R. Co.*, 17 Md. 32; *Day v. Allender*, 22 Md. 527; *Heiskell v. Baltimore*, 65 Md. 125, 57 Am. Rep. 308.

Massachusetts. — *Osgood v. Breed*, 12 Mass. 530; *Wilbur v. Crane*, 13 Pick. (Mass.) 290; *Harwood v. Lowell*, 4 Cush. (Mass.) 313.

Michigan. — *Bandfield v. Bandfield*, 117 Mich. 80, 72 Am. St. Rep. 550.

Minnesota. — *Sullivan v. La Crosse, etc., Steam Packet Co.*, 10 Minn. 386.

Mississippi. — *Hollman v. Bennet*, 44 Miss. 323.

New Jersey. — *State v. Norton*, 23 N. J. L. 33.

New York. — *Graham v. Van Wyck*, 14 Barb. (N. Y.) 531; *White v. Wager*, 32 Barb. (N. Y.)

250, 25 N. Y. 328; *Howe v. Peckham*, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 230; *M'Queen v. Middletown Mfg. Co.*, 16 Johns. (N. Y.) 6; *Douglass v. Howland*, 24 Wend. (N. Y.) 35; *Bertles v. Nunan*, 92 N. Y. 152, 44 Am. Rep. 361; *People v. Palmer*, 109 N. Y. 110, 4 Am. St. Rep. 423; *Fitzgerald v. Quann*, 109 N. Y. 444. *Pennsylvania.* — *Huber v. Reily*, 53 Pa. St. 112.

Tennessee. — *McGinnis v. State*, 9 Humph. (Tenn.) 46, 49 Am. Dec. 697; *Sheafer v. Mitchell*, (Tenn. 1902) 71 S. W. Rep. 86.

The Same Rule Applies to Statutes Which It Is Contended Change Existing Statutes as to those which it is contended change the common law. *Colorado Milling, etc., Co. v. Mitchell*, 26 Colo. 284, affirming 12 Colo. App. 277.

A Statute Enabling Married Women to Take, Convey, and Devise Property will not be extended to married infants. *Zimmerman v. Schoenfeldt*, 3 Hun (N. Y.) 692.

An Act Giving an Adopted Child the Right to Inherit was held not intended to change in any respect the law relating to collateral inheritance tax, from which only lineal descendants were exempted. *Com. v. Nancrede*, 32 Pa. St. 389.

A New Clause Added in a Revision should be construed in its natural sense without reference to this presumption. *Collins v. Millen*, 57 Ohio St. 289.

4. Statute Not Presumed to Be Without Purpose. — *Conger v. Kennedy*, 26 Can. Sup. Ct. 404.

A new enactment is to be interpreted "in the light of the general policy of previous legislation and of the long established principles of law and equity," and "there is a presumption that by the new enactment the legislature intended some progress along the line, and did not intend any reversal, of such established policy and principle." *Haggett v. Hurley*, 91 Me. 547.

5. English Law as to Codifying Acts. — *Bank of England v. Vagliano*, (1891) A. C. 107, per Lord Herschell, who observed also, with apparent justice, that the application to the Bills of Exchange Act of the presumption that no change was intended in the law would almost

such an exception seems never to have been adverted to, and "the general presumption will be indulged that the codifiers did not intend to change the laws as they formerly stood, their functions being merely to bring forward and arrange them; and that the legislature, in codifying the laws, intended to bring them forward, giving them the same effect which they formerly had."¹

(2) *Adopting Language of Settled Meaning.* — When an act or part thereof which has received a judicial interpretation is re-enacted in the same terms, or where words used in a statute have a definite and well-known meaning in law, that construction or that meaning must be considered to have the sanction of the legislature unless the contrary appears.²

entirely defeat its utility, as instead of finding the law in the statute, it must still be extracted from a multitude of previous decisions whose examination would require knowledge of numerous obsolete legal proceedings. Lord Herschell was careful to say, however, that resort to the old law might still be necessary, as when a provision of the act was of doubtful import or its language had previously acquired a technical meaning. The exact point involved in this case and the opposite view of the lower court, which applied the presumption, are stated under the title *BILLS AND NOTES*, vol. 4, p. 116, note.

The principle thus established was subsequently applied by the privy council to the construction of the civil code of Lower Canada. *Robinson v. Canadian Pac. R. Co.*, (1892) A. C. 481. See also *In re English Bank*, (1893) 2 Ch. 442.

Consolidating and Amending Acts are subject to a different rule, and they must be construed with regard to previous legislation. *In re Budget*, (1894) 2 Ch. 557.

1. **View in the United States.** — *Braun v. State*, 40 Tex. Crim. 236. See also cases cited to the last paragraph of text *supra*.

2. **Re-enactment and Use of Phrases Judicially Interpreted** — *England.* — *Mansell v. Reg.*, 8 El. & Bl. 93, 92 E. C. L. 93; *Ex p. Campbell*, L. R. 5 Ch. 706; *Ex p. Thorne*, 3 Ch. D. 458; *Ex p. Attwater*, 5 Ch. D. 30; *Bustros v. White*, 1 Q. B. D. 425; *Dale's Case*, 6 Q. B. D. 453; *Barlow v. Teal*, 15 Q. B. D. 403.

Canada. — *McCurdy v. McRae*, 23 Nova Scotia 43; *Halifax Pilot Com'rs v. Farquhar*, 26 Nova Scotia 333.

United States. — *U. S. v. Mooney*, 116 U. S. 104; *U. S. v. Central Pac. R. Co.*, 118 U. S. 235; *U. S. v. Le Bris*, 121 U. S. 278; *In re Guggenheim Smelting Co.*, 121 Fed. Rep. 153; *The Devonshire*, 13 Fed. Rep. 39; *U. S. v. Trans-Missouri Freight Assoc.*, 58 Fed. Rep. 58, 19 U. S. App. 36.

Alabama. — *Duramus v. Harrison*, 26 Ala. 326; *Ex p. Banks*, 28 Ala. 28; *Anthony v. State*, 29 Ala. 27; *Glass v. State*, 30 Ala. 531; *Mobile Bank v. Meagher*, 33 Ala. 622; *O'Byrnes v. State*, 51 Ala. 25; *Ex p. Roundtree*, 51 Ala. 42; *Ex p. Matthews*, 52 Ala. 51; *Woolsey v. Cade*, 54 Ala. 378, 25 Am. Rep. 711; *Huddleston v. Askey*, 56 Ala. 218; *Posey v. Pressley*, 60 Ala. 243; *Morrison v. Stevenson*, 69 Ala. 448; *Snider v. Burks*, 84 Ala. 57; *Barnewall v. Murrell*, 108 Ala. 366.

Arkansas. — *McKenzie v. State*, 11 Ark. 594.

California. — *People v. Webb*, 38 Cal. 467; *In re Baker*, 55 Cal. 303; *Eck v. Hoffman*, 55 Cal. 502.

Colorado. — *Harvey v. Travelers' Ins. Co.*, 18 Colo. 354.

Illinois. — *McGann v. People*, 194 Ill. 526, reversing 97 Ill. App. 587.

Indiana. — *State v. Swope*, 7 Ind. 91; *Indianapolis, etc., R. Co. v. Guard*, 24 Ind. 222, 87 Am. Dec. 327; *Anderson v. Bell*, 140 Ind. 375.

Louisiana. — *State v. Brewer*, 22 La. Ann. 273.

Maine. — *Myrick v. Hasey*, 27 Me. 9, 46 Am. Dec. 583; *Cota v. Ross*, 66 Me. 161; *Tuxbury's Appeal*, 67 Me. 269; *Harpwell v. Cumberland County*, 78 Me. 103.

Maryland. — *McKee v. McKee*, 17 Md. 352.

Massachusetts. — *Com. v. Hartnett*, 3 Gray (Mass.) 451; *Grace v. M'Elroy*, 1 Allen (Mass.) 566; *Cronan v. Cotting*, 104 Mass. 248, 6 Am. Rep. 232; *Low v. Blanchard*, 116 Mass. 274.

Missouri. — *Collins v. Wilhoit*, 35 Mo. App. 585; *Kelly v. Thuey*, 143 Mo. 422.

Nevada. — *Gould v. Wise*, 18 Nev. 253.

New Hampshire. — *Tomson v. Ward*, 1 N. H. 12; *Moore v. Bunker*, 29 N. H. 420; *Frink v. Pond*, 46 N. H. 126.

New Jersey. — *Matter of Murphy*, 23 N. J. L. 180.

New York. — *Perkins v. Smith*, 116 N. Y. 441; *Hakes v. Peck*, (Supm. Ct. Gen. T.) 30 How. Pr. (N. Y.) 104; *Erhard v. Kings County*, (Supm. Ct. Spec. T.) 36 N. Y. Supp. 656.

North Carolina. — *Bridgers v. Taylor*, 102 N. Car. 86.

Ohio. — *Gray v. Askew*, 3 Ohio 480; *Turney v. Yeoman*, 14 Ohio 218; *Grogan v. Garrison*, 27 Ohio St. 63; *Bulkley v. Stephens*, 29 Ohio St. 622; *State v. Jackson*, 36 Ohio St. 286.

Pennsylvania. — *Evans v. Ross*, 107 Pa. St. 235; *Gonder v. Estabrook*, 33 Pa. St. 375; *Com. v. Lehigh Valley R. Co.*, 104 Pa. St. 89.

Texas. — *Munson v. Hallowell*, 26 Tex. 484, 84 Am. Dec. 582; *Timmins v. Bonner*, 58 Tex. 558; *Sanders v. Bridges*, 67 Tex. 94; *Hussey v. Moser*, 70 Tex. 44; *Cooper v. Yoakum*, 91 Tex. 391.

Virginia. — *Mangus v. McClelland*, 93 Va. 786.

West Virginia. — *Daniel v. Simms*, 49 W. Va. 554.

Wisconsin. — *Harrington v. Smith*, 28 Wis. 43.

See also *supra*, this section, 5. *Interpretation of Words and Phrases* — *Technical Words* — *Legal Terms*; and *infra*, this title, *Particular Application of Principle of Construction* — *Adopted Statutes*.

The re-enactment of a statute of the state is

(3) *Change of Phraseology.* — In the amendment, re-enactment, or revision of a statute a mere change of phraseology works no change in the established interpretation thereof, unless it clearly appears that such was the intention of the legislature;¹ and this rule is especially applicable to general statutory revisions or codes.²

an adoption of the construction previously given thereto by the courts of the state. *White v. State*, 134 Ala. 197; *Hilliker v. Citizens St. R. Co.*, 152 Ind. 88; *Camp v. Wabash R. Co.*, 94 Mo. App. 272; *State v. Cornell*, 54 Neb. 647; *Kendall v. Garneau*, 55 Neb. 403.

Statutory Provisions exist in several states that acts substantially the same as existing statutes (and some enactments add, or as the common law) shall be construed as continuations thereof and not as new enactments. The *Louis Olsen*, (C. C. A.) 57 Fed. Rep. 845 (applying Civ. Code Cal., § 5); *Barrows v. Peoples' Gaslight, etc.*, Co., 75 Fed. Rep. 794 (applying Rev. Stat. Ill., c. 131, § 2); *Hartford F. Ins. Co. v. Walker*, 94 Tex. 473; *Judd v. State*, 25 Tex. Civ. App. 418; *Marston v. Yaites*, (Tex. Civ. App. 1901) 66 S. W. Rep. 867.

The Re-enactment of a Former Act with the Same Punctuation is a legislative adoption of the prior judicial construction giving effect to such punctuation. *Potter v. State*, 92 Ala. 39.

Where a Section of a State Code Is Codified from a Decision of its highest court, it will be presumed that the legislature intended merely to adopt the principle of law announced in the decision, unless the language of the section requires a different construction. *Calhoun v. Little*, 106 Ga. 336, 71 Am. St. Rep. 254.

A Practical or Executive Construction of a Former Act will generally be presumed to have been had in view in the adoption of similar language in later acts. *State v. Moore*, 50 Neb. 88, 61 Am. St. Rep. 538.

1. Amendments, Re-enactments, and Revisions — England. — *Cates v. Knight*, 3 T. R. 442; *Reg. v. Ingham*, 5 B. & S. 271, 117 E. C. L. 271; *Reg. v. Buttle*, L. R. 1 C. C. 251; *Hadley v. Perks*, L. R. 1 Q. B. 457; *Hudston v. Midland R. Co.*, L. R. 4 Q. B. 370; *Skinner v. Usher*, L. R. 7 Q. B. 427; *Mitchell v. Simpson*, 25 Q. B. D. 189; *Brown v. McLachlan*, L. R. 4 P. C. 550.

United States. — *McDonald v. Hovey*, 110 U. S. 619; *Taylor v. Bowker*, 111 U. S. 110.

Alabama. — *Bradley v. State*, 69 Ala. 318; *Jackson County v. Derrick*, 117 Ala. 348.

California. — *Hyatt v. Allen*, 54 Cal. 356.

Connecticut. — *Montville St. R. Co. v. New London Northern R. Co.*, 68 Conn. 418.

Iowa. — *State v. Smith*, 46 Iowa 672.

Kentucky. — *Allen v. Ramsey*, 1 Met. (Ky.) 635.

Massachusetts. — *Sheffield v. Lovering*, 12 Mass. 492; *Woodward v. Spurr*, 138 Mass. 593; *Hittinger v. Boston*, 139 Mass. 19; *Wright v. Dressel*, 140 Mass. 149.

Minnesota. — *McNamara v. Minnesota Cent. R. Co.*, 12 Minn. 388; *Burwell v. Tullis*, 12 Minn. 572; *Gaston v. Merriam*, 33 Minn. 279.

Missouri. — *Dawson v. Dawson*, 23 Mo. App. 173; *Stump v. Hornback*, 94 Mo. 33.

New Hampshire. — *Crowell v. Clough*, 23 N. H. 209; *Sloan v. Bryant*, 28 N. H. 71; *Moore v. Bunker*, 29 N. H. 420.

New Jersey. — *Matter of Murphy*, 23 N. J. L. 192; *State v. Hale*, 25 N. J. L. 328.

New York. — *Goodell v. Jackson*, 20 Johns. (N. Y.) 722, 11 Am. Dec. 351; *Douglass v. Howland*, 24 Wend. (N. Y.) 47; *Theriat v. Hart*, 2 Hill (N. Y.) 380; *Gaffney v. Colvill*, 6 Hill (N. Y.) 574; *Parmelee v. Thompson*, 7 Hill (N. Y.) 79; *Humbert v. Protestant Episcopal Church*, 1 Edw. (N. Y.) 312; *Dunham v. Waterman*, 17 N. Y. 13, 72 Am. Dec. 406; *Hall v. Western Transp. Co.*, 34 N. Y. 286; *Elwood v. Klock*, 13 Barb. (N. Y.) 55; *Douglas v. Douglas*, 5 Hun (N. Y.) 144; *Orser's Estate*, (Surrogate Ct.) 4 Civ. Pro. (N. Y.) 134; *Du Bois v. Brown*, 1 Dem. (N. Y.) 317; *Taggard v. Roosevelt*, 2 E. D. Smith (N. Y.) 102, 8 How. Pr. (N. Y.) 143; *Coxson v. Doland*, 2 Daly (N. Y.) 67.

Ohio. — *Boley v. Ohio L. Ins., etc., Co.*, 12 Ohio St. 144; *Dutoit v. Doyle*, 16 Ohio St. 405; *Marienthal v. Mosler*, 16 Ohio St. 569; *State v. Stockley*, 45 Ohio St. 308.

Pennsylvania. — *Chambers v. Carson*, 2 Whart. (Pa.) 9; *Com. v. Rainey*, 4 W. & S. (Pa.) 186; *McMicken v. Com.*, 58 Pa. St. 213.

Texas. — *Ennis v. Crump*, 6 Tex. 34.

Vermont. — *Clark v. Powell*, 62 Vt. 442; *Whitcomb v. Davenport*, 63 Vt. 656.

West Virginia. — *Brown v. Election Canvassers*, 45 W. Va. 827.

Wisconsin. — *Winterfield v. Stauss*, 24 Wis. 394.

The *New York Act* of 1818 required the defendant in a judgment by confession to make a "particular" statement and specification of "the nature and consideration" of the debt or demand, and where the demand arose on a note, bond, or other specialty, the "origin and consideration" of the same was required to be "particularly set forth." Section 383, subd. 2, of the Code of Procedure requires the defendant to "state concisely the facts out of which it [the money due or to become due] arose, and to show that the sum confessed therefor is justly due or to become due." It was held that the provision of the code did not change the law. *Dunham v. Waterman*, 17 N. Y. 13, 72 Am. Dec. 406.

2. Rule Applied to Revised Statutes and Codes — Kentucky. — *Overfield v. Sutton*, 1 Met. (Ky.) 621.

Maine. — *Hughes v. Farrar*, 45 Me. 72.

Minnesota. — *Hugo v. Miller*, 50 Minn. 105.

New Hampshire. — *Burnham v. Stevens*, 33 N. H. 247.

New York. — *Yates's Case*, 4 Johns. (N. Y.) 359; *Matter of Brown*, 21 Wend. (N. Y.) 316; *Dominick v. Michael*, 4 Sandf. (N. Y.) 374; *Croswell v. Crane*, 7 Barb. (N. Y.) 191; *People v. Deming*, 1 Hilt. (N. Y.) 271; *Hoffman v. Delihanty*, (Supm. Ct. Gen. T.) 13 Abb. Pr. (N. Y.) 388; *Taylor v. Delancy*, 2 Cai. Cas. (N. Y.) 151.

Ohio. — *Gardener v. Woodyear*, 1 Ohio 176; *Swazey v. Blackman*, 8 Ohio 20; *Ash v. Ash*, 9 Ohio St. 387; *Tyler v. Winslow*, 15 Ohio St. 368; *Williams v. State*, 35 Ohio St. 175; *State v. Jackson*, 36 Ohio St. 286; *State v. Shelby*

The Omission of a Word in the amendment, re-enactment, or revision of a statute will not change the law, unless such be the evident intent of the legislature.¹

A Material Change of Expression, however, must be taken *prima facie* to import a change of intention.² Where the omission of material words plainly indicates an intent to change the law, effect must be given to such intent.³

County, 36 Ohio St. 326; *State v. Vanderbilt*, 37 Ohio St. 640.

Texas.—*Ennis v. Crump*, 6 Tex. 34; *Gulf, etc., R. Co. v. Ft. Worth, etc., R. Co.*, 68 Tex. 98.

Virginia.—*Parramore v. Taylor*, 11 Gratt. (Va.) 220.

Several statutes provided that the widow of an intestate, in the absence of children of the intestate, "shall be entitled to the whole residue of the personal property after the debts, funeral charges, and other incidental expenses shall have been paid." These statutes were revised, and the revision provided that, in a like case, "the widow shall be entitled to all the personal estate as next of kin, which shall be subject to distribution upon settlement of the estate." It was held that the former rule as to the time when the widow's right to her share of the personal property accrued was not changed by the revision. *Conger v. Barker*, 11 Ohio St. 14.

Change for Conciseness.—So where the change in a revision is introduced in the interest of conciseness. *McDonald v. Hovey*, 110 U. S. 619; *Minneapolis, etc., R. Co. v. Cedar Rapids, etc., R. Co.*, 114 Iowa 502; *St. George v. Rockland*, 89 Me. 43; *State v. Brewster*, 44 Ohio St. 249.

Before the Courts May Pronounce a Change in the Law in an amendment, revision, or re-enactment of statutes, such intent must be evident, and language must be employed which is not susceptible of any other just construction. *Bradley v. State*, 69 Ala. 318.

Inferences Differ in Regard to Single Statutes and General Revision.—In *Allen v. Russell*, 39 Ohio St. 336, it was stated that where one or more sections of a statute were repealed and re-enacted in a different form, the fair inference would in general be that a change in meaning was intended, whereas in the case of a general revision there is a strong presumption that the same construction was to be applied to the consolidated statute as had been given to the prior acts.

1. Omission of Words in Amendments, etc.—*England*.—*Horn v. Ion*, 4 B. & Ad. 78, 24 E. C. L. 28; *Bond v. Rosling*, 1 B. & S. 371, 101 E. C. L. 371; *per Byles, J.*, in *Tidey v. Mollett*, 16 C. B. N. S. 298, 111 E. C. L. 298; *McCallmont v. Rankin*, 2 De G. M. & G. 418; *Parker v. Taswell*, 2 De G. & J. 559; *Liverpool Borough Bank v. Turner*, 2 De G. F. & J. 508; *Reg. v. Hulme*, L. R. 5 Q. B. 379; *In re Wright*, 3 Ch. D. 78.

Massachusetts.—*Ford v. Ford*, 143 Mass. 578.

Michigan.—*State v. Sparrow*, 89 Mich. 269.

Minnesota.—*Gaston v. Merriam*, 33 Minn. 279.

New York.—*Croswell v. Crane*, 7 Barb. (N. Y.) 195; *Douglas v. Douglas*, 5 Hun (N. Y.) 145.

Ohio.—*Painesville, etc., R. Co. v. King*, 17

Ohio St. 543; *State v. Shelby County*, 36 Ohio St. 330.

Vermont.—*Whitcomb v. Davenport*, 63 Vt. 656.

Where the Words Omitted Are Surplusage, merely specifying what the law presumes with respect to acts within the statute, no change is effected. *In re Wood*, L. R. 7 Ch. 302; *Ford v. Ford*, 143 Mass. 578. See also *Reg. v. Hulme*, L. R. 5 Q. B. 377.

2. Material Change of Expression—England.—*Rex v. Great Bolton*, 8 B. & C. 71, 15 E. C. L. 154; *St. Losky v. Green*, 9 C. B. N. S. 375, 99 E. C. L. 375; *Rickett v. Metropolitan R. Co.*, L. R. 2 H. L. 207; *Reg. v. Bullock*, L. R. 1 C. C. 117; *Lawrence v. King*, L. R. 3 Q. B. 348; *Reg. v. Price*, L. R. 6 Q. B. 416; *Dickenson v. Fletcher*, L. R. 9 C. P. 8.

United States.—*U. S. v. Bashaw*, 4 U. S. App. 360.

Alabama.—*Lehman v. Robinson*, 59 Ala. 240.

Colorado.—*Heinssen v. State*, 14 Colo. 228, 29 Am. & Eng. Corp. Cas. 532.

Connecticut.—*Mechanics, etc., Bank v. Versailles Woollen Co.*, 59 Conn. 347.

Maryland.—*Parkinson v. State*, 14 Md. 191, 74 Am. Dec. 522.

Massachusetts.—*Com. v. Messenger*, 4 Mass. 462; *Rutland v. Mendon*, 1 Pick. (Mass.) 156.

New Jersey.—*State v. Hale*, 25 N. J. L. 328.

New York.—*James v. Patten*, 6 N. Y. 9, 55 Am. Dec. 376; *Taggard v. Roosevelt*, 2 E. D. Smith (N. Y.) 102, 8 How. Pr. (N. Y.) 143.

Ohio.—*Bloom v. Richards*, 2 Ohio St. 403.

Pennsylvania.—*Rich v. Keyser*, 54 Pa. St. 89.

In *Reg. v. Price*, L. R. 6 Q. B. 416, *Cockburn, C. J.*, said that when the legislature in legislating *in pari materia*, and substituting certain provisions in an act for those which existed in an earlier one, has entirely changed the language of the enactment, it must be taken to have done so with some intention and motive.

When a Later Statute Substitutes a More Comprehensive Word or phrase for that used in the preceding act, a change in meaning is to be presumed. *Reg. v. Pembridge*, 3 Q. B. 901, 43 E. C. L. 1028; *Pennsylvania R. Co. v. Pittsburgh*, 104 Pa. St. 522. See also *Hurlbatt v. Barnett*, (1803) 1 Q. B. 77.

Where Parts of a Statute Are Omitted in a Revision, those parts are not to be revived by construction. *Pingree v. Snell*, 42 Me. 53; *Ellis v. Paige*, 1 Pick. (Mass.) 45; *Lyon v. Smith*, 11 Barb. (N. Y.) 126.

3. Omission of Material Words.—*West v. Francis*, 5 B. & Ald. 737, 7 E. C. L. 247; *Reg. v. Llangian*, 4 B. & S. 249, 116 E. C. L. 249; *Wills v. Russell*, 100 U. S. 621; *Broadbuss v. Broadbuss*, 10 Bush (Ky.) 299; *Buck v. Spofford*, 31 Me. 36; *Pingree v. Snell*, 42 Me. 53; *Blackburn v. Walpole*, 9 Pick. (Mass.) 104; *State v. Clark*, 57 Mo. 25; *Bloom v. Richards*, 2 Ohio St. 403; *Poe v. State*, 85 Tenn. 499.

12. Effect of Mistakes or Omissions, Substantial or Formal — a. PRESUMPTION AGAINST MISTAKES IN STATUTES — (1) *In General.* — It has been said that courts must proceed on the presumption that the legislature has made no mistake in a statute, either in regard to matters of law or of fact.¹ In other words, statements in statutes are *prima facie* evidence of their own correctness.

(2) *Statements of Fact.* — The effect and weight to be given to statements of facts in a statute have been considered in another connection.²

(3) *Statements of Law.* — It is to be assumed that the legislature knows or has informed itself on the existing state of the law on the subject of a statute.³ Yet a misapprehension of what the law is will not have the effect of making that law which the legislature erroneously assumed to be such, and the real state of the law may be shown,⁴ but it has been held that where a legal right is not only recognized as existing, but explicit provision is made for the form and manner of its exercise, it must be recognized by the courts though in fact it did not previously exist.⁵

b. CORRECTION OF ERRORS, OMISSIONS, OR MISUSE OF WORDS —

(i) *General Rule.* — When to give the words of a statute their ordinary meaning, or to adhere strictly to the arrangement of words and phrases in sentences, would result in manifest contradiction of, or inconsistency with, the plain purpose of the law, evident mistakes, accidental omissions, and the improper use of words may be remedied, the ordinary meaning may be modified, and even the structure of sentences may be altered, to prevent such a result.⁶ The power to make such corrections is well established, but it is exercised

Among the provisions of the statute of frauds, as revised by the *New York* legislature, was one relating to the manner of creating an estate or interest in land, and of assigning it, etc.; another prescribed the requisites of a valid contract for the sale of lands or any interest in lands; and both, by way of exception, left "leases for a term not exceeding one year" and "contracts for the leasing for a period not longer than one year" unaffected by the formalities and requisites therein prescribed, but omitted the words "from the making thereof" which were found in the statute before revision. It was held that the legislature intended to dispense entirely with the qualifications which the latter words would seem to import. *Young v. Dake*, 5 N. Y. 467, 55 Am. Dec. 356, *overruling* *Croswell v. Crane*, 7 Barb. (N. Y.) 191.

1. *Income Tax Com'rs v. Pemsel*, (1891) A. C. 549.

2. See *infra*, this title, *Evidence — Proof of Statutes.*

3. **Legislative View of Law Prima Facie Correct.** — *Mulcahy v. Reg.*, L. R. 3 H. L. 319; *Young v. Royal Leamington Spa*, 8 App. Cas. 526.

The Burden of Proving that the legislature has fallen into a mistake is cast upon those who say so. *Reg. v. Treasury*, 20 L. J. Q. B. 312, *per* Lord Campbell.

The Judicial Interpretation of a Prior Statute is presumed to be known to the legislature. *In re Barned's Banking Co.*, L. R. 3 Ch. 781.

4. **Mistaken View of the Law by Legislature Not Conclusive — England.** — *Dore v. Gray*, 2 T. R. 358; *Cambridge University v. Bryer*, 16 East 326; *Ex p. Lloyd*, 1 Sim. N. S. 248; *Reg. v. Houghton*, 6 Cox C. C. 104; *Shrewsbury v. Scott*, 6 C. B. N. S. 180, 95 E. C. L. 180, *per* Cockburn, C. J.; *Mersey Docks v. Cameron*, 11 H. L. Cas. 518; *Mitcalfe v. Hanson*, L. R. 1 H. L. 850; *Mollwe v. Court of Wards*, L. R. 4 P. C. 437.

Canada. — *North West Electric Co. v. Walsh*, 29 Can. Sup. Ct. 48; *In re Rockwood Electoral Div. Agricultural Soc.*, 12 Manitoba 656; *Ross v. Blake*, 28 Nova Scotia 546.

United States. — *District of Columbia v. Hutton*, 143 U. S. 27.

Mississippi. — *Davis v. Doe*, 25 Miss. 450.

Wisconsin. — *State v. Miller*, 23 Wis. 634.

5. **Effect of Provision for a Right Erroneously Assumed.** — *Norton v. Spooner*, 9 Moo. P. C. 129; *Ross v. Blake*, 28 Nova Scotia 543; *State v. Miller*, 23 Wis. 634. See also *Reg. v. Oldham*, L. R. 3 Q. B. 474.

"A mistaken opinion of the legislature concerning the law does not make the law. But if this mistake is manifested in words competent to make the law in future, we know of no principle which can deny them this effect." *Postmaster-Gen. v. Early*, 12 Wheat. (U. S.) 148, *per* Marshall, C. J. See also *Farmers' Bank v. Hale*, 59 N. Y. 53.

6. **Mistakes, Omissions, etc.** — *Wright v. Williams*, 1 M. & W. 97; *Becke v. Smith*, 2 M. & W. 195; *Atty-Gen. v. Lockwood*, 9 M. & W. 398; *Hollingworth v. Palmer*, 4 Exch. 267; *Miller v. Salomons*, 7 Exch. 475; *Ex p. Rashleigh*, 2 Ch. D. 9; *Com. v. Kimball*, 24 Pick. (Mass.) 366; *State v. Polk County*, 87 Minn. 325; *Orvil, Tp. v. Woodcliff*, 64 N. J. L. 289; *Baca v. Bernalillo County*, 10 N. Mex. 445; *White v. Rio Grande Western R. Co.*, (Utah 1903) 71 Pac. Rep. 593.

Conflict Between Words and Figures. — Where a statute contained the words and figures, "ninety thousand (50,000)," it was held that the words should control, the court declaring that where there is a conflict between words and figures, the former prevail, and this is especially true where the figures are subordinated in their relation to the sentence by bracket enclosures. *Weaver v. Davidson County*, 104 Tenn. 315.

only where the error is so manifest as to leave no doubt in the judicial mind as to the actual intent of the legislature,¹ and a genuine *casus omissus*, a case for which provision has been clearly and undoubtedly omitted, can be remedied by the legislature alone.²

Acts Authorized by Statute. — It is often provided in statutes that acts done "under," "by virtue of," or "in pursuance of" the same shall not be actionable, except on certain conditions; and the statutes limit the time and regulate the manner of proceeding when such acts are actionable. It is obvious that these words are not to be taken in their literal import, for acts done strictly under authority of the law cannot be actionable.³ Such provisions are obviously intended to protect under certain circumstances acts done in good faith and under color of the statute although not in fact legal or justifiable.⁴

(2) *Interpolation and Elimination.* — Courts cannot add to or take from the words of a statute to give effect to any supposed intention of the legislature,⁵ but when the intention can be ascertained with reasonable certainty, words may be altered or supplied in the statute so as to give it effect and avoid any repugnancy to or inconsistency with such intention.⁶ On the

1. **Error Must Be Manifest.** — *Green v. Wood*, 7 Q. B. 178, 53 E. C. L. 178; *Doe v. Moffatt*, 15 Q. B. 257, 69 E. C. L. 257; *Joseph v. Montreal*, 10 Quebec Super. Ct. 536; *Blanchard v. Sprague*, 3 Sumn. (U. S.) 279; *Holmberg v. Jones*, (Idaho 1901) 65 Pac. Rep. 563; *Angèle de Sentmanat v. Soulé*, 33 La. Ann. 609; *Hicks v. Jamison*, 10 Mo. App. 35; *McConvill v. Jersey City*, 39 N. J. L. 38; *Com. v. Pennsylvania Bank*, 3 W. & S. (Pa.) 177; *Lancaster County v. Frey*, 128 Pa. St. 599; *Ward v. Ward*, 37 Tex. 389; *Johnson v. Barham*, 99 Va. 305, 3 Va. Sup. Ct. Rep. 167; *Harrington v. Smith*, 28 Wis. 44.

In *Northern Pac. R. Co. v. U. S.*, 36 Fed. Rep. 287, *Brewer, J.*, said: "It is familiar learning that a word may be interpolated or suppressed if it be necessary to make the language harmonize with the obvious intent of the lawmaker. But I know of no rule of construction which permits us to beg the intent, and then to interpolate or suppress a word to carry out such intent. Rather is it to be presumed that the very language was used which expresses the intent."

2. **Casus Omissus.** — *State v. Hunkins*, 90 Wis. 270.

"A *casus omissus* can in no case be supplied by a court of law, for that would be to make laws." *Per Buller, J.*, in *Jones v. Smart*, 1 T. R. 44. See also *Lane v. Bennett*, 1 M. & W. 70.

No case can be found to authorize any court to alter a word so as to produce a *casus omissus*. *Per Lord Halsbury* in *Mersey Docks, etc., Board v. Henderson*, 13 App. Cas. 602.

See also *supra*, this section, 3. **Object and General Scope of Doctrine**; 4. *Whether Intention Deduced from Letter or Spirit of Statute* — *Nothing Added to or Taken from Statute*.

3. See the title *DAMNUM ABSQUE INJURIA*, vol. 8, p. 697. See also, as bearing on the same question, the title *NUISANCES*, vol. 21, p. 736.

4. **Acts "Under," "by Virtue of," or "in Pursuance of" Statute.** — *Wilson v. Halifax*, L. R. 3 Exch. 114; *Newton v. Ellis*, 5 El. & Bl. 115, 85 E. C. L. 115; *Mitchell v. Cowgill*, 4 Binn. (Pa.) 20; *Jones v. Hughes*, 5 S. & R. (Pa.) 301, 9 Am. Dec. 364. Under *PURSUANCE*, vol. 23, p.

529, this rule is explained and numerous cases are collected. See also *Parton v. Williams*, 3 B. & Ald. 330, 5 E. C. L. 307, statute creating a special limitation for actions against a constable for things done while "acting by his [a magistrate's] order and in his aid;" *Wedge v. Berkeley*, 6 Ad. & El. 663, 33 E. C. L. 167, statute requiring notice of actions against a magistrate for things done "in the execution of his office."

"**Done**" Including "**Omitted**." — Statutes requiring notice of action for anything "done" under them are construed as including omission of an act which ought to be done, as well as the commission of a wrongful one. *Wilson v. Halifax*, L. R. 3 Exch. 114; *Poulsum v. Thirst*, L. R. 2 C. P. 449; *Newton v. Ellis*, 5 El. & Bl. 115, 85 E. C. L. 115.

5. See *supra*, this section, 4. *Whether Intention Deduced from Letter or Spirit of Statute* — *Nothing Added to or Taken from Statute*.

6. **Words Altered or Supplied** — *England*. — *Quin v. O'Keeffe*, 10 Ir. C. L. 393; *East London R. Co. v. Whitechurch*, L. R. 7 H. L. 89; *Matter of Wainwright*, 1 Phil. 258; *The Beta*, 3 Moo. P. C. C. N. S. 23; *Ex p. Greenwood*, 27 L. J. Q. B. 28; *Moyle v. Jenkins*, 8 Q. B. D. 116, 51 L. J. Q. B. 112; *Reg. v. Hulme*, L. R. 5 Q. B. 377; *Wilson v. Nightingale*, 8 Q. B. 1035, 55 E. C. L. 1035; *Reg. v. Dowling*, 8 El. & Bl. 605, 92 E. C. L. 605.

United States. — *Kennedy v. Gibson*, 8 Wall. (U. S.) 498.

Alabama. — *Worrell v. State*, 12 Ala. 732.

Illinois. — *Loverin v. McLaughlin*, 161 Ill. 430.

Indiana. — *Gustavel v. State*, 153 Ind. 617.

Kansas. — *Landrum v. Flannigan*, 60 Kan. 439.

Missouri. — *Fairchild v. Masonic Hall Assoc.*, 71 Mo. 526.

New York. — *Furey v. Gravesend*, 104 N. Y. 410.

Ohio. — *Fosdick v. Perrysburg*, 14 Ohio St. 472; *Slingsluff v. Weaver*, 66 Ohio St. 621.

Oklahoma. — *Territory v. Clark*, 2 Okla. 82.

Pennsylvania. — *Worth v. Peck*, 7 Pa. St. 268; *Big Black Creek Imp. Co. v. Com.*, 94 Pa.

other hand, notwithstanding the rule that full effect must be given to every part of an act, words and phrases which might operate to defeat the clear purpose of a statute, or which would have no sensible meaning, should be eliminated or treated as surplusage.¹

(3) *Obvious or Clerical Errors.* — Where it is manifest upon the face of an act that an error has been made in the use of words, the court may correct the error and read the statute as corrected, in order to give effect to the obvious intention of the legislature.²

St. 455; *Philadelphia v. Ridge Ave. Pass. R. Co.*, 102 Pa. St. 196.

Tennessee. — *Thurston v. State*, 3 Coldw. (Tenn.) 115.

Virginia. — *Hutchings v. Commercial Bank*, 91 Va. 68 (word "not" inserted).

In the interpretation of statutes, the court will rearrange and substitute if necessary to make the meaning clear. *State v. Deuel*, 63 Kan. 814.

Illustrations — Words Added. — A statute provided that a person, on conviction of a specified offense, was to be imprisoned in the penitentiary not less than two nor more than five years, and an amendatory act added the words, "or by fine and imprisonment, one or both, at the discretion of the jury trying the same." The court held that it was required to supply after the word "or" the words "be punished." *Turner v. State*, 40 Ala. 21.

A statute authorized an aqueduct company to take and use the waters of two ponds named, and of a certain lake. It was further provided in the statute that nothing in the act should be construed to authorize the company "to raise the water of any of said ponds above high-water mark, nor to drain any of them below low-water mark." It was held that the restriction applied to the lake as well as to the ponds. *Brickett v. Haverhill Aqueduct Co.*, 142 Mass. 394.

A law provided that "the keeper of a boarding house shall have the same lien upon, and right to detain, the baggage and effects of any boarder for the amount which may be due for board by such boarder, to the same extent and in the same manner as innkeepers have such lien and such right of detention." It was held that the words "with respect to the baggage and effects of their guests" should be supplied to give effect to the obvious intention of the law. *Nichols v. Halliday*, 27 Wis. 406.

Strict Construction. — It has been said that the interpolation and insertion of words, although necessary to effect the evident intention of the lawmakers, has been refused in cases where the statutes are within the rule of strict construction. *Maxwell Inter. Stat.* (3d ed.) 353, 383, citing *Underhill v. Longridge*, 6 Jur. N. S. 221, 29 L. J. M. C. 65, where, however, the court did not mention the character of the statute as a reason for its action, but refused to assume the functions of the legislature. See *Hardcastle Stat. Law* (3d ed.) 124. But evidently the court will hesitate to depart from the literal construction of a statute where the doing so would bring a person within a penal enactment. *Reg. v. Davis*, L. R. 1 C. C. 272. See also *Ex p. National Mercantile Bank*, 15 Ch. D. 42; *Broadhead v. Holdsworth*, 2 Ex. D. 321; *Coe v. Lawrance*, 1 E. & Bl. 516, 72 E. C. L. 516.

1. Eliminating Words — England. — *Stone v. Yeovil*, 1 C. P. D. 701; *Lyde v. Barnard*, 1 M. & W. 116; *Hall v. Knox*, 4 B. & S. 515, 116 E. C. L. 515.

United States. — *U. S. v. Rossvally*, 3 Ben. (U. S.) 157; *U. S. v. Stern*, 5 Blatchf. (U. S.) 512.

California. — *Pond v. Maddox*, 38 Cal. 572.

Iowa. — *State v. Lee*, 37 Iowa 402.

Kansas. — *Brook v. Blue Mound*, 61 Kan. 184 (word eliminated from title).

Missouri. — *State v. Beasley*, 5 Mo. 91; *State v. Heman*, 70 Mo. 441.

Nebraska. — *Paxton, etc., Irrigating Canal, etc., Co. v. Farmers', etc., Irrigation, etc., Co.*, 45 Neb. 884, 50 Am. St. Rep. 585 ("if" disregarded).

Pennsylvania. — *McCahan v. Hirst*, 7 Watts (Pa.) 175; *Com. v. Marshall*, 69 Pa. St. 332.

Texas. — *Chapman v. State*, 16 Tex. App. 76.

In *U. S. v. Stern*, 5 Blatchf. (U. S.) 512, the court treated the words "and shall be thereof convicted," in a statute, as surplusage, where their effect was to make a previous conviction necessary to finding an indictment. The court said that to give these words "any meaning at all, as they stand, is to render the whole act meaningless; and the question is, whether these words, standing as they do, shall be treated as surplusage and of no effect, or whether, by giving them effect, the whole act shall be rendered void; * * * it is the duty of a court to prevent such a result, and, by treating the words in question as surplusage, to carry out the intention of Congress as manifested by the passage of an act."

An act provided that "if any guardian of any white female under the age of eighteen years, or of any other person to whose care or protection any such female shall have been confided, shall defile her," etc. It was held that the word "of" before "any other person" should be stricken out. *State v. Acuff*, 6 Mo. 55.

2. Obvious Errors — England. — *Metropolitan Board of Works v. Steed*, 8 Q. B. D. 445 ("or" read "nor").

United States. — *Mankel v. U. S.*, 19 Ct. Cl. 295 ("Lewis Mankel" read "Louis Mankel").

Alaska. — *Brace v. Solner*, 1 Alaska 362 ("provided" read "but" or "and").

Arkansas. — *Haney v. State*, 34 Ark. 263 ("fifth" read "fourth").

California. — *Ex p. Hedley*, 31 Cal. 109 ("without" read "within").

Idaho. — *State v. Mulkey*, (Idaho 1899) 59 Pac. Rep. 17 (slight typographical error will not defeat intent).

Illinois. — *People v. Hoffman*, 97 Ill. 234 (ad satisfaciendum read ad respondendum).

c. STATUTES VOID FOR UNCERTAINTY. — When the language of an act appears on its face to have a meaning, but it is impossible to give it any precise or intelligible application in the circumstances under which it was intended to operate, it is simply void;¹ for if no judicial certainty can be

Indiana. — *Jocelyn v. Barrett*, 18 Ind. 128 ("acts" read "act").

Kentucky. — *Bird v. Kenton County*, 95 Ky. 195 ("width" changed to "depth").

Maine. — *Lowell v. Washington County R. Co.*, 90 Me. 80.

Maryland. — *Waters v. Laurel*, 93 Md. 221 (words "town of Laurel," omitted in section 1, supplied).

Minnesota. — *Moody v. Stephenson*, 1 Minn. 401 ("penal judgments" read "final judgments").

Nevada. — *Gould v. Wise*, 18 Nev. 253 ("on" read "or").

New York. — *Burch v. Newbury*, 10 N. Y. 374 ("first day of July" read "first Monday in July"); *People v. Lord*, 9 N. Y. App. Div. 458 ("chapter 329" read "chapter 339"); *McKee Land, etc., Co. v. Swikehard*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 21 (intent controls verbal inaccuracies).

North Carolina. — *Graham v. Charlotte, etc., R. Co.*, 64 N. Car. 631 ("venire" read "venue").

Pennsylvania. — *Levering v. Philadelphia, etc., R. Co.*, 8 W. & S. (Pa.) 459 ("or" read "on").

Texas. — *Chambers v. State*, 25 Tex. 307 ("provisions" read "proviso").

In *Lancaster County v. Frey*, 128 Pa. St. 593, the word "county" was corrected and read "city." *Clark, J.*, said: "It falls within the province of the courts to correct a merely clerical error, even in an act of assembly, when, as it is written, it involves a manifest absurdity, and the error is plain and obvious." See also *Lancaster County v. Lancaster City*, 160 Pa. St. 411; *Lancaster County v. Lancaster City*, 170 Pa. St. 108, which construe the same statute in the same way.

Erroneous Descriptions May Be Corrected. — *Reynolds v. Holland*, 35 Ark. 56; *State v. Orange*, 32 N. J. L. 49; *State v. Platt*, 2 S. Car. 150, 16 Am. Rep. 647; *Brown v. Hamlett*, 8 Lea (Tenn.) 732; *Atty.-Gen. v. Chicago, etc., R. Co.*, 35 Wis. 557; *Palms v. Shawano County*, 61 Wis. 215 ("south" in description corrected to "north").

An act contained a description of property as "Dennis" mill property; it, however, appearing that there was no "Dennis" mill property which could be intended, but that "Dunn's" mill property answered the description and was clearly that intended by the act, the court corrected the description. *Lindsley v. Williams*, 20 N. J. Eq. 93.

In *State v. Timme*, 56 Wis. 425, *Cassoday, J.*, said: "We agree * * * that questions of misdescription in statutes, like other questions calling for construction, merely present questions of intent," and held that "Northern Mechanical and Agricultural Society" in an act was a sufficient description for "The Northern Wisconsin Agricultural and Mechanical Association."

Words Omitted in Amendatory Act. — Where

an amendatory act, in reciting how the original statute would read as amended, omitted certain words therein, but there was no intimation in the title of the act or otherwise that such omission was intended, the omitted words were regarded as left out by clerical error, and the statute was read as if it contained them. *Abernathy v. Mitchell*, 113 Ga. 127.

Mistakes in Codifications and Compilations May Be Corrected. — *Atlanta v. Gate City Gas Light Co.*, 71 Ga. 106; *State v. Lee*, 37 Iowa 404; *Mobile Sav. Bank v. Patty*, 16 Fed. Rep. 751.

Misrecitals of Dates May Be Rejected. — *Shrewsbury v. Boylston*, 1 Pick. (Mass.) 105.

In Amendatory and Supplementary Acts Erroneous References to Other Acts or Sections May Be Corrected — *California.* — *People v. King*, 28 Cal. 265.

Colorado. — *Murray v. Hobson*, 10 Colo. 66.

Illinois. — *School Directors v. School Directors*, 73 Ill. 249.

Indiana. — *Poock v. Lafayette Bldg. Assoc.*, 71 Ind. 357.

Kentucky. — *Gibson v. Belcher*, 1 Bush (Ky.) 145.

Maine. — *Blake v. Brackett*, 47 Me. 28.

Maryland. — *Pue v. Hetzell*, 16 Md. 539.

New York. — *Watervliet Turnpike Co. v. M'Kean*, 6 Hill (N. Y.) 616; *People v. Clute*, 50 N. Y. 451, 10 Am. Rep. 508.

Pennsylvania. — *Bradbury v. Wagenhorst*, 54 Pa. St. 180; *Com. v. Marshall*, 69 Pa. St. 332.

Texas. — *State v. McCracken*, 42 Tex. 383.

Utah. — *People v. Hill*, 3 Utah 334.

Wisconsin. — *Madison, etc., Plankroad Co. v. Reynolds*, 3 Wis. 287; *Custin v. Viroqua*, 67 Wis. 314.

1. Statute Unmeaning — *England.* — *Doe v. Carew*, 2 Q. B. 317, 42 E. C. L. 692; *Green v. Wood*, 7 Q. B. 178, 53 E. C. L. 178.

Alabama. — *Johnston v. State*, 100 Ala. 32.

Indiana. — *Cook v. State*, 26 Ind. App. 278.

Maryland. — *Hughes's Case*, 1 Bland (Md.) 46.

Missouri. — *State v. Ashbrook*, 154 Mo. 375, 77 Am. St. Rep. 765.

New York. — *Johnson v. Hudson River R. Co.*, 49 N. Y. 455; *People v. Schoonmaker*, 63 Barb. (N. Y.) 49.

North Carolina. — *State v. Partlow*, 91 N. Car. 550, 49 Am. Rep. 652 (stated under AMBIGUITY, vol. 2, p. 296); *State v. Boon*, Tayl. (1 N. Car.) 246.

Pennsylvania. — *Pittsburgh v. Kalchthaler*, 114 Pa. St. 547; *Com. v. Pennsylvania Bank*, 3 W. & S. (Pa.) 173.

Texas. — *Ward v. Ward*, 37 Tex. 389.

"If an act of the legislature is so vague and uncertain in its terms as to convey no meaning, or if the means for carrying out its provisions are not adequate or effective, or if it is so conflicting and inconsistent in its provisions that it cannot be executed, it is incumbent upon the courts to declare it void and inoperative." *Hilburn v. St. Paul, etc., R. Co.*, 23 Mont. 241. Surely the court does not mean to assert, how-

settled upon as to its meaning, courts are not at liberty to supply the deficiency or make the statute certain.¹ But legislation cannot be nullified on the ground of uncertainty, if susceptible of any reasonable construction that will support it.²

13. Evasions. — To carry out effectually the purpose of a statute it must be so construed as to defeat all attempts to do or avoid in an indirect or circuitous manner that which it has prohibited or enjoined; courts must labor to suppress all subtle inventions and circumlocution by which the object and purpose of the law will be defeated.³ It is, however, essential not to confound what is actually or virtually prohibited or enjoined by the language, with what is really beyond the contemplation, though it be within the policy, of the act, for it is only to the former case that the principle under consideration applies, and not to cases where, however manifest the object of the act may be, the language is not coextensive with it.⁴

VII. PARTICULAR APPLICATIONS OF PRINCIPLES OF CONSTRUCTION — 1. Strict and Liberal Construction — a. STRICT CONSTRUCTION — (1) Definition. — Strict construction, as applied to statutes, means that they are not to be so extended by implication beyond the legitimate import of the words used in them as to embrace cases or acts not clearly described by such words and to bring them within the prohibition or penalty of such statutes. It does not mean that words shall be so restricted as not to have their full meaning, but that everything shall be excluded from the operation of statutes so construed which does not clearly come within the meaning of the language used.⁵

ever, that an act is void because the means for carrying it out are "inadequate."

When the Principal Provisions of a Statute Are Absolutely Contradictory, it must be declared void. *In re Hendricks*, 60 Kan. 806.

Private Acts Legitimizing a Bastard without stating to whom he is next of kin are incapable of any application and so are inoperative, except as changing the bastard's name. *Edmondson v. Dyson*, 7 Ga. 512 (stated under title BASTARDY, vol. 3, p. 871); *Drake v. Drake*, 4 Dev. L. (15 N. Car.) 110.

Parts of Acts are governed by the same principles. *Matter of Willis Ave.*, 56 Mich. 244; *Pillow v. Gaines*, 3 Lea (Tenn.) 466.

1. *State v. Partlow*, 91 N. Car. 550, 49 Am. Rep. 652; *Augustine v. State*, 41 Tex. Crim. 59.

2. If Capable of Any Reasonable Construction Not Void. — *Wentworth v. Racine County*, 99 Wis. 26.

The claim that a statute was void for uncertainty was disallowed in the following cases on a reasonable construction of the act: *Gustavel v. State*, 153 Ind. 616; *Davis v. State*, 51 Neb. 301; *People v. Borges*, (N. Y. Gen. Sess.) 6 Abb. Pr. (N. Y.) 132; *Petterson v. Pilot Com'rs*, 24 Tex. Civ. App. 33; *State v. Stuth*, 11 Wash. 423.

3. Courts Will Not Permit Evasion of Statute — England. — *Magdalen College Case*, 11 Coke 76; *Armstrong v. Armstrong*, 3 Myl. & K. 45; *Doe v. Carter*, 8 T. R. 300; *Collins v. Blantern*, 2 Wils. C. Pl. 349; *Tate v. Wellings*, 3 T. R. 531; *Boldero v. Jackson*, 11 East 612; *White v. Wright*, 3 B. & C. 273, 10 E. C. L. 75; *Floyer v. Edwards*, 1 Cowp. 114.

United States. — *Bowdoin College v. Merritt*, 75 Fed. Rep. 480.

Arkansas. — *Woodruff v. State*, 3 Ark. 285.

Illinois. — *Guyman v. Burlingame*, 36 Ill. 201.

Indiana. — *Nudd v. Burnett*, 14 Ind. 25.

26 C. of L.—42

Kentucky. — *Com. v. Harris*, 8 B. Mon. (Ky.) 373.

New Jersey. — *Cooley v. Barcroft*, 43 N. J. L. 363.

North Carolina. — *Mills v. Salisbury Bldg., etc., Assoc.*, 75 N. Car. 292.

Pennsylvania. — *Big Black Creek Imp. Co. v. Com.*, 94 Pa. St. 450; *Douglass v. Com.*, 2 Rawle (Pa.) 262; *Fallon's Appeal*, 42 Pa. St. 255; *Johnson's Appeal*, 103 Pa. St. 377; *Com. v. Heffner*, 8 Leg. Gaz. (Pa.) 166.

Tennessee. — *Martin v. Nashville Bldg. Assoc.*, 2 Coldw. (Tenn.) 418.

4. England. — *Etherington v. Wilson*, 1 Ch. D. 161; *Pender v. Lushington*, 6 Ch. D. 70; *Cross v. Watts*, 13 C. B. N. S. 239, 106 E. C. L. 239, 32 L. J. M. C. 73; *Brigden v. Heighes*, 1 Q. B. D. 330; *Rex v. Little Coggeshall*, 6 M. & S. 264; *Rex v. Mursley*, 1 T. R. 694; *Whiteley v. Chappell*, L. R. 4 Q. B. 147.

United States. — *Bowdoin College v. Merritt*, 75 Fed. Rep. 480; *Neilson v. Lagow*, 12 How. (U. S.) 98.

Pennsylvania. — *Johnson's Appeal*, 103 Pa. St. 377; *Blakey's Appeal*, 7 Pa. St. 449.

5. Strict Construction Defined — England. — *Nicholson v. Fields*, 7 H. & N. 817, 31 L. J. Exch. 233.

United States. — *U. S. v. Sheldon*, 2 Wheat. (U. S.) 119; *U. S. v. Ellis*, 51 Fed. Rep. 808; *The Schooner Enterprise*, 1 Paine (U. S.) 32; *Andrews v. U. S.*, 2 Story (U. S.) 202; *U. S. v. Bassett*, 2 Story (U. S.) 389.

Alabama. — *Bettis v. Taylor*, 8 Port. (Ala.) 564.

Arkansas. — *State v. Graham*, 38 Ark. 519.

Connecticut. — *Daggett v. State*, 4 Conn. 61, 10 Am. Dec. 100; *Rawson v. State*, 19 Conn. 299; *State v. Powers*, 36 Conn. 77.

Georgia. — *Austin v. State*, 71 Ga. 595.

Massachusetts. — *Melody v. Reab*, 4 Mass.

471.

(2) *Penal Statutes* — (a) *In General*. — It is a well-settled rule of law that penal statutes are to be construed strictly.¹ This rule is said to be founded on the tenderness of the law for the rights of individuals and on the plain principle that the power of the punishment is vested in the legislature, not in the

New York. — *Watervliet Turnpike Co. v. McKean*, 6 Hill (N. Y.) 616.

Texas. — *Jordt v. State*, 31 Tex. 571, 98 Am. Dec. 550.

West Virginia. — *Hall v. Norfolk, etc., R. Co.*, 44 W. Va. 39, 67 Am. St. Rep. 757.

In *State v. Powers*, 36 Conn. 77, Park, J., said: "The letter of remedial statutes may be extended to include cases clearly within the mischief the statute was intended to remedy, unless such construction does violence to the language used. But a consideration of the old law, the mischief, and the remedy are not enough to bring cases within the purview of penal statutes. They must be expressly included by the words of the statute. This is all the difference between a liberal and a strict construction of a statute. A case may come within the one unless the language excludes it, while it is excluded by the other unless the language includes it."

1. *Strict Construction of Penal Statutes* — *England*. — *Rex v. Harvey*, 1 Wils. C. Pl. 164; *Fletcher v. Sondes*, 3 Bing. 580; *Jenkinson v. Thomas*, 4 T. R. 665; *Martin v. Ford*, 5 T. R. 101; *Rex v. Handy*, 6 T. R. 286; *Warne v. Varley*, 6 T. R. 443; *Graff v. Evans*, 8 Q. B. D. 377; *Cone v. Bowles*, 1 Salk. 205; *Huntingtower v. Gardiner*, 1 B. & C. 297, 8 E. C. L. 128; *Whiteley v. Chappell*, L. R. 4 Q. B. 147; *Reg. v. Cooper*, L. R. 2 C. C. 123; *Reg. v. Newman*, 8 Q. B. D. 706. *Compare* *Powder's Case*, 11 Coke 34; *Soldier's Case*, Cro. Car. 71; *Platt v. Lock*, Plowd. 36; *Hammond v. Webb*, 10 Mod. 281.

United States. — *U. S. v. Hall*, 6 Cranch (U. S.) 171; *U. S. v. Sheldon*, 2 Wheat. (U. S.) 119; *U. S. v. Gooding*, 12 Wheat. (U. S.) 460; *American Fur Co. v. U. S.*, 2 Pet. (U. S.) 367; *U. S. v. Hartwell*, 6 Wall. (U. S.) 385; *U. S. v. Lacher*, 134 U. S. 624; *U. S. v. Huggett*, 40 Fed. Rep. 636; *U. S. v. Garretson*, 42 Fed. Rep. 22; *In re McDonough*, 49 Fed. Rep. 360; *U. S. v. Ellis*, 51 Fed. Rep. 808; *Whitney v. Emmett*, Baldw. (U. S.) 303; *U. S. v. 1,412 Gallons Distilled Spirits*, 10 Blatchf. (U. S.) 428; *U. S. v. Clayton*, 2 Dill. (U. S.) 219; *The Schooner Industry*, 1 Gall. (U. S.) 114; *U. S. v. Moulton*, 5 Mason (U. S.) 537; *The Schooner Enterprise*, 1 Paine (U. S.) 32; *The Schooner Harriet*, 1 Story (U. S.) 251; *Johnson v. Southern Pac. Co.*, (C. C. A.) 117 Fed. Rep. 462; *U. S. v. Morrissey*, 32 Fed. Rep. 147; *U. S. v. Hewecker*, 79 Fed. Rep. 64.

Alabama. — *Crosby v. Hawthorn*, 25 Ala. 221; *Huffman v. State*, 29 Ala. 40; *Grooms v. Hanon*, 59 Ala. 510; *Brooks v. State*, 88 Ala. 122; *Morrow v. Rosenstihl*, 106 Ala. 198.

Alaska. — *U. S. v. Powers*, 1 Alaska 180.

Arkansas. — *State v. Graham*, 38 Ark. 519; *Anthony v. Manlove*, 53 Ark. 423; *Brooks v. Western Union Tel. Co.*, 56 Ark. 224; *State v. Arkadelphia Lumber Co.*, 70 Ark. 331.

California. — *Ex p. McNulty*, 77 Cal. 164, 11 Am. St. Rep. 257.

Colorado. — *Brooks v. People*, 14 Colo. 413.

Connecticut. — *Booth v. State*, 4 Conn. 65.

Georgia. — *Atlanta v. White*, 33 Ga. 229; *Holland v. State*, 34 Ga. 455; *U. S. v. Athens Armory*, 35 Ga. 344; *Southwestern R. Co. v. Cohen*, 49 Ga. 627; *Renfroe v. Colquitt*, 74 Ga. 619.

Illinois. — *People v. Peacock*, 98 Ill. 172; *Hankins v. People*, 106 Ill. 628; *Woolverton v. Taylor*, 132 Ill. 197, 22 Am. St. Rep. 521.

Indiana. — *Steel v. State*, 26 Ind. 82; *Sondheim v. Gilbert*, 117 Ind. 71, 10 Am. St. Rep. 23; *Ramsey v. Foy*, 10 Ind. 493; *State v. Coffing*, 3 Ind. App. 304. See also *State v. Hogreiver*, 152 Ind. 652.

Iowa. — *State v. Lovell*, 23 Iowa 304; *State v. Stoller*, 38 Iowa 321; *Hanks v. Brown*, 79 Iowa 560.

Kentucky. — *Com. v. Louisville R. Co.*, (Ky. 1902) 66 S. W. Rep. 753; *Lawrence v. Conner*, 14 S. W. Rep. 77, 12 Ky. L. Rep. 86.

Louisiana. — *Simms v. Bean*, 10 La. Ann. 346; *State v. McCrystol*, 43 La. Ann. 907; *State v. Glaudi*, 43 La. Ann. 914.

Maine. — *Pierce's Case*, 16 Me. 255.

Maryland. — *State v. Archer*, 73 Md. 44.

Massachusetts. — *Com. v. Loring*, 8 Pick. (Mass.) 373; *Com. v. Fisher*, 17 Mass. 49.

Michigan. — *Shaw v. Clark*, 49 Mich. 384, 43 Am. Rep. 474; *Van Buren v. Wylie*, 56 Mich. 501; *People v. Gadway*, 61 Mich. 285, 1 Am. St. Rep. 578.

Minnesota. — *State v. Walsh*, 43 Minn. 444, 42 Am. & Eng. R. Cas. 623; *Ferch v. Victoria Elevator Co.*, 79 Minn. 416.

Mississippi. — *Merrill v. Melchior*, 30 Miss. 516; *Haynie v. State*, 32 Miss. 400; *Foot v. Vanzandt*, 34 Miss. 40.

Missouri. — *State v. Williams*, 35 Mo. App. 541; *Pacific v. Seifert*, 79 Mo. 210.

Nebraska. — *McCormick Harvesting Mach. Co. v. Mills*, (Neb. 1902) 89 N. W. Rep. 621.

Nevada. — *State v. Wheeler*, 23 Nev. 143.

New Hampshire. — *Wilson v. Wentworth*, 25 N. H. 247.

New York. — *Hintermister v. Chittenango First Nat. Bank*, 64 N. Y. 212; *Dewey v. Goodenough*, 56 Barb. (N. Y.) 54; *Foster v. Rhoads*, 19 Johns. (N. Y.) 191; *Matter of Baker*, (Supm. Ct.) 29 How. Pr. (N. Y.) 485; *People v. Masonic Guild, etc., Assoc.*, (Supm. Ct. Spec. T.) 22 Civ. Pro. (N. Y.) 74.

Ohio. — *State v. Oak Harbor Gas Co.*, 4 Ohio Cir. Dec. 158, 18 Ohio Cir. Ct. 751.

Oregon. — *Horner v. State*, 1 Oregon 267.

Pennsylvania. — *Philadelphia v. Davis*, 6 W. & S. (Pa.) 269; *Gallagher v. Neal*, 3 P. & W. (Pa.) 183; *Warner v. Com.*, 1 Pa. St. 154, 44 Am. Dec. 114; *Bucher v. Com.*, 103 Pa. St. 528.

Tennessee. — *State v. Wilcox*, 3 Yerg. (Tenn.) 278.

Texas. — *Smith v. State*, 17 Tex. 191.

West Virginia. — *Hall v. Norfolk, etc., R. Co.*, 44 W. Va. 36, 67 Am. St. Rep. 757.

See also the title FINES AND PENALTIES, vol. 13, p. 55.

For construction of statutes against gaming, see the title GAMING, vol. 14, p. 667.

judicial department.¹ It is, however, the object of the construction of penal as of all other statutes, to ascertain the true legislative intent; and while the courts will not, on the one hand, apply such statutes to cases which are not within the obvious meaning of the language employed by the legislature, even though they be within the mischief intended to be remedied,² they will not, on the other hand, apply the rule of strict construction with such technicality as to defeat the purpose of ascertaining the true meaning and intent of the statute.³

Under Express Statutes in some jurisdictions, provision is made for the construction of penal statutes according to the fair import of their terms so as to effectuate the purpose of the legislature.⁴

(b) **Rule Applicable to Other than Strictly Criminal Statutes.**—The rule under consideration applies not only to statutes relating to criminal offenses, but also to all statutes which impose, as punishment, any penalties, pecuniary or otherwise, or forfeitures of money or other property or of vested rights, or provide for the recovery of damages beyond just compensation to the party injured, whether such penalties, forfeitures, or damages are to be enforced and recovered at the suit of the state or of a private individual.⁵

1. Reason of Rule.—U. S. v. Wiltberger, 5 Wheat. (U. S.) 76; Woodruff v. State, (N. J. 1902) 52 Atl. Rep. 294.

2. Penal Statutes Not Extended Beyond Obvious Meaning.—United States.—U. S. v. Wiltberger, 5 Wheat. (U. S.) 76; U. S. v. Huggett, 40 Fed. Rep. 636; U. S. v. Garretson, 42 Fed. Rep. 22.

Alabama.—Crosby v. Hawthorn, 25 Ala. 221, California.—Ex p. Kohler, 74 Cal. 38.

Connecticut.—Daggett v. State, 4 Conn. 61, 10 Am. Dec. 100.

Illinois.—Connolly v. People, 42 Ill. App. 36.

Indiana.—State v. Coffing, 3 Ind. App. 304;

State v. Indiana, etc., Southern R. Co., 133 Ind. 69.

Iowa.—Hanks v. Brown, 79 Iowa 560.

Maine.—Butler v. Ricker, 6 Me. 268.

Maryland.—Parkinson v. State, 14 Md. 184, 74 Am. Dec. 522.

Massachusetts.—Com. v. Loring, 8 Pick. (Mass.) 370; Reed v. Davis, 8 Pick. (Mass.) 514.

Minnesota.—State v. Finch, 37 Minn. 433; State v. Walsh, 43 Minn. 444, 42 Am. & Eng. R. Cas. 623.

See generally *supra*, this title, VI. 4. b. *Where Meaning in Doubt, the Spirit Controls.*

3. Intent of Legislature Not to Be Defeated by Technical Application of Rule.—U. S. v. Hartwell, 6 Wall. (U. S.) 395; U. S. v. Lacher, 134 U. S. 624; Bolles v. Outing Co., 175 U. S. 262; O'Grady v. Wiseman, 9 Quebec Q. B. 169, 3 Can. Crim. Cas. 332; Indianapolis v. Huegele, 115 Ind. 581; State v. McCrystol, 43 La. Ann. 907; State v. Glaudi, 43 La. Ann. 914; State v. Archer, 73 Md. 44; Stricker v. Pennsylvania R. Co., 60 N. J. L. 230; State v. Godfrey, 97 N. Car. 507; Hardwick v. Vermont Telephone, etc., Co., 70 Vt. 180.

In Bolles v. Outing Co., 175 U. S. 265, the court said: "The statute, then, being penal, must be construed with such strictness as to carefully safeguard the rights of the defendant and at the same time preserve the obvious intention of the legislature. If the language be plain, it will be construed as it reads, and the words of the statute given their full meaning; if ambiguous, the court will lean more strongly in

favor of the defendant than it would if the statute were remedial. In both cases it will endeavor to effect substantial justice." Citing U. S. v. Wiltberger, 5 Wheat. (U. S.) 95; U. S. v. Hartwell, 6 Wall. (U. S.) 385; American Fur Co. v. U. S., 2 Pet. (U. S.) 358; U. S. v. Reese, 92 U. S. 214.

4. Statutory Provisions for Construction of Penal Statutes.—People v. Soto, 49 Cal. 67; Peterson v. Currier, 62 Ill. App. 163, affirmed 163 Ill. 528; Hanks v. People, 106 Ill. 628; Richmond v. Moore, 107 Ill. 429, 47 Am. Rep. 445. Compare Pierce v. Dillingham, 96 Ill. App. 300; Walker v. Dailey, 101 Ill. App. 575.

5. Strict Construction of Statutes Not Strictly Criminal.—England.—Nicholson v. Fields, 7 H. & N. 810; Fletcher v. Hudson, 7 Q. B. D. 611, 51 L. J. Q. B. 48; Gorton v. Champneys, 1 Bing. 287, 8 E. C. L. 512.

United States.—Schooner Bolina, 1 Gall. (U. S.) 75; Farmers', etc., Nat. Bank v. Dearing, 91 U. S. 29.

Alabama.—Grooms v. Hannon, 59 Ala. 510.

Arkansas.—Brooks v. Western Union Tel. Co., 56 Ark. 224.

California.—White v. Steam-Tug Mary Ann, 6 Cal. 462, 65 Am. Dec. 523; Ex p. Kohler, 74 Cal. 38.

Georgia.—Renfroe v. Colquitt, 74 Ga. 618.

Indiana.—State v. Cleveland, etc., R. Co., 157 Ind. 290.

Iowa.—Hanks v. Brown, 79 Iowa 560.

Maine.—Abbott v. Wood, 22 Me. 541.

Maryland.—Ordway v. Central Nat. Bank, 47 Md. 217, 28 Am. Rep. 455.

Massachusetts.—Suffolk Bank v. Worcester Bank, 5 Pick. (Mass.) 106.

Missouri.—St. Louis v. Goebel, 32 Mo. 295.

Nevada.—Maxwell v. Rives, 11 Nev. 213.

New Jersey.—Camden, etc., R., etc., Co. v. Briggs, 22 N. J. L. 623; Allaire v. Howell Works Co., 14 N. J. L. 21; Shotwell v. Denman, 1 N. J. L. 202.

New York.—People v. Wright, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 136; Merchants Bank v. Bliss, (N. Y. Super. Ct. Gen. T.) 13 Abb. Pr. (N. Y.) 225, 21 How. Pr. (N. Y.) 365; Sickles v. Sharp, 13 Johns. (N. Y.) 497.

(c) **Extension of Penal Statutes to Things Not in Esse at Time of Passage.** — It has been held that penal laws should not be extended to new things which were not in being at the time when the laws were made nor to offenses created and defined by subsequent statutes.¹ On the other hand, it has been held that things not *in esse* at the time of the passage of a statute may be construed as within its contemplation, when words large enough to embrace them are used.²

(d) **Where Penal Clause Is Less Comprehensive than Body of Act.** — Where the penal clause is less comprehensive than the body of the act, the courts will not extend the penalties provided therein to classes of persons or things not embraced within the penal clause, even where there is a manifest omission or oversight on the part of the legislature.³

Ohio. — Cleveland, etc., R. Co. v. Wells, 65 Ohio St. 318.

Pennsylvania. — Com. v. Standard Oil Co., 101 Pa. St. 119; Marston v. Tryon, 108 Pa. St. 270; Aechternacht v. Watmough, 8 W. & S. (Pa.) 162.

Wisconsin. — Stone v. Lannon, 6 Wis. 497; Cohn v. Neeves, 40 Wis. 393.

Statute Imposing Penalty for Discrimination in Freight Rates. — Hines v. Wilmington, etc., R. Co., 95 N. Car. 434, 59 Am. Rep. 250.

Statute Prescribing Forfeiture of Interest for Usury. — Coble v. Shoffner, 75 N. Car. 42. See also Smithwick v. Williams, 8 Ired. L. (30 N. Car.) 268; State v. Knight, 2 Hayw. (3 N. Car.) 109.

Statute Authorizing Judgment for Double Damages. — Bay City, etc., R. Co. v. Austin, 21 Mich. 390.

Statute Imposing Penalty on Officer for Taking Excessive Fees. — Aechternacht v. Watmough, 8 W. & S. (Pa.) 162 (correcting a dictum to the contrary in Jackson v. Purdue, 3 P. & W. (Pa.) 523); Schultzman v. McCarthy, 16 Pa. Co. Ct. 600.

Statute Exacting Interest on Overdue Taxes. — Com. v. Standard Oil Co., 101 Pa. St. 119, citing Com. v. Easton Bank, 10 Pa. St. 451.

Statute Imposing Penalty for Failure to Satisfy Paid Judgment or Mortgage. — Grooms v. Hannon, 59 Ala. 510; Marston v. Tryon, 108 Pa. St. 270. See also Fairley v. Davis, 6 Ala. 375; Russell v. Irby, 13 Ala. 131; Connolly v. Alabama, etc., Rivers R. Co., 29 Ala. 373; Jones v. Brooks, 30 Ala. 588.

Recovery of Treble Damages for Conversion of Logs or Lumber. — Cohn v. Neeves, 40 Wis. 393.

Penalty for Leaving Open Swinging Gate Across Private Road. — Allen v. Stevens, 29 N. J. L. 509.

Penalty for Refusal of Telegraph Company to Transmit Telegrams. — Brooks v. Western Union Tel. Co., 56 Ark. 224.

For a discussion of the construction of the statute of frauds, see the title **STATUTE OF FRAUDS**, *ante*.

For a discussion of the construction of statutes relating to gambling contracts, see the title **GAMBLING CONTRACTS**, vol. 14, p. 625. And see Cole v. Groves, 134 Mass. 471.

1. **Penal Statutes Not to Be Extended to Things Not in Esse at Time of Passage of Statutes.** — Reg. v. Smith, L. R. 1 C. C. 266; Wells v. Porter, 3 Scott 141, 36 E. C. L. 357, 2 Bing. N. Cas. 722, 29 E. C. L. 469; Oakley v. Rigby, 2 Bing. N. Cas. 732, 29 E. C. L. 469, 3 Scott 194; Robson v. Fallows, 4 Scott 43, 3 Bing. N. Cas. 392, 32 E. C. L. 173; Morgan v. Pebrer, 4 Scott

230, 3 Bing. N. Cas. 457, 32 E. C. L. 202; Hewitt v. Price, 5 Scott N. R. 229, 4 M. & G. 355, 43 E. C. L. 188; Elsworth v. Cole, 2 M. & W. 31; Williams v. Tyre, 18 Beav. 366, 18 Jur. 442; Com. v. Howe, 144 Mass. 144; Com. v. Wells, 110 Pa. St. 463.

2. **Things Not in Esse Held Included.** — Gambart v. Ball, 14 C. B. N. S. 306, 108 E. C. L. 306; Graves v. Ashford, L. R. 2 C. P. 410; Milton v. Faversham, 10 B. & S. 548, note; Atty.-Gen. v. Lockwood, 9 M. & W. 378; Atty.-Gen. v. Sagers, 1 Price 182; Collier v. Worth, 1 Ex. D. 464; Taylor v. Goodwin, 4 Q. B. D. 228; Parkyns v. Preist, 7 Q. B. D. 313; Reg. v. Cottle, 16 Q. B. 412, 71 E. C. L. 412.

In Reg. v. Smith, L. R. 1 C. C. 266, Bovill, C. J., said: "The subject of extending statutes by inference to include cases not originally contemplated is one which has given rise to several decisions, the leading characteristic of which is that the earlier statute deals with a genus within which a new species is brought by a subsequent act. Thus, choses in action were not originally within 13 Eliz., c. 5, against fraudulent conveyance; that statute being applicable only to property which could be taken in execution. Sims v. Thomas, 12 Ad. & El. 536, 40 E. C. L. 117. But as to choses in action made subject to execution by 1 & 2 Vict., c. 110, there can be no doubt that by the conjoint operation of that act and the 13 Eliz., c. 5, such choses in action having become by new enactment a species of the genus property subject to execution, did, without any express enactment to that effect in the later statute, become subject to the operation of the former act. Norcutt v. Dodd, Cr. & Ph. 100; Barrack v. McCulloch, 3 Kay & J. 110."

3. **Where Penal Clause Is Less Comprehensive than Body of Act** — *England.* — Coe v. Lawrance, 1 El. & Bl. 516, 72 E. C. L. 516; Underhill v. Longridge, 6 Jur. N. S. 221, 29 L. J. M. C. 65; *Ex p.* National Mercantile Bank, 15 Ch. D. 42; Broadhead v. Holdsworth, 2 Ex. D. 321. Compare Williams v. Evans, 1 Ex. D. 277.

United States. — U. S. v. Ten Cases Shawls, 2 Paine (U. S.) 162.

Alabama. — Brooks v. State, 88 Ala. 122; Southwestern Bldg., etc., Assoc. v. Rowe, 125 Ala. 491.

Georgia. — Southwestern R. Co. v. Cohen, 49 Ga. 627.

Indiana. — State v. Cleveland, etc., R. Co., 157 Ind. 290.

In Thomas v. Stephenson, 2 El. & Bl. 108, 75 E. C. L. 108, it appeared that under Statute 5 & 6 Wm. IV., c. 63, § 28, an inspector is authorized at all reasonable times to enter any shop,

(2) **Statutes Both Penal and Remedial.** — It has been held that statutes which are both penal and remedial are to be construed strictly, in so far as they inflict punishment upon offenders, but that in their remedial features they are to be liberally and beneficially construed.¹ Many remedial statutes have, however, been construed liberally throughout, notwithstanding the imposition of penalties for their violation, on the ground that their primary object was redress and not punishment.²

(3) **Statutes in Derogation of Common Right.** — All statutes which encroach on the personal or property rights of the individual are to be construed strictly; it will be presumed, in the absence of express words or necessary intendment or implication, that a statute is not intended to interfere with or prejudice a private right or title.³

Statutes Working a Forfeiture or Confiscation of Private Property. — In this class are embraced all statutes which work a forfeiture or confiscation of the private property of a particular person or a particular class of persons.⁴

and there to examine all weights and measures, steelyards, or other weighing machines, and "if, upon examination, it shall appear that the said weights and measures are light or otherwise unjust, the same shall be liable to be seized and forfeited, and the person or persons in whose possession the same shall be found shall, upon conviction, forfeit a sum not exceeding £5." It was held that under this provision the inspector was not given authority to seize any weighing machine, although found to be unjust, but only weights and measures.

In *Southwestern R. Co. v. Cohen*, 49 Ga. 627, it was held that a statute providing for the inspection of weights and measures, and providing penalties against those who sold by weights not inspected and marked, did not apply to those who bought by such weights.

1. **Statutes Construed Strictly in Part.** — *Gorton v. Champneys*, 1 Bing 301, 8 E. C. L. 518; *Short v. Hubbard*, 2 Bing. 349, 445, 9 E. C. L. 429, 474; *Bones v. Booth*, 2 W. Bl. 1226; *Cumming v. Fryer*, *Dudley* (Ga.) 182.

In *Short v. Hubbard*, 2 Bing. 349, 9 E. C. L. 429, Best, C. J., said: "There is no impropriety in putting a strict construction on a penal clause and a liberal construction on a remedial clause in the same act of Parliament. This has been done on the statutes which make it felony to burn houses and other property, and give those who suffer from the felony a remedy against the hundred."

2. *Stanley v. Wharton*, 9 Price 301; *Taylor v. U. S.*, 3 How. (U. S.) 197; *Carey v. Giles*, 9 Ga. 253; *Gray v. Bennett*, 3 Met. (Mass.) 522; *Reed v. Northfield*, 13 Pick. (Mass.) 94, 23 Am. Dec. 662; *Ellis v. Whitlock*, 10 Mo. 781; *Sickles v. Sharp*, 13 Johns. (N. Y.) 497.

3. **Strict Construction of Statute in Derogation of Common Right** — *England*. — *Green v. Reg.*, 1 App. Cas. 513; *Harrod v. Worship*, 1 B. & S. 381, 101 E. C. L. 381; *Ex p. Jones*, L. R. 10 Ch. 663; *Ex p. Sheil*, 4 Ch. D. 789; *Wells v. London*, etc., R. Co., 5 Ch. D. 126; *Yarmouth v. Simmons*, 10 Ch. D. 518; *In re Lundy Granite Co.*, L. R. 6 Ch. 462; *Randolph v. Milman*, L. R. 4 C. P. 107; *Hughes v. Chester*, etc., R. Co., 8 Jur. N. S. 221, 31 L. J. Ch. 97.

Alabama. — *Gunter v. Leckey*, 30 Ala. 591.

Colorado. — *Troy Laundry*, etc., Co. v. Denver, 11 Colo. App. 368.

Connecticut. — *Chalker v. Chalker*, 1 Conn.

79, 6 Am. Dec. 206; *Booth v. State*, 4 Conn. 65; *Tuttle v. State*, 4 Conn. 68; *Strong v. Birchard*, 5 Conn. 357; *Johnson v. Stanley*, 1 Root (Conn.) 245.

Georgia. — *Young v. McKenzie*, 3 Ga. 40; *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248; *Savannah v. Hartridge*, 8 Ga. 23.

Illinois. — *Walker v. Chicago*, 56 Ill. 277; *Rothgerber v. Dupuy*, 64 Ill. 452.

Indiana. — *Webb v. Baird*, 6 Ind. 13; *Doe v. Avaline*, 8 Ind. 6; *Indianapolis*, etc., R. Co. v. Kinney, 8 Ind. 402.

Louisiana. — *Richardson v. Emswiler*, 14 La. Ann. 668; *Pelham v. Steamboat Messenger*, 16 La. Ann. 99.

Maine. — *Mitchell v. Rockland*, 45 Me. 496; *Pinkham v. Dorothy*, 55 Me. 135.

Massachusetts. — *Smith v. Spooner*, 3 Pick. (Mass.) 229; *Sewall v. Jones*, 9 Pick. (Mass.) 412; *Danvers v. Boston*, 10 Pick. (Mass.) 513; *Monson v. Chester*, 22 Pick. (Mass.) 385; *Coolidge v. Williams*, 4 Mass. 140; *Melody v. Reab*, 4 Mass. 473; *Billerica v. Chelmsford*, 10 Mass. 394; *Com. v. Tewksbury*, 11 Met. (Mass.) 55.

Michigan. — *Brady v. Northwestern Ins. Co.*, 11 Mich. 451.

Mississippi. — *McAfee v. Southern R. Co.*, 36 Miss. 669.

New York. — *Sprague v. Birdsall*, 2 Cow. (N. Y.) 419; *Ramsey v. Gould*, 57 Barb. (N. Y.) 398; *Port of New York v. Cartwright*, 4 Sandf. (N. Y.) 236.

Pennsylvania. — *McGlade's Appeal*, 99 Pa. St. 338; *Marsh v. Nelson*, 101 Pa. St. 51; *Palairret v. Snyder*, 106 Pa. St. 227; *Stewart v. Com.*, 10 Watts (Pa.) 307; *Morris v. Balderston*, 2 Brews. (Pa.) 459.

Washington. — *Kimball v. Olmsted*, 20 Wash. 634.

West Virginia. — *Harrison v. Smith*, 4 W. Va. 97; *Harrison v. Leach*, 4 W. Va. 383; *Pendleton v. Barton*, 4 W. Va. 496.

Wisconsin. — *Coleman v. Hart*, 37 Wis. 180; *Oshkosh City R. Co. v. Winnebago County*, 89 Wis. 437.

4. **Statutes Working a Forfeiture or Confiscation of Private Property Strictly Construed** — *England*. — *Ex p. Sheil*, 4 Ch. D. 789; *Wells v. London*, etc., R. Co., 5 Ch. D. 126; *In re Lundy Granite Co.*, L. R. 6 Ch. 467; *Ex p. Jones*, L. R. 10 Ch. 665; *Randolph v. Milman*, L. R. 4 C. P. 107.

Statutes Restricting and Regulating Use of Private Property. — So statutes regulating or restricting the use to be made by persons of their private property,¹ such as acts passed in the exercise of the police power of the state² or acts restricting and regulating the disposition of private property,³ are in derogation of common right, and must be construed strictly.

Statutes in Derogation of Personal Rights. — So statutes in derogation of the personal rights of individuals,⁴ such as laws in restraint of liberty⁵ or laws placing restrictions upon useful occupations and callings,⁶ are to be construed strictly.

Statutes Abridging Power to Make Contracts. — So all legislation interfering with the right of the individual, whether he be a natural person or a corporation, to enter into contracts or to exercise his preferences as to the person with whom he shall do business, should receive strict construction.⁷

(4) *Statutes in Derogation of Common Law* — (a) *In General.* — It is a well-established rule of construction that statutes in derogation of the common law are to be strictly construed, and hence, while a statute which is plainly inconsistent with the common law will prevail, yet statutes are not presumed to make any alteration in the common law further or otherwise than the clear import of the statutory language necessarily requires.⁸

United States. — *Russell v. Transylvania University*, 1 Wheat. (U. S.) 432; *U. S. v. Athens Armory*, 35 Ga. 344, 2 Abb. (U. S.) 129; *Polk v. The Steamer J. W. French*, 5 Hughes (U. S.) 429; *U. S. v. La Coste*, 2 Mason (U. S.) 129.

Ohio. — *The Steamboat Ohio v. Stunt*, 10 Ohio St. 582.

Confiscation Without Compensation Not Presumed. — *Wells v. London, etc.*, R. Co., 5 Ch. D. 126.

Acts Authorizing Impressment of Property for Public Use in Case of Pestilence or War. — *White v. Ivey*, 34 Ga. 186; *Pinkham v. Dorothy*, 55 Me. 135. See also the title EMINENT DOMAIN, vol. 10, pp. 1054, 1100.

1. **Statutes Restricting and Regulating Use of Private Property.** — *Shiel v. Sunderland*, 6 H. & N. 796; *People v. Smith*, 108 Mich. 527, 62 Am. St. Rep. 715; *Port of New York v. Cartwright*, 4 Sandf. (N. Y.) 236; *Tyack v. Brumley*, 1 Barb. Ch. (N. Y.) 519; *Morris v. Balderson*, 2 Brews. (Pa.) 459.

2. **Statutes Passed in Exercise of Police Power** — *United States.* — *Slaughter-House Cases*, 16 Wall. (U. S.) 36; *Bartemeyer v. Iowa*, 18 Wall. (U. S.) 137; *Munn v. Illinois*, 94 U. S. 113; *Mugler v. Kansas*, 123 U. S. 661.

Connecticut. — *Booth v. State*, 4 Conn. 65; *Tuttle v. State*, 4 Conn. 68.

Illinois. — *Louisville v. Webster*, 108 Ill. 414. *Massachusetts.* — *Com. v. Tewksbury*, 11 Met. (Mass.) 55; *Com. v. Sylvester*, 13 Allen (Mass.) 247; *Austin v. Murray*, 16 Pick. (Mass.) 121; *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694.

Michigan. — *Brady v. Northwestern Ins. Co.*, 11 Mich. 425; *Welch v. Stowell*, 2 Dougl. (Mich.) 332.

New York. — *Port of New York v. Cartwright*, 4 Sandf. (N. Y.) 236; *Wynehamer v. People*, 13 N. Y. 378; *Matter of Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34.

Ohio. — *Walker v. Board of Public Works*, 16 Ohio 540.

Pennsylvania. — *Stewart v. Com.*, 10 Watts (Pa.) 306; *McGlade's Appeal*, 99 Pa. St. 338.

West Virginia. — *State v. Gilman*, 33 W. Va. 146.

Compare Wadleigh v. Gilman, 12 Me. 403, 28 Am. Dec. 188.

3. **Statutes Regulating the Disposition of Private Property.** — *Richardson v. Emswiler*, 14 La. Ann. 668; *Sewall v. Jones*, 9 Pick. (Mass.) 412; *McGlade's Appeal*, 99 Pa. St. 338; *Palairat v. Snyder*, 106 Pa. St. 227.

4. **Statutes in Derogation of Personal Rights.** — *Ash v. Abdy*, 3 Swanst. 664; *Webb v. Baird*, 6 Ind. 13; *Pelham v. Steamboat Messenger*, 16 La. Ann. 99; *Smith v. Spooner*, 3 Pick. (Mass.) 229; *Ramsey v. Gould*, 57 Barb. (N. Y.) 398; *Sprague v. Birdsall*, 2 Cow. (N. Y.) 419; *Harrison v. Smith*, 4 W. Va. 97; *Harrison v. Leach*, 4 W. Va. 383; *Coleman v. Hart*, 37 Wis. 180.

Act Requiring "Test Oath" by Suitors. — *Harrison v. Smith*, 4 W. Va. 97; *Harrison v. Leach*, 4 W. Va. 383.

5. **Laws in Restraint of Liberty.** — *In re Wolf*, 27 Fed. Rep. 609; *In re Schenkein*, 113 Fed. Rep. 429; *Snedden v. Gunn*, 16 Pa. Co. Ct. 47.

6. **Statutes in Restraint of Useful Callings.** — *Gunter v. Leckey*, 30 Ala. 591; *Carberry v. People*, 39 Ill. App. 506.

7. **Statute Abridging Power to Contract.** — *Prescott, etc.*, R. Co. v. *Atchison, etc.*, R. Co., 73 Fed. Rep. 438.

Statute Declaring Void Stipulation for Attorneys' Fees in Written Evidences of Indebtedness. — *Barry Barry v. Snowden*, 106 Fed. Rep. 571.

Statute Disabling Spendthrift to Contract. — *Smith v. Spooner*, 3 Pick. (Mass.) 229, distinguished in *Manson v. Felton*, 13 Pick. (Mass.) 206.

Act Prohibiting Specified Contracts on Part of Public Officers. — *Coleman v. Hart*, 37 Wis. 180.

8. **Strict Construction of Statutes in Derogation of Common Law** — *England.* — *Ash v. Abdy*, 3 Swanst. 664; *Potter's Dwaris*, 70, 71, 219; 2 Inst. 199; *Rex v. Moreley*, 2 Burr. 1041; *Rex v. Cumberland County*, 6 T. R. 194.

Canada. — *Conger v. Kennedy*, 26 Can. Sup. Ct. 397.

United States. — *Brown v. Barry*, 3 Dall. (U. S.) 365; *Wilson v. Lenox*, 1 Cranch (U. S.) 211; *McCool v. Smith*, 1 Black (U. S.) 459; *Shaw v. North Pennsylvania R. Co.*, 101 U. S. 557; *Johnson v. Southern Pac. Co.*, 117 Fed. Rep. 462.

Remedial Statutes. — Even the liberal construction of remedial statutes may

Alabama. — *Gunter v. Leckey*, 30 Ala. 591; *Scaife v. Stovall*, 67 Ala. 237; *Lock v. Miller*, 3 Siew. & P. (Ala.) 13.

California. — *Hotaling v. Cronise*, 2 Cal. 60; *Bottomly v. Grace Church*, 2 Cal. 90; *Gassner v. Patterson*, 23 Cal. 299; *Turner v. Tuolumne County Water Co.*, 25 Cal. 397.

Colorado. — *Crane v. Chandler*, 5 Colo. 21.
District of Columbia. — *McCarthy v. McCarthy*, 20 App. Cas. (D. C.) 195.

Georgia. — *Young v. McKenzie*, 3 Ga. 31.
Illinois. — *Schuyler County v. Mercer County*, 9 Ill. 20; *Porter v. Dement*, 35 Ill. 478; *Cadwallader v. Harris*, 76 Ill. 370; *Thompson v. Weller*, 85 Ill. 197.

Indiana. — *Haas v. Shaw*, 91 Ind. 384, 46 Am. Rep. 607; *Barnett v. Harshbarger*, 105 Ind. 410; *Taylor v. Garnett*, 110 Ind. 287; *Citizens St. R. Co. v. Willooby*, 15 Ind. App. 320.

Kentucky. — *Pendleton v. State Bank*, 2 J. J. Marsh. (Ky.) 148; *Johnson v. State Bank*, 5 T. B. Mon. (Ky.) 119.

Louisiana. — *State v. Whetstone*, 13 La. Ann. 376.

Maryland. — *Hooper v. Baltimore*, 12 Md. 464; *Keech v. Baltimore*, etc., R. Co., 17 Md. 32; *Heiskell v. Baltimore*, 65 Md. 125, 57 Am. Rep. 308; *Dyson v. West*, 1 Har. & J. (Md.) 567.

Massachusetts. — *Melody v. Reab*, 4 Mass. 471; *Gibson v. Jenney*, 15 Mass. 205; *Howes v. Newcomb*, 146 Mass. 76; *Lord v. Parker*, 3 Allen (Mass.) 127; *Com. v. Cooley*, 10 Pick. (Mass.) 37; *Wilbur v. Crane*, 13 Pick. (Mass.) 284.

Michigan. — *Brown v. Fifield*, 4 Mich. 322; *Glover v. Alcott*, 11 Mich. 470.

Mississippi. — *Hemingway v. Scales*, 42 Miss. 1, 97 Am. Dec. 425;

Montana. — *Butte Hardware Co. v. Sullivan*, 7 Mont. 312.

New Hampshire. — *Mayo v. Wilson*, 1 N. H. 55.

New Jersey. — *State v. Lash*, 16 N. J. L. 380, 32 Am. Dec. 397; *Tinsman v. Belvidere Delaware R. Co.*, 26 N. J. L. 148, 69 Am. Dec. 565.

New York. — *McCluskey v. Cromwell*, 11 N. Y. 601; *Burnside v. Whitney*, 21 N. Y. 148; *Newell v. Wheeler*, 48 N. Y. 488; *People v. Hall*, 80 N. Y. 117; *Bertles v. Nunan*, 92 N. Y. 157, 44 Am. Rep. 361; *Manhattan Co. v. Laimbeer*, 108 N. Y. 578; *People v. Palmer*, 109 N. Y. 110, 4 Am. St. Rep. 423; *Fitzgerald v. Quann*, 109 N. Y. 441; *Dean v. Metropolitan El. R. Co.*, 119 N. Y. 540; *Smith v. Moffatt*, 1 Barb. (N. Y.) 65; *Graham v. Van Wyck*, 14 Barb. (N. Y.) 532; *Jackson v. Bradt*, 2 Cai. (N. Y.) 169; *Striker v. Kelly*, 2 Den. (N. Y.) 323; *Doughty v. Hope*, 3 Den. (N. Y.) 249; *Rue v. Alter*, 5 Den. (N. Y.) 119; *Berley v. Rampacher*, 5 Duer (N. Y.) 183; *Ex p. Heath*, 3 Hill (N. Y.) 52; *Sharp v. Speir*, 4 Hill (N. Y.) 76; *Sharp v. Johnson*, 4 Hill (N. Y.) 92, 40 Am. Dec. 259; *Bowen v. Lease*, 5 Hill (N. Y.) 221; *Bussing v. Bushnell*, 6 Hill (N. Y.) 382; *Sherwood v. Reade*, 7 Hill (N. Y.) 431; *Howe v. Peckham*, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 229; *Millered v. Lake Ontario*, etc., R. Co., (Supm. Ct. Gen. T.) 9 How. Pr. (N. Y.) 238; *Gilbert v. Columbia Turnpike Co.*, 3 Johns. Cas. (N. Y.)

107; *People v. Bristol*, etc., Turnpike Road Co., 23 Wend. (N. Y.) 222; *O'Rourke v. John Hancock Mut. L. Ins. Co.*, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 407.

North Carolina. — *Bailey v. Bryan*, 3 Jones L. (48 N. Car.) 357, 67 Am. Dec. 246.

Pennsylvania. — *Esterley's Appeal*, 54 Pa. St. 192; *McMullin v. McCreary*, 54 Pa. St. 230; *Moyer v. Pennsylvania Slate Co.*, 71 Pa. St. 293; *Com. v. Davidson*, 4 Pa. Dist. 173.

Tennessee. — *Miller v. Childress*, 2 Humph. (Tenn.) 320.

Washington. — *Hays v. Miller*, 1 Wash. Ter. 143.

West Virginia. — *Harrison v. Leach*, 4 W. Va. 383.

Caution. — In some states this rule has been changed by statute to a greater or less extent, see *infra*, this subsection, (c) *Abrogation of Rule by Statute*.

Statutes Making Real Estate of Decedent Liable for His Debts. — *Dean v. Dean*, 3 Mass. 258; *Drinkwater v. Drinkwater*, 4 Mass. 356; *Mitchell v. Lunt*, 4 Mass. 658; *Hollman v. Bennett*, 44 Miss. 322.

Statutes Giving Administrators Power Over Real Estate. — *Jones v. Lamar*, 34 Fed. Rep. 454.

Mechanics' Liens. — A discussion of the construction of statutes relating to mechanics' liens will be found in the title MECHANICS' LIENS, vol. 20, p. 277 *et seq.* And see the following cases:

United States. — *In re Hope Min. Co.*, 1 Sawy. (U. S.) 710.

Alabama. — *Montandon v. Deas*, 14 Ala. 33, 48 Am. Dec. 84.

California. — *Tuttle v. Montford*, 7 Cal. 358.

Connecticut. — *Consociated Presb. Soc. v. Staples*, 23 Conn. 544; *Chapin v. Persse*, etc., Paper Works, 30 Conn. 461, 79 Am. Dec. 263.

Illinois. — *Brady v. Anderson*, 24 Ill. 110.

Indiana. — *Wade v. Reitz*, 18 Ind. 307; *Gilman v. Gard*, 29 Ind. 291.

Maine. — *Collins Granite Co. v. Devereux*, 72 Me. 422.

Massachusetts. — *Lynch v. Cronan*, 6 Gray (Mass.) 531.

Michigan. — *Willard v. Magoon*, 30 Mich. 273; *Wagar v. Briscoe*, 38 Mich. 587.

Mississippi. — *Buck v. Brian*, 2 How. (Miss.) 880.

Missouri. — *Schulenburg v. Bascom*, 38 Mo. 188; *Putnam v. Ross*, 46 Mo. 337.

New Jersey. — *Ayres v. Revere*, 25 N. J. L. 475; *Associates of Jersey Co. v. Davison*, 29 N. J. L. 415.

New York. — *Mushlitt v. Silverman*, 50 N. Y. 360; *Roberts v. Fowler*, (C. Pl. Spec. T.) 4 Abb. Pr. (N. Y.) 263, 3 E. D. Smith (N. Y.) 632; *Rafter v. Sullivan*, (Supm. Ct. Spec. T.) 13 Abb. Pr. (N. Y.) 262; *Wood v. Donaldson*, 17 Wend. (N. Y.) 550; *Donaldson v. Wood*, 22 Wend. (N. Y.) 399.

Ohio. — *Thomas v. Huesman*, 10 Ohio St. 152.

Pennsylvania. — *Noll v. Swineford*, 6 Pa. St. 187; *Harlan v. Rand*, 27 Pa. St. 511; *Esterley's Appeal*, 54 Pa. St. 192.

South Dakota. — *Pinkerton v. Le Beau*, 3 S. Dak. 440.

be modified by this rule.¹

(b) **Applications of Rule.** — This rule has been applied to statutes which innovate upon the common-law rules of evidence,² statutes conferring powers and rights upon married women,³ and statutes generally by which the

Tennessee. — *Barnes v. Thompson*, 2 Swan (Tenn.) 313.

Vermont. — *Greenough v. Nichols*, 30 Vt. 768.

Factors' Acts. — For discussion of construction of factors' acts, see the title **FACTORS' ACTS**, vol. 12, p. 616.

Disorderly Houses. — For discussion of construction of statutes changing common law as to disorderly houses, see the title **DISORDERLY HOUSES**, vol. 9, p. 510.

1. *Webb v. Mullins*, 78 Ala. 111; *Smith v. Moffat*, 1 Barb. (N. Y.) 65.

2. **Statutes Changing Common-law Rules of Evidence.** — *Hoteling v. Cronise*, 2 Cal. 60; *Dyson v. West*, 1 Har. & J. (Md.) 567; *Broadbent v. State*, 7 Md. 416; *Warner v. Fowler*, 8 Md. 25; *Thistle v. Frostburg Coal Co.*, 10 Md. 129; *Smith v. Randall*, 3 Hill (N. Y.) 495; *Sheetz v. Hanbest*, 81 Pa. St. 100; *Packer v. Noble*, 103 Pa. St. 188; *Dequasie v. Harris*, 16 W. Va. 345.

Statute Permitting Party to Testify in His Own Behalf. — *Dewey v. Goodenough*, 56 Barb. (N. Y.) 54. See also *Dwely v. Dwely*, 46 Me. 377.

But in *Texas v. Chiles*, 21 Wall. (U. S.) 490, it was held that a statute removing the disqualification of a witness on the ground of interest was remedial and to be liberally construed.

Act Permitting a Party to Prove His Own Accounts by Oath or Affirmation. — *Warner v. Fowler*, 8 Md. 25.

Statute Compelling Witness to Give Evidence Against Himself. — *Broadbent v. State*, 7 Md. 416.

Statutes Permitting Testimony of Jurors to Show Verdict Was Made by Lot. — *Turner v. Tuolumne County Water Co.*, 25 Cal. 397. See *Taylor v. Garnett*, 110 Ind. 289.

3. **Married Women's Acts** — *United States.* — *Compare Warford v. Noble*, 9 Biss. (U. S.) 320.

Alabama. — *Gibson v. Marquis*, 29 Ala. 668; *Canty v. Sanderford*, 37 Ala. 91; *Alexander v. Saulsbury*, 37 Ala. 375; *Warfield v. Ravesies*, 38 Ala. 518; *Perryman v. Greer*, 39 Ala. 133; *Ashford v. Watkins*, 70 Ala. 156.

Illinois. — *Cunningham v. Hanney*, 12 Ill. App. 437.

Indiana. — *Haas v. Shaw*, 91 Ind. 384, 46 Am. Rep. 607.

Iowa. — *Triplett v. Graham*, 58 Iowa 135.

Maine. — *Swift v. Luce*, 27 Me. 285.

Maryland. — *Marburg v. Cole*, 49 Md. 402, 33 Am. Rep. 266.

Massachusetts. — *Lord v. Parker*, 3 Allen (Mass.) 128.

Mississippi. — *Olive v. Walton*, 33 Miss. 103.

New York. — *Reynolds v. Robinson*, 64 N. Y. 589; *Kelso v. Tabor*, 52 Barb. (N. Y.) 129; *Perkins v. Perkins*, 7 Lans. (N. Y.) 19; *Chambovet v. Cagney*, 35 N. Y. Super. Ct. 474.

Pennsylvania. — *Pettit v. Fretz*, 33 Pa. St. 118; *Diver v. Diver*, 56 Pa. St. 109; *Bergey's Appeal*, 60 Pa. St. 418, 100 Am. Dec. 578; *Dorris v. Erwin*, 101 Pa. St. 239; *Quick v. Miller*, 103 Pa. St. 67.

Vermont. — *Longey v. Leach*, 57 Vt. 377.

And see the title **SEPARATE PROPERTY OF MARRIED WOMEN**, vol. 25, p. 347.

Statutes Conferring Separate Property Rights. — *Neelly v. Lancaster*, 47 Ark. 175, 58 Am. Rep. 752; *Swift v. Luce*, 27 Me. 285; *Pentz v. Simonson*, 13 N. J. Eq. 232; *Compton v. Pier-son*, 28 N. J. Eq. 229; *Naylor v. Field*, 29 N. J. L. 287; *Haines v. Ellis*, 24 Pa. St. 255; *Pettit v. Fretz*, 33 Pa. St. 118; *Moore v. Cornell*, 68 Pa. St. 320.

Power to Contract — *Alabama.* — *Cook v. Meyer*, 73 Ala. 580.

Illinois. — *Carpenter v. Mitchell*, 50 Ill. 471; *Thompson v. Weller*, 85 Ill. 197.

Indiana. — *Barnett v. Harshbarger*, 105 Ind. 413.

Iowa. — *Jones v. Crosthwaite*, 17 Iowa 393. *Compare Kramer v. Rebman*, 9 Iowa 114.

Kentucky. — *Hannon v. Madden*, 10 Bush (Ky.) 664.

Massachusetts. — *Lord v. Parker*, 3 Allen (Mass.) 127; *Ingham v. White*, 4 Allen (Mass.) 412; *Bassett v. Bassett*, 112 Mass. 99; *Fowle v. Torrey*, 135 Mass. 87.

Michigan. — *Compare White v. Zane*, 10 Mich. 333; *Burdeno v. Amperse*, 14 Mich. 97, 90 Am. Dec. 225; *Tong v. Marvin*, 15 Mich. 60; *Tillman v. Shackleton*, 15 Mich. 455, 93 Am. Dec. 198; *Rankin v. West*, 25 Mich. 195.

New Jersey. — *Eckert v. Reuter*, 33 N. J. L. 268; *Vankirk v. Skillman*, 34 N. J. L. 114.

New York. — *Yale v. Dederer*, 18 N. Y. 265, 72 Am. Dec. 503; *White v. Wager*, 25 N. Y. 328; *Winans v. Peebles*, 32 N. Y. 423; *Meeker v. Wright*, 76 N. Y. 270; *Colvin v. Currier*, 22 Barb. (N. Y.) 371; *Savage v. O'Neil*, 42 Barb. (N. Y.) 374; *Corn Exch. Ins. Co. v. Babcock*, 57 Barb. (N. Y.) 222; *Perkins v. Perkins*, 7 Lans. (N. Y.) 19; *Gardner v. Gardner*, 22 Wend. (N. Y.) 528, 34 Am. Dec. 340.

Pennsylvania. — *Moore v. Cornell*, 68 Pa. St. 320; *Quick v. Miller*, 103 Pa. St. 68; *Dorris v. Erwin*, 101 Pa. St. 245.

Prescribed Mode of Making Contract to Be Strictly Pursued. — Statutes giving married women the right to make contracts which they could not make at common law, must be followed strictly when they prescribe the manner of exercising such right.

Indiana. — *Shumaker v. Johnson*, 35 Ind. 33; *Mattox v. Hightshue*, 39 Ind. 95.

Massachusetts. — *Leggate v. Clark*, 111 Mass. 308.

Missouri. — *Bartlett v. O'Donoghue*, 72 Mo. 563; *Hoskinson v. Adkins*, 77 Mo. 537; *Bagby v. Emberson*, 79 Mo. 139.

Nevada. — *Beckman v. Stanley*, 8 Nev. 257.

New Jersey. — *Armstrong v. Ross*, 20 N. J. Eq. 109.

Pennsylvania. — *Trimmer v. Heagy*, 16 Pa. St. 484; *Glidden v. Strupler*, 52 Pa. St. 400; *Dunham v. Wright*, 53 Pa. St. 167; *Graham v. Long*, 65 Pa. St. 385; *Miller v. Wentworth*, 82 Pa. St. 280; *Miller v. Ruble*, 107 Pa. St. 395; *Overseers of Poor v. Overseers of Poor*, 112 Pa. St. 99.

common-law incidents of marriage are abrogated.¹

(e) **Abrogation of Rule by Statute.** — Under express statute in some jurisdictions, the rule of the common law that statutes in derogation thereof are to be strictly construed is abrogated, and provision is made for a liberal construction with a view to effecting the legislative intent.²

(a) **Constructive Repeal of Common Law.** — As a rule, while affirmative words without negative words do not annul the common law, a statute which treats of the whole of any subject-matter is a constructive repeal of the common law on that subject, as a subsequent statute treating of the whole subject-matter of a previous statute will impliedly repeal the previous statute.³ But unless the intent is manifest, the repeal by implication cannot be inferred.⁴

(5) **Statutes Delegating Powers.** — It may be stated generally that where special powers for the accomplishment of a particular purpose are conferred by statute upon corporations or individuals, the acts conferring such powers are to be construed strictly and the powers cannot be exercised for any collateral purpose.⁵ This rule has been applied to the powers conferred upon

Capacity to Sue and Be Sued. — *In re Somerset*, 34 Ch. D. 465; *Fitzgerald v. Quann*, 109 N. Y. 441.

1. Statutes Abrogating Common-law Incidents of Marriage. — *Neelly v. Lancaster*, 47 Ark. 175, 58 Am. Rep. 752; *Thompson v. Weller*, 85 Ill. 197; *Glover v. Alcott*, 11 Mich. 470; *Bertles v. Nunan*, 92 N. Y. 160; 44 Am. Rep. 361; *Perkins v. Perkins*, 7 Lans. (N. Y.) 19; *Haines v. Ellis*, 24 Pa. St. 255; *Hays v. Hays*, 5 Rich. L. (S. Car.) 31.

Statutes in Derogation of Common-law Rule of Tenancy by Entireties — *Arkansas*. — *Robinson* 1. Eagle, 29 Ark. 202.

Illinois. — *Compare Cooper v. Cooper*, 76 Ill. 57.

Indiana. — *Chandler v. Cheney*, 37 Ind. 391; *Patton v. Rankin*, 68 Ind. 245, 34 Am. Rep. 254; *Carver v. Smith*, 90 Ind. 222, 46 Am. Rep. 210.

Maryland. — *Marburg v. Cole*, 49 Md. 402, 33 Am. Rep. 266.

Massachusetts. — *Pray v. Stebbins*, 141 Mass. 219, 55 Am. Rep. 462.

Michigan. — *Fisher v. Provin*, 25 Mich. 347.

Mississippi. — *McDuff v. Beauchamp*, 50 Miss. 531.

New Hampshire. — *Compare Clark v. Clark*, 56 N. H. 109.

New Jersey. — *Washburn v. Burns*, 34 N. J. L. 18.

New York. — *Torrey v. Torrey*, 14 N. Y. 430; *Bertles v. Nunan*, 92 N. Y. 152, 44 Am. Rep. 361; *Zornlein v. Bram*, 100 N. Y. 12; *Miller v. Miller*, (Supm. Ct. Spec. T.) 9 Abb. Pr. N. S. (N. Y.) 444; *Goelet v. Gori*, 31 Barb. (N. Y.) 314; *Farmers', etc., Nat. Bank v. Gregory*, 49 Barb. (N. Y.) 155; *Beach v. Hollister*, 3 Hun (N. Y.) 519; *Freeman v. Barber*, 3 Thomp. & C. (N. Y.) 574.

Pennsylvania. — *Bates v. Seely*, 46 Pa. St. 248; *Diver v. Diver*, 56 Pa. St. 106; *French v. Mehan*, 56 Pa. St. 286; *McCurdy v. Canning*, 64 Pa. St. 39.

Wisconsin. — *Bennett v. Child*, 19 Wis. 362, 88 Am. Dec. 692.

2. Rule of Strict Construction Abrogated by Statute. — *Dillehay v. Hickey*, (Ky. 1902) 71 S. W. Rep. 1, 24 Ky. L. Rep. 1220; *Hyatt v. Anderson*, (Ky. 1903) 74 S. W. Rep. 1094; *Pinkerton v. Le Beau*, 3 S. Dak. 440; *O'Connor*

v. State, (Tex. Civ. App. 1902) 71 S. W. Rep. 409.

In some states statutes abrogating this rule apply only to the general codes of the state (Civ. Code Cal., § 4) or only to a particular code or statute (Code Civ. Pro. N. Y., § 3345). See *Apple's Estate*, 66 Cal. 434, and generally the title *COMMON LAW*, vol. 6, p. 270.

3. Constructive Repeal of the Common Law — *England*. — *Rex v. Cator*, 4 Burr. 2026; *Rex v. Davis*, 1 Leach C. C. 271.

Delaware. — *Hill v. Ginn*, 2 Penn. (Del.) 177. *Maryland*. — *Dugan v. Gittings*, 3 Gill (Md.) 138, 43 Am. Dec. 306.

Massachusetts. — *Bartlett v. King*, 12 Mass. 537, 7 Am. Dec. 99; *Ellis v. Paige*, 1 Pick. (Mass.) 45; *Nichols v. Squire*, 5 Pick. (Mass.) 168; *Com. v. Cooley*, 10 Pick. (Mass.) 37; *Com. v. Marshall*, 11 Pick. (Mass.) 350, 22 Am. Dec. 377; *Jennings v. Com.*, 17 Pick. (Mass.) 80.

New Hampshire. — *Leighton v. Walker*, 9 N. H. 62.

New Jersey. — *State v. Norton*, 23 N. J. L. 41.

Wisconsin. — *Gilkey v. Cook*, 60 Wis. 139.

4. Jennings v. Com., 17 Pick. (Mass.) 82; *State v. Norton*, 23 N. J. L. 39.

5. Strict Construction of Statutes Delegating Powers — *England*. — *Galloway v. London*, L. R. 1 H. L. 34; *Rex v. Loxdale*, 1 Burr. 445; *The Earl of Auckland*, Lush. 164; *The Kil-larney*, Lush. 202; *Richter v. Hughes*, 2 B. & C. 499, 9 E. C. L. 162; *Scales v. Pickering*, 4 Bing. 448, 15 E. C. L. 37, 1 M. & P. 195; *Reg. v. Cousins*, 4 B. & S. 849, 116 E. C. L. 849; *Calder, etc., Nav. Co. v. Pilling*, 14 M. & W. 76; *Hughes v. Chester, etc., R. Co.*, 8 Jur. N. S. 221, 31 L. J. C. 97; *Anonymous*, Lofft 438; *Rex v. Croke*, 1 Cowp. 26.

Indiana. — *Garrigus v. Parke County*, 39 Ind. 66.

Kansas. — *Shawnee County v. Carter*, 2 Kan. 115.

Ohio. — *State v. Chase*, 5 Ohio St. 528.

Pennsylvania. — *Pike County v. Rowland*, 94 Pa. St. 238.

South Carolina. — *Geter v. Tobacco Inspection Com'rs*, 1 Bay (S. Car.) 354, 1 Am. Dec. 621.

corporations both public¹ and private.²

Delegation of Power of Eminent Domain. — Thus the power of eminent domain belongs in the first instance to the state exclusively, and when the legislature delegates such power to municipal or private corporations, the act under which the right to exercise the power is claimed must be construed strictly.³

Delegation of Power to Levy Taxes. — So also statutes delegating the power to

1. See the title MUNICIPAL CORPORATIONS, vol. 20, p. 1140.

Power of Municipality to Subscribe to Stock of Private Corporation — *United States*. — Marsh v. Fulton County, 10 Wall. (U. S.) 676; St. Joseph Tp. v. Rogers, 16 Wall. (U. S.) 644; Commercial Nat. Bank v. Iola, 2 Dill. (U. S.) 353; Savannah v. Kelly, 108 U. S. 184; Daviess County v. Dickinson, 117 U. S. 657; Concord v. Robinson, 121 U. S. 165; Kelley v. Milan, 127 U. S. 139; Pulaski v. Gilmore, 21 Fed. Rep. 870.

Alabama. — Wetumpka v. Wetumpka Wharf Co., 63 Ala. 611.

Arkansas. — English v. Chicot County, 26 Ark. 454; Jacksonport v. Watson, 33 Ark. 704.

California. — People v. Coon, 25 Cal. 635; McCoy v. Briant, 53 Cal. 247.

Connecticut. — Bridgeport v. Housatonic R. Co., 15 Conn. 475.

Georgia. — Jones v. Columbus, 25 Ga. 610.

Illinois. — Gaddis v. Richland County, 92 Ill. 119.

Indiana. — Evansville, etc., Strait Line R. Co. v. Evansville, 15 Ind. 395; Indiana North, etc., R. Co. v. Attica, 56 Ind. 476.

Kansas. — Burnes v. Atchison, 2 Kan. 454; Atchison v. Butcher, 3 Kan. 104.

Missouri. — St. Louis v. Alexander, 23 Mo. 483.

New York. — Rome Bank v. Rome, 18 N. Y. 38; Starin v. Genoa, 23 N. Y. 439; People v. Mitchell, 35 N. Y. 551.

Tennessee. — Milan Taxpayers v. Tennessee Cent. R. Co., 11 Lea (Tenn.) 330.

And see the title MUNICIPAL AID, vol. 20, pp. 1097, 1098.

2. Strict Construction of Powers of Private Corporation — *England*. — Colman v. Eastern Counties R. Co., 10 Beav. 1; Salomons v. Laing, 12 Beav. 339; East Anglian R. Co. v. Eastern Counties R. Co., 11 C. B. 775, 73 E. C. L. 775; Eastern Counties R. Co. v. Hawkes, 5 H. L. Cas. 348; *In re Dudley*, 8 Q. B. D. 93; Ashbury R. Carriage, etc., Co. v. Riche, L. R. 7 H. L. 653; Atty.-Gen. v. Great Eastern R. Co., 5 App. Cas. 481; London, etc., R. Co. v. Board of Works, 3 K. & J. 123, 26 L. J. Ch. 164; South Staffordshire Waterworks Co. v. Barrow, 61 J. P. 661.

United States. — Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518; Augusta Bank v. Earle, 13 Pet. (U. S.) 587; Thomas v. Richmond, 12 Wall. (U. S.) 349; Huntington v. National Sav. Bank, 96 U. S. 388.

Alabama. — State v. Mobile, 5 Port. (Ala.) 279, 30 Am. Dec. 564.

California. — Vandall v. South San Francisco Dock Co., 40 Cal. 83.

Connecticut. — Fuller v. Academic School, 6 Conn. 532; Bridgeport v. Housatonic R. Co., 15 Conn. 501; New London v. Brainard, 22 Conn. 553; Hartford Bridge Co. v. Union Ferry Co., 29 Conn. 210.

Georgia. — Winter v. Muscogee R. Co., 11 Ga. 438.

Illinois. — Petersburg v. Metzker, 21 Ill. 205.

Kentucky. — Bowling Green, etc., R. Co. v. Warren County Ct., 10 Bush (Ky.) 712.

Maryland. — Pennsylvania, etc., Steam Nav. Co. v. Dandridge, 8 Gill & J. (Md.) 248, 29 Am. Dec. 543; Weckler v. Hagerstown First Nat. Bank, 42 Md. 581, 20 Am. Rep. 95.

Massachusetts. — Hood v. Dighton Bridge, 3 Mass. 263; Perry v. Wilson, 7 Mass. 393; Stetson v. Kempton, 13 Mass. 272, 7 Am. Dec. 145; Middlesex R. Co. v. Boston, etc., R. Co., 115 Mass. 347; Sutton v. Cole, 3 Pick. (Mass.) 240; Salem Mill Dam Corp. v. Ropes, 6 Pick. (Mass.) 23; Com. v. Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672; Richardson v. Sibley, 11 Allen (Mass.) 65, 87 Am. Dec. 700; Whittenton Mills v. Upton, 10 Gray (Mass.) 582, 71 Am. Dec. 681.

Mississippi. — McIntyre v. Ingraham, 35 Miss. 25; Leonard v. Canton, 35 Miss. 189; Mobile, etc., R. Co. v. Franks, 41 Miss. 494; Gaines v. Coates, 51 Miss. 342.

Missouri. — St. Louis v. Weber, 44 Mo. 547; Matthews v. Skinner, 62 Mo. 329, 21 Am. Rep. 425.

Nevada. — Whitman Gold, etc., Min. Co. v. Baker, 3 Nev. 386.

New Hampshire. — South Newmarket Methodist Seminary v. Peaslee, 15 N. H. 330; Downing v. Mt. Washington Road Co., 40 N. H. 231.

New Jersey. — Passaic, etc., Rivers Bridge v. Hoboken Land, etc., Co., 13 N. J. Eq. 81, 503.

New York. — People v. Utica Ins. Co., 15 Johns. (N. Y.) 358, 8 Am. Dec. 243; New York Firemen Ins. Co. v. Sturges, 2 Cow. (N. Y.) 675; New York Firemen Ins. Co. v. Ely, 2 Cow. (N. Y.) 699; Camden R., etc., Co. v. Remer, 4 Barb. (N. Y.) 130; Le Couteux v. Buffalo, 33 N. Y. 333.

North Carolina. — Mills v. Williams, 11 Ired. L. (33 N. Car.) 558.

Ohio. — White's Bank v. Toledo F. & M. Ins. Co., 12 Ohio St. 601; Lima v. Lima Cemetery Assoc., 42 Ohio St. 128, 51 Am. Rep. 809.

Pennsylvania. — Dugan v. Bridge Co., 27 Pa. St. 303, 67 Am. Dec. 464; Com. v. Erie, etc., R. Co., 27 Pa. St. 352, 67 Am. Dec. 471; Cleveland, etc., R. Co. v. Erie, 27 Pa. St. 380.

Texas. — Waxahachie v. Brown, 67 Tex. 519.

Vermont. — Shawmut Bank v. Plattsburgh, etc., R. Co., 31 Vt. 491.

And see the title CORPORATIONS, vol. 7, p. 708 et seq.

3. Delegation of Power of Eminent Domain — *England*. — Simpson v. South Staffordshire Waterworks Co., 4 De G. J. & S. 679, 34 L. J. Ch. 380.

Alabama. — Martin v. Rushton, 42 Ala. 289; Reynolds v. Speers, 1 Stew. (Ala.) 34.

Illinois. — Doe v. Hileman, 2 Ill. 323; Morris v. Chicago, 11 Ill. 650.

Louisiana. — Matter of Exch. Alley, 4 La.

levy taxes or local assessments¹ or authorizing the sale of land for taxes² must be construed strictly.

Ann. 4; Matter of Claiborne St., 4 La. Ann. 7; Opening of Philip St., 10 La. Ann. 313.

Missouri.—Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co., 82 Mo. 121; Cox v. Tipton, 18 Mo. App. 450.

New Jersey.—Watson v. Acquackanonck Water Co., 36 N. J. L. 195; Jersey City v. Central R. Co., 40 N. J. Eq. 417; Central R. Co. v. Hudson Terminal R. Co., 46 N. J. L. 289.

New York.—Belknap v. Belknap, 2 Johns. Ch. (N. Y.) 463, 7 Am. Dec. 548.

North Carolina.—Lea v. Johnston, 9 Ired. L. (31 N. Car.) 15.

See also the title EMINENT DOMAIN, vol. 10, p. 1054.

Prescribed Procedure under Condemnation Proceedings to Be Strictly Pursued—*Arkansas*.—Roberts v. Williams, 15 Ark. 43.

California.—Bensley Mountain Lake Water Co., 13 Cal. 306, 73 Am. Dec. 575; Curran v. Shattuck, 24 Cal. 427; Lincoln v. Colusa County, 28 Cal. 662; Damrell v. San Joaquin County, 40 Cal. 154.

Georgia.—Young v. McKenzie, 3 Ga. 31; Justices v. Griffin, etc., Plank Road Co., 9 Ga. 475.

Illinois.—Chicago, etc., R. Co. v. Smith, 78 Ill. 96; Hyslop v. Finch, 99 Ill. 171.

Louisiana.—New Orleans v. Sohr, 16 La. Ann. 393; Jefferson v. Delachaise, 22 La. Ann. 26.

Massachusetts.—Harris v. Marblehead, 10 Gray (Mass.) 40; Wamesit Power Co. v. Allen, 120 Mass. 352.

Michigan.—Kroop v. Forman, 31 Mich. 144; Toledo, etc., R. Co. v. Munson, 57 Mich. 42.

Minnesota.—Bartleson v. Minneapolis, 33 Minn. 468.

Mississippi.—Stockett v. Nicholson, Walk. (Miss.) 75.

Missouri.—St. Louis v. Franks, 78 Mo. 41.

New Jersey.—State v. Van Geison, 15 N. J. L. 339; Grisco v. Gilmore, 15 N. J. L. 475; State v. Jersey City, 25 N. J. L. 309; State v. Bergen, 33 N. J. L. 72.

New York.—Miller v. Brown, 56 N. Y. 383.

Ohio.—Harbeck v. Toledo, 11 Ohio St. 219.

Pennsylvania.—Killbuck Private Road, 77 Pa. St. 39.

West Virginia.—Adams v. Clarksburg, 23 W. Va. 203.

Wisconsin.—Bohlman v. Green Bay, etc., R. Co., 40 Wis. 157.

1. Statutes Delegating Power to Tax—*United States*.—Heine v. Levee Com'rs, 19 Wall. (U. S.) 660; U. S. v. New Orleans, 98 U. S. 381; Meriwether v. Garrett, 102 U. S. 472; Ralls County Ct. v. U. S., 105 U. S. 733; Commercial Bank v. Sandford, 103 Fed. Rep. 98; Southern R. Co. v. North Carolina Corp. Commission, 97 Fed. Rep. 513.

Alabama.—Mobile v. Yuille, 3 Ala. 137, 36 Am. Dec. 441; Lott v. Ross, 38 Ala. 156; Mobile v. Baldwin, 57 Ala. 61, 29 Am. Rep. 712.

Arkansas.—Vance v. Little Rock, 30 Ark. 439.

California.—Emery v. San Francisco Gas Co., 28 Cal. 354; Taylor v. Donner, 31 Cal. 480; Bucknall v. Story, 36 Cal. 67; Swamp Land Dist. No. 121 v. Haggin, 64 Cal. 204.

Florida.—Moseley v. Tift, 4 Fla. 402.

Georgia.—Savannah v. Hartridge, 8 Ga. 23; Augusta v. Dunbar, 50 Ga. 387.

Illinois.—Wright v. Chicago, 20 Ill. 252; Chicago v. Wright, 32 Ill. 192; Scammon v. Chicago, 40 Ill. 146; Ottawa v. Spencer, 40 Ill. 211; Drake v. Phillips, 40 Ill. 388; Gridley v. Bloomington, 88 Ill. 555, 30 Am. Rep. 566; Hyde Park v. Borden, 94 Ill. 26; English v. People, 96 Ill. 566; Webster v. People, 98 Ill. 343.

Indiana.—Kyle v. Malin, 8 Ind. 34; Harmony Tp. v. Osborne, 9 Ind. 458; Nelson v. La Porte, 33 Ind. 258.

Iowa.—Jeffries v. Lawrence, 42 Iowa 498; Dubuque v. Chicago, etc., R. Co., 47 Iowa 201.

Kansas.—Leavenworth v. Norton, 1 Kan. 432; Burnes v. Atchison, 2 Kan. 454; Paine v. Spratley, 5 Kan. 525.

Kentucky.—Kniper v. Louisville, 7 Bush (Ky.) 599; Caldwell v. Rupert, 10 Bush (Ky.) 182; Murray v. Tucker, 10 Bush (Ky.) 240; Collins v. Louisville, 2 B. Mon. (Ky.) 134.

Louisiana.—Mason v. Police Jury, 9 La. Ann. 368.

Maryland.—Henderson v. Baltimore, 8 Md. 352; Annapolis v. Harwood, 32 Md. 471, 3 Am. Rep. 161; St. Mary's Industrial School v. Brown, 45 Md. 310; Vansant v. Harlem Stage Co., 59 Md. 330.

Massachusetts.—Boston v. Schaffer, 9 Pick. (Mass.) 419.

Minnesota.—Sewall v. St. Paul, 20 Minn. 511.

Mississippi.—Jackson v. Newman, 59 Miss. 385, 42 Am. Rep. 367.

Missouri.—St. Louis v. Laughlin, 49 Mo. 559; State v. Van Every, 75 Mo. 530.

New Jersey.—State v. Jersey City, 26 N. J. L. 444; Shackleton v. Guttenberg, 39 N. J. L. 660.

New York.—Sharp v. Speir, 4 Hill (N. Y.) 76; Sharp v. Johnson, 4 Hill (N. Y.) 92, 40 Am. Dec. 259; Rathbun v. Acker, 18 Barb. (N. Y.) 393; Dyckman v. New York, 5 N. Y. 434; Manice v. New York, 8 N. Y. 120; Howell v. Buffalo, 15 N. Y. 512; Bennett v. Buffalo, 17 N. Y. 385; Matter of Second Avenue M. E. Church, 66 N. Y. 395; Merritt v. Portchester, 71 N. Y. 309, 27 Am. Rep. 47.

North Carolina.—Asheville v. Means, 7 Ired. L. (29 N. Car.) 406.

Ohio.—Mays v. Cincinnati, 1 Ohio St. 268; Zanesville v. Richards, 5 Ohio St. 589; Jonas v. Cincinnati, 18 Ohio 318.

Oregon.—Oregon Steam Nav. Co. v. Portland, 2 Oregon 81.

South Carolina.—State v. Maysville, 12 S. Car. 76; Columbia v. Hunt, 5 Rich. L. (S. Car.) 550.

Tennessee.—Columbia v. Beasley, 1 Humph. (Tenn.) 240, 34 Am. Dec. 646.

Vermont.—Henry v. Chester, 15 Vt. 460.

Virginia.—Peters v. Lynchburg, 76 Va. 927; Schoolfield v. Lynchburg, 78 Va. 366; Richmond v. Daniel, 14 Gratt. (Va.) 387; Orange, etc., R. Co. v. Alexandria, 17 Gratt. (Va.) 176.

Wisconsin.—Dean v. Gleason, 16 Wis. 1.

Power to Impose License Tax.—Cache County v. Jensen, 21 Utah 207.

2. Power to Sell Land for Taxes—*United States*.—Stead v. Course, 4 Cranch (U. S.) 403;

(6) *Statutes Imposing Liabilities.* — Statutes imposing a liability having no existence, or only a limited existence, outside of the legislation, are to be strictly construed.¹ For a discussion of the construction of statutes imposing an individual liability upon stockholders of corporations, see the title STOCKS AND STOCKHOLDERS.²

Statutes Giving Right of Action for Death by Wrongful Act. — It has been held that statutes which give a right of action to the personal representative of the deceased for tortious acts resulting in death should be construed strictly.³ On the other hand, it is held that such statutes are remedial, inasmuch as they simply provide a remedy for an obvious wrong, and that they should be construed liberally,⁴ except in so far as they provide for the recovery of punitive damages.⁵

Statutes Imposing Costs. — So statutes imposing costs have been held subject to strict construction, sometimes as being penal statutes, and sometimes as being in derogation of the common law.⁶

(7) *Exemptions from Liabilities.* — Acts creating exemptions from common-law liabilities are construed strictly. A party who claims such an exemption must bring his case within the letter and spirit of the statute.⁷ So statutory

Rodbird v. Rodbird, 5 Cranch (C. C.) 125; *Bradley v. Conner*, 5 Cranch (C. C.) 615; *M'Clung v. Ross*, 5 Wheat. (U. S.) 116; *Thatcher v. Powell*, 6 Wheat. (U. S.) 119; *Washington v. Pratt*, 8 Wheat. (U. S.) 681; *Ronkendorff v. Taylor*, 4 Pet. (U. S.) 349; *Mason v. Fearson*, 9 How. (U. S.) 248; *Holroyd v. Pumphrey*, 18 How. (U. S.) 69; *Parker v. Overman*, 18 How. (U. S.) 137; *Thompson v. Roe*, 22 How. (U. S.) 422; *Ransom v. Williams*, 2 Wall. (U. S.) 313; *Harvey v. Tyler*, 2 Wall. (U. S.) 329; *Gould v. Day*, 94 U. S. 405; *Denike v. Rourke*, 3 Biss. (U. S.) 39; *Waldron v. Chasteney*, 2 Blatchf. (U. S.) 62; *Segee v. Thomas*, 3 Blatchf. (U. S.) 11; *Clarke v. Strickland*, 2 Curt. (U. S.) 439; *Walker v. Moore*, 2 Dill. (U. S.) 256; *McGunnegle v. Rutherford*, Hempst. (U. S.) 45; *Piatt v. M'Cullough*, 1 McLean (U. S.) 82; *Stansbury v. Taggart*, 3 McLean (U. S.) 457; *Miner v. McLean*, 4 McLean (U. S.) 138; *Mayhew v. Davis*, 4 McLean (U. S.) 213; *Ogden v. Harrington*, 6 McLean (U. S.) 418; *LeRoy v. Reeves*, 5 Sawy. (U. S.) 102; *Bright v. Boyd*, 1 Story (U. S.) 487; *Warner v. Howell*, 3 Wash. (U. S.) 12.

District of Columbia. — *Harkness v. District of Columbia*, 1 MacArthur (D. C.) 121; *Coombs v. O'Neal*, 1 MacArthur (D. C.) 405.

Michigan. — *Sibley v. Smith*, 2 Mich. 487.

New York. — *Ritter v. Worth*, 58 N. Y. 627; *National F. Ins. Co. v. McKay*, (Buffalo Super. Ct. Gen. T.) 5 Abb. Pr. N. S. (N. Y.) 445; *Finlay v. Cook*, 54 Barb. (N. Y.) 9; *Cruger v. Dougherty*, 1 Lans. (N. Y.) 464.

Tennessee. — *Rule v. Parker, Cooke*, (Tenn.) 365; *Bush v. Williams, Cooke*, (Tenn.) 360.

1. *Strict Construction of Statutes Creating Liabilities.* — *Chicago*, etc., R. Co. v. *Sturgis*, 44 Mich. 538; *Detroit v. Putnam*, 45 Mich. 265; *Detroit v. Chaffee*, 70 Mich. 80; *Matter of Hollister Bank*, 27 N. Y. 393, 84 Am. Dec. 292; *Matter of Hollister*, 2 Keyes (N. Y.) 245; *The Steamboat Ohio v. Stunt*, 10 Ohio St. 582; *Moyer v. Pennsylvania Slate Co.*, 71 Pa. St. 293; *Bunn's Appeal*, 105 Pa. St. 49, 51 Am. Rep. 166; *O'Reilly v. Bard*, 105 Pa. St. 569; *Com. v. Davidson*, 4 Pa. Dist. 173; *York Hospital*, etc., Assoc. v. *York County*, 12 Pa. Dist. 539; *Cohn v. Neeves*, 40 Wis. 393.

2. As to the construction of statutes imposing liability on the officers and directors of private corporations for corporate debts, see the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 21, p. 882. And see *Rorke v. Thomas*, 56 N. Y. 560.

3. *Strict Construction of Statutes Making Death by Wrongful Act Actionable.* — *Eustace v. Jahns*, 38 Cal. 3; *Daly v. Stoddard*, 66 Ga. 145; *Burns v. Grand Rapids*, etc., R. Co., 113 Ind. 169; *Hamilton v. Jones*, 125 Ind. 176; *Jackson v. St. Louis*, etc., R. Co., 87 Mo. 422, 56 Am. Rep. 460; *Pittsburg*, etc., R. Co. v. *Hine*, 25 Ohio St. 629.

4. *Liberal Construction of Statutes Making Death by Wrongful Act Actionable.* — *Stewart v. Baltimore*, etc., R. Co., 168 U. S. 448; *Hayes v. Williams*, 17 Col. 465; *Soule v. New York*, etc., R. Co., 24 Conn. 575; *Lamphear v. Buckingham*, 33 Conn. 237; *Wabash*, etc., R. Co. v. *Shacklett*, 10 Ill. App. 404; *Merkle v. Bennington Tp.*, 58 Mich. 156, 55 Am. Rep. 666; *Bolinger v. St. Paul*, etc., R. Co., 36 Minn. 418, 1 Am. St. Rep. 680; *Haggerty v. Central R. Co.*, 31 N. J. L. 349; *Beach v. Bay State Co.*, (Supm. Ct. Spec. T.) 6 Abb. Pr. (N. Y.) 415, 16 How. Pr. (N. Y.) 1, 27 Barb. (N. Y.) 248.

5. *Board of Internal Imp. v. Searce*, 2 Duv. (Ky.) 576.

6. *Statutes Giving Costs.* — *Cone v. Bowles*, 1 Salk. 205; *Cobb v. Mid Wales R. Co.*, L. R. 1 Q. B. 351; *Dent v. State*, 42 Ala. 514; *Walker v. Sheftall*, 73 Ga. 806; *Gehrke v. Gehrke*, 190 Ill. 170; *State v. Kinne*, 41 N. H. 238; *Van Horne v. Petrie*, 2 Cai. (N. Y.) 213; *Farrington v. Rennie*, 2 Cai. (N. Y.) 220; *Briggs v. Allen*, 4 Hill (N. Y.) 538; *Van Hovenburgh v. Case*, 4 Hill (N. Y.) 541; *Dockstader v. Sammons*, 4 Hill (N. Y.) 546; *Clark v. Dewey*, 5 Johns. (N. Y.) 251. Compare *Smith v. Allen*, 79 Me. 536.

7. *Statutes Exempting from Liability.* — *Gale v. Laurie*, 5 B. & C. 156, 11 E. C. L. 187; *Smith v. Kirby*, 1 Q. B. D. 131; *The Protector*, 1 W. Rob. 45; *The Ship Diana*, 4 Moo. P. C. 11; *London*, etc., Shipping Co. v. *The Emily Fanny*, L. R. 1 P. C. 426; *Pierce v. Bryant*, 5 Allen (Mass.) 91; *Willis v. Long Island R. Co.*, 32 Barb. (N. Y.) 398, affirmed 34 N. Y. 670; *An-*

exemptions from taxation are construed strictly against the grantee of the exemption.¹

(8) *Statutes Imposing Taxes* — (a) *In General*. — In *England*, it is a firmly established rule that statutes imposing public burdens in the form of taxation are to be construed strictly; where there is an ambiguity in the language which raises a doubt as to the legislative intent, such doubt must be resolved in favor of the persons upon whom it is sought to impose the burden,² and in the *United States* this rule is generally followed.³

(b) *Tariff Laws*. — If the question whether articles are dutiable under the tariff laws is one of doubt, the doubt will be resolved in favor of the importer, as duties are never imposed on the citizen upon vague and doubtful interpretations.⁴ Yet it has been said that acts imposing duties are not to be construed strictly against the government, like penal laws, but so as most effectually to accomplish the intention of the legislature in passing them.⁵

draws v. Schott, 10 Pa. St. 47; *Breitenbach v. Bush*, 44 Pa. St. 313, 84 Am. Dec. 442; *Vandike v. Roskam*, 67 Pa. St. 330; *Maloney v. Bruce*, 94 Pa. St. 249; *Eliot v. Himrod*, 108 Pa. St. 569.

Homestead Exemptions and Exemptions from Executions Generally. — A discussion of the application of the rule of the text to homestead exemptions and exemptions from execution generally will be found in the titles EXEMPTIONS (FROM EXECUTION), vol. 12, p. 75, and HOMESTEAD, vol. 15, p. 533. And see the following cases:

Alabama. — *Noiand v. Wickham*, 9 Ala. 169, 44 Am. Dec. 435; *Sallee v. Waters*, 17 Ala. 482. *Arkansas*. — *Tumlinson v. Swinney*, 22 Ark. 408, 76 Am. Dec. 432.

Connecticut. — *Seeley v. Gwillim*, 40 Conn. 106.

Indiana. — *Barkley v. Mahon*, 95 Ind. 101.

Iowa. — *Davis v. Humphrey*, 22 Iowa 137.

Louisiana. — *Todd v. Gordy*, 28 La. Ann. 666; *Briant v. Lyons*, 29 La. Ann. 64.

Massachusetts. — *Gibson v. Jenney*, 15 Mass. 205.

Michigan. — *King v. Moore*, 10 Mich. 538.

Minnesota. — *Ward v. Huhn*, 16 Minn. 159.

Missouri. — *Wade v. Jones*, 20 Mo. 75, 61 Am. Dec. 584.

Nevada. — *Hawthorne v. Smith*, 3 Nev. 182, 93 Am. Dec. 397.

New York. — *Ford v. Johnson*, 34 Barb. (N. Y.) 364; *Tillotson v. Wolcott*, 48 N. Y. 188.

Texas. — *Anderson v. McKay*, 30 Tex. 190.

Vermont. — *Mundell v. Hammond*, 40 Vt. 641.

Wisconsin. — *Comstock v. Becketl*, 63 Wis. 656.

1. See the title EXEMPTIONS (FROM TAXATION), vol. 12, p. 302. And see *In re Walker*, 200 Ill. 566.

2. *Statutes Imposing Taxes Strictly Construed in England*. — *Warrington v. Furbor*, 8 East 242; *Williams v. Sangar*, 10 East 66; *Chandos v. Inland Revenue Com'rs*, 6 Exch. 464; *Gurr v. Scudds*, 11 Exch. 190; *In re Micklethwait*, 11 Exch. 452; *Wroughton v. Turtle*, 11 M. & W. 561; *Denn v. Diamond*, 4 B. & C. 243, 10 E. C. L. 320; *Tomkins v. Ashby*, 6 B. & C. 541, 13 E. C. L. 249; *Doe v. Snaith*, 8 Bing. 146, 21 E. C. L. 253; *Burder v. Veley*, 12 Ad. & El. 246, 40 E. C. L. 48; *Atty.-Gen. v. Middleton*, 3 H. & N. 138; *Caswell v. Cook*, 11 C. B. N. S. 637, 103 E. C. L. 637; *Pryce v. Monmouthshire*

Canal, etc., Co., 4 App. Cas. 197; *Oriental Bank Corp. v. Wright*, 5 App. Cas. 842; *Reg. v. Barclay*, 8 Q. B. D. 306; *Daines v. Heath*, 3 C. B. 938, 54 E. C. L. 938; *Iles v. Assessment Committee*, 8 Q. B. D. 69; *Gosling v. Veley*, 12 Q. B. 407, 64 E. C. L. 407; *Partington v. Atty.-Gen.*, L. R. 4 H. L. 122; *Shaw v. Ruddin*, 9 Ir. C. L. 214; *Reg. v. Mallow Union*, 12 Ir. C. L. 35.

Stamp Acts. — *Doe v. Snaith*, 8 Bing. 147, 21 E. C. L. 253; *Gurr v. Scudds*, 11 Exch. 190.

Rule Applied in Canada. — *Thivierge v. Cinqmars*, 13 Quebec Super. Ct. 398.

3. *Strict Construction in United States — United States*. — *Beatty v. Knowler*, 4 Pet. (U. S.) 170; *U. S. v. Eighty-four Boxes Sugar*, 7 Pet. (U. S.) 453; *Equitable Trust Co. v. Seldon*, 8 Fed. Cas. No. 4,508; *Gibson County v. Pullman Southern Car Co.*, 42 Fed. Rep. 577; *Rice v. U. S.*, (C. C. A.) 53 Fed. Rep. 912; *Commercial Bank v. Sandford*, 103 Fed. Rep. 98; *Campbellsville Lumber Co. v. Hubbert*, (C. C. A.) 112 Fed. Rep. 723; *Treat v. Tolman*, (C. C. A.) 113 Fed. Rep. 894; *McNally v. Field*, 119 Fed. Rep. 445; *Powers v. Barney*, 5 Blatchf. (U. S.) 202; *U. S. v. Watts*, 1 Bond (U. S.) 580; *U. S. v. Wigglesworth*, 2 Story (U. S.) 369; *Adams v. Bancroft*, 3 Sumn. (U. S.) 387. *Indiana*. — *Barnes v. Doe*, 4 Ind. 132; *Smith v. Waters*, 25 Ind. 397; *Williams v. State*, 6 Blackf. (Ind.) 36.

Maine. — *Williamsburg v. Lord*, 51 Me. 599. *Massachusetts*. — *Sewall v. Jones*, 9 Pick. (Mass.) 412; *Green v. Holway*, 101 Mass. 248, 3 Am. Rep. 339.

New Hampshire. — *Cahoon v. Coe*, 57 N. H. 556.

Pennsylvania. — *Boyd v. Hood*, 57 Pa. St. 98; *Com. v. Gilkeson*, 18 Pa. Super. Ct. 522.

Virginia. — *Brown v. Com.*, 98 Va. 366.

Compare Hubbard v. Brainard, 35 Conn. 568; *Cornwall v. Todd*, 38 Conn. 447. See also the title OCCUPATION, ETC., TAXES, vol. 21, p. 809.

4. *Strict Construction of Tariff Laws*. — *U. S. v. Isham*, 17 Wall. (U. S.) 496; *Henderson v. U. S.*, (C. C. A.) 66 Fed. Rep. 53; *In re Myers*, 69 Fed. Rep. 239; *In re Southern Pac. Co.*, 82 Fed. Rep. 313. And see the title REVENUE LAWS, vol. 24, p. 888.

5. *Rankin v. Hoyt*, 4 How. (U. S.) 332. See also *Anglo-California Bank v. Secretary of Treasury*, (C. C. A.) 76 Fed. Rep. 748; *U. S. v. Breed*, 1 Sumn. (U. S.) 159.

(c) **Statutes to Prevent Frauds upon the Revenue.** — It is a settled doctrine of the United States Supreme Court that statutes to prevent fraud upon the revenue are considered as enacted for the public good and to suppress public wrong, and therefore, although they impose penalties or forfeitures, are not to be construed like penal laws generally, strictly in favor of the defendant, but they are to be fairly and reasonably construed so as to carry out the intention of the legislature.¹

(9) **Statutes Affecting Jurisdiction of Courts.** — Acts creating courts of limited jurisdiction are construed strictly, and the powers of such courts will not be extended by implication further than is necessary for the exercise of the jurisdiction expressly conferred upon them.² So it is well established that statutes which merely give affirmative jurisdiction to one court do not oust that previously existing in another court; jurisdiction cannot be taken away from the court previously exercising it except by express words or necessary implication.³

(10) **Statutes Conferring Right to Sue State.** — A state cannot be sued in its

1. **Statutes to Prevent Frauds on Revenue.** — *Harford v. U. S.*, 8 Cranch (U. S.) 109; *Taylor v. U. S.*, 3 How. (U. S.) 197; *Rankin v. Hoyt*, 4 How. (U. S.) 332; *Cliquot's Champagne*, 3 Wall. (U. S.) 145; *U. S. v. Hodson*, 10 Wall. (U. S.) 406; *U. S. v. Stowell*, 133 U. S. 12 (*disapproving dictum* by Mr. Justice McLean in *U. S. v. Eighty-four Boxes Sugar*, 7 Pet. (U. S.) 453); *U. S. v. Olney*, 1 Abb. (U. S.) 275; *U. S. v. One Hundred Barrels Spirits*, 2 Abb. (U. S.) 305; *Twenty-eight Cases*, 2 Ben. (U. S.) 63; *The Steamer Missouri*, 3 Ben. (U. S.) 511; *U. S. v. Willetts*, 5 Ben. (U. S.) 220; *U. S. v. Three Tons Coal*, 6 Biss. (U. S.) 379; *U. S. v. 36 Barrels High Wines*, 7 Blatchf. (U. S.) 459; *U. S. v. Mynderse*, 7 Blatchf. (U. S.) 489; *U. S. v. 1,412 Gallons Distilled Spirits*, 10 Blatchf. (U. S.) 433; *Two Hundred and Fifty Barrels Molasses v. U. S.*, Chase (U. S.) 511; *U. S. v. Twenty-five Cases Cloths*, Crabbe (U. S.) 356; *Ten Cases Opium*, Deady (U. S.) 70; *In re Muller*, Deady (U. S.) 523; *U. S. v. One Hundred Barrels Spirits*, 1 Dill. (U. S.) 49; *The Schooner Industry*, 1 Gall. (U. S.) 114; *U. S. v. Breed*, 1 Sumn. (U. S.) 160; *U. S. v. Belding*, 12 Int. Rev. Rec. 39, 24 Fed. Cas. No. 14,562; *U. S. v. Dustin*, 15 Int. Rev. Rec. 30, 25 Fed. Cas. No. 15,012; *U. S. v. Hodson*, 14 Int. Rev. Rec. 100, 26 Fed. Cas. No. 15,376; *U. S. v. One Hundred and Twenty-Nine Packages*, 2 Am. L. Reg. N. S. 419, 27 Fed. Cas. No. 15,941; *U. S. v. De Goer*, 38 Fed. Rep. 83; *U. S. v. Allen*, 38 Fed. Rep. 736; *State v. Sullivan*, 50 Fed. Rep. 603; *Anglo-California Bank v. Secretary of Treasury*, (C. C. A.) 76 Fed. Rep. 748; *The Coquitlam*, (C. C. A.) 77 Fed. Rep. 751; *Hunter v. Corning*, (C. C. A.) 86 Fed. Rep. 915; *U. S. v. Sapinkow*, 90 Fed. Rep. 654. To the same effect see *State v. Carter*, 129 N. Car. 560. *Compare* *Sixty Pipes Brandy*, 10 Wheat. (U. S.) 424; *U. S. v. A Lot Silk Umbrellas*, 12 Fed. Rep. 412; *U. S. v. 1,150½ Pounds Celluloid*, (C. C. A.) 82 Fed. Rep. 634; *U. S. v. Ten Cases Shawls*, 2 Paine (U. S.) 166; *Taber v. U. S.*, 1 Story (U. S.) 1; *Walker v. Dailey*, 101 Ill. App. 575; *State v. Wheeler*, 23 Nev. 143.

2. **Statutes Creating Courts of Limited Jurisdiction** — *England.* — *Diss Urban Sanitary Authority v. Aldrich*, 2 Q. B. D. 179; *Flower v. Lloyd*, 6 Ch. D. 297; *Hartley v. Hooker*, 2

Cowp. 523; *Montreal v. Stephens*, 3 App. Cas. 605.

United States. — *Russell v. Wheeler*, Hempst. (U. S.) 3.

California. — *Caulfield v. Stevens*, 28 Cal. 118.

Illinois. — *School Inspectors v. People*, 20 Ill. 525; *Steamboat Delta v. Walker*, 24 Ill. 233.

Indiana. — *Wakefield v. State*, 5 Ind. 195; *Matlock v. Strange*, 8 Ind. 57; *O'Brien v. State*, 12 Ind. 369.

Kentucky. — *Barret v. Chitwood*, 2 Bibb (Ky.) 431.

Maine. — *Martin v. Fales*, 18 Me. 23, 36 Am. Dec. 693; *Call v. Mitchell*, 39 Me. 465.

Missouri. — *State v. Metzger*, 26 Mo. 65; *Williams v. Bower*, 26 Mo. 601.

North Carolina. — *Thompson v. Cox*, 8 Jones L. (53 N. Car.) 311.

Pennsylvania. — *East Union Tp. v. Ryan*, 86 Pa. St. 459.

South Carolina. — *Pringle v. Carter*, 1 Hill L. (S. Car.) 53.

Tennessee. — *State v. Anderson*, 2 Overt. (Tenn.) 6, 5 Am. Dec. 648; *Walker v. Wynne*, 3 Yerg. (Tenn.) 62; *Vanbibber v. Vanbibber*, 10 Humph. (Tenn.) 53.

See also the title JUSTICES OF THE PEACE, vol. 18, pp. 17, 37.

Special Powers Conferred on Courts of General Jurisdiction. — So statutes conferring special powers on tribunals of general jurisdiction are strictly construed. *Peacock v. Bell*, 1 Saund. 69; *Cohen v. Barrett*, 5 Cal. 195; *Haywood v. Collins*, 60 Ill. 333; *Bradley v. Jamison*, 46 Iowa 68; *Miller v. Corbin*, 46 Iowa 150; *Pren-tiss v. Parks*, 65 Me. 559; *Den v. Hammel*, 18 N. J. L. 79; *Ludlow v. Johnston*, 3 Ohio 553, 17 Am. Dec. 609; *Northcut v. Lemery*, 8 Oregon 316; *Odell v. Campbell*, 9 Oregon 298; *Furgeson v. Jones*, 17 Oregon 204, 11 Am. St. Rep. 308. See also *Atocha's Case*, 6 Ct. Cl. 71.

Statutes Enlarging Jurisdiction of Court to Correct Mischief of Old Law. — Statutes enlarging the jurisdiction of courts where the existing law operated mischievously have been liberally construed. *Larkin v. Saffarans*, 15 Fed. Rep. 150; *Bissell Carpet-Sweeping Co. v. Goshen Sweeper Co.*, (C. C. A.) 72 Fed. Rep. 553.

3. See *supra*, this title, VI. 7. d. *As to Con-ferring Jurisdiction*; 11. f. *ousting Jurisdiction*.

own courts unless it has expressly consented to such action, and a statute permitting such suits is in derogation of sovereign power and must be construed strictly.¹

(11) *Statutory Remedies and Proceedings.* — A statute instituting a new remedy for an existing right does not take away a pre-existing remedy without express words or necessary implication; the new remedy is cumulative and either may be pursued.² But when a statute gives a right or remedy which did not exist at common law, and provides a specific method of enforcing it, the mode of procedure provided by the statute is exclusive³ and must be

1. *Statutes Conferring Right to Sue State.* — *Ex p. Greene*, 29 Ala. 61; *State v. Joiner*, 23 Miss. 500; *Josselyn v. Stone*, 28 Miss. 753; *Raymond v. State*, 54 Miss. 562, 28 Am. Rep. 382; *Parmilee v. McNutt*, 1 Smed. & M. (Miss.) 179; *State v. Stout*, 7 Neb. 89; *Rose v. Governor*, 24 Tex. 496. Compare *State v. Curran*, 12 Ark. 321.

2. *New Remedy Cumulative Apart from Express Language or Necessary Implication — England.* — *Collinson v. Newcastle, etc.*, R. Co., 1 C. & K. 546, 47 E. C. L. 545; *Castle's Case*, Cro. Jac. 644; *Lichfield v. Simpson*, 8 Q. B. 65, 55 E. C. L. 65; *Rex v. Wright*, 1 Burr. 544.

Alabama. — *Branch Bank v. Tillman*, 12 Ala. 214; *Donnell v. Jones*, 13 Ala. 490, 48 Am. Dec. 59.

Colorado. — *Colorado Milling, etc., Co. v. Mitchell*, 26 Colo. 290.

Florida. — *Mitchell v. Duncan*, 7 Fla. 13; *Allen v. Ingram*, 39 Fla. 242.

Illinois. — *Chicago, etc., R. Co. v. Chicago*, 148 Ill. 160.

Maine. — *Gooch v. Stephenson*, 13 Me. 371.

Massachusetts. — *Jennings v. Com.*, 17 Pick. (Mass.) 82.

New Hampshire. — *State v. Manchester, etc.*, R. Co., 62 N. H. 34.

New York. — *Almy v. Harris*, 5 Johns. (N. Y.) 175; *Farmers' Turnpike Road Co. v. Coventry*, 10 Johns. (N. Y.) 389; *Scidmore v. Smith*, 13 Johns. (N. Y.) 322; *Looney v. Hughes*, 30 Barb. (N. Y.) 605; *Stafford v. Ingersoll*, 3 Hill (N. Y.) 38; *Renwick v. Morris*, 3 Hill (N. Y.) 621; *Crittenden v. Wilson*, 5 Cow. (N. Y.) 165, 15 Am. Dec. 462; *People v. Stevens*, 13 Wend. (N. Y.) 341; *Clark v. Brown*, 18 Wend. (N. Y.) 213; *People v. Bristol, etc.*, Turnpike Road Co., 23 Wend. (N. Y.) 222; *Behan v. People*, 17 N. Y. 516; *Burnham v. Onderdonk*, 41 N. Y. 425; *Lane v. Salter*, 51 N. Y. 1; *Farmers' Bank v. Hale*, 59 N. Y. 61; *Tremain v. Richardson*, 68 N. Y. 617.

North Carolina. — *Wilson v. Myers*, 4 Hawks (11 N. Car.) 73, 15 Am. Dec. 510.

Pennsylvania. — *Methodist Church v. Remington*, 1 Watts (Pa.) 210, 26 Am. Dec. 61.

Texas. — *Dawson v. Miller*, 20 Tex. 171, 70 Am. Dec. 380; *Thouvenin v. Rodrigues*, 24 Tex. 468.

Virginia. — *Booker v. M'Roberts*, 1 Call (Va.) 243.

Cumulative Remedy Against Nuisance. — Reg. v. Wigg, 2 Salk. 460.

Action of Trespass Held Not Abrogated by Statutory Remedy of Distress. — *Colden v. Eldred*, 15 Johns. (N. Y.) 220.

Statute Providing Penalty and Declaring Act Misdemeanor. — Where a statute provides a specific penalty for certain acts and also declares

such acts misdemeanors, the acts are indictable as misdemeanors at common law, although the penalty has already been recovered. *People v. Stevens*, 13 Wend. (N. Y.) 341.

Statutory Submission. — A statute prescribing certain forms for submission to arbitrators, and allowing the parties to agree that a judgment of a court of record, designated in the instrument of submission, shall be rendered upon the award, gives a cumulative remedy; and an award pursuant to a submission which would have been valid at common law, but which did not conform to the statute, will support an action. *Lamar v. Nicholson*, 7 Port. (Ala.) 158; *Burnside v. Whitney*, 21 N. Y. 149; *Wells v. Lane*, 15 Wend. (N. Y.) 99; *Diedrick v. Richley*, 2 Hill (N. Y.) 271; *Logsdon v. Roberts*, 3 T. B. Mon. (Ky.) 256; *Evans v. M'Kinsey*, Litt. Sel. Cas. (Ky.) 264; *Richardson v. Cassily*, 3 Watts (Pa.) 320. See also *Dickerson v. Tyner*, 4 Blackf. (Ind.) 253. But see *Deerfield v. Arms*, 20 Pick. (Mass.) 480, 32 Am. Dec. 228.

3. *Statutes Prescribing Exclusive Mode of Procedure — England.* — *Rex v. Robinson*, 2 Burr. 803; *Millar v. Taylor*, 4 Burr. 2305; *Beckford v. Hood*, 7 T. R. 620; *Lamplugh v. Norton*, 22 Q. B. D. 457.

Canada. — *Sims v. Kelly*, 20 Ont. 291.

United States. — *Dollar Sav. Bank v. U. S.*, 19 Wall. (U. S.) 227; *New York Fourth Nat. Bank v. Franchlyn*, 120 U. S. 747; *Campbellsville Lumber Co. v. Hubbert*, (C. C. A.) 112 Fed. Rep. 718.

Alabama. — *Janney v. Buell*, 55 Ala. 408; *Phillips v. Ash*, 63 Ala. 414; *Chandler v. Hanna*, 73 Ala. 390.

Indiana. — *Butler v. State*, 6 Ind. 165; *McCormack v. Terre Haute, etc.*, R. Co., 9 Ind. 283; *Toney v. Johnson*, 26 Ind. 382; *Storms v. Stevens*, 104 Ind. 46; *Sturgeon v. State*, 1 Blackf. (Ind.) 39; *Lang v. Scott*, 1 Blackf. (Ind.) 405, 12 Am. Dec. 257.

Maine. — *Bassett v. Carleton*, 32 Me. 553, 54 Am. Dec. 605.

Mississippi. — *Brown v. Beatty*, 34 Miss. 243, 69 Am. Dec. 389.

Massachusetts. — *Smith v. Drew*, 5 Mass. 514; *Andover, etc.*, Turnpike Corp. v. Gould, 6 Mass. 40, 4 Am. Dec. 80; *Franklin Glass Co. v. White*, 14 Mass. 286; *Kelton v. Phillips*, 3 Met. (Mass.) 62; *Knowlton v. Ackley*, 8 Cush. (Mass.) 93.

Missouri. — *Riddick v. Governor*, 1 Mo. 147; *Journey v. State*, 1 Mo. 428.

New Hampshire. — *State v. Manchester, etc.*, R. Co., 62 N. H. 34.

New York. — *Dudley v. Mayhew*, 3 N. Y. 9; *People v. Hall*, 80 N. Y. 117; *Almy v. Harris*, 5 Johns. (N. Y.) 175; *Renwick v. Morris*, 3 Hill (N. Y.) 621; *Matter of Townsend*, 4 Hun (N. Y.) 31; *Matter of Hollister*, 2 Keyes (N. Y.)

pursued strictly.¹ So, where the legislature authorizes the erection of a public work by individuals or by corporations, which may in its erection or operation occasion damage to others, and provides a specific mode of indemnity, the common-law action of the case treating such erection as a tort and regarding the damages given by it as a compensation for an injury done, is taken away.² Where a statute which creates a duty or liability provides no form of action, or mode by which it may be enforced, the right to an appropriate action is implied in favor of the party in whose behalf the duty or liability arises.³

(12) *Private Acts* — (a) *In General*. — Acts conferring special privileges upon or granting public property to private individuals or corporations are construed

245; *Smith v. Lockwood*, 13 Barb. (N. Y.) 209.

Pennsylvania. — *Chestnut Hill Turnpike Co. v. Martin*, 12 Pa. St. 361; *Huntingdon, etc., Turnpike Co. v. Brown*, 2 P. & W. (Pa.) 463; *App v. Dreisbach*, 2 Rawle (Pa.) 287, 21 Am. Dec. 447.

Ohio. — *Shepard v. Darke County*, 8 Ohio St. 354; *Commissioners v. Findley Bank*, 32 Ohio St. 194.

Rhode Island. — *Moies v. Sprague*, 9 R. I. 541.

South Carolina. — *State v. Cole*, 2 McCord L. (S. Car.) 1.

See also the title *INJUNCTIONS*, vol. 16, p. 354.

For a discussion of the construction of attachment and garnishment statutes, see the titles *ATTACHMENT*, vol. 2, p. 184; *GARNISHMENT*, vol. 14, p. 745. And see *Leonhard v. John Hope, etc., Engraving, etc., Co.*, 21 R. I. 449.

Where a Statute Limits a Thing to Be Done in a Particular Mode, it includes a negative of any other mode. *Raleigh, etc., R. Co. v. Reid*, 13 Wall. (U. S.) 270; *Camden v. Allen*, 26 N. J. L. 398; *Pratt v. Short*, 79 N. Y. 442.

When an Act Prescribes a Specified Procedure for Recovering a Penalty, no other method can in general be followed. *Pentlarge v. Kirby*, 19 Fed. Rep. 501; *People v. Stevens*, 13 Wend. (N. Y.) 342. See also the title *PENALTIES AND PENAL ACTIONS*, 16 ENCYC. OF PL. AND PR. 239.

Where the Remedy Prescribed Is Inadequate the implication of exclusiveness has been held not to arise. *Ryan v. Gallatin County*, 14 Ill. 78; *Johnston v. Louisville*, 11 Bush (Ky.) 528. But see *Faribault v. Misener*, 20 Minn. 396.

1. *Strict Pursuance of Exclusive Statutory Remedy Required* — *England*. — *St. Pancras v. Batterbury*, 2 C. B. N. S. 477, 89 E. C. L. 477.

Alabama. — *Logwood v. Planters', etc., Bank*, Minor (Ala.) 23; *Childress v. McGehee*, Minor (Ala.) 131; *Crawford v. State*, Minor (Ala.) 143; *Yancey v. Hankins*, Minor (Ala.) 171.

California. — *Souter v. The Sea Witch*, 1 Cal. 162; *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306, 73 Am. Dec. 575.

Connecticut. — *Chapin v. Persse, etc., Paper Works*, 30 Conn. 461, 79 Am. Dec. 263.

Georgia. — *Hale v. Burton*, Dudley (Ga.) 105.

Illinois. — *Day v. Cushman*, 2 Ill. 475; *Dennison v. Blumenthal*, 37 Ill. App. 385.

Iowa. — *Cole v. Muscatine*, 11 Iowa 296.

Michigan. — *Thurston v. Prentiss*, 1 Mich. 193; *Galpin v. Abbott*, 6 Mich. 17; *Kroop v. Forman*, 31 Mich. 144; *Lane v. Burnap*, 39

Mich. 736; *Burnett v. Scully*, 56 Mich. 374; *Bennett v. Olney*, 56 Mich. 634; *Weed v. Lyon*, Walk. (Mich.) 77.

Missouri. — *Moore v. White*, 45 Mo. 206.

New York. — *Dudley v. Mayhew*, 3 N. Y. 9; *Whitney v. Thomas*, 23 N. Y. 281; *Cruger v. Dougherty*, 43 N. Y. 107; *Westbrook v. Willey*, 47 N. Y. 457; *Hascall v. Madison University*, 8 Barb. (N. Y.) 174; *Wheeler v. Mills*, 40 Barb. (N. Y.) 644; *Whitehall First Nat. Bank v. Lamb*, 57 Barb. (N. Y.) 434; *People v. Gates*, 57 Barb. (N. Y.) 291; *People v. Adirondack Co.*, 57 Barb. (N. Y.) 656; *Folsom's Petition*, 2 Thomp. & C. (N. Y.) 55; *People v. Hillsdale, etc., Turnpike Co.*, 2 Johns. (N. Y.) 190; *O'Donnell v. McIntyre*, 37 Hun (N. Y.) 615; *Matter of Ford*, 6 Lans. (N. Y.) 92; *Sharp v. Speir*, 4 Hill (N. Y.) 76; *Sharp v. Johnson*, 4 Hill (N. Y.) 92, 40 Am. Dec. 259; *U. S. v. Wyngall*, 5 Hill (N. Y.) 16; *Olcott v. Frazier*, 5 Hill (N. Y.) 562.

For discussion of construction of statutes extending the common-law remedy by distress, see the title *DISTRESS*, vol. 9, p. 620.

For a discussion of the necessity of strict compliance with submission to arbitration under statutes, see the title *ARBITRATION AND AWARD*, vol. 2, p. 547.

2. *Sudbury Meadows v. Middlesex Canal*, 23 Pick. (Mass.) 36; *Dodge v. Essex County*, 3 Met. (Mass.) 380. See also *Boston v. Shaw*, 1 Met. (Mass.) 130; *Wiley v. Yale*, 1 Met. (Mass.) 553; *Elder v. Bemis*, 2 Met. (Mass.) 599; *Calving v. Baldwin*, 4 Wend. (N. Y.) 667, 21 Am. Dec. 168; and *supra*, VI. 12. b. (1) *General Rule*.

3. *Remedy Implied Where Right Given* — *England*. — *Couch v. Steel*, 3 El. & Bl. 411, 77 E. C. L. 411; *Atkinson v. Newcastle, etc., Waterworks Co.*, L. R. 6 Exch. 404; *Beckford v. Hood*, 7 T. R. 620.

United States. — *Bullard v. Bell*, 1 Mason (U. S.) 290; *Kneass v. Schuylkill Bank*, 4 Wash. (U. S.) 106.

Alabama. — *Lynes v. State*, 5 Port. (Ala.) 236, 30 Am. Dec. 557; *Branch Bank v. Tillman*, 12 Ala. 214; *Russell v. Irby*, 13 Ala. 131.

Iowa. — *McInerney v. Reed*, 23 Iowa 410 (stated under *COLLECT*, vol. 6, p. 206); *Merriam v. Moody*, 25 Iowa 172.

Massachusetts. — *Smith v. Drew*, 5 Mass. 514.

New York. — *Dudley v. Mayhew*, 3 N. Y. 9; *Burnham v. Onderdonk*, 41 N. Y. 425; *Willy v. Mulledy*, 78 N. Y. 314; *Chisholm v. Northern Transp. Co.*, 61 Barb. (N. Y.) 363; *Matter of Townsend*, 4 Hun (N. Y.) 31; *Van Hook v.*

strictly against the grantees and in favor of the state.¹ This rule is adopted on the ground that the language used in the statute is to be treated as the language of the grantee who sought and obtained the enactment and not as

Whitlock, 2 Edw. (N. Y.) 311; Jetter v. New York, etc., R. Co., 2 Abb. App. Dec. (N. Y.) 464.

See also *Stubbs v. Martin*, (1895) 2 Ir. R. 70; *Flynn v. Canton Co.*, 40 Md. 312, 17 Am. Rep. 603; *Heeney v. Sprague*, 11 R. I. 460, where the generality of the rule is limited.

Indictment.—Where a statute prohibits a matter of public grievance, or commands a matter of public convenience, and no special mode of prosecution is directed, it may be prosecuted by indictment. *Colburn v. Swett*, 1 Met. (Mass.) 235.

A Statute Which Prohibits an Act gives a person injured by the performance thereof a right of action. *Chicago, etc., R. Co. v. Hines*, 82 Ill. App. 488.

Right of Action for Penalty.—No action for a penalty can, as a general rule, be maintained by a common informer, unless power is given to him specially by statute, but when a penalty is given wholly to particular persons, an action will lie for it in their name, although no express authority to sue is contained in the statute. *Colburn v. Swett*, 1 Met. (Mass.) 234. See also the title **INFORMERS**, vol. 16, p. 327.

1. Private Acts Conferring Special Privileges and Rights—*England.*—*Blakemore v. Glamorgan-shire Canal Co.*, 1 Myl. & K. 162; *Gildart v. Gladstone*, 11 East 675; *Rex v. Croke*, 1 Cowp. 30; *Anonymous*, Lofft 438; *Dock Co. v. La Marche*, 8 B. & C. 52, 15 E. C. L. 153; *Dudley Canal Nav. Co. v. Grazebrook*, 1 B. & Ad. 59, 20 E. C. L. 344; *Dock Co. v. Browne*, 2 B. & Ad. 45, 22 E. C. L. 23; *Stourbridge Canal v. Wheeley*, 2 B. & Ad. 792, 22 E. C. L. 185; *Bernard v. Winchester*, Lofft 401; *Rex v. Cumberworth*, 4 Ad. & El. 741, 31 E. C. L. 170; *Webb v. Manchester, etc., R. Co.*, 4 Myl. & C. 116; *Stockton, etc., R. Co. v. Barrett*, 11 Cl. & F. 590, 7 M. & G. 870, 49 E. C. L. 870; *Scales v. Pickering*, 4 Bing. 448, 15 E. C. L. 37; *Parker v. Great Western R. Co.*, 7 M. & G. 253, 49 E. C. L. 253; *Eversfield v. Mid-Sussex R. Co.*, 3 De G. & J. 286; *Simpson v. South Staffordshire Waterworks Co.*, 4 De G. J. & S. 679, 34 L. J. Ch. 380; *Reg. v. Wycombe R. Co.*, L. R. 2 Q. B. 310; *Morgan v. Metropolitan R. Co.*, L. R. 4 C. P. 97; *Fenwick v. East London R. Co.*, L. R. 20 Eq. 544; *Atty.-Gen. v. Furness R. Co.*, 47 L. J. Ch. 776; *Lamb v. North London R. Co.*, L. R. 4 Ch. 522; *Clowes v. Staffordshire Potteries Waterworks Co.*, L. R. 8 Ch. 125; *Abergavenny v. Brace*, L. R. 7 Exch. 160; *Davis v. Taff Vale R. Co.*, (1895) A. C. 542. See also *Roths v. Kirkcaldy, etc., Waterworks Com'rs*, 7 App. Cas. 707.

Canada.—*St. Hyacinthe Gas Co. v. St. Hyacinthe Hydraulic Power Co.*, 25 Can. Sup. Ct. 168.

United States.—*U. S. v. Arredondo*, 6 Pet. (U. S.) 738; *Martin v. Waddell*, 16 Pet. (U. S.) 411; *Mills v. St. Clair*, 8 How. (U. S.) 581; *Ohio L. Ins., etc., Co. v. Debolt*, 16 How. (U. S.) 435; *Dubuque, etc., R. Co. v. Litchfield*, 23 How. (U. S.) 66; *Rice v. Minnesota, etc., R. Co.*, 1 Black (U. S.) 358; *Binghamton Bridge*, 3 Wall. (U. S.) 51; *Leavenworth, etc., R. Co. v. U. S.*

92 U. S. 733; *Slidell v. Grandjean*, 111 U. S. 412; *Hannibal, etc., R. Co. v. Missouri River Packet Co.*, 125 U. S. 271; *St. Paul, etc., R. Co. v. Phelps*, 26 Fed. Rep. 569. See also *Tompkins v. Little Rock, etc., R. Co.*, 15 Fed. Rep. 6, 18 Fed. Rep. 344, 21 Fed. Rep. 370.

Alabama.—*Broadbent v. Tuscaloosa Scientific, etc., Assoc.*, 45 Ala. 170. Compare *Bartlett v. Morris*, 9 Port. (Ala.) 266.

Connecticut.—*Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. 210.

Georgia.—*Young v. McKenzie*, 3 Ga. 31; *Macon v. Macon, etc., R. Co.*, 7 Ga. 221; *Justices v. Griffin, etc., Plank Road Co.*, 9 Ga. 475; *Sugar v. Sackett*, 13 Ga. 462.

Indiana.—*Indianapolis, etc., R. Co. v. Kinney*, 8 Ind. 402.

Iowa.—*Miners' Bank v. U. S.*, 1 Greene (Iowa) 553.

Kentucky.—*Maddox v. Graham*, 2 Met. (Ky.) 56.

Louisiana.—*State v. James*, 47 La. Ann. 176.

Maryland.—*Campbell's Case*, 2 Bland (Md.) 209, 20 Am. Dec. 360.

Massachusetts.—*Wales v. Stetson*, 2 Mass. 143, 3 Am. Dec. 39; *Hood v. Dighton Bridge*, 3 Mass. 263; *Coolidge v. Williams*, 4 Mass. 145; *Perry v. Wilson*, 7 Mass. 393.

Minnesota.—*St. Louis River Dalles Imp. Co. v. Nelson Lumber Co.*, 51 Minn. 10.

Mississippi.—*McAfee v. Southern R. Co.*, 36 Miss. 669; *Louisiana Bank v. Williams*, 46 Miss. 618, 12 Am. Rep. 319; *Gaines v. Coates*, 51 Miss. 335.

New Jersey.—*Passaic, etc., Rivers Bridge v. Hoboken Land, etc., Co.*, 13 N. J. Eq. 81, 503; *Water Com'rs v. Hudson*, 13 N. J. Eq. 420; *Morris Canal, etc., Co. v. Central R. Co.*, 16 N. J. Eq. 436; *Jersey City v. Central R. Co.*, 40 N. J. Eq. 417; *Jersey City Gaslight Co. v. Consumers Gas Co.*, 40 N. J. Eq. 427; *Camden, etc., R., etc., Co. v. Briggs*, 22 N. J. L. 623; *State v. Bentley*, 23 N. J. L. 538; *Townsend v. Brown*, 24 N. J. L. 80.

New York.—*Sprague v. Birdsall*, 2 Cow. (N. Y.) 419; *Rathbun v. Acker*, 18 Barb. (N. Y.) 393; *Palmer v. Hickory Grove Cemetery*, 84 N. Y. App. Div. 600.

North Carolina.—*Drake v. Drake*, 4 Dev. L. (15 N. Car.) 110; *Perry v. Newsom*, 1 Ired. Eq. (36 N. Car.) 28; *Lee v. Shankle*, 6 Jones L. (51 N. Car.) 313; *Raleigh, etc., R. Co. v. Reid*, 64 N. Car. 155; *McAden v. Jenkins*, 64 N. Car. 796.

Ohio.—*Currier v. Marietta, etc., R. Co.*, 11 Ohio St. 228.

Pennsylvania.—*Stormfeltz v. Manor Turnpike Co.*, 13 Pa. St. 555; *State Bank v. Com.*, 19 Pa. St. 144; *Packer v. Sunbury, etc., R. Co.*, 19 Pa. St. 211; *Pennsylvania R. Co. v. Canal Com'rs*, 21 Pa. St. 9; *Allegheny v. Ohio, etc., R. Co.*, 26 Pa. St. 355; *Dugan v. Bridge Co.*, 27 Pa. St. 303, 67 Am. Dec. 464; *West Branch Boom Co. v. Dodge*, 31 Pa. St. 285; *Com. v. Central Pass. R. Co.*, 52 Pa. St. 506.

Tennessee.—*Talmdge v. North American Coal, etc., Co.*, 3 Head (Tenn.) 337.

Texas.—*Brennan v. Weatherford*, 53 Tex. 330, 37 Am. Rep. 758.

the language of the grantor.¹ But when the language leaves no doubt as to the legislative intent, there is no room for construction, and public grants are not to be construed so strictly as to defeat the manifest intention of the legislature.²

(b) **Monopolies.** — Particularly is the rule of strict construction of private acts to be applied where exorbitant powers such as a monopoly are conferred.³ The charters of municipal corporations are construed so strictly in that regard that nothing short of express authority from the legislature will authorize their creating monopolies or granting special privileges.⁴

b. LIBERAL CONSTRUCTION — (1) *Definition.* — A liberal construction is that by which the letter of the statute is enlarged or restrained so as more effectually to accomplish the purpose intended. It is called also "equitable construction."⁵

(2) *Early Application of Rule.* — In the construction of old statutes, equita-

1. **Reason of Rule.** — *Parker v. Great Western R. Co.*, 7 M. & G. 288, 49 E. C. L. 287; *May v. Frazee*, 4 Litt. (Ky.) 391, 14 Am. Dec. 169; *Coolidge v. Williams*, 4 Mass. 145; *Morris Canal, etc., Co. v. Central R. Co.*, 16 N. J. Eq. 436; *Raleigh, etc., R. Co. v. Reid*, 64 N. Car. 155, reversed on other grounds in 13 Wall. (U. S.) 269.

2. **Manifest Intention of Legislature Not to Be Defeated** — *United States*. — *Wolcott v. Des Moines Nav. Co.*, 5 Wall. (U. S.) 681; *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44; *Farnsworth v. Minnesota, etc., R. Co.*, 92 U. S. 49; *Missouri, etc., R. Co. v. Kansas Pac. R. Co.*, 97 U. S. 491; *Wolsey v. Chapman*, 101 U. S. 755; *Dubuque, etc., R. Co. v. Des Moines Valley R. Co.*, 109 U. S. 329; *Winona, etc., R. Co. v. Barney*, 113 U. S. 618; *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 629; *U. S. v. Denver, etc., R. Co.*, 150 U. S. 14; *Hughes v. Northern Pac. R. Co.*, 18 Fed. Rep. 106; *Tod v. Kentucky Union Land Co.*, 57 Fed. Rep. 50; *St. Paul, etc., R. Co. v. Greenhalgh*, 26 Fed. Rep. 563.

Michigan. — *Johnson v. Ballou*, 28 Mich. 384; *Bowes v. Haywood*, 35 Mich. 241; *Fenn v. Kinsey*, 45 Mich. 446; *Rogers v. Port Huron, etc., R. Co.*, 45 Mich. 460; *Jackson, etc., R. Co. v. Davison*, 65 Mich. 416.

Minnesota. — *Nash v. Sullivan*, 29 Minn. 206.

3. **Strict Construction of Grants of Monopolies** — *England*. — *Reed v. Ingham*, 3 El. & Bl. 889, 77 E. C. L. 889; *Direct U. S. Cable Co. v. Anglo-American Tel. Co.*, 2 App. Cas. 412; *Foley v. Fletcher*, 3 H. & N. 781; *Stourbridge Canal v. Wheelley*, 2 B. & Ad. 793, 22 E. C. L. 185; *Gale v. Laurie*, 5 B. & C. 156, 11 E. C. L. 187.

Canada. — *St. Hyacinthe Gas Co. v. St. Hyacinthe Hydraulic Power Co.*, 25 Can. Sup. Ct. 168.

United States. — *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 540; *Fanning v. Gregoire*, 16 How. (U. S.) 524; *Binghamton Bridge*, 3 Wall. (U. S.) 51; *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550; *Stein v. Bienville Water-Supply Co.*, 34 Fed. Rep. 145.

Massachusetts. — *Cleveland v. Norton*, 6 Cush. (Mass.) 380.

Nevada. — *State v. Curry*, 1 Nev. 251; *Lake v. Virginia, etc., R. Co.*, 7 Nev. 294.

New Jersey. — *Passaic, etc., Rivers Bridge v. Hoboken Land, etc., Co.*, 13 N. J. Eq. 81.

Pennsylvania. — *Westfall v. Mapes*, 3 Grant Cas. (Pa.) 198; *Lehigh Water Co.'s Appeal*, 102 Pa. St. 515.

West Virginia. — *Wheeling Bridge Co. v. Wheeling, etc., Bridge Co.*, 34 W. Va. 155, affirmed *Wheeling, etc., Bridge Co. v. Wheeling Bridge Co.*, 138 U. S. 287.

See also the title **MONOPOLIES AND CORPORATE TRUSTS**, vol. 20, p. 854.

Power Held Not to Be "Exorbitant" Within Meaning of Rule. — *Montreal Gas Co. v. Cadieux*, (1899) A. C. 589, reversing 28 Can. Sup. Ct. 382.

4. **Power of Municipal Corporations to Create Monopolies** — *United States*. — *Minturn v. Larue*, 23 How. (U. S.) 435; *Saginaw Gas-Light Co. v. Saginaw*, 28 Fed. Rep. 529.

Alabama. — *Birmingham, etc., St. R. Co. v. Birmingham St. R. Co.*, 79 Ala. 465, 58 Am. Rep. 615.

Indiana. — *Vincennes v. Citizens Gas Light Co.*, 132 Ind. 114; *Rushville v. Rushville Natural Gas Co.*, 132 Ind. 575.

Louisiana. — *New Orleans, etc., R. Co. v. New Orleans*, 44 La. Ann. 748.

Maryland. — *North Baltimore Pass. R. Co. v. Baltimore*, 75 Md. 247.

Minnesota. — *Nash v. Lowry*, 37 Minn. 261; *Long v. Duluth*, 49 Minn. 280, 32 Am. St. Rep. 547.

New York. — *Richmond County Gas-Light Co. v. Middletown*, 59 N. Y. 228; *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167.

Ohio. — *State v. Cincinnati Gas-Light, etc., Co.*, 18 Ohio St. 262.

Texas. — *Brenham v. Brenham Water Co.*, 67 Tex. 542; *Altgelt v. San Antonio*, 81 Tex. 436; *Houston v. Houston City St. R. Co.*, 83 Tex. 548, 29 Am. St. Rep. 679.

West Virginia. — *Parkersburg Gas Co. v. Parkersburg*, 30 W. Va. 435.

Canada. — *Langlois v. Turcotte*, 15 Quebec Super. Ct. 400.

See the title **MONOPOLIES AND CORPORATE TRUSTS**, vol. 20, p. 866.

5. **Liberal Construction Defined.** — *Weltman v. Posenecker*, (Supm. Ct. App. T.) 26 Civ. Pro. (N. Y.) 241, 19 Misc. (N. Y.) 592.

"By an **Equitable Construction**, a case not within the letter of a statute is sometimes holden to be within the meaning, because it is within the mischief for which a remedy is provided. The reason for such construction is that the lawmaker could not set down every case in express terms." Bacon's Abr., tit. Statute (I) 6,

ble construction has been understood as extending to general cases the application of an enactment which literally was limited to a special case.¹ So the doctrine was frequently invoked to exclude from the operation of a statute cases which were clearly within its letter, on the ground that they were not within the spirit and reason of the act.² The extreme cases of equitable construction in the old decisions, it has been said, were justified only by the great conciseness of ancient statutes.³ They have been explained also on the ground that language was used with no great precision in early times and that acts were framed in harmony with the lax method of interpretation contemporaneously prevalent.⁴

(3) *Modern Rule.* — There is, however, always danger in giving effect to what is called the equity of a statute,⁵ and it has been declared that the proposition, however it may once have been held or considered, that the courts, upon what is termed an equitable construction or otherwise, may, against the plain language of the statute and in opposition to the intent clearly expressed by the words, mitigate the "violence of the letter" by introducing exceptions where the statute itself contains none, so as to relieve in cases of hardship or particular inconvenience, has been too long and too frequently rejected to be now the subject of serious argument or doubt. Such doctrine, if it ever existed, was long since exploded, and the rule now uniformly recognized and acted upon is, that whatever else may be done with the words of a

1. *Early Application of Rule.* — Maxwell on the Interpretation of Statutes (3d ed.) 357, citing *Strother v. Hutchinson*, 4 Bing. N. Cas. 83, 33 E. C. L. 283; *Platt v. Lock*, Plowd. 35. See also *Eyston v. Studd*, Plowd. 465; *Wheatly v. Lane*, 1 Saund. 216; *Hoguet v. Wallace*, 28 N. J. L. 526; and *supra*, VI. 5. e. *Particular Language Construed Generally*.

In *Hill v. Grange*, Plowd. 178, it is said: "Where an act is made to remedy any mischief, there, in order to aid things in like degree, one action has been used for another, one thing for another, one place for another, and one person for another, notwithstanding that in some cases the thing is penal." See also *Wheatly v. Lane*, 1 Saund. 216, and note 2; *Eyston v. Studd*, Plowd. 465.

2. *Equitable Construction Applied to Provision in Statute of Frauds.* — Atty.-Gen. v. Day, 1 Ves. 221; *Lincoln v. Wright*, 4 De G. & J. 16; *Haigh v. Kaye*, L. R. 7 Ch. 474; *Williams v. Evans*, L. R. 19 Eq. 547; *Ungley v. Ungley*, 5 Ch. D. 887; *Bond v. Hopkins*, 1 Sch. & Lef. 433; *Lester v. Foxcroft*, 1 Colles 108; *Webster v. Webster*, 27 L. J. Ch. 115; *Wilson v. West Hartlepool R. Co.*, 2 De G. J. & S. 475; *Nunn v. Fabian*, L. R. 1 Ch. 35; *Hughes v. Morris*, 2 De G. M. & G. 349. The application of the rule to these cases was never recognized by the common-law courts. *Cocking v. Ward*, 1 C. B. 858, 50 E. C. L. 858; *Boydell v. Drummond*, 11 East 159. See the title *STATUTE OF FRAUDS, ante*.

Statute of Limitations Equitably Construed. — *Hodsdon v. Harridge*, 2 Saund. 64a; *Curlewis v. Mornington*, 7 El. & Bl. 283, 90 E. C. L. 283; *Willocks v. Huggins*, 2 Stra. 907; *Piggott v. Rush*, 4 Ad. & El. 912, 31 F. C. L. 228.

Statute Prescribing Mode of Devising Stock. — *Ripley v. Waterworth*, 7 Ves. Jr. 440; *Franklin v. Bank of England*, 1 Russ. 589.

Application to Usury Laws. — Decisions in which courts of equity, refusing to give relief against usurious contracts without payment of

the sum actually due with lawful interest, have been said to illustrate this rule; see

Alabama. — *Eslava v. Elmore*, 50 Ala. 587.

Arkansas. — *Pickett v. Merchants' Nat. Bank*, 32 Ark. 346.

Illinois. — *Tooke v. Newman*, 75 Ill. 215.

Maryland. — *Jordan v. Trumbo*, 6 Gill & J. (Md.) 103; *Legoux v. Wante*, 3 Har. & J. (Md.) 184.

Mississippi. — *McRaven v. Forbes*, 6 How. (Miss.) 569.

New Jersey. — *Miller v. Ford*, 1 N. J. Eq. 358.

New York. — *Rogers v. Rathbun*, 1 Johns. Ch. (N. Y.) 367; *Mitchell v. Oakley*, 7 Paige (N. Y.) 68; *Fulton Bank v. Beach*, 1 Paige (N. Y.) 429; *Utica Ins. Co. v. Scott*, 6 Cow. (N. Y.) 606; *Jackson v. Varick*, 2 Wend. (N. Y.) 294.

These cases are, however, more properly discussed as illustrating the equitable maxim that "he who seeks equity must do equity." See the titles *EQUITY*, vol. 11, p. 161; *USURY*.

3. In *Gwynne v. Burnell*, 6 Bing. N. Cas. 453, 37 E. C. L. 451, Lord Brougham, after characterizing such construction as legislation and not interpretation, said: "This becomes peculiarly improper in dealing with a modern statute, because the extreme conciseness of the ancient statutes was the only ground for the sort of legislative interpretation frequently put upon their words, and the prolixity of modern statutes is still more remarkable than the shortness of the old."

4. Maxwell on the Interpretation of Statutes (3d ed.) 358, citing *Wilson v. Knubley*, 7 East 134.

5. *Equitable Construction Considered Dangerous.* — *Brandling v. Barrington*, 6 B. & C. 475, 13 E. C. L. 238; *Gwynne v. Burnell*, 6 Bing. N. Cas. 453, 37 E. C. L. 451; *Colehan v. Cooke*, Willes 397; *Guthrie v. Fisk*, 3 B. & C. 183, 10 E. C. L. 48; *Entick v. Carrington*, 19 How. St. Tr. 1060.

statute, they may never, in the language of Lord Bacon, "be taken to a repugnant intent."¹ But the construction which equity would favor may be adopted by a court of law in construing a statute, if two constructions are fairly possible.²

(4) *Remedial Statutes.* — Remedial statutes are made to supply defects or abridge superfluities in the law;³ and the rule is that they are to be construed liberally for the suppression of the mischief and the advancement of the remedy.⁴ In construing remedial statutes, the old law, the mischief, and the remedy must be kept in mind,⁵ and, within the limits of the modern rule just examined, that which is within the mischief intended to be remedied is con-

1. *Ancient Application of Rule Repudiated.* — *Per* Dixon, C. J., in *Encking v. Simmons*, 28 Wis. 272.

In *Ex p. Walton*, 17 Ch. D. 746, Jessel, M. R., said: "I should like to say a word or two as to the rules which are binding on all courts in regard to the construction of statutes as well as of all other instruments. Whatever may have been the case in times past, in modern times those rules have become perfectly well settled. They have become much more limited as regards the power of the courts, and at the same time so well recognized as to be binding on this court and all other courts."

2. *Washington, etc., R. Co. v. Coeur D'Alene R., etc., Co.*, 160 U. S. 77; *State v. Comptoir National D'Escompoir de Paris*, 51 La. Ann. 1272.

3. *Object of Remedial Statutes.* — 1 Black. Com. 86-87.

4. *Remedial Statutes Liberally Construed* — *England.* — *Turtle v. Hartwell*, 6 T. R. 429; *Twycross v. Grant*, 2 C. P. D. 530; *Wimbish v. Tailbois*, Plowd. 47; *Heydon's Case*, 3 Coke 7b; *Magdalen's College Case*, 11 Coke 74; *St. Peter v. Middleburgh*, 2 Y. & J. 196; *Johnes v. Johnes*, 3 Dow. 15; *Atcheson v. Everitt*, 1 Cowp. 391; *Daputo v. Wyllie*, L. R. 5 P. C. 482; *Reg. v. Pilkington*, 2 El. & Bl. 546, 75 E. C. L. 546.

United States. — *U. S. v. Freeman*, 3 How. (U. S.) 565; *Parks v. Turner*, 12 How. (U. S.) 46; *Silver v. Ladd*, 7 Wall. (U. S.) 226; *Vigo's Case*, 21 Wall. (U. S.) 648; *U. S. v. Rhodes*, 1 Abb. (U. S.) 36; *Jacob v. U. S.*, 1 Brock. (U. S.) 520; *Evans-Snyder-Buel Co. v. McFadden*, (C. C. A.) 105 Fed. Rep. 293; *Commercial Bank v. Sandford*, 103 Fed. Rep. 98.

Alabama. — *Sprowl v. Lawrence*, 33 Ala. 674.

Arkansas. — *White County v. Key*, 30 Ark. 603.

California. — *White v. Steam-Tug Mary Ann*, 6 Cal. 462, 65 Am. Dec. 523; *Cullerton v. Mead*, 22 Cal. 95.

Connecticut. — *Wolcott v. Pond*, 19 Conn. 597; *First School Dist. v. Ufford*, 52 Conn. 44.

Georgia. — *Neal v. Moultrie*, 12 Ga. 104; *Shumate v. Williams*, 34 Ga. 251.

Illinois. — *Jackson v. Warren*, 32 Ill. 331; *Chicago, etc., R. Co. v. Dunn*, 52 Ill. 260, 4 Am. Rep. 606; *Smith v. Stevens*, 82 Ill. 554.

Indiana. — *State v. Blair*, 32 Ind. 313.

Iowa. — *Rural Independent School Dist. No. 10 v. New Independent School Dist.*, (Iowa 1903) 94 N. W. Rep. 284.

Louisiana. — *New Orleans v. St. Romes*, 9 La. Ann. 573; *Fox v. Sloo*, 10 La. Ann. 11.

Maine. — *Smith v. Allen*, 79 Me. 536.

Maryland. — *Franklin v. Franklin*, 1 Md. Ch. 342; *Ordway v. Central Nat. Bank*, 47 Md. 217, 28 Am. Rep. 455.

Massachusetts. — *Brown v. Pendergast*, 7 Allen (Mass.) 427; *Whitney v. Whitney*, 14 Mass. 88.

Mississippi. — *Edwards v. Gaudling*, 38 Miss. 118; *Excelsior Mfg. Co. v. Keyser*, 62 Miss. 155.

New Jersey. — *Davenport v. Barnes*, 2 N. J. L. 196; *Camden, etc., R., etc., Co. v. Briggs*, 22 N. J. L. 676; *Kinnealy v. State*, 67 N. J. L. 435.

New York. — *Gillet v. Moody*, 3 N. Y. 479; *Hudler v. Golden*, 36 N. Y. 446; *Smith v. Moffat*, 1 Barb. (N. Y.) 65; *Van Hook v. Whitlock*, 2 Edw. (N. Y.) 304; *Gillespie v. Winberg*, 4 Daly (N. Y.) 325; *Stuyvesant v. New York*, 7 Cow. (N. Y.) 604; *Hart v. Albany*, 9 Wend. (N. Y.) 571, 24 Am. Dec. 165.

Ohio. — *Wilber v. Paine*, 1 Ohio 256; *Pan-coast v. Ruffin*, 1 Ohio 385; *Burgett v. Burgett*, 1 Ohio 481, 13 Am. Dec. 634; *McCormick v. Alexander*, 2 Ohio 74.

Oregon. — *Tucker v. Constable*, 16 Oregon 407.

Pennsylvania. — *Schuylkill Nav. Co. v. Loose*, 19 Pa. St. 15; *Quinn v. Fidelity Beneficial Assoc.*, 100 Pa. St. 382; *Hassenplug's Appeal*, 106 Pa. St. 527; *Poor Dist. v. Poor Dist.*, 109 Pa. St. 579; *Clay v. McCreanor*, 9 Pa. Super. Ct. 433; *Howes v. Dolan*, 9 Pa. Super. Ct. 591.

Tennessee. — *Taylor v. McGill*, 6 Lea (Tenn.) 294.

Texas. — *O'Connor v. State*, (Tex. Civ. App. 1902) 71 S. W. Rep. 409.

Vermont. — *Thorpe v. Rutland, etc., R. Co.*, 27 Vt. 147, 62 Am. Dec. 625; *Congdon v. Congdon*, 59 Vt. 597.

Virginia. — *Janesville Hay Tool Co. v. Boyd*, 35 W. Va. 240.

Acts Tending to Effect an Object of Great Public Utility. — *Baring v. Erdman*, 2 Fed. Cas. No. 981; *Marshall v. Vultee*, 1 E. D. Smith (N. Y.) 294.

Statute Creating an Agister's Lien. — *Becker v. Brown*, (Neb. 1902) 91 N. W. Rep. 178.

For a discussion of the construction of statutes relating to submissions to arbitration, see the title *ARBITRATION AND AWARD*, vol. 2, p. 612.

For a discussion of the construction of home-stead laws and exemption laws generally, see the titles *EXEMPTIONS (FROM EXECUTION)*, vol. 12, p. 75; *HOMESTEAD*, vol. 15, p. 533.

For a discussion of the construction of statutes relating to mechanics' liens, see the title *MECHANICS' LIENS*, vol. 20, p. 277 *et seq.*

5. See *supra*, this title, VI. 10. b. (1) *History, the Old Law and Mischief.*

sidered within the statute though not within the letter, and that which is not within the mischief is considered not within the statute though within the letter.¹

Applications of Rule. — This class of statutes has been held to include acts for the suppression of fraud,² acts designed to abolish or alter harsh or defective rules of procedure whether such rules are of common-law or statutory origin, and generally statutes in furtherance of the simple and convenient administration of justice;³ acts providing for the redemption of property sold for the nonpayment of taxes;⁴ an act giving a mortgagee the right to redeem after foreclosure decree and sale;⁵ acts providing indemnity for those who suffer damages by reason of some third person's exercise of a statutory privilege;⁶ an act making towns liable for injuries caused by defects in highways;⁷ a statute giving double damages for injuries by dogs;⁸ statutes making a railroad company absolutely liable in damages for fire communicated by its locomotives and giving an insurable interest in property along its route;⁹ acts to

1. Literal Construction Not Essential — *England*. — *Doe v. Waterton*, 3 B. & Ald. 151, 5 E. C. L. 247; *Eyston v. Studd*, Plowd. 464.

United States. — *U. S. v. Freeman*, 3 How. (U. S.) 565.

Arkansas. — *Woodruff v. State*, 3 Ark. 285.

District of Columbia. — *Mackall v. District of Columbia*, 16 App. Cas. (D. C.) 307.

Illinois. — *Smith v. Stevens*, 82 Ill. 554.

Indiana. — *Maxwell v. Collins*, 8 Ind. 38;

Traut v. Hagerman, 27 Ind. App. 150.

Iowa. — *Fidelity L. & T. Co. v. Douglas*, 104 Iowa 539.

Kentucky. — *Phillips v. Pope*, 10 B. Mon. (Ky.) 172.

Maryland. — *State v. Boyd*, 2 Gill & J. (Md.) 374; *Baltimore v. Root*, 8 Md. 95, 63 Am. Dec. 692.

Missouri. — *State v. Canton*, 43 Mo. 48.

New York. — *People v. Albertson*, 55 N. Y. 50; *People v. Lacombe*, 99 N. Y. 43; *Simonton v. Barrell*, 21 Wend. (N. Y.) 362.

West Virginia. — *Brown v. Gates*, 15 W. Va. 165.

And see *supra*, this title, VI. 4. b. *Where Meaning in Doubt the Spirit Controls*.

2. Acts for Suppression of Fraud. — *Heydon's Case*, 3 Coke 76; *Wimbish v. Tailbois*, Plowd. 47; *U. S. Bank v. Lee*, 13 Pet. (U. S.) 107; *Smith v. Townsend*, 148 U. S. 498; *Hahn v. Salmon*, 20 Fed. Rep. 801; *Edmondson v. Hyde*, 2 Sawy. (U. S.) 212; *White County v. Key*, 30 Ark. 603; *White v. Steam-Tug Mary Ann*, 6 Cal. 470, 65 Am. Dec. 523; *Carey v. Giles*, 9 Ga. 253; *Sharp v. New York*, 31 Barb. (N. Y.) 572; *Fitzhugh v. Anderson*, 2 Hen. & M. (Va.) 289, 3 Am. Dec. 625. See also the title **FRAUDULENT SALES AND CONVEYANCES**, vol. 14, p. 223.

3. Acts in Furtherance of Proper Administration of Justice. — *Larkin v. Saffarans*, 15 Fed. Rep. 147; *White County v. Key*, 30 Ark. 603; *Fisher v. Hervey*, 6 Colo. 16; *Willis v. Fincher*, 68 Ga. 444; *Clark's Succession*, 11 La. Ann. 124; *Mitchell v. Mitchell*, 1 Gill (Md.) 84; *State v. Buchanan County Ct.*, 41 Mo. 254; *Heman v. McNamara*, 77 Mo. App. 1; *Quinn v. Fidelity Beneficial Assoc.*, 100 Pa. St. 382; *Hassenplug's Appeal*, 106 Pa. St. 527.

Act Giving Suitors the Benefit of Discovery of Documents. — *Kingsford v. Great Western R. Co.*, 16 C. B. N. S. 761, 11 E. C. L. 761, *distinguishing* *Christopherson v. Lotinga*, 15 C. B.

N. S. 809, 109 E. C. L. 809. Compare *Herschfeld v. Clarke*, 11 Exch. 712.

Statutes Giving the Right of Appeal. — *Arce-neaux v. Benoit*, 21 La. Ann. 673; *Converse v. Burrows*, 2 Minn. 240; *Pearson v. Lovejoy*, 53 Barb. (N. Y.) 407.

Statute Relating to Bills of Exceptions. — *Morehead v. Adams*, 18 Neb. 569; *Williams v. Miles*, 62 Neb. 566.

Statutes Relating to Amendments. — *Nash v. Adams*, 24 Conn. 33; *Spencer v. Howe*, 26 Conn. 201; *Hoyt v. Smith*, 27 Conn. 472; *Beers v. Woodruff*, etc., *Iron Works*, 30 Conn. 308; *Stuart v. Corning*, 32 Conn. 105; *Bulkley v. Andrews*, 39 Conn. 523; *Fidler v. Hershey*, 90 Pa. St. 366; *Bolton v. King*, 105 Pa. St. 83, 51 Am. Rep. 181; *Dick's Appeal*, 106 Pa. St. 596.

Statutes Extending the Time Within Which New Actions May Be Brought in cases where actions were brought within the time specified in the statute of limitations, but failed through some error, are construed liberally. *Coffin v. Cottle*, 16 Pick. (Mass.) 383; *Johnston v. Sikes*, 56 Conn. 589.

Act Abolishing Distinctions Between Forms of Action ex Contractu. — *Jones v. Gordon*, 124 Pa. St. 263.

4. Acts Providing for Redemption of Property Sold for Taxes. — *Dubois v. Hepburn*, 10 Pet. (U. S.) 1; *Corbett v. Nutt*, 10 Wall. (U. S.) 464; *Alter v. Shepherd*, 27 La. Ann. 207.

In *Dubois v. Hepburn*, 10 Pet. (U. S.) 22, the court said: "A law authorizing the redemption of lands so sold ought to receive a liberal and benign construction in favor of those whose estates will be otherwise divested, especially where the time allowed is short, an ample indemnity given to the purchaser, and a penalty is imposed on the owner."

Singer Mfg. Co. v. McCollock, 24 Fed. Rep. 667.

Boston, etc., *Mill Corp. v. Gardner*, 2 Pick. (Mass.) 37; *New York v. Lord*, 17 Wend. (N. Y.) 285.

7. Acts Imposing Liability on Towns for Injuries Caused by Defective Highways. — *Reed v. Northfield*, 13 Pick. (Mass.) 94, 23 Am. Dec. 662.

8. Statute Giving Double Damages for Injuries by Dogs. — *Mitchell v. Clapp*, 12 Cush. (Mass.) 278; *Le Forest v. Tolman*, 117 Mass. 109, 19 Am. Rep. 400.

St. Louis, etc., *R. Co. v. Mathews*, 165 U. S. 1.

quiet title to real estate; ¹ statutes of mortmain; ² acts to legitimate the offspring of marriages otherwise void; ³ registration acts; ⁴ acts to prevent unjust discrimination by railroads; ⁵ bankruptcy and insolvency laws; ⁶ copyright laws; ⁷ patent laws of Congress; ⁸ an employers' liability act; ⁹ the federal statutes prohibiting an injunction against any proceeding in a state court; ¹⁰ donation land grants made in order to encourage settlement of distant public lands; ¹¹ statutes giving the government priority of payment out of the estates of insolvent debtors; ¹² the federal civil rights act; ¹³ land bounty acts; ¹⁴ statutes designed to give to a class of claimants a legal remedy for the enforcement of their claims where none exists available to them; ¹⁵ an act of Congress for the purpose of meeting and obviating hardships resulting from the rejection of claims to lands under supposed or defective grants; ¹⁶ the captured and abandoned property act of Congress of 1863. ¹⁷ So in the interpretation of statutes prescribing compensation to a public officer, where the words are loose and obscure and admit of two interpretations the construction should be favorable to the officer. ¹⁸

2. Provisos, Exceptions, and Saving Clauses — *a.* **DEFINITIONS** — **Proviso**. — The office of the proviso generally is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview; ¹⁹ its office is not to confer

1. Act to Quiet Title to Real Estate. — Holmes v. Chester, 26 N. J. Eq. 79.

2. Doe v. Waterton, 3 B. & Ald. 151, 5 E. C. L. 247.

3. Acts to Legitimate Offspring of Void Marriages. — Beall v. Beall, 8 Ga. 210; Brower v. Bowers, 1 Abb. App. Dec. (N. Y.) 214; Baity v. Cranfill, 91 N. Car. 293, 49 Am. Rep. 641.

4. Registration Acts. — Cheval v. Michols, 1 Stra. 664; Worsey v. Demattos, 1 Burr. 467; Le Neve v. Le Neve, 3 Atk. 648; Doe v. Allsop, 5 B. & Ald. 142, 7 E. C. L. 46; Connecticut Mut. L. Ins. Co. v. Talbot, 113 Ind. 373, 3 Am. St. Rep. 655; Janesville Hay Tool Co. v. Boyd, 35 W. Va. 240.

5. Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co., 37 Fed. Rep. 567; State v. Fremont, etc., R. Co., 22 Neb. 313.

6. Bankruptcy and Insolvency Laws. — See the title INSOLVENCY and BANKRUPTCY, vol. 16, p. 642. And see the following cases: Neal v. Clark, 95 U. S. 709; Tracy v. Tuffly, 134 U. S. 206; Southern L. & T. Co. v. Benbow, 96 Fed. Rep. 528; Murray v. Beal, 97 Fed. Rep. 568; Botts v. Hammond, (C. C. A.) 99 Fed. Rep. 920; *In re Kenney*, (C. C. A.) 105 Fed. Rep. 898; *In re Carley*, 106 Fed. Rep. 863; Salters v. Tobias, 3 Paige (N. Y.) 339; Stanton v. Ellis, 12 N. Y. 575, 64 Am. Dec. 512; McNair v. Gilbert, 3 Wend. (N. Y.) 344; Sidell v. McCrea, 1 Wend. (N. Y.) 156; Ely v. Cooke, 28 N. Y. 365; Hale v. Sweet, 40 N. Y. 97; People v. Gray, (Supm. Ct. Gen. T.) 10 Abb. Pr. (N. Y.) 468, 19 How. Pr. (N. Y.) 238; Dieckerhoff v. Ahlborn, (Supm. Ct. Spec. T.) 2 Abb. N. Cas. (N. Y.) 372; People v. Daly, 4 Hun (N. Y.) 641, 67 Barb. (N. Y.) 325; Matter of Underwood, 3 Cow. (N. Y.) 59; Morewood v. Hollister, 6 N. Y. 309; Matter of Cohen, (C. Pl. Spec. T.) 18 Civ. Pro. (N. Y.) 156.

7. Myers v. Callaghan, 5 Fed. Rep. 732. And see the title COPYRIGHT, vol. 7, p. 552.

8. See the title PATENTS, vol. 22, p. 271.

9. Employers' Liability Act. — Canney v. Walk-eine, (C. C. A.) 113 Fed. Rep. 66.

10. Federal Statutes Prohibiting Injunction in State Court. — American Assoc. v. Hurst, (C. C. A.) 59 Fed. Rep. 1; Aultman, etc., Co. v. Brumfield, 102 Fed. Rep. 14.

11. Donation Land Grants. — Stark v. Starrs, 6 Wall. (U. S.) 402; Silver v. Ladd, 7 Wall. (U. S.) 219; Cutting v. Cutting, 6 Fed. Rep. 266; Bear v. Luse, 6 Sawy. (U. S.) 151.

12. Giving Government Priority out of Insolvents' Estate. — U. S. v. State Bank, 6 Pet. (U. S.) 29; Beaton v. Farmers' Bank, 12 Pet. (U. S.) 134; U. S. v. Duncan, 4 McLean (U. S.) 628.

13. Federal Civil Rights Act. — U. S. v. Rhodes, 1 Abb. (U. S.) 28.

14. Land Bounty Acts. — Ross v. Doe, 1 Pet. (U. S.) 667.

15. Neurath's Motion, 17 Ct. Cl. 225. See also U. S. v. Wiley, 11 Wall. (U. S.) 508.

16. Beley v. Naphtaly, (C. C. A.) 73 Fed. Rep. 124, affirmed 169 U. S. 353.

17. Captured and Abandoned Property Act. — U. S. v. Anderson, 9 Wall. (U. S.) 56; U. S. v. Padelford, 9 Wall. (U. S.) 537.

18. Statutes Fixing Compensation of Public Officers. — U. S. v. Morse, 3 Story (U. S.) 87; McKinstry v. U. S., 40 Fed. Rep. 813 (*disapproved* in U. S. v. Clough, (C. C. A.) 55 Fed. Rep. 373); Moore's Case, 4 Ct. Cl. 141; Butler v. U. S., 23 Ct. Cl. 165.

19. Office of Proviso. — Voorhees v. Jackson, 10 Pet. (U. S.) 449; Minis v. U. S., 15 Pet. (U. S.) 445; Savings Bank v. Collector, 3 Wall. (U. S.) 495; Dollar Sav. Bank v. U. S., 19 Wall. (U. S.) 237; Selma, etc., R. Co. v. U. S., 139 U. S. 560; Austin v. U. S., 155 U. S. 417; Deitch v. Staub, (C. C. A.) 115 Fed. Rep. 309; Boon v. Juliet, 2 Ill. 258; Walsh v. Van Horn, 22 Ill. App. 170; Gaither v. Wilson, 164 Ill. 548; Chicago v. Phoenix Ins. Co., 126 Ill. 276; Matter of Webb, (Supm. Ct. Spec. T.) 24 How. Pr. (N. Y.) 247; Beaumont v. Irwin, 2 Sneed (Tenn.) 301; Treasurer v. Clark, 19 Vt. 129.

For Definition of Proviso, see Proviso, vol. 23, p. 292.

In Wayman v. Southard, 10 Wheat. (U. S.)

a power,¹ or as a general rule to enlarge the enactment to which it is appended so as to operate as a substantive enactment itself.²

Exceptions. — Doubtless there is a technical distinction between an exception and a proviso as thus defined, since an exception ought to be confined to that which would otherwise be included in the category from which it is excepted,³ but there are said to be a great many examples where the distinction is disregarded and where the words are used as if they were of the same signification.⁴

A **Saving Clause** is sometimes defined as being synonymous with an exception,⁵ but it is ordinarily a restriction in a repealing act, and saves rights, pending proceedings, penalties, etc., from the annihilation which would result from unrestricted repeal.⁶

b. CONSTRUCTION OF PROVISIO. — A provision or exception as a general rule relates only to the paragraph or distinct portion of the enactment which immediately precedes it, and is to be confined by construction to the subject-matter of the section of which it is a part.⁷ This rule is, however, not absolute, and if the context requires, the proviso may be construed as extending to and qualifying other sections⁸ or even as being tantamount to

30, Marshall, C. J., said: "The proviso is generally intended to restrain the enacting clause and to except something which would otherwise have been within it, or in some measure to modify the enacting clause." See also *McRae v. Holcomb*, 46 Ark. 306.

1. Powers Not Conferred by Provisos. — *Guardians of Poor v. Metropolitan L. Assur. Soc.*, (1897) A. C. 647; *Chicago v. Phoenix Ins. Co.*, 126 Ill. 276; *Com. v. Hough*, 22 Pa. Co. Ct. 440. See also *The Irresistible*, 7 Wheat. (U. S.) 551; *Matter of Webb*, (Supm. Ct. Spec. T.) 24 How. Pr. (N. Y.) 247.

2. *In re Day*, 181 Ill. 73. For an exception to this rule, see *infra*, this section, *Construction of Proviso*.

3. Exception Distinguished from Proviso. — *U. S. v. Cook*, 17 Wall. (U. S.) 177. See *Mullins v. Surrey County*, 5 Q. B. D. 170; *Voorhees v. Jackson*, 10 Pet. (U. S.) 449; *McRae v. Holcomb*, 46 Ark. 306. See also **EXCEPTION**, vol. 11, p. 555.

4. *U. S. v. Cook*, 17 Wall. (U. S.) 177. See also 21 Op. Atty.-Gen. 597.

5. Saving Clause Defined. — *Potter's Dwarries* 17, citing *Hollowell v. Bridgewater Corp.*, 2 And. 192.

6. Saving Clause in Repealing Acts—England. — *Rex v. Justices*, 3 Burr. 1456.

United States. — *U. S. v. Ship Helen*, 6 Cranch (U. S.) 203; *The Irresistible*, 7 Wheat. (U. S.) 551; *U. S. v. Kohnstamm*, 5 Blatchf. (U. S.) 222.

Arkansas. — *Files v. Fuller*, 44 Ark. 273.

California. — *People v. Gill*, Cal. 356.

Colorado. — *Beatty v. People*, 6 Colo. 538.

Illinois. — *Dobbins v. Peoria First Nat. Bank*, 112 Ill. 553.

Indiana. — *Taylor v. State*, 7 Blackf. (Ind.) 93.

Kansas. — *Gilleland v. Schuyler*, 9 Kan. 569.

Massachusetts. — *Com. v. Marshall*, 11 Pick. (Mass.) 350, 22 Am. Dec. 377; *Com. v. Kimball*, 21 Pick. (Mass.) 373; *Com. v. Edwards*, 4 Gray (Mass.) 1; *Com. v. Bennett*, 108 Mass. 30, 11 Am. Rep. 304.

New York. — *Smith v. Banker*, (Supm. Ct. Spec. T.) 3 How. Pr. (N. Y.) 142.

North Carolina. — *Governor v. Howard*, 1 Murph. (5 N. Car.) 465.

Ohio. — *Cochran v. Taylor*, 13 Ohio St. 382.

Vermont. — *Harris v. Townshend*, 56 Vt. 716.

7. Construction of Proviso with Reference to Enacting Clause—England. — *Ex p. Partington*, 6 Q. B. 649, 51 E. C. L. 649; *Rex v. Newark-upon-Trent*, 3 B. & C. 59, 10 E. C. L. 17.

United States. — *Savings Bank v. Collector*, 3 Wall. (U. S.) 495; *Henderson's Tobacco*, 11 Wall. (U. S.) 658; *Dollar Sav. Bank v. U. S.*, 19 Wall. (U. S.) 227; *U. S. v. One Hundred and Thirty-two Packages Spirituous Liquors*, 65 Fed. Rep. 983; *Chattanooga, etc., R. Co. v. Evans*, (C. C. A.) 66 Fed. Rep. 814; *Boston Safe-Deposit, etc., Co. v. Hudson*, 68 Fed. Rep. 760; *U. S. v. Slazenger*, 113 Fed. Rep. 525.

Alabama. — *Rawls v. Doe*, 23 Ala. 248; *Pearce v. Mobile Bank*, 33 Ala. 693.

Connecticut. — *Mechanics', etc., Bank's Appeal*, 31 Conn. 63.

Illinois. — *Spring v. Olney*, 78 Ill. 101; *Gaither v. Wilson*, 164 Ill. 548.

Iowa. — *Rogers v. Vass*, 6 Iowa 405.

Louisiana. — *Gast v. Board of Assessors*, 43 La. Ann. 1104.

Maryland. — *Wolf v. Bauereis*, 72 Md. 481.

Massachusetts. — *Cushing v. Worrick*, 9 Gray (Mass.) 382.

Michigan. — *Sullivan v. Bailey*, 125 Mich. 104, 7 Detroit Leg. N. 419.

Nebraska. — *School Dist. Number Ten v. Coleman*, 39 Neb. 396.

Ohio. — *Zumstein v. Mullen*, 67 Ohio St. 410.

Oklahoma. — *Leader Printing Co. v. Nicholas*, 6 Okla. 302.

Pennsylvania. — *Lehigh County v. Meyer*, 102 Pa. St. 479.

Virginia. — *Callaway v. Harding*, 23 Gratt. (Va.) 547.

Effect of Repeal of Enacting Clause. — So intimate is the connection between the proviso and the enacting clause, that the repeal of the latter necessarily repeals the former, which is not continued in force as an independent enactment. *Church v. Stadler*, 16 Ind. 463.

8. *Gearing's Case*, 3 Ct. Cl. 165; *In re Lange*, 91 Fed. Rep. 361; *In re Scheld*, (C. C. A.) 104 Fed. Rep. 870; *Wartensleben v. Haithcock*, 80 Ala. 565; *Mechanics', etc., Bank's Appeal*, 31 Conn. 63; *State v. St. Louis*, (Mo. 1903) 73 S.

an independent enactment.¹

c. **PROVISO AS AIDING CONSTRUCTION OF ENACTING CLAUSE.** — When the legislature has attached a proviso to a section, the natural presumption is that, but for the proviso, the enacting part of the statute would have included the subject-matter of the proviso.² But the rule must not be carried too far. Such clauses are often introduced from excessive caution and for the purpose of preventing a possible misinterpretation of the act by including therein that which was not intended; the rule is therefore not one of universal obligation and must yield to the cardinal rule which requires the court to give effect to the general intent, if that can be discovered within the four corners of the act. If such general intention would be defeated by construing the act as embracing everything of the same general description as those particularly excepted therefrom, an arbitrary application of the rule is not admissible.³ And in *England* the rule has been laid down that where the enacting part of a statute is clear and unambiguous in its terms and contains no trace of certain provisions, those provisions cannot be imported by implication from a proviso.⁴

d. **STRICT CONSTRUCTION OF PROVISO.** — Where the enacting clause is general in its language and objects, and a proviso is afterward introduced, the proviso is construed strictly and takes no case out of the enacting clause which does not fall fairly within its terms.⁵ In statutes which are strictly construed, however, as, for example, penal statutes, provisos must be liberally construed.⁶

W. Rep. 623; *Traders' Nat. Bank v. Lawrence Mfg. Co.*, 96 N. Car. 298.

1. Proviso as Independent Enactment. — *Georgia R.*, etc., *Co. v. Smith*, 128 U. S. 174; *U. S. v. Babbit*, 1 Black (U. S.) 55; *Cumberland v. Magruder*, 34 Md. 381. See also *Wells v. Iggulden*, 3 B. & C. 189, 10 E. C. L. 48; *Russell v. Worthington*, 23 Fed. Rep. 8; *In re Schallenberger*, 72 Fed. Rep. 494; *Ryan's Case*, 17 Ct. Cl. 47; *Wartensleben v. Haithcock*, 80 Ala. 565; *State v. Eskridge*, 1 Swan (Tenn.) 415.

In *Georgia R.*, etc., *Co. v. Smith*, 128 U. S. 174, Field, J., said: "It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them, to precede their proposed amendments with the term 'provided,' so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction 'but' or 'and' in the same place, and simply serving to separate or distinguish the different paragraphs or sentences."

Exception Construed as Independent Enactment. — *Carroll v. Carroll*, 16 How. (U. S.) 282.

2. Proviso as Aiding Construction of Enacting Clause. — *Mullins v. Surrey County*, 5 Q. B. D. 173; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 191; *Noel v. People*, 187 Ill. 592; *Tinkham v. Tapscott*, 17 N. Y. 152. See also *Downs v. Huntington*, 35 Conn. 591.

Repealed Proviso as Aiding Construction. — *Savings Bank v. Collector*, 3 Wall. (U. S.) 495.

Unconstitutional Proviso in Aid of Construction. — *Philadelphia v. Barber*, 160 Pa. St. 123, 34 W. N. C. (Pa.) 155; *General Assembly v. Gratz*, 139 Pa. St. 497.

An Exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted. *Bend v. Hoyt*, 13 Pet. (U. S.) 271. To the same effect, see *Brown v. Maryland*, 12 Wheat. (U. S.) 438; *Equitable L. Assur. Soc. v. Clements*, 140 U. S. 226; *Arnold v. U. S.*, 147 U. S. 499; *In re Bau-*

mann, 96 Fed. Rep. 948; *Thornton v. U. S.*, 27 Ct. Cl. 342; *Adams v. Bancroft*, 3 Sumn. (U. S.) 387.

3. Baggaley v. Pittsburg, etc., Iron Co., (C. C. A.) 90 Fed. Rep. 636; *Tinkham v. Tapscott*, 17 N. Y. 141. See also *In re Perrone*, 89 Fed. Rep. 150; *U. S. v. Gilmore*, 8 Wall. (U. S.) 330.

4. Guardians of Poor v. Metropolitan L. Assur. Soc., (1897) A. C. 647; *Mullins v. Surrey County*, 5 Q. B. D. 173.

5. Strict Construction of Provisos — England. — *Compare Foster v. Pritchard*, 2 H. & W. 151. *United States.* — *U. S. v. Dickson*, 15 Pet. (U. S.) 141; *Ryan v. Carter*, 93 U. S. 78; *U. S. v. Newhall*, 91 Fed. Rep. 529; *Wall v. Cox*, (C. C. A.) 101 Fed. Re 410; *In re Matthews*, 109 Fed. Rep. 614; *Royce v. U. S.*, 36 Ct. Cl. 328. See also *Potter v. Chicago Third Nat. Bank*, 102 U. S. 163.

Alabama. — *Bragg v. Clark*, 50 Ala. 363. *Arkansas.* — *Wassell v. Armstrong*, 35 Ark. 247; *Bird v. Jones*, 37 Ark. 195; *Nolen v. Harden*, 43 Ark. 307, 51 Am. Rep. 563; *McRae v. Holcomb*, 46 Ark. 306.

California. — *Blood v. Fairbanks*, 50 Cal. 420. *Connecticut.* — *Clark's Appeal*, 58 Conn. 207. *Georgia.* — *Willingham v. Smith*, 48 Ga. 580. *Illinois.* — *Epps v. Epps*, 17 Ill. App. 196. *Iowa.* — *Compare Rogers v. Vass*, 6 Iowa 405. *Maryland.* — *Cumberland v. Magruder*, 34 Md. 381.

Mississippi. — *Butts v. Vicksburg, etc., R. Co.*, 63 Miss. 462.

Missouri. — *Looker v. Davis*, 47 Mo. 140.

Nevada. — *State v. Wheeler*, 23 Nev. 143.

Pennsylvania. — *Philadelphia v. Costello*, 17 Pa. Super. Ct. 339.

South Carolina. — *Southgate v. Goldthwaite*, 1 Bailey L. (S. Car.) 367.

Texas. — *Roberts v. Yarbboro*, 41 Tex. 449.

6. Liberal Construction of Provisos in Statutes Strictly Construed. — *Savings Bank v. Collector*, 3 Wall. (U. S.) 495; *Matter of Ankrim*, 3 Mc-

e. HARMONIZING PROVISIO AND ENACTING CLAUSE. — The rule that all parts of a statute are to be construed together, and effect given to the whole, if possible, is to be observed in the construction of provisos and saving clauses.¹ Thus a construction of a proviso which is plainly repugnant to the body of the act is to be avoided if possible.² And the proviso must be construed so as to give some effect different from that which would exist without it.³

Where There Is Direct Repugnance. — If, however, a saving clause is totally repugnant to the purview or body of the act, it will be void, and the body of the act will prevail.⁴ But in construing provisos which are repugnant to or inconsistent with the body or purview of the act, some of the authorities have drawn a distinction between "provisos" and "saving clauses," it being held that a proviso that is repugnant to the body of the act renders the latter absolutely void on the ground that the proviso is the later expression of the legislative will.⁵ But other authorities have declared that the distinction is without foundation in reason, and that where a proviso is inconsistent with the purview of the act, the latter must prevail.⁶

f. GENERAL SAVING CLAUSES RELATING TO REPEALING ACTS. — Statutes providing that the repeal of an act shall not affect any rights which have accrued under it, any duty imposed, any penalty incurred, or any proceeding commenced, etc., are not infrequent. Such statutes are in the nature of general saving clauses; and though, of course, not binding upon a subsequent legislature, yet courts, in construing the repealing act, will adhere to them, unless a contrary intent of the legislature plainly appears.⁷

Lean (U. S.) 285; *People v. Gill*, 7 Cal. 356; *Jackson v. Moye*, 33 Ga. 296; *Sanders v. State*, 77 Ind. 227; *Sneed v. Com.*, 6 Dana (Ky.) 339; *Dull v. People*, 4 Den. (N. Y.) 91; *Com. v. Standard Oil Co.*, 101 Pa. St. 119; *White v. Nashville, etc., R. Co.*, 7 Heisk. (Tenn.) 518.

1. Harmonizing Proviso and Enacting Clause. — *Rex v. Armagh*, 8 Mod. 8; *Portland Sav. Inst. v. Makin*, 23 Me. 360; *Ihmsen v. Monongahela Nav. Co.*, 32 Pa. St. 153.

2. Construction of Proviso Repugnant to Body of Statute to Be Avoided. — *Dollar Sav. Bank v. U. S.*, 19 Wall. (U. S.) 227. See also *Greely v. Thompson*, 10 How. (U. S.) 237.

3. Effect to Be Given to Proviso. — *Jackson v. Clark*, 1 Pet. (U. S.) 628; *Quackenbush v. U. S.*, 33 Ct. Cl. 355.

Prior Construction of Statutes Inapplicable After Addition of Proviso. — *Markee v. People*, 103 Ill. App. 347.

4. Saving Clause Repugnant to Purview Invalid. — *Wood's Case*, 1 Coke 47; *Walsingham's Case*, Plowd. 565; *Yarmouth v. Simmons*, 10 Ch. D. 518; *Farmers' Bank v. Hale*, 59 N. Y. 59.

5. Purview Held Invalidated by Repugnant Proviso. — *Atty-Gen. v. Chelsea Waterworks Co.*, Fitzg. 195; *Rex v. Middlesex*, 2 B. & Ad. 818, 22 E. C. L. 190; *Van Horn v. State*, 46 Neb. 62; *Townsend v. Brown*, 24 N. J. L. 80; *Farmers' Bank v. Hale*, 59 N. Y. 59; *White v. Nashville, etc., R. Co.*, 7 Heisk. (Tenn.) 534. See also *Ryan v. State*, 5 Neb. 276; *Gibbons v. Brittenum*, 56 Miss. 232.

6. Repugnant Proviso Held Invalid. — *Jackson v. Moye*, 33 Ga. 302; *Penick v. High Shoals Mfg. Co.*, 113 Ga. 592; *Dugan v. Bridge Co.*, 27 Pa. St. 309, 67 Am. Dec. 464; *Colegrove's Estate*, 21 Pa. Co. Ct. 577; *Collner's Estate*, 22 Pa. Co. Ct. 198, 29 Pittsb. Leg. J. N. S. (Pa.) 423. See also *Mason v. Boom Co.*, 3 Wall. Jr. (C. C.)

252. *Compare Packer v. Sunbury, etc., R. Co.*, 19 Pa. St. 219.

7. General Saving Clauses Relating to Repealing Acts — *United States*. — *U. S. v. Reisinger*, 128 U. S. 398; *U. S. v. Barr*, 4 Sawy. (U. S.) 254; *State v. Kansas City, etc., R. Co.*, 32 Fed. Rep. 722; *U. S. v. Keokuk, etc., Bridge Co.*, 45 Fed. Rep. 178.

Arkansas. — *Volmer v. State*, 34 Ark. 487. See also *Files v. Fuller*, 44 Ark. 280.

California. — *People v. Quinn*, 18 Cal. 122.

Georgia. — *Jordan v. State*, 38 Ga. 585.

Illinois. — *Tipton v. Carrigan*, 10 Ill. App. 318; *Farmer v. People*, 77 Ill. 322.

Indiana. — *Sanders v. State*, 77 Ind. 227; *Western Union Tel. Co. v. Brown*, 108 Ind. 538.

Iowa. — *State v. Shaffer*, 21 Iowa 486.

Kansas. — *Willets v. Jeffries*, 5 Kan. 473; *Gilleland v. Schuyler*, 9 Kan. 580; *State v. Boyle*, 10 Kan. 113; *State v. Crawford*, 11 Kan. 32.

Kentucky. — *Acree v. Com.*, 13 Bush (Ky.) 353; *Com. v. Sherman*, 85 Ky. 686.

Massachusetts. — *Com. v. Desmond*, 123 Mass. 407; *Com. v. Sullivan*, 150 Mass. 316.

Minnesota. — *Grace v. Donovan*, 12 Minn. 580; *Brisbin v. Farmer*, 16 Minn. 215.

Missouri. — *Rogers v. Pacific R. Co.*, 35 Mo. 153; *State v. Ross*, 49 Mo. 416; *State v. Proctor*, 90 Mo. 334.

North Dakota. — *National Bank v. Lemke*, 3 N. Dak. 154.

Vermont. — *Pratt v. Jones*, 25 Vt. 303; *Haris v. Townshend*, 56 Vt. 716.

Wisconsin. — *Garland v. Hickey*, 75 Wis. 178.

Canada. — *Morris Tp. v. Huron County*, 26 Ont. 689.

See also *Ex p. Iarkin*, 1 Okla. 53.

In *People v. McNulty*, 93 Cal. 437, it was

3. General and Special Laws. — In Many of the States There Are Constitutional Inhibitions against the enactment of special or local laws in enumerated cases, and in all others where a general law may be made applicable; and also provisions requiring laws of a general nature to be uniform in their operation.¹

said: "It is quite clear that a general saving clause, if it be clothed in apt language to express the purpose, is as efficient as a special clause expressly inserted in a particular statute. This proposition is too plain to need the support of authorities, but there are authorities directly to the point."

In *Mongeon v. People*, 55 N. Y. 613, the court refused to apply the provision of the general repealing act of 1828, providing that "no offense committed, and no penalty or forfeiture incurred, previous to the time when any statutory provision shall be repealed, shall be affected by such repeal," to subsequent legislation, saying: "The legislature could not declare in advance the intent of subsequent legislatures, or the effect of subsequent legislation upon existing statutes." See also *Nash v. White's Bank*, 105 N. Y. 245.

1. Uniform Operation of General Laws — *United States*. — *Shaver v. Pennsylvania Co.*, 71 Fed. Rep. 931 (*Ohio Constitution*); *Rathbone v. Kiowa County*, 73 Fed. Rep. 395 (*Kansas Constitution*); *Peirce v. Van Dusen*, 47 U. S. App. 339.

Alabama. — *Lovejoy v. Beeson*, 121 Ala. 605.

California. — *Turner v. Siskiyou County*, 109 Cal. 332; *Bloss v. Lewis*, 109 Cal. 493; *Rauer v. Williams*, 118 Cal. 401; *Murphy v. Pacific Bank*, 119 Cal. 334; *Britton v. Election Com'rs*, 129 Cal. 337; *Freman v. Marshall*, 137 Cal. 159; *Solano County v. McCudden*, 120 Cal. 648; *Wigmore v. Buell*, 122 Cal. 144; *Van Harlingen v. Doyle*, 134 Cal. 53; *Beveridge v. Lewis*, 137 Cal. 619; *Napa State Hospital v. Yuba County*, 138 Cal. 378.

Georgia. — *Thorpe v. Butt*, 106 Ga. 52.

Indiana. — *Jackson County v. State*, 147 Ind. 476.

Iowa. — *Primghar State Bank v. Rerick*, 96 Iowa 238; *Morris v. Stout*, 110 Iowa 659; *State v. Omaha, etc., R., etc., Co.*, 113 Iowa 30; *Cedar Rapids Water Co. v. Cedar Rapids*, (Iowa 1902) 91 N. W. Rep. 1081.

Kansas. — *Campbell v. Labette County*, 63 Kan. 377.

North Dakota. — *Plummer v. Borsheim*, 8 N. Dak. 565.

Ohio. — *Mott v. Hubbard*, 59 Ohio St. 199; *State v. Brown*, 60 Ohio St. 462; *State v. Cowles*, 64 Ohio St. 162; *State v. Bloch*, 65 Ohio St. 370; *Hibbard v. State*, 65 Ohio St. 574; *Platt v. Craig*, 66 Ohio St. 75; *State v. Yates*, 66 Ohio St. 546; *State v. Garver*, 66 Ohio St. 555; *Cincinnati v. Steinkamp*, 54 Ohio St. 284; *Hixson v. Burson*, 54 Ohio St. 470, *overruling State v. Franklin County*, 35 Ohio St. 458; *State v. Davis*, 55 Ohio St. 15; *Cincinnati v. Conner*, 55 Ohio St. 82; *Gaylord v. Hubbard*, 56 Ohio St. 25; *Pearson v. Stephens*, 56 Ohio St. 126; *Silberman v. Hay*, 59 Ohio St. 582; *State v. Buckley*, 60 Ohio St. 273; *State v. Spellmire*, 67 Ohio St. 77; *State v. Bader*, 5 Ohio Cir. Dec. 703, 12 Ohio Cir. Ct. 659; *Andrews v. Settles*, 9 Ohio Cir. Dec. 191, 16 Ohio Cir. Ct. 638; *State v. Tooker*, 8 Ohio Cir. Dec. 656, 16 Ohio Cir. Ct. 647; *State v. Buckley*, 9

Ohio Cir. Dec. 341, 17 Ohio Cir. Ct. 86; *Arcade Tea Co. v. Glueck*, 10 Ohio Cir. Dec. 126, 18 Ohio Cir. Ct. 279; *Diemer v. Hudson*, 9 Ohio Cir. Dec. 858, 18 Ohio Cir. Ct. 890; *Yost v. Maumee Brewery Co.*, 10 Ohio Cir. Dec. 693, 20 Ohio Cir. Ct. 26; *State v. Yates*, 12 Ohio Cir. Dec. 298, 21 Ohio Cir. Ct. 686; *State v. Garver*, 23 Ohio Cir. Ct. 140; *State v. Toledo*, 23 Ohio Cir. Ct. 327; *Lloyd v. Dollisin*, 23 Ohio Cir. Ct. 571; *Nye v. State*, 1 Ohio Cir. Dec. 198; *Madden v. Smeltz*, 1 Ohio Cir. Dec. 424; *Gill v. Sealbridge*, 9 Ohio Cir. Dec. 554, 17 Ohio Cir. Ct. 390; *Matter of Roberg*, 10 Ohio Cir. Dec. 107, 18 Ohio Cir. Ct. 367; *State v. Hamilton County*, 11 Ohio Cir. Dec. 317; *State v. Jones*, 11 Ohio Cir. Dec. 496; *State v. Hubbard*, 12 Ohio Cir. Dec. 87; *State v. Gardner*, 4 Ohio Dec. 34, 2 Ohio N. P. 405; *State v. Owen*, 4 Ohio Dec. 163, 3 Ohio N. P. 181; *Emery v. Cincinnati*, 6 Ohio Dec. 411, 4 Ohio N. P. 220; *Emery v. Coles*, 7 Ohio Dec. 414, 5 Ohio N. P. 199; *Mahoney v. Kinney*, 7 Ohio Dec. 405, 5 Ohio N. P. 336; *Cincinnati v. Ehrman*, 9 Ohio Dec. 1, 6 Ohio N. P. 169; *Smith v. Cincinnati*, 9 Ohio Dec. 806, 6 Ohio N. P. 175; *Fagin v. Ohio Humane Soc.*, 9 Ohio Dec. 341, 6 Ohio N. P. 357; *Watkins v. Schlechter*, 9 Ohio Dec. 590, 7 Ohio N. P. 42; *Billings v. Dressler*, 7 Ohio Dec. 250, 5 Ohio N. P. 114; *State v. Campbell*, 8 Ohio Cir. Dec. 62; *Smith v. Cincinnati*, 9 Ohio Dec. 806; *In re Brown*, 9 Ohio Dec. 810.

Pennsylvania. — *Re Millvale*, 26 Pittsb. Leg. J. N. S. (Pa.) 411; *Com. v. Connell*, 5 Lack. Leg. N. (Pa.) 332.

Utah. — *State v. Standford*, 24 Utah 148.

See also *Dinsmore v. State*, 61 Neb. 418.

When a General Law Exists. — In some states the legislature is forbidden to enact a special law in a case for which provision is made by an existing general law. See the following cases:

Georgia. — *Branch v. Augusta Glass Works*, 95 Ga. 573; *Mattox v. Knox*, 96 Ga. 403; *Fullington v. Williams*, 98 Ga. 807; *Plumb v. Christie*, 103 Ga. 686; *Deal v. Singletary*, 105 Ga. 466; *Smith v. State*, 112 Ga. 291; *Griffin v. Eaves*, 114 Ga. 65; *Hawkinsville, etc., R. Co. v. Waycross Air-Line R. Co.*, 114 Ga. 239; *Harris v. State*, 114 Ga. 436; *Hancock v. State*, 114 Ga. 439; *Roberts v. State*, 114 Ga. 541; *Chamlee v. Davis*, 115 Ga. 266; *Bagley v. State*, 103 Ga. 388; *Caldwell v. State*, 101 Ga. 557; *Starnes v. Mutual Loan, etc., Co.*, 102 Ga. 597; *Thomas v. Austin*, 103 Ga. 701; *Aycoc v. Rutledge*, 104 Ga. 533; *Papworth v. Fitzgerald*, 105 Ga. 491; *Papworth v. State*, 103 Ga. 36; *Benning v. Smith*, 108 Ga. 259; *Atlanta Sav. Bank v. Spencer*, 107 Ga. 629; *O'Brien v. State*, 109 Ga. 51; *Embry v. State*, 109 Ga. 61; *Tinsley v. State*, 109 Ga. 822.

Maryland. — *Hamilton v. Carroll*, 82 Md. 326; *Herbert v. Baltimore County*, (Md. 1903) 55 Atl. Rep. 376.

A law which is general in its operation is not the less a general law because at the time of its passage there was also a local law relating to the same matter. *Mattox v. Knox*, 96 Ga. 403.

Legislative Question. — And whether a general law could be made applicable is, as to any case not specially enumerated, a legislative and not a judicial question.¹

The Test. — In order to determine whether or not a given law is general, the purpose of the act and the objects on which it is intended to operate must be considered. If these objects are distinguished from others by characteristics evincing a peculiar relation to the legislative purpose, and showing the legislation to be reasonably appropriate to the former and inappropriate to the latter, the objects will be considered, as respects such legislation, to be a class by themselves, and legislation affecting such a class, to be general.² But if

1. Legislative Determination — United States.

— *Rathbone v. Kiowa County*, 49 U. S. App. 577; *Springfield Safe Deposit, etc., Co. v. Attica*, 56 U. S. App. 330; *Seward County v. Ætna L. Ins. Co.*, (C. C. A.) 90 Fed. Rep. 222; *Kearny County v. Vandriess*, (C. C. A.) 115 Fed. Rep. 866; *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528.

California. — *People v. Levee Dist. No. 6*, (Cal. 1900) 63 Pac. Rep. 342, *affirmed* 131 Cal. 30; *People v. McFadden*, 81 Cal. 489, 15 Am. St. Rep. 66; *People v. Mullender*, 132 Cal. 217.

Indiana. — *Gentile v. State*, 29 Ind. 409, *overruling* *Thomas v. Clay County*, 5 Ind. 4; *Longworth v. Evansville*, 32 Ind. 322; *State v. Tucker*, 46 Ind. 355; *Vickery v. Chase*, 50 Ind. 461; *Kelly v. State*, 92 Ind. 236; *Johnson v. Wells County*, 107 Ind. 15; *Mode v. Beasley*, 143 Ind. 306; *Jackson County v. State*, 147 Ind. 476; *Indianapolis v. Navin*, 151 Ind. 139; *Schneck v. Jeffersonville*, 152 Ind. 204; *Pennsylvania R. Co. v. State*, 142 Ind. 428; *Smith v. Indianapolis St. R. Co.*, 158 Ind. 425.

North Dakota. — *Edmonds v. Herbrandson*, 2 N. Dak. 270.

South Dakota. — *Stuart v. Kirley*, 12 S. Dak. 245.

Texas. — *Smith v. Grayson County*, 18 Tex. Civ. App. 153.

In *Richman v. Muscatine County*, 77 Iowa 513, 14 Am. St. Rep. 308, it was said in reference to this subject: "We are not justified in disturbing its acts on constitutional grounds, except where the infraction is clear, palpable, and plainly inconsistent."

See for Instances where a general law could not be made applicable, *State v. Squires*, 26 Iowa 340; *Com. v. Haly*, 106 Ky. 716 (special joint resolution), *followed in* *Com. v. Lyon*, 72 S. W. Rep. 323, 24 Ky. L. Rep. 1747; *State v. Brock*, 66 S. Car. 357. And where a general law could be made applicable, *State v. Hill*, 147 Mo. 63.

2. Test as to Whether Law General or Special — United States. — *Harwood v. Wentworth*, 162 U. S. 547 (act of territorial legislature); *Waite v. Santa Cruz*, 184 U. S. 302, 75 Fed. Rep. 967, 89 Fed. Rep. 619; *Louisville Trust Co. v. Cincinnati*, 76 Fed. Rep. 296, 47 U. S. App. 36; *Terre Haute, etc., R. Co. v. Cox*, 42 C. C. A. 654.

Alabama. — *Childress v. State*, 122 Ala. 21; *Mitchell v. State*, 129 Ala. 23; *Gilmore v. State*, 126 Ala. 20.

Arizona. — *Hughes v. Lazard*, (Ariz. 1896) 43 Pac. Rep. 422; *Harwood v. Perrin*, (Ariz. 1900) 60 Pac. Rep. 891; *Sanford v. Tucson*, (Ariz. 1903) 71 Pac. Rep. 903.

Arkansas. — *Little Rock, etc., R. Co. v. Han-niford*, 49 Ark. 291; *Dow v. Beidelman*, 49 Ark. 325.

California. — *People v. Judge*, 17 Cal. 548; *Brooks v. Hyde*, 37 Cal. 366; *People v. Hen-shaw*, 76 Cal. 436; *Pasadena v. Stimson*, 91 Cal. 238; *Miles v. Woodward*, 115 Cal. 308; *Tulare County v. May*, 118 Cal. 303; *Rode v. Siebe*, 119 Cal. 518; *Wigmore v. Buell*, 122 Cal. 144; *Vail v. San Diego County*, 126 Cal. 35; *Fragley v. Phelan*, 126 Cal. 383; *People v. King*, 127 Cal. 570; *Escondido High School Dist. v. Escondido Seminary, etc.*, 130 Cal. 128; *People v. Mullender*, 132 Cal. 217; *Thom v. Los Angeles County*, 136 Cal. 375; *Summerland v. Bicknell*, 111 Cal. 567; *Los Angeles v. Teed*, 112 Cal. 319; *Hellman v. Shoulters*, 114 Cal. 136; *Mintzer v. Schilling*, 117 Cal. 361; *San Luis Obispo County v. Greenberg*, 120 Cal. 300; *Clarke v. Police, etc., Ins. Board*, 123 Cal. 24; *Lower Kings River Reclamation Dist. No. 531 v. McCullah*, 124 Cal. 175; *People v. Lodi High School Dist.*, 124 Cal. 694; *Vernon School Dist. v. Board of Education*, 125 Cal. 593; *Jackson v. Baehr*, 138 Cal. 266; *Napa State Hospital v. Yuba County*, 138 Cal. 378; *Madera County v. Raymond Granite Co.*, (Cal. 1903) 72 Pac. Rep. 915.

Colorado. — *Pueblo County v. Smith*, 22 Colo. 534; *Frost v. Pfeiffer*, 26 Colo. 338; *Cardillo v. People*, 26 Colo. 355.

Dakota. — *Farris v. Vannier*, 6 Dak. 186. *Florida.* — *State v. Canfield*, 40 Fla. 36; *State v. Jacksonville Terminal Co.*, 41 Fla. 363; *Randall v. Tillis*, (Fla. 1901) 29 So. Rep. 540.

Georgia. — *Cook v. Equitable Bldg., etc., Assoc.*, 104 Ga. 814; *Union Sav. Bank, etc., Co. v. Dottenheim*, 107 Ga. 606; *Phinizy v. Eve*, 108 Ga. 360; *Welborne v. Donaldson*, 115 Ga. 563; *Crovatt v. Mason*, 101 Ga. 246; *McGinnis v. Ragsdale*, 116 Ga. 245; *Dallis v. Griffin*, (Ga. 1903) 43 S. E. Rep. 758.

Illinois. — *People v. Wallace*, 70 Ill. 680; *Holmes v. Smythe*, 100 Ill. 413; *Coal Run Coal Co. v. Finlen*, 124 Ill. 666; *Jensen v. Fricke*, 133 Ill. 171; *West Chicago Park Com'rs v. McMullen*, 134 Ill. 170; *People v. Onahan*, 170 Ill. 449; *Chicago Gen. R. Co. v. Chicago*, 176 Ill. 253, 68 Am. St. Rep. 188; *People v. Cook County*, 176 Ill. 576; *Park v. Modern Woodmen of America*, 181 Ill. 214; *Cleveland, etc., R. Co. v. Randle*, 183 Ill. 364; *People v. Knopf*, 183 Ill. 410; *People v. Adams County*, 185 Ill. 288; *People v. Raymond*, 186 Ill. 407; *Burton Stock-Car Co. v. Traeger*, 187 Ill. 9; *Arms v. Ayer*, 192 Ill. 601.

Indiana. — *Groesch v. State*, 42 Ind. 547; *Hanlon v. Floyd County*, 53 Ind. 123; *State v.*

the characteristics used to distinguish the objects to which the legislation applies from others be not germane to the legislative purpose, or do not indi-

Reitz, 62 Ind. 159; *Heanley v. State*, 74 Ind. 99; *Elder v. State*, 96 Ind. 162; *Gilson v. Rush County*, 128 Ind. 65; *Consumers' Gas Trust Co. v. Harless*, 131 Ind. 446; *Pennsylvania R. Co. v. State*, 142 Ind. 428; *Indianapolis v. Navin*, 151 Ind. 139; *International Bldg., etc., Assoc. v. Wall*, 153 Ind. 554; *Campbell v. Indianapolis*, 155 Ind. 186; *Indianapolis St. R. Co. v. Robinson*, 157 Ind. 232, 414; *Southern Indiana R. Co. v. Peyton*, 157 Ind. 690; *Indianapolis St. R. Co. v. Taylor*, 158 Ind. 274; *Legler v. Paine*, 147 Ind. 181; *Jackson County v. State*, 147 Ind. 476; *Shea v. Muncie*, 148 Ind. 14; *Harmon v. Madison County*, 153 Ind. 68; *State v. Smith*, 158 Ind. 559; *Evansville, etc., R. Co. v. Terre Haute*, (Ind. 1903) 67 N. E. Rep. 686; *Citizens' St. R. Co. v. Jolly*, (Ind. 1903) 67 N. E. Rep. 935.

Iowa.—*McAunich v. Mississippi*, etc., R. Co., 26 Iowa 343; *Primghar State Bank v. Rerick*, 96 Iowa 238; *Page v. Millerton*, 114 Iowa 378; *Scottish Union, etc., Ins. Co. v. Herriott*, 109 Iowa 606, 77 Am. St. Rep. 548.

Kansas.—*Kansas Town, etc., Co. v. Smith Center*, 6 Kan. App. 252; *Lowe v. Bourbon County*, 6 Kan. App. 603; *State v. Haun*, 7 Kan. App. 509; *State v. Hunter*, 38 Kan. 578; *Chesney v. McClintock*, 61 Kan. 94; *In re Greer*, 58 Kan. 268; *Mitchell v. Topeka*, (Kan. App. 1898) 54 Pac. Rep. 292; *Allen v. Kansas Town, etc., Co.*, (Kan. 1899) 56 Pac. Rep. 1131; *Ash v. Thorp*, 65 Kan. 60; *Rambo v. Larrabee*, (Kan. 1903) 72 Pac. Rep. 225.

Kentucky.—*Stone v. Wilson*, (Ky. 1897) 39 S. W. Rep. 49; *Com. v. E. H. Taylor Jr. Co.*, 101 Ky. 325; *Winston v. Stone*, 102 Ky. 423; *Louisville School Board v. Superintendent of Public Instruction*, 102 Ky. 394; *Louisville, etc., Ferry Co. v. Com.*, 104 Ky. 726; *Williams v. Nall*, 108 Ky. 21; *Com. v. Hillside Coal Co.*, 109 Ky. 47; *Shoemaker v. Hodge*, (Ky. 1901) 63 S. W. Rep. 979; *Walston v. Louisville*, (Ky. 1902) 66 S. W. Rep. 385; *Woolley v. Louisville*, (Ky. 1903) 71 S. W. Rep. 893.

Louisiana.—*State v. Liverpool, etc., Ins. Co.*, 40 La. Ann. 463; *Duffy v. New Orleans*, 49 La. Ann. 114; *Medical Examiners v. Fowler*, 50 La. Ann. 1358; *McKeon v. Sumner Bldg., etc., Co.*, 51 La. Ann. 1961; *Dehon v. Lafourche Basin Levee Board*, (La. 1903) 34 So. Rep. 770.

Maryland.—*Stevens v. State*, 89 Md. 669.

Michigan.—*Ripley v. Evans*, 87 Mich. 217.

Minnesota.—*State v. Spaude*, 37 Minn. 322; *Allen v. Pioneer-Press Co.*, 40 Minn. 117, 12 Am. St. Rep. 707; *State v. Donaldson*, 41 Minn. 74; *State v. St. Louis County*, 61 Minn. 542; *State v. Ramsey County*, 84 Minn. 377; *State v. Sullivan*, 62 Minn. 283; *State v. Sullivan*, 72 Minn. 126; *Bausher v. St. Paul*, 72 Minn. 539; *Flynn v. Little Falls Electric, etc., Co.*, 74 Minn. 180; *State v. Thief River Falls*, 76 Minn. 15; *State v. Minor*, 79 Minn. 201; *State v. Westfall*, 85 Minn. 437; *State v. Ames*, 87 Minn. 23; *Beck v. St. Paul*, 87 Minn. 381; *State v. Stofels*, (Minn. 1903) 94 N. W. Rep. 675.

Mississippi.—*Vicksburg v. Sun Mut. Ins. Co.*, 72 Miss. 71.

Missouri.—*State v. Pond*, 93 Mo. 606; *Ex p. Swann*, 96 Mo. 44; *State v. Hughes*, 104 Mo. 459; *State v. Orrick*, 106 Mo. 111; *B. F.*

Coombs, etc., Commission Co. v. Block, 130 Mo. 668; *Dunne v. Kansas City Cable R. Co.*, 131 Mo. 1; *State v. Bockstruck*, 136 Mo. 335; *Daggs v. Orient Ins. Co.*, 136 Mo. 382, 58 Am. St. Rep. 638; *State v. Stratton*, 136 Mo. 423; *State v. Arnold*, 136 Mo. 446; *State v. Darrah*, 152 Mo. 522; *Young v. Kansas City*, 152 Mo. 661; *State v. Whitaker*, 160 Mo. 59; *Ex p. Lucas*, 160 Mo. 219; *State v. Williams*, 160 Mo. 333; *State v. Hamey*, 168 Mo. 167; *Glover v. Meinrath*, 133 Mo. 292; *McMahon v. Pacific Express Co.*, 132 Mo. 641; *Carson v. Smith*, 133 Mo. 606; *State v. Gritzner*, 134 Mo. 512; *St. Louis v. Dorr*, 145 Mo. 466, 68 Am. St. Rep. 575; *State v. Fleming*, 147 Mo. 1; *State v. Aetna Ins. Co.*, 150 Mo. 113; *Kansas City v. Siegmiller*, 151 Mo. 189; *State v. Mason*, 155 Mo. 486; *State v. O'Neil Lumber Co.*, 170 Mo. 7; *Jenkins v. Covenant Mut. L. Ins. Co.*, 171 Mo. 375; *Elting v. Hickman*, 172 Mo. 237; *State v. Faulkner*, (Mo. 1903) 75 S. W. Rep. 116; *Seaboard Nat. Bank v. Woesten*, (Mo. 1903) 75 S. W. Rep. 464.

Montana.—*State v. Long*, 21 Mont. 26; *In re Dewar*, 10 Mont. 426; *King v. Pony Gold Min. Co.*, 24 Mont. 470.

Nebraska.—*State v. Berka*, 20 Neb. 375; *Lancaster County v. Trimble*, 33 Neb. 121; *Livingston Loan, etc., Assoc. v. Drummond*, 49 Neb. 200; *State v. Farmers, etc., Irrigation Co.*, 59 Neb. 1; *Dinsmore v. State*, 61 Neb. 418; *Coil v. State*, 62 Neb. 15; *State v. Stuht*, 52 Neb. 209; *State v. Magdrey*, 52 Neb. 508; *Lincoln St. R. Co. v. Lincoln*, 61 Neb. 109; *State v. Frank*, 61 Neb. 679, *affirmed* 60 Neb. 327; *State v. Aitken*, 62 Neb. 428; *Moore v. State*, 63 Neb. 345; *Dougherty v. Kubat*, (Neb. 1903) 93 N. W. Rep. 317; *Baker v. Gillan*, (Neb. 1903) 94 N. W. Rep. 615; *Chadron Loan, etc., Assoc. v. Hayes*, (Neb. 1901) 95 N. W. Rep. 812.

Nevada.—*Youngs v. Hall*, 9 Nev. 226; *State v. Ruhe*, 24 Nev. 251; *Thompson v. Turner*, 24 Nev. 292; *State v. Beck*, 25 Nev. 68.

New Hampshire.—*State v. Griffin*, 69 N. H. 1, 76 Am. St. Rep. 139.

New Jersey.—*Rutgers v. New Brunswick*, 42 N. J. L. 51; *State v. Yard*, 42 N. J. L. 357; *Skinner v. Bogert*, 42 N. J. L. 407; *State v. Hammer*, 42 N. J. L. 435; *Long Branch Police v. Sloane*, 49 N. J. L. 356; *Shotwell v. Dalrymple*, 49 N. J. L. 530; *Warner v. Hoagland*, 51 N. J. L. 62; *Hudson County v. Buck*, 51 N. J. L. 156; *Matter of Cleveland*, 52 N. J. L. 188; *Sumerset v. Hunterdon County*, 52 N. J. L. 512; *Point Breeze Ferry, etc., Co. v. Bergen Neck R. Co.*, 53 N. J. L. 108; *State v. Clayton*, 53 N. J. L. 277; *Lewis v. Moore*, 54 N. J. L. 121; *Harrington Tp. Road Commission v. Collector*, 54 N. J. L. 274; *Benson v. Bloomfield Tp.*, 58 N. J. L. 491; *Johnson v. Asbury Park*, 60 N. J. L. 427; *Flock v. Smith*, 65 N. J. L. 224; *Hudson County v. Clarke*, 65 N. J. L. 271; *Butler v. Montclair*, 67 N. J. L. 426; *Berry v. Cramer*, 58 N. J. L. 278; *Johnson v. Hoover*, 58 N. J. L. 334; *Van Reipen v. Jersey City*, 58 N. J. L. 262; *Johnson v. Asbury Park*, 58 N. J. L. 604; *Glen Ridge v. Stout*, 58 N. J. L. 598; *Burlington v. Pennsylvania R. Co.*, 56 N. J. Eq.

cate some reasonable appropriateness in its application, or if objects with similar characteristics and like relation to the legislative purpose have been

259; *Brown v. Union*, 62 N. J. L. 142; *Atty.-Gen. v. Dover*, 62 N. J. L. 40; *Varney v. Kramer*, 62 N. J. L. 483; *Schmalz v. Wooley*, 57 N. J. Eq. 303, 73 Am. St. Rep. 637; *Randolph v. Union County*, 63 N. J. L. 155; *Herrman v. Guttenberg*, 62 N. J. L. 605, *affirmed* 63 N. J. L. 616; *Drew v. West Orange Tp.*, 64 N. J. L. 481; *Boorum v. Connelly*, 66 N. J. L. 197; *Budd v. Hancock*, 66 N. J. L. 133; *McArdle v. Jersey City*, 66 N. J. L. 590; *State v. Corson*, 67 N. J. L. 178; *State v. Diamond Mills Paper Co.*, 63 N. J. Eq. 111, *affirmed* (N. J. 1902) 53 Atl. Rep. 1125; *Slocum v. Neptune Tp.*, (N. J. 1902) 53 Atl. Rep. 301; *Albright v. Sussex County Lake, etc., Commission*, (N. J. 1902) 53 Atl. Rep. 612; *Riccio v. Hoboken*, (N. J. 1903) 54 Atl. Rep. 801; *McMullin v. Doughty*, (N. J. 1903) 55 Atl. Rep. 284; *Ross v. Essex County*, (N. J. 1903) 55 Atl. Rep. 310.

New Mexico.—*Codlin v. Kohlhausen*, 9 N. Mex. 565; *U. S. v. De Amador*, 6 N. Mex. 173; *U. S. v. De Lujan*, 6 N. Mex. 179; *U. S. v. Chaves*, 6 N. Mex. 180.

New York.—*People v. Dunn*, 157 N. Y. 528; *Perkins v. Heert*, 158 N. Y. 306, 70 Am. St. Rep. 483; *Kittinger v. Buffalo Traction Co.*, 160 N. Y. 377; *Czarnowsky v. Rochester*, 165 N. Y. 649, *affirming* 55 N. Y. App. Div. 388; *People v. King County*, (Supm. Ct. Spec. T.) 13 Misc. (N. Y.) 587; *Fox v. Mohawk, etc., Humane Soc.*, (Supm. Ct. Tr. T.) 20 Misc. (N. Y.) 461; *People v. Dunn*, 31 N. Y. App. Div. 139; *Sun Printing, etc., Assoc. v. New York*, 8 N. Y. App. Div. 230; *Matter of Buffalo Traction Co.*, 25 N. Y. App. Div. 447; *Davidge v. Binghamton*, 62 N. Y. App. Div. 525.

Ohio.—*State v. Baker*, 55 Ohio St. 1; *Hayes v. Cleveland*, 55 Ohio St. 117; *Dietz v. Cleveland*, 55 Ohio St. 645; *Costello v. Wyoming*, 49 Ohio St. 202; *State v. Buckley*, 60 Ohio St. 273; *Squires v. Wiener*, 10 Ohio Cir. Dec. 293; *Seifert v. Weidner*, 5 Ohio Cir. Dec. 506, 12 Ohio Cir. Ct. 1; *State v. Buckley*, 9 Ohio Cir. Dec. 341, 17 Ohio Cir. Ct. 86; *Froelich v. Toledo, etc., R. Co.*, 24 Ohio Cir. Ct. 359.

Oklahoma.—*Guthrie Daily Leader v. Cameron*, 3 Okla. 677; *Addington v. Canfield*, 11 Okla. 204.

Oregon.—*Ex p. Northrup*, 41 Oregon 489; *Northern Counties Trust v. Sears*, 30 Oregon 388; *Oregon City v. Moore*, 30 Oregon 215; *Landis v. Lincoln County*, 31 Oregon 424; *Clemmensen v. Peterson*, 35 Oregon 47; *State v. Frazier*, 36 Oregon 178; *Ladd v. Holmes*, 40 Oregon 167.

Pennsylvania.—*Wheeler v. Philadelphia*, 77 Pa. St. 348; *Kilgore v. Magee*, 85 Pa. St. 401; *Weinman v. Wilkinsburg, etc., R. Co.*, 118 Pa. St. 192; *Ayars's Appeal*, 122 Pa. St. 266; *Opening Ruan St.*, 132 Pa. St. 257; *Paving, etc., of Wyoming St.*, 137 Pa. St. 494; *Straub v. Pittsburgh*, 138 Pa. St. 356; *Durkin v. Kingston Coal Co.*, 171 Pa. St. 193; *Lloyd v. Smith*, 176 Pa. St. 213; *Com. v. Anderson*, 178 Pa. St. 171; *Jermyn v. Fowler*, 186 Pa. St. 595; *Com. v. Gilligan*, 195 Pa. St. 504; *School Dist. v. Smith*, 195 Pa. St. 515; *Clark's Estate*, 195 Pa. St. 520; *Kaisely v. Cotterel*, 196 Pa. St. 614; *Com. v. Charity Hospital*, 198 Pa. St. 270; *Com.*

v. Guthrie, 203 Pa. St. 209; *Com. v. Blackley*, 198 Pa. St. 372; *Com. v. Moir*, 199 Pa. St. 534; *Com. v. Hitchens*, 200 Pa. St. 508; *Stegmaier v. Jones*, 203 Pa. St. 47; *Rose v. Beaver County*, 204 Pa. St. 372; *Sugar Notch*, 192 Pa. St. 349; *Alleghany County Constables*, 17 Pa. Co. Ct. 622; *Com. v. Morton*, 23 Pa. Co. Ct. 386; *Com. v. Norton*, 9 Pa. Dist. 132; *Weaver v. Schuylkill County*, 23 Pa. Co. Ct. 507; *Graeff v. Felix*, 24 Pa. Co. Ct. 657; *Hoffa v. Person*, 1 Pa. Super. Ct. 357; *Com. v. Jones*, 4 Pa. Super. Ct. 362; *Com. v. Clark*, 10 Pa. Super. Ct. 507; *Shenk v. McKennan*, 11 Pa. Super. Ct. 84; *Com. v. Beatty*, 15 Pa. Super. Ct. 5; *Middletown Road*, 15 Pa. Super. Ct. 167; *Com. v. Hanley*, 15 Pa. Super. Ct. 271; *Weaver v. Schuylkill County*, 17 Pa. Super. Ct. 327; *Com. v. Mintz*, 19 Pa. Super. Ct. 283; *Rose v. Beaver County*, 20 Pa. Super. Ct. 110; *Consolidated Gas Co. v. Mitchell*, 1 Dauphin Co. Rep. (Pa.) 71; *Knisely v. Cotterel*, 3 Dauphin Co. Rep. (Pa.) 120; *Shenk v. Pittsburgh Club*, 28 Pittsb. Leg. J. N. S. (Pa.) 464; *Com. v. Charity Hospital*, 31 Pittsb. Leg. J. N. S. (Pa.) 11; *Com. v. Moir*, 7 Lack. Leg. N. (Pa.) 50; *Com. v. Gilligan*, 10 Kulp (Pa.) 117; *Seabolt v. Northumberland County*, 187 Pa. St. 318.

South Carolina.—*State v. Berkeley*, 64 S. Car. 194.

South Dakota.—*Nixon v. Reid*, 8 S. Dak. 507.

Tennessee.—*Peters v. State*, 96 Tenn. 682; *Knoxville, etc., R. Co. v. Harris*, 99 Tenn. 684; *Demoville v. Davidson County*, 87 Tenn. 214; *Peterson v. State*, 104 Tenn. 127.

Texas.—*Dillingham v. Putnam*, (Tex. 1890) 14 S. W. Rep. 303; *Houston, etc., R. Co. v. Stuart*, (Tex. Civ. App. 1898) 48 S. W. Rep. 799; *Clark v. Finley*, 93 Tex. 171; *Clark v. Reeves County*, 25 Tex. Civ. App. 463; *Galveston, etc., R. Co. v. Galveston*, (Tex. 1903) 74 S. W. Rep. 537.

Utah.—*State v. Sopher*, 25 Utah 318.

Washington.—*Holmes, etc., Furniture Co. v. Hedges*, 13 Wash. 696; *Lewis County v. Gordon*, 20 Wash. 80; *State v. Sharpless*, (Wash. 1903) 71 Pac. Rep. 737.

West Virginia.—*McEldowney v. Wyatt*, 44 W. Va. 711.

Wisconsin.—*Boyd v. Milwaukee*, 92 Wis. 456; *Roane Iron Co. v. Wisconsin Trust Co.*, 99 Wis. 273, 67 Am. St. Rep. 856; *Adams v. Beloit*, 105 Wis. 363; *Verges v. Milwaukee County*, (Wis. 1903) 93 N. W. Rep. 44; *Appleton Waterworks Co. v. Appleton*, (Wis. 1903) 93 N. W. Rep. 262; *Land, etc., Co. v. Brown*, 73 Wis. 294; *Johnson v. Milwaukee*, 88 Wis. 392.

Wyoming.—*Standard Cattle Co. v. Baird*, 8 Wyo. 144; *Reals v. Smith*, 8 Wyo. 159.

See also *Town School Dist. v. School Dist. No. 2*, 72 Vt. 451. And see the cases in the note following.

Law Not Rendered Special Because Its Operation Dependent upon Adoption by Vote of People.—*People v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793, *followed* in *People v. Simon*, 176 Ill. 165, 68 Am. St. Rep. 175; *People v. Kipley*, 171 Ill. 44; *Adams v. Beloit*, 105 Wis. 363. But see

excluded from the operation of the law, then the classification is incomplete and faulty, and the legislation not general, and local and special.¹

State v. Copeland, 66 Minn. 315, 61 Am. St. Rep. 410.

Or Upon Its Adoption Within a Limited Time.—*Albright v. Sussex County Lake, etc., Commission*. (N. J. 1902) 53 Atl. Rep. 612; *Passaic County v. Stevenson*, 46 N. J. L. 173, followed in *De Hart v. Atlantic City*, 62 N. J. L. 586.

Steps Resorted to in Procuring Enactment.—The fact that notice of intention to apply for the enactment of the law was published as required in cases of special laws, and that the precedent steps indicated that those who sought its enactment supposed it would be a special law, will not render a general law invalid as being special. *State v. Stratton*, 136 Mo. 423.

Acts That Are Revisionary or Amendatory of a City Charter do not offend against the constitutional inhibition. *Cunningham v. Denver*, 23 Colo. 18, 58 Am. St. Rep. 212.

General Act Not Rendered Special by the Application Thereof to Valid Special Act.—*Miller v. Camden*, 64 N. J. L. 201; affirmed 64 N. J. L. 722, distinguishing *Dempsey v. Newark*, 53 N. J. L. 4.

Existing Conditions as Basis — Purpose of Law Temporary.—While it is true, as a general rule, that classification with a view to the enactment of general laws cannot be based upon existing circumstances only, or those of a limited duration, yet a distinctive class may be based upon existing conditions, when the purpose of the law is temporary only. *Alexander v. Duluth*, 77 Minn. 445.

Where Legislative Classification Conclusive.—The courts cannot inquire whether a municipality, or class of municipalities, is titular only. The classification of the legislature in that regard is conclusive. *Herrman v. Guttenberg*, 62 N. J. L. 605, affirmed 63 N. J. L. 616.

Party Whose Rights Not Affected May Not Raise Question of Special Legislation.—*State v. Beck*, 25 Nev. 68.

1. *United States.*—*Ward v. Robert J. Boyd Paving, etc., Co.*, 79 Fed. Rep. 390, 55 U. S. App. 730, 85 Fed. Rep. 27; *Central Trust Co. v. Citizens' St. R. Co.*, 80 Fed. Rep. 218, 82 Fed. Rep. 1; *Union Sewer-Pipe Co. v. Connelly*, 99 Fed. Rep. 354.

Arizona.—*McRae v. Cochise County*, (Ariz. 1896) 44 Pac. Rep. 299; *Maricopa County v. Burnett*, (Ariz. 1903) 71 Pac. Rep. 908.

California.—*Earle v. Board of Education*, 55 Cal. 489; *Pasadena v. Stimson*, 91 Cal. 238; *Bloss v. Lewis*, 109 Cal. 493; *Conlin v. San Francisco*, 114 Cal. 404; *Rauer v. Williams*, 118 Cal. 401; *Tulare v. Hevren*, 126 Cal. 226; *Krause v. Durbrow*, 127 Cal. 681; *Knight v. Martin*, 128 Cal. 245; *Lougher v. Soto*, 129 Cal. 610; *Denman v. Broderick*, 111 Cal. 96; *Marsh v. Hanly*, 111 Cal. 368; *Ex p. Jentzsch*, 112 Cal. 468; *Spier v. Baker*, 120 Cal. 370; *San Francisco v. Broderick*, 125 Cal. 188; *Pratt v. Browne*, 135 Cal. 649.

Colorado.—*In re School Dist.*, 23 Colo. 499; *Pitkin County v. Aspen First Nat. Bank*, 6 Colo. App. 423, affirmed 24 Colo. 124; *In re School Dist.*, 26 Colo. 136.

Georgia.—*Maxwell v. Tumlin*, 79 Ga. 570; *Lorentz v. Alexander*, 87 Ga. 444.

Illinois.—*Eden v. People*, 161 Ill. 296, 52 Am. St. Rep. 365; *People v. Normal*, 170 Ill. 468; *People v. Martin*, 178 Ill. 611; *People v. Knopf*, 183 Ill. 410; *Bessette v. People*, 193 Ill. 334; *Knopf v. People*, 185 Ill. 20, 76 Am. St. Rep. 17.

Indiana.—*Mode v. Beasley*, 143 Ind. 306; *Campbell v. Indianapolis*, 155 Ind. 186; *Jackson County v. State*, 155 Ind. 604; *Dixon v. Poe*, 159 Ind. 492; *In re Bank of Commerce*, 153 Ind. 460; *Owen County v. Spangler*, 159 Ind. 575.

Iowa.—*State v. Des Moines*, 96 Iowa 521, 59 Am. St. Rep. 381.

Kansas.—*Topeka v. Gillett*, 32 Kan. 431; *State v. Downs*, 60 Kan. 788; *Conklin v. Hutchinson*, 65 Kan. 582.

Kentucky.—*Com. v. Taylor*, (Ky. 1896) 38 S. W. Rep. 10; *Simpson v. Kentucky Citizens' Bldg., etc., Assoc.*, 101 Ky. 496; *Gorley v. Louisville*, 104 Ky. 372; *Louisville v. Kuntz*, 104 Ky. 584; *Louisville v. Hegan*, (Ky. 1899) 49 S. W. Rep. 532; *Safety Bldg., etc., Co. v. Ecklar*, 106 Ky. 115; *Harrodsburg v. Renfro*, (Ky. 1900) 58 S. W. Rep. 795, 22 Ky. L. Rep. 806.

Louisiana.—*Swords v. Baillio*, 105 La. 328.

Minnesota.—*Murray v. Ramsey County*, 81 Minn. 359; *Duluth Banking Co. v. Koon*, 81 Minn. 486; *State v. Walker*, 83 Minn. 295; *State v. Ramsey County*, 48 Minn. 236, 31 Am. St. Rep. 650; *State v. Copeland*, 66 Minn. 315, 61 Am. St. Rep. 410; *Bowe v. St. Paul*, 70 Minn. 341; *State v. Ritt*, 76 Minn. 531; *State v. Johnson*, 77 Minn. 453; *Hetland v. Norman County*, (Minn. 1903) 95 N. W. Rep. 305.

Missouri.—*Ex p. Allen*, 67 Mo. 534; *State v. Kring*, 74 Mo. 612; *State v. Hill*, 147 Mo. 63; *State v. Ashbrook*, 154 Mo. 375, 77 Am. St. Rep. 765; *Owen v. Baer*, 154 Mo. 434; *Ashbrook v. Schaub*, 160 Mo. 107; *State v. Borden*, 164 Mo. 221; *Henderson v. Koenig*, 168 Mo. 356; *State v. Granneman*, 132 Mo. 326; *St. Louis v. Dorr*, 145 Mo. 466, 68 Am. St. Rep. 575; *State v. Anslinger*, 171 Mo. 600.

Montana.—*Hotchkiss v. Marion*, 12 Mont. 218; *State v. Thomas*, 25 Mont. 226.

Nebraska.—*State v. Farmers', etc., Irrigation Co.*, 59 Neb. 1; *Gordon v. Moores*, 61 Neb. 345.

Nevada.—*State v. Boyd*, 19 Nev. 43; *Schweiss v. First Judicial Dist. Ct.*, 23 Nev. 226.

New Jersey.—*Van Riper v. Parsons*, 40 N. J. L. 1; *Skinner v. Bogert*, 42 N. J. L. 407; *Anderson v. Trenton*, 42 N. J. L. 486; *Hightstown v. Glenn*, 47 N. J. L. 105; *Randolph v. Wood*, 49 N. J. L. 88; *Shotwell v. Dalrymple*, 49 N. J. L. 530; *Bray v. Hudson County*, 50 N. J. L. 82; *Bowyer v. Camden*, 50 N. J. L. 87; *Alsbath v. Philbrick*, 50 N. J. L. 581; *Lodi Tp. v. State*, 51 N. J. L. 402; *State v. Mullica Tp.*, 51 N. J. L. 412; *Miles v. Bergen County*, 52 N. J. L. 303; *State v. Somers Point*, 52 N. J. L. 32; *Helfer v. Simon*, 53 N. J. L. 550; *Pierson v. O'Connor*, 54 N. J. L. 36; *Wanser v. Hoos*, 60 N. J. L. 482, 64 Am. St. Rep. 600; *Lowthorp v. Trenton*, 62 N. J. L. 795; *Grey v. Union*, 67 N. J. L. 363; *Dobbins v. Long Branch Police*, 59 N. J. L. 146; *Dexheimer v. Orange*, 60 N. J. L. 111; *Meredith v. Perth Amboy*, 60 N. J. L.

The Effect and Not the Form of the law determines its character in this regard.¹

The Constitutional Restrictions Apply to Direct Legislation, and not to the incidental operation of statutes.²

Power of Repeal Not Destroyed. — Constitutional inhibitions against special laws do not deprive the legislature of the inherent power of repeal.³

The Exclusion by a Proviso of All Retroactive Force does not detract from the general character of a statute.⁴

134; *Hoos v. O'Donnell*, 60 N. J. L. 35; *Morris v. Ocean Tp.*, 61 N. J. L. 12; *Foley v. Hoboken*, 61 N. J. L. 478; *Burlington v. Pennsylvania R. Co.*, 56 N. J. Eq. 259, 58 N. J. Eq. 547; *Canfield v. Davies*, 61 N. J. L. 26; *Crookall v. Matthews*, 61 N. J. L. 349, *affirmed* 62 N. J. L. 799; *Grey v. Dover*, 62 N. J. L. 40, *affirmed* 62 N. J. L. 647; *De Hart v. Atlantic City*, 63 N. J. L. 223; *Oram v. New Brunswick*, 64 N. J. L. 19; *Christie v. Bayonne*, 64 N. J. L. 191; *Sneath v. Mager*, 64 N. J. L. 94; *New Jersey v. Van Hovenberg*, (N. J. 1899) 45 Atl. Rep. 439; *Ross v. Passaic*, 64 N. J. L. 488; *Burnet v. Dean*, 60 N. J. Eq. 9, *affirmed* 63 N. J. Eq. 253; *Grey v. Newark Plank Road Co.*, 65 N. J. L. 51; *Uffert v. Vogt*, 65 N. J. L. 621; *Black v. Gloucester*, (N. J. 1901) 48 Atl. Rep. 1112; *Gilhooly v. Elizabeth*, 66 N. J. L. 484; *Lewis v. Jersey City*, 66 N. J. L. 582; *Lane v. Otis*, (N. J. 1902) 52 Atl. Rep. 305, (N. J. 1903) 54 Atl. Rep. 442; *Renner v. Holmes*, (N. J. 1902) 53 Atl. Rep. 76. See also *Zeigler v. Gaddis*, 44 N. J. L. 363; *Closson v. Trenton*, 48 N. J. L. 438; *Tyler v. Plainfield*, 54 N. J. L. 529.

New York. — *People v. Howland*, 155 N. Y. 270; *People v. Washington County*, 18 Misc. (N. Y.) 714, 155 N. Y. 295; *Matter of Henneberger*, 155 N. Y. 420; *Matter of Burns*, 16 N. Y. App. Div. 507; *Auchincloss v. Metropolitan El. R. Co.*, 69 N. Y. App. Div. 63.

North Dakota. — *Edmonds v. Herbrandson*, 2 N. Dak. 270; *Angell v. Cass County*, 11 N. Dak. 265.

Ohio. — *State v. Cowles*, 64 Ohio St. 162; *Platt v. Craig*, 66 Ohio St. 75; *Cincinnati v. Cincinnati Hospital*, 66 Ohio St. 440; *State v. Jones*, 66 Ohio St. 453; *State v. Beacom*, 66 Ohio St. 491; *Korb v. Mitchell*, 3 Ohio Dec. 267, 2 Ohio N. P. 185; *Shaw v. Jones*, 6 Ohio Dec. 453, 4 Ohio N. P. 372; *Eckstein v. Board of Education*, 4 Ohio Cir. Dec. 149, 10 Ohio Cir. Ct. 480; *Pittsburgh, etc., R. Co. v. Martin*, 53 Ohio St. 386; *State v. Hamilton County*, 54 Ohio St. 333; *State v. Buckley*, 60 Ohio St. 273.

Oklahoma. — *Territory v. School Dist. No. 83*, 10 Okla. 556.

Oregon. — *Ellis v. Frazier*, 38 Oregon 462.

Pennsylvania. — *Ellis v. Kies*, 1 Dauphin Co. Rep. (Pa.) 195; *Com. v. Gilligan*, 8 Kulp (Pa.) 560; *Re Prison Com'rs*, 9 Kulp (Pa.) 196; *Com. v. Scranton Board of Control*, 4 Lack. Leg. N. (Pa.) 47; *Com. v. Clark*, 5 Lack. Leg. N. (Pa.) 177; *Record Pub. Co. v. Geyer*, 29 Pittsb. Leg. J. N. S. (Pa.) 70; *Scowden's Appeal*, 96 Pa. St. 422; *Davis v. Clark*, 106 Pa. St. 377; *Van Loon v. Engle*, 171 Pa. St. 157; *Chalfant v. Edwards*, 173 Pa. St. 246; *Blankenburg v. Black*, 200 Pa. St. 629; *Gaston v. Graham*, 18 Pa. Co. Ct. 265, 5 Pa. Dist. 549; *Opening Knox St.*, 7 Pa. Dist. 500; *Baker v. McKee*, 20 Pa. Co. Ct. 10, 6 Pa. Dist. 599; *Com. v. Heckert*, 7 Pa. Dist. 186, 28 Pittsb. Leg. J. N. S. (Pa.) 296; *Lewisburg*

Bridge, 20 Pa. Co. Ct. 553, 7 Pa. Dist. 285; *Mercer Union School Dist. v. School Dist.*, 21 Pa. Co. Ct. 176; *Campbell v. Kane*, 22 Pa. Co. Ct. 17; *Com. v. McMichael*, 22 Pa. Co. Ct. 182, 8 Pa. Dist. 157, 2 Dauphin Co. Rep. (Pa.) 107; *Com. v. Barnhardt City Controller*, 23 Pa. Co. Ct. 152; *Strasburger v. Guinter*, 23 Pa. Co. Ct. 481; *Sugar Notch*, 7 Pa. Super. Ct. 4; *Clark's Estate*, 10 Pa. Super. Ct. 423, 44 W. N. C. (Pa.) 470; *Com. v. Clark*, 14 Pa. Super. Ct. 435; *Mansfield's Case*, 22 Pa. Super. Ct. 224; *Litzenberg v. Allentown School Dist.*, 11 York Leg. Rec. (Pa.) 166.

South Carolina. — *Dean v. Spartanburg County*, 59 S. Car. 110; *Nance v. Anderson County*, 60 S. Car. 501; *State v. Queen*, 62 S. Car. 247; *State v. Garrett*, 64 S. Car. 249; *State v. Hammond*, 66 S. Car. 219; *De Hay v. Berkeley County*, 66 S. Car. 229; *Utsey v. Hiott*, 30 S. Car. 360, 11 Am. St. Rep. 910; *State v. Higgins*, 51 S. Car. 51.

South Dakota. — *McClain v. Williams*, 11 S. Dak. 60; *State v. Sexton*, 11 S. Dak. 105.

Tennessee. — *Sibley v. State*, 107 Tenn. 515.

Texas. — *Smith v. Grayson County*, 18 Tex. Civ. App. 153.

Utah. — *Openshaw v. Halfin*, 24 Utah 426; *Brubaker v. Bennett*, 19 Utah 401; *Love v. Liddle*, (Utah 1903) 72 Pac. Rep. 185.

West Virginia. — *Groves v. Grant County*, 42 W. Va. 587.

Wisconsin. — *Boyd v. Milwaukee*, 92 Wis. 456; *Chicago, etc., R. Co. v. Forest County*, 95 Wis. 80; *Burnham v. Milwaukee*, 98 Wis. 128.

And see the cases in the preceding note.

1. **Effect and Not Form Controls.** — *Fellows v. Walker*, 39 Fed. Rep. 651; *McAunich v. Mississippi, etc., R. Co.*, 20 Iowa 338; *Haskel v. Burlington*, 30 Iowa 232; *State v. Tolle*, 71 Mo. 645; *Humes v. Missouri Pac. R. Co.*, 82 Mo. 231, 52 Am. Rep. 369; *State v. Stuhst*, 52 Neb. 209; *Dempsey v. Newark*, 53 N. J. L. 4; *Marmet v. State*, 45 Ohio St. 63; *State v. Smith*, 48 Ohio St. 211; *Com. v. Patton*, 88 Pa. St. 258.

But it has been said that "when a law is in terms local, satisfactory reasons must be found to exclude it from the constitutional interdict." *Wanser v. Hoos*, 60 N. J. L. 482, 64 Am. St. Rep. 600, *per* Depue, J.

For instances of statutes general in form but special in operation, see *Devine v. Cook County*, 84 Ill. 590; *State v. Mitchell*, 31 Ohio St. 592; *State v. Anderson*, 44 Ohio St. 247; *State v. Ellet*, 47 Ohio St. 90, 21 Am. St. Rep. 772.

2. *Sugar Notch*, 192 Pa. St. 349.

3. *Central Wharf, etc., Co. v. Corpus Christi*, 23 Tex. Civ. App. 390.

Prohibition Against Enactment of Special Law "by the Partial Repeal of a General Law." — *Henderson v. Koenig*, 168 Mo. 356.

4. *New York, etc., Land Co. v. Weidner*, 169 Pa. St. 359.

In the Absence of a Constitutional Prohibition against special legislation, such legislation is valid.¹

Practical Construction. — This constitutional inhibition against special legislation must receive a reasonable and practical construction, and not be given a strained one, so as to tie the hands of the legislature beyond the intention of the people, as fairly indicated by its terms.²

The Court Will Not Transplant and Construe a Void Special Law into a valid general law, if the result of such transplanting would be to render void the valid general law.³

4. Mandatory or Directory — *a.* IN GENERAL. — Where a statute prescribes something to be done, or to be done in a certain way, but neglects to declare the consequences of noncompliance, it is oftentimes difficult to discover the legislative purpose and intent. Clearly, where the legislative purpose would be defeated if the prescription of the statute did not imply a prohibition to do the thing in any other way, there can be no question of the mandatory character of the statute.⁴ Where the provision of a statute is the very essence of the thing which it requires to be done, it is imperative or mandatory.⁵ It has been held that the failure to provide a remedy in the event of noncompliance is no reason for declaring a statute mandatory rather than directory.⁶ When the statute in terms makes compliance a condition precedent, there is no room for construction.⁷ Although the right of courts in construing statutes to treat language seemingly positive as directory simply is undoubted, yet such a construction is not to be lightly adopted, and never when it would really be to make a new law instead of that made by the legislature.⁸

1. Where Special Laws Not Prohibited. — *Massey v. Bowles*, 99 Ga. 216; *National Bank v. Augusta Cotton, etc., Co.*, 104 Ga. 403; *Thorpe v. Butt*, 106 Ga. 52; *Sayles v. Christie*, 187 Ill. 420; *Messenger v. Teagan*, 106 Mich. 654; *Bittenhaus v. Johnston*, 92 Wis. 588.

In Some of the States Certain Subjects Are Exempted from the constitutional inhibition against special legislation. See the following cases:

Alabama. — *State v. Webb*, 110 Ala. 214.

Georgia. — *Phinizz v. Eve*, 108 Ga. 360.

Idaho. — *Wiggin v. Lewiston*, (Idaho 1902) 69 Pac. Rep. 286.

Indiana. — *Eitel v. State*, 33 Ind. 201; *Vickery v. Chase*, 50 Ind. 461.

Kansas. — *State v. Shawnee County*, 57 Kan. 267.

Kentucky. — *Louisville, etc., R. Co. v. Berg*, (Ky. 1895) 32 S. W. Rep. 616; *Maysville, etc., Turnpike Road Co. v. Wiggins*, 104 Ky. 540; *Richardson v. Mehler*, (Ky. 1901) 63 S. W. Rep. 957.

Missouri. — *State v. Mason*, 153 Mo. 23; *State v. Mason*, 155 Mo. 486.

Montana. — *Holliday v. Sweet Grass County*, 19 Mont. 364.

New York. — *People v. Oneida County*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 597, affirmed 68 N. Y. App. Div. 650; *Board of Education v. Board of Education*, 76 N. Y. App. Div. 355; *Brevoort v. Grace*, 53 N. Y. 245; *Ebling v. Dreyer*, 149 N. Y. 460; *Clark v. Van Surlay*, 15 Wend. (N. Y.) 436.

Ohio. — *Wood County v. Pargillis*, 6 Ohio Cir. Dec. 717, 10 Ohio Cir. Ct. 376.

South Carolina. — *Carolina Grocery Co. v. Burnet*, 61 S. Car. 205.

Texas. — *Smith v. Grayson County*, 18 Tex. Civ. App. 153; *Nalle v. Austin*, 23 Tex. Civ. App. 595.

West Virginia. — *South Morgantown v. Morgantown*, 49 W. Va. 729.

Special Provisions in General Laws. — *Dean v. Spartanburg County*, 59 S. Car. 110.

Special Curative Acts Valid. — See *Read v. Plattsmouth*, 107 U. S. 568; *Springfield Safe Deposit, etc., Co. v. Attica*, 56 U. S. App. 330; *State v. Webb*, 110 Ala. 214; *Chicago, etc., R. Co. v. Independent Dist.*, 99 Iowa 556; *Windsor v. Des Moines*, 110 Iowa 175; *Witter v. Polk County*, 112 Iowa 380; *Fair v. Buss*, 117 Iowa 164; *Windsor v. Des Moines*, 101 Iowa 343; *Inlow v. Graham County*, 6 Kan. App. 391.

But it has been held that illegal and wholly unauthorized proceedings of a board of commissioners may not be validated. *Williams v. Boynton*, 147 N. Y. 426.

2. *State v. Sullivan*, 67 Minn. 379.

3. *Ex p. Pfirrmann*, 134 Cal. 143.

4. Mandatory Statutes — General Rules. — *Maxwell Interp. of Stat.* 518; *Stevens v. Gourley*, 7 C. B. N. S. 99, 97 E. C. L. 99; *Westerton v. Liddell*, 1 Jur. N. S. 1178; *Martin v. Mackonochie*, L. R. 2 P. C. 365; *Webster v. French*, 12 Ill. 302; *Hall v. Schoenecke*, 128 Mo. 669; *Corbett v. Bradley*, 7 Nev. 106; *People v. Collin*, 19 N. Y. App. Div. 463, affirmed 154 N. Y. 750; *Carbaugh v. Sanders*, 13 Pa. Super. Ct. 361.

5. *Rex v. Loxdale*, 1 Burr. 447; *Jackson County v. Derrick*, 117 Ala. 366; *Hope v. Flentge*, 140 Mo. 390.

6. *Maxwell Interp. Stat.* 519; *Rex v. Leicester*, 7 B. & C. 6, 14 E. C. L. 3; *Gwynne v. Burnell*, 2 Bing. N. Cas. 7, 29 E. C. L. 228.

7. *Maxwell Interp. Stat.* 518; *Ex p. Rosenthal*, 20 Ch. D. 315, 51 L. J. Ch. 736; *Jolly v. Hancock*, 7 Exch. 820; *Hoyt v. East Saginaw*, 19 Mich. 39, 2 Am. Rep. 76; *Verona's Appeal*, 108 Pa. St. 83.

8. See *Bowman v. Blyth*, 7 El. & Bl. 47, 99

b. AFFIRMATIVE AND NEGATIVE TERMS. — It is, in general, true that negative terms in a statute show a legislative intent to make the provision imperative, requiring a strict performance in respect of both time and manner.¹ Yet as a rule of universal application, this cannot be relied upon, as provisions framed in negative language have been adjudged to be directory merely.² Nevertheless it is undoubtedly true that a design to make a provision merely directory is more rarely to be found under negative words.³ On the other hand, the absence of negative words from a statute is not always conclusive of an intention that the provision is to be regarded as directory simply, as affirmative words, if absolute, explicit, and peremptory, showing that no discretion was intended to be given, may, and often have been held to, render the statute mandatory.⁴ And it seems to be agreed that affirmative expressions which introduce a new rule imply a negative of all that is not within the purview.⁵

c. TIME AND MODE OF PROCEEDING BY PUBLIC OFFICERS. — Statutory prescriptions in regard to the time, form, and mode of proceeding by public functionaries are generally directory, as they are not of the essence of the thing to be done, but are given simply with a view to secure system, uniformity, and dispatch in the conduct of public business.⁶

E. C. L. 47; *Hoyt v. East Saginaw*, 19 Mich. 39, 2 Am. Rep. 76; *Koch v. Bridges*, 45 Miss. 247; *Briggs v. Georgia*, 15 Vt. 72.

The Difficulty in Fixing Any Settled, Discriminate Point between a mandatory and directory statute, led Lord Penzance, in *Howard v. Bodington*, 2 P. D. 203, to observe: "I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter, consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the act, and upon a review of the ease in that aspect, decide whether the matter is what is called imperative or only directory." Quoted in *McLaughlin v. Michel*, 14 S. Dak. 195.

1. Negative Terms — *England*. — Reg. v. Sneyd, 9 Dowl. 1001; *Cole v. Green*, 6 M. & G. 872, 46 E. C. L. 872; *Rex v. Leicester*, 7 B. & C. 12, 14 E. C. L. 3; *Pearse v. Morrice*, 2 Ad. & El. 94, 29 E. C. L. 42.

United States. — *Pacific Electric Co. v. Los Angeles*, 118 Fed. Rep. 753.

Indiana. — *Stayton v. Hulings*, 7 Ind. 144.

Iowa. — *State v. Russell*, 90 Iowa 572; *Starling v. Bedford*, 94 Iowa 197.

Massachusetts. — *Torrey v. Millbury*, 21 Pick. (Mass.) 64; *Pond v. Negus*, 3 Mass. 230, 3 Am. Dec. 131.

Mississippi. — *Koch v. Bridges*, 45 Miss. 247.

Nebraska. — *Hurford v. Omaha*, 4 Neb. 336.

New York. — *In re Douglass*, 46 N. Y. 42, 12 Abb. Pr. N. S. (N. Y.) 161, reversing 58 Barb. (N. Y.) 174, (Supm. Ct. Spec. T.) 9 Abb. Pr. N. S. (N. Y.) 84, 40 How. Pr. (N. Y.) 201.

Pennsylvania. — *Bladen v. Philadelphia*, 60 Pa. St. 464; *In re Contested Election*, 105 Pa. St. 488; *Ammerman v. Stone*, 11 Pa. Dist. 726.

Wisconsin. — *State v. Hilmantel*, 21 Wis. 574; *State v. Stumpf*, 23 Wis. 630.

2. Potter's Dwaris, p. 224; *Margate Pier Co. v. Hannam*, 3 B. & Ald. 266, 5 E. C. L. 278; *Dale v. Irwin*, 78 Ill. 170, followed in *Clark v. Robinson*, 88 Ill. 498.

3. Bishop Stat. Cr., § 255a.

26 C. of L. — 44

4. Affirmative Words. — *Davison v. Gill*, 1 East 64; *Koch v. Bridges*, 45 Miss. 247; *District Tp. v. Dubuque*, 7 Iowa 276; *Morris v. People*, 3 Den. (N. Y.) 381; *Bryan v. Sundberg*, 5 Tex. 418.

In *Cohen v. Hoff*, 2 Treadw. (S. Car.) 661, Nott, J., said that "affirmative words may and often do imply a negative of what is not affirmed as strongly as if expressed."

5. Stradling v. Morgan, Plowd. 206; *District Tp. v. Dubuque*, 7 Iowa 276; *U. S. v. One Case Hair Pencils*, 1 Paine (U. S.) 406; 9 Bacon's Abr. Statutes (G).

6. Time, Mode, etc., of Proceeding by Public Officers — *England*. — *Rex v. Loxdale*, 1 Burr. 445; *Smith v. Jones*, 1 B. & Ad. 334, 20 E. C. L. 397; *Rex v. Birmingham*, 8 B. & C. 29, 15 E. C. L. 151, 2 M. & R. 230; *Morgan v. Parry*, 17 C. B. 334, 84 E. C. L. 334; *Brumfit v. Bremner*, 9 C. B. 8, 99 E. C. L. 1; *Reg. v. Sneyd*, 9 Dowl. 1001; *Reg. v. Rochester*, 7 El. & Bl. 910, 90 E. C. L. 910; *Bonar v. Mitchell*, 5 Exch. 415; *Nowell v. Worcester*, 9 Exch. 467; *Hunt v. Hibbs*, 5 H. & N. 123; *Reg. v. Lofthouse*, L. R. 1 Q. B. 433; *Rex v. Ingram*, 2 Salk. 593; *Reg. v. Ingall*, 2 Q. B. D. 199.

United States. — *Whitney v. Emmett*, Baldw. (U. S.) 303.

Alabama. — *State v. Click*, 2 Ala. 26; *Walker v. Chapman*, 22 Ala. 116; *Savage v. Walshe*, 26 Ala. 619; *Limestone County v. Rather*, 48 Ala. 433; *Ex p. Holding*, 56 Ala. 458.

Arkansas. — *Thompson v. State*, 26 Ark. 323; *Edwards v. Hall*, 30 Ark. 31; *Neal v. Burrows*, 34 Ark. 491.

California. — *People v. Weller*, 11 Cal. 54; *Hart v. Plum*, 14 Cal. 149; *People v. Murray*, 15 Cal. 221; *Tuohy v. Chase*, 30 Cal. 525; *People v. Lake County*, 33 Cal. 487.

Connecticut. — *Colt v. Eves*, 12 Conn. 243.

Florida. — *Fraser v. Willey*, 2 Fla. 116.

Georgia. — *Justices v. House*, 20 Ga. 328; *Wise v. State*, 34 Ga. 348; *Central Bank v. Kendrick*, Dudley (Ga.) 66.

Illinois. — *Chicago v. Gage*, 95 Ill. 593, 35 Am. Rep. 182.

Iowa. — *State v. Gillick*, 7 Iowa 287; *State*

Provisions in Regard to the Assessment and Collection of Taxes, and the measures preliminary thereto, which are intended for the protection of the taxpayer, to

v. Carney, 20 Iowa 82; *Shaw v. Orr*, 30 Iowa 355; *Hubbell v. Polk County*, 106 Iowa 622.

Kansas. — *Gilleland v. Schuyler*, 9 Kan. 569; *Gossard v. Vaught*, 10 Kan. 165; *St. Louis*, etc., R. Co. *v. Wilder*, 17 Kan. 239.

Louisiana. — *Wilson v. Alabama Bank*, 3 La. Ann. 196; *New Orleans v. St. Romes*, 9 La. Ann. 573; *Bell v. Taylor*, 37 La. Ann. 56.

Maine. — *State v. Smith*, 67 Me. 328.

Massachusetts. — *Torrey v. Millbury*, 21 Pick. (Mass.) 64.

Michigan. — *Rawson v. Parsons*, 6 Mich. 401; *Smith v. Crittenden*, 16 Mich. 152.

Minnesota. — *State v. West Duluth Land Co.*, 75 Minn. 472.

Mississippi. — *Weeks v. State*, 31 Miss. 490; *Johnson v. State*, 33 Miss. 363; *Gaines v. Faris*, 39 Miss. 403; *Arthur v. Adam*, 49 Miss. 409; *Boykin v. State*, 50 Miss. 375.

Missouri. — *St. Louis County Ct. v. Sparks*, 10 Mo. 119, 45 Am. Dec. 355; *State v. Churchill*, 41 Mo. 41; *State v. Pitts*, 58 Mo. 556.

New York. — *Wood v. Chapin*, 13 N. Y. 514, 67 Am. Dec. 62; *Cunningham v. Cassidy*, 17 N. Y. 276; *Sears v. Burnham*, 17 N. Y. 448; *U. S. Trust Co. v. U. S. Fire Ins. Co.*, 18 N. Y. 200; *Matter of New York Protestant Episcopal Public School*, 47 N. Y. 556; *People v. McDonough*, 76 N. Y. App. Div. 257, affirmed 173 N. Y. 181; *Thompson v. Sargent*, (Supm. Ct.) 15 Abb. Pr. (N. Y.) 452; *U. S. Deposit Fund v. Chase*, 6 Barb. (N. Y.) 37; *Ex p. Kellogg*, 3 Cow. (N. Y.) 372; *Jackson v. Young*, 5 Cow. (N. Y.) 269, 15 Am. Dec. 473; *Cole v. Perry*, 6 Cow. (N. Y.) 584; *Ex p. Johnson*, 7 Cow. (N. Y.) 424; *Stewart v. Slater*, 6 Duer (N. Y.) 83; *Bloom v. Burdick*, 1 Hill (N. Y.) 130, 37 Am. Dec. 299; *Ex p. Heath*, 3 Hill (N. Y.) 42; *Marchant v. Langworthy*, 6 Hill (N. Y.) 646; *Striker v. Kelly*, 7 Hill (N. Y.) 9; *Duntley v. Davis*, 42 Hun (N. Y.) 229; *Howland v. Luce*, 16 Johns. (N. Y.) 135; *Thomson v. Harris*, 88 Hun (N. Y.) 481; *Troy Carriage Works v. Muxlow*, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 563; *Miller v. Finkle*, (Supm. Ct. Gen. T.) 1 Park. Crim. (N. Y.) 374; *Canniff v. New York*, 4 E. D. Smith (N. Y.) 430; *People v. Allen*, 6 Wend. (N. Y.) 486; *People v. Holley*, 12 Wend. (N. Y.) 481. See also *Matter of Mohawk*, etc., R. Co., 19 Wend. (N. Y.) 143.

North Dakota. — *Emmons County v. Lands of Bismarck First Nat. Bank*, 9 N. Dak. 589.

Ohio. — *Davidson v. Kuhn*, 1 Disney (Ohio) 405.

Oregon. — *Gaston v. Stott*, 5 Oregon 48.

Pennsylvania. — *Rodebaugh v. Sanks*, 2 Watts (Pa.) 9; *Reese v. Lackawanna Electric Light*, etc., Co., 11 Pa. Dist. 470.

South Carolina. — *McBee v. Hoke*, 2 Spears L. (S. Car.) 138.

Tennessee. — *Cheatham v. Brien*, 3 Head (Tenn.) 552; *Atkinson v. Rhea*, 7 Humph. (Tenn.) 59.

Texas. — *Pearson v. Flanagan*, 52 Tex. 266; *Canadian-American Mortg., etc., Co. v. McCarty*, (Tex. Civ. App. 1895) 34 S. W. Rep. 306.

Vermont. — *Free Press Assoc. v. Nichols*, 45 Vt. 8.

West Virginia. — *Hunter v. Berkeley Springs*, 47 W. Va. 347.

Wisconsin. — *State v. Lean*, 9 Wis. 292; *Wendel v. Durbin*, 26 Wis. 390; *Lackawanna Iron*, etc., Co. *v. Little Wolf*, 38 Wis. 152; *Fifield v. Marinette County*, 62 Wis. 532.

Certain Cases Explained. — In *Holland v. Os-good*, 8 Vt. 276; *Corliss v. Corliss*, 8 Vt. 373; *People v. Cook*, 14 Barb. (N. Y.) 259, it is laid down as a rule that statutes directing the mode of proceeding by public officers are directory and are not to be regarded as essential to the validity of the proceedings themselves, "unless it be so declared in the statute." And in a subsequent part of the opinion, in the last case above cited, it is said: "And we have already seen by reference to the adjudications that statutes directing the mode of proceeding of public officers are regarded as directory unless there is something in the statute itself which plainly shows a different intent."

In *Jones v. State*, 1 Kan. 273, 81 Am. Dec. 510, *Cobb, C. J.*, in delivering the opinion of the court, says, in reference to the foregoing: "The rule first mentioned appears to us inaccurate. The words 'unless it be so declared in the statute' seem to require an express declaration that the provision directing the manner is essential, however important and essential a just view of the policy of the statute may show such provision to be. The rule secondly stated contains probably all that the learned justice intended to say in the first, and as a general proposition is doubtless correct. But the intent to make such provision essential may appear as well by the general scope and policy of the statute as by direct averment. In other words, unless a fair consideration of the statute shows that the legislature intended compliance with the provision in relation to the manner to be essential to the validity of the proceeding, it is to be regarded as directory merely. In statutes of this class as well as all others, the will of the legislature expressed in the statute is the law, and is to be ascertained by all legitimate methods of interpretation."

And this is in accord with the view entertained by Judge Cooley. He says: "This rule [referring to *People v. Cook*, 14 Barb. (N. Y.) 290] strikes us as very general and as likely to include within its scope, in many cases, things which are of the very essence of the proceeding." *Cooley Const. Lim.* (6th ed.) 89. And on the same page he points out that in another case (*People v. Schermerhorn*, 19 Barb. (N. Y.) 540, 558), the same court observes: "Statutory requisitions are deemed directory only when they relate to some immaterial matter where a compliance is a matter of convenience rather than of substance."

Neglect or Refusal of Officers to Qualify. — In *Texas*, it is held that the statute requiring a party elected to office to qualify within a prescribed time will be construed as directory only in a case where, from reasons beyond his control, he cannot qualify within the time allowed, but it will not be so construed in any case of neglect or refusal to qualify. *Flatan v. State*, 56 Tex. 93.

insure an equality of taxation, and to prevent a sacrifice of his property, are mandatory; while, on the other hand, those intended simply for the guidance of the officers and to promote the efficiency of their work are directory.¹

Provisions Concerning the Conduct of Elections, and the time for certifying the returns, will be held directory except where they are of such a character that a failure to comply therewith will have the effect of preventing or obstructing the complete expression of the popular will.²

Statutes Requiring the Instructions of the Court to be delivered to the jury in writing are in some jurisdictions deemed directory, in others, mandatory.³

If a Statute Directing the Issuing of a Warrant against a defaulting collector is, in point of time, directory as to the principal, it is likewise directory in respect to those to be incidentally affected by it.⁴

d. CONFERRING POWERS, PRIVILEGES, OR IMMUNITIES. — A very marked distinction exists between statutes imposing a public duty, such as are discussed in the preceding section, and those conferring powers, privileges, or immunities. Generally speaking, the former are, as has been seen, deemed directory merely, and very justly so, as, apart from the fact that their prescriptions as to the time, manner, etc., of performance are ordinarily not of the essence of the thing required to be done, it would be inequitable to permit parties to suffer by the dereliction of public officers over whose conduct they have no control. But in the latter class these considerations do not obtain, and it is held that where a statute confers a power, privilege, or immunity, the formalities or conditions which it prescribes for its acquisition are imperative, in the sense that nonobservance of any of them is fatal to the benefit sought.⁵

1. Statutes Concerning Taxes — Connecticut.

— *Thames Mfg. Co. v. Lathrop*, 7 Conn. 550.

Illinois. — *Marsh v. Chesnut*, 14 Ill. 223; *Wheeler v. Chicago*, 24 Ill. 105, 76 Am. Dec. 736.

Massachusetts. — *Torrey v. Millbury*, 21 Pick. (Mass.) 64; *Pond v. Negus*, 3 Mass. 230, 3 Am. Dec. 131.

Michigan. — *Sibley v. Smith*, 2 Mich. 487; *Clark v. Crane*, 5 Mich. 151, 71 Am. Dec. 776; *Case v. Dean*, 16 Mich. 12.

Mississippi. — *Chesnut v. Elliott*, 61 Miss. 569. *New Jersey.* — *State v. Metz*, 31 N. J. L. 378; *Hugg v. Camden*, 39 N. J. L. 620.

New York. — *Gale v. Mead*, 2 Den. (N. Y.) 160; *Doughty v. Hope*, 3 Den. (N. Y.) 594; *Cruiger v. Dougherty*, 43 N. Y. 107.

Ohio. — *State v. Harris*, 17 Ohio St. 608; *Welker v. Potter*, 18 Ohio St. 85.

Pennsylvania. — *Magee v. Com.*, 46 Pa. St. 358; *Pittsburg v. Coursin*, 74 Pa. St. 400.

Rhode Island. — *Young v. Joslin*, 13 R. I. 675. See generally the title TAXATION.

2. Elections — United States.

— *Weil v. Calhoun*, 25 Fed. Rep. 865.

Arkansas. — *Holland v. Davies*, 36 Ark. 446; *Willeford v. State*, 43 Ark. 62. See also *Swepton v. Barton*, 39 Ark. 549.

Indiana. — *Duncan v. Shenk*, 109 Ind. 26.

Kansas. — *Gilleland v. Schuyler*, 9 Kan. 569.

Maryland. — *State v. Baltimore County*, 29 Md. 516.

Michigan. — *People v. Higgins*, 3 Mich. 233, 61 Am. Dec. 491; *People v. Hartwell*, 12 Mich. 508, 86 Am. Dec. 70; *People v. Witherell*, 14 Mich. 48; *People v. Sackett*, 14 Mich. 320; *People v. Cicott*, 16 Mich. 283, 97 Am. Dec. 141.

Minnesota. — *Taylor v. Taylor*, 10 Minn. 107.

Missouri. — *Bowers v. Smith*, 111 Mo. 45, 33 Am. St. Rep. 491.

New York. — *People v. Cook*, 8 N. Y. 69, 59 Am. Dec. 451; *People v. Livingston*, 79 N. Y. 279; *Ex p. Heath*, 3 Hill (N. Y.) 42. See also *People v. Peck*, 11 Wend. (N. Y.) 604, 27 Am. Dec. 104.

Ohio. — *Fry v. Booth*, 19 Ohio St. 25.

And see the title ELECTIONS, vol. 10, p. 588.

3. Instructions. — In *Reid v. Reid*, 11 Tex. 585; *Boone v. Thompson*, 17 Tex. 606; *Chapman v. Sneed*, 17 Tex. 428; *Galveston, etc., R. Co. v. Dunlavy*, 56 Tex. 256, where the language of the statute was simply that "the charge shall be in writing," the provision was held directory, and a violation thereof not assignable as error.

But in *Head v. Langworthy*, 15 Iowa 235; *Hardin v. Helton*, 50 Ind. 320; *Miller v. Hampton*, 37 Ala. 342; *Illinois Cent. R. Co. v. Hammer*, 85 Ill. 526; *Dixon v. State*, 13 Fla. 636; *City Bank v. Kent*, 57 Ga. 285; *Householder v. Granby*, 40 Ohio St. 430; *Penberthy v. Lee*, 51 Wis. 261, the statutes were adjudged mandatory.

It should be observed that some of the statutes which are held mandatory contain negative terms, or are otherwise so expressive of command as to leave no room for doubt as to the legislative intent, and are subject to the principles stated above. See *supra*, this subdivision, *b. Affirmative and Negative Terms*. And see for examples, *Dixon v. State*, 13 Fla. 636; *Penberthy v. Lee*, 51 Wis. 261.

4. *Looney v. Hughes*, 30 Barb. (N. Y.) 605, affirmed 26 N. Y. 516.

5. Statutes Conferring Privileges — England. — *Reg. v. Pinder*, 24 L. J. Q. B. 148; *Freud v. Dennett*, 4 C. B. N. S. 576, 93 E. C. L. 576; *Cope v. Thames Haven Dock, etc., Co.*, 6 R. & Can. Cas. 83, 18 L. J. Exch. 345; *Spice v. Bacon*, 2 Ex. D. 463; *Low v. Routledge*, 33 L. J. Ch. 725; *Mathieson v. Harrod*, L. R. 7 Eq.

c. **REGULATING JUDICIAL PROCEDURE.** — Where authority to proceed in courts is conferred by statute, and where the manner of obtaining jurisdiction is prescribed by statute, the mode of proceeding is mandatory and must be strictly conformed to, otherwise the proceeding will be void.¹ There are instances where an imperative effect has been given to statutes, even where the observance of the formalities was not a condition exacted of the party seeking the benefit of the statute, but a duty imposed upon the court or public officer in the exercise of authority conferred upon him.²

f. **PARTICULAR WORDS — SHALL, MAY, MUST.** — The principles governing the construction of the foregoing words, as used in statutes, will be found fully treated elsewhere in this work.³

5. Retrospective Laws — a. DEFINITION. — A retrospective or retroactive law is one which operates upon matters which occurred, or rights and obligations which existed, before the time of enactment.⁴

b. SCOPE OF SECTION. — The constitutional provisions prohibiting the passage of retrospective laws, and all questions connected with the validity of such laws, have been fully discussed in another portion of this work,⁵ and in so far as such statutes tend to impair the obligation of contracts or to interfere with vested rights a discussion of them properly falls within the scope of other titles.⁶ The object of the present section is merely to discuss the question of the construction of statutes with respect to whether prospective or retrospective in their operation.⁷ It is also to be noted that while in a broad sense the term "retrospective laws" includes penal laws as well as those which affect civil or property rights, the term is ordinarily applied only to the latter class of laws, and it is in this sense that it is here used. Penal laws which are retrospective in their operation or effect are known as *ex post facto* laws, and these have been thoroughly discussed elsewhere in this work.⁸

270; *Henderson v. Maxwell*, 5 Ch. D. 892; *Newton v. Cowie*, 4 Bing. 234, 13 E. C. L. 412; *Caldow v. Pixell*, 2 C. P. D. 562, *per* Lord Denman.

United States. — *Wheaton v. Peters*, 8 Pet. (U. S.) 591; *Jollie v. Jaques*, 1 Blatchf. (U. S.) 618; *Baker v. Taylor*, 2 Blatchf. (U. S.) 82; *Ewer v. Cox*, 4 Wash. (U. S.) 487.

Iowa. — *Des Moines v. Gilchrist*, 67 Iowa 210, 56 Am. Rep. 341.

Maine. — *Winterport v. Winterport Water Co.*, 94 Me. 232.

Nebraska. — *Hurford v. Omaha*, 4 Neb. 336.

Pennsylvania. — *District Com'rs v. Keith*, 2 Pa. St. 218; *Pittsburg v. Walter*, 69 Pa. St. 365.

Compare Nichols v. Ruggles, 3 Day (Conn.) 158, 3 Am. Dec. 262. See also cases cited under the section next preceding.

1. Judicial Procedure. — *Rex v. Justices*, 1 M. & S. 446; *Rex v. Carnarvon County*, 4 B. & Ald. 86, 6 E. C. L. 401; *Rex v. Bond*, 6 Ad. & El. 905, 33 E. C. L. 242; *Mays v. King*, 28 Ala. 690; *Elliott v. Chapman*, 15 Cal. 383; *Knight v. Bean*, 18 Me. 219; *Blake v. Sherman*, 12 Minn. 420; *Coffman v. Davanay*, 2 How. (Miss.) 854; *Seymour v. Judd*, 2 N. Y. 465; *Brisbane v. Peabody*, (Supm. Ct. Spec. T.) 3 How. Pr. (N. Y.) 109; *Norwegian St.*, 81 Pa. St. 349; *Ammerman v. Stone*, 11 Pa. Dist. 726; *In re Road in Salem Tp.*, 103 Pa. St. 250; *French v. Martin*, 8 Manitoba 362, *following McKay v. Nanton*, 7 Manitoba 250. *Compare McCarter v. Jenkins*, 2 Heisk. (Tenn.) 629.

2. Ex p. *Van Sandau*, 1 De G. 303. See also *Dale's Case*, 6 Q. B. D. 376; *Enraght v. Pen-*

zance, 7 App. Cas. 240; *Rex v. Washbrook*, 4 B. & C. 732, 10 E. C. L. 451. See *supra*, this subdivision, *c. Time and Mode of Proceeding by Public Officers*.

A statute requiring the person serving a summons to indorse the date of service upon it was held mandatory in *Wendel v. Durbin*, 26 Wis. 390. But see *Hester v. Keith*, 1 Ala. 316.

3. See the titles *MAY*, vol. 20, p. 237, and references there given.

4. See *Society, etc., v. Wheeler*, 2 Gall. (U. S.) 105. See also *RETROACTIVE OR RETROSPECTIVE LAWS*, vol. 24, p. 877.

5. See the title *CONSTITUTIONAL LAW*, vol. 6, pp. 937-957.

6. See the title *IMPAIRMENT OF OBLIGATION OF CONTRACTS*, vol. 15, p. 1030.

7. Particular Classes of Statutes have been discussed with reference to their retrospective operation in various portions of this work. For instance: *As to Divorce Laws*, see the title *DIVORCE*, vol. 9, p. 730; *As to Exemption Laws*, see the title *EXEMPTIONS (FROM EXECUTION)*, vol. 12, pp. 74, 165; *As to Factors Acts*, see the title *FACTORS ACTS*, vol. 12, pp. 615, 616; *As to Garnishment Laws*, see the title *GARNISHMENT*, vol. 14, p. 743; *As to Homestead Laws*, see the title *HOMESTEAD*, vol. 15, pp. 530, 535, 610; *As to Bankruptcy Laws*, see the title *INSOLVENCY AND BANKRUPTCY*, vol. 16, p. 640; *As to Statutes of Limitation*, see the title *LIMITATION OF ACTIONS*, vol. 19, p. 174; *As to Lis Pendens Laws*, see the title *NOTICE OF PENDENCY AND LIS PENDENS*, vol. 21, p. 614.

8. See the title *EX POST FACTO LAWS*, vol. 12, p. 525.

c. GENERAL RULE OF CONSTRUCTION. — It may be laid down as a fundamental rule for the construction of statutes that they will be considered to have a prospective operation only, unless a legislative intent to the contrary is expressed or necessarily to be implied from the language used or the particular circumstances,¹ especially where to construe the act as retrospective

1. General Rule of Construction — *England.* — *Young v. Hughes*, 4 H. & N. 76; *Williams v. Smith*, 4 H. & N. 559; *Burn v. Carvalho*, 4 N. & M. 889, 30 E. C. L. 425; *Harding v. Stamp Com'rs*, (1898) A. C. 769; *Thompson v. Lack*, 3 C. B. 540, 54 E. C. L. 540; *Midland R. Co. v. Pye*, 10 C. B. N. S. 191, 100 E. C. L. 191; *Young v. Adams*, (1898) A. C. 469; *Knight v. Lee*, (1893) 1 Q. B. 41; *Moon v. Durden*, 2 Exch. 22; *Grosset v. Ogilvie*, 5 Bro. P. C. 75; *Couch v. Jeffries*, 4 Burr. 2460; *Physicians College v. Harrison*, 9 B. & C. 524, 17 E. C. L. 433; *Pettamberdass v. Thackoorseydass*, 5 Moo. Indian App. 109; *Hickson v. Darlow*, 52 L. J. Ch. 454, 31 W. R. 362, *affirmed* 23 Ch. D. 690, 48 L. T. N. S. 449; *Evans v. Williams*, 2 Drew. & Sm. 324; *Marsh v. Higgins*, 9 C. B. 551; *The Ironsides*, Lush. 358; *Quilter v. Mapleson*, 9 Q. B. D. 672; *Marsh v. Higgins*, 9 C. B. 551.

Canada. — *Hurtubise v. Desmarteau*, 19 Can. Sup. Ct. 562; *Couture v. Bouchard*, 21 Can. Sup. Ct. 281; *Massey v. McClelland*, 17 Can. L. T. 293; *Bergman v. The Ship Aurora*, 3 Can. Exch. 228; *In re Roden*, 25 Ont. App. 12; *St. Joachim v. Pointe Claire Turnpike Road Co.*, 24 Can. Sup. Ct. 486; *Reg. v. Martin*, 20 Can. Sup. Ct. 240; *Leonard v. Leonard*, 1 N. Bruns. Eq. Rep. 576; *Williams v. Irvine*, 22 Can. Sup. Ct. 108; *Cowen v. Evans*, 22 Can. Sup. Ct. 331; *Dixon v. Winnipeg Electric St. R. Co.*, 11 Manitoba 528; *Waterous Engine Works Co. v. Wilson*, 11 Manitoba 287; *Charett v. Howley*, 14 Quebec Super. Ct. 481; *Reneault v. Gagnon*, 18 Quebec Super. Ct. 127; *Walsh v. Nugent*, 1 N. Bruns. Eq. Rep. 335.

United States. — *Terrett v. Taylor*, 9 Cranch (U. S.) 43; *Wrightman v. Boone County*, (C. C. A.) 88 Fed. Rep. 435; *Rich v. U. S.*, 33 Ct. Cl. 191; *Hathaway v. Mutual L. Ins. Co.*, 99 Fed. Rep. 534; *Northwestern Mut. L. Ins. Co. v. Seaman*, 80 Fed. Rep. 357; *Wright v. Southern R. Co.*, 80 Fed. Rep. 260; *Sears v. Mahoney*, 66 Fed. Rep. 860; *Anheuser-Busch Brewing Assoc. v. Bond*, 66 Fed. Rep. 653, 32 U. S. App. 38; *Central Trust Co. v. Sheffield, etc.*, R. Co., 60 Fed. Rep. 9; *Southwestern Coal Co. v. McBride*, 185 U. S. 499, *affirming* 104 Fed. Rep. 1007, 43 C. C. A. 683; *Schenck v. Peay*, Woolw. (U. S.) 175; *U. S. v. Arredondo*, 6 Pet. (U. S.) 736; *Osborne v. Detroit*, 32 Fed. Rep. 36; *Gardner v. U. S.*, 25 Ct. Cl. 24; *Harvey v. Tyler*, 2 Wall. (U. S.) 328; *Locke v. New Orleans*, 4 Wall. (U. S.) 172; *McEwen v. Den*, 24 How. (U. S.) 242; *Twenty Per Cent. Cases*, 20 Wall. (U. S.) 179. See also *Surgett v. Lapice*, 8 How. (U. S.) 48; *Dodge v. Nevada Nat. Bank*, 109 Fed. Rep. 726, 48 C. C. A. 626.

Alabama. — *State v. Sloss*, 83 Ala. 93; *Engelhardt v. State*, 88 Ala. 100.

Arkansas. — *Parsons v. Paine*, 26 Ark. 124.

California. — *Higgins v. Bear River, etc., Water, etc., Co.*, 27 Cal. 159; *Oakland v. Oakland Water Front Co.*, 118 Cal. 160; *Webber v. Clarke*, 74 Cal. 11. See also *Swamp Land*

Dist. No. 307 v. Glide, 112 Cal. 25; *Ukiah Bank v. Moore*, 106 Cal. 673.

Colorado. — *French v. Deane*, 19 Colo. 504; *Spangler v. Green*, 21 Colo. 505, 52 Am. St. Rep. 259; *Chicago Lumber Co. v. Dillon*, 13 Colo. App. 196.

Connecticut. — *Gumpper v. Waterbury Traction Co.*, 68 Conn. 424; *Thames Mfg. Co. v. Lathrop*, 7 Conn. 550; *Perkins v. Perkins*, 7 Conn. 558, 18 Am. Dec. 120; *Goshen v. Stonington*, 4 Conn. 209, 10 Am. Dec. 121.

Delaware. — *Friedmann v. McGowan*, 1 Pen. (Del.) 436.

District of Columbia. — *Trask v. Wanamaker*, 21 D. C. 119.

Florida. — *Sammis v. Bennett*, 32 Fla. 458; *McCarthy v. Havis*, 23 Fla. 508.

Georgia. — *Maynard v. Marshall*, 91 Ga. 840; *State v. Bradford*, 36 Ga. 422.

Hawaii. — *Matter of Wong Tuck*, 11 Hawaii 600.

Illinois. — *Field v. Brokaw*, 148 Ill. 654; *Fisher v. Green*, 142 Ill. 80; *Bauer Grocer Co. v. Zelle*, 172 Ill. 407; *Porter v. Glenn*, 87 Ill. App. 106; *Howard v. American Boiler Co.*, 68 Ill. App. 566; *Jimison v. Adams County*, 130 Ill. 558; *Russell, etc., Drainage Dist. v. Benson*, 125 Ill. 490; *Matter of Tuller*, 79 Ill. 99, 22 Am. Rep. 164; *Garrett v. Doe*, 2 Ill. 335, 30 Am. Dec. 653. See also *Berndt v. Armknecht*, 50 Ill. App. 467.

Indiana. — *Hopkins v. Jones*, 22 Ind. 310; *Pritchard v. Spencer*, 2 Ind. 486; *Aurora, etc., Turnpike Co. v. Holthouse*, 7 Ind. 59; *Flinn v. Parsons*, 60 Ind. 573; *Stilz v. Indianapolis*, 81 Ind. 582; *Wilhite v. Hamrick*, 92 Ind. 594; *Dale v. Frisbie*, 59 Ind. 531; *Maxwell v. Fulton County*, 119 Ind. 20; *Rogers v. Rogers*, 137 Ind. 151; *Niklaus v. Conkling*, 118 Ind. 289; *Lucas v. Tucker*, 17 Ind. 41. See also *Eaton v. Union County Nat. Bank*, 141 Ind. 159.

Indian Territory. — *McFadden v. Blocker*, 2 Indian Ter. 260.

Iowa. — *Bartruff v. Remey*, 15 Iowa 257; *Knoulton v. Redenbaugh*, 40 Iowa 114.

Kansas. — *State v. Crawford*, 11 Kan. 32.

Kentucky. — *Long v. Louisville*, 97 Ky. 364; *O'Donoghue v. Akin*, 2 Duv. (Ky.) 480; *Cumberland, etc., R. Co. v. Judge*, 10 Bush (Ky.) 564. See also *Berg v. Berg*, 105 Ky. 80.

Louisiana. — *Cassard v. Tracy*, 52 La. Ann. 835; *State v. Bermudez*, 12 La. 352; *Eugenie v. Preval*, 2 La. Ann. 180; *Reed v. His Creditors*, 39 La. Ann. 115.

Maine. — *Conner v. Lewis*, 16 Me. 268; *Torrey v. Corliss*, 33 Me. 333; *Preston v. Drew*, 33 Me. 558, 54 Am. Dec. 639; *Rogers v. Greenbush*, 58 Me. 395; *Deake, Appellant*, 80 Me. 50; *Stetson v. Hall*, 86 Me. 110.

Maryland. — *Magruder v. Carroll*, 4 Md. 335; *State v. Norwood*, 12 Md. 195; *Williar v. Baltimore Butchers' Loan, etc., Assoc.*, 45 Md. 546; *Grinder v. Nelson*, 9 Gill (Md.) 299, 52 Am. Dec. 694; *Clark v. Baltimore*, 29 Md. 283; *Davis v. Clabaugh*, 30 Md. 508; *Williams v.*

in its operation would render it obnoxious to some constitutional provision,¹

Johnson, 30 Md. 500, 96 Am. Dec. 613; Herbert v. Gray, 38 Md. 529.

Massachusetts.—Wild v. Boston, etc., R. Co., 171 Mass. 245; Pierce v. Cabot, 159 Mass. 202; French v. Hussey, 159 Mass. 206; Shallow v. Salem, 136 Mass. 136; Somerset v. Dighton, 12 Mass. 383; Abington v. Duxbury, 105 Mass. 287. See also Bucher v. Fitchburg R. Co., 131 Mass. 156, 41 Am. Rep. 216; Lynch v. Cronan, 6 Gray (Mass.) 531.

Michigan.—Heineman v. Schloss, 83 Mich. 153; Stitt v. Casterline, 89 Mich. 239; Smith v. Pinch, 80 Mich. 332; Finn v. Haynes, 37 Mich. 63; Maxwell v. Bay City Bridge Co., 46 Mich. 278; Danville Stove, etc., Co. v. Adsit, 88 Mich. 244; Todd v. Election Com'rs, 104 Mich. 474; Matter of Sanborn, 96 Mich. 606; Phillips v. New Buffalo Tp., 68 Mich. 217. See also Gemmerling v. Lazarus, 100 Mich. 324.

Minnesota.—Brown v. Hughes, (Minn. 1903) 94 N. W. Rep. 438; Pond Mach. Tool Co. v. Robinson, 38 Minn. 272; Kerlinger v. Barnes, 14 Minn. 526; Davidson v. Gaston, 16 Minn. 230; Giles v. Giles, 22 Minn. 348.

Mississippi.—Bramlett v. Wetlin, 71 Miss. 902; Drane v. Newsom, 73 Miss. 422; Brown v. Wilcox, 14 Smed. & M. (Miss.) 127; Gayden v. Bates, Walk. (Miss.) 209; Eastin v. Van Dorn, Walk. (Miss.) 214; Hooker v. Hooker, 10 Smed. & M. (Miss.) 599; Stewart v. Davidson, 10 Smed. & M. (Miss.) 351; Garrett v. Beaumont, 24 Miss. 377; Carson v. Carson, 40 Miss. 349.

Missouri.—Huff v. Sovereign Camp Woodmen of the World, 85 Mo. App. 96; Walton v. Fudge, 63 Mo. App. 52, 1 Mo. App. Rep. 620; Reed v. Swan, 133 Mo. 100; State v. Thompson, 41 Mo. 25. See also Arnold v. Willis, 128 Mo. 145.

Montana.—Ryan v. Maxey, 14 Mont. 81. See also Cotter v. Grand Lodge, etc., 23 Mont. 82; Bullard v. Smith, (Mont. 1903) 72 Pac. Rep. 761.

Nebraska.—Walker v. State, 46 Neb. 25.

New Hampshire.—Stilphen v. Stilphen, 65 N. H. 126.

New Jersey.—Allen v. Taxation Com'rs, 57 N. J. L. 303; Williamson v. New Jersey Southern R. Co., 29 N. J. Eq. 311; Elizabeth v. Hill, 39 N. J. L. 555.

New York.—Hackley v. Sprague, 10 Wend. (N. Y.) 113; Jackson v. Van Zandt, 12 Johns. (N. Y.) 174; Palmer v. Conly, 4 Den. (N. Y.) 376, 2 N. Y. 184; Sayre v. Wisner, 8 Wend. (N. Y.) 663; Johnson v. Burrell, 2 Hill (N. Y.) 239; Berley v. Rampacher, 5 Duer (N. Y.) 183; Wood v. Oakley, 11 Paige (N. Y.) 403; Sanford v. Bennett, 24 N. Y. 20; Matter of Foley, (Supm. Ct. Spec. T.) 8 Misc. (N. Y.) 57; National Park Bank v. Goddard, (Supm. Ct. Spec. T.) 9 Misc. (N. Y.) 626; Butler v. Parochial Fund, 92 Hun (N. Y.) 96; People v. Crennan, (Supm. Ct. Gen. T.) 26 N. Y. Supp. 167; Dodin v. Dodin, 16 N. Y. App. Div. 42, affirming 17 Misc. (N. Y.) 35, affirmed 162 N. Y. 635; Quinlan v. Welch, 141 N. Y. 158, affirming 69 Hun (N. Y.) 584; Matter of Miller, 110 N. Y. 216; Sanford v. Bennett, 24 N. Y. 20; People v. McCall, 94 N. Y. 587; Amsbry v. Hinds, 48 N. Y. 57; Fairbanks v. Wood, 17 Wend. (N. Y.) 329; Quinn v. New York, 63 Barb. (N. Y.) 595,

Wilson v. Baptist Education Soc., 10 Barb. (N. Y.) 308; Quackenbush v. Danks, 1 Den. (N. Y.) 128, 1 N. Y. 129; Stisser v. New York Cent., etc., R. Co., 32 N. Y. App. Div. 98.

North Carolina.—Greer v. Asheville, 114 N. Car. 678.

Ohio.—Cincinnati, etc., R. Co. v. Hedges, 63 Ohio St. 339; Norwood v. Wooley, 4 Ohio Cir. Dec. 274, 9 Ohio Cir. Ct. 195; State v. Roosa, 11 Ohio St. 16.

Pennsylvania.—Taylor v. Mitchell, 57 Pa. St. 209; Glazier's Estate, 33 W. N. C. (Pa.) 310; Spare v. Walz, 14 Phila. (Pa.) 132, 37 Leg. Int. (Pa.) 262; Goodman v. Huntingdon County, 17 Pa. Co. Ct. 393; Price v. Mott, 52 Pa. St. 315; Dewart v. Purdy, 29 Pa. St. 113; Ellet v. Paxson, 2 W. & S. (Pa.) 418.

South Carolina.—Nohrden v. North Eastern R. Co., 54 S. Car. 492; Mutual Aid, etc., Co. v. Logan, 55 S. Car. 295.

South Dakota.—American Invest. Co. v. Thayer, 7 S. Dak. 72; American Invest. Co. v. Beadle County, 5 S. Dak. 410; Guild v. Deadwood First Nat. Bank, 4 S. Dak. 566.

Tennessee.—Dugger v. Mechanics, etc., Ins. Co., 95 Tenn. 245; Jordan v. Gower, 1 Baxt. (Tenn.) 103; Collins v. East Tennessee, etc., R. Co., 9 Heisk. (Tenn.) 841.

Texas.—Kurtzman v. Blackwell, 21 Tex. Civ. App. 222; Aaron v. State, 34 Tex. Crim. 103; Orr v. Rhine, 45 Tex. 345; Rockwall County v. Kaufman County, 69 Tex. 172.

Utah.—Farrel v. Pingree, 5 Utah 443.

Vermont.—Rutland v. Chittenden, 74 Vt. 219.

Virginia.—Myers v. Com., 90 Va. 785; Richmond v. Henrico County, 83 Va. 204.

West Virginia.—Rogers v. Lynch, 44 W. Va. 94; Murdock v. Franklin Ins. Co., 33 W. Va. 407; Stewart v. Vandervort, 34 W. Va. 524; Fowler v. Lewis, 36 W. Va. 112.

Wisconsin.—Seamans v. Carter, 15 Wis. 548, 82 Am. Dec. 696; Finney v. Ackerman, 21 Wis. 268. See also Fife v. Oshkosh, 89 Wis. 540.

See also the title CONSTITUTIONAL LAW, vol. 6, p. 939.

Constitutional Provision Not Retroactive.—State v. Tucker, 54 S. Car. 251.

Rule Applies to Construction of Title.—Allen v. Taxation Com'rs, 57 N. J. L. 303.

Contract Made After Enactment of Statute Pursuant to Previous Negotiations.—A contract is not "made" in the sense of the law until it is complete. Therefore a statute providing that it shall not apply to contracts previously made does apply to a contract the papers for which are drawn and signed after the enactment of the statute, although the negotiations leading up to the contract were pending at the time of the passage of the statute. U. S. Savings, etc., Co. v. Miller, (Tenn. Ch. 1897) 47 S. W. Rep. 17.

What Is a Retroactive Effect.—The anti-trust law of July 2, 1890, was not given a retroactive effect by being applied to contracts which, though entered into before the passage of the act, were of a continuing nature, the construction given being that the statute prevented the continuance of such contracts. U. S. v. Trans-Missouri Freight Assoc., 166 U. S. 290.

1. Construction Rendering Statute Unconstitutional.—The Queen, 93 Fed. Rep. 834; Wilder

though the fact that the retrospective operation would not be unconstitutional does not require that the act be construed as retrospective.¹ Of course, however, where the legislative intent that a statute shall be retroactive is clear it must be given that effect,² even though such construction renders the statute unconstitutional.³

The Time of Taking Effect, and not the time of enactment, is the time to be taken into consideration in determining whether a statute is prospective or retrospective.⁴

d. STATUTES AFFECTING JUDICIAL PROCEDURE. — Statutes which are designed to change the mode of judicial procedure, where such change relates to the method of enforcing a right and does not affect the right itself, are construed to apply to causes of action which accrued before enactment as well as to those to accrue thereafter.⁵ And such statutes are generally held to apply

v. Campbell, (Idaho 1896) 43 Pac. Rep. 677; *Young v. Jones*, 180 Ill. 216, reversing 78 Ill. App. 78; *Kent v. Bentley*, 3 Ohio Dec. 173; *In re Voting Laws*, 12 R. I. 586; *Taft v. Cannon*, 19 R. I. 408; *Fordyce v. DuBose*, 87 Tex. 78. See also *State v. Bradshaw*, 35 Fla. 313; *Walton v. Fudge*, 63 Mo. App. 52, 1 Mo. App. Rep. 620; *Kirkwood v. Hoxie*, 95 Mich. 62, 35 Am. St. Rep. 549; *Reid v. New York*, 139 N. Y. 534, affirming 68 Hun (N. Y.) 110.

1. *McFadden v. Blocker*, 2 Indian Ter. 260.

2. **Legislative Intent to Make Statute Retrospective** — *United States*. — *Pauley Jail Bldg.*, etc., *Co. v. Crawford County*, 84 Fed. Rep. 942, 56 U. S. App. 53; *Untermeyer v. Freund*, 58 Fed. Rep. 205, 20 U. S. App. 32, affirming 50 Fed. Rep. 77.

Arkansas. — *Pelt v. Payne*, 30 S. W. Rep. 426, 60 Ark. 637.

Kansas. — See *Moline Plow Co. v. Witham*, 52 Kan. 185.

Maryland. — *State v. Norwood*, 12 Md. 206. *Massachusetts*. — *Tremont, etc., Mills v. Lowell*, 165 Mass. 265.

Minnesota. — *Mason v. Heyward*, 5 Minn. 74. *Nebraska*. — *Colpetzer v. Trinity Church*, 24 Neb. 113.

New York. — *People v. Crennan*, 141 N. Y. 239.

Washington. — *Swinburne v. Mills*, 17 Wash. 611, 61 Am. St. Rep. 932; *State v. Whittlesey*, 17 Wash. 447.

Canada. — *In re Gillespie*, 19 Ont. App. 713; *Joseph v. Montreal*, 10 Quebec Super. Ct. 531; *Reg. v. Canada Sugar Refining Co.*, 27 Can. Sup. Ct. 395, reversing 5 Can. Exch. 177, affirmed (1898) A. C. 735. See also *Goodherham v. Toronto*, 19 Ont. App. 641, affirming 21 Ont. 120.

Section 10 of the Building Societies Act of 1894 (57 and 58 Vict., c. 47) applies to a society the dissolution of which was begun before the act came into force, but which was not completely dissolved at that time. *Kemp v. Wright*, (1895) 1 Ch. 121.

3. **Unconstitutional Statute**. — *New York L. Ins. Co. v. Cuyahoga County*, 99 Fed. Rep. 846.

4. **Time of Taking Effect to Be Considered**. — *Paddon v. Bartlett*, 3 Ad. & El. 884, 30 E. C. L. 252, 4 N. & M. 321, 30 E. C. L. 373; *Barlow v. Gregory*, 31 Conn. 261; *Medford v. Learned*, 16 Mass. 215; *Dewart v. Purdy*, 29 Pa. St. 113; *Galveston, etc., R. Co. v. State*, 81 Tex. 572; *State v. Messmore*, 14 Wis. 163. See also *Burlington, etc., R. Co. v. Shelter*, 6 Colo. App. 246;

Gumpper v. Waterbury Traction Co., 68 Conn. 424.

5. **Statute Affecting Remedy** — *England*. — *Wright v. Hale*, 6 H. & N. 227; *Costa Rica v. Erlanger*, 3 Ch. D. 69; *The Dumfries, Swabey* 63; *Atty.-Gen. v. Sillem*, 10 H. L. Cas. 704; *Warner v. Murdoch*, 4 Ch. D. 752; *Cornish v. Hockin*, 1 El. & Bl. 602, 72 E. C. L. 602; *Kimbray v. Draper*, L. R. 3 Q. B. 163; *Warne v. Beresford*, 2 M. & W. 848; *The Alexander*, 1 W. Rob. 288; *The Ironsides, Lush*, 458; *Boodle v. Davis*, 8 Exch. 351; *Binns v. Hey*, 1 Dowl. & L. 661; *Brooks v. Bockett*, 9 Q. B. 847, 58 E. C. L. 847; *Scadding v. Eyles*, 9 Q. B. 858, 58 E. C. L. 858; *Watton v. Watton*, L. R. 1 P. & D. 227; *Weldon v. Winslow*, 13 Q. B. D. 784; *Gardner v. Lucas*, 3 App. Cas. 582.

Canada. — *Harrington v. Peters*, 32 Nova Scotia 464.

United States. — *Sampeyreac v. U. S.*, 7 Pet. (U. S.) 222; *Tennessee v. Sneed*, 96 U. S. 69; *Curtis v. Whitney*, 13 Wall. (U. S.) 68.

Alabama. — *Coosa River Steamboat Co. v. Barclay*, 30 Ala. 120.

California. — *Oullahan v. Sweeney*, 79 Cal. 537, 12 Am. St. Rep. 172. See also *Chapman v. State*, 104 Cal. 690, 43 Am. St. Rep. 158.

Colorado. — See *Orman v. Crystal River R. Co.*, 5 Colo. App. 493.

Connecticut. — *Buckingham v. Moss*, 40 Conn. 461; *Rowen v. New York, etc., R. Co.*, 59 Conn. 364.

Illinois. — *Dobbins v. Peoria First Nat. Bank*, 112 Ill. 553; *Winslow v. People*, 117 Ill. 152; *Gage v. Stewart*, 127 Ill. 207, 11 Am. St. Rep. 116.

Indiana. — *Southern Indiana R. Co. v. Peyton*, 157 Ind. 690; *Connecticut Mut. L. Ins. Co. v. Talbot*, 113 Ind. 373, 3 Am. St. Rep. 655; *Logan v. Logan*, 77 Ind. 558; *Ralston v. Lothain*, 18 Ind. 303; *Indianapolis v. Imberry*, 17 Ind. 175; *Collier v. State*, 10 Ind. 58.

Iowa. — *State v. Shreves*, 81 Iowa 615; *Kosuth County v. Wallace*, 60 Iowa 508; *Harlan v. Sigler, Morr.* (Iowa) 39.

Kansas. — *Leavenworth Coal Co. v. Barber*, 47 Kan. 29; *Berry v. Kansas City, etc., R. Co.*, 52 Kan. 759, 39 Am. St. Rep. 371.

Louisiana. — *Morton v. Valentine*, 15 La. Ann. 150.

Maine. — *Berry v. Clary*, 77 Me. 482.

Massachusetts. — *Stocker v. Foster*, 178 Mass. 591; *Wood v. Westborough*, 140 Mass. 403; *Com. v. Hall*, 97 Mass. 570.

Michigan. — *Judd v. Judd*, 125 Mich. 228.

also to actions pending at the time of enactment,¹ in the absence of a saving clause,² although it has been held that such actions are presumed to be exempt from their operation unless the contrary intent appears.³

Minnesota. — *State v. Baldwin*, 62 Minn. 518; *Wade v. Drexel*, 60 Minn. 164.

Mississippi. — *Excelsior Mfg. Co. v. Keyser*, 62 Miss. 155.

Missouri. — *Security Sav. Trust Co. v. Donnell*, 81 Mo. App. 151; *Merchants' Ins. Co. v. Hill*, 86 Mo. 466; *State v. Jackson*, 105 Mo. 199.

Montana. — See *Baxter v. Hamilton*, 20 Mont. 327.

Nebraska. — *Jones v. Davis*, 6 Neb. 33.

New Hampshire. — *Wolfeborough Sav. Bank's Petition*, 69 N. H. 84.

New York. — *Howard v. Moot*, 64 N. Y. 262; *Rouge v. Rouge*, (N. Y. Super. Ct. Gen. T.) 15 Misc. (N. Y.) 36, *affirming* 14 Misc. (N. Y.) 421, 25 N. Y. Civ. Pro. (N. Y.) 102, 2 N. Y. Annot. Cas. 376; *People v. Ulster County*, 63 Barb. (N. Y.) 85; *Ball v. Bullard*, 52 Barb. (N. Y.) 141; *Underhill v. Manhattan R. Co.*, (Supm. Ct. Spec. T.) 27 Abb. N. Cas. (N. Y.) 478.

North Carolina. — *Wallace v. Western North Carolina R. Co.*, 104 N. Car. 442.

Ohio. — *Cincinnati, etc., R. Co. v. Hedges*, 8 Ohio Cir. Dec. 265, 15 Ohio Cir. Ct. 254; *Lawrence R. Co. v. Mahoning County*, 35 Ohio St. 1.

Oregon. — *Bennett v. Taffe*, (Oregon 1891) 27 Pac. Rep. 223; *Judkins v. Taffe*, 21 Oregon 89.

Pennsylvania. — *Lane v. White*, 140 Pa. St. 99; *Lane v. Nelson*, 79 Pa. St. 407.

South Carolina. — *Bredenburg v. Bardin*, 36 S. Car. 197.

Texas. — *Phoenix Ins. Co. v. Shearman*, (Tex. Civ. App. 1898) 43 S. W. Rep. 1063.

Vermont. — *Richardson v. Cook*, 37 Vt. 599, 88 Am. Dec. 622; *Murray v. Mattison*, 63 Vt. 479.

Washington. — *Seattle, etc., R. Co. v. Ah Kow*, 2 Wash. Ter. 36.

Wisconsin. — *Plum v. Fond du Lac*, 51 Wis. 393.

See also title CONSTITUTIONAL LAW, vol. 6, p. 946 et seq.

Law Regulating Procedure Does Not Apply to Trial Which Took Place Before Its Passage. — *Secor v. State*, (Wis. 1903) 95 N. W. Rep. 942.

1. Pending Actions — England. — *Singer v. Hasson*, 50 L. T. N. S. 326.

Canada. — *Todd v. Union Bank*, 6 Manitoba 457; *Re Scott*, 6 Manitoba 193; *Foulds v. Foulds*, 12 Manitoba 389.

United States. — *Larkin v. Saffarans*, 15 Fed. Rep. 147; *Untermeyer v. Freund*, 50 Fed. Rep. 77. See also *Fairchild v. U. S.*, 91 Fed. Rep. 297.

California. — *Bensley v. Ellis*, 39 Cal. 309; *People v. Mortimer*, 46 Cal. 114.

Connecticut. — *Hubbard v. New York, etc., R. Co.*, 70 Conn. 563.

Georgia. — *Willis v. Fincher*, 68 Ga. 444.

Indiana. — *Indianapolis v. Imberry*, 17 Ind. 175; *Steele v. Empsom*, 142 Ind. 397.

Iowa. — *Slocum v. Fayette County*, 61 Iowa 169; *State v. Shreves*, 81 Iowa 615.

Kentucky. — *Hale v. Grogan*, (Ky. 1899) 49 S. W. Rep. 464; *Walston v. Com.*, 16 B. Mon. (Ky.) 15.

Maryland. — *Gill v. Wells*, 59 Md. 492.

Michigan. — *Beebe v. Birkett*, 108 Mich. 234.

Minnesota. — *McNamara v. Minnesota Cent. R. Co.*, 12 Minn. 388; *Fish v. Chicago, etc., R. Co.*, 82 Minn. 9.

Missouri. — *Sheehan v. Southern Ins. Co.*, 53 Mo. App. 351.

New York. — *Underhill v. Manhattan R. Co.*, (Supm. Ct. Spec. T.) 27 Abb. N. Cas. (N. Y.) 478.

North Dakota. — *Grand Forks First M. E. Church v. Fadden*, 8 N. Dak. 162.

Ohio. — *McAlpin v. Clark*, 2 Ohio Dec. 160.

Oregon. — *Judkins v. Taffe*, 21 Oregon 89; *Bennett v. Taffe*, (Oregon 1891) 27 Pac. Rep. 223; *Catterlin v. Bush*, 39 Oregon 496.

Pennsylvania. — *Matter of Koch*, 5 Rawle (Pa.) 338; *Lane v. White*, 140 Pa. St. 99.

Texas. — *State v. Manning*, 14 Tex. 402; *Phoenix Ins. Co. v. Shearman*, (Tex. Civ. App. 1898) 43 S. W. Rep. 1063; *Texas Midland R. Co. v. Southwestern Tel., etc., Co.*, 24 Tex. Civ. App. 198; *Bexar Bldg., etc., Assoc. v. Newman*, 86 Tex. 380.

Vermont. — *Murray v. Mattison*, 63 Vt. 479.

Wisconsin. — *Lee v. Buckheit*, 49 Wis. 54.

A Statute Compelling Election Between Two Remedies, both of which existed prior to its adoption and neither of which is taken away, does not apply to a suit begun before its enactment. *Provident L., etc., Co. v. Brunner*, (Neb. 1903) 93 N. W. Rep. 144.

Statutes Relating to Appeals. — See also title CONSTITUTIONAL LAW, vol. 6, p. 1039.

In *McNamara v. Minnesota Cent. R. Co.*, 12 Minn. 388, it was held that an act giving appeals from certain enumerated judgments and orders applies to such judgments and orders made prior to its passage.

But in *Decatur First Nat. Bank v. Preston Nat. Bank*, 3 Tex. Civ. App. 545, it was held that a statute in reference to appeals cannot revive the right of appeal where it has been lost by lapse of time prior to the enactment of the statute. See also *Koksilah Quarry Co. v. Reg.*, 5 British Columbia 600.

Appeal Perfected Before Writ of Error Substituted as Only Remedy. — *Ropes v. Snyder Harris Bassett Co.*, 35 Fla. 537.

2. A Saving Clause with Respect to Pending Actions will not apply to a proceeding which is not included within the meaning of the term "action." *Grand Trunk R. Co. v. Cumberland County*, 88 Me. 225.

3. Presumption — Connecticut. — *State v. Smith*, 38 Conn. 397.

Michigan. — *Bedier v. Fuller*, 116 Mich. 126; *Auditor Gen. v. Chandler*, 108 Mich. 569. See also *Clark v. Hall*, 19 Mich. 356; *Smith v. Humphrey*, 20 Mich. 398; *Auditor Gen. v. Monroe County*, 36 Mich. 70.

New Hampshire. — *Rowell v. B., etc., R. Co.*, 59 N. H. 35.

New York. — *Trist v. Cabenas*, (N. Y. Super. Ct. Gen. T.) 18 Abb. Pr. (N. Y.) 143.

North Carolina. — *Merwin v. Ballard*, 66 N. Car. 398.

Ohio. — *Stiles v. Murphy*, 4 Ohio 92. See also

Change in Form of Action — New Rules as to Parties, Pleading, and Evidence. — So, in the absence of a constitutional prohibition of retrospective legislation, a liberal construction in this respect will be given to statutes changing forms of actions,¹ making new rules as to parties and pleadings,² or changing the rules relating to rules of evidence or the qualification of witnesses.³

Intent. — But even statutes of this character are subject, though perhaps to a more limited extent, to the general rule that the legislative intent that the statute shall be retrospective must be apparent.⁴

e. DECLARATORY STATUTES. — The power to interpret and construe statutes rests with the courts and not with the legislature.⁵ Courts have resisted constantly legislative efforts to invade the judicial prerogative by means of expository statutes designed to have a retroactive operation. While the legislature by a declaratory statute may change an existing law,⁶ it cannot by such a statute reverse or vacate judicial decisions,⁷ or inject into an existing statute a meaning which the courts have declared that it did not possess or contrary to the previous judicial interpretation,⁸ though it may, by

Norwood v. Wooley, 4 Ohio Cir. Dec. 274, 9 Ohio Cir. Ct. 195.

Tennessee. — Mabry v. Baxter, 11 Heisk. (Tenn.) 682.

The Venue Is Governed by the law in force at the institution of the suit and not that in force at the time of the trial. Baines v. Jemison, (Tex. Civ. App. 1893) 27 S. W. Rep. 182; Ball v. Presidio County, (Tex. Civ. App. 1894) 27 S. W. Rep. 702.

1. Form of Action. — Broadus v. Broadus, 10 Bush (Ky.) 299; Thayer v. Seavey, 11 Me. 284; Baldwin v. Newark, 38 N. J. L. 158; Matter of Protestant Episcopal Public School, 58 Barb. (N. Y.) 161. See title CONSTITUTIONAL LAW, vol. 6, p. 948.

2. Parties and Pleadings. — Palmore v. State, 29 Ark. 248; Lockett v. Ustry, 28 Ga. 345; Grinder v. Nelson, 9 Gill (Md.) 299, 52 Am. Dec. 694. See also title CONSTITUTIONAL LAW, vol. 6, p. 949.

3. Evidence and Witnesses — Maine. — Fales v. Wadsworth, 23 Me. 553.

Massachusetts. — Holmes v. Hunt, 122 Mass. 505, 23 Am. Rep. 381; Monson v. Palmer, 8 Allen (Mass.) 551.

Mississippi. — Belcher v. Mhoon, 47 Miss. 613.

Pennsylvania. — Foster v. Gray, 22 Pa. St. 9. South Carolina. — Rutland v. Copes, 15 Rich. L. (S. Car.) 84.

See also the title CONSTITUTIONAL LAW, vol. 6, p. 950.

4. Intent. — Baines v. Jemison, 86 Tex. 118. See also Catterlin v. Bush, 39 Oregon 496; Oliver v. Lewis, 9 Wash. 572.

In Vermont a statute will not be given a retrospective effect where it contains nothing that indicates an intention to give it an effect inconsistent with the provision of Vt. Stat. 28, that no act of the general assembly shall affect a suit begun or pending at the time of its passage. Fuller v. Montpelier, 73 Vt. 44.

5. People v. Kipley, 171 Ill. 44. See also *supra*, this title, VI. 2. *Construction a Judicial Function*; 10. b. (4) *Legislative Construction*; and the title CONSTITUTIONAL LAW, vol. 6, p. 1032 *et seq.*

6. Union Iron Co. v. Pierce, 4 Biss. (U. S.) 327.

7. Statute Cannot Reverse or Vacate Judicial Decisions — Alabama. — Weaver v. Lapsley, 43 Ala. 224; Sanders v. Cabaniss, 43 Ala. 173.

California. — People v. Frisbie, 26 Cal. 135.

Connecticut. — State v. New York, etc., R. Co., 71 Conn. 43.

Illinois. — Geneva v. People, 98 Ill. App. 315.

Indiana. — Young v. State Bank, 4 Ind. 301, 58 Am. Dec. 630; Beebe v. State, 6 Ind. 501, 63 Am. Dec. 391.

Louisiana. — Lanier v. Gallatas, 13 La. Ann. 175.

Maine. — Lewis v. Webb, 3 Me. 326; Durham v. Lewiston, 4 Me. 140; Atkinson v. Dunlap, 50 Me. 111.

Maryland. — Baltimore v. Horn, 26 Md. 194.

Michigan. — Moser v. White, 29 Mich. 59.

Mississippi. — Lawson v. Jeffries, 47 Miss. 686, 12 Am. Rep. 342.

New Hampshire. — Merrill v. Sherburne, 1 N. H. 199, 8 Am. Dec. 52.

Pennsylvania. — De Chastellux v. Fairchild, 15 Pa. St. 18, 53 Am. Dec. 570.

Vermont. — Bates v. Kimball, 2 D. Chip. (Vt.) 77; Staniford v. Barry, 1 Aik. (Vt.) 314, 15 Am. Dec. 691.

Virginia. — Ratcliffe v. Anderson, 31 Gratt. (Va.) 105, 31 Am. Rep. 716.

Wisconsin. — Sydnor v. Palmer, 32 Wis. 406; Charles Baumbach Co. v. Singer, 86 Wis. 329.

But see Pennsylvania v. Wheeling, etc., Bridge Co., 18 How. (U. S.) 421, where it was held that an act of Congress declaring a bridge over the Ohio river to be a lawful structure superseded a previous decree of the court declaring it an obstruction to navigation and ordering its removal.

In Ontario the rule stated in the text does not seem to apply, for it has been held that where a decree made in a lower court was right at the time when made, but subsequent to such decree the law was changed with reference to the subject, the Court of Appeals might reverse the decision of the lower court and make such other order as the event required. *In re Gillespie*, 19 Ont. App. 713.

8. Changing Meaning of Statute — United States. — The Energia, 66 Fed. Rep. 604, 35 U. S. App. 6. See also Postmaster-Gen. v. Early, 12 Wheat. (U. S.) 148.

a statute passed for the purpose, lay down a rule which must govern the decision in a pending action or proceeding.¹

f. REMEDIAL STATUTES. — Remedial statutes are subject to the general rule of construction that statutes are to have a prospective operation only unless the contrary intent appears,² although the courts apply the rule to such statutes with somewhat less strictness than others,³ and where the language plainly shows the legislative intent that the statute should have a retrospective operation the court will so construe the act as to give it the operation intended.⁴

g. CURATIVE STATUTES. — Although necessarily retroactive,⁵ curative

Georgia. — Calhoun *v.* McLendon, 42 Ga. 405.

Indiana. — Stephenson *v.* Boody, 139 Ind. 60.

Maryland. — James *v.* Rowland, 52 Md. 462.

Massachusetts. — See Todd *v.* Clapp, 118 Mass. 495.

Missouri. — McNichol *v.* U. S. Mercantile Reporting Agency, 74 Mo. 457.

New York. — Dash *v.* Van Kleeck, 7 Johns. (N. Y.) 477, 5 Am. Dec. 291; Salters *v.* Tobias, 3 Paige (N. Y.) 338.

Pennsylvania. — Greenough *v.* Greenough, 11 Pa. St. 489, 51 Am. Dec. 567; Reiser *v.* William Tell Sav. Fund Assoc., 39 Pa. St. 137; Haley *v.* Philadelphia, 68 Pa. St. 45, 8 Am. Rep. 153; Ball *v.* Anderson, 196 Pa. St. 86.

1. In Clinton Bridge, etc., 10 Wall. (U. S.) 454, it was held that an act of Congress to legalize a bridge across a navigable river, passed pending a suit to remove the bridge as a nuisance, gave the rule of decision for the court at the final hearing.

2. *Remedial Statutes.* — McFadden *v.* Blocker, 2 Indian Ter. 260; People *v.* Ulster County, 63 Barb. (N. Y.) 83. See also cases cited in next note.

3. *Relaxation of Rule* — *Alabama.* — *Ex p.* Buckley, 53 Ala. 55.

Arkansas. — Parsons *v.* Paine, 26 Ark. 124.

Idaho. — People *v.* Moore, 1 Idaho 662.

Illinois. — Marsh *v.* Chesnut, 14 Ill. 223.

Louisiana. — Cassard *v.* Tracy, 52 La. Ann. 835.

Maine. — Hastings *v.* Lane, 15 Me. 134.

Maryland. — James *v.* Rowland, 52 Md. 462.

Massachusetts. — Shallow *v.* Salem, 136 Mass. 136; Forster *v.* Forster, 129 Mass. 559; Gerry *v.* Stoneham, 1 Allen (Mass.) 319.

Michigan. — Moser *v.* White, 29 Mich. 59.

New Jersey. — Citizens' Gas Light Co. *v.* State, 44 N. J. L. 648.

New York. — People *v.* Ulster County, 63 Barb. (N. Y.) 83; Quinn *v.* New York, 63 Barb. (N. Y.) 595.

Ohio. — Bernier *v.* Becker, 37 Ohio St. 72.

Pennsylvania. — Journeay *v.* Gibson, 56 Pa. St. 57; Lambertson *v.* Hogan, 2 Pa. St. 22; Cunningham's Appeal, 108 Pa. St. 546; White *v.* Crawford, 84 Pa. St. 433; Chalker *v.* Ives, 55 Pa. St. 81.

Texas. — Linn *v.* Scott, 3 Tex. 67.

Wisconsin. — Dean *v.* Charlton, 27 Wis. 522.

4. *Intent* — *Alabama.* — Palmer *v.* Fitts, 51 Ala. 489.

California. — Reis *v.* Graff, 51 Cal. 86; Payne *v.* Treadwell, 16 Cal. 220; Grogan *v.* San Francisco, 18 Cal. 590.

Illinois. — People *v.* Chicago, 51 Ill. 17, 2 Am. Rep. 278.

Indiana. — King *v.* Course, 25 Ind. 202.

Iowa. — Bennett *v.* Fisher, 26 Iowa 497;

Newman *v.* Samuels, 17 Iowa 528; Jones *v.*

Berkshire, 15 Iowa 248, 83 Am. Dec. 412; Mc-

Millen *v.* Boyles, 6 Iowa 304.

Louisiana. — Police Jury *v.* Shreveport, 5 La. Ann. 661.

Massachusetts. — Portage County *v.* Wisconsin Cent. R. Co., 121 Mass. 460.

Michigan. — Park Com'rs *v.* Detroit, 28 Mich. 228, 15 Am. Rep. 202; People *v.* Ingham County, 20 Mich. 95.

New Jersey. — State *v.* Union, 33 N. J. L. 350; State *v.* Guttenberg, 38 N. J. L. 419.

New York. — People *v.* Mitchell, 35 N. Y. 551; People *v.* Ingersoll, 58 N. Y. 1, 17 Am. Rep. 178; People *v.* McDonald, 69 N. Y. 362; People *v.* Batchellor, 53 N. Y. 128, 13 Am. Rep. 480.

North Carolina. — Belo *v.* Forsythe County, 76 N. Car. 489.

Ohio. — Butler *v.* Toledo, 5 Ohio St. 225.

Pennsylvania. — Journeay *v.* Gibson, 56 Pa. St. 57.

Wisconsin. — Blount *v.* Janesville, 31 Wis. 648; Single *v.* Marathon County, 38 Wis. 363; State *v.* Tappan, 29 Wis. 664, 9 Am. Rep. 622; Mills *v.* Charleton, 29 Wis. 400, 9 Am. Rep. 578.

5. *Curative Acts.* — McFaddin *v.* Evans-Snider-Buel Co., 185 U. S. 505, affirming 105 Fed. Rep. 293, 44 C. C. A. 494; Farmers Sav., etc., Assoc. *v.* Berger, 70 Ark. 613, 69 S. W. Rep. 57; Brand *v.* Multnomah County, 38 Oregon 79; Ritz *v.* Schmidt, 13 Manitoba 419.

Strict Construction. — Where an act is retrospective in its nature, and in a sense special legislation in that it purports to legalize the retention and appropriation to their own use by county treasurers of counties under township organization, of public moneys to which by the laws of the state they were not entitled, it should be strictly construed or at least should not be held to embrace any subject not specifically named therein. Kearney County *v.* Taylor, 54 Neb. 542.

Authorizing Taxation to Meet Expenses Unauthorized When Incurred. — Ritchie *v.* Franklin County, 22 Wall. (U. S.) 67; Kenosha *v.* Lamson, 9 Wall. (U. S.) 477; Johnson *v.* Campbell, 49 Ill. 316; Steines *v.* Franklin County, 48 Mo. 167, 8 Am. Rep. 87; Hannibal, etc., R. Co. *v.* Marion County, 36 Mo. 294; Barton County *v.* Walser, 47 Mo. 189; People *v.* Mitchell, 35 N. Y. 551; Weister *v.* Hade, 52 Pa. St. 474. See also Stuart *v.* Warren, 37 Conn. 225; Bartholomew *v.* Harwinton, 33 Conn. 408; Kunkle *v.* Franklin, 12 Minn. 127, 97 Am. Dec. 226; Comer *v.* Folsom, 13 Minn. 219; State *v.* Dem-

acts are not for that reason invalid,¹ for the general rule is that the legislature can validate any act which it might have originally authorized.²

Application to Pending Suits. — Curative statutes apply to pending suits unless they are expressly excepted.³

h. STATUTES OF LIMITATIONS. — The rule that a statute should have a prospective action only, unless its terms plainly show a legislative intention

arrest, 32 N. J. L. 528; *State v. Jackson*, 31 N. J. L. 189; *State v. Reed*, 31 N. J. L. 133; *State v. Harris*, 17 Ohio St. 608.

As to special assessments, see the title SPECIAL OR LOCAL ASSESSMENTS, vol. 25, p. 1229.

Curing Lack of Legislative Consent. — Acts of municipal corporations which require legislative consent may be made valid by retrospective acts. *Bridgeport v. Housatonic R. Co.*, 15 Conn. 475; *Bartholomew County v. Bright*, 18 Ind. 93; *Walpole v. Elliott*, 18 Ind. 238, 81 Am. Dec. 358; *Brown v. New York*, 63 N. Y. 239; *Fisk v. Kenosha*, 26 Wis. 23. See also titles CONSTITUTIONAL LAW, vol. 6, p. 941; COUNTIES, vol. 7, p. 972; MUNICIPAL CORPORATIONS, vol. 20, p. 1226.

Curing Irregularities in Exercise of the Power of Taxation. — *United States.* — *Wilkinson v. Leland*, 2 Pet. (U. S.) 627; *Carpenter v. Com.*, 17 How. (U. S.) 456; *Stockdale v. Insurance Companies*, 20 Wall. (U. S.) 323.

California. — *People v. Seymour*, 16 Cal. 332, 76 Am. Dec. 521.

Connecticut. — *Beach v. Walker*, 6 Conn. 190.

Indiana. — *De Pauw v. New Albany*, 22 Ind. 204.

Louisiana. — *New Orleans v. Poutz*, 14 La. Ann. 866; *New Orleans v. Cordeviolle*, 13 La. Ann. 268; *New Orleans v. Locke*, 14 La. Ann. 867.

New Jersey. — *State v. Newark*, 27 N. J. L. 185.

New York. — *Lennon v. New York*, 55 N. Y. 361; *Brewster v. Syracuse*, 19 N. Y. 116; *Litchfield v. McComber*, 42 Barb. (N. Y.) 288.

Ohio. — *Zanesville v. Richards*, 5 Ohio St. 589.

Pennsylvania. — *Montgomery v. Meredith*, 17 Pa. St. 42; *Stewart v. Shoenfelt*, 13 S. & R. (Pa.) 360; *Williston v. Colkett*, 9 Pa. St. 38; *Barnet v. Barnet*, 15 S. & R. (Pa.) 72, 16 Am. Dec. 516.

Wisconsin. — *Hasbrouck v. Milwaukee*, 13 Wis. 37, 80 Am. Dec. 718.

See also the title CONSTITUTIONAL LAW, vol. 6, p. 945.

Validating Effect Dates from Time Act Came into Force. — *Schmidt v. Ritz*, 31 Can. Sup. Ct. 602.

1. Statutes Valid. — *United States.* — *Satterlee v. Matthewson*, 2 Pet. (U. S.) 380; *Watson v. Mercer*, 8 Pet. (U. S.) 88; *Randall v. Kreiger*, 23 Wall. (U. S.) 137; *Ewell v. Daggs*, 108 U. S. 143; *Gross v. U. S. Mortgage Co.*, 108 U. S. 477; *Williams v. Paine*, 169 U. S. 55; *Rosenplanter v. Provident Sav. L. Assur.*, (C. C. A.) 96 Fed. Rep. 721.

Arkansas. — *Green v. Abraham*, 43 Ark. 420; *Johnson v. Richardson*, 44 Ark. 365.

California. — *Dentzel v. Waldie*, 30 Cal. 138.

Connecticut. — *Goshen v. Stonington*, 4 Conn. 209, 10 Am. Dec. 121.

Florida. — *Summer v. Mitchell*, 29 Fla. 179, 30 Am. St. Rep. 106.

Illinois. — *U. S. Mortgage Co. v. Gross*, 93 Ill. 483.

Indiana. — *Burget v. Merritt*, 155 Ind. 143; *Schneck v. Jeffersonville*, 152 Ind. 204; *Dowell v. Talbot Paving Co.*, 138 Ind. 675; *Rupert v. Martz*, 116 Ind. 72; *Maxey v. Wise*, 25 Ind. 1; *Walpole v. Elliott*, 18 Ind. 258, 81 Am. Dec. 358; *State v. Sickler*, 9 Ind. 67; *Andrews v. Russell*, 7 Blackf. (Ind.) 474.

Iowa. — *State v. Squires*, 26 Iowa 340; *Tilton v. Swift*, 40 Iowa 78.

Maryland. — *Grinder v. Nelson*, 9 Gill (Md.) 299, 52 Am. Dec. 694.

Massachusetts. — *Wildes v. Vanvoorhis*, 15 Gray (Mass.) 139.

Minnesota. — *Wisconsin v. Torinus*, 26 Minn. 1, 37 Am. Rep. 395; *Wistar v. Foster*, 46 Minn. 484, 24 Am. St. Rep. 241.

Montana. — *Mutual Ben. L. Ins. Co. v. Winne*, 20 Mont. 20.

New Jersey. — *State v. Newark*, 27 N. J. L. 185; *Baldwin v. Newark*, 38 N. J. L. 158.

New York. — *Syracuse City Bank v. Davis*, 16 Barb. (N. Y.) 188; *Chandler v. Northrop*, 24 Barb. (N. Y.) 129; *Curtis v. Leavitt*, 15 N. Y. 9, 228; *Forbes v. Halsey*, 26 N. Y. 53.

Ohio. — *Chesnut v. Shane*, 16 Ohio 599, 47 Am. Dec. 387.

Oregon. — *Stanley v. Smith*, 15 Oregon 505; *Mitchell v. Campbell*, 19 Oregon 198.

Pennsylvania. — *Tate v. Stooltzfoos*, 16 S. & R. (Pa.) 35, 16 Am. Dec. 546; *Donley v. Pittsburgh*, 147 Pa. St. 348, 30 Am. St. Rep. 738.

Rhode Island. — *Stokes v. Rodman*, 5 R. I. 405.

Tennessee. — *Shields v. Clifton Hill Land Co.*, 94 Tenn. 123, 45 Am. St. Rep. 700; *Butler v. U. S. Building, etc., Assoc.*, 97 Tenn. 679.

Virginia. — *Danville v. Pace*, 25 Gratt. (Va.) 1, 18 Am. Rep. 663.

Washington. — *Skellinger v. Smith*, 1 Wash. Ter. 369.

West Virginia. — *Huffman v. Alderson*, 9 W. Va. 616.

Wisconsin. — *Johnson v. Hill*, 90 Wis. 19; *Freiherr v. Singer*, 90 Wis. 608.

2. *Iowa Sav. etc., Assoc. v. Heidt*, 107 Iowa 297, 70 Am. St. Rep. 197; *Windsor v. Des Moines*, 101 Iowa 343; *Clinton v. Walliker*, 98 Iowa 655. See title CONSTITUTIONAL LAW, vol. 6, p. 940.

Legislature May Legalize Void Act. — *Fair v. Buss*, 117 Iowa 164; *Richman v. Muscatine County*, 77 Iowa 513, 14 Am. St. Rep. 308; *Tuttle v. Polk*, 84 Iowa 12; *Clinton v. Walliker*, 98 Iowa 655. *Contra*, *Finlayson v. Peterson*, 5 N. Dak. 587, 57 Am. St. Rep. 584. And see also *Altschuler v. Snyder*, 49 Neb. 22; *Weitz v. Walter A. Wood Reaping, etc., Mach. Co.*, 49 Neb. 434.

3. *Sidway v. Lawton*, 58 Ark. 117.

that it should operate retrospectively, applies to statutes of limitation.¹

Adverse Possession. — In *Texas* it has been held that a statute reducing the quantity of land to which title may be acquired by adverse possession applies to a person who has previously been in possession of a larger amount, but whose possession is not continued for a sufficient length of time to ripen into title of such larger amount under a prior statute.²

i. MECHANICS' LIEN STATUTES. — A mechanics' lien statute does not as a rule apply to cases where the contract was made and all the materials were furnished or all the work was done before it went into effect,³ but such statutes have been held to apply to cases where the contract was made and part of the work was done or part of the materials furnished before it went into effect, and part afterwards,⁴ and also to cases where the contract was made before the statute went into effect but was performed after that time.⁵

In the Enforcement of the Lien, however, the provisions of the law in force when the action to foreclose is brought are applicable.⁶

6. Adopted Statutes — *a. IN GENERAL.* — Congress or a state legislature, in adopting an English statute, is ordinarily deemed to have adopted also the definite and known construction put thereon by the English courts prior to its adoption.⁷

1. Statutes of Limitations. — *Friedmann v. McGowan*, 1 Penn. (Del.) 436; *Field v. Brokaw*, 148 Ill. 654; *Wilkerson v. Hudson*, 71 Miss. 130; *Relyea v. Tomahawk Paper, etc., Co.*, 102 Wis. 301, 72 Am. St. Rep. 878. See also title LIMITATION OF ACTIONS, vol. 19, p. 174.

Statutes Extending the Time Within Which an Appeal or Writ of Error May Be Allowed are, like other statutes relating to the remedy, construed to apply to cases pending the time of their passage. *Odum v. Garner*, 86 Tex. 374. See also *Garce v. Buffington*, (Tex. Civ. App. 1894) 25 S. W. Rep. 317.

2. Adverse Possession. — *Hardy v. Dunlap*, 7 Tex. Civ. App. 339.

3. Mechanics' Liens Statutes — *Colorado.* — *Townsend v. Wild*, 1 Colo. 10.

Florida. — *McCarthy v. Havis*, 23 Fla. 508.

Illinois. — *Arbuckle v. Illinois Midland R. Co.*, 81 Ill. 429; *Berkowsky v. Sable*, 43 Ill. App. 410; *Kinney v. Sherman*, 28 Ill. 520; *Springer v. Bowerman*, 75 Ill. App. 352; *Hughes v. Russell*, 43 Ill. App. 430.

Kentucky. — *Kinsy v. Eilerman*, (Ky. 1901) 62 S. W. Rep. 1009.

Minnesota. — *Nelson v. Sykes*, 44 Minn. 68; *Bardwell v. Mann*, 46 Minn. 285.

New York. — *Donaldson v. O'Connor*, 1 E. D. Smith (N. Y.) 695.

North Dakota. — *Mahon v. Surerus*, 9 N. Dak. 57.

Texas. — *Central, etc., R. Co. v. Henning*, 52 Tex. 466.

Wisconsin. — *Vanderpool v. La Crosse, etc., R. Co.*, 44 Wis. 652.

Statute Held Retroactive. — *The Indiana Act of March 9, 1889*, giving to persons who would be entitled to a mechanics' lien a preference for the payment of their claims when the debtor is in failing circumstances without the necessity of filing a notice of claim, applied in favor of a claimant whose work was done before the statute went into effect, where such statute became operative before the expiration of the time within which the claimant had the right to file his notice. *Goodhub v. Hornung*, 127 Ind. 181.

4. Part Performance After Enactment. — *Allen v. Schweigert*, 110 Ga. 323; *Rutherford v.*

Schweigert, 110 Ga. 324; *Tell v. Woodruff*, 45 Minn. 10; *Bardwell v. Mann*, 46 Minn. 285. *Contra*, *Griffin v. Seymour*, 15 Colo. App. 487.

5. Performance After Enactment of Contract Made Before. — *Summerlin v. Thompson*, 31 Fla. 369; *Knoxville, etc., R. Co. v. Hoge*, 26 S. W. Rep. 534, 16 Ky. L. Rep. 9; *John Spry Lumber Co. v. Sault Sav. Bank L. & T. Co.*, 77 Mich. 199, 18 Am. St. Rep. 396; *Wheaton v. Berg*, 50 Minn. 525; *Sullivan v. Brewster*, 1 E. D. Smith (N. Y.) 681; *Miller v. Moore*, 1 E. D. Smith (N. Y.) 739; *Hauptman v. Catlin*, 3 E. D. Smith (N. Y.) 666, *affirmed* 20 N. Y. 247. But compare *Hall v. Banks*, 79 Wis. 229.

Lien Merely a Cumulative Remedy. — See title MECHANICS' LIENS, vol. 20, p. 273.

6. Remedy for Enforcement. — *Berndt v. Armknecht*, 50 Ill. App. 467; *Main St. Hotel Co. v. Horton Hardware Co.*, 56 Kan. 448; *Nixon v. Cydon Lodge No. 5*, 56 Kan. 298; *Whittaker Brick Co. v. Seneca First Nat. Bank*, 2 Kan. App. 704; *Groesbeck v. Barger*, 1 Kan. App. 61; *Mahon v. Surerus*, 9 N. Dak. 57; *Hopkins v. Jamieson-Dixon Mill Co.*, 11 Wash. 308. See also *Barton v. Steinmiz*, 37 Ill. App. 141; *Paine v. Woodworth*, 15 Wis. 298.

But compare *Evans v. Springer*, 2 Miles (Pa.) 29, in which it was held that the provisions of the *Pennsylvania Act of June 16, 1836*, showed that a proviso that the writ must issue at least fifteen days previous to the return day had relation only to cases in which the claim itself was filed after the law went into operation.

7. Adopting Construction of English Statutes — *United States.* — *Pennock v. Dialogue*, 2 Pet. (U. S.) 1; *Cathcart v. Robinson*, 5 Pet. (U. S.) 264; *Tayloe v. Thomson*, 5 Pet. (U. S.) 358; *Kendall v. U. S.*, 12 Pet. (U. S.) 625; *Ex p. Wells*, 18 How. (U. S.) 311; *McDonald v. Hovey*, 110 U. S. 628; *Interstate Commerce Commission v. Baltimore, etc., R. Co.*, 145 U. S. 263; *Kirkpatrick v. Gibson*, 2 Brock. (U. S.) 391; *Ullman v. Meyer*, 10 Fed. Rep. 242.

Alabama. — *Kennedy v. Kennedy*, 2 Ala. 571. *Connecticut.* — *Alsop v. Nichols*, 9 Conn. 364; *State v. Rowley*, 12 Conn. 101.

Illinois. — *Grattan v. Grattan*, 18 Ill. 171, 65

Adoption by One State from Another. — The same rule applies where the statute of one state has been adopted by the legislature of another.¹

Am. Dec. 726; *Tyler v. Tyler*, 19 Ill. 151; *Fisher v. Deering*, 60 Ill. 114; *Hopkins v. Medley*, 97 Ill. 402.

Indiana. — *Fall v. Hazelrigg*, 45 Ind. 586, 15 Am. Rep. 278; *Johnson v. Johnson*, 106 Ind. 475, 55 Am. Rep. 762.

Iowa. — *Maltby v. Cooper*, Morr. (Iowa) 60. Massachusetts. — *Sheffield v. Lovering*, 12 Mass. 494; *Bigelow v. Morong*, 103 Mass. 289; *Com. v. Taylor*, 132 Mass. 262; *Ryalls v. Mechanics' Mills*, 150 Mass. 191; *Com. v. Hartnett*, 3 Gray (Mass.) 450.

Mississippi. — *Ingraham v. Regan*, 23 Miss. 213.

Missouri. — *Skouten v. Wood*, 57 Mo. 380; *Laranka v. Allen*, 76 Mo. 384.

New York. — *Waterford, etc., Turnpike Co. v. People*, 9 Barb. (N. Y.) 161.

Ohio. — *Burgett v. Burgett*, 1 Ohio 473, 13 Am. Dec. 634; *Brice v. Myers*, 5 Ohio 124.

Texas. — *Munson v. Hollowell*, 26 Tex. 475, 84 Am. Dec. 582.

Vermont. — *Adams v. Field*, 21 Vt. 256.

Virginia. — *Norfolk, etc., R. Co. v. Old Dominion Baggage Co.*, 99 Va. 111.

English Statute Re-enacted in Canada. — *Paradis v. Reg.*, 1 Can. Exch. 191; *McPherson v. Reg.*, 1 Can. Exch. 53; *Reg. v. Authier*, 6 Quebec Q. B. 146.

1. Adoption of Construction of Another State — United States. — *Allen v. St. Louis Nat. Bank*, 120 U. S. 34; *New York Fourth Nat. Bank v. Francklyn*, 120 U. S. 752; *Coulam v. Doull*, 133 U. S. 216; *Stutsman County v. Wallace*, 142 U. S. 293; *Coulter v. Stafford*, 48 Fed. Rep. 266; *Peterman v. Northern Pac. R. Co.*, 105 Fed. Rep. 335.

Arizona. — *Goldman v. Sotelo*, (Ariz. 1902) 68 Pac. Rep. 558.

California. — *People v. Coleman*, 4 Cal. 46, 60 Am. Dec. 581; *Taylor v. Palmer*, 31 Cal. 254; *People v. Webb*, 38 Cal. 477; *Lux v. Haggin*, 69 Cal. 384.

Colorado. — *Omaha, etc., Smelting, etc., Co. v. Tabor*, 13 Colo. 58, 16 Am. St. Rep. 185; *McGowney v. Gwillim*, 16 Colo. App. 284; *Colorado Milling, etc., Co. v. Mitchell*, 84 Colo. 289.

Dakota. — *White v. Chicago, etc., R. Co.*, 5 Dak. 508.

Delaware. — *Wilmington City R. Co. v. People's R. Co.*, (Del. 1900) 47 Atl. Rep. 245.

Florida. — *Duval v. Hunt*, 34 Fla. 85; *Florida Cent., etc., R. Co. v. Mooney*, 40 Fla. 17.

Illinois. — *Campbell v. Quinlin*, 4 Ill. 288; *Little v. Smith*, 5 Ill. 402; *Ballance v. Rankin*, 12 Ill. 420, 54 Am. Dec. 412; *Rigg v. Wilton*, 13 Ill. 15, 54 Am. Dec. 419; *Grattan v. Grattan*, 18 Ill. 171, 65 Am. Dec. 726; *Tyler v. Tyler*, 19 Ill. 151; *Potter v. Potter*, 41 Ill. 84; *Streeter v. People*, 69 Ill. 598; *Freese v. Tripp*, 70 Ill. 496; *Gage v. Smith*, 79 Ill. 219; *Martin v. Judd*, 81 Ill. 488; *Cole v. People*, 84 Ill. 216; *Hudson v. King*, 23 Ill. App. 118; *Cole v. Bentley*, 26 Ill. App. 260; *Glaubensklee v. Low*, 29 Ill. App. 408; *Harrison v. Hill*, 37 Ill. App. 32; *Requa v. Graham*, 86 Ill. App. 566; *Wanamaker v. Poorbaugh*, 91 Ill. App. 560; *Van Matre v. Sankey*, 148 Ill. 536, 39 Am. St. Rep. 196.

Indiana. — *Langdon v. Applegate*, 5 Ind. 327;

Clark v. Jeffersonville, etc., R. Co., 44 Ind. 263; *Fall v. Hazelrigg*, 45 Ind. 585, 15 Am. Rep. 278; *Monroe County v. Conner*, 155 Ind. 484.

Iowa. — *Eldridge v. Kuehl*, 27 Iowa 163; *Fairfield v. McNany*, 37 Iowa 77; *Jamison v. Burton*, 43 Iowa 282.

Kansas. — *Stebbins v. Guthrie*, 4 Kan. 353; *Doyle v. Boyle*, 19 Kan. 171; *Atchison, etc., R. Co. v. Franklin*, 23 Kan. 80; *Holden v. Garrett*, 23 Kan. 111; *Dille v. McGregor*, 24 Kan. 362; *Hamilton v. Hannibal, etc., R. Co.*, 39 Kan. 56.

Kentucky. — *Overall v. Overall*, Litt. Sel. Cas. (Ky.) 504; *Carney v. Hampton*, 3 T. B. Mon. (Ky.) 231.

Massachusetts. — *Com. v. Hartnett*, 3 Gray (Mass.) 450; *Bigelow v. Morong*, 103 Mass. 289; *Pratt v. American Bell Telephone Co.*, 141 Mass. 225, 55 Am. Rep. 465.

Michigan. — *Drennan v. People*, 10 Mich. 175; *Shaw v. Hoffman*, 25 Mich. 162; *Harrison v. Sager*, 27 Mich. 476; *Greiner v. Klein*, 28 Mich. 12; *Daniels v. Clegg*, 28 Mich. 32; *State v. Holmes*, 115 Mich. 456.

Minnesota. — *Matter of St. Paul, etc., R. Co.*, 37 Minn. 169; *Nicollet Nat. Bank v. City Bank*, 38 Minn. 85, 8 Am. St. Rep. 643.

Mississippi. — *Daily v. Swope*, 47 Miss. 367; *Marqueze v. Caldwell*, 48 Miss. 31.

Missouri. — *State v. Macon County Ct.*, 41 Mo. 463; *Skouten v. Wood*, 57 Mo. 380; *Griswold v. Seligman*, 72 Mo. 110; *Bowers v. Smith*, 111 Mo. 45; *Collins v. Wilhoit*, 35 Mo. App. 585; *St. Louis Nat. Bank v. Hoffman*, 74 Mo. App. 203; *Burnside v. Wand*, 170 Mo. 531.

Montana. — *Lindley v. Davis*, 6 Mont. 453; *Butte First Nat. Bank v. Bell Silver, etc., Min. Co.*, 8 Mont. 32; *Largey v. Chapman*, 18 Mont. 563; *Stadler v. Helena First Nat. Bank*, 22 Mont. 190, 74 Am. St. Rep. 582; *Butte, etc., Consol. Min. Co. v. Montana Ore Purchasing Co.*, 25 Mont. 41.

Nebraska. — *Goble v. Simeral*, (Neb. 1903) 93 N. W. Rep. 235; *O'Dea v. Washington County*, 3 Neb. 118; *Parks v. State*, 20 Neb. 515; *Coffield v. State*, 44 Neb. 417; *Forrester v. Kearney Nat. Bank*, 49 Neb. 655.

Nevada. — *Hess v. Pegg*, 7 Nev. 23; *Frankel v. Creditors*, 20 Nev. 49.

New Mexico. — *Reymond v. Newcomb*, 10 N. Mex. 151.

North Dakota. — *Cass County v. Security Imp. Co.*, 7 N. Dak. 528.

Ohio. — *Burgett v. Burgett*, 1 Ohio 473, 13 Am. Dec. 634; *Gray v. Askew*, 3 Ohio 480; *Irwin v. Bellefontaine Bank*, 6 Ohio St. 88; *Favorite v. Booher*, 17 Ohio St. 554; *Kulp v. Fleming*, 65 Ohio St. 321.

Oklahoma. — *Nixon v. Hubbell*, 4 Okla. 224. Oregon. — *Trabant v. Rummell*, 14 Oregon 17; *Everding v. McGinn*, 23 Oregon 15.

Rhode Island. — *In re O'Connor*, 21 R. I. 465.

South Dakota. — *Yankton Sav. Bank v. Guttererson*, 15 S. Dak. 486.

Texas. — *Munson v. Hollowell*, 26 Tex. 475, 84 Am. Dec. 582. *Compare Snoddy v. Cage*, 5 Tex. 106.

Utah. — *Dixon v. Ricketts*, (Utah 1903) 72 Pac. Rep. 947.

Virginia. — *Doswell v. Buchanan*, 3 Leigh

State Statutes Adopted by Congress. — So, whenever Congress in legislating for the District of Columbia or the territories has borrowed from the statutes of a state provisions which had received in that state a known and settled construction before their enactment by Congress, that construction must be deemed to have been adopted by courts together with the text which it expounded, and the provisions must be construed as they were understood at the time in the state.¹

b. LIMITATION OF RULE. — But while it is the ordinary rule to accept the interpretation given to a statute by the courts of the state by which it was originally adopted, the rule is not an absolute one to be followed under all circumstances.² An essential element upon which the presumption is based is that the statute has already received a known and definite construction; decisions in the state or sovereignty in which the statute was originally enacted subsequent to the adoption of the statute by another state will not be controlling in the latter.³ The meaning of a statute cannot be considered as settled by judicial construction so as to carry that construction with it to the jurisdiction where it is adopted when it has not been so settled by the highest judicial authority which can pass upon the question;⁴ and so the application of the rule has been denied because of the introduction of a provision in the adopted statute indicating a different intention on the part of the legislature⁵ or because of other alterations rendering the statutes materially different.⁶ Nor will the decisions of the state from which a statute has been adopted be

(Va.) 365, 23 Am. Dec. 280; *Danville v. Pace*, 25 Gratt. (Va.) 1, 18 Am. Rep. 663.

Wisconsin. — *Atty.-Gen. v. Brunst*, 3 Wis. 787; *Ableman v. Booth*, 11 Wis. 524, note by Dixon, C. J.; *Draper v. Emerson*, 22 Wis. 150; *Perkins v. Simonds*, 28 Wis. 94; *Poertner v. Russel*, 33 Wis. 201; *State v. Brophy*, 38 Wis. 413; *Westcott v. Miller*, 42 Wis. 461; *Kilkelly v. State*, 43 Wis. 609; *Pomeroy v. Pomeroy*, 93 Wis. 262; *State v. Wheeler*, 97 Wis. 96; *State v. Portage City Water Co.*, 107 Wis. 441.

Statute Adopted by Territorial Legislature. — *Henrietta Min., etc., Co. v. Gardner*, 173 U. S. 123.

Notes and Decisions Referred to by Commissioners in Preparation of Code of Another State. — *Bailey Loan Co. v. Seward*, 9 S. Dak. 326.

Statute Borrowed in Part. — *Stephan v. Metzger*, 95 Mo. App. 609.

Fact of Adoption to Be Established. — *Texas, etc., R. Co. v. Humble*, 181 U. S. 57. See also *Snoddy v. Cage*, 5 Tex. 106.

State Statute Enacted to Effectuate Federal Statute. — It will be presumed that the meaning of a state statute is the same as a federal statute it was enacted to effectuate. *Wilson v. Bradley*, 105 Ky. 52.

1. State Statutes Adopted by Congress. — *Metropolitan R. Co. v. Moore*, 121 U. S. 558; *Willis v. Eastern Trust, etc., Co.*, 169 U. S. 295; *Capital Traction Co. v. Hof*, 174 U. S. 1; *Sanger v. Flow*, (C. C. A.) 48 Fed. Rep. 152; *Robinson v. Belt*, 187 U. S. 41; *Blaylock v. Incorporated Town of Muskogee*, (C. C. A.) 117 Fed. Rep. 125, *affirming* (Indian Ter. 1901) 64 S. W. Rep. 609; *Strasburger v. Dodge*, 12 App. Cas. (D. C.) 37; *Zufall v. U. S.*, 1 Indian Ter. 638; *McFadden v. Blocker*, 3 Indian Ter. 224; *Boyt v. Mitchell*, (Indian Ter. 1901) 64 S. W. Rep. 610; *Chisolm v. Weisse*, 2 Okla. 611.

2. Whitney v. Fox, 166 U. S. 637; *F. M. Davis Ironworks Co. v. White*, (Colo. 1903) 71 Pac. Rep. 384.

3. Rule Inapplicable to Construction Subsequent to Adoption. — *Stutsman County v. Wallace*, 142 U. S. 293; *Germania L. Ins. Co. v. Ross-Lewin*, 24 Colo. 43, 65 Am. St. Rep. 215; *Myers v. McGavock*, 39 Neb. 843, 42 Am. St. Rep. 627; *Barnes v. Lynch*, 9 Okla. 11, 156.

Prior Official Publication of Decision Held Essential. — *Hunter v. Truckee Lodge No. 14*, 14 Nev. 38.

4. Construction by Highest Judicial Authority Held Necessary. — *Smith v. Baker*, 5 Okla. 326, in which it was held that the Supreme Court of the territory of Dakota was not the highest tribunal which could have passed upon the question involved, as an appeal would lie therein to the Supreme Court of the United States. See also *Andrews v. Hovey*, 124 U. S. 716. To the same effect see *Osborne v. Home L. Ins. Co.*, 123 Cal. 610.

5. In Nebraska Loan, etc., Assoc. v. Marshall, 51 Neb. 534, the court declined to apply the general rule because of another provision in the statutes which indicated a different intention on the part of the legislature, and because the courts of the state from which the statute had been taken had since altered their opinion as to its construction. See also *Goble v. Simeral*, (Neb. 1903) 93 N. W. Rep. 235.

6. Rule Inapplicable Where Statutes Are Materially Different. — *Stutsman County v. Wallace*, 142 U. S. 293; *Swofford Bros. Dry-Goods Co. v. Mills*, 86 Fed. Rep. 556; *Kirman v. Powning*, 25 Nev. 378.

In *Morgan v. State*, 51 Neb. 672, it was held that the prior construction had no more force than would be allowed to a previous decision of the court construing the statute, and hence might be rejected for reasons which would require such course had the decision been rendered by that court originally. In *Rhea v. State*, 63 Neb. 461, this proposition was somewhat restricted, and alteration of the statute by subsequent amendment as to a point on which the

followed where they are inconsistent with the constitution of the adopting state,¹ or not in harmony with the spirit and policy of its legislation and decisions.² Thus it has been held that the presumption will not be indulged where other jurisdictions having the identical or substantially the same provision had, almost without exception, given to the language a different construction long prior to the adoption in question.³ So where a statute construed in the state where it was enacted is adopted by another state, where it receives a different construction, and is then borrowed from the latter by a third state, the original construction may be adopted in the third state.⁴ It has been held that the interpretation which is required by the obvious meaning of the statute will not be rejected because apparently the highest court of the state from which the statute was taken has in a single decision taken a different view.⁵

VIII. AMENDMENT — 1. Definition. — Literally, an amendment is a correction or improvement of that which is incorrect, faulty, or defective.⁶ In legislation, an amendment means an alteration in the draft of a bill proposed, or in a law already passed.⁷

2. Amendment of Bill Changing Original Purpose. — A constitutional inhibition against amending a bill during passage so as to change its original purpose has reference to its amendment during its consideration by the legislature before it becomes a law, and does not attempt to prohibit a subsequent legislature from making any changes in a statute that may be deemed proper.⁸

3. Existence of Act Amended — a. IN GENERAL. — It has been said that a statute or entire section which is void and unconstitutional or which has been wiped out of existence by repeal is no longer the subject of further legislation by amendment.⁹

b. ACTS PREVIOUSLY AMENDED. — In this position in some states are statutes and sections which have previously been amended and therefore, by

prior construction largely rested was held to afford ground for independent interpretation. *Goble v. Simeral*, (Neb. 1903) 93 N. W. Rep. 236.

Alteration in Punctuation Held Immaterial. — *Griffiths v. Montandon*, (Idaho 1895) 39 Pac. Rep. 548.

1. Decision Adverse to Constitutional Provisions. — *In re Swearingen*, 5 Sawy. (U. S.) 52; *Little v. Smith*, 5 Ill. 402; *Rigg v. Wilton*, 13 Ill. 18, 54 Am. Dec. 419; *Bowers v. Smith*, 111 Mo. 45.

2. Oleson v. Wilson, 20 Mont. 544, 63 Am. St. Rep. 639; *Frankel v. Creditors*, 20 Nev. 49. See also *Florida Cent., etc., R. Co. v. Mooney*, 40 Fla. 17; *Gray v. Askew*, 3 Ohio 466.

3. Coad v. Cowhick, 9 Wyo. 316.

4. Coulam v. Doull, 133 U. S. 216.

5. Whitney v. Fox, 166 U. S. 637. See also *Gray v. Askew*, 3 Ohio 466.

6. Amendment Defined. — See Cent. Dict., "Amend."

7. State v. Wright, 14 Oregon 369; *Warren v. Crosby*, 24 Oregon 562.

When Act Amendatory. — It is only when the legislature in passing a subsequent act has under consideration the subject-matter contained in a former enactment, and is working along the same legislative line, that the subsequent act can fairly be termed amendatory of the prior; but when the subsequent act dealing with a special subject happens in some particulars to be related to matters in prior enactments in force, it appears that it cannot be considered an amendatory statute. *In re Ashby*, 60 Kan. 101.

Where the subject-matter of the claim claiming to be an amendment differed from that of the

original act, it was held to be no amendment. *Wilson v. Board of Education*, 12 S. Dak. 535. See also *Murray v. State*, 112 Ga. 7.

Changes Not Affecting the Application, Force or Effect of an Act, or any portion thereof, do not constitute an amendment within the provision that an amendatory act must set out the act amended. *Gilbert v. Moody*, 2 Idaho 747.

8. State v. Pike County, 144 Mo. 282. See also *Mutual Ben. L. Ins. Co. v. Winne*, 20 Mont. 35.

A Defect in the Title of a Bill May Be Corrected by amendment at any time before the bill is put upon its passage. *Richards v. State*, (Neb. 1902) 91 N. W. Rep. 878.

9. Void and Unconstitutional Acts. — *Cowley v. Rushville*, 60 Ind. 327; *Carr v. Fowler*, 74 Ind. 590; *Copeland v. Sheridan*, 152 Ind. 107; *Peele v. Ohio, etc., Oil Co.*, 158 Ind. 377.

"When the entire act is void there is nothing to amend." *Lynch v. Murphy*, 119 Mo. 173.

Repealed Acts. — See *Fletcher v. Prather*, 102 Cal. 418; *Lampkin v. Pike*, 115 Ga. 829; *Howlett v. Cheetham*, 17 Wash. 626.

"It would seem to be impossible to contend that there could be a valid amendment to a non-existent and defunct statute." *Newark v. Mt. Pleasant Cemetery Co.*, 58 N. J. L. 168.

The *Montana Political Code* provides that an act amending a section of an act repealed is void. *Dowdy v. Pittwood*, 23 Mont. 113.

A Statute Which Has Expired by Constitutional Limitation (as where the legislature can only provide for a two years' levy of taxes) is not a mere nullity, and the legislature may amend it. *State v. Bailey*, 56 Kan. 81.

construction or express constitutional provision, repealed.¹ But where an amendment is considered as a continuance of so much of the law as is left unchanged in form or substance, or as having taken the place of the original enactment and as incorporated therein for all purposes including amendment, a subsequent statute purporting further to amend the original act is to be construed in accordance with the intent of the legislature as operating on the prior amendment, and effect will be given to it.²

c. ACTS WHOLLY UNCONSTITUTIONAL. — In a recent well-considered case it is held that a statute though wholly unconstitutional is not absolutely null and void and is more properly said to be merely unenforceable; that the question of the amendment of such a statute is one of identification only; and that if the amendatory act properly identifies it and removes the constitutional objections it is valid although the whole amended act is not repealed.³ In many cases it has been held that statutes undertaking to amend and curing the defects in prior ones which were unconstitutional merely because the legis-

1. Amendment of Amended Statute Void. — An act of the legislature which attempts to amend a section of a statute which has already been amended, deals with something not in existence and is void. *Wall v. Garrison*, 11 Colo. 517; *Lampkin v. Pike*, 115 Ga. 827; *Louisville, etc., R. Co. v. East St. Louis*, 134 Ill. 656; *Draper v. Falley*, 33 Ind. 465; *Clay County v. Markle*, 46 Ind. 96; *Longlois v. Longlois*, 48 Ind. 60; *Blakemore v. Dolan*, 50 Ind. 194; *Feibleman v. State*, 98 Ind. 518; *Hall v. Craig*, 125 Ind. 529; *Boring v. State*, 141 Ind. 653; *Stony Creek Tp. v. Kabel*, 144 Ind. 501; *Smith v. McClain*, 146 Ind. 77; *Helt v. Helt*, 152 Ind. 142; *Peele v. Ohio, etc., Oil Co.*, 158 Ind. 377. But see *Fuller v. Cox*, 135 Ind. 47; *Walsh v. State*, 142 Ind. 362.

2. Amendments of Amended Statutes Valid. — *United States.* — *Columbia Wire Co. v. Boyce*, (C. C. A.) 104 Fed. Rep. 172.

Alabama. — *Wilkinson v. Ketler*, 59 Ala. 306; *State v. Warford*, 84 Ala. 15; *Harper v. State*, 109 Ala. 28.

California. — *Fletcher v. Prather*, 102 Cal. 413.

Florida. — *Basnett v. Jacksonville*, 19 Fla. 664; *Jacksonville, etc., R. Co. v. Adams*, 33 Fla. 612.

Kansas. — *Reynolds v. Board of Education*, (Kan. 1903) 72 Pac. Rep. 274.

Massachusetts. — *Com. v. Kenneson*, 143 Mass. 418.

Michigan. — *People v. Pritchard*, 21 Mich. 236.

New Jersey. — *Allison v. Corker*, 67 N. J. L. 601.

New York. — *White v. Inebriates Home*, 141 N. Y. 123; *People v. Upson*, 79 Hun (N. Y.) 87.

Ohio. — *State v. Brewster*, 39 Ohio St. 653.

Texas. — *Greer v. State*, 22 Tex. 588; *Ex p. Segars*, 32 Tex. Crim. 553; *Ratigan v. State*, 33 Tex. Crim. 301.

Wisconsin. — *Golonbieski v. State*, 101 Wis. 333.

As to repeal of original statutes after their amendment, see *infra*, this title, *Repeal*.

Where the second amending act refers merely to the original act overlooking the first repealing act, provisions in the latter not repeated are repealed. *Wilkinson v. Ketler*, 59 Ala. 306.

In *Nebraska*, when by implication a statute has been repealed by reason of a later law conflicting with it, it is no longer the subject of amendment. *State v. Benton*, 33 Neb. 823.

But the case is different when a statute has been expressly amended by another statute which takes its place. *State v. Kearney*, 49 Neb. 325; *State v. Wahoo*, 62 Neb. 40.

An Act Repealed by Mistake May Be Amended. — *Howlett v. Cheetham*, 17 Wash. 626.

No Intent to Deal with Amendatory Statute Deducible. — *Newark v. Mt. Pleasant Cemetery Co.*, 58 N. J. L. 168. The court referred to and distinguished the cases cited in this note, taking *Com. v. Kenneson*, 143 Mass. 418, as a type, and saying that in that case each amendatory enactment covered the whole subject of the original section and that the decision "was put upon the ground that the sections in each statute were complete in themselves, and, being substitutes for each other, stood like independent enactments."

Republication Held Not Re-enactment. — A republication in a statute amendatory to a prior act of a section thereof which had been repealed by an intermediate act, has been held not to be a re-enactment of such section, where the whole amendatory act, construed in the light of the intention of the legislature, appeared to negate the intention of re-enactment. *Stingle v. Nevel*, 9 Oregon 62.

3. Amendment of Act Wholly Unconstitutional. — *Allison v. Corker*, 67 N. J. L. 601. In this case the court said: "If properly to be called void, it [an unconstitutional act] is only so with reference to claims based upon it. * * * The function of the judicial department with respect to legislation deemed unconstitutional is not exercised *in rem*, but always *in personam*. The Supreme Court cannot set aside a statute as it can a municipal ordinance. * * * An unconstitutional statute is not merely blank paper. The solemn act of the legislature is a fact to be reckoned with. Nowhere has power been vested to expunge it or remove it from its proper place among statutes."

When an act is totally unconstitutional and void it does not admit of amendment, but when it is void in one section only, or in a part of one section, it may properly be amended. *Lynch v. Murphy*, 119 Mo. 166.

lature had failed to comply with constitutional requirements in enacting them were valid laws taking effect from their enactment.¹

d. AMENDMENTS TAKING EFFECT AS INDEPENDENT LEGISLATION.—When the amendment takes effect as independent legislation of its own force, it is obvious that its validity is unaffected by the fact that the act which it purports to amend is void, unconstitutional, or repealed.²

4. Identification of Act Amended—*a. IN GENERAL.*—An amendatory act, in order to be effective, must identify the act intended to be amended. In the absence of any specific constitutional provision on the subject, this is usually done by referring to the title, chapter, and time of passage of the act to be amended.³ But the sufficiency of the reference is now generally determined by constitutional provisions in the several states.⁴

1. *State v. Corbett*, 61 Ark. 226; *Walsh v. State*, 142 Ind. 357; *Ferry v. Campbell*, 110 Iowa 290; *State v. Cincinnati*, 52 Ohio St. 419. See also *English, etc., Mortg., etc., Co. v. Hardy*, 93 Tex. 300.

When the adoption of a new constitution has rendered certain provisions in a prior act unconstitutional, the unconstitutionality may be removed by subsequent amendment to the original act. *Jacksonville, etc., R. Co. v. Adams*, 33 Fla. 608.

2. Amendment as Independent Legislation.—*Beatrice v. Masslich*, (C. C. A.) 108 Fed. Rep. 743; *English, etc., Mortg., etc., Co. v. Hardy*, 93 Tex. 300. See also the last note but one *supra*.

An Act Repealed by Amendment may be the subject of a subsequent amendment which will be enforced as valid, if the legislature has authority over the subject-matter, if its purpose is plain, and if the statute is such that it may stand as an independent enactment. *Stone v. State*, (Ala. 1903) 34 So. Rep. 629; *Reynolds v. Board of Education*, (Kan. 1903) 72 Pac. Rep. 274; *People v. County Canvassers*, 143 N. Y. 84.

3. Identification of Amended Act.—*People v. Hatter*, (Ct. Sess.) 22 N. Y. Supp. 688; *Garland v. Hickey*, 75 Wis. 178; *Land, etc., Co. v. Brown*, 73 Wis. 294.

Identification by the Title of the Amending Act Is Sufficient.—*State v. Robinson*, 32 Oregon 43; *Ratigan v. State*, 33 Tex. Crim. 301. See also *State v. Courtney*, 27 Mont. 378. And see *supra*, this title, V. 9. g. (5) *Amending and Supplemental Acts*.

In Amendments by Implication no reference to the amended statute is essential. See *infra*, this section, 6. b. (2) *d. Amendments by Implication*.

4. See *supra*, this title, V. 9. g. (5) *Amending and Supplemental Acts*, and *infra*, this section.

The Provision of the Indiana Constitution has been held to require two things: (1) The title of the act to be amended should be referred to by setting out the same in the title of the amendatory act; and (2) the section as amended should be set forth and published at full length. When the act amended is identified as required, the court will resort to means other than the title to determine the act in case of ambiguity; but where the constitutional requirements have not been fulfilled, the court will not resort to other means of identification, although the act intended would thereby be ascertained beyond question. *Citizens' St. R. Co. v. Haugh*, 142 Ind. 254; *O'Mara v. Wabash R. Co.*, 150 Ind. 648; *Lingquist v. State*, 153 Ind. 542; *Mankin*

v. Pennsylvania Co., (Ind. 1903) 67 N. E. Rep. 229.

The Constitutional Provisions of Georgia and Tennessee are unique.

The constitution of *Georgia* provides that no law or section of the code shall be amended by mere references to its title or the number of the section of the code, but that the amending act "shall distinctly describe the law amended" as well as the alteration to be made. Setting out the act amended is a sufficient "description," and the description may follow the declaration of what the amendment shall be. *Fite v. Black*, 85 Ga. 413; *Georgia Southern, etc., R. Co. v. George*, 92 Ga. 760; *Foster v. State*, 99 Ga. 56; *Gilbert v. Georgia R., etc., Co.*, 104 Ga. 412; *Ryle v. Wilkinson County*, 104 Ga. 473; *Puckett v. Young*, 112 Ga. 578.

All that the constitution requires is that the act amended shall be identified in some other way than by a mere reference to its title. *Welborne v. State*, 114 Ga. 822.

In *Tennessee* the constitution (art. 2, § 17) requires that acts which "repeal, revive, or amend former laws shall recite in their caption or otherwise the title or substance of the law repealed, revived, or amended." In *Memphis St. R. Co. v. State*, (Tenn. 1903) 75 S. W. Rep. 730, the construction of this clause is reviewed at length in the light of all the previous decisions of the court, and it is held that a mere reference to chapter and volume continuing the law is not sufficient, and that a reference to Shannon's Code does not cure the defect, this not being an authorized publication. But in *State v. Runnels*, 92 Tenn. 328, it is said that the words "Code of Tennessee" are the official title of the compilation of 1858, and that a reference to a section of the Code of Tennessee sufficiently recites the legal title of the law amended. In this case it was also held that the word "caption" should be construed as synonymous with "title," and that "otherwise" means in the body of the repealed, revised, or amended statute. See *Ransome v. State*, 91 Tenn. 717, construing "substance" as synonymous with "subject," and "recital," as synonymous with "reference." See also *Hardaway v. Lilly*, (Tenn. Ch. 1898) 48 S. W. Rep. 712; *Wallace v. Goodlett*, 104 Tenn. 670.

Scope of Amendment of Particular Section.—An amendment purporting to deal with a particular section of an act cannot deal with matters specifically provided for in another section of the original act, although, subject to this principle, such an amendment may bring within

Amendment of "Section." — The requirement that the section amended shall be set out in the amendatory statute has been held to require the amendatory statute to set out the whole section as amended, into however many clauses it may be divided.¹ On the other hand it has been said that "section" in this provision of the constitution refers merely to a subdivision of the legislative enactment, and a statute which sets out the subdivision amended is not within the inhibition.²

b. ERRORS IN REFERENCE. — An error in the reference is immaterial where the intent is apparent;³ but if the error is such that the act to be amended cannot be ascertained definitely, the amendatory act is void for uncertainty.⁴

5. Title of Amendatory Act. — The application to the titles of amendatory acts of the ordinary constitutional provision that no law shall embrace more than one subject, which shall be expressed in its title, has been already treated in this title.⁵

6. Form and Contents of Amendatory Act — *a. IN GENERAL.* — In the absence of a constitutional prohibition, a statute or section thereof may be amended in one or more of four ways: first, by striking out certain words; second, by striking out certain words and inserting others; third, by inserting certain words; and, fourth, by adding other provisions. These modes of amendment did not repeal or disturb the existence of the parts of the original section not stricken out, but the objection thereto was that it tended to confuse the law and make it uncertain, because of the difficulty of clearly reading the original section with the amendments, a difficulty which largely increased with each subsequent amendment.⁶

Amendment "So as to Read as Follows." — To obviate this difficulty, the practice was adopted of using the words "so as to read as follows," and introducing thereafter the whole of the statute or section amended, with the changes made by the amending act. The effect of amendment in this form is to put the language of the new statute in place of that of the old. The portions unchanged are considered to have been the law all along (either as not having been repealed or as having been repealed and re-enacted at the same instant of time), and the new or changed portions as taking effect from the time of the amendatory enactment and not before.⁷ The amendment for purposes of construction takes its place as part of the original act.⁸ Constitutions now

the provisions of the section amended matters which might logically and legally have been placed there originally. *State v. American Sugar Refining Co.*, 106 La. 553.

1. Section. — *Martinsville v. Frieze*, 33 Ind. 507 (quoted under SECTION, vol. 25, p. 177); *Cowley v. Rushville*, 60 Ind. 332; *Copeland v. Sheridan*, 152 Ind. 108.

2. State v. Babcock, 23 Neb. 128 (quoted under SECTION, vol. 25, p. 177); *Fenton v. Yule*, 27 Neb. 758; *Baird v. Todd*, 27 Neb. 782; *State v. Partridge*, 29 Neb. 158; *State v. Bemis*, 45 Neb. 724; *State v. Kearney*, 49 Neb. 325; *Nobles v. State*, 38 Tex. Crim. 330.

3. Trivial Errors in Reference — *California*. — *People v. King*, 28 Cal. 265.

Illinois. — *School Directors v. School Directors*, 73 Ill. 249.

Kansas. — *Baker v. Agricultural Land Co.*, 62 Kan. 79.

Montana. — *Lane v. Missoula County*, 6 Mont. 473; *Carruthers v. Madison County*, 6 Mont. 482.

Nebraska. — *Richards v. State*, (Neb. 1902) 91 N. W. Rep. 878.

North Carolina. — *State v. Woolard*, 119 N. Car. 779.

West Virginia. — *State v. Cross*, 44 W. Va. 315.

Wisconsin. — *Madison, etc., Plank-Road Co. v. Reynolds*, 3 Wis. 287.

See also *supra*, this title, V. 9. g. (5) (a) aa. *In General*.

Thus an error in the amendatory act in stating the date of the approval of the former statute was held not to render void the amendatory act. *Saunders v. Provisional Municipality*, 24 Fla. 226. See also *Harper v. State*, 109 Ala. 28; *Scott v. Missouri Pac. R. Co.*, 38 Mo. App. 523.

4. Amendatory Act Void for Uncertainty in Reference. — *Murphy v. Eney*, 77 Md. 80.

5. See *supra*, this title, V. 9. g. (5) *Amending and Supplemental Acts*.

6. Methods of Amendment. — *Fletcher v. Prather*, 102 Cal. 418.

Such a method of amendment is not prohibited by the *Georgia* constitution, which "requires only description not transcription." *Fite v. Black*, 85 Ga. 413.

7. Amendments "So as to Read as Follows." — *Central Pac. R. Co. v. Schackelford*, 63 Cal. 265; *Swamp-Land Dist. No. 307 v. Glide*, 112 Cal. 85; *Ely v. Holton*, 15 N. Y. 598. See also *infra*, this section, 7. a. *Not Usually Retroactive*; 8. b. *Amendment as Repeal or Continuation*.

8. See *infra*, this section, 8. a. *In General*.

usually require that amendments shall set out the statute as amended.¹

b. CONSTITUTIONAL REQUIREMENT OF RECITAL OF ACT — (1) *In General.* — It is now provided by the constitutions of many of the states that no act shall be amended by reference to its title only, but that the act or section as amended shall be enacted and published at length, for it was found by experience that the old method of striking out and inserting words and provisions was liable to abuse, being calculated to mislead the careless and even affording an opportunity for intentional deception.²

Construction in Favor of Validity. — Where one construction of ambiguous words in an amendatory act would render it obnoxious to this constitutional inhibition and another construction would render it valid, the latter must be adopted.³

Prospective. — Such a constitutional provision is prospective only.⁴

(2) *To What Legislation Applicable* — (a) *Independent and Dependent Legislation.* — The constitutional requirement is not intended to embrace a statute complete in itself, and such a statute may modify or amend prior statutes without referring to them.⁵ And a complete and original enactment may be valid although it purports to be an amendment and is insufficient as such.⁶ But a statute not complete in itself, but simply and clearly amendatory of a former statute, even though it does not purport to be amendatory, falls directly within the constitutional inhibition.⁷

(b) *Codes and Revisions.* — A code, body, or system of law, adopted or enacted by a single act of the legislature, is not within the letter or spirit of this mandate of the constitution, though it may contain inconsistent or repugnant provisions, or one section or part may be modified, and to the extent of the modification controlled by another.⁸ In *Louisiana* the adoption of a code by

1. See the following paragraphs.

2. **Purpose of Constitutional Provision.** — *People v. Mahaney*, 13 Mich. 497, is the leading case on the meaning and scope of this constitutional provision, which Cooley, J., discusses with great ability. See also the cases cited in the following notes.

The Words "Amend" or "Amendment" Need Not Appear in the Body of the Act where it appears by the title that the act is amendatory of a prior act. *Ballou v. Black*, 17 Neb. 389.

The Constitutional Provision Refers to the Body of the Act or section, and an amendment to an existing act requires no new title. *Northern Pac. Exp. Co. v. Metschan*, (C. C. A.) 90 Fed. Rep. 80; *Oregon v. Phenline*, 16 Oregon 107.

3. **Ambiguities Resolved in Favor of Constitutionality.** — *Horkey v. Kendall*, 53 Neb. 522, 68 Am. St. Rep. 623; *State v. Frank*, 60 Neb. 337. See also *supra*, VI. 11. c. *Unconstitutionality*.

4. **Operation Prospective.** — *Phoenix Assur. Co. v. Fire Dept.*, 117 Ala. 645.

5. **Independent Acts** — *United States*. — *In re Buelow*, 98 Fed. Rep. 86.

Alabama. — *Burton v. State*, 107 Ala. 108; *State v. Rogers*, 107 Ala. 455; *Ex p. Thomas*, 113 Ala. 1; *Phoenix Assur. Co. v. Fire Dept.*, 117 Ala. 645; *Cobb v. Vary*, 120 Ala. 267; *Thomas v. State*, 124 Ala. 48; *Montgomery v. Birdsong*, 126 Ala. 632.

Georgia. — *Peed v. McCrary*, 94 Ga. 487.

Illinois. — *People v. Loeffler*, 175 Ill. 585; *People v. Knopf*, 183 Ill. 410.

Michigan. — *Rice v. Hosking*, 105 Mich. 303, 55 Am. St. Rep. 448.

Montana. — *King v. Pony Gold-Min. Co.*, 24 Mont. 470,

Nebraska. — *Smails v. White*, 4 Neb. 353; *Nebraska Tel. Co. v. Cornell*, 59 Neb. 737.

Oregon. — *Warren v. Crosby*, 24 Oregon 558.

Texas. — *Washington v. State*, 28 Tex. App. 411; *Clark v. Finley*, 93 Tex. 171.

Washington. — *Copland v. Pirie*, 26 Wash. 483.

See also *State v. De Hart*, 109 La. 570, and *infra*, this section, (d) *Amendments by Implication*.

Whether an Amendatory Act or an Original Act Shall Be Employed is matter of legislative discretion which the courts cannot control. *State v. Rogers*, 107 Ala. 455; *Birmingham Union R. Co. v. Elyton Land Co.*, 114 Ala. 70.

If an Act Is Clearly Amendatory in Effect, it has been said elsewhere, the legislature may not evade the constitutional provision merely by casting it in the form of new legislation. *Board of Education v. Moses*, 51 Neb. 288; *German American F. Ins. Co. v. Minden*, 51 Neb. 874. See also *State v. Trenton*, 53 N. J. L. 571.

6. **Independent Acts Insufficient as Amendments.** — *Gandy v. State*, 86 Ala. 20; *State v. Bennett*, (Mo. 1889) 11 S. W. Rep. 264.

7. **Dependent Acts.** — *In re Buelow*, 98 Fed. Rep. 86; *Sovereign v. State*, 7 Neb. 409; *In re House Roll* 284, 31 Neb. 505; *Stricklett v. State*, 31 Neb. 674; *State v. Moore*, 48 Neb. 870; *Board of Education v. Moses*, 51 Neb. 288; *State v. Tibbets*, 52 Neb. 228, 66 Am. St. Rep. 492; *Copland v. Pirie*, 26 Wash. 483.

8. **Codes.** — *Ex p. Thomas*, 113 Ala. 1. See also *Gilbert v. Moody*, 2 Idaho 747.

An act previously unconstitutional may be validated by being included in a code. *Central of Georgia R. Co. v. State*, 104 Ga. 831; *McFarland v. Donaldson*, 115 Ga. 567.

reference merely is prohibited.¹

(c) **Supplements and Additions.** — The requirement that an amendatory act shall recite the provisions of the act or section as amended does not apply to supplemental acts not in any way altering or modifying the original act,² nor to those merely adding new sections to an existing statute without modifying it,³

(d) **Amendments by Implication.** — Whenever there is an irreconcilable conflict between two acts, the later, as the more recent expression of the legislative will, must prevail, and to the extent of the conflict between the provisions of the two enactments it supplants the earlier and amends it by implication.⁴ It is well settled that acts complete and perfect in themselves, which, without being amendatory in form, amend other legislation on the same subject by implication merely, are valid and are not within the mischief designed to be remedied by constitutional provisions requiring the recital of laws as amended.⁵

1. **Louisiana. — Adoption of Code by Reference Prohibited.** — The constitution of Louisiana (Const. 1879, art. 31) provides that the General Assembly shall never adopt any system or code of laws by general reference to such system or code of laws, but in all cases shall recite at length the several provisions of the laws it may enact. This provision has been contained in every constitution of the state, including the earliest one, that of 1812. It is not retroactive in operation, and so was not infringed by the section of the act of 1805, adopting common-law definitions of crimes, nor by the subsequent re-enactments of this section, they being construed as re-enactments merely and not new statutes. *State v. Lacombe*, 12 La. Ann. 195; *State v. Smith*, 30 La. Ann. 846; *State v. Dennison*, 31 La. Ann. 847; *State v. Gaster*, 45 La. Ann. 636; *State v. Vicknair*, 52 La. Ann. 1921. See also *State v. De Hart*, 109 La. 570.

2. **Supplemental Acts — United States.** — *Loomis v. Runge*, 66 Fed. Rep. 856, 30 U. S. App. 133 (defining "supplemental" as "that which supplies a deficiency or meets a want," and holding that an act to supply defective legislation, if in some sense amendatory, is not obnoxious to the Texas constitutional provision); *U. S. v. Stocking*, 87 Fed. Rep. 858. *Georgia.* — *Bagwell v. Lawrenceville*, 94 Ga. 654.

Kansas. — *Berry v. Kansas City, etc., R. Co.*, 52 Kan. 759, 39 Am. St. Rep. 371.

Nebraska. — See *In re State Treasurer's Settlement*, 51 Neb. 135.

New Jersey. — *Bradley v. Loving*, 54 N. J. L. 227; *State v. Hancock*, 54 N. J. L. 393.

Pennsylvania. — *Com. v. Connell*, 5 Lack. Leg. N. (Pa.) 332; *Forty Fort v. Forty Fort Water Co.*, 9 Kulp (Pa.) 241.

Virginia. — *Sinclair v. Young*, 100 Va. 284.

3. **Addition of New Sections.** — The Borrowdale, 39 Fed. Rep. 376; *Edwards v. Denver, etc., R. Co.*, 13 Colo. 59; *Boonville v. Trigg*, 46 Mo. 288; *State v. Chambers*, 70 Mo. 625; *State v. Thruston*, 92 Mo. 325, 1 Am. St. Rep. 720; *Morrison v. St. Louis, etc., R. Co.*, 96 Mo. 602; *State v. Hendrix*, 98 Mo. 374; *In re White*, 33 Neb. 812; *Werner v. Galveston*, 72 Tex. 22.

4. *Henrietta Min., etc., Co. v. Gardner*, 173 U. S. 128. See *infra*, this title, *Repeal*.

5. **Amendments by Implication — Alabama.** — *Ex p. Pollard*, 40 Ala. 100; *Falconer v. Robinson*, 46 Ala. 340; *Ware v. St. Louis Bagging, etc., Co.*, 47 Ala. 667.

Arkansas. — *Scales v. State*, 47 Ark. 476, 58

Am. Rep. 768; *Little Rock v. Quindley*, 61 Ark. 622.

California. — *Baum v. Raphael*, 57 Cal. 361; *Hellman v. Shoulters*, 114 Cal. 136.

Colorado. — *Denver Circle R. Co. v. Nestor*, 10 Colo. 403.

Florida. — *Lake v. State*, 18 Fla. 501; *State v. Hocker*, 36 Fla. 358.

Georgia. — *Peed v. McCrary*, 94 Ga. 488; *Johnson v. Southern Mut. Bldg., etc., Assoc.*, 97 Ga. 622; *Swift v. Van Dyke*, 98 Ga. 725; *Collins v. Russell*, 107 Ga. 423.

Illinois. — *People v. Wright*, 70 Ill. 396; *Timm v. Harrison*, 109 Ill. 593; *School Directors v. School Directors*, 135 Ill. 464; *English v. Danville*, 150 Ill. 92; *People v. Loeffler*, 175 Ill. 585.

Indiana. — *Spencer v. State*, 5 Ind. 41; *Branham v. Lange*, 16 Ind. 497; *State v. Gerhardt*, 145 Ind. 439.

Kansas. — *State v. Cross*, 38 Kan. 696. See also *In re Ashby*, 60 Kan. 101.

Maryland. — *Davis v. State*, 7 Md. 152, 61 Am. Dec. 331.

Michigan. — *People v. Mahaney*, 13 Mich. 496; *Underwood v. McDuffee*, 15 Mich. 361, 93 Am. Dec. 194; *People v. Wands*, 23 Mich. 385; *Swartwout v. Michigan Air Line R. Co.*, 24 Mich. 399; *Mok v. Detroit Bldg., etc., Assoc.* No. 4, 30 Mich. 511; *Ripley v. Evans*, 87 Mich. 217.

Missouri. — *State v. Geiger*, 65 Mo. 306.

Montana. — *King v. Pony Gold Min. Co.*, 24 Mont. 478. See *State v. Courtney*, 27 Mont. 378.

Nebraska. — *Stricklett v. State*, 31 Neb. 677; *State v. Benton*, 33 Neb. 823; *Smith v. State*, 34 Neb. 689; *State v. Moore*, 48 Neb. 870; *Affholder v. State*, 51 Neb. 91; *Wenham v. State*, (Neb. 1902) 91 N. W. Rep. 421; *De France v. Harmer*, (Neb. 1902) 92 N. W. Rep. 159.

New Jersey. — *Evernham v. Hulit*, 45 N. J. L. 53; *State v. Trenton*, 53 N. J. L. 571; *State v. Hancock*, 54 N. J. L. 393.

Ohio. — *Lehman v. McBride*, 15 Ohio St. 573.

Oregon. — *Fleischner v. Chadwick*, 5 Oregon 152; *Warren v. Crosby*, 24 Oregon 558 (*overruling State v. Wright*, 14 Oregon 370); *Hoffman v. Branch*, 24 Oregon 588.

Pennsylvania. — *Pinkerton v. Pennsylvania Traction Co.*, 193 Pa. St. 229; *Gallagher v. Mac Lean*, 193 Pa. St. 583, *affirming* 6 Pa. Dist. 315; *Com. v. Connell*, 5 Lack. Leg. N. (Pa.) 332; *Matter of Emsworth*, 5 Pa. Super. Ct. 29.

Tennessee. — *Home Ins. Co. v. Taxing Dist.*,

(3) *What Is Sufficient Recital* — Only the Act as Amended and Not the Old Law. — It is a sufficient compliance with the requirement to set out the law as amended, without reciting the old law as it stood before the amendment.¹ The peculiar phraseology of the *Missouri* constitutional provision has been held to be satisfied by setting out the statute as amended without specifying the changes made.²

(4) *Whether Mandatory or Directory*. — Constitutional provisions requiring the publication of the act as amended are usually deemed mandatory, so that a disregard of them renders the amendatory act void.³ In some states, how-

4 Lea (Tenn.) 644; *Ballentine v. Pulaski*, 15 Lea (Tenn.) 633; *Poe v. State*, 85 Tenn. 495; *Henley v. State*, 98 Tenn. 665.

Texas. — *Snyder v. Compton*, 87 Tex. 374; *Weekes v. Galveston*, 21 Tex. Civ. App. 102.

Virginia. — *Anderson v. Com.*, 18 Gratt. (Va.) 295.

Washington. — *Bierer v. Blurock*, 9 Wash. 63; *Copland v. Pirie*, 26 Wash. 483.

West Virginia. — *Shields v. Bennett*, 8 W. Va. 74; *State v. Cain*, 8 W. Va. 720; *Roby v. Sheppard*, 42 W. Va. 286.

Wyoming. — *In re Boulter*, 5 Wyo. 329.

See also *supra*, this subdivision, *Independent and Dependent Legislation*.

It is no objection to the validity of an act amending a particular law that by implication it incidentally operates to modify other statutes. *Van Horn v. State*, 46 Neb. 62; *Henry v. Ward*, 49 Neb. 392; *Nebraska Loan, etc., Assoc. v. Perkins*, 61 Neb. 254; *Eaton v. Eaton*, (Neb. 1902) 92 N. W. Rep. 995. See also *St. Louis, etc., R. Co. v. Paul*, 64 Ark. 83, 62 Am. St. Rep. 154.

1. *United States*. — *The Borrowdale*, 39 Fed. Rep. 376.

Alabama. — *Wilkinson v. Ketler*, 59 Ala. 306; *Montgomery v. State*, 107 Ala. 372; *Lewis v. State*, 123 Ala. 84.

Colorado. — *Edwards v. Denver, etc., R. Co.*, 13 Colo. 59; *Callahan v. Jennings*, 16 Colo. 471.

Florida. — *State v. Duval County*, 23 Fla. 506.

Illinois. — *Manchester v. People*, 178 Ill. 292.

Indiana. — *Greencastle Southern Turnpike Co. v. State*, 28 Ind. 382 [overruling *Langdon v. Applegate*, 5 Ind. 327; *Rogers v. State*, 6 Ind. 31; *Kennon v. Shull*, 9 Ind. 154; *Littler v. Smiley*, 9 Ind. 118; *Wilkins v. Miller*, 9 Ind. 102; *Armstrong v. Berreman*, 13 Ind. 426; which laid down the opposite rule]; *Martinsville v. Frieze*, 33 Ind. 507; *Feibleman v. State*, 98 Ind. 516; *Bush v. Indianapolis*, 120 Ind. 476; *Weatherhogg v. Jasper County*, 158 Ind. 14.

Kentucky. — *Purnell v. Mann*, 105 Ky. 95.

Louisiana. — *Arnoult v. New Orleans*, 11 La. Ann. 54.

Michigan. — *People v. Mahaney*, 13 Mich. 481; *People v. Pritchard*, 21 Mich. 236; *Mok v. Detroit Bldg., etc., Assoc.* No. 4, 30 Mich. 511; *Atty.-Gen. v. Parsell*, 100 Mich. 170.

Missouri. — *Boonville v. Trigg*, 46 Mo. 288; *State v. Draper*, 47 Mo. 29; *State v. Chambers*, 70 Mo. 625; *State v. Bennett*, 102 Mo. 364.

Nebraska. — *People v. McCallum*, 1 Neb. 182.

New Jersey. — *State v. Parsons*, 40 N. J. L. 123, 29 Am. Rep. 210; *Colwell v. Chamberlin*, 43 N. J. L. 387, distinguishing *Everham v. Hulit*, 45 N. J. L. 53; *State v. American For-*

cite Powder Mfg. Co., 50 N. J. L. 75; *Montclair v. New York, etc., R. Co.*, 45 N. J. Eq. 436.

Ohio. — *Lehman v. McBride*, 15 Ohio St. 602.

Oregon. — *Portland v. Stock*, 2 Oregon 69.

Pennsylvania. — *Wilson v. Downing*, 40 W. N. C. (Pa.) 342, 4 Pa. Super. Ct. 487.

The Recital of the Original Provision Is Mere Surplusage, and a mistake made in such recital does not render the new act void. *Draper v. Falley*, 33 Ind. 465.

Section Number Need Not Be Retained. — *Dickinson v. State*, 38 Tex. Crim. 472.

Only Section Amended Need Be Set Out. — *Nations v. State*, 64 Ark. 467.

2. **Missouri** — **Specification of Changes**. — *State v. Chambers*, 70 Mo. 626; *Morrison v. St. Louis, etc., R. Co.*, 96 Mo. 602; *State v. Miller*, 100 Mo. 439; *Cox v. Hannibal, etc., R. Co.*, (Mo. 1903) 74 S. W. Rep. 854.

An Express Repeal and Re-enactment is not within this clause of the constitution. *State v. Murlin*, 137 Mo. 297.

3. **Requirement Held Mandatory** — *Alabama*. — *Tuskaloosa Bridge Co. v. Olmstead*, 41 Ala. 9; *Rogers v. Torbut*, 58 Ala. 523; *Stewart v. Hale County Ct.*, 82 Ala. 209; *Todd v. State*, 85 Ala. 339; *Judson v. Bessemer*, 87 Ala. 240; *Bolling v. Le Grand*, 87 Ala. 482; *Bates v. State*, 118 Ala. 102.

Arkansas. — *Watkins v. Eureka Springs*, 49 Ark. 131.

Florida. — *Smith v. State*, 29 Fla. 408.

Georgia. — *Bibb County Loan Assoc. v. Richards*, 21 Ga. 592.

Indiana. — *Indianapolis Brewing Co. v. Claypool*, 149 Ind. 193. See *Evansville v. State*, 118 Ind. 426.

Kansas. — *State v. Guiney*, 55 Kan. 532; *In re Ashby*, 60 Kan. 101.

Kentucky. — *Purnell v. Mann*, 105 Ky. 95.

Louisiana. — *Walker v. Caldwell*, 4 La. Ann. 297; *Duverge v. Salter*, 5 La. Ann. 94; *State v. Hackett*, 5 La. Ann. 91; *Kohn v. Carrollton*, 10 La. Ann. 719; *Arnoult v. New Orleans*, 11 La. Ann. 54.

Maryland. — *Davis v. State*, 7 Md. 151, 61 Am. Dec. 331.

Missouri. — *State v. Miller*, 100 Mo. 439.

Nebraska. — *State v. Corner*, 22 Neb. 265, 3 Am. St. Rep. 267; *Smith v. State*, 34 Neb. 689; *State v. Douglas County*, 47 Neb. 428; *State v. Moore*, 48 Neb. 873; *State v. Byrum*, 60 Neb. 384; *Haverly v. State*, 63 Neb. 83; *Board of Education v. Moses*, 51 Neb. 288; *Douglas County v. Hayes*, 52 Neb. 191.

New Jersey. — *Everham v. Hulit*, 45 N. J. L. 53; *Haring v. State*, 51 N. J. L. 386; *State v. Trenton*, 53 N. J. L. 566.

ever, it has been held that the constitutional provision is merely directory, and that strict compliance is not essential to the validity of the amendatory act.¹

(5) *Partial Invalidity of Amendatory Act.*—Even though part of an amendatory act may be void, the rest may stand, unless the two parts are inseparable and mutually dependent.² Thus, so much of an act to amend certain sections of a previous act as relates to sections not contained in the previous act may be rejected as surplusage, and the act hold good as to the residue.³

c. *EXTENDING APPLICATION OF EXISTING LAW*—(1) *Constitutional Provision.*—The constitutions of several states declare that the provisions of an existing law shall not be extended or conferred by reference to its title only, but that so much thereof as is extended or conferred shall be re-enacted and published at length.⁴ Other constitutions declare that no act shall be passed which shall provide that any existing law or part thereof shall be deemed a part of said act, except by inserting it therein.⁵

How Construed.—The Supreme Court of *Colorado* has said that a clause of this character goes further than the general constitutional provision about amendments, "and extends to cases of amendments by implication;" but that it should not be taken to apply alike to all legislative enactments, for such a

New York.—*People v. Laurence*, 36 Barb. (N. Y.) 177; *Sharp v. New York*, 31 Barb. (N. Y.) 572; *Brewster v. Syracuse*, 19 N. Y. 116.

Oregon.—*Portland v. Stock*, 2 Oregon 70.

Pennsylvania.—*Barrett's Appeal*, 116 Pa. St. 486; *Pittsburgh's Petition*, 138 Pa. St. 401; *Merritt v. Whitlock*, 200 Pa. St. 50; *McKeever v. Victor Oil Co.*, 9 Pa. Co. Ct. 284; *Com. v. Mercer*, 9 Pa. Co. Ct. 461; *Oil City*, etc., *Bridge*, 9 Pa. Dist. 110.

Tennessee.—*Memphis St. R. Co. v. State*, (Tenn. 1903) 75 S. W. Rep. 730; *Hyman v. State*, 87 Tenn. 109.

Texas.—*Miller v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 522. See *Johnson v. Martin*, 75 Tex. 33.

Utah.—*State v. Beddo*, 22 Utah 432; *State v. Morrey*, 23 Utah 273; *State v. McNally*, 23 Utah 277.

Virginia.—*Com. v. Drewry*, 15 Gratt. (Va.) 1. See also *Com. v. Brown*, 91 Va. 762.

1. *Requirement Held to Be Merely Directory.*—*Pierpont v. Crouch*, 10 Cal. 315; *East Georgia*, etc., *R. Co. v. King*, 91 Ga. 519; *Murray v. State*, 112 Ga. 7; *Pim v. Nicholson*, 6 Ohio St. 176; *Lehman v. McBride*, 15 Ohio St. 573. See further *supra*, this title, V. 9. c. *Whether Provisions Directory or Mandatory.*

It is sometimes held that the legislature is the judge whether to employ independent legislation or an amendment (see *supra*, this subdivision, *Independent and Dependent Legislation*, note), and such a doctrine makes the constitutional provision merely directory to some extent at least.

2. *Partial Invalidity.*—*Anderson v. Byrnes*, 122 Cal. 272; *Campau v. Detroit*, 14 Mich. 275. See also *supra*, this title, *Constitutionality—Partial Invalidity.*

Where a single section only of an amendatory act offends the constitutional provision, such section will alone be rejected, and the remainder of the act will be operative. *Rice v. Westcott*, 108 Ala. 353.

3. *Part of Amendatory Act Rejected as Surplusage.*—*State v. Laughlin*, (Mo. 1882), 14

Cent. L. J. 454; *Kansas v. Payne*, 71 Mo. 159; *State v. Ranson*, 73 Mo. 78; *Miller v. Hurford*, 13 Neb. 17.

4. *Prohibition Against Extending Application of Statute—Alabama.*—*Stewart v. Hale County Ct.*, 82 Ala. 209; *Bay Shell-Road Co. v. O'Donnell*, 87 Ala. 376; *Barnhill v. Teague*, 96 Ala. 207; *Rice v. Westcott*, 108 Ala. 353; *Miller v. Berry*, 101 Ala. 531.

Arkansas.—*Beard v. Wilson*, 52 Ark. 290.

Colorado.—*Denver Circle R. Co. v. Nestor*, 10 Colo. 403.

Kentucky.—*Purnell v. Mann*, 105 Ky. 94.

North Dakota.—*Erickson v. Cass County*, 11 N. Dak. 502.

Pennsylvania.—*Titusville Iron Works v. Keystone Oil Co.*, 122 Pa. St. 627; *Gallagher v. MacLean*, 193 Pa. St. 583, *affirming* 6 Pa. Dist. 315; *Reynolds Lumber Co. v. Reynolds*, 4 Pa. Dist. 573, *affirmed* 175 Pa. St. 437; *In re Greenfield Ave.*, 21 Pa. Co. Ct. 619, 8 Pa. Dist. 80; *Com. v. Hodusko*, 24 Pa. Co. Ct. 388, 31 Pittsb. Leg. J. N. S. (Pa.) 235.

Meaning of Confer.—The constitutional provision frequently is "that no law shall be re-vived, amended, or the provisions thereof extended or conferred, by reference to its title only." In *Stewart v. Hale County Ct.*, 82 Ala. 209, the provision is thus paraphrased by the court: "It prohibits in plain language the revival, amendment, extension, or the otherwise conferring of the benefits of the provisions of any law 'by reference to its title only.'"

The Repeal of an Exception in a Statute though it practically extends the operation of the statute does not violate the constitutional provision in question. *Scales v. State*, 47 Ark. 476, 58 Am. Rep. 768.

An Independent Statute though upon the subject of a prior enactment is not obnoxious to this provision. *Hood v. Norton*, 202 Pa. St. 114.

Substantial Compliance with the constitutional requirement is sufficient. *Purnell v. Mann*, 105 Ky. 94; *Purvis v. Ross*, 158 Pa. St. 20.

5. See the constitutions of New Jersey and New York.

construction would be unreasonable and would impose more serious inconveniences than those sought to be remedied. Having regard to the argument from inconvenience, it should be enforced according to its reason and spirit and the evils against which it was directed.¹ The purpose of this clause has been said to be not to embarrass the legislature in the enactment of laws, but to obtain a fair and intelligent exercise of the law-making power.²

(2) *Reference Statutes.* — Therefore, it is generally held that if an act is complete in itself, it may adopt rules of construction or modes of procedure for carrying out its provisions by reference to other statutes, whether or not this provision is contained in the constitution;³ and such adoption by reference may include references to local as well as general laws.⁴ Statutes of this character are known as reference statutes.⁵

1. **Construction** — *Denver Circle R. Co. v. Nestor*, 10 Colo. 403, wherein, as an illustration of the evils against which the provision was directed is mentioned "the vicious system then prevailing of extending at different sessions of the legislature the operation of a special statute, enacted for a certain county or town, to other counties or towns by reference to its title merely, and in many cases publishing no law whatever." See also *Matter of Haynes*, 54 N. J. L. 24; *People v. Squire*, 107 N. Y. 602.

2. *Christie v. Bayonne*, 48 N. J. L. 409.

Inapplicable to Complete and Perfect Act. — In the case cited above it was said that an act complete and perfect in itself — the purpose, meaning, and full scope of which are apparent on its face — is valid, though it may provide for actions or means for carrying its provisions into effect by reference to a course of procedure established by other statutes; but the clause is applicable to an imperfect and incomplete act of legislation. See also *Kennedy v. Belmar*, 61 N. J. L. 23, where the court said that decisions upon this clause of the New Jersey constitution "are perhaps not easy to reconcile."

Inapplicable to Mere Matters of Procedure. — *Matter of Buffalo Traction Co.*, 25 N. Y. App. Div. 447, *affirmed* 155 N. Y. 700.

Inapplicable to Mere Amendment of Existing Law. — *Wells v. Buffalo*, 14 Hun (N. Y.) 438, *affirmed* 80 N. Y. 253. See also *People v. Squire*, 107 N. Y. 602; *People v. McKay*, 72 N. Y. App. Div. 527.

Exclusion of Existing Laws. — An act which defines its scope and effect by excluding from its operation any offenses that may have been included in the language employed by certain laws then existing is not obnoxious to this provision. *People v. Van De Carr*, 150 N. Y. 439, *affirming* 7 N. Y. App. Div. 608.

3. **Adoption by Reference** — *United States*. — *Knights Templars', etc.*, L. Indemnity Co. v. Jarman, 187 U. S. 197; *Geer v. Ouray County*, (C. C. A.) 97 Fed. Rep. 435; *St. Louis, etc.*, R. Co. v. Southwestern Telephone, etc., Co., (C. C. A.) 121 Fed. Rep. 276.

Alabama. — *Phoenix Assur. Co. v. Fire Dept.*, 117 Ala. 646; *Cobb v. Vary*, 120 Ala. 263; *Thomas v. State*, 124 Ala. 48.

Arkansas. — *Watkins v. Eureka Springs*, 49 Ark. 131; *State v. Hunter*, 69 Ark. 548.

California. — *People v. Whipple*, 47 Cal. 592.

Colorado. — *Denver Circle R. Co. v. Nestor*,

10 Colo. 403; *Edwards v. Denver, etc.*, R. Co., 13 Colo. 59; *Long v. Sullivan*, 21 Colo. 109.

Louisiana. — *Dehon v. Lafourche Basin Levee Board*, (La. 1903) 34 So. Rep. 770.

Michigan. — See *Trowbridge v. Detroit*, 99 Mich. 443.

Nebraska. — *Pacific Express Co. v. Cornell*, 59 Neb. 364.

New Jersey. — *Campbell v. Board of Pharmacy*, 45 N. J. L. 244, *affirmed* 47 N. J. L. 347; *State v. Hibernia Underground R. Co.*, 47 N. J. L. 49; *State v. Hancock*, 54 N. J. L. 393. See also the last two notes *supra*.

New York. — *People v. Banks*, 67 N. Y. 568, *affirming* (Supm. Ct. Spec. T.) 1 Abb. N. Cas. (N. Y.) 167; *Matter of Union Ferry Co.*, 98 N. Y. 139; *People v. Lorillard*, 135 N. Y. 285; *Curtin v. Barton*, 139 N. Y. 505; *People v. Bruning*, 89 Hun (N. Y.) 124; *People v. McKay*, 72 N. Y. App. Div. 527; *People v. Hayt*, 7 Hun (N. Y.) 39. See also last two notes *supra*.

Pennsylvania. — *In re Greenfield Ave.*, 191 Pa. St. 290; *Knisely v. Cotterel*, 196 Pa. St. 614; *New Brighton v. Biddell*, 14 Pa. Super. Ct. 207.

Where Such Special Constitutional Provision Is Lacking, "the practice of making the provisions of one statute applicable to another by a reference to the former law in the new act is of frequent occurrence in legislation, both in England and in this country, and such legislation has been uniformly recognized as valid, so far as we have been able to discover." *Quinlan v. Houston, etc.*, R. Co., 89 Tex. 356. *Citing* *Warrington Waterworks Co. v. Longshaw*, 9 Q. B. D. 145; *Atty.-Gen. v. Gaslight, etc.*, Co., 7 Ch. D. 217; *Binghamton Bridge Co.*, 3 Wall. (U. S.) 51; *Spring Valley Water Works v. San Francisco*, 23 Cal. 434; *Schwenke v. Union Depot, etc.*, Co., 7 Colo. 512; *Jones v. Dexter*, 8 Fla. 276; *Turney v. Wilton*, 36 Ill. 385; *Wood v. Hustis*, 17 Wis. 416; *Crosby v. Smith*, 19 Wis. 449; *Sika v. Chicago, etc.*, R. Co., 21 Wis. 370. To the same effect see *State v. Geiger*, 65 Mo. 306; *Houston, etc.*, R. Co. v. *State*, (Tex. Civ. App. 1896) 39 S. W. Rep. 390.

4. **Reference to Local Laws.** — *State v. Minor*, 79 Minn. 201; *In re Lorillard*, (Supm. Ct. Gen. T.) 13 N. Y. Supp. 83; *Weinckie v. New York Cent., etc.*, R. Co., (Supm. Ct. Gen. T.) 15 N. Y. Supp. 680; *Choate v. Buffalo*, 39 N. Y. App. Div. 379, *affirmed* 167 N. Y. 597.

5. *Phoenix Assur. Co. v. Fire Dept.*, 117 Ala. 646.

7. Effect and Operation of Amendatory Acts — *a.* NOT USUALLY RETROACTIVE. — An amendatory act, like other legislative enactments,¹ takes effect only from the time of its passage and has no application to prior transactions unless an intent to the contrary is expressed in the act or clearly implied from its provisions.² But for purposes of construction it is treated as a part of the original act.³

b. INVALIDITY. — According to the generally received rule, an amending act which is unconstitutional and void does not, being a nullity, in any way affect the validity of the act amended.⁴ Especially is this true where the amendment is by implication, or the repealing clause is general, applying only to acts or parts of acts inconsistent with the amendatory statute.⁵ But it has been held, upon the principle that a law may be valid in part, that the repealing portion of an amendatory act may stand although the act fails of its purpose as an amendment.⁶

8. Construction — *a.* IN GENERAL. — The Intent of the Legislature is the primary object in the construction of all statutes, including amendatory acts.⁷

An Amendment Is to Be Construed as Incorporated in the Original Act and as a part thereof;⁸ the provisions of the two are, if possible, to be harmonized, and no

1. See *supra*, this title, IV. *Time of Taking Effect*; VII. *Particular Applications of Principles of Construction* — *Retrospective Laws*.

2. **Amendments Not Retroactive** — *Indiana*. — *State v. Mount*, 151 Ind. 679.

Kansas. — *Junction City v. Webb*, 44 Kan. 71. *Louisiana*. — *McGeehan v. Burke*, 37 La. Ann. 156.

Minnesota. — *State v. Hill*, 32 Minn. 275. *New York*. — *Moore v. Mausert*, 49 N. Y. 332; *People v. Montgomery County*, 67 N. Y. 110, 23 Am. Rep. 94; *Goillotel v. New York*, 87 N. Y. 445; *Matter of Miller*, 110 N. Y. 216; *Reid v. Albany County*, 128 N. Y. 364.

See also *supra*, this section, 6. *b.* (1) *In General*.

Amendment Held Applicable to Pending Proceedings. — *Perry v. Denver*, 27 Colo. 93; *Nations v. Lovejoy*, 80 Miss. 401.

Statutes of Limitation. — As to the effect of the amendment of statutes of limitation, see the title LIMITATION OF ACTIONS, vol. 19, pp. 168 *et seq.*, 174 *et seq.*

3. See *infra*, this section, *Construction*.

4. **Amendatory Act Void**. — *Ex p. Davis*, 21 Fed. Rep. 396; *Judson v. Bessemer*, 87 Ala. 240; *People v. Butler St. Foundry, etc., Co.*, 201 Ill. 259; *Childs v. Shower*, 18 Iowa 261; *Detroit v. Western Union Tel. Co.*, (Mich. 1902) 90 N. W. Rep. 283; *Lexington v. Lafayette County Bank*, 165 Mo. 671.

5. *Campau v. Detroit*, 14 Mich. 276 (where Cooley, J., says: "Nothing can come in conflict with a nullity"); *State v. Burton*, 11 Wis. 51.

6. *Meshmeier v. State*, 11 Ind. 484. In this case the doctrine was admitted that a repeal by mere implication would be ineffectual, but a general clause such as that stated in the last sentence of the text was held to take effect. This case is considered and disapproved by Dillon, J., in *Childs v. Shower*, 18 Iowa 273.

See on the General Subject of this Paragraph of the text, *infra*, this title, *Repeal*, 1. *d.* *Validity of Repealing Act*.

7. **Intent of Legislature**. — *Parsons v. Circuit Judge*, 37 Mich. 289. See generally, *supra*, this title, VI. 3. *Object and General Scope of Doctrine*.

Special Legislation Outside of a City Charter Amended will not be presumed to be affected by the amendment in the absence of a clear intent. *Taggart v. Detroit*, 71 Mich. 92.

8. **Statute and Amendment Treated as One Act** — *England*. — *Reg. v. Overseers of Poor*, 3 El. & El. 224, 107 E. C. L. 224.

United States. — *McEwen v. Den*, 24 How. (U. S.) 242; *U. S. v. Sapinkow*, 90 Fed. Rep. 654.

Dakota. — *People v. Sweetser*, 1 Dak. 295. *Illinois*. — *Holbrook v. Nichol*, 36 Ill. 161; *Turney v. Wilton*, 36 Ill. 385; *Richland County v. People*, 3 Ill. App. 216.

Indiana. — *Walsh v. State*, 142 Ind. 362. *Massachusetts*. — *Fitzgerald v. Lewis*, 164 Mass. 499.

Michigan. — *Parsons v. Circuit Judge*, 37 Mich. 287.

Missouri. — *State v. Ranson*, 73 Mo. 88; *Kamerick v. Castleman*, 21 Mo. App. 587; *Epperson v. New York L. Ins. Co.*, 90 Mo. App. 432.

Nebraska. — *Cass County v. Sarpy County*, 63 Neb. 813.

New Jersey. — *Farrell v. State*, 54 N. J. L. 421.

New York. — *Goldman v. Kennedy*, 49 Hun (N. Y.) 157; *Ely v. Holton*, 15 N. Y. 595; *Matter of Peugnet*, 67 N. Y. 441; *Moore v. Mausert*, 5 Lans. (N. Y.) 173, affirmed 49 N. Y. 332.

Ohio. — *McKibben v. Lester*, 9 Ohio St. 627; *State v. Cincinnati*, 52 Ohio St. 419.

See also generally, *supra*, this title, VI. 8. *Construing Entire Statute as One Whole*.

A provision in an amendatory act repeated from the statute amended, that "all acts and parts of acts inconsistent with this act" are repealed, must be referred to the date of the original act. *State v. Newark*, 57 N. J. L. 298.

Doctrine of Incorporation Not Applied to Make Amendment Retroactive. — *State v. Mount*, 151 Ind. 679. See also *supra*, this subsection, *Not Usually Retroactive*.

Penal Clause in Amendment Held Confined to New Provisions. — *Hatch v. Calhoun Circuit Judge*, 127 Mich. 174.

clause of either is to be left inoperative.¹

Old Law and Mischief. — The old law must be considered; the mischiefs, inconveniences, or hardships produced by it; and then the remedy proposed by the amendatory law.²

Construction Adopted by Re-enactment. — Where the language in an act has received a judicial construction and is adopted into an amendatory act, the construction placed upon it is also adopted;³ and a word used in the re-enacted part of the statute and repeated in the amendatory part is to be similarly construed in the absence of contrary intent.⁴

b. AMENDMENT AS REPEAL OR CONTINUATION — Where Constitution Declares Act Amended Shall Be Repealed. — The constitutions of some states contain, after the section requiring a statute or section amended to be repeated in its amended form, a further provision that the statute amended "shall be repealed." The latter clause has been held sometimes as in itself effecting the repeal of the sections amended without an express clause of repeal,⁵ but other courts hold that an express clause of repeal in amendatory statutes is necessary.⁶

Without Such Constitutional Provision an amending statute setting out the whole act as amended is, according to the better view, a repeal only as to the portions of the original act left out in the amendment, but as to the portion unchanged in form or substance⁷ is considered as a continuation of the original act;⁸ but in other states such an amending act is considered as entirely

1. **Provisions Harmonized.** — Harrell v. Harrell, 8 Fla. 46; Conrad v. Nall, 24 Mich. 278.

Of Two Constructions Equally Warranted by the Language of an amendment, that is to be preferred which best harmonizes with the general tenor and spirit of the act amended. Griffin's Case, Chase (U. S.) 364; Van Riper v. Essex Public Road Co., 38 N. J. L. 23.

Conflict Between Changes Specified and Act as Amended. — Where the specifications of the changes in the former statute are absolutely irreconcilable with the recital of the statute as amended, the latter will be taken generally as representing the legislative intent. Gilbert v. Georgia R., etc., Co., 104 Ga. 412; Howard v. Bangor, etc., R. Co., 86 Me. 387; Loper v. State, 82 Minn. 71.

Amendment Presumed to Have Same Application as Original Act. — Chase v. U. S., 7 App. Cas. (D. C.) 149.

Where the original act is limited to a particular locality, one amending it is so limited unless an intent to the contrary is expressed. U. S. v. Crawford, 6 Mackey (D. C.) 319.

2. **Old Law and Mischief.** — People v. Greer, 43 Ill. 213; Maus v. Logansport, etc., R. Co., 27 Ill. 77. See also *supra*, this title, VI. 10. b. (1) *History, the Old Law and Mischief.*

The Fact of a Legislative Amendment Is Not an Admission that the Statute Was Before Inadequate to cover a particular case, for the amendment may, with as great likelihood, have been intended to make the statute correspond to what had previously been supposed to be the law. Rural Independent School Dist. No. 10 v. New Independent School Dist., (Iowa 1903) 94 N. W. Rep. 284.

3. **Adopted Construction.** — Burwell v. Tullis, 12 Minn. 572; Gonder v. Estabrook, 33 Pa. St. 174. See Robbins v. Omnibus R. Co., 32 Cal. 472. See also *supra*, this title, VI. 11. k. (2) *Adopting Language of Settled Meaning.*

4. *Pitte v. Shipley*, 46 Cal. 154. See *State v. Cumberland County*, 78 Me. 100, and generally

supra, this title, VI. 5. g. (1) *Same Throughout Act.*

5. **Repeal by Amendment.** — Wilkinson v. Ketler, 59 Ala. 306. This clause is no longer in the *Alabama* constitution.

6. *Ryan v. State*, 5 Neb. 276; *Lancaster County v. Hoagland*, 8 Neb. 38; *South Omaha v. Taxpayers' League*, 42 Neb. 671; *Morgan v. State*, 48 Neb. 798; *State v. Kearney*, 49 Neb. 325; *Reid v. Panska*, 56 Neb. 195; *State v. Byrum*, 60 Neb. 384; *Haverly v. State*, 63 Neb. 83.

7. **A Verbal Identity Between the Original Act and the Amendatory Act** is not necessary in order that the latter may be construed as a continuation of the former, but the use of equivalent though different words will be sufficient to have that effect. *Matter of Prime*, 136 N. Y. 347. See also *Com. v. Herrick*, 6 Cush. (Mass.) 465.

8. **Former Act Continued in Part, Repealed in Part — United States.** — *The Louis Olsen*, 52 Fed. Rep. 652.

California. — *Central Pac. R. Co. v. Shackelford*, 63 Cal. 265; *Swamp Land Dist. No. 307 v. Glide*, 112 Cal. 85; *Hellman v. Shoulters*, 114 Cal. 136. *Compare Billings v. Harvey*, 6 Cal. 383.

Colorado. — *People v. Board of Equalization*, 20 Colo. 231.

Idaho. — *Barton v. Moscow Independent School Dist. No. 5*, 2 Idaho 998.

Michigan. — *Crane v. Saginaw Circuit Judge*, 111 Mich. 496.

Minnesota. — *Burwell v. Tullis*, 12 Minn. 572.

Mississippi. — *Nations v. Lovejoy*, 80 Miss. 401.

Missouri. — *Kamerick v. Castleman*, 21 Mo. App. 587.

Nebraska. — *Grand Island, etc., R. Co. v. Swinbank*, 51 Neb. 521; *State v. Stewart*, 52 Neb. 243; *Reynolds v. State*, 53 Neb. 761.

New York. — *Bay v. Gage*, 36 Barb. (N. Y.) 447; *Ely v. Holton*, 15 N. Y. 595.

repealing the whole statute reproduced and amended, so that the original statute as to the portion reproduced and amended "ceases to exist."¹ But these rules are only rules of construction,² and the last has been held to yield to the intent of the legislature, where circumstances showed that it was intended not to repeal but to re-enact and continue the old law.³

c. REFERENCE STATUTES. — The general rule has been stated that clauses of a prior act adopted by reference take effect as fully as if repeated and re-enacted in the adopting statute.⁴ But where the incorporating act is special and the act incorporated is general,⁵ or where a special adopting act gives a complete rule on some subject included in the prior general act,⁶ the later act governs. And where a statute enacted with reference to one subject is adopted in a later statute dealing with an essentially different subject, it will be presumed that only such provisions as are applicable to the new subject are adopted.⁷

Whether Future Changes in Acts Referred to Are Adopted. — When an act adopts by reference the whole or a portion of another statute, it means the law as existing at the time of the adoption and does not include subsequent modifications of the statute adopted, unless it does so by express or strongly implied intent;⁸ but where the adopting statute makes no reference to any particular act by its title or otherwise, but refers to the general law regulating the sub-

North Carolina. — *State v. Williams*, 117 N. Car. 753; *Wood v. Bellamy*, 120 N. Car. 212; *Robinson v. Goldsboro*, 122 N. Car. 211.

Texas. — *Swain v. Mitchell*, 27 Tex. Civ. App. 62; *Fischer v. Simon*, (Tex. Civ. App. 1901) 66 S. W. Rep. 882.

Vermont. — *Kelsey v. Kendall*, 48 Vt. 24.

See for this rule put in statutory form Cal. Pol. Code, § 325; Idaho Pol. Code, § 79; Stat. Const. Law N. Y., § 32; Rev. Civ. Stat. Tex. (1895), p. 1105, § 19; and other statutes and codes.

This has been held even in states where the constitution contained the clause that the section amended "shall be repealed." *Wilkinson v. Ketler*, 59 Ala. 306; *State v. Wish*, 15 Neb. 448.

The Portions Omitted from an Amendatory Statute Are Repealed, even though the statute cannot without such omitted portions be so construed as to make sense. *Bierer v. Blurock*, 9 Wash. 63. See also *State v. Andrews*, 20 Tex. 230.

An Intermediate Supplement Is Repealed by an amendment which is substituted for the original act and does not refer to the supplement. *State v. Wyandot County*, 9 Ohio Cir. Dec. 90, affirmed 57 Ohio St. 661.

Reason for Rule. — This rule is sometimes based upon the ground that if the amending act has no repealing clause it can operate as a repeal only by implication, and such repeals are not favored. *Crane v. Saginaw Circuit Judge*, 111 Mich. 496.

1. An Entire Repeal. — *Longlois v. Longlois*, 48 Ind. 60; *Blakemore v. Dolan*, 50 Ind. 204; *Feibleman v. State*, 98 Ind. 516; *Walsh v. State*, 142 Ind. 362; *State v. Mount*, 151 Ind. 696. See also *People v. Young*, 38 Ill. 490.

In *Wisconsin* many cases announce that when an amendment embodies the entire act or section amended, any provision of the former act not found in the new section is repealed. *State v. Ingersoll*, 17 Wis. 631; *State v. Keaough*, 68 Wis. 144; *Ashland Water Co. v. Ashland County*, 87 Wis. 211. But the reasoning in *Goodno v. Osh-*

kosh, 31 Wis. 127, seems to go to the length stated above.

2. Mere Rule of Construction. — Even where such a rule is adopted by statute it cannot bind the courts, for "the power to construe the constitution devolves upon the courts, and the courts in construing its provisions are not controlled by any act of the legislature." *Matter of Allison*, 172 N. Y. 431. See also *supra*, this title, VI. 10. b. (4) *Legislative Construction*.

3. *Gilkey v. Cook*, 60 Wis. 133; *Bentley v. Adams*, 92 Wis. 391.

4. *Potter's Dwaris*, 218; *In re Wood*, 31 Ch. D. 615.

The Subsequent Repeal of a Statute Adopted by Reference in a later act has been held in *England* not to affect its provisions as adopted in the latter. *Reg. v. Stock*, 8 Ad. & El. 405, 35 E. C. L. 414; *Reg. v. Merionethshire*, 6 Q. B. 343, 51 E. C. L. 343.

When a New York Act Incorporates Portions of the "Revised Statutes" the reference is to the Revised Statutes as published in 1828, not to later compilations. *Matter of Norton*, 39 N. Y. App. Div. 369, affirmed 160 N. Y. 684.

5. Special Act Incorporating General Act. — *Atty.-Gen. v. Great Eastern R. Co.*, L. R. 7 Ch. 475.

Only General and Not Particular Powers have been said to be included in such a reference. *Ex p. Greene*, 29 Ala. 52.

6. The Two Acts at Variance. — *Matter of Westminster*, 4 De G. J. & S. 232; *London, etc., R. Co. v. Board of Works*, L. R. 8 C. P. 185. See also *Matter of Strachan*, 9 Hare 185.

7. Subject-matter of Statutes Different. — *Jones v. Dexter*, 8 Fla. 276.

8. State of Law as Adopted by Reference Acts. — *Kendall v. U. S.*, 12 Pet. (U. S.) 524; *Postal Tel. Cable Co. v. Southern R. Co.*, 89 Fed. Rep. 190; *Jones v. Dexter*, 8 Fla. 276; *Culver v. People*, 161 Ill. 96; *Darmstaetter v. Moloney*, 45 Mich. 621; *Matter of Main St.*, 98 N. Y. 454. See also *In re Cherry*, 4 De G. F. & J. 332; *Bird v. Adcock*, 47 L. J. M. C. 123; *In re Mills*, 34 Ch. D. 24.

ject in hand, the reference will be regarded as including not only the law in force at the date of the adopting act, but also the law in force when proceedings are resorted to or when action is taken.¹

IX. REPEAL — 1. General Principles — a. DURATION OF STATUTES IN GENERAL. — It is presumed to be the legislative intent that a statute once enacted is enacted for all time, in the absence of an expression of a contrary intent.² The legislature, however, may limit the time within which a statute shall be operative,³ and when the time so limited expires, the statute ceases to operate as completely as if it had never existed,⁴ unless particular provision is made that matters occurring while the statute was in force shall be governed by it though the time limited for its operation has expired.⁵

Perpetuation of Temporary Act. — A temporary act may, before its expiration, be made perpetual, and is then considered to have been perpetual from the beginning.⁶

Suspension of Operation. — The operation of a statute may be suspended for a specified period;⁷ and during the period of suspension the act suspended is wholly inoperative,⁸ but it is not repealed.⁹

b. POWER TO REPEAL STATUTES. — The legislature has the same plenary power to repeal laws as it has to enact them, in the absence of any constitutional prohibition or restriction,¹⁰ unless the statute embodies a contract, so that its repeal would violate the constitutional provision against laws impairing the obligation of contracts.¹¹ But while the power to repeal statutes rests

1. *Jones v. Dexter*, 8 Fla. 276; *Snell v. Chicago*, 133 Ill. 413; *Culver v. People*, 161 Ill. 97; *Harris v. White*, 81 N. Y. 532; *Kugler's Appeal*, 55 Pa. St. 123.

2. **Statutes Presumed to Be Perpetual in Absence of Time Limitation.** — *U. S. v. Gear*, 3 How. (U. S.) 120.

3. **Temporary Statutes.** — *Brown v. Barry*, 3 Dall. (U. S.) 365. And see *supra*, this title, *Classification — In Respect to Duration*.

4. **Expiration of Time Limit.** — *Brown v. Barry*, 3 Dall. (U. S.) 365; *The Irresistible*, 7 Wheat. (U. S.) 551; *Stoever v. Immell*, 1 Watts (Pa.) 258; *Com. v. Beatty*, 1 Watts (Pa.) 382.

But penalties fixed by a later statute for offenses enumerated in a temporary one may be enforced, though the temporary statute has expired. *Ex p. Higginbotham*, 9 Dowl. 200.

5. **Act Operative After Expiration.** — Thus, an offense against a temporary statute may be punished after its expiration where particular provision is made therefor. *The Irresistible*, 7 Wheat. (U. S.) 551.

6. **Temporary Act Made Perpetual.** — *Rex v. Swiney*, 1 Alc. & Nap. 139; *Dingley v. Moor*, Cro. Eliz. 750; *Rex v. Morgan*, 2 Stra. 1066.

7. **Suspending Operation of Statute.** — *Edmonson v. Ferguson*, 11 Mo. 344; *Lindsey v. Burbridge*, 11 Mo. 545.

An Act May Be Suspended by Implication, but such a construction will not be given unless there is a clear and strong inconsistency between the acts. *Egypt St.*, 2 Grant Cas. (Pa.) 455. See also *Powers v. Shepard*, 48 N. Y. 540.

8. **Effect of Suspension.** — Thus a suspended act cannot be enforced during the period of suspension for penalties previously incurred. *State v. State Bank*, 12 Rich. L. (S. Car.) 609.

9. **Suspension Not Repeal.** — Therefore, where a repealing act and an act suspending it are passed at the same session of the legislature, the rule that a repealing act shall not revive the act first repealed does not apply. The repealing

act and the act suspending it taken together only amount to a provision that the repeal shall take place at a future day. *Brown v. Barry*, 3 Dall. (U. S.) 365. See also *Oliver v. Perry*, Phil. L. (61 N. Car.) 581.

And so, too, the repeal of a suspending act forthwith restores the operation of the suspended act. *Cassell v. Lexington, etc., Turnpike Road Co.*, 9 S. W. Rep. 502, 701, 10 Ky. L. Rep. 486.

10. **Power to Repeal Statutes.** — *Musgrove v. Vicksburg, etc., R. Co.*, 50 Miss. 677; *State v. Judge*, 14 La. Ann. 491; *People v. Livingston*, 6 Wend. (N. Y.) 530; *Shepherd v. Wheeling*, 30 W. Va. 479; *State v. Hoefflinger*, 31 Wis. 257.

Constitutional Provisions. — Section 59 of the *Kentucky* constitution, providing that "the general assembly shall not pass local or special acts * * * to remit fines, penalties, or forfeitures," does not deprive the legislature of the power to repeal a statute prescribing a penalty or forfeiture, with the result that such penalty or forfeiture cannot afterwards be recovered or enforced even though an action therefor was pending at the time of the repeal. *Pannell v. Louisville Tobacco Warehouse Co.*, (Ky. 1902) 68 S. W. Rep. 662.

As to the effect in general of the repeal of a penal statute, see *infra*, this section, 3. b. (3) (a) *ee. Penalties and Forfeitures*.

11. See the title *CONSTITUTIONAL LAW*, vol. 6. p. 882. See also *infra*, this section, 3. *Effect of Repeal*.

Even where a statute constitutes a contract with the state, it may be subject to repeal. Thus, in *Kentucky* there is a provision that all statutes "shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed." Under this provision it was held that if a special act authorizing the city to construct water-works, and providing that such works should be forever exempt from taxes, did, in any sense,

with the legislature alone, it is the exclusive province of the courts to determine whether any statute has been repealed.¹

Partial Repeals. — The line of demarcation between the amendment of a statute by the omission of certain provisions and the repeal of a part of a statute is sometimes obscure. The distinction is important in some states because of the constitutional provision that an amendatory act shall set out in full the act as amended, so that an enactment would be void if regarded as an amendatory act, while it would be valid if regarded as a repealing act.² The question here involved has several times been before the courts, and it has been held that a definite portion of a section or article in a statute may be repealed without a re-enactment of such section or article, omitting the part repealed; in other words, a distinct provision of a statute which is readily capable of identification and separable may be repealed without infringing the constitutional provision referred to above.³

Legislature Cannot Limit or Take Away Power of Repeal. — Unlike the decision of a court, a legislative act does not bind a subsequent legislature. Each body possesses the same power and has a right to exercise the same discretion, and therefore, one legislature, in enacting a statute, cannot by any provision therein contained take away or limit the power of any subsequent legislature to repeal it.⁴

c. TIME FOR EXERCISE OF POWER. — Under the rule of the English Parliament a statute was not repealable at the same session at which it was passed, in the absence of a clause reserving the power of repeal;⁵ but even at common law repeals by implication were apparently not within this rule,⁶ and, in the absence of constitutional provision, the rule seems never to have been applicable in the states of the Union.⁷

d. VALIDITY OF REPEALING ACT. — Where one statute purports to repeal

constitute a contract between the city and the commonwealth, the reservation of the general right to amend or repeal statutes was itself a part of that contract. *Covington v. Kentucky*, 173 U. S. 231.

1. Distinction Between Legislative and Judicial Power. — *District of Columbia v. Hutton*, 143 U. S. 27; *Postmaster Gen. v. Early*, 12 Wheat. (U. S.) 136; *South Ottawa v. Perkins*, 94 U. S. 270; *Shepherd v. Wheeling*, 30 W. Va. 479.

Therefore a recital in a statute, that a former statute was repealed or superseded by subsequent acts, is not conclusive as to such repeal or supersedure. *U. S. v. Clafin*, 97 U. S. 546.

2. As to the requirement referred to in respect to amendatory acts, see *supra*, this title, *Amendment — Form and Contents of Amendatory Act*.

3. Repeal of Part of Statute. — *Commercial Bank v. Markham*, 3 La. Ann. 698; *Chambers v. State*, 25 Tex. 307.

4. Legislature Cannot Take Away Power of Future Legislature. — *United States.* — *Bloomer v. Stolley*, 5 McLean (U. S.) 158; *Stone v. Mississippi*, 101 U. S. 814.

Colorado. — *Gregory v. German Bank*, 3 Colo. 332.

Georgia. — *Hamrick v. Rouse*, 17 Ga. 56; *Shaw v. Macon*, 21 Ga. 288.

Indiana. — *Armstrong v. Dearborn County*, 4 Blackf. (Ind.) 208; *Wall v. State*, 23 Ind. 153.

Louisiana. — *State v. Pilsbury*, 31 La. Ann. 1.

Mississippi. — *Musgrove v. Vicksburg, etc., R. Co.*, 50 Miss. 677.

South Carolina. — *Thomas v. Daniel*, 2 McCord L. (S. Car.) 359.

Wisconsin. — *Atty.-Gen. v. Brown*, 1 Wis. 513; *Kellogg v. Oshkosh*, 14 Wis. 623; *Brightman v. Kirner*, 22 Wis. 54; *Oleson v. Green Bay, etc., R. Co.*, 36 Wis. 383.

5. Act of Parliament Not Repealable at Session Enacting It. — 8 Bacon Abr. 225. See also *Cain v. State*, 20 Tex. 355.

As to which of two statutes passed on the same day is the final expression of the legislative will, see *supra*, this title, *Classification — In Respect to Time of Taking Effect*.

6. Repeal by Implication at Same Session as Enactment. — *England.* — *Rex v. Middlesex*, 2 B. & Ad. 818, 22 E. C. L. 190.

United States. — *Johnson v. Byrd, Hempst.* (U. S.) 434; *In re Oregon Bulletin Printing, etc., Co.*, 3 Sawy. (U. S.) 614.

Alabama. — *Mobile, etc., R. Co. v. State*, 29 Ala. 573; *Watson v. Kent*, 78 Ala. 602.

California. — *Smith v. McDermott*, 93 Cal. 421; *Cerf v. Reichert*, 73 Cal. 360.

Idaho. — *People v. Lytle*, 1 Idaho 143.

Indiana. — *Ham v. State*, 7 Blackf. (Ind.) 314; *Spencer v. State*, 5 Ind. 41.

Maryland. — *Strauss v. Heiss*, 48 Md. 292.

Missouri. — *State v. Heidorn*, 74 Mo. 412.

New York. — *Metropolitan Board of Health v. Schmades*, 3 Daly (N. Y.) 282.

Wisconsin. — *Atty.-Gen. v. Brown*, 1 Wis. 513; *Mead v. Bagnall*, 15 Wis. 156.

7. English Rule Not Followed in United States. — *Mobile, etc., R. Co. v. State*, 29 Ala. 582; *Peyton v. Moseley*, 3 T. B. Mon. (Ky.) 80; *Southwark Bldg. Assoc. v. Com.*, 26 Pa. St. 446; *Bourguignon Bldg. Assoc. v. Com.*, 98 Pa. St. 54; *Atty.-Gen. v. Brown*, 1 Wis. 513.

another specified statute, by an express clause to that effect, the repealing clause, it seems, may be valid and effective although every other clause of the statute is unconstitutional,¹ unless it is apparent that the repealing act was intended as a substitute for the act repealed.² But where there is, by a general clause, a repeal of all acts and parts of acts inconsistent with the statute, and it is apparent that the repealing statute is to be substituted for the one repealed, the unconstitutional character of the repealing statute will also render void the repealing clause.³ And on the same principle a prior statute will not be impliedly repealed by inconsistency with a subsequent unconstitutional one.⁴

Partial Repeal — Enacting Clause. — Under a constitutional requirement that the style of all laws shall be, "Be it enacted," etc., it would seem that the repeal of such enacting clause would render the statute unconstitutional, though this point has not been decided; but the enacting clause is no more a part of the first section of an act than it is of the other sections, and therefore the repeal of the first section of an act does not operate as a repeal of the enacting clause.⁵

2. Modes of Repealing Statutes — a. EXPRESS REPEAL — (1) Repealing Clause. — An express repeal of a statute may be accomplished, as the term implies, only by positive enactment. Therefore, a recital in the title of an act that its purpose is to repeal a previous act is not of itself sufficient for that purpose, because the title is not an operative part of the act. There must be a repealing clause in the body of the statute.⁶ But, inasmuch as the question of repeal is always one of legislative intent, an express declaration that a

1. Validity of Repealing Act. — *Ely v. Thompson*, 3 A. K. Marsh. (Ky.) 70; *Meshmeier v. State*, 11 Ind. 482. See *State v. Hallock*, 14 Nev. 202, 33 Am. Rep. 559. Compare *Matter of Rafferty*, 1 Wash. 382.

2. Repealing Act Substituted for Act Repealed. — *Pitkin County v. Aspen First Nat. Bank*, 24 Colo. 124, affirming 6 Colo. App. 423; *State v. Blend*, 121 Ind. 514, 16 Am. St. Rep. 411; *State v. Heffner*, 59 Ohio St. 368; *State v. Buckley*, 60 Ohio St. 273; *Porter v. Kingfisher County*, 6 Okla. 550.

In *State v. Smith*, 48 Ohio St. 211, the court had under consideration a statute which provided for the creation of a certain city board, and repealed an earlier statute, under the authority of which there was an existing board with duties corresponding to those of the proposed new board. The later act was declared unconstitutional, and it was held that the repealing clause contained therein was void also, because it could not be that the legislature would have repealed the act creating the existing board without providing a substitute for it.

3. Repealing Clause Rendered Void. — *Alabama*. — *Tims v. State*, 26 Ala. 165; *Randolph v. Builders', etc., Supply Co.*, 106 Ala. 501.

Colorado. — *People v. Fleming*, 7 Colo. 230. *Iowa*. — *Childs v. Shower*, 18 Iowa 261.

Kansas. — *In re Petty*, 22 Kan. 489.

Massachusetts. — *Sullivan v. Adams*, 3 Gray (Mass.) 476.

Michigan. — *Detroit v. Western Union Tel. Co.*, (Mich. 1902) 90 N. W. Rep. 283.

Missouri. — *Copeland v. St. Joseph*, 126 Mo. 417; *Lexington v. Lafayette County Bank*, 165 Mo. 671.

New York. — *Harbeck v. New York*, 10 Bosw. (N. Y.) 366; *People v. Tiphaine*, (Oyer & T.

Ct.) 3 Park. Crim. (N. Y.) 241; *Devoy v. New York*, 35 Barb. (N. Y.) 264.

Wisconsin. — *Shepardson v. Milwaukee, etc., R. Co.*, 6 Wis. 605; *State v. Burton*, 11 Wis. 51.

But see *Harvey v. Virginia*, 20 Fed. Rep. 411.

There Can Be No Inconsistency between a void amendatory act and the act referred to as amended. *Campau v. Detroit*, 14 Mich. 285.

4. Void Inconsistent Statute — United States. — *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, affirming 19 Tex. Civ. App. 1; *Ex p. Davis*, 21 Fed. Rep. 396.

Alabama. — *Randolph v. Builders, etc., Supply Co.*, 106 Ala. 501; *Ex p. Gayles*, 108 Ala. 514.

California. — *McAllister v. Hamlin*, 83 Cal. 361; *Orange County v. Harris*, 97 Cal. 600; *Santa Cruz Rock Pavement Co. v. Lyons*, 133 Cal. 114.

Colorado. — *Miller v. Edwards*, 8 Colo. 528.

Georgia. — *Barker v. State*, (Ga. 1903) 44 S. E. Rep. 874.

Illinois. — *People v. Butler St. Foundry, etc., Co.*, 201 Ill. 236.

Indiana. — *Wilkinson v. Marion County*, 158 Ind. 1.

Kansas. — *Stephens v. Ballou*, 27 Kan. 594.

Missouri. — *Westport v. McGee*, 128 Mo. 152.

New York. — *Devoy v. New York*, 36 N. Y. 449.

North Carolina. — *Raleigh v. Peace*, 110 N. Car. 32.

Wisconsin. — *State v. Burton*, 11 Wis. 50.

5. Repeal of Enacting Clause. — *Pearce v. Vitum*, 193 Ill. 192.

6. Necessity of Repealing Clause. — *Brooks v. Hydron*, 76 Mich. 280. See also *Atty.-Gen. v. Rice*, 64 Mich. 385; *Larrison v. Peoria, etc., R. Co.*, 77 Ill. 17.

As to the validity of the repealing clause, see *supra*, this section, *Validity of Repealing Act*.

particular statute is repealed will not be given effect where it is apparent that the legislature did not so intend.¹

(2) *Identification of Act Repealed.* — In order to repeal expressly a specified statute or part of a statute, the reference to it must be certain.² As a general rule the state constitutions do not undertake to prescribe the mode by which the legislature shall identify the act intended to be repealed; and therefore any description, either by reference to the title and date or to the substance of the act, so that it is clearly identified, is sufficient.³ In some states, however, there are constitutional provisions on the subject;⁴ but these provisions relate only to express repeals and have no application to repeals by implication,⁵ in which are included such as are effected by a clause declaring the repeal of all inconsistent enactments.⁶

Mistake in Reference to Act Repealed. — Since the reference to the act repealed is a mere matter of identification, a mistake therein will not prevent the repeal if the identification is complete.⁷ And conversely, a repeal is not effected

1. Express Declaration of Repeal Controlled by Intent. — *Pratt v. Swan*, 16 Utah 483; *Howlett v. Cheetham*, 17 Wash. 626. See also the next following subdivision of this section, *Identification of Act Repealed*.

2. Identification of Act Repealed. — *Leard v. Leard*, 30 Ind. 171; *Chegaray v. Jenkins*, 3 Sandf. (N. Y.) 409; *Madison, etc., Plankroad Co. v. Reynolds*, 3 Wis. 287.

Reference to Original Bill to Aid Identification. — Where the reference to the published law was a mistaken one, the court looked at the original bill on file to determine what section was actually repealed. *State v. Clare*, 5 Iowa 509.

Description in Title. — A description of the act repealed is sufficient, though it is contained only in the title of the repealing act, and not in the body thereof. Thus, a repealing act in the following form was held sufficient: "An act to repeal an act entitled 'An act concerning corporations and persons engaged in the business of banking,' approved April 1, 1876. Section 1. Said act is hereby repealed." *Savings Bank v. Burns*, 104 Cal. 473.

3. Mode of Identification Not Prescribed by Constitution. — *Alabama.* — *Falconer v. Robinson*, 46 Ala. 340.

Florida. — *Greeley v. Jacksonville*, 17 Fla. 174.

Louisiana. — *Commercial Bank v. Markham*, 3 La. Ann. 698.

New Jersey. — *Van Riper v. Parsons*, 40 N. J. L. 126, 29 Am. Rep. 210; *Wallace v. Bradshaw*, 54 N. J. L. 175.

Oregon. — *Bird v. Wasco County*, 3 Oregon 282.

West Virginia. — *Shields v. Bennett*, 8 W. Va. 87.

See also the constitutions of the several states.

4. Constitutional Provisions as to Identification of Law Repealed. — The constitution of *Georgia* declares that "no law, or section of the code, shall be amended or repealed by mere reference to its title, or to the number of the section of the code, but the amending or repealing act shall distinctly describe the law to be amended or repealed, as well as the alteration to be made." Const. Ga., art. 3, § 7, par. 17; *Swift v. Van Dyke*, 98 Ga. 725.

Under this provision a repealing act sufficiently describes the act to be repealed by giv-

ing its title and the date of its enactment. *Adam v. Wright*, 84 Ga. 723; *Fullington v. Williams*, 98 Ga. 807.

In *Tennessee* "all acts which repeal, revive, or amend former laws shall recite in their caption, or otherwise, the title or substance of the law repealed, revived, or amended." Const. Tenn., art. 2, § 17; *State v. Gaines*, 1 Lea (Tenn.) 734; *Morrell v. Fickle*, 3 Lea (Tenn.) 79; *Home Ins. Co. v. Taxing Dist.*, 4 Lea (Tenn.) 644; *Ballentine v. Pulaski*, 15 Lea (Tenn.) 633.

The *Maryland* constitution formerly contained a similar provision. *Davis v. State*, 7 Md. 151, 61 Am. Dec. 331. But it was omitted from the present constitution of that state. See Const. Md., art. 3, § 29.

5. Repeals by Implication Not Within Constitutional Provisions. — *Arkansas.* — *Scales v. State*, 47 Ark. 476, 58 Am. Rep. 768.

Georgia. — *Swift v. Van Dyke*, 98 Ga. 725.

Illinois. — *Geisen v. Heiderich*, 104 Ill. 537.

Indiana. — *Branham v. Lange*, 16 Ind. 497.

Kansas. — *Stephens v. Ballou*, 27 Kan. 601.

Missouri. — *State v. Miller*, 100 Mo. 439; *State v. Macklin*, (Mo. 1890) 13 S. W. Rep. 680.

Nevada. — See *State v. Elko County*, 21 Nev. 19.

Tennessee. — *Uhl v. Gaines*, 4 Lea (Tenn.) 353; *Home Ins. Co. v. Taxing Dist.*, 4 Lea (Tenn.) 644; *Maney v. State*, 6 Lea (Tenn.) 218; *Knoxville v. Lewis*, 12 Lea (Tenn.) 181; *Ballentine v. Pulaski*, 15 Lea (Tenn.) 638; *Poe v. State*, 85 Tenn. 495; *State v. Yardley*, 95 Tenn. 546; *State v. King*, 104 Tenn. 156; *Turner v. State*, (Tenn. 1902) 69 S. W. Rep. 774.

Virginia. — *Anderson v. Com.*, 18 Gratt. (Va.) 295.

6. Turner v. State, (Tenn. 1902) 69 S. W. Rep. 774.

7. Repeal Not Prevented by Mistake in Reference. — Where the title was set out, a mistake in the reference to the year or chapter, not preventing identification of the act to be repealed, was disregarded. *Blake v. Brackett*, 47 Me. 28; *In re Boothroyd*, 15 M. & W. 1.

So a reference to "provisions to article 411" of the Penal Code, by obvious mistake instead of to "proviso to" said article, will not prevent the repeal of the proposed proviso. *Chambers v. State*, 25 Tex. 307.

when it is apparent that the act specified could not have been the one intended, as where a law is inadvertently included in a schedule of acts repealed.¹

(3) *Repeal of Inconsistent Acts.* — Where an act is passed covering the whole of a particular subject or field of legislation, it is customary to insert a general clause repealing "all acts or parts of acts inconsistent therewith," and such a clause is effective in repealing inconsistent enactments,² in the absence of any constitutional prohibition against such method of repeal;³ but the repeal extends only to those acts on the same subject or parts of such acts clearly inconsistent and irreconcilable with the provisions of the repealing act, and only to the extent of the conflicting provisions.⁴

Enumeration of Acts Repealed. — The operation of a clause repealing all inconsistent acts is not affected by the fact that the statute containing such clause also enumerates certain prior acts as repealed. All inconsistent acts, whether included in such enumeration or not, are repealed by virtue of such general clause.⁵

1. **Act Inadvertently Included in Schedule of Acts Repealed.** — *People v. Lord*, 9 N. Y. App. Div. 458; *McKee Land, etc., Co. v. Swikehard*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 21, affirmed 63 N. Y. App. Div. 553.

2. **Repeal of Inconsistent Enactments** — *England*. — *Rex v. Northleach*, 5 B. & Ad. 978, 27 E. C. L. 250.

United States. — *U. S. v. Cheeseman*, 3 Sawy. (U. S.) 424. See also *U. S. v. Bedgood*, 49 Fed. Rep. 54.

California. — *People v. Durick*, 20 Cal. 94.

Colorado. — *People v. Ames*, 27 Colo. 126.

Maryland. — *Prince George's County v. Laurel*, 51 Md. 464.

Minnesota. — *Tierney v. Dodge*, 9 Minn. 166.

New Jersey. — *State v. Kelly*, 34 N. J. L. 75.

Pennsylvania. — *Newbold v. Pennock*, 154 Pa. St. 591.

Washington. — *State v. Allen*, 14 Wash. 103.

West Virginia. — *Totten v. Nighbert*, 41 W. Va. 800.

The rules of construction and effect to be given to inconsistent provisions are the same whether the question of repeal arises under such a general clause or by implication alone, as to which see *infra*, this section, *Implied Repeal*.

Limitation of Repealing Clause. — Where the last section of a statute declares all acts and parts of acts relating to the subject-matter thereof repealed "from and after the time" when such statute shall take effect, this will not be construed a repeal of such statute itself, but to mean all other acts. *State v. Stinson*, 17 Me. 154.

Acts Identical with Acts Repealed. — A general repealing clause repeals every act identical with those expressly repealed thereby. *State v. Barrōw*, 30 La. Ann. 657; *New York v. Broadway, etc., R. Co.*, 12 Hun (N. Y.) 571.

Effect of Repealing Clause in Amendment of City Charter. — A law amending the charter of a town permitting it to levy taxes on "trades, businesses, etc.," and "on every bar-room," and repealing all acts inconsistent therewith, does not repeal a general act prohibiting the sale of intoxicating liquors within two miles of the county court-house, part of the last-named territory being within the town jurisdiction; the ground of the decision being that a repealing

clause in an act amending a city charter does not repeal public laws, but refers only to laws conferring power, authority, and privileges upon or denying the same to the town. *State v. Witter*, 107 N. Car. 792.

3. **Constitutional Provisions.** — Thus, the *Tennessee* constitution provides that the title and substance of all laws repealed shall be recited in the caption or body of the repealing act, and therefore, a clause in a statute "that all laws and parts of laws in conflict with this act be, and the same are, hereby repealed," is of no force whatever. *Memphis v. American Express Co.*, 102 Tenn. 336; *State v. Yardley*, 95 Tenn. 548. Compare the statutes in other states.

4. **Statutes Affected by Repealing Clause** — *California.* — *People v. Durick*, 20 Cal. 94.

Connecticut. — *State v. Grady*, 34 Conn. 118.

Georgia. — *Elrod v. Gilliland*, 27 Ga. 467.

Kentucky. — See *Payne v. Conner*, 3 Bibb (Ky.) 180.

Louisiana. — *State v. Fuller*, 14 La. Ann. 678.

Massachusetts. — *Dolan v. Thomas*, 12 Allen (Mass.) 421; *Carter v. Burt*, 12 Allen (Mass.) 424.

Pennsylvania. — *Hickory Tree Road*, 43 Pa. St. 139.

Wisconsin. — *Lewis v. Stout*, 22 Wis. 234; *Simmons v. Bradley*, 27 Wis. 689. See also *State v. Campbell*, 44 Wis. 529.

Thus an act was passed which granted a right to establish a ferry within certain limits, provided the right should not extend beyond the land of the grantee. A later amendatory act in two sections was passed, which in the first section said nothing of confining the franchise to the grantee's own land, and in the second section repealed all acts inconsistent with the first section. It was held that the first act was thereby repealed. *McRoberts v. Washburne*, 10 Minn. 23.

Effect of Repealing Clause. — The insertion of a general clause repealing no act in particular, but applying only to such laws as may be inconsistent, merely declares an intention that would otherwise be implied to the same extent and with the same effect. *District of Columbia v. Sisters of Visitation*, 15 App. Cas. (D. C.) 308.

5. **Enumeration of Acts Repealed.** — *Com. v. Owensboro, etc., R. Co.*, 95 Ky. 60.

(4) *Repeal of Acts Within Purview.* — It is not unusual for a statute to contain a clause repealing all other laws within its purview, by which is meant the enacting part of the statute as distinguished from provisos and saving clauses;¹ and such a clause, therefore, operates to repeal all other legislation relating to the same subject, though not inconsistent,² but it does not repeal any provisions of the former laws as to cases not provided for by the repealing act.³

(5) *Construction of Repealing Clause.* — A clause in a statute purporting to repeal other statutes is subject to the same rules of interpretation as other enactments, and the intent, if fairly expressed, must prevail over a mere literal interpretation clearly at variance with such intent.⁴ But even where the repealing statute is broad enough in its terms to embrace a particular earlier statute, yet if it is apparent that it is not the legislative intent to repeal such statute, a literal interpretation of the repealing act will not be adopted.⁵

b. IMPLIED REPEAL — (1) *In General.* — A statute is repealed by implication whenever it becomes apparent from subsequent legislation that the legislature does not intend the earlier act to remain in force,⁶ and the converse of this proposition is that no statute will operate as an implied repeal of an earlier statute, if it appears that the legislature did not intend it so to operate.⁷ Though repeal by implication is not favored,⁸ it necessarily results in any case of repugnancy or inconsistency between two successive statutes, or in any case where the intention of the legislature is manifest that a later statute should supersede an earlier one, and this rule is not affected by a constitutional provision that statutes shall not be amended by a mere reference to the title, but that the act as amended must be set out.⁹

Title and Subject of Repealing Act. — The constitutional requirement is general that a statute shall contain but one subject, which shall be expressed in the title,¹⁰ and does not, in the nature of things, apply to repeals by implication;¹¹ but where the title of an act did not indicate the subject-matter in which it was inconsistent with a prior act, it was held not to repeal the prior act.¹²

1. *Purview Defined.* — *Payne v. Conner*, 3 Bibb (Ky.) 180; *Dunfee v. Childs*, 45 W. Va. 161; 1 Kent Com. 462.

2. *Repeal of Acts Within Purview.* — *Ogden v. Witherspoon*, 2 Hayw. (3 N. Car.) 227; *Bingham v. Keylor*, 19 Wash. 555; *Dunfee v. Childs*, 45 W. Va. 161.

3. *Cases Not Provided for by Repealing Act.* — *Payne v. Conner*, 3 Bibb (Ky.) 180; *Patterson v. Caldwell*, 1 Met. (Ky.) 489; *Grigsby v. Barr*, 14 Bush (Ky.) 330; *Com. v. Watts*, 84 Ky. 537.

4. *Construction of Repealing Clause.* — *Rex v. Rogers*, 10 East 573; *Warren v. Windle*, 3 East 205; *Smith v. People*, 47 N. Y. 331.

As to the matter of construction in general, see *supra*, this title, *Principles of Interpretation and Construction*.

5. *Words of Repeal in Conflict with Intent.* — *Smith v. People*, 47 N. Y. 330; *State v. Moorhouse*, 5 N. Dak. 406.

In the case last cited a schedule of acts repealed was held not to operate as a repeal of a particular act therein mentioned, where it was evident from the general provisions of the repealing act that the legislature could not have intended to repeal the act in question.

6. *What Constitutes Repeal by Implication — Legislative Intent.* — *Pennie v. Reis*, 80 Cal. 266; *State v. White*, 49 La. Ann. 127; *Chosen Freeholders v. Park Commission*, 62 N. J. L. 376; *Rodebaugh v. Philadelphia Traction Co.*, 190 Pa. St. 358; *Jadwin v. Hurley*, 10 Pa. Super. Ct. 104.

Thus where all the laws of a specified class, except one, were specifically repealed, and it was evident from the course of the legislature that it intended to repeal all such laws, but had overlooked the omitted one, it was held that this law was also repealed by implication. *New York v. Broadway, etc., R. Co.*, 12 Hun (N. Y.) 571.

In Ascertaining the Legislative Intent, contemporaneous acts of the legislature are sometimes important; thus, it has been held that the amendment of a statute was a recognition of its existence and negated the implication of its repeal by an act relating to the same subject passed on the day preceding the amendatory act. *Altoona v. Calvert*, 21 Pa. Co. Ct. 362.

7. *State v. Miller*, 140 Ind. 168; *State v. Caldwell*, 9 Wash. 336.

8. See the next following subdivision of this section, *Repeals by Implication Not Favored*.

9. *Repeal by Implication Not Affected by Constitutional Provision Relating to Amendments.* — *Chillicothe v. Logan Natural Gas, etc., Co.*, 11 Ohio Dec. 24, 8 Ohio N. P. 88.

10. See *supra*, this title, V. 9. *Titles and Subjects*.

11. *Title and Subject of Act Repealing Previous Act by Implication.* — *Geisen v. Heiderich*, 104 Ill. 537; *Spencer v. State*, 5 Ind. 51.

12. *In re Board of Public Lands, etc.*, 37 Neb. 425; *Miller v. Edwards*, 8 Colo. 528; *State v. Moore*, 37 Oregon 536.

Express Prohibition of Implied Repeals. — Some statutes contain clauses forbidding an implied repeal of any of its provisions,¹ but in view of the fact that one legislature cannot limit the powers of succeeding legislatures in regard to the enactment of laws within the constitutional limitations, and in view of the further fact that the operation of any statute as an implied repeal of an earlier one is a matter of legislative intent, it is difficult to see how effect can be given to such a prohibition.²

(2) *Repeals by Implication Not Favored.* — Repeals by implication are not favored, and will not be indulged unless it is manifest that the legislature so intended.³ As laws are presumed to be passed with deliberation and with

1. **Implied Repeal Expressly Prohibited.** — American Soc., etc., v. Gloversville, 78 Hun (N. Y.) 40.

2. See generally *infra*, this section, 3. b. (3) (a) ff. (cc.) *General Statutes Limiting Effect of Repealing Laws.*

The prohibition referred to in the text also seems to conflict with the well-settled principle that the latest expression of the legislative will must govern, and that a prior statute inconsistent with and repugnant to a later one must give way to the later statute; and it has been expressly held that the legislature cannot declare in advance the intent of subsequent legislatures or the effect of subsequent legislation on existing statutes. *Mongeon v. People*, 55 N. Y. 618.

3. **Repeals by Implication Not Favored — Intent Must Be Plain** — *England.* — Reg. v. St. Edmund, 2 Q. B. 84, 42 E. C. L. 583; *Foster's Case*, 11 Coke 63a; *Dobbs v. Grand Junction Waterworks Co.*, 9 Q. B. D. 158.

Canada. — *Thivierge v. Cinquars*, 13 Quebec Super. Ct. 398.

United States. — *Arthur v. Homer*, 96 U. S. 137; *Clay County v. Savings Soc.*, 104 U. S. 579; *Louisiana v. Taylor*, 105 U. S. 454; *Red Rock v. Henry*, 106 U. S. 596; *King v. Cornell*, 106 U. S. 395; *Ex p. Crow Dog*, 109 U. S. 556; *Chew Heong v. U. S.*, 112 U. S. 536; *Tracy v. Tuflly*, 134 U. S. 207; *District of Columbia v. Hutton*, 143 U. S. 18; *Harford v. U. S.*, 8 Cranch (U. S.) 109; *Wood v. U. S.*, 16 Pet. (U. S.) 342; *Beals v. Hale*, 4 How. (U. S.) 37; *U. S. v. Sixty-seven Packages Dry Goods*, 17 How. (U. S.) 85; *U. S. v. Walker*, 22 How. (U. S.) 299; *McCool v. Smith*, 1 Black (U. S.) 459; *Furman v. Nichol*, 8 Wall. (U. S.) 44; *Henderson's Tobacco*, 11 Wall. (U. S.) 652; *Distilled Spirits*, 11 Wall. (U. S.) 365; *Aspden's Estate*, 2 Wall. Jr. (C. C.) 368; *U. S. v. Twenty-five Cases Cloths*, *Crabbe* (U. S.) 356; *U. S. v. 10,000 Cigars*, *Woolw.* (U. S.) 123; *U. S. v. One Hundred Barrels Spirits*, 2 Abb. (U. S.) 305.

Alabama. — *Wyman v. Campbell*, 6 Port. (Ala.) 219, 31 Am. Dec. 677; *Kinney v. Malory*, 3 Ala. 626; *Magruder v. State*, 40 Ala. 347; *Horton v. Mobile School Com'rs*, 43 Ala. 598; *Riggs v. Brewer*, 64 Ala. 282; *Parker v. Hubbard*, 64 Ala. 203; *Cook v. Meyer*, 73 Ala. 580; *Herr v. Seymour*, 76 Ala. 270; *Jackson v. State*, 76 Ala. 26; *Abernathy v. State*, 78 Ala. 411.

Arkansas. — *State v. Watts*, 23 Ark. 304; *Ex p. Osborn*, 24 Ark. 479.

California. — *Merrill v. Gorham*, 6 Cal. 41; *Scofield v. White*, 7 Cal. 400; *Crosby v. Patch*, 18 Cal. 439; *People v. San Francisco*, etc., R.

Co., 28 Cal. 258; *Matter of Yick Wo*, 68 Cal. 294, 58 Am. Rep. 12; *Home for Inebriates v. Reis*, 95 Cal. 142.

Colorado. — *Schwenke v. Union Depot*, etc., Co., 7 Colo. 512; *Saguache County v. Decker*, 10 Colo. 149.

Florida. — *Greeley v. Jacksonville*, 17 Fla. 174.

Georgia. — *Erwin v. Moore*, 15 Ga. 361; *Conner v. Southern Express Co.*, 37 Ga. 397; *Central R. Co. v. Hamilton*, 71 Ga. 465; *Montgomery v. Board of Education*, 74 Ga. 41.

Illinois. — *Bruce v. Schuyler*, 9 Ill. 221, 46 Am. Dec. 447; *Tyson v. Postlethwaite*, 13 Ill. 728; *Chicago v. Quimby*, 38 Ill. 278; *McDonough County v. Campbell*, 42 Ill. 490; *Hume v. Gossett*, 43 Ill. 297; *People v. Barr*, 44 Ill. 198; *Harding v. Rockford*, etc., R. Co., 65 Ill. 98; *Card v. McCaleb*, 69 Ill. 317; *Fowler v. Perkins*, 77 Ill. 271; *Covington v. East St. Louis*, 78 Ill. 548; *East St. Louis v. Maxwell*, 99 Ill. 443; *Barr v. People*, 103 Ill. 112; *Holton v. Daly*, 106 Ill. 139; *Hyde Park v. Oakwoods Cemetery Assoc.*, 119 Ill. 141; *Hunt v. Chicago Horse*, etc., R. Co., 121 Ill. 644; *Butz v. Kerr*, 123 Ill. 659; *Trausch v. Cook County*, 147 Ill. 537; *Illinois Cent. R. Co. v. Gilbert*, 157 Ill. 354; *People v. Murphy*, 202 Ill. 493; *Gibson v. Ackermann*, 70 Ill. App. 399; *Illinois Cent. R. Co. v. O'Connor*, 90 Ill. App. 153, *reversed* on other points 189 Ill. 559.

Indiana. — *Lichtenstein v. State*, 5 Ind. 162; *Blain v. Bailey*, 25 Ind. 165; *Coghill v. State*, 37 Ind. 111; *Hamlyn v. Nesbit*, 37 Ind. 284; *Indianapolis Water Works Co. v. Burkhart*, 41 Ind. 364; *Carver v. Smith*, 90 Ind. 222, 46 Am. Rep. 210; *Evansville v. Summers*, 108 Ind. 189; *Robinson v. Rippey*, 111 Ind. 112; *State v. Cooper*, 114 Ind. 12; *Jeffersonville*, etc., R. Co. v. *Dunlap*, 112 Ind. 93.

Iowa. — *Ament v. Humphrey*, 3 Greene (Iowa) 255; *Casey v. Harned*, 5 Iowa 1; *Cole v. Jackson County*, 11 Iowa 552; *State v. Berry*, 12 Iowa 58; *Baker v. Steamboat Milwaukee*, 14 Iowa 214; *Central Iowa R. Co. v. Board of Supervisors*, 67 Iowa 199; *Snell v. Dubuque*, etc., R. Co., 78 Iowa 88.

Kansas. — *Stephens v. Ballou*, 27 Kan. 594; *Matter of Hall*, 38 Kan. 670.

Kentucky. — *Peyton v. Moseley*, 3 T. B. Mon. (Ky.) 77; *Brown v. Miller*, 4 J. J. Marsh. (Ky.) 474; *Elizabethtown*, etc., R. Co. v. *Elizabethtown*, 12 Bush (Ky.) 233; *Com. v. Mason*, 82 Ky. 256.

Louisiana. — *Saul v. His Creditors*, 5 Mart. N. S. (La.) 569, 16 Am. Dec. 212; *Herbert's Succession*, 5 La. Ann. 121; *Gee v. Thompson*, 11 La. Ann. 657; *Nixon v. Piffet*, 16 La. Ann.

full knowledge of all existing laws on the subject, it is but reasonable to conclude that in passing a statute it was not intended to interfere with or abrogate any former law relating to the same matter, unless the later act is either

379; *Desban v. Pickett*, 16 La. Ann. 350; *State v. Brown*, 48 La. Ann. 1569.

Maine.—*Collins v. Chase*, 71 Me. 434.

Maryland.—*Dugan v. Gittings*, 3 Gill (Md.) 138, 43 Am. Dec. 306; *Higgins v. State*, 64 Md. 419.

Massachusetts.—*Haynes v. Jenks*, 2 Pick. (Mass.) 172; *Loker v. Brookline*, 13 Pick. (Mass.) 343; *Goddard v. Boston*, 20 Pick. (Mass.) 407; *Snell v. Bridgewater Cotton Gin Mfg. Co.*, 24 Pick. (Mass.) 296; *New London Northern R. Co. v. Boston*, etc., R. Co., 102 Mass. 389.

Michigan.—*Brown v. McCormick*, 28 Mich. 215; *Breitung v. Lindauer*, 37 Mich. 217; *Matter of Ryan*, 45 Mich. 173; *People v. Gustin*, 57 Mich. 407; *People v. Grand Rapids*, etc., *Plank Road Co.*, 64 Mich. 618, 67 Mich. 9; *Crane v. Saginaw Circuit Judge*, 111 Mich. 496; *People v. Hiller*, 113 Mich. 209.

Minnesota.—*Kerlinger v. Barnes*, 14 Minn. 526; *State v. Archibald*, 43 Minn. 328.

Mississippi.—*Planters Bank v. State*, 6 Smed. & M. (Miss.) 628; *Commercial Bank v. Chambers*, 8 Smed. & M. (Miss.) 9; *White v. Johnson*, 23 Miss. 68; *McAfee v. Southern R. Co.*, 36 Miss. 669; *Swann v. Buck*, 40 Miss. 268.

Missouri.—*State v. Morrow*, 26 Mo. 131; *State v. Bishop*, 41 Mo. 16; *State v. Macon County Ct.*, 41 Mo. 453; *State v. Draper*, 47 Mo. 29; *St. Louis v. Independent Ins. Co.*, 47 Mo. 146; *Pacific R. Co. v. Cass County*, 53 Mo. 17; *State v. Severance*, 55 Mo. 378; *State v. Jaeger*, 63 Mo. 403; *Lamar v. Adams*, 99 Mo. App. 35.

Montana.—*Lane v. Missoula County*, 6 Mont. 473.

Nebraska.—*Dawson County v. Clark*, 58 Neb. 756.

Nevada.—*Thorpe v. Schooling*, 7 Nev. 15; *Gillette v. Sharp*, 7 Nev. 246.

New Jersey.—*Naylor v. Field*, 29 N. J. L. 287; *State v. Collector*, 37 N. J. L. 258; *Plum v. Lugar*, 49 N. J. L. 557.

New York.—*Chamberlain v. Chamberlain*, 43 N. Y. 424; *Matter of Evergreens*, 47 N. Y. 216; *Smith v. People*, 47 N. Y. 330; *Powers v. Shepard*, 48 N. Y. 540; *People v. L. Lawrence County*, 103 N. Y. 541; *Williams v. Potter*, 2 Barb. (N. Y.) 316; *Van Rensselaer v. Snyder*, 9 Barb. (N. Y.) 302; *Wallace v. Bassett*, 41 Barb. (N. Y.) 92; *People v. Van Nort*, 64 Barb. (N. Y.) 205; *Heckmann v. Pinkney*, (C. Pl. Gen. T.) 6 Abb. N. Cas. (N. Y.) 371; *McCartee v. Orphan Asylum Soc.*, 9 Cow. (N. Y.) 437, 18 Am. Dec. 516; *New York*, etc., R. Co. v. Delaware County, (Supm. Ct. Spec. T.) 67 How. Pr. (N. Y.) 5; *Excise Com'rs v. Willey*, 2 Lans. (N. Y.) 427; *Burkhard v. Smith*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 31; *Bowen v. Lease*, 5 Hill (N. Y.) 221; *Harrington v. Rochester*, 10 Wend. (N. Y.) 550; *People v. Deming*, 1 Hilt. (N. Y.) 271.

North Carolina.—*State v. Woodside*, 9 Ired. L. (31 N. Car.) 496; *State v. Sutton*, 100 N. Car. 474.

Ohio.—*Ludlow v. Johnston*, 3 Ohio 553, 17

Am. Dec. 609; *Cass v. Dillon*, 2 Ohio St. 607; *Robbins v. State*, 8 Ohio St. 131; *Buckingham v. Steubenville*, etc., R. Co., 10 Ohio St. 25; *Ex p. Van Hagan*, 25 Ohio St. 426.

Pennsylvania.—*Morris v. Delaware*, etc., Canal, 4 W. & S. (Pa.) 461; *Street v. Com.*, 6 W. & S. (Pa.) 209; *Brown v. Philadelphia County*, 21 Pa. St. 43; *Walter's Appeal*, 70 Pa. St. 392; *Erie v. Bootz*, 72 Pa. St. 196; *Rhein Bldg. Assoc. v. Lea*, 100 Pa. St. 214; *Osborne v. Everitt*, 103 Pa. St. 421; *Harrisburg v. Sheck*, 104 Pa. St. 53; *Gerhard v. Packer Tp. School Dist.*, 24 Pa. Co. Ct. 339.

South Carolina.—*State v. Alexander*, 14 Rich. L. (S. Car.) 247.

Oregon.—*Stingle v. Nevel*, 9 Oregon 62.

Tennessee.—*Smith v. Hickman*, *Cooke* (Tenn.) 330; *Cate v. State*, 3 Sneed (Tenn.) 120; *Hockaday v. Wilson*, 1 Head (Tenn.) 113; *Furman v. Nichol*, 3 Coldw. (Tenn.) 432; *Buchanan v. Robinson*, 3 Baxt. (Tenn.) 147; *Frazier v. East Tennessee*, etc., R. Co., 88 Tenn. 140; *Durham v. State*, 89 Tenn. 728; *Zickler v. Union Bank*, etc., Co., 104 Tenn. 277.

Texas.—*Neil v. Keese*, 5 Tex. 33; *Cain v. State*, 20 Tex. 370; *Thouvenin v. Rodrigues*, 24 Tex. 468; *Selman v. Wolfe*, 27 Tex. 72; *Gill v. State*, 30 Tex. 514; *Napier v. Hodges*, 31 Tex. 287; *Walker v. State*, 7 Tex. App. 245, 32 Am. Rep. 595.

Virginia.—*Davies v. Creighton*, 33 Gratt. (Va.) 696; *Justice v. Com.*, 81 Va. 209.

West Virginia.—*Conley v. Calhoun County*, 2 W. Va. 416; *Forqueman v. Donnally*, 7 W. Va. 114; *State v. Cain*, 8 W. Va. 732; *Chesapeake*, etc., R. Co. v. Hoard, 16 W. Va. 270.

Wisconsin.—*Atty.-Gen. v. Brown*, 1 Wis. 513; *Goodrich v. Milwaukee*, 24 Wis. 422.

See also the titles EXEMPTIONS (FROM TAXATION), vol. 12, p. 384; REVENUE LAWS, vol. 24, p. 888.

A repeal will not be implied if an unconstitutional result would be produced thereby. *Reid v. Smoulter*, 128 Pa. St. 324.

Unjust Result.—It will not be presumed that the legislature intended an unjust result of the repeal of a law, but if the language be clear, it must govern, whatever the result, and pending interests be defeated. *Calkins v. State*, 14 Ohio St. 232.

Express Repeal of Particular Section.—Pre-emption.—Where an act repeals expressly a particular portion or section of another act, this shows the intention of the legislature to allow the remaining parts of the act to stand unaffected. *The Louis Olsen*, 52 Fed. Rep. 652; *Scales v. State*, 47 Ark. 476, 58 Am. Rep. 768; *State v. Morrow*, 26 Mo. 131; *Everham v. Hulit*, 45 N. J. L. 53; *Pursell v. New York L. Ins.*, etc., Co., 42 N. Y. Super. Ct. 383.

Enumeration of Sections Not Affected.—A mere enumeration in a statute of certain previous provisions, which are not to be affected by it, does not warrant the inference that all existing provisions on similar subjects not so enumerated are repealed. *Burnham v. Onderdonk*, 41 N. Y. 425.

repugnant to the earlier one, or fully embraces the subject-matter thereof,¹ or unless the reason for the earlier act is beyond peradventure removed.²

(3) *How Implied Repeal Is Effected* — (a) **Constitutional Provisions.** — The adoption of a self-executing constitutional provision which conflicts with an existing statute operates as an implied repeal of such statute;³ but it is otherwise in the case of a constitutional provision which is not self-executing.⁴ So, too, a constitutional provision which merely prescribes the form and method of passing statutes or which forbids the enactment of statutes of a certain sort, such as special or local laws, refers only to future legislation, and does not affect statutes enacted before the constitutional provision was adopted.⁵

Declaration that Certain Laws Should Remain in Force. — Where a constitution expressly declares that certain laws shall remain in force, then, in accordance with the maxim *expressio unius exclusio est alterius*, all laws other than those specified are thereby impliedly repealed.⁶

(b) **Repugnant Acts** — *aa. IN GENERAL.* — If two statutes on the same subject are mutually repugnant, the later act without any repealing clause operates, in the absence of expressed intent to the contrary, as a repeal of the earlier one,⁷ on

1. **Conditions of Implied Repeal in General.** — Florida, etc., R. Co. v. Hazel, (Fla. 1901) 31 So. Rep. 272.

And see *infra*, this subdivision, *Repugnant Acts; Acts Covering Same Subject.*

Later Act Fully Covering Subject of Earlier. — Chicago, etc., R. Co. v. U. S., 127 U. S. 406; Dugan v. Gittings, 3 Gill (Md.) 138, 43 Am. Dec. 306; State v. Donnelly, 20 Nev. 214. See also *infra*, this subdivision, *Acts Covering Same Subject.*

2. See *infra*, this subdivision, *Removing Reason of Law.*

3. **Implied Repeal of Statute by Constitution.** — Adams v. Sneed, 41 Fla. 151; Washington Home v. Chicago, 157 Ill. 414; McTigue v. Com., 99 Ky. 66; Louisville, etc., R. Co. v. Barbourville, 105 Ky. 174; Roberts v. Hackney, 109 Ky. 265; State v. Holcomb, 46 Neb. 88, 612; Little v. Oliver, 59 N. J. L. 89; People v. Cleary, (Ct. Sess.) 13 Misc. (N. Y.) 546; Remington v. Higgins, 6 S. Dak. 313; Cass v. Dillon, 2 Ohio St. 607.

4. The Kentucky constitution provides that laws inconsistent with such provisions of that constitution as require legislation to enforce them shall remain in force until such legislation is had, but not longer than six years after the adoption of the constitution. Wright v. Woods, 96 Ky. 56.

Constitutional Provision Not Self-executing. — Roesler v. Taylor, 3 N. Dak. 547, holding that an existing exemption law was not repealed by the adoption of a constitutional provision providing for a different kind of exemption to be prescribed and limited by law. See also Robinson v. Southern Pac. R. Co., 105 Cal. 526; State v. District Ct., 14 Mont. 476; Doherty v. Ransom County, 5 N. Dak. 1.

5. **Constitutional Provision Relating to Future Legislation Only.** — Cutting v. Taylor, 3 S. Dak. 11; State v. Tucker, 54 S. Car. 251, holding that a constitutional prohibition against special laws did not apply to a special law in existence when the constitution was adopted. See also Brann v. Hart, 97 Ky. 735; Lyman County v. State, 11 S. Dak. 391.

Within this principle a constitutional provision that "the legislature shall not hereafter" grant lands except to actual settlers in

limited quantities, does not repeal a prior act providing for grants to railroad companies under certain conditions that had been complied with before the adoption of the constitutional provision, though the act expressly reserved the power of repeal. Houston, etc., R. Co. v. State, (Tex. Civ. App. 1896) 39 S. W. Rep. 390.

6. **Repeal Implied by Expressly Retaining Certain Laws.** — *Ex p. Osborn*, 24 Ark. 479; Mack v. Johnson, 59 Ark. 333; Stull v. Graham, 60 Ark. 461.

7. **Repeal Implied from Repugnancy of Acts** — *England.* — O'Flaherty v. M'Dowell, 6 H. L. Cas. 142; Haydon v. Carroll, 3 Ridg. P. C. 545; Sharp v. Warren, 6 Price 131; Rex v. Middlesex, 1 Dowd. 117; Reg. v. St. Edmund, 2 Q. B. 84, 42 E. C. L. 583; Harris v. Robinson, 2 Q. B. 908, 52 E. C. L. 908; Dobbs v. Grand Junction Waterworks Co., 9 Q. B. D. 158; Summers v. Holborn Dist. Board of Works, (1893) 1 Q. B. 612; Daly v. Amherst Park Land Co., 13 Quebec Super. Ct. 516.

United States. — Wood v. U. S., 16 Pet. (U. S.) 342; Daviess v. Fairbairn, 3 How. (U. S.) 636; Beals v. Hale, 4 How. (U. S.) 37; U. S. v. Sixty-seven Packages Dry Goods, 17 How. (U. S.) 85; U. S. v. Walker, 22 How. (U. S.) 299; McCool v. Smith, 1 Black (U. S.) 459; Galena v. Amy, 5 Wall. (U. S.) 705; Furman v. Nichol, 143 U. S. 44; U. S. v. Tynen, 11 Wall. (U. S.) 92; Distilled Spirits, 11 Wall. (U. S.) 356; Henderson's Tobacco, 11 Wall. (U. S.) 657; Wood County v. Lackawana Iron, etc., Co., 93 U. S. 619; Movius v. Arthur, 95 U. S. 144; Arthur v. Homer, 96 U. S. 137; Clay County v. Savings Soc., 104 U. S. 579; Red Rock v. Henry, 106 U. S. 596; *Ex p. Crow Dog*, 109 U. S. 556; District of Columbia v. Hutton, 143 U. S. 18; Den v. Pine, 4 Wash. (U. S.) 691; Milne v. Huber, 3 McLean (U. S.) 212; U. S. v. Irwin, 5 McLean (U. S.) 178; Morlot v. Lawrence, 1 Blatchf. (U. S.) 608; Powers v. Barney, 5 Blatchf. (U. S.) 202; Johnson v. Byrd, Hempst. (U. S.) 434; U. S. v. One Hundred Barrels Spirits, 2 Abb. (U. S.) 305; Union Iron Co. v. Pierce, 4 Biss. (U. S.) 327; U. S. v. Barr, 4 Sawy. (U. S.) 254; Woods v. Jackson Iron Mfg. Co., Holmes (U. S.) 379. *Alabama.* — Kinney v. Mallory, 3 Ala. 626;

the obvious principle that the enactment of provisions inconsistent with those

George v. Skeates, 19 Ala. 738; *Barker v. Bell*, 46 Ala. 216; *Smith v. Speed*, 50 Ala. 276; *Iverson v. State*, 52 Ala. 170; *Parker v. Hubbard*, 64 Ala. 203; *Riggs v. Brewer*, 64 Ala. 282; *Watson v. Kent*, 78 Ala. 602.

Arizona.—*History Co. v. Dougherty*, (Ariz. 1892) 29 Pac. Rep. 649.

Arkansas.—*State v. Watts*, 23 Ark. 304; *Ex p. Osborn*, 24 Ark. 479; *Coats v. Hill*, 41 Ark. 149.

California.—*Pierpont v. Crouch*, 10 Cal. 315; *People v. Grippen*, 20 Cal. 677; *People v. San Francisco, etc.*, R. Co., 28 Cal. 254; *Matter of Wixom*, 35 Cal. 320; *Christy v. Sacramento County*, 39 Cal. 3; *Ex p. Smith*, 40 Cal. 419; *People v. Burt*, 43 Cal. 560; *People v. Sargent*, 44 Cal. 430; *Matter of Yick Wo*, 68 Cal. 305; 58 Am. Rep. 12; *Pennie v. Reis*, 80 Cal. 266; *People v. Auburn, etc.*, Turnpike Co., 122 Cal. 335; *Chico Bridge Co. v. Sacramento Transp. Co.*, 123 Cal. 178.

Colorado.—*Branagan v. Dulaney*, 8 Colo. 408; *Hirschburg v. People*, 6 Colo. 145.

Connecticut.—*Parrott v. Stevens*, 37 Conn. 93.

District of Columbia.—*Eckloff v. District of Columbia*, 4 Mackey (D. C.) 572.

Florida.—*Greeley v. Jacksonville*, 17 Fla. 174; *State v. Palmes*, 23 Fla. 620.

Georgia.—*Harrison v. Walker*, 1 Ga. 32; *Elrod v. Gilliland*, 27 Ga. 467; *Smith v. Oatts*, 92 Ga. 692. It is doubted whether under the clause of the new constitution of Georgia providing that "no law or section of the code shall be amended or repealed by mere reference to its title or to the number of the section of the code, but the amending or repealing act shall distinctly describe the law to be amended or repealed, as well as the alteration to be made," there can be such a thing as a repeal or alteration of a law by implication. *Central R. Co. v. Hamilton*, 71 Ga. 465. But see *Lehman v. McBride*, 15 Ohio St. 573, on this question.

Idaho.—*People v. Lytle*, 1 Idaho 143.

Illinois.—*Moore v. Moss*, 14 Ill. 106; *Sullivan v. People*, 15 Ill. 233; *Korah v. Ottawa*, 32 Ill. 121, 83 Am. Dec. 255; *Card v. McCaleb*, 69 Ill. 314; *Fowler v. Pirkins*, 77 Ill. 271; *Devine v. Cook County*, 84 Ill. 590; *People v. Brayton*, 94 Ill. 342; *Kepley v. People*, 123 Ill. 367; *Schwartz v. Ritter*, 186 Ill. 209; *Farwell v. Benevolent Assoc.*, 4 Ill. App. 36; *West Chicago Park Com'rs v. Brenock*, 18 Ill. App. 559; *Washington Heights v. Moffatt*, 57 Ill. App. 269.

Indiana.—*Ham v. State*, 7 Blackf. (Ind.) 314; *McQuilkin v. Doe*, 8 Blackf. (Ind.) 581; *State v. Miskimmons*, 2 Ind. 440; *State v. Youmans*, 5 Ind. 280; *Peru, etc.*, R. Co. v. *Bradshaw*, 6 Ind. 146; *Vermillion County v. Potts*, 10 Ind. 286; *Wall v. State*, 23 Ind. 150; *State v. Craig*, 23 Ind. 185; *Hamlyn v. Nesbit*, 37 Ind. 284; *Longlois v. Longlois*, 48 Ind. 60; *Dowdell v. State*, 58 Ind. 333; *Swinney v. Ft. Wayne, etc.*, R. Co., 59 Ind. 205; *State v. Wells*, 112 Ind. 237; *State v. Cooper*, (Ind. 1887) 13 N. E. Rep. 861. There is nothing in the Indiana constitution of 1857 which prohibits the repeal of statutes by implication. *Spencer v. State*, 5 Ind. 41; *Branham v. Lange*, 16 Ind. 497.

Indian Territory.—*Ranney Alton Mercantile Co. v. Mineral Belt Constr. Co.*, 2 Indian Ter. 134.

Iowa.—*Casey v. Harned*, 5 Iowa 1; *State v. Smith*, 7 Iowa 244; *Edgar v. Greer*, 8 Iowa 394, 74 Am. Dec. 316; *Central Iowa R. Co. v. Board of Supervisors*, 67 Iowa 199; *Straight v. Crawford*, 73 Iowa 676.

Kansas.—*Montague v. Jefferson County*, 7 Kan. App. 160.

Kentucky.—*Adams v. Ashby*, 2 Bibb (Ky.) 96; *Ely v. Thompson*, 3 A. K. Marsh. (Ky.) 70; *Nazareth Literary, etc.*, Inst. v. Com., 14 B. Mon. (Ky.) 214; *Maddox v. Graham*, 2 Met. (Ky.) 56.

Louisiana.—*Saul v. His Creditors*, 5 Mart. N. S. (La.) 569, 16 Am. Dec. 212; *Gayle v. Williams*, 7 La. 162; *Peet v. Nalle*, 30 La. Ann. 949.

Maine.—*Collins v. Chase*, 71 Me. 434; *Starbird v. Brown*, 84 Me. 238.

Maryland.—*Dugan v. Gittings*, 3 Gill (Md.) 138, 43 Am. Dec. 306; *Cumberland v. Magruder*, 34 Md. 381; *Appeal Tax Ct. v. Western Maryland R. Co.*, 50 Md. 275; *Willing v. Bozman*, 52 Md. 44; *State v. Yewell*, 63 Md. 120.

Massachusetts.—*Pease v. Whitney*, 5 Mass. 380; *Com. v. Kimball*, 21 Pick. (Mass.) 376; *Britton v. Com.*, 1 Cush. (Mass.) 302; *New London Northern R. Co. v. Boston, etc.*, R. Co., 102 Mass. 386.

Michigan.—*Brown v. McCormick*, 28 Mich. 220; *Chapoton v. Detroit*, 38 Mich. 636; *Connors v. Carp River Iron Co.*, 54 Mich. 168; *Atty-Gen. v. Amos*, 60 Mich. 372.

Minnesota.—*Tierney v. Dodge*, 9 Minn. 166; *Gates v. Shugrue*, 35 Minn. 392; *Morrison v. Rice*, 35 Minn. 436.

Mississippi.—*Planters Bank v. State*, 6 Smed. & M. (Miss.) 628; *Commercial Bank v. Chambers*, 8 Smed. & M. (Miss.) 9; *Miller v. State*, 33 Miss. 361, 49 Am. Dec. 351; *McAfee v. Southern R. Co.*, 36 Miss. 669; *Swann v. Buck*, 40 Miss. 268; *House v. State*, 41 Miss. 737; *Hearn v. Brogan*, 64 Miss. 334.

Missouri.—*State v. Macon County Ct.*, 41 Mo. 453; *State v. Dolan*, 93 Mo. 467; *Young v. Kansas City, etc.*, R. Co., 33 Mo. App. 509; *State v. Lindell R. Co.*, 151 Mo. 162.

Nebraska.—*State v. Maccuaig*, 8 Neb. 215; *State v. Wish*, 15 Neb. 448; *State v. Howe*, 28 Neb. 618; *State v. Bemis*, 45 Neb. 724; *Omaha Real Estate, etc.*, Co. v. *Kraggsow*, 47 Neb. 592; *State v. Moore*, 48 Neb. 870; *Fox v. McClay*, 48 Neb. 820; *State v. Magney*, 52 Neb. 508; *Bryant v. Dakota County*, 53 Neb. 755; *Beha v. State*, (Neb.) 1903) 93 N. W. Rep. 155.

Nevada.—*Thorpe v. Schooling*, 7 Nev. 15.

New Hampshire.—*Leighton v. Walker*, 9 N. H. 59; *State v. Wilson*, 43 N. H. 415, 82 Am. Dec. 163.

New Jersey.—*Buckallew v. Ackerman*, 8 N. J. L. 48; *State v. Blake*, 35 N. J. L. 208; *State v. Collector*, 37 N. J. L. 258; *Poulson v. Union Nat. Bank*, 40 N. J. L. 563; *Mulligan v. Cavanagh*, 46 N. J. L. 45; *Jersey City v. Jersey City, etc.*, R. Co., 20 N. J. Eq. 360; *Public School v. Trenton*, 30 N. J. Eq. 667; *Mersereau v. Mersereau Co.*, 51 N. J. Eq. 382; *Anderson v. Camden*, 58 N. J. L. 515.

previously existing manifests a clear intent to abolish the old law.¹

Nature and Extent of Repugnancy.—In order that an implied repeal may result from the principles now under consideration the repugnancy appearing in the two statutes must be wholly irreconcilable,² and it must also be clear and

New Mexico.—*Baca v. Bernalillo County*, 10 N. Mex. 438.

New York.—*Pierce v. Delamater*, 1 N. Y. 17; *People v. Palmer*, 52 N. Y. 83; *Mongeon v. People*, 55 N. Y. 613; *Lyddy v. Long Island City*, 104 N. Y. 218; *Dexter, etc., Plank Road Co. v. Allen*, 16 Barb. (N. Y.) 18; *Rochester v. Barnes*, 26 Barb. (N. Y.) 657; *People v. New York*, 32 Barb. (N. Y.) 102; *People v. Goodwin*, 50 Barb. (N. Y.) 562; *People v. Van Nort*, 64 Barb. (N. Y.) 205; *Excelsior Petroleum Co. v. Embury*, 67 Barb. (N. Y.) 261; *Victory Webb Printing Co. v. Beecher*, 26 Hun (N. Y.) 51; *Farley v. De Waters*, 2 Daly (N. Y.) 192; *Church v. Rhodes*, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 281; *Bowen v. Lease*, 5 Hill (N. Y.) 221; *People v. Kelly*, 7 Robt. (N. Y.) 592; *People v. Fuller*, 41 N. Y. App. Div. 404.

North Carolina.—*Ogden v. Witherspoon*, 2 Hayw. (3 N. Car.) 227; *State v. Custer*, 65 N. Car. 339; *State v. Massey*, 103 N. Car. 356; *State v. Monger*, 111 N. Car. 675.

Ohio.—*Ruffner v. Hamilton County*, 1 Disney (Ohio) 39; *Moore v. Vance*, 1 Ohio 10; *Lehman v. McBride*, 15 Ohio St. 573.

Oregon.—*Bird v. Wasco County*, 3 Oregon 284; *Fleischner v. Chadwick*, 5 Oregon 152; *Grant County v. Sels*, 5 Oregon 243; *Hurst v. Hawn*, 5 Oregon 275; *Stingle v. Nevel*, 9 Oregon 63.

Pennsylvania.—*Hughes v. Jones*, 8 Kulp (Pa.) 242; *Com. v. Cromley*, 1 Ashm. (Pa.) 179; *Egypt St., 2 Grant Cas. (Pa.)* 455; *Southwark Bank v. Com.*, 26 Pa. St. 446; *Johnston's Estate*, 33 Pa. St. 511; *Com. v. Cross Cut R. Co.*, 53 Pa. St. 62; *Sifred v. Com.*, 104 Pa. St. 179; *Homer v. Com.*, 106 Pa. St. 221, 51 Am. Rep. 521; *Hendrix's Account*, 146 Pa. St. 289; *Spees v. Boggs*, 204 Pa. St. 504.

Rhode Island.—*State v. Wilbor*, 1 R. I. 199, 36 Am. Dec. 245.

South Carolina.—*Byrne v. Stewart*, 3 Desaus. (S. Car.) 135; *Morrison v. Barksdale*, Harp. L. (S. Car.) 101; *State v. Stoll*, 2 S. Car. 538.

Tennessee.—*Smith v. Hickman*, Cooke (Tenn.) 330; *Browning v. Jones*, 4 Humph. (Tenn.) 69; *Hockaday v. Wilson*, 1 Head (Tenn.) 113; *Wilcox v. State*, 3 Heisk. (Tenn.) 110; *White v. Nashville, etc., R. Co.*, 7 Heisk. (Tenn.) 518; *Wells v. State*, 3 Lea (Tenn.) 70; *Homes Ins. Co. v. Taxing Dist.*, 4 Lea (Tenn.) 644; *Poe v. State*, 85 Tenn. 495.

Texas.—*Rogers v. Watrous*, 8 Tex. 62, 58 Am. Dec. 100; *Cain v. State*, 20 Tex. 355; *Fayette County v. Faires*, 44 Tex. 514; *Brown v. Chancellor*, 61 Tex. 437; *Davis v. State*, 2 Tex. App. 425; *Rutherford v. State*, 39 Tex. Crim. 137.

Utah.—*Oregon Short Line, etc., R. Co. v. Standing*, 19 Utah 452; *Hudson Furniture Co. v. Freed Furniture, etc., Co.*, 10 Utah 31.

Virginia.—*Fox v. Com.*, 16 Gratt. (Va.) 10; *Hogan v. Guigon*, 29 Gratt. (Va.) 705.

Washington.—*Philbrick v. Andrews*, 8 Wash. 7; *Gasch v. Davies*, 1 Wash. 290.

West Virginia.—*Shields v. Bennett*, 8 W.

Va. 88; *Forqueran v. Donnally*, 7 W. Va. 114; *State v. Cain*, 8 W. Va. 730.

In *Louisiana*, it is prescribed by the Code of Practice that whenever its provisions conflict with those of the Civil Code the latter shall be considered repealed. *Beck v. Brady*, 7 La. Ann. 124.

Expression of Contrary Intent.—Where a later act expressly provides that it is to be construed as having been passed prior to a specified earlier act, the earlier act is not repealed by implication, but the latter must yield in case an inconsistency exists. *People v. Jaehne*, 103 N. Y. 182; *People v. Moran*, 123 N. Y. 262, 20 Am. St. Rep. 732.

Grant of Right Conditioned on Different Things.—Acts which grant a right conditioned on different things are clearly inconsistent. *Gwinner v. Lehigh, etc., R. Co.*, 55 Pa. St. 126.

Re-enactment of Repugnant Laws.—The re-enactment by codification of two repugnant statutes merely operates as a continuation of them, though the codifying act purports to repeal all prior acts, and therefore the act which was first passed is repealed by the later one, notwithstanding the codification. *Northern Pac. R. Co. v. Ellison*, 3 Wash. 226.

1. Theory of Implied Repeal.—*Henrietta Min., etc., Co. v. Gardner*, 173 U. S. 123.

2. Repugnancy Must Be Irreconcilable.—*Alabama.*—*State v. Styles*, 121 Ala. 363.

Arkansas.—*Chamberlain v. State*, 50 Ark. 137; *State v. Kirk*, 53 Ark. 337; *Ex p. Coleman*, 54 Ark. 237; *Thompson v. State*, 60 Ark. 59.

California.—*In re Mitchell*, 120 Cal. 384; *Nickey v. Stearns Ranchos Co.*, 126 Cal. 150.

Illinois.—*Covington v. East St. Louis*, 78 Ill. 548; *Lewis v. Cook County*, 72 Ill. App. 151; *McGillen v. Wolff*, 83 Ill. App. 227.

Indiana.—*Coghill v. State*, 37 Ind. 111; *Hamlyn v. Nesbit*, 37 Ind. 285; *Carver v. Smith*, 90 Ind. 222, 46 Am. Rep. 210.

Kansas.—*Kansas City, etc., R. Co. v. Tontz*, 29 Kan. 460; *Montague v. Jefferson County*, 7 Kan. App. 160.

Kentucky.—*Com. v. Boone County Ct.*, 82 Ky. 632; *Adams Express Co. v. Lexington*, 83 Ky. 657.

Maryland.—*Frostburg Min. Co. v. Cumberland, etc., R. Co.*, 81 Md. 28.

Michigan.—*Connors v. Carp River Iron Co.*, 54 Mich. 168; *Musselman v. Wright*, 107 Mich. 639.

Minnesota.—*Gurney v. St. Paul*, 36 Minn. 163.

Missouri.—*St. Louis v. Alexander*, 23 Mo. 483; *Deters v. Renick*, 37 Mo. 508; *State v. McDonald*, 38 Mo. 529; *State v. Bishop*, 41 Mo. 16; *State v. Macon County Ct.*, 41 Mo. 453; *St. Louis v. Independent Ins. Co.*, 47 Mo. 147; *State v. Severance*, 55 Mo. 378; *Manker v. Faulhaber*, 94 Mo. 430.

Nebraska.—*State v. Babcock*, 21 Neb. 599; *Beatrice Paper Co. v. Beloit Iron Works*, 46 Neb. 900; *State v. Moore*, 48 Neb. 870.

convincing,¹ and following necessarily from the language used.²

Acts Reconciled if Possible.—Hence every effort must be used to make all acts stand, and the later act will not operate as a repeal of the earlier one, if by any reasonable construction they can be reconciled.³

New York.—Bowen v. Lease, 5 Hill (N. Y.) 225.

Ohio.—Ludlow v. Johnston, 3 Ohio 553, 17 Am. Dec. 609; Cass v. Dillon, 2 Ohio St. 607; Dodge v. Gridley, 10 Ohio 178.

Pennsylvania.—Com. v. Vetterlein, 21 Pa. Super. Ct. 587.

Texas.—State v. Drake, 86 Tex. 329; Hastings v. Kellogg, (Tex. Civ. App. 1896) 36 S. W. Rep. 821.

Virginia.—Fulkerson v. Treasurer, 95 Va. 1.

West Virginia.—Forqueran v. Donnally, 7 W. Va. 114.

See also the cases cited in the next preceding note but one.

Where Congress has expressly legislated in respect to a given matter, that express legislation must control in the absence of subsequent legislation equally express, and is not overthrown by any mere inferences or implications to be found in such subsequent legislation. *Rosencrans v. U. S.*, 165 U. S. 262.

1. Repugnancy Must Be Clear.—*Iverson v. State*, 52 Ala. 170; *Gibson v. Ackermann*, 70 Ill. App. 399; *State v. Blend*, 121 Ind. 514, 16 Am. St. Rep. 411; *Allen v. Salem*, 10 Ind. App. 650; *Farwell v. Des Moines Brick Mfg. Co.*, 97 Iowa 286; *Lee v. Forman*, 3 Met. (Ky.) 114; *Com. v. Rumford Chemical Works*, 16 Gray (Mass.) 231; *House v. State*, 41 Miss. 737; *Brown v. Harris*, 67 N. J. L. 207; *Orton v. Noonan*, 29 Wis. 541; *Thivierge v. Cinqmars*, 13 Quebec Super. Ct. 398.

2. Repugnancy Must Follow Necessarily from Language Used.—*Lucas County v. Chicago*, etc., R. Co., 67 Iowa 541; *Pratt v. Atlantic*, etc., R. Co., 42 Me. 579; *Richards v. Patterson*, 30 Miss. 583; *Lingonner v. Ambler*, 44 Neb. 316.

That two acts are repugnant in principle merely, forms no reason why both acts may not stand. *Ex p. Smith*, 40 Cal. 419. See also *Cass v. Dillon*, 2 Ohio St. 612; *Eastern*, etc., *School Dist. v. Cincinnati*, 19 Ohio 197.

A statute conferring on juries discretion to fix the punishment in cases of conviction for murder in the first degree at imprisonment for life instead of the death penalty does not repeal an earlier statute making conscientious scruples against capital punishment ground of challenge for cause. *Hill v. State*, 42 Neb. 503. See also *Caldwell v. State*, 41 Tex. 86.

3. Acts Must Be Reconciled if Possible—*England.*—*Lybbe v. Hart*, 29 Ch. D. 15.

United States.—*U. S. v. Tynen*, 11 Wall. (U. S.) 88; *District of Columbia v. Hutton*, 143 U. S. 18; *Henrietta Min.*, etc., *Co. v. Gardner*, 173 U. S. 123.

Alabama.—*Iverson v. State*, 52 Ala. 170; *Parker v. Hubbard*, 64 Ala. 203; *Riggs v. Brewer*, 64 Ala. 282; *Montgomery v. National Bldg.*, etc., *Assoc.*, 108 Ala. 336.

California.—*Merrill v. Gorham*, 6 Cal. 41.

Colorado.—*Kollenberger v. People*, 9 Colo. 233.

Connecticut.—*Chichester v. New Hampshire F. Ins. Co.*, 72 Conn. 707.

Florida.—*Mitchell v. Duncan*, 7 Fla. 18.

Georgia.—*Conner v. Southern Express Co.*, 37 Ga. 397.

Illinois.—*Bruce v. Schuyler*, 9 Ill. 221, 46 Am. Dec. 447; *Ottawa v. La Salle County*, 12 Ill. 341; *Mullen v. People*, 31 Ill. 444; *Roberts v. Fahs*, 36 Ill. 268; *People v. Barr*, 44 Ill. 198; *Perteet v. People*, 65 Ill. 230; *Fowler v. Perkins*, 77 Ill. 271; *Wragg v. Penn Tp.*, 94 Ill. 11, 34 Am. Rep. 199; *Barr v. People*, 103 Ill. 110; *Cook County v. Gilbert*, 146 Ill. 268.

Indiana.—*La Grange County v. Cutler*, 6 Ind. 354; *De Pauw v. New Albany*, 22 Ind. 204; *Blain v. Bailey*, 25 Ind. 165; *Indianapolis Water Works Co. v. Burkhardt*, 41 Ind. 364; *Wright v. Tipton County*, 82 Ind. 335; *Madison v. Smith*, 83 Ind. 502; *Carver v. Smith*, 90 Ind. 222, 46 Am. Rep. 210; *Harbin v. State*, 133 Ind. 698; *Ledgerwood v. State*, 134 Ind. 81; *Pomeroy v. Beach*, 149 Ind. 511.

Iowa.—*Ament v. Humphrey*, 3 Greene (Iowa) 255; *Cedar Rapids*, etc., *R. Co. v. Elseffer*, 84 Iowa 510; *Rhode v. Bank*, 52 Iowa 376.

Kansas.—*Elliott v. Lochnane*, 1 Kan. 127. *Kentucky.*—*Brown v. Miller*, 4 J. J. Marsh. (Ky.) 474; *Graves v. Graves*, 10 B. Mon. (Ky.) 31.

Louisiana.—*De Armas's Case*, 10 Mart. (La.) 172; *Gayle v. Williams*, 7 La. 166; *New Orleans v. Mechanics*, etc., *Bank*, 15 La. Ann. 107; *Nixon v. Piffet*, 16 La. Ann. 379; *State v. Callac*, 45 La. Ann. 27.

Maine.—*Pratt v. Atlantic*, etc., *R. Co.*, 42 Me. 579.

Maryland.—*Chesapeake*, etc., *Canal Co. v. Baltimore*, etc., *R. Co.*, 4 Gill & J. (Md.) 6; *State v. Mister*, 5 Md. 11; *Billingslea v. Baldwin*, 23 Md. 85.

Massachusetts.—*Com. v. Herrick*, 6 Cush. (Mass.) 465; *Com. v. Kimball*, 21 Pick. (Mass.) 377.

Michigan.—*People v. Gustin*, 57 Mich. 407.

Minnesota.—*State v. Archibald*, 43 Minn. 328.

Mississippi.—*Planters' Bank v. State*, 6 Smed. & M. (Miss.) 628; *Commercial Bank v. Chambers*, 8 Smed. & M. (Miss.) 9; *White v. Johnson*, 23 Miss. 68; *Shelton v. Baldwin*, 26 Miss. 443; *Richards v. Patterson*, 30 Miss. 583.

Missouri.—*State v. Macon County Ct.*, 41 Mo. 453; *State v. Bishop*, 41 Mo. 16.

Nebraska.—*Lawson v. Gibson*, 18 Neb. 137; *State v. Babcock*, 21 Neb. 599; *Jackson v. Washington County*, 34 Neb. 680.

New Jersey.—*State v. Blake*, 35 N. J. L. 208.

New York.—*Chamberlain v. Chamberlain*, 43 N. Y. 424; *Matter of Evergreens*, 47 N. Y. 216; *People v. Palmer*, 52 N. Y. 83; *People v. St. Lawrence County*, 103 N. Y. 541; *Kilbourne v. Sullivan County*, 62 Hun (N. Y.) 210; *Reinhardt v. Fritzsche*, 69 Hun (N. Y.) 565; *Williams v. Potter*, 2 Barb. (N. Y.) 316; *New York*, etc., *R. Co. v. Delaware County*, (Supm. Ct. Spec. T.) 67 How. Pr. (N. Y.) 5.

Partial Repugnancy. — The repeal in any case will be measured by the extent of the conflict or inconsistency between the acts, and if any part of the earlier act can stand as not superseded or affected by the later one, it will not be repealed.¹

Identity of Object and Subject. — An implied repeal on the ground of repugnancy will not result in any case unless both the object and the subject of the statutes are the same;² and if their objects are different both statutes will stand,

North Carolina. — *State v. Custer*, 65 N. Car. 339; *State v. Massey*, 103 N. Car. 356.

Ohio. — *Ludlow v. Johnston*, 3 Ohio 553, 17 Am. Dec. 609; *State v. Ehrman*, 6 Ohio Dec. 11.

Oklahoma. — *Atchison, etc., R. Co. v. Haynes*, 8 Okla. 576.

Oregon. — *Winter v. Norton*, 1 Oregon 42; *McLaughlin v. Hoover*, 1 Oregon 31.

Pennsylvania. — *Morris v. Delaware, etc., Canal, 4 W. & S. (Pa.) 461*; *Street v. Com., 6 W. & S. (Pa.) 209*; *Shinn v. Com., 3 Grant Cas. (Pa.) 205*; *Wayne County Com'r's Appeal*, 4 W. N. C. (Pa.) 411; *Dickinson v. Dickinson*, 61 Pa. St. 401; *Erie v. Bootz*, 72 Pa. St. 196; *Williamsport v. Brown*, 84 Pa. St. 438; *In re Contested Election*, 86 Pa. St. 392; *Com. v. Erie R. Co.*, 98 Pa. St. 127; *Osborne v. Everitt*, 103 Pa. St. 421; *Gerhard v. Packer Tp. School Dist.*, 24 Pa. Co. Ct. 339.

Tennessee. — *Fisher v. Baldrige*, 91 Tenn. 418.

Texas. — *Lewis v. Aylott*, 45 Tex. 199; *Laughter v. Seela*, 59 Tex. 177; *Walker v. State*, 7 Tex. App. 245, 32 Am. Rep. 595; *Braun v. State*, 40 Tex. Crim. 236.

Wisconsin. — *Atty.-Gen. v. Brown*, 1 Wis. 513.

West Virginia. — *Forqueran v. Donnally*, 7 W. Va. 114.

1. Implied Repeal Only to Extent of Repugnancy — *United States.* — *Wood v. U. S.*, 16 Pet. (U. S.) 363; *McCool v. Smith*, 1 Black (U. S.) 459; *Daviess v. Fairbairn*, 3 How. (U. S.) 636; *Chicago, etc., R. Co. v. U. S.*, 127 U. S. 406; *District of Columbia v. Hutton*, 143 U. S. 18; *Weil v. Polack*, 30 Fed. Rep. 813; *Seward County v. Ætna L. Ins. Co., (C. C. A.) 90 Fed. Rep. 222*.

Alabama. — *Turner v. State*, 40 Ala. 21; *Watson v. Kent*, 78 Ala. 602.

Arkansas. — *Coats v. Hill*, 41 Ark. 149.

California. — *Ex p. Pfirrmann*, 134 Cal. 143.

Connecticut. — *State v. Grady*, 34 Conn. 118.

District of Columbia. — *McCarthy v. McCarthy*, 20 App. Cas. (D. C.) 195.

Georgia. — *Elrod v. Gilliland*, 27 Ga. 467.

Illinois. — *Bruce v. Schuyler*, 9 Ill. 221, 46 Am. Dec. 447; *Ottawa v. La Salle County*, 12 Ill. 339; *Sullivan v. People*, 15 Ill. 233; *Fowler v. Perkins*, 77 Ill. 271; *East St. Louis v. Maxwell*, 99 Ill. 439; *Holton v. Daly*, 106 Ill. 131; *Hunt v. Chicago Horse, etc., R. Co.*, 121 Ill. 638; *Butz v. Kerr*, 123 Ill. 659; *Dunaway v. Goodall*, 3 Ill. App. 201; *Gibson v. Ackermann*, 70 Ill. App. 399; *McGillen v. Wolff*, 83 Ill. App. 227.

Indiana. — *Jeffersonville, etc., R. Co. v. Dunlap*, 112 Ind. 93; *Pennsylvania Co. v. McCarty*, 112 Ind. 322; *State v. Cooper*, 114 Ind. 12.

Kansas. — *Montague v. Jefferson County*, 7 Kan. App. 160.

Michigan. — *Brown v. McCormick*, 28 Mich. 220; *Breitung v. Lindauer*, 37 Mich. 233; *Connors v. Carp River Iron Co.*, 54 Mich. 168; *People v. Gustin*, 57 Mich. 407.

Mississippi. — *Hearn v. Brogan*, 64 Miss. 334.

Missouri. — *Manker v. Faulhaber*, 94 Mo. 430.

New Jersey. — *Plum v. Lugar*, 49 N. J. L. 557; *Bowyer v. Camden*, 50 N. J. L. 87; *Public School v. Trenton*, 30 N. J. Eq. 667.

New York. — *Mongeon v. People*, 55 N. Y. 613; *McCartee v. Orphan Asylum Soc.*, 9 Cow. (N. Y.) 437.

North Carolina. — *State v. Custer*, 65 N. Car. 339; *State v. Massey*, 103 N. Car. 356.

Ohio. — *Eggleston v. Harrison*, 61 Ohio St. 397.

Pennsylvania. — *In re Contested Election*, 86 Pa. St. 392.

South Carolina. — *Byrne v. Stewart*, 3 Desaus. (S. Car.) 135.

Utah. — *North Point Consol. Irrigation Co. v. Utah, etc., Canal Co.*, 14 Utah 162; *Nelden v. Clark*, 20 Utah 382, 77 Am. St. Rep. 917; *State University v. Richards*, 20 Utah 457, 77 Am. St. Rep. 928.

Vermont. — *St. Johnsbury v. Thompson*, 59 Vt. 300.

Virginia. — *Justice v. Com.*, 81 Va. 209; *Warder v. Arell*, 2 Wash. (Va.) 296, 1 Am. Dec. 488.

West Virginia. — *Dunfee v. Childs*, 45 W. Va. 165.

And see the cases cited in the next preceding note.

2. Identity of Object and Subject — *United States.* — *U. S. v. Claflin*, 97 U. S. 546; *U. S. v. Gear*, 3 How. (U. S.) 120; *Stockwell v. U. S.*, 13 Wall. (U. S.) 531.

Alabama. — *Ezell v. State*, 102 Ala. 121.

Arkansas. — *Hilliard v. Bunker*, 68 Ark. 340; *Ex p. Morrison*, 69 Ark. 517.

California. — *People v. Platt*, 67 Cal. 22; *Rosborough v. Boardman*, 67 Cal. 116; *Banks v. Yolo County*, 104 Cal. 258.

Colorado. — *Miller v. Edwards*, 8 Colo. 528; *Canfield v. Leadville*, 7 Colo. App. 453.

District of Columbia. — *District of Columbia v. Sisters of Visitation*, 15 App. Cas. (D. C.) 300.

Florida. — *Shepherd v. State*, 36 Fla. 374.

Idaho. — *In re Corcoran*, (Idaho 1899) 59 Pac. Rep. 18.

Illinois. — *Rawson v. Rawson*, 52 Ill. 62.

Indiana. — *Coghill v. State*, 37 Ind. 111; *Whiting v. Doob*, 152 Ind. 157.

Kentucky. — *Com. v. Carter*, (Ky. 1900) 55 S. W. Rep. 701; *Com. v. Grinstead*, 108 Ky. 59.

Michigan. — *People v. Kinney*, 110 Mich. 97.

Minnesota. — *State v. Rieger*, 59 Minn. 151.

Mississippi. — *Vicksburg v. Sun Mut. Ins. Co.*, 72 Miss. 67.

Nebraska. — *State v. Cobb*, 44 Neb. 434; *Korth v. State*, 46 Neb. 631.

New Jersey. — *Green v. Clarke*, 56 N. J. L. 62; *Daly v. Ely*, 53 N. J. Eq. 270.

New York. — *Keyes v. New York*, 165 N. Y.

though both relate to the same subject, because in such case the conflict is apparent only, and when the language of each statute is restricted to its own object, the two will run in parallel lines without meeting.¹

654, *affirming* 40 N. Y. App. Div. 409; *People v. DeWitt*, 167 N. Y. 575, *affirming* 59 N. Y. App. Div. 493; *Matter of Taylor*, 3 N. Y. App. Div. 244, *affirmed* 150 N. Y. 242; *Bowen v. Lease*, 5 Hill (N. Y.) 225; *People v. Brady*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 82.

Ohio.—*Stahl v. State*, 5 Ohio Cir. Dec. 29, 11 Ohio Cir. Ct. 23.

Tennessee.—*Cate v. State*, 3 Sneed (Tenn.) 120.

Texas.—*Dreyer v. State*, 10 Tex. App. 97; *Braun v. State*, 40 Tex. Crim. 236.

Thus if one act imposes a toll payable to turnpike trustees for passing along the road, and another transfers the duty of repairing the road to another body, prohibiting also the trustee from repairing it, the provision imposing the toll is not impliedly repealed. *Phipson v. Harvett*, 1 C. M. & R. 473. See *Brown v. Great Western R. Co.*, 9 Q. B. D. 744, 51 L. J. Q. B. 529.

Diversity of Object.—A statute which provides for compensating landowners for land taken for public purposes by "municipal or other corporations" which have the power of eminent domain does not affect an earlier statute relating to the taking of land by townships for road purposes, because a township is not a corporation but merely a political subdivision of the state, though townships are commonly called "quasi corporations." *Dell Rapids v. Irving*, 7 S. Dak. 310.

A statute permitting the defendant in a criminal case to testify in his own behalf differs in object from an earlier statute permitting a person accused of crime to make a voluntary statement which may be used in evidence against him, and therefore the later statute does not repeal the earlier one. *Aiken v. State*, (Tex. Crim. 1901) 64 S. W. Rep. 57.

A Police Regulation and a Revenue Law being referable to different branches of legislative power, do not conflict; and therefore an act forbidding the sale of cigarettes is not repealed by a later act imposing a privilege tax on dealers in cigarettes "when not sold in violation of criminal law." *Blaufield v. State*, 103 Tenn. 593.

1. Merely Apparent Conflict—Identity of Object—*England*.—*Ely v. Cash*, 15 M. & W. 617; *Ely v. Bliss*, 2 De G. M. & G. 459; *Reg. v. Everett*, 1 El. & Bl. 273, 72 E. C. L. 273; *Adey v. Trinity House*, 17 Jur. 489, 22 L. J. Q. B. 3; *Grant v. Ellis*, 9 M. & W. 113; *Manning v. Phelps*, 10 Exch. 59.

United States.—*Red Rock v. Henry*, 106 U. S. 596; *Gohen v. Texas Pac. R. Co.*, 2 Woods (U. S.) 346.

Alabama.—*Turner v. State*, 40 Ala. 21; *Campbell v. State*, 46 Ala. 116; *Lillenstine v. State*, 46 Ala. 498; *Iverson v. State*, 52 Ala. 170; *Mobile, etc., R. Co. v. Steiner*, 61 Ala. 559; *Roberts v. Phippen*, 75 Ala. 103; *Fulghum v. Roberts*, 75 Ala. 341.

Arkansas.—*State v. Kirk*, 53 Ark. 337.

California.—*Hall v. San Francisco*, 20 Cal. 591; *Taylor v. Palmer*, 31 Cal. 240; *Napa State Hospital v. Yuba County*, 138 Cal. 383.

Florida.—*Shear v. Columbia County*, 14 Fla. 146.

Georgia.—*Central Bank v. Kendrick*, *Dudley* (Ga.) 66; *Jackson v. State*, 12 Ga. 1; *Shaw v. Macon*, 21 Ga. 280.

Idaho.—*Wooley v. Watkins*, 2 Idaho 555.

Illinois.—*Tyson v. Postlethwaite*, 13 Ill. 727; *Louisville, etc., R. Co. v. East St. Louis*, 134 Ill. 656.

Indiana.—*State v. Barbee*, 3 Ind. 258; *Cordell v. State*, 22 Ind. 1; *Blain v. Bailey*, 25 Ind. 165.

Iowa.—*State v. Donehey*, 8 Iowa 396; *Baker v. Steamboat Milwaukee*, 14 Iowa 214.

Kentucky.—*Moore v. Miller*, 1 Litt. (Ky.) 356; *Graves v. Graves*, 10 B. Mon. (Ky.) 31; *Com. v. Duff*, 87 Ky. 587.

Louisiana.—*Commercial Bank v. Markham*, 3 La. Ann. 698; *State v. Judge*, 5 La. Ann. 518; *Albert v. Brewer*, 9 La. Ann. 64; *St. Martin v. New Orleans*, 14 La. Ann. 113; *New Orleans v. Mechanics*, etc., Bank, 15 La. Ann. 107; *State v. Le Bourgeois*, 45 La. Ann. 249.

Massachusetts.—*Gilson v. Emery*, 11 Gray (Mass.) 430; *McQuade v. O'Neil*, 15 Gray (Mass.) 52, 77 Am. Dec. 350; *Green v. Com.*, 12 Allen (Mass.) 155; *Com. v. Norton*, 13 Allen (Mass.) 550; *Com. v. Worcester*, 3 Pick. (Mass.) 462; *Harnden v. Gould*, 126 Mass. 411.

Michigan.—*People v. Mahaney*, 13 Mich. 481.

Minnesota.—*Maple Lake v. Wright County*, 12 Minn. 403; *Gaston v. Merriam*, 33 Minn. 271.

Mississippi.—*Shelton v. Baldwin*, 26 Miss. 439; *House v. State*, 41 Miss. 737.

Missouri.—*State v. Vernon County Ct.*, 53 Mo. 128.

Nevada.—*State v. Storey County*, 17 Nev. 96.

New York.—*Powers v. Shepard*, 48 N. Y. 540; *Crouch v. Hayes*, 98 N. Y. 183; *Harlem Bridge, etc., R. Co. v. Southern Boulevard R. Co.*, 41 Hun (N. Y.) 553; *People v. Harris*, (Supm. Ct. Gen. T.) 7 N. Y. Supp. 773; *Kilbourne v. Sullivan County*, 62 Hun (N. Y.) 210.

Ohio.—*Cass v. Dillon*, 2 Ohio St. 607; *Raubenbaugh v. Shelley*, 6 Ohio St. 307; *State v. Board of Public Works*, 36 Ohio St. 409.

Oregon.—*Winter v. Norton*, 1 Oregon 42.

Pennsylvania.—*Drew v. Com.*, 1 Whart. (Pa.) 279; *Street v. Com.*, 6 W. & S. (Pa.) 209; *Moyer v. Gross*, 2 P. & W. (Pa.) 171; *McFate's Appeal*, 105 Pa. St. 323; *Dick's Appeal*, 106 Pa. St. 589; *Malloy v. Com.*, 115 Pa. St. 25; *Com. v. Collis*, 10 Phila. (Pa.) 430, 32 Leg. Int. (Pa.) 239; *Com. v. Wilkes-Barre, etc., R. Co.*, 14 Pa. Co. Ct. 205.

South Carolina.—*State v. Durant*, Harp. L. (S. Car.) 319; *State v. Smith*, 8 S. Car. 127; *State v. Young*, 30 S. Car. 399; *State v. Beaufort*, 39 S. Car. 5.

South Dakota.—*Wright v. Lee*, 2 S. Dak. 596.

Texas.—*Cain v. State*, 20 Tex. 355; *Mills v. State*, 23 Tex. 295; *Green v. State*, 28 Tex. App. 493.

Modifications of or Exceptions to Earlier Statute.—Another instance in which an inconsistency between two statutes is seeming only and not real is where the later one can be construed as a modification of or exception to the earlier one.¹

State Laws Repugnant to Acts of Congress.—It is clear that the power to repeal or abrogate a statute is legislative in its nature, and pertains exclusively to the sovereignty from which the law emanated.² Under the complex polity, however, which prevails in the United States, there are some matters which are within the legislative power of the states, subject to the paramount power of the Congress of the United States. The result of this condition is that a state law in the category mentioned, while valid and operative so long as there is no federal legislation on the subject, will be suspended by the exercise of the power of Congress. But the effect of the act of Congress is merely to suspend and not to repeal the state law, so that it will again come into operation without further state legislation, if the act of Congress is repealed.³

bb. NEGATIVE AND AFFIRMATIVE TERMS—(aa) *In General.*—If a subsequent statute which is contrary to an earlier one has negative words, it repeals the earlier.⁴ Conversely, an affirmative statute is not repealed by a subsequent statute which is in affirmative terms only, without any express or implied negative;⁵ but in such case the later statute is to be considered as cumulative rather than exclusive.⁶

Negative Act in Affirmative Form.—A later statute containing provisions, though merely affirmative in form, plainly repugnant to those of a former statute, repeals it as absolutely as by a negative clause.⁷

Utah.—*People v. McAllister*, 10 Utah 357; *Matter of Gannett*, 11 Utah 283.

Wisconsin.—*Cramer v. Milwaukee*, 18 Wis. 257; *Jones v. St. Onge*, 67 Wis. 520.

Illustrations.—An act which provides one course of proceeding for the habitual neglect to send a child to school, does not conflict with another which provides a different mode of proceeding for a neglect which was not habitual but occasional only, and both therefore can stand. *Ex p. London School Board*, 2 Q. B. D. 397; *Ex p. Attwater*, 5 Ch. D. 27.

A statute which does not take away any right or impose any substantially new duty, but regulates, with additional requirements, a duty imposed by a previous act, is not to be deemed inconsistent with the previous act. *Staats v. Hudson River R. Co.*, 4 Abb. App. Dec. (N. Y.) 287.

The right which a nonresident plaintiff had by one act to bring suit by a "long" summons without first giving security for costs, is not taken away by a subsequent act permitting him to bring suit by a "short" summons on giving security for costs. *Osborne v. Everitt*, 103 Pa. St. 421.

Where the original act fixed a tax on the privilege of standing jacks, and also a penalty for the exercise thereof without a license, and a later statute changed the tax and provided a remedy for its collection, but was silent as to the penalty, it was held that the two acts were not inconsistent. *Cate v. State*, 3 Sneed (Tenn.) 120.

1. Later Act Mere Modification of or Exception to Earlier One.—*Riggs v. Pfister*, 21 Ala. 469; *State v. Brewer*, 64 Ala. 287; *Horn v. State*, (Ga. 1901) 40 S. E. Rep. 297; *State v. Bishop*, 41 Mo. 16.

² See *supra*, this section, 1. *b. Power to Repeal Statutes.*

3. State Laws Repugnant to Act of Congress.—*Smith v. Turner*, 7 How. (U. S.) 395; *Cooley v. Board of Wardens*, 12 How. (U. S.) 299; *Ex p. McNeil*, 13 Wall. (U. S.) 236; *The South Cambria*, 27 Fed. Rep. 526; *State v. Lord*, 66 N. H. 479; *Sturgis v. Spofford*, 45 N. Y. 452; *Henderson v. Spofford*, 59 N. Y. 131; *People v. Brooks*, 4 Den. (N. Y.) 469. See also the title *INSOLVENCY AND BANKRUPTCY*, vol. 16, p. 642.

4. Negative Words—Repealing Effect.—*Ballston Spa Bank v. Marine Bank*, 16 Wis. 120; *Read v. Storey*, 6 H. & N. 423.

Thus, an act providing that "no corporation" shall interpose the defense of usury repeals the laws against usury as to corporations. *Curtis v. Leavitt*, 15 N. Y. 135.

5. Effect of Subsequent Affirmative Statute.—*Ex p. Warrington*, 3 De G. M. & G. 171; *Chamberlain v. State*, 50 Ark. 137; *People v. Lytle*, 1 Idaho 143; *People v. Mount*, 87 Ill. App. 194, affirmed 186 Ill. 560; *State v. Buckner*, 42 La. Ann. 74; *State v. Hay*, 45 Neb. 321; *Com. v. Richmond*, etc., R. Co., 81 Va. 355; *Atty-Gen. v. Brown*, 1 Wis. 513; *Atty-Gen. v. Chicago*, etc., R. Co., 35 Wis. 435.

6. Cumulative Statute.—*Burlington Ins. Co. v. Mortimer*, 52 Kan. 784, holding that a statute authorizing service of process against foreign insurance companies doing business in the state to be made on the superintendent of insurance does not impliedly repeal an earlier act authorizing service on the chief officer of the agency of an insurance company, in any county, but merely provides an additional method of making service. See also *Sweasey v. Sweasey*, 126 Cal. 123; *People v. Henwood*, 123 Mich. 317.

7. Negative Act in Affirmative Form—*England.*—*O'Flaherty v. McDowell*, 6 H. L. Cas. 142; *Garnett v. Bradley*, 3 App. Cas. 966; *Ex p. Warrington*, 3 De G. M. & G. 159; *Foster's Case*, 5 Coke 59.

Negative Acts Affirmative Inter Se. — Though two statutes may be expressed in the negative with respect to an earlier statute, yet, *inter se*, they may be affirmative and thus stand together.¹

(*bb*) *Prescribing Different Powers, Privileges, or Duties.* — A subsequent statute conferring in affirmative words larger or more restricted powers operates to repeal the corresponding provisions of the earlier act;² and the result is the same in the case of a later statute granting wider or less extensive privileges,³ imposing more or less onerous burdens or liabilities,⁴ or imposing other duties than

Illinois. — *Sullivan v. People*, 15 Ill. 233; *People v. Nelson*, 156 Ill. 364.

Massachusetts. — *Whitney v. Blanchard*, 2 Gray (Mass.) 208; *Goddard v. Boston*, 20 Pick. (Mass.) 410; *New London Northern R. Co. v. Boston, etc.*, R. Co., 102 Mass. 386.

Oklahoma. — *Board of Education v. Haralson*, 2 Okla. 170.

Pennsylvania. — *Com. v. Erie R. Co.*, 98 Pa. St. 127; *Com. v. McCandless*, (Pa. 1888) 12 Atl. Rep. 440.

South Carolina. — *Laurens v. Crawford*, 55 S. Car. 594.

Thus, an act providing that whenever any judgment rendered by a justice of the peace otherwise than on the verdict of a jury, shall exceed five dollars, an appeal shall be allowed, impliedly repeals a previous statute which allowed an appeal from a justice of the peace in any case without regard to the amount of the judgment. *Curtis v. Gill*, 34 Conn. 49.

And so an act exempting from impressment seamen who had embarked for the Greenland fisheries, and had their names registered, was held to repeal by implication a previous act exempting from impressment all seamen engaged in the Greenland fisheries. *Ex p. Caruthers*, 9 East 44.

1. Acts Negative as to Earlier Statute but Affirmative Inter Se. — Thus, Stat. 3 & 4 Wm. IV., c. 98, enacts that no bill of exchange or promissory note made payable at or within three months from the date thereof, or not having more than three months to run, shall be void, nor shall the liability of any party thereto be affected by reason of any statute or law in force for the prevention of usury. Stat. 2 & 3 Vict., c. 27, is in the same words as 3 & 4 Wm., c. 98, except that the time specified is twelve months instead of three months, with a further provision that existing usury laws shall not apply to any loan exceeding £12, and a proviso "that nothing herein contained shall extend to the loan or forbearance of any money upon the security of any lands, tenements, or hereditaments, or any estate or interest therein." These acts, while negative with respect to the statute 12 Anne, st. 2, c. 16, § 1, declaring that all contracts reserving more than five per cent interest should be utterly void and imposing a penalty for violating its provisions, are affirmative with respect to each other, and may stand together. *Clack v. Sainsbury*, 11 C. B. 695, 73 E. C. L. 695; *Ex p. Warrington*, 3 De G. M. & G. 159. See also *Nixon v. Phillips*, 7 Exch. 188; *Canastota, etc., Plank Road Co. v. Parkill*, 50 Barb. (N. Y.) 601.

2. Extension or Restriction of Powers. — *Reg. v. Harden*, 2 El. & Bl. 188, 75 E. C. L. 188; *Reg. v. Llangian*, 4 B. & S. 249, 116 E. C. L. 249; *Vermillion County v. Potts*, 10 Ind. 286; *Mc-*

Roberts v. Washburne, 10 Minn. 23; *Jersey City v. Jersey City, etc.*, R. Co., 20 N. J. Eq. 360; *Knox County v. McComb*, 19 Ohio St. 320; *Com. v. Allegheny County*, 40 Pa. St. 348; *Schneider v. Staples*, 66 Wis. 167.

Thus a statute granting general jurisdiction to a court was held to repeal one granting limited jurisdiction. *Farley v. De Waters*, 2 Daly (N. Y.) 192.

And so an act providing that costs in the high courts should be in the discretion of the court, was held to repeal a prior law depriving a successful plaintiff of costs in an action of slander when he did not recover as much as forty shillings damages. *Garnett v. Bradley*, 3 App. Cas. 944; *Mersey Docks, etc., Board v. Lucas*, 51 L. J. Q. B. 114; *Gardner v. Whitford*, 4 C. B. N. S. 665, 93 E. C. L. 665.

3. Extending or Restricting Privileges. — *Rex v. Northleach, etc., Roads*, 5 B. & Ad. 978, 27 E. C. L. 250 (giving to specified classes of persons a right conferred by a previous statute on all persons); *Ex p. Caruthers*, 9 East 44 (exempting certain persons from imprisonment); *Rex v. Worcestershire*, 5 M. & S. 457 (authorizing appeals within limited time); *Hogane v. Hogane*, 57 Ark. 508 (giving longer time for appeals than was allowed by previous statute); *Pierpont v. Crouch*, 10 Cal. 315 (fixing the salary of a public officer); *Curtis v. Gill*, 34 Conn. 49 (authorizing appeals in certain cases).

4. Liabilities or Burdens Increased by Later Statute — *England.* — *Reg. v. Harden*, 2 El. & Bl. 188, 75 E. C. L. 188.

Alabama. — *State v. Whitworth*, 8 Port. (Ala.) 434; *Smith v. State*, 1 Stew. (Ala.) 506; *St. Clair County v. Smith*, 112 Ala. 347.

Delaware. — *Husbands v. Talley*, 3 Penn. (Del.) 88.

Illinois. — *Wilson v. Ohio, etc.*, R. Co., 64 Ill. 542, 16 Am. Rep. 565.

Indiana. — *State v. Horsey*, 14 Ind. 185; *State v. Pierce*, 14 Ind. 302.

New Hampshire. — *Leighton v. Walker*, 9 N. H. 59.

Ohio. — *Carter v. Hawley*, *Wright* (Ohio) 74.

Liabilities or Burdens Decreased by Later Statute — *England.* — *Cumberland v. Copeland*, 1 H. & C. 194; *Jefferys v. Boosey*, 4 H. L. Cas. 943; *Kyle v. Jeffreys*, 3 Macq. H. L. 611.

Alabama. — *Watson v. Kant*, 78 Ala. 602.

Georgia. — *Gorman v. Hammond*, 28 Ga. 85.

Kentucky. — *Ely v. Thompson*, 3 A. K. Marsh. (Ky.) 70.

Massachusetts. — *Com. v. Kelliher*, 12 Allen (Mass.) 480; *Nichols v. Squire*, 5 Pick. (Mass.) 168; *Com. v. Kimball*, 21 Pick. (Mass.) 373.

Texas. — *State v. Smith*, 44 Tex. 443; *St. Louis, etc., R. Co. v. Kay*, 85 Tex. 558.

West Virginia. — *State v. Cain*, 8 W. Va. 735.

were granted or imposed in the same particular by a previous act, the old and the new provisions being conflicting in their nature.¹

(cc) *Prescribing Exclusive Rule — Conflicting Rights.* — A later statute, the evident intent of which is to furnish the exclusive rule governing a certain case, repeals by implication an earlier law on the same subject.² And if the coexistence of successive acts containing affirmative provisions is destructive of the object for which the later act was passed, or if the same right is made dependent on conflicting conditions, then the later act impliedly repeals the earlier one.³

(e) *Acts Covering Same Subject* — aa. *RULE STATED.* — Where the later of two acts covers the whole subject-matter of the earlier one, not purporting to amend it, and plainly shows that it was intended to be a substitute for the earlier act, such later act will operate as a repeal of the earlier one,⁴ though the two

1. *Different Duties Imposed by Later Statute.* — In *Com. v. Godshaw*, 92 Ky. 435, 13 Ky. L. Rep. 572, an act requiring that what remained of the jury fund after the trustee had paid the jurors, should be paid into the state treasury, was held to repeal a prior act requiring the trustee to pay the balance to the auditor.

2. *Exclusive Rule Prescribed by Later Statute* — *Alabama.* — *David v. Levy*, 119 Ala. 241.

Arkansas. — *Galloway v. State*, 60 Ark. 362.

Colorado. — *Walpole v. Pueblo*, 12 Colo. App. 151; *Sipe v. People*, 26 Colo. 127.

Idaho. — *People v. Lytle*, 1 Idaho 143.

Illinois. — *Matter of Busse*, 80 Ill. App. 261.

Indiana. — *Swindell v. State*, 143 Ind. 153.

Michigan. — *Atty.-Gen. v. Railroad Com'rs*, 117 Mich. 477.

New Jersey. — *Anderson v. Camden*, 58 N. J. L. 515.

Ohio. — *Pierce v. Board of Education*, 8 Ohio Dec. 648, 1 Ohio N. P. 286.

Pennsylvania. — *Felts v. Delaware, etc.*, R. Co., 195 Pa. St. 21; *Com. v. Pattison*, 3 Pa. Dist. 599; *Com. v. Dauphin County Com'rs*, 3 Pa. Dist. 584; *Evans v. Willistown Tp.*, 168 Pa. St. 578.

Washington. — *Mac Master v. Advance Thresher Co.*, 10 Wash. 149; *Cochrane v. King County*, 12 Wash. 518.

Where an act confers no new and conflicting right or duty, but merely prescribes limitations and qualifications on those already existing, it does not repeal the acts conferring the previous rights and duties. *Staats v. Hudson River R. Co.*, 4 Abb. App. Dec. (N. Y.) 287; *Corwin v. New York, etc.*, R. Co., 13 N. Y. 42; *Chamberlain v. Chamberlain*, 43 N. Y. 424.

3. *Coexistence of Affirmative Provisions Destructive of Object of Later Act* — *England.* — *O'Flaherty v. M'Dowell*, 6 H. L. Cas. 142; *Davidson v. Farmer*, 6 Exch. 252; *Chapman v. Milvain*, 5 Exch. 61; *Steward v. Greaves*, 10 M. & W. 711; *Green v. Reg.*, 1 App. Cas. 513; *Roles v. Rosewell*, 5 T. R. 538; *Cowley v. Byas*, 5 Ch. D. 944.

Illinois. — *Korah v. Ottawa*, 32 Ill. 121, 83 Am. Dec. 255.

Mississippi. — *Commercial Bank v. Chambers*, 8 Smed. & M. (Miss.) 9; *Gibbons v. Brittenum*, 56 Miss. 232.

Nebraska. — *Von Steen v. Beatrice*, 63 Neb. 421.

Pennsylvania. — *Gwinner v. Lehigh, etc.*, R. Co., 55 Pa. St. 126.

West Virginia. — *Herron v. Carson*, 26 W. Va. 62.

The monopoly conferred upon the city of New Orleans, of keeping powder magazines in the state, was repealed to the extent that like privileges were conferred upon other corporations by subsequent enactments. *New Orleans v. Hoyle*, 23 La. Ann. 740.

So a law providing that certain officials should fix the price of all county advertising is repealed by one providing that the county advertising must be contracted for with the lowest bidder. *Journal Pub. Co. v. Whitney*, 97 Cal. 283.

4. *Repeal by Act Covering Same Subject* — *England.* — *Rex v. Cator*, 4 Burr. 2026; *Rex v. Davis*, 1 Leach C. C. 271; *Bramston v. Colchester*, 6 El. & Bl. 246, 88 E. C. L. 246.

Canada. — *Cockerill v. Harrison*, 14 Manitoba 366.

United States. — *Kent v. U. S.*, (C. C. A.) 73 Fed. Rep. 680; *Rogers v. Nashville, etc.*, R. Co., (C. C. A.) 91 Fed. Rep. 299; *Daviess v. Fairbairn*, 3 How. (U. S.) 636; *Norris v. Crocker*, 13 How. (U. S.) 429; *U. S. v. Tynen*, 11 Wall. (U. S.) 88; *Murdock v. Memphis*, 20 Wall. (U. S.) 590; *King v. Cornell*, 106 U. S. 395; *Red Rock v. Henry*, 106 U. S. 596; *Tracy v. Tuffy*, 134 U. S. 207; *Fisk v. Henarie*, 142 U. S. 459; *District of Columbia v. Hutton*, 143 U. S. 27; *U. S. v. Barr*, 4 Sawy. (U. S.) 254.

Alabama. — *Turnipseed v. Jones*, 101 Ala. 593; *Edson v. State*, 134 Ala. 50.

Arkansas. — *Hogane v. Hogane*, 57 Ark. 508; *Inman v. State*, 65 Ark. 508.

California. — *Pierpont v. Crouch*, 10 Cal. 315; *Sacramento v. Bird*, 15 Cal. 294; *State v. Conkling*, 19 Cal. 501; *Mack v. Jastro*, 126 Cal. 130.

Colorado. — *People v. Ames*, 27 Colo. 129.

Dakota. — *Campbell v. Case*, 1 Dak. 17.

District of Columbia. — *U. S. v. Macfarland*, 18 App. Cas. (D. C.) 120.

Florida. — *State v. Palmes*, 23 Fla. 620.

Illinois. — *Eaton v. Graham*, 11 Ill. 622; *Andrews v. People*, 75 Ill. 605; *Devine v. Cook County*, 84 Ill. 590; *Hunt v. Chicago, etc.*, R. Co., 20 Ill. App. 282, reversed on another point in 121 Ill. 638; *Washington Heights v. Moffatt*, 57 Ill. App. 269; *State Board of Health v. Ross*, 91 Ill. App. 281, affirmed 191 Ill. 87.

Indiana. — *Dowdell v. State*, 58 Ind. 333; *State v. Mason*, 108 Ind. 48; *Robinson v. Rippey*, 111 Ind. 112; *Crowell v. Jaqua*, 114 Ind. 246; *Western Union Tel. Co. v. Brown*, 108 Ind. 538; *Allen v. Salem*, 10 Ind. App. 650; *Bell v. Hiner*, 16 Ind. App. 184; *Koons v. Cluggish*, 8 Ind. App. 232; *Thomas v. Butler*, 139 Ind. 245.

are not repugnant.¹

Intent to Substitute New Act for Old. — But there must be an unmistakable intent manifested on the part of the legislature to make the new act a substitute for the old and to make it contain all the law on the subject;² for mere similarity

Kansas. — *State v. Studt*, 31 Kan. 245; *State v. Showers*, 34 Kan. 269; *Chicago, etc., R. Co. v. Manhattan*, 45 Kan. 419; *Beadle v. Kansas City, etc., Co.*, 51 Kan. 248; *State v. Menke*, 56 Kan. 77.

Kentucky. — *Gorham v. Luckett*, 6 B. Mon. (Ky.) 146; *Com. v. Owensboro, etc., R. Co.*, 95 Ky. 60; *Buchannon v. Com.*, 95 Ky. 334.

Louisiana. — *State v. King*, 12 La. Ann. 593.

Maine. — *Towle v. Marrett*, 3 Me. 22, 14 Am. Dec. 210.

Massachusetts. — *Ellis v. Paige*, 1 Pick. (Mass.) 45; *Nichols v. Squire*, 5 Pick. (Mass.) 168; *Com. v. Cooley*, 10 Pick. (Mass.) 39; *Weeks v. Walcott*, 15 Gray (Mass.) 54; *Bartlett v. King*, 12 Mass. 536, 7 Am. Dec. 99; *Brownell v. Holmes*, 165 Mass. 169.

Michigan. — *Shannon v. People*, 5 Mich. 88; *Breitung v. Lindauer*, 37 Mich. 217.

Minnesota. — *Rundlett v. St. Paul*, 64 Minn. 223; *Lien v. Norman County*, 80 Minn. 58; *Nicol v. St. Paul*, 80 Minn. 415.

Missouri. — *Meriwether v. Love*, 167 Mo. 514; *Berkshire v. Missouri Pac. R. Co.*, 28 Mo. App. 225; *Young v. Kansas City, etc., R. Co.*, 33 Mo. App. 519.

Mississippi. — *Swann v. Buck*, 40 Miss. 268; *Clay County v. Chickasaw County*, 64 Miss. 534; *Monroe County v. McDaniel*, 68 Miss. 203.

Nebraska. — *Brome v. Cuming County*, 31 Neb. 362; *State v. Benton*, 33 Neb. 834.

Nevada. — *Thorpe v. Schooling*, 7 Nev. 15; *State v. Rogers*, 10 Nev. 319.

New Hampshire. — *Wakefield v. Phelps*, 37 N. H. 295.

New Jersey. — *Roche v. Jersey City*, 40 N. J. L. 257; *Gabler v. Elizabeth*, 42 N. J. L. 79; *Henry v. Camden*, 42 N. J. L. 335; *Burlington v. Estlow*, 43 N. J. L. 13; *Mulligan v. Cavanagh*, 46 N. J. L. 49; *Haynes v. Cape May*, 52 N. J. L. 180; *Vreeland v. Jersey City*, 54 N. J. L. 49; *Green v. Clarke*, 56 N. J. L. 62; *Wilson v. Trenton*, 56 N. J. L. 469; *De Gintner v. New Jersey Home, etc.*, 58 N. J. L. 354; *Industrial School Dist. v. Whitehead*, 13 N. J. Eq. 290; *Bracken v. Smith*, 39 N. J. Eq. 169; *McCartin v. Traphagen*, 43 N. J. Eq. 323; *Mersereau v. Mersereau Co.*, 51 N. J. Eq. 382; *Tomlin v. Hildreth*, 65 N. J. L. 438; *Camden v. Varney*, 63 N. J. L. 325.

New York. — *People v. Brooklyn*, 69 N. Y. 605; *People v. Westchester County*, 73 N. Y. 173; *Heckmann v. Pinkney*, 81 N. Y. 215; *People v. Gold, etc., Tel. Co.*, 98 N. Y. 78; *People v. Jaehne*, 103 N. Y. 182; *Horton v. Cantwell*, 108 N. Y. 255; *Anderson v. Anderson*, 112 N. Y. 104; *Matter of New York Inst.*, 121 N. Y. 234; *Cromwell v. MacLean*, 123 N. Y. 485; *People v. Carr*, 36 Hun (N. Y.) 488; *Reinhardt v. Fritzsche*, 69 Hun (N. Y.) 565; *McDermott v. Nassau Electric R. Co.*, 85 Hun (N. Y.) 422; *Dexter, etc., Plank Road Co. v. Allen*, 16 Barb. (N. Y.) 15; *Excelsior Petroleum Co. v. Embury*, 67 Barb. (N. Y.) 261; *People v. Van Nort*, 64 Barb. (N. Y.) 205; *People v. Peck*, 157 N. Y. 51, *affirming* 32 N. Y. App. Div. 624; *People v.*

Coler, 65 N. Y. App. Div. 217; *Matter of Stewart*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 32; *Matter of Board of St. Opening*, 86 Hun (N. Y.) 267.

Ohio. — *State v. Brown*, 4 Ohio Cir. Dec. 345, 8 Ohio Cir. Ct. 103.

Oregon. — *Little v. Cogswell*, 20 Oregon 345; *Reed v. Dunbar*, 41 Oregon 509.

Pennsylvania. — *Com. v. Cromley*, 1 Ashm. (Pa.) 179; *Johnston's Estate*, 33 Pa. St. 515; *Philadelphia v. Kates*, 150 Pa. St. 30; *Philadelphia v. Congers*, 150 Pa. St. 35; *Wood v. Armstrong County*, 2 Pa. Dist. 696.

South Dakota. — *Busby v. Riley*, 6 S. Dak. 401.

Tennessee. — *Hunter v. Memphis*, 93 Tenn. 571; *Memphis v. American Express Co.*, 102 Tenn. 336.

Texas. — *Rogers v. Watrous*, 8 Tex. 62, 58 Am. Dec. 100; *State v. Horan*, 11 Tex. 144; *Bryan v. Harvey*, 11 Tex. 311; *Stirman v. State*, 21 Tex. 734; *Harold v. State*, 16 Tex. App. 157; *Stebbins v. State*, 22 Tex. App. 32.

Utah. — *Bartch v. Meloy*, 8 Utah 424.

Vermont. — *Farr v. Brackett*, 30 Vt. 344.

Virginia. — *Fox v. Com.*, 16 Gratt. (Va.) 1.

Washington. — *State v. Carbon Hill Coal Co.*, 4 Wash. 422; *Baer v. Choir*, 7 Wash. 631; *Mansfield v. Whatcom First Nat. Bank*, 5 Wash. 665; *Stetson-Post Mill Co. v. Brown*, 21 Wash. 619, 75 Am. St. Rep. 862.

West Virginia. — *Herron v. Carson*, 26 W. Va. 62; *Dunfee v. Childs*, 45 W. Va. 155.

Wisconsin. — *Lewis v. Stout*, 22 Wis. 234; *Burlander v. Milwaukee, etc., R. Co.*, 26 Wis. 76; *Simmons v. Bradley*, 27 Wis. 689; *Moore v. Superior, etc., R. Co.*, 34 Wis. 173; *Oleson v. Green Bay, etc., R. Co.*, 36 Wis. 383; *State v. Campbell*, 44 Wis. 538.

Provisions of the former law not contained in the latter will be presumed to have been intentionally omitted. *In re Wheelock* (Supreme Ct. Gen. T.) 3 N. Y. Supp. 890; *In re Alexander* (Supreme Ct. Gen. T.) 3 N. Y. Supp. 892.

1. Repugnancy Not Essential — *United States.* — *District of Columbia v. Hutton*, 143 U. S. 18. *Georgia.* — *Harrison v. Walker*, 1 Ga. 32. *Illinois.* — *Sullivan v. People*, 15 Ill. 233. *Kansas.* — *State v. Studt*, 31 Kan. 245. *Massachusetts.* — *Com. v. Kimball*, 21 Pick. (Mass.) 376.

New Hampshire. — *Leighton v. Walker*, 9 N. H. 59.

New York. — *Dexter, etc., Plank Road Co. v. Allen*, 16 Barb. (N. Y.) 15; *Excelsior Petroleum Co. v. Embury*, 67 Barb. (N. Y.) 261.

Texas. — *Rogers v. Watrous*, 8 Tex. 62, 58 Am. Dec. 100.

Utah. — *Bartch v. Meloy*, 8 Utah 424.

2. Intent to Substitute Must Be Clear. — *Wood v. U. S.*, 16 Pet. (U. S.) 363; *State v. Kirk*, 53 Ark. 337; *Gilbert v. Craddock*, (Kan. 1903) 72 Pac. Rep. 869; *State v. Macon County Ct.*, 41 Mo. 454; *Manker v. Faulhaber*, 94 Mo. 430; *Keyes v. New York*, 40 N. Y. App. Div. 409;

in the provisions of the two statutes is not enough to effect a repeal,¹ even though the similarity may be such as to cause confusion or inconvenience.²

Express Declaration Against Repeal. — Even where the later statute covers the whole ground of the earlier, if there is an expressed declaration of intention against a repeal by implication, the courts will let both acts stand and construe them as instituting two separate systems of accomplishing the same object,³ unless such a construction is impossible.⁴ And where the revisory statute declares what effect it is intended to have on the former, only such effect can be given to it.⁵

bb. REVISIONS, COMPILATIONS, AND RE-ENACTMENTS. — The general rule that where a statute, not merely cumulative of the common law or of previous statutes, and not made to cure the deficiencies thereof, is designed to create a new and independent system, and to dispose of the whole subject of legislation, it is the only law on that subject and without an express repealing clause displaces the old statutes, has been almost universally applied to codes and revisions,⁶

Stratton v. Oregon City, 35 Oregon 409; *Booth's Will*, 40 Oregon 154.

Evidence of Intent to Substitute. — The intent to substitute one statute for the other when both relate to the same subject is discovered by the fact that both statutes are complete in themselves, and that each is on its face independent of the other. *Murphy v. Utter*, 186 U. S. 95.

1. Mere Similarity Not Sufficient. — *Robinson v. Rippey*, 111 Ind. 112; *State v. Ogden*, 50 La. Ann. 982. See *Powers v. Shepard*, 48 N. Y. 540.

Thus, an act which makes it a penitentiary offense for any officer to fail to pay over to the treasurer any county funds which may come into his hands as such officer, is not repealed by a later statute giving the clerks of the district courts a salary instead of the fees of the office as theretofore, and requiring them under penalty of imprisonment in the county jail to pay into the county treasury all the fees of the office. The later act relates only to the fees prescribed for services performed by the clerks, while the earlier act does not apply to such fees, but relates exclusively to other moneys, such as witness fees, etc., which may come into the clerk's hands by virtue of his office. *Adams v. People*, 25 Colo. 532.

2. Similarity Causing Confusion or Inconvenience — *Florida*. — *Mitchell v. Duncan*, 7 Fla. 13.

Indiana. — *Robinson v. Rippey*, 111 Ind. 112. *Iowa*. — *State v. Berry*, 12 Iowa 58; *Wilson v. Shorick*, 21 Iowa 332.

Louisiana. — *Waldo v. Bell*, 13 La. Ann. 329. *Ohio*. — *Raudebaugh v. Shelley*, 6 Ohio St. 307.

3. Express Declaration Against Repeal. — *Ex p. Yerger*, 8 Wall. (U. S.) 105; *Robinson v. Rippey*, 111 Ind. 116; *Hurst v. Samuels*, 29 S. Car. 476.

4. Deisner v. Simpson, 72 Ind. 435.

5. Patterson v. Tatum, 3 Sawy. (U. S.) 164. In this case, the act itself provided that such provisions of the earlier act as were inconsistent with it were to be repealed, and it was held that only the inconsistent provisions were repealed. See also *Barden v. Wells*, 14 Mont. 462.

6. Previous Statutes Repealed by Revision — *England*. — *Rex v. Cator*, 4 Burr. 2026; *Rex v. Davis*, 1 Leach C. C. 271.

United States. — *Butler v. Russel*, 3 Cliff. (U.

S.) 251; *Patterson v. Tatum*, 3 Sawy. (U. S.) 164; *Davies v. Fairbairn*, 3 How. (U. S.) 636; *Norris v. Crocker*, 13 How. (U. S.) 429; *King v. Cornell*, 106 U. S. 395.

Alabama. — *Barker v. Bell*, 46 Ala. 221.

Arkansas. — *Pulaski County v. Downer*, 10 Ark. 588.

California. — *Pierpont v. Crouch*, 10 Cal. 316; *Sacramento v. Bird*, 15 Cal. 294; *State v. Conkling*, 19 Cal. 501; *Mack v. Jastro*, 126 Cal. 130.

Dakota. — *Campbell v. Case*, 1 Dak. 17.

Florida. — *State v. Palmes*, 23 Fla. 620; *Jernigan v. Holden*, 34 Fla. 530.

Illinois. — *Eaton v. Graham*, 11 Ill. 622; *Illinois, etc., Canal v. Chicago*, 14 Ill. 334; *Andrews v. People*, 75 Ill. 605; *Hunt v. Chicago, etc., R. Co.*, 20 Ill. App. 282, *reversed* on another point in 121 Ill. 638; *Canal Com'rs v. East Peoria*, 179 Ill. 214, *affirming* 75 Ill. App. 450.

Maine. — *Towle v. Marrett*, 3 Me. 22, 14 Am. Dec. 206.

Massachusetts. — *Ellis v. Paige*, 1 Pick. (Mass.) 45; *Ashley, Appellant*, 4 Pick. (Mass.) 23; *Nichols v. Squire*, 5 Pick. (Mass.) 168; *Com. v. Cooley*, 10 Pick. (Mass.) 39; *Goodenow v. Buttrick*, 7 Mass. 140; *Bartlet v. King*, 12 Mass. 536, 7 Am. Dec. 99.

Michigan. — *Atty.-Gen. v. Parsell*, 100 Mich. 170.

Mississippi. — *Clay County v. Chickasaw County*, 64 Miss. 534; *Monroe County v. McDaniel*, 68 Miss. 203; *State v. Jenkins*, 73 Miss. 523.

Missouri. — *Berkshire v. Missouri Pac. R. Co.*, 28 Mo. App. 225; *Young v. Kansas City, etc., R. Co.*, 33 Mo. App. 509.

Nebraska. — *Brome v. Cuming County*, 31 Neb. 362.

Nevada. — *State v. Rogers*, 10 Nev. 319.

New Hampshire. — *Wakefield v. Phelps*, 37 N. H. 295.

New York. — *Heckmann v. Pinkney*, 81 N. Y. 211; *People v. Gold, etc., Tel. Co.*, 98 N. Y. 67; *People v. Jaehne*, 103 N. Y. 182; *Matter of New York Inst.*, 121 N. Y. 234; *Matter of Southworth*, 5 Hun (N. Y.) 55; *Dexter, etc., Plank Road Co. v. Allen*, 16 Barb. (N. Y.) 15; *People v. Peck*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 477.

Ohio. — *State v. Wyandot County*, 9 Ohio Cir. Dec. 90, 16 Ohio Cir. Ct. 218.

except so far as a contrary rule may be laid down by the revision itself.¹ But a general revision of existing laws which are substantially re-enacted operates as a simultaneous repeal and re-enactment, that is, the new statutes are to be construed as a continuance and modification of the laws rather than as an abrogation of the old and a re-enactment of the new ones,² and sometimes this is expressly declared by the revising statute.³

Limitations of Rule. — In some instances, however, the repealing effect of a revision has been limited to matters embraced in the old law which are omitted from the new,⁴ or to cases of manifest repugnance.⁵ And in no case will a revision effect a repeal of the previous statute where the legislative intent to the contrary is either expressed or implied.⁶

Inadvertent Omissions. — It has been held that a repeal of a statute is effected by omitting it from a revision or compilation, though the omission was the result of inadvertence.⁷

Conflicting Sections in Revision. — Where there is a conflict between two parts of a single act, the rule is that the latest in position will be declared to be the

Oregon. — *Little v. Cogswell*, 20 Oregon 345; *In re Ferdon*, 35 Oregon 171.

Pennsylvania. — *Ft. Pitt Bldg., etc., Assoc. v. Model Plan Bldg., etc., Assoc.*, 159 Pa. St. 308.

Rhode Island. — *Hawes's Petition*, 22 R. I. 312.

South Dakota. — *Sands v. Cruickshank*, 12 S. Dak. 1.

Tennessee. — *Padgett v. Ducktown Sulphur, etc., Co.*, 97 Tenn. 690.

Texas. — *Dickinson v. State*, 38 Tex. Crim. 472.

Vermont. — *Farr v. Brackett*, 30 Vt. 344; *Giddings v. Cox*, 31 Vt. 607; *State v. Smith*, 63 Vt. 201; *Barton Nat. Bank v. Atkins*, 72 Vt. 33.

Washington. — *State v. Carbon Hill Coal Co.*, 4 Wash. 422.

West Virginia. — *Herron v. Carson*, 26 W. Va. 62; *State v. Mines*, 38 W. Va. 125.

Wisconsin. — *Lewis v. Stout*, 22 Wis. 234; *Burlander v. Milwaukee, etc., R. Co.*, 26 Wis. 76; *Simmons v. Bradley*, 27 Wis. 689; *Moore v. Superior, etc., R. Co.*, 34 Wis. 173; *Oleson v. Green Bay, etc., R. Co.*, 36 Wis. 383; *State v. Campbell*, 44 Wis. 538; *Smith v. Eau Claire*, 78 Wis. 457.

But a Mere Change of Phraseology in the revision of statutes will not impliedly repeal the old law, unless it appears that such was the intention of the legislature. *Matter of Brown*, 21 Wend. (N. Y.) 316; *Theriat v. Hart*, 2 Hill (N. Y.) 380.

Statute Repealed by Omission from Code. — *Flores v. State*, 41 Tex. Crim. 166.

A Code Not Adopted by the Legislature does not operate as a repeal of statutes omitted therefrom. *Murray v. State*, 112 Ga. 7.

1. Thus, the act adopting the *Alabama* code of 1896 provides that it shall not repeal acts passed at that session of the legislature, and it was held, under this provision, that an act passed at that session in regard to gambling was effectual notwithstanding an inconsistent section in the code. *Benners v. State*, 124 Ala. 97.

The *Mississippi* code of 1892 provides that no local law shall be thereby repealed unless a repeal is expressly declared. *Vicksburg v. Sun Mut. Ins. Co.*, 72 Miss. 67.

As to the effect of the General Statutes of *Kentucky*, see *Wetzell v. Paducah*, 117 Fed. Rep. 647.

2. **Revision Operating as Simultaneous Repeal and Re-enactment.** — *State v. Prouty*, 115 Iowa 657; *Com. v. Gilkeson*, 24 Pa. Co. Ct. 289. As to the effect of a simultaneous repeal and re-enactment, see *infra*, this section, *Repeal and Re-enactment*.

3. **Adoption of Old Law Declared by Revising Act.** — *Butte First Nat. Bank v. Weidenbeck*, (C. C. A.) 97 Fed. Rep. 896, reversing 87 Fed. Rep. 271; *Boyce v. Perry*, (County Ct.) 26 Misc. (N. Y.) 355; *Bird v. Sellers*, 122 Mo. 23; *Richardson v. Fletcher*, 74 Vt. 417; *Julien v. Model Bldg., etc., Co.*, (Wis. 1902) 92 N. W. Rep. 561.

4. **Repeal Limited to Omissions** — *Georgia.* — *Georgia R., etc., Co. v. Kirkpatrick*, 35 Ga. 144.

Louisiana. — *State v. Judge*, 37 La. Ann. 581. See also *Stafford v. Creditors*, 11 La. Ann. 470.

Maine. — *Buck v. Spofford*, 31 Me. 36. See also *Pingree v. Snell*, 42 Me. 53.

Massachusetts. — See *Rutland v. Mendon*, 1 Pick. (Mass.) 154; *Blackburn v. Walpole*, 9 Pick. (Mass.) 97.

New Jersey. — *Bracken v. Smith*, 39 N. J. Eq. 172.

North Dakota. — *Fargo v. Ross*, 11 N. Dak. 369.

Virginia. — *Combined Saw, etc., Co. v. Flournoy*, 88 Va. 1029.

5. **Repeal Limited to Cases of Manifest Repugnance.** — *Lyon v. Fisk*, 1 La. Ann. 456.

6. **Express or Implied Intent as to Repeal.** — *Com. v. Watts*, 84 Ky. 544; *Taylor v. Chickasaw County*, 74 Miss. 23; *Phipps v. State*, 36 Tex. Crim. 216; *Bentley v. Adams*, 92 Wis. 386.

By express provision in the act adopting the *Alabama* Code of 1886, it was declared that "no act passed at the present session of the general assembly shall be repealed or affected in any manner by the adoption of this code." *South v. State*, 86 Ala. 617.

See also *Barden v. Wells*, 14 Mont. 462; *Boyce v. Perry*, (County Ct.) 26 Misc. (N. Y.) 355.

7. **Inadvertent Omissions.** — *Buck v. Spofford*, 31 Me. 36; *Combined Saw, etc., Co. v. Flournoy*, 88 Va. 1029. But see *contra*, *Phipps v. State*, 36 Tex. Crim. 216; *Crawford v. State*, (Tex. Crim. 1897) 39 S. W. Rep. 372.

law, as containing the latest expression of the legislative will.¹ According to the same principle, where there are two conflicting sections in a code or other compilation of statutes, that section prevails which is derived from a source which can be considered as the last expression of the law-making power, without regard to the relative position of such sections in the code.²

Repealing Clause. — General revisions sometimes contain provisions that all acts thereby revised, amended, or re-enacted shall operate as a repeal of prior acts relating to the same subject,³ and in such case it has been held that a prior act, the subject of which is covered by a section of such revision, is repealed though such section is unconstitutional.⁴

Re-enactments. — In case a statute is re-enacted and some of the provisions of the old law are omitted from the new, this constitutes a repeal of the omitted provisions,⁵ but the re-enacted provisions are to be read as part of the earlier statute and not of the re-enacted one if they conflict with another statute passed after the first but before the last act; and therefore they do not repeal by implication the intermediate act.⁶ Where the re-enacted statute had been amended, the re-enactment does not necessarily repeal the amendment, but the amendment may be taken as operating on the new statute.⁷

cc. AMENDMENTS "SO AS TO READ." — A statute providing that certain sections of a prior act shall be amended "so as to read as follows," repeals all contained in the sections of the original act not re-enacted;⁸ and a statute enacted "in lieu" of another has a similar effect.⁹ The portions of the

1. See *supra*, this title, VI. 8. *c. Clauses Absolutely Irreconcilable.*

2. **Conflicting Sections in Code.** — *Lamar v. Allen*, 108 Ga. 158.

3. **Repealing Clause in Revision.** — *West v. Bishop*, 110 Iowa 410; *State v. Wardell*, 153 Mo. 319; *Kern v. Supreme Council*, etc., 167 Mo. 471; *Dane County v. Reindahl*, 104 Wis. 302. And see generally the revised codes and statutes of the several states.

4. **Effect of Repealing Clause — Unconstitutional Provisions in Revision.** — *State v. Wardell*, 153 Mo. 319.

5. **Omissions in Re-enactment.** — *O'Rear v. Jackson*, 124 Ala. 298; *Ellis v. Paige*, 1 Pick. (Mass.) 43; *Cannon v. Beatty*, 19 R. I. 524.

6. *Horn v. State*, 114 Ga. 50.

7. **Re-enactment After Amendment.** — *Powell v. King*, 78 Minn. 83.

8. **Effect of Amendment "So as to Read"** — *United States*. — *Gossler v. Goodrich*, 3 Cliff. (U. S.) 71; *Columbia Wire Co. v. Boyce*, (C. C. A.) 104 Fed. Rep. 172.

California. — *People v. McNulty*, 93 Cal. 427.

Colorado. — *Denver, etc., R. Co. v. Crawford*, 11 Colo. 598.

Florida. — *State v. Duval County*, 23 Fla. 483.

Idaho. — *Barton v. Moscow Independent School Dist. No. 5*, 2 Idaho 998.

Illinois. — *Perry v. Bozarth*, 198 Ill. 328. See also *Hayward v. Gunn*, 82 Ill. 385; *Geisen v. Heiderich*, 104 Ill. 537.

Indiana. — *Longlois v. Longlois*, 48 Ind. 60; *Blakemore v. Dolan*, 50 Ind. 194.

Michigan. — *Breitung v. Lindauer*, 37 Mich. 217; *People v. Hiller*, 113 Mich. 209.

Minnesota. — *McRoberts v. Washburne*, 10 Minn. 23; *State v. Routh*, 61 Minn. 205; *Shadewald v. Phillips*, 72 Minn. 520; *State v. Enger*, 81 Minn. 399.

Nebraska. — *State v. Wish*, 15 Neb. 448.

New York. — *Moore v. Mausert*, 49 N. Y. 332; *People v. Montgomery County*, 67 N. Y.

109, 23 Am. Rep. 94; *People v. Upson*, 79 Hun (N. Y.) 87; *McDermott v. Nassau Electric R. Co.*, 85 Hun (N. Y.) 422; *Wirt v. Allegany County*, 90 Hun (N. Y.) 205; *Matter of Connellan*, (County Ct.) 25 Misc. (N. Y.) 592.

Pennsylvania. — *Fowler v. Columbia County*, 18 Pa. Co. Ct. 653.

Tennessee. — *Druggist Cases*, 85 Tenn. 449.

Texas. — *State v. Andrews*, 20 Tex. 230.

Virginia. — *Mosby v. St. Louis Mut. Ins. Co.*, 31 Gratt. (Va.) 629; *Somers v. Com.*, 97 Va. 759.

Wisconsin. — *State v. Ingersoll*, 17 Wis. 634; *Goodno v. Oshkosh*, 31 Wis. 127; *Chapin v. Crusen*, 31 Wis. 209; *Sydner v. Palmer*, 32 Wis. 406; *State v. Keaough*, 68 Wis. 135; *Ashland Water Co. v. Ashland County*, 87 Wis. 209.

Where a general law declaring what roads should be considered highways was amended, and the amendatory act provided that it should apply only to roads in certain counties, it was held that the limitation of the new act to the enumerated counties did not have the effect of retaining the original act in force, but that it was entirely repealed. *Huffman v. Hall*, 102 Cal. 26, *overruling* *Gloster v. Wade*, 78 Cal. 407.

Clerical Errors. — Where, in an amendatory act, the amendments to be made were mere substitutions of words which were specified and stated to be inserted "so as to make the section read as follows," and in the recital of the sections as amended a clerical error was made, the error was disregarded and held not to operate as a repeal of the original statute. *State v. Stillman*, 81 Wis. 124.

9. **Statute Enacted "in Lieu" of Another.** — *New Jersey Steamboat Co. v. Collector*, 18 Wall. (U. S.) 478; *Gossler v. Goodrich*, 3 Cliff. (U. S.) 71; *Griggs v. Guinn*, (Supm. Ct. Spec. T.) 29 Abb. N. Cas. (N. Y.) 144; *Matter of Prime*, 136 N. Y. 347; *Mortimer v. Chambers*, 63 Hun (N. Y.) 335.

amended act, however, which are copied without change are not to be considered as repealed and re-enacted, but they are regarded as having been continuously in force.¹

Where an Amendment Does Not Change the Original Law, but simply adds something to it, the amendatory law will not operate as a repeal of the former one.²

dd. **SUPPLEMENTAL ACTS.** — A later act which is merely supplemental to an earlier one, as by extending its provisions or giving an additional remedy, does not impliedly repeal the earlier act.³

cc. **ACTS PASSED AT SAME SESSION.** — Where two acts are passed at the same session of the legislature the presumption is strong against implied repeal, and effect must be given to each if possible;⁴ but if the two are irreconcilable the one which was approved last will prevail.⁵

(d) **Removing Reason of Law.** — Where the object and reason for which a statute was passed are removed by a later enactment, it is held that this is an implied repeal of the former statute.⁶ Thus, it is held by the weight of authority that the married women's acts removing the disabilities of coverture and

1. Unchanged Portions of Original Act. — *Central Pac. R. Co. v. Shackelford*, 63 Cal. 261; *People v. Sutter St. R. Co.*, 117 Cal. 604; *Ely v. Holton*, 15 N. Y. 598; *Mudgett v. Liebes*, 14 Wash. 482.

In another part of this article it is shown that in a few jurisdictions a simultaneous repeal and re-enactment operate to cut off pending rights and liabilities acquired or incurred under the original act; and to this extent the rule stated in the text is important. See *infra*, this section, *Effect of Repeal—Repeal and Re-enactment—Simultaneous Repeal and Re-enactment*.

2. Amendment by Mere Addition. — *Alexander v. State*, 9 Ind. 337; *State v. Miller*, 58 Ind. 399.

3. Supplemental Acts. — *Coyle v. Metropolitan L. Ins. Co.*, 8 Kulp (Pa.) 169; *State v. Martin*, 68 Vt. 93.

4. Acts Passed at Same Session — *California*. — *Thompson v. Alameda County*, 111 Cal. 553. *Connecticut*. — *Skelly v. Montville St. R. Co.*, 67 Conn. 261.

Idaho. — *Barton v. Moscow Independent School Dist. No. 5*, 2 Idaho 998.

Indiana. — *State v. Schoonover*, 135 Ind. 526; *Blumenthal v. Tibbits*, (Ind. 1903) 66 N. E. Rep. 159. See also *Cheezem v. State*, 2 Ind. 149; *La Grange County v. Cutler*, 6 Ind. 354; *Alexander v. State*, 9 Ind. 337; *Martindale v. Martindale*, 10 Ind. 566; *Cordell v. State*, 22 Ind. 1; *Gorley v. Sewall*, 77 Ind. 319.

Kentucky. — *Conley v. Com.*, 98 Ky. 125; *Lewis v. Brandenburg*, 105 Ky. 14.

Louisiana. — *Soniat v. Supple*, 48 La. Ann. 296.

Massachusetts. — *Com. v. Huntley*, 156 Mass. 236.

Minnesota. — *State v. Luther*, 56 Minn. 156.

Missouri. — *State v. Clark*, 54 Mo. 216; *Curtwright v. Crow*, 44 Mo. App. 563; *Lang v. Caloway*, 68 Mo. App. 393.

Montana. — *State v. Rotwitt*, 17 Mont. 41; *Congdon v. Butte Consol. R. Co.*, 17 Mont. 481.

Nebraska. — *Omaha Real Estate, etc., Co. v. Kragcow*, 47 Neb. 592.

New York. — *Smith v. People*, 47 N. Y. 330; *Powers v. Shepard*, 48 N. Y. 540.

Oklahoma. — *Garton v. Hudson Kimberly Pub. Co.*, 8 Okla. 631.

Pennsylvania. — *Altoona v. Calvert*, 7 Pa. Dist. 739.

Tennessee. — *Bailey v. Drane*, 96 Tenn. 16.

Texas. — *Houston, etc., R. Co. v. Ford*, 53 Tex. 364.

Utah. — *State University v. Richards*, 20 Utah 457, 77 Am. St. Rep. 928.

Virginia. — *Lacey v. Palmer*, 93 Va. 159, 57 Am. St. Rep. 795.

See also *supra*, this section, *General Principles—Time for Exercise of Power*.

5. Act Last Approved. — *In re Oregon Bulletin Printing, etc., Co.*, 3 Sawy. (U. S.) 614; *State v. Halliday*, 63 Ohio St. 165.

6. Repeal by Removing Reason of Law — *England*. — *Lowe v. Fox*, 15 Q. B. D. 667.

United States. — *Kibbe v. Ditto*, 93 U. S. 674.

California. — *Cameron v. Smith*, 50 Cal. 303.

Illinois. — *Hayward v. Gunn*, 82 Ill. 385; *Castner v. Walrod*, 83 Ill. 171, 25 Am. Rep. 369, affirming *Emerson v. Clayton*, 32 Ill. 493, and overruling *Morrison v. Norman*, 47 Ill. 477, and *Noble v. McFarland*, 51 Ill. 226; *Enos v. Buckley*, 94 Ill. 458; *Geisen v. Heiderich*, 104 Ill. 537.

Maine. — *Brown v. Cousens*, 51 Me. 302.

New York. — *Ball v. Bullard*, 52 Barb. (N. Y.) 141. Compare *Clark v. McCann*, 18 Hun (N. Y.) 13; *Dunham v. Sage*, 52 N. Y. 229.

Ohio. — *Ong v. Sumner*, 1 Cinc. Super. Ct. 424.

Pennsylvania. — *Hicks's Appeal*, 7 Pa. Super. Ct. 274.

In these cases, it was held that exemptions granted to married women on account of their coverture were impliedly repealed and removed by the married women's acts enabling women to sue and be sued, and hold property as men. But this effect has been denied in other jurisdictions. *Hershy v. Latham*, 42 Ark. 305; *McLaughlin v. Spengler*, 57 Miss. 818; *Briggs v. Smith*, 83 N. Car. 306; *Lippard v. Troutman*, 72 N. Car. 551.

A statute which prohibited bottomry loans by Englishmen to foreigners on foreign ships engaged in the Indian trade, was held to have been silently repealed by the subsequent enactments which put an end to the monopoly of the East Indian Company and threw its trade open to foreign as well as to British ships. *The India, Brown & L.* 221.

enabling them to be sued and to sue as if they were unmarried, repeal by implication the clause in the statute of limitations exempting married women from its operation. There is, however, some conflict of opinion on this question.¹ But the mere removal of some of the evils provided against in the original statute does not operate to repeal it.²

(e) *Disuse of Law*. — It has several times been said that a statute may become obsolete and inoperative, that is, may be impliedly repealed, by long disuse.³ The doctrine is reasonable and has the support of authority so far as it means that nonuser will help the implication of repeal by a later statute,⁴ or that a law becomes obsolete when the object to which it was intended to apply, or the occasion for which it was enacted, no longer exists.⁵ But it has been expressly denied that the mere fact of nonuser of a statute, without other circumstances, will in any case operate as an implied repeal, because the power to repeal statutes, like the power of enactment, belongs exclusively to the legislature; and this view seems to be supported by the weight of authority.⁶

(4) *Penal Acts* — (a) *In General*. — The general rules relating to implied repeals are applicable to penal statutes; so where two such statutes are repugnant in any of their provisions, the later will be held to repeal the earlier to the extent of the repugnancy;⁷ and where a new statute covers the whole subject-matter of an earlier one, and adds offenses and prescribes penalties different from those enumerated in the old law, so as to indicate an intention to substitute the new law for the old, it is by necessary implication a repeal of the former statute, even though its provisions be not all repugnant.⁸ But,

1. See the title *LIMITATION OF ACTIONS*, vol. 19, p. 239. See also, in support of the minority rule, *Stubblefield v. Menzies*, 11 Fed. Rep. 268; *Fink v. Campbell*, (C. C. A.) 70 Fed. Rep. 664; *Bliler v. Boswell*, 9 Wyo. 57.

2. *Removal of Some Evils Originally Provided Against*. — *Alexandria v. Dearmon*, 2 Sneed (Tenn.) 104.

3. *Repeal by Nonuser*. — *Hill v. Smith*, Morr. (Iowa) 70; *Wright v. Crane*, 13 S. & R. (Pa.) 452; *Porter's Appeal*, 30 Pa. St. 499; *Watson v. Blaylock*, 2 Treadw. (S. Car.) 351; *O'Hanlon v. Myers*, 10 Rich. L. (S. Car.) 128; *Canady v. Gorge*, 6 Rich. Eq. (S. Car.) 103. See also *Leigh v. Kent*, 3 T. R. 364; *James v. Com.*, 12 S. & R. (Pa.) 220.

4. *Reasonable Extent of Doctrine — Cessation of Reason or Purpose of Law*. — *Pearson v. International Distillery*, 72 Iowa 357; *Com. v. Hoover*, 1 Browne (Pa.) xxviii.

5. *Nonuser to Help Implication of Repeal*. — *Rex v. Dodd*, 9 East 516.

6. *Doctrine of Repeal by Nonuser Denied*. — *Snowden v. Snowden*, 1 Bland (Md.) 556; *Com. v. Hoover*, 1 Browne (Pa.) xxviii; *Respublica v. Philadelphia County*, 4 Yeates (Pa.) 181; *Glancey v. Jones*, 4 Yeates (Pa.) 215; *Kitchen v. Smith*, 101 Pa. St. 452; *Homer v. Com.*, 106 Pa. St. 221, 51 Am. Rep. 521. See also *Costello v. Palmer*, 20 App. Cas. (D. C.) 210; *Tise v. Shaw*, 68 Md. 1; *The India, Brown & L.* 221.

7. *Implied Repeal of Penal Acts — England*. — *Rex v. Cator*, 4 Burr. 2026.

United States. — *U. S. v. Ulrici*, 3 Dill. (U. S.) 532, 28 Fed. Cas. No. 16,594.

California. — *People v. Tisdale*, 57 Cal. 104; *Fraser v. Alexander*, 75 Cal. 147.

Connecticut. — *State v. Grady*, 34 Conn. 118.

Georgia. — *Gorman v. Hammond*, 28 Ga. 85.

Indiana. — *State v. Miller*, 58 Ind. 399.

Massachusetts. — *Flaherty v. Thomas*, 12 Allen (Mass.) 428; *Com. v. Wyman*, 12 Cush. (Mass.) 237; *Com. v. Gardner*, 11 Gray (Mass.) 438.

Missouri. — *State v. Boogher*, 71 Mo. 631.
New York. — *Mongeon v. People*, 55 N. Y. 613.

South Carolina. — *State v. Hamblin*, 4 S. Car. 1.

Tennessee. — *State v. Duncan*, 16 Lea (Tenn.) 79; *Durham v. State*, 89 Tenn. 724.

Same Object as Well as Subject. — To effect the repeal of an earlier act the subject thereof must be treated and both statutes enacted to accomplish the same object. *U. S. v. Claflin*, 97 U. S. 546; *Stockwell v. U. S.*, 13 Wall. (U. S.) 531; *State v. Grady*, 34 Conn. 118; *Coghill v. State*, 37 Ind. 111; *Com. v. Gardner*, 11 Gray (Mass.) 447; *Cate v. State*, 3 Sneed (Tenn.) 120. See also *Shoemaker v. State*, 20 N. J. L. 163; *Walker v. State*, 7 Tex. App. 257, 32 Am. Rep. 595.

8. *New Statute Covering Whole Subject-matter of Earlier Statute — England*. — *Rex v. Cator*, 4 Burr. 2026; *Rex v. Davis*, 1 Leach C. C. 271; *Michell v. Brown*, 1 El. & El. 267, 102 E. C. L. 267; *In re Baker*, 2 H. & N. 219; *Robinson v. Emerson*, 4 H. & C. 355; *Henderson v. Sherborne*, 2 M. & W. 236; *Parry v. Croydon Commercial Gas, etc., Co.*, 15 C. B. N. S. 568, 109 E. C. L. 568.

United States. — *Norris v. Crocker*, 13 How. (U. S.) 429; *U. S. v. Tynen*, 11 Wall. (U. S.) 88; *U. S. v. Irwin*, 5 McLean (U. S.) 178.

Alabama. — *State v. Whitworth*, 8 Port. (Ala.) 434.

Connecticut. — *State v. Grady*, 34 Conn. 118.

Florida. — *Michell v. Duncan*, 7 Fla. 13.

Georgia. — *Gorman v. Hammond*, 28 Ga. 85.

Illinois. — *Sullivan v. People*, 15 Ill. 233.

as in the case of statutes generally, repeals by implication are not favored, and if the statutes can stand together consistently, there is no repeal.¹ As there is no repugnancy in several remedies of a different nature, with different penalties, they may coexist.²

(b) **Change in Nature of Offense.** — Where a statute alters the quality and incidents of an offense, as by making that which was a felony merely a misdemeanor, or *vice versa*, it will be construed as repealing, by implication, the old law.³

(c) **Change in Degree of Punishment.** — Where the punishment is altered in degree but not in kind, the later statute repeals by implication the earlier one, so far as they are inconsistent; as where the later provides a milder punishment;⁴

Indiana. — *Peru, etc., R. Co. v. Bradshaw*, 6 Ind. 146; *State v. Horsey*, 14 Ind. 185; *State v. Pierce*, 14 Ind. 302; *Dowdell v. State*, 58 Ind. 333; *Johns v. State*, 78 Ind. 332, 41 Am. Rep. 577; *Wagoner v. State*, 90 Ind. 504; *Engle v. State*, 97 Ind. 122; *State v. Pike County*, 104 Ind. 123; *Phillips v. Lewis*, 109 Ind. 62; *State v. Wells*, 112 Ind. 237.

Kentucky. — *Adams v. Ashby*, 2 Bibb (Ky.) 96.

Massachusetts. — *Nichols v. Squire*, 5 Pick. (Mass.) 168; *Com. v. Cooley*, 10 Pick. (Mass.) 37; *Jennings v. Com.*, 17 Pick. (Mass.) 82; *Com. v. Kimball*, 21 Pick. (Mass.) 373; *Com. v. Kelliher*, 12 Allen (Mass.) 480.

New Jersey. — *State v. Norton*, 23 N. J. L. 41.

New York. — *Hartung v. People*, 22 N. Y. 95; *Heckmann v. Pinkney*, 81 N. Y. 215.

Pennsylvania. — *Com. v. Jones*, 10 Pa. Co. Ct. 611, 1 Pa. Dist. 29.

Tennessee. — *Durham v. State*, 89 Tenn. 723.

Wisconsin. — *State v. Campbell*, 44 Wis. 529.

1. Implied Repeal of Penal Statutes Not Favored — *United States.* — *U. S. v. Cobb*, 43 Fed. Rep. 570; *U. S. v. One Case Hair Pencils*, 1 Paine (U. S.) 400.

Arkansas. — *Ex p. Osborn*, 24 Ark. 479.

Illinois. — *Mingia v. People*, 54 Ill. 274.

Indiana. — *State v. Miller*, 58 Ind. 399.

Kentucky. — *Com. v. Gilbert*, 6 J. J. Marsh. (Ky.) 184.

Maryland. — *Beard v. State*, 74 Md. 130.

Massachusetts. — *Dolan v. Thomas*, 12 Allen (Mass.) 421; *Flaherty v. Thomas*, 12 Allen (Mass.) 428.

Michigan. — *People v. Gustin*, 57 Mich. 407. *New York.* — *People v. Coffee*, (Supm. Ct. Gen. T.) 62 How. Pr. (N. Y.) 445. See also *Case of Twelve Commitments*, (C. Pl.) 19 Abb. Pr. (N. Y.) 394; *Doyle's Case*, (Supm. Ct.) 19 Abb. Pr. (N. Y.) 269.

Pennsylvania. — *Sifred v. Com.*, 104 Pa. St. 179.

South Carolina. — *State v. Alexander*, 14 Rich. L. (S. Car.) 247.

Texas. — *Walker v. State*, 7 Tex. App. 246, 32 Am. Rep. 595.

Acts Held Not Repugnant in Relation to a Penalty Imposed. — *Cate v. State*, 3 Sneed (Tenn.) 120.

2. Different Remedies with Different Penalties. — *Rex v. Jackson*, 1 Cowp. 297; *Henderson v. Sherborne*, 2 M. & W. 236; *Stephens v. Watson*, 1 Salk. 45; *Gray v. Cookson*, 16 East 13; *Jennings v. Com.*, 17 Pick. (Mass.) 80; *Hastings v. Aiken*, 1 Gray (Mass.) 163; *Crittenden v. Wilson*, 5 Cow. (N. Y.) 165, 15 Am. Dec. 463;

State v. Shaw, 8 Humph. (Tenn.) 32; *Cate v. State*, 3 Sneed (Tenn.) 120.

Thus a statute making it a penal offense to injure a milldam was held not to take away the right to abate it as a nuisance. *State v. Moffett*, 1 Greene (Iowa) 247.

And an act which provides that any person who buys another's vote at any election shall be subject to a penalty of three hundred dollars, to be recovered in a civil action by the person whose vote has been bought, is not repealed by a later act making the purchase of votes a criminal offense. *State v. Schoonover*, 135 Ind. 526.

3. Changing Nature of Offense — *England.* — *Michell v. Brown*, 1 El. & El. 267, 102 E. C. L. 27; *Robinson v. Emerson*, 4 H. & C. 355; *Rex v. Davis*, 1 Leach C. C. 271; *Reg. v. Button*, 12 Jur. 1017; *Robinson's Case*, 2 East P. C. 1110. *United States.* — *U. S. v. Tynen*, 11 Wall. (U. S.) 88.

California. — *People v. Tisdale*, 57 Cal. 104. *Florida.* — *Sherman v. State*, 17 Fla. 888.

Indiana. — *State v. Hope*, 15 Ind. 474; *Hayes v. State*, 55 Ind. 99.

New York. — *Mongeon v. People*, 55 N. Y. 613; *People v. Cleary*, (Ct. Sess.) 13 Misc. (N. Y.) 546.

North Carolina. — *State v. Upchurch*, 9 Ired. L. (31 N. Car.) 454.

4. Reducing Punishment — *England.* — *Atty-Gen. v. Lockwood*, 9 M. & W. 391; *Rex v. Cator*, 4 Burr. 2026; *Rex v. M'Kenzie*, R. & R. C. C. 429; *Henderson v. Sherborne*, 2 M. & W. 236; *Heath's Case*, 2 East P. C. 609; *Michell v. Brown*, 1 El. & El. 267, 102 E. C. L. 267; *Robinson v. Emerson*, 4 H. & C. 352.

Alabama. — *Smith v. State*, 1 Stew. (Ala.) 506; *State v. Whitworth*, 8 Port. (Ala.) 434; *Turner v. State*, 40 Ala. 21; *Gunter v. State*, 83 Ala. 96; *Herrington v. State*, 87 Ala. 1.

California. — *People v. Tisdale*, 57 Cal. 104.

Connecticut. — *State v. Daley*, 29 Conn. 272.

Georgia. — *Gorman v. Hammond*, 28 Ga. 87.

Massachusetts. — *Nichols v. Squire*, 5 Pick. (Mass.) 168; *Com. v. Kimball*, 21 Pick. (Mass.) 376; *Com. v. Wyman*, 12 Cush. (Mass.) 237; *Com. v. Davis*, 11 Gray (Mass.) 48; *Flaherty v. Thomas*, 12 Allen (Mass.) 428.

Michigan. — *People v. Bussell*, 59 Mich. 104.

North Carolina. — *State v. Upchurch*, 9 Ired. L. (31 N. Car.) 454.

South Carolina. — *State v. Cooler*, 30 S. Car. 105.

Where a statute merely provides punishment for a common-law offense, the common law is not abrogated, but the offense is still a common-law offense, the punishment only being changed.

so also where the punishment is increased.¹ But where the new statute merely provides a new kind of punishment or a change in procedure, without a change in the degree of punishment, no such effect will be allowed.²

(5) *General and Special Laws* — (a) *Later General Act*. — It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general — the terms of the general broad enough to include the matter provided for in the special — the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special.³ This rule, however, is not one of positive law, but of construc-

State v. Daley, 29 Conn. 276; *Rex v. Bridges*, 8 East 53; *Williams v. Reg.*, 7 Q. B. 250, 53 E. C. L. 250.

Statute Conferring on Court Discretionary Power to Mitigate Punishment. — A statute which merely authorizes the court under certain circumstances, in the exercise of its discretion, to mitigate the sentence to which an offender is liable under the existing law, by dispensing with a portion of the prescribed punishment, does not repeal such existing law. *Dolan v. Thomas*, 12 Allen (Mass.) 421. But see *Com. v. Kimball*, 21 Pick. (Mass.) 373.

1. **Increasing Punishment.** — *Nichols v. Squire*, 5 Pick. (Mass.) 168; *Flaherty v. Thomas*, 12 Allen (Mass.) 428; *People v. Bussell*, 59 Mich. 104; *Leighton v. Walker*, 9 N. H. 59; *Buckallew v. Ackerman*, 8 N. J. L. 48; *People v. England*, 91 Hun (N. Y.) 152; *Carter v. Hawley*, Wright (Ohio) 74; *State v. Campbell*, 44 Wis. 529; *State v. Van Stralen*, 45 Wis. 437.

In such case a person who violated the former law while it was in force cannot be punished at all; for he cannot be sentenced under the old law, because that is repealed. *State v. Daley*, 29 Conn. 272; *Flaherty v. Thomas*, 12 Allen (Mass.) 428; *State v. Campbell*, 44 Wis. 529; *State v. Van Stralen*, 45 Wis. 437. Nor can he be sentenced under the new law, because that imposes a greater punishment than the law prescribed at the time the offense was committed, and is therefore as to such offense *ex post facto*. See the title *EX POST FACTO LAWS*, vol. 12, p. 525.

It Is the Possibility of Inflicting a Severe Punishment under the new law than could have been inflicted under the old one that makes the new law *ex post facto*. The fact that the sentence was actually within the old law is immaterial. *State v. Callahan*, 109 La. 946.

2. **Change Not Affecting Degree of Punishment** — *England*. — *Rex v. Carlile*, 3 B. & Ald. 161, 5 E. C. L. 249; *Reg. v. Wigg*, 2 Salk. 460; *Stephens v. Watson*, 1 Salk. 45; *Rex v. Robinson*, 2 Burr. 800.

United States. — *U. S. v. One Case Hair Pencils*, 1 Paine (U. S.) 400.

Arkansas. — *Ex p. Osborn*, 24 Ark. 479.

Florida. — *Mitchell v. Duncan*, 7 Fla. 13.

Massachusetts. — *Com. v. McKenney*, 14 Gray (Mass.) 1; *Carter v. Burt*, 12 Allen (Mass.) 424.

Nebraska. — *Hopkins v. Scott*, 38 Neb. 661.

New Jersey. — *Shoemaker v. State*, 20 N. J. L. 159.

Pennsylvania. — *Sifred v. Com.*, 104 Pa. St. 179. See also *Drew v. Com.*, 1 Whart. (Pa.) 279.

Rhode Island. — *State v. Wilbor*, 1 R. I. 200, 36 Am. Dec. 245.

See also *Rex v. Hanson*, 1 Root (Conn.) 59.

The imposition of both a penalty and a criminal prosecution is not punishing the same offense twice. They are but parts of one punishment; they both constitute the punishment which the law inflicts upon the offense. That they are enforced in different modes of proceeding, and at different times, does not affect the principle. *People v. Stevens*, 13 Wend. (N. Y.) 341.

When a statute prohibits an act, under a penalty to be enforced by an indictment, and a subsequent statute gives a *qui tam* action for such penalty, the latter is merely cumulative of, and does not repeal the remedy given by, the former statute. *Bush v. Texas*, 1 Tex. 455.

3. **Special Act Not Generally Repealed by Later General Act** — *England*. — *Lyn v. Wyn*, O. Bridge 127; *Williams v. Pritchard*, 4 T. R. 2; *Rex v. Church Trustees*, 6 Ad. & El. 314, 33 E. C. L. 86; *Westbrook v. Blythe*, 3 El. & Bl. 741, 77 E. C. L. 741; *Shepherd v. Hodsman*, 18 Q. B. 316, 83 E. C. L. 316; *Hawkins v. Gathercole*, 6 De G. M. & G. 31; *London, etc., R. Co. v. Board of Works*, 3 Kay & J. 123; *Fitzgerald v. Champneys*, 2 Johns. & H. 54; *Thorpe v. Adams*, L. R. 6 C. P. 125; *Reg. v. Champneys*, L. R. 6 C. P. 394; *River Thames Conservators v. Hall*, L. R. 3 C. P. 415; *Abergavenny v. Brace*, L. R. 7 Exch. 145; *Dodds v. Shepherd*, 1 Ex. D. 78; *Garnet v. Bradley*, 2 Ex. D. 351. *reversed* 3 App. Cas. 944; *Walsall Tp. Overseers v. London, etc., R. Co.*, 4 App. Cas. 467; *Seward v. The Vera Cruz*, 10 App. Cas. 68; *Gard v. Sewer Com'rs*, 28 Ch. D. 486; *In re Smith*, 35 Ch. D. 595; *Mahony v. Wright*, 10 Ir. C. L. 420; *Barker v. Edger*, (1898) A. C. 748.

Canada. — *Vancouver v. Bailey*, 25 Can. Sup. Ct. 62.

United States. — *Furman v. Nichol*, 8 Wall. (U. S.) 44; *State v. Stoll*, 17 Wall. (U. S.) 425; *Cass County v. Gillett*, 100 U. S. 585; *Louisiana v. Taylor*, 105 U. S. 454; *Ex p. Crow Dog*, 109 U. S. 556; *Chew Heong v. U. S.*, 112 U. S. 536; *Rodgers v. U. S.*, 185 U. S. 88; *Johanson v. Washington*, 190 U. S. 179, *affirming* 26 Wash.

668; *Lewis v. Sherman County*, 1 McCrary (U. S.) 377; *U. S. v. Berry*, 4 Fed. Rep. 785; *St. Louis Third Nat. Bank v. Harrison*, 8 Fed. Rep. 721; *Gilchrist v. Helena*, etc., R. Co., 47 Fed. Rep. 595; *Seward County v. Ætna L. Ins. Co.*, (C. C. A.) 90 Fed. Rep. 222.

Alabama.—*Mobile*, etc., R. Co. v. State, 29 Ala. 573; *Daughdrill v. Alabama L. Ins.*, etc., Co., 31 Ala. 100; *Pearce v. Mobile Bank*, 33 Ala. 702; *Magruder v. State*, 40 Ala. 347; *Ex p. Selma*, etc., R. Co., 46 Ala. 245; *Iverson v. State*, 52 Ala. 170.

Arkansas.—*McFarland v. State Bank*, 4 Ark. 415; *Ex p. Trapnall*, 6 Ark. 9, 42 Am. Dec. 676; *Babcock v. Helena*, 34 Ark. 502; *Blackwell v. State*, 45 Ark. 90; *Chamberlain v. State*, 50 Ark. 132; *Baughner v. Rudd*, 53 Ark. 417.

California.—*Crosby v. Patch*, 18 Cal. 439; *Whitaker v. Haynes*, 49 Cal. 596; *Wood v. Election Com'rs*, 58 Cal. 561; *People v. Clunie*, 70 Cal. 504; *Home for Inebriates v. Reis*, 95 Cal. 142; *Bateman v. Colgan*, 111 Cal. 580.

Colorado.—*Schwenke v. Union Depot*, etc., Co., 7 Colo. 512.

Connecticut.—*Coe v. Meriden*, 45 Conn. 156; *Beach v. Meriden*, 46 Conn. 502; *New York*, etc., R. Co. v. *Bridgeport Traction Co.*, 65 Conn. 410.

Florida.—*Luke v. State*, 5 Fla. 185; *State v. Southern Land*, etc., Co., (Fla. 1903) 33 So. Rep. 999.

Georgia.—*Haywood v. Savannah*, 12 Ga. 404; *Erwin v. Moore*, 15 Ga. 361; *Pausch v. Guerrard*, 67 Ga. 319; *Montezuma v. Minor*, 70 Ga. 191; *Davis v. Dougherty County*, 116 Ga. 491.

Illinois.—*Ottawa v. La Salle County*, 12 Ill. 339; *Spring v. Olney*, 78 Ill. 101; *Covington v. East St. Louis*, 78 Ill. 548; *Litchfield Coal Co. v. Taylor*, 81 Ill. 590; *Allen v. People*, 84 Ill. 504; *Gunnarssohn v. Sterling*, 92 Ill. 569; *East St. Louis v. Maxwell*, 99 Ill. 439; *Holton v. Daly*, 106 Ill. 139; *Hyde Park v. Oakwoods Cemetery Assoc.*, 119 Ill. 141; *Butz v. Kerr*, 123 Ill. 659; *Trausch v. Cook County*, 147 Ill. 534; *Ridgway v. Gallatin County*, 181 Ill. 521; *People v. Marquiss*, 192 Ill. 377; *Pana v. Lippincott*, 2 Ill. App. 473; *Braceville v. Doherty*, 30 Ill. App. 645; *Rushville v. Rushville*, 32 Ill. App. 320, 39 Ill. App. 504; *People v. Mount*, 87 Ill. App. 194.

Indiana.—*Blain v. Bailey*, 25 Ind. 165; *Indianapolis Water Works Co. v. Burkhart*, 41 Ind. 381; *Evansville v. Summers*, 108 Ind. 189; *Walter v. State*, 105 Ind. 589.

Iowa.—*Cole v. Jackson County*, 11 Iowa 552; *Burlington v. Leebick*, 43 Iowa 252.

Kentucky.—*Ely v. Thompson*, 3 A. K. Marsh. (Ky.) 70; *Tyler v. Elizabethtown*, etc., R. Co., 9 Bush (Ky.) 510; *Com. v. Cain*, 14 Bush (Ky.) 525; *Adams Express Co. v. Owensboro*, 85 Ky. 265; *Brann v. Hart*, 97 Ky. 735; *Pearce v. Mason County*, 99 Ky. 357; *Louisville v. Louisville Water Co.*, 105 Ky. 754; *Mauget v. Plummer*, 107 Ky. 41; *Raubold v. Com.*, (Ky. 1899) 54 S. W. Rep. 17.

Louisiana.—*State Bank v. Farrar*, 1 La. Ann. 49; *De Armas' Case*, 10 Mart. (La.) 172; *State v. Kitty*, 12 La. Ann. 805; *Beridon v. Barbin*, 13 La. Ann. 458; *St. Martin v. New Orleans*, 14 La. Ann. 113; *Bond v. Hiestand*, 20 La. Ann. 140; *Third Ward School Dist. v. School Directors*, 23 La. Ann. 158; *State v. Labatut*, 39 La. Ann. 513; *State v. Buckner*, 42 La. Ann. 74;

Garrett v. Aby, 47 La. Ann. 618; *Osthoff v. Flotte*, 48 La. Ann. 1094; *Welch v. Gossens*, 51 La. Ann. 852.

Maine.—*State v. Donovan*, 89 Me. 448.

Maryland.—*State v. Northern Cent. R. Co.*, 44 Md. 167; *Garrett v. Jones*, 65 Md. 260.

Massachusetts.—*Nichols v. Bertram*, 3 Pick. (Mass.) 342; *Gage v. Currier*, 4 Pick. (Mass.) 399; *Brown v. Lowell*, 8 Met. (Mass.) 172; *Tracy v. Goodwin*, 5 Allen (Mass.) 409; *Calder v. Haynes*, 7 Allen (Mass.) 387.

Michigan.—*Crane v. Reeder*, 22 Mich. 322; *University of Michigan v. Auditor Gen.*, 109 Mich. 134; *Highland Park v. McAlpine*, 117 Mich. 666.

Minnesota.—*State v. Archibald*, 43 Minn. 328; *State v. Egan*, 64 Minn. 331; *State v. Lindquist*, 77 Minn. 540.

Missouri.—*Brown v. Crawford County*, 8 Mo. 640; *Mauro v. Buffington*, 26 Mo. 184; *State v. McDonald*, 38 Mo. 529; *State v. Bishop*, 41 Mo. 16; *State v. Macon County Ct.*, 41 Mo. 459; *State v. Draper*, 47 Mo. 29; *State v. Fiala*, 47 Mo. 310; *McVey v. McVey*, 51 Mo. 406; *Kansas City v. Johnson*, 78 Mo. 661; *State v. Green*, 87 Mo. 583; *Manker v. Faulhaber*, 94 Mo. 430; *State v. Frazier*, 98 Mo. 426; *St. Joseph*, etc., R. Co. v. *Cudmore*, 103 Mo. 634; *Blanchard v. Wolff*, 1 Mo. App. 528; *State v. Wesleyan Cemetery Assoc.*, 11 Mo. App. 570; *Merchants' Ins. Co. v. Hill*, 12 Mo. App. 163; *State v. Fitzporter*, 17 Mo. App. 271; *State v. Willard*, 39 Mo. App. 251; *Gazollo v. McCann*, 63 Mo. App. 414; *State v. Slover*, 134 Mo. 24, *affirming* 134 Mo. 12.

Nebraska.—*Jackson v. Washington County*, 34 Neb. 680; *State v. Cornell*, 53 Neb. 556, 68 Am. St. Rep. 629.

Nevada.—*State v. Alt*, 22 Nev. 203.

New Jersey.—*Stonington Sav. Bank v. Davis*, 14 N. J. Eq. 290; *Cross v. Morristown*, 18 N. J. Eq. 305; *State v. Branim*, 23 N. J. L. 484; *State v. Mellick*, 25 N. J. L. 563; *State v. Jersey City*, 29 N. J. L. 170; *State v. Morristown*, 33 N. J. L. 57; *State v. Mills*, 34 N. J. L. 177; *State v. Trenton*, 36 N. J. L. 201; *State v. Railroad Taxation Com'rs*, 38 N. J. L. 472; *North Hudson County R. Co. v. Hoboken*, 41 N. J. L. 78; *Anderson v. Hill*, 42 N. J. L. 351; *New Brunswick v. Williamson*, 44 N. J. L. 165; *Sheridan v. Stevenson*, 44 N. J. L. 371; *Chosen Freeholders v. Park Commission*, 62 N. J. L. 376.

New Mexico.—*Wilburn v. Territory*, 10 N. Mex. 402.

New York.—*Matter of Evergreens*, 47 N. Y. 216; *Matter of Central Park Com'rs*, 50 N. Y. 493; *People v. Quigg*, 59 N. Y. 83; *Van Denburgh v. Greenbush*, 66 N. Y. 1; *People v. Brinkerhoff*, 68 N. Y. 259; *Matter of Delaware*, etc., Canal Co., 69 N. Y. 209; *People v. Essex County*, 70 N. Y. 228; *Whipple v. Christian*, 80 N. Y. 523; *McKenna v. Edmundstone*, 91 N. Y. 231; *Graf v. Cunningham*, 109 N. Y. 369; *Buffalo Cemetery Assoc. v. Buffalo*, 118 N. Y. 61; *People v. Moran*, 123 N. Y. 254, 20 Am. St. Rep. 732; *Coxe v. State*, 144 N. Y. 396; *Casterton v. Vienna*, 163 N. Y. 368, *affirming* 17 N. Y. App. Div. 94; *Parker v. Elmira*, etc., R. Co., 165 N. Y. 274; *Deposit v. Vail*, 5 Hun (N. Y.) 315; *Deposit v. Devereux*, 8 Hun (N. Y.) 317; *People v. Westchester County*, 40 Hun (N. Y.) 353; *People v. County Canvassers*, 77 Hun (N. Y.) 372, *affirmed* 143 N. Y. 84; *Reynolds v.*

tion only, adopted to settle legislative intent in the absence of words declaring such intent.¹

The Reason which has been given for this rule is that in passing a special act the legislature has its attention directed to the special case which the act was made to meet, and considers and provides for all the circumstances of that special case; and having done so it is not to be considered that the legislature, by a subsequent general enactment, intended to derogate from the special provision previously made where it was not mentioned in such enactment.²

Niagara Falls, 81 Hun (N. Y.) 353; New York, etc., R. Co. v. Delaware County, (Supm. Ct. Spec. T.) 67 How. Pr. (N. Y.) 5; People v. Edson, 52 N. Y. Super. Ct. 64; People v. Myers, (Supm. Ct. Spec. T.) 25 Abb. N. Cas. (N. Y.) 368; Bergman v. Wolff, (Buffalo Super. Ct. Gen. T.) 33 N. Y. St. Rep. 499; People v. Dohling, 6 N. Y. App. Div. 86; People v. O'Grady, 46 N. Y. App. Div. 213; Stack v. Brooklyn, (Brooklyn City Ct. Gen. T.) 9 Misc. (N. Y.) 260; People v. Carson, (Supm. Ct.) 10 Misc. (N. Y.) 237; People v. Scannell, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 619; Matter of McKay, (Surrogate Ct.) 33 Misc. (N. Y.) 520.

North Carolina. — McRae v. Wessell, 6 Ired. L. (28 N. Car.) 153.

Ohio. — Ginn v. Logan County, 5 Ohio Cir. Dec. 412, 11 Ohio Cir. Ct. 396, affirmed 39 Cinc. L. Bul. 217; Robbins v. State, 8 Ohio St. 191; State v. Roosa, 11 Ohio St. 16; Fosdick v. Perrysburg, 14 Ohio St. 472; Shunk v. Galion First Nat. Bank, 22 Ohio St. 515; State v. Newton, 26 Ohio St. 206; Muskingum County v. Board of Public Works, 39 Ohio St. 628; Manix v. Auditors, 43 Ohio St. 315.

Oklahoma. — Goodson v. U. S., 7 Okla. 117.

Oregon. — State v. Sturgess, 10 Oregon 58.

Pennsylvania. — Brown v. Philadelphia County, 21 Pa. St. 39; Omit v. Com., 21 Pa. St. 426; Dyer v. Covington Tp., 28 Pa. St. 186; Jefferson County v. Reitz, 56 Pa. St. 44; Bounty Accounts, 70 Pa. St. 92; Rounds v. Waymart, 81 Pa. St. 395; Kilgore v. Com., 94 Pa. St. 495; Com. v. Erie R. Co., 98 Pa. St. 127; Rhein Bldg. Assoc. v. Lea, 100 Pa. St. 210; Seifried v. Com., 101 Pa. St. 200; Com. v. Judges, 102 Pa. St. 228; Harrisburg v. Sheck, 104 Pa. St. 53; Lackawanna County v. Stevens, 105 Pa. St. 465; Dick's Appeal, 106 Pa. St. 589; Dunlap v. Com., 108 Pa. St. 607; Malloy v. Com., 115 Pa. St. 25; Evans v. Phillippi, 117 Pa. St. 226, 2 Am. St. Rep. 655; Rymer v. Luzerne County, 142 Pa. St. 108; Com. v. Summerville, 204 Pa. St. 300; Com. v. Dillon, 17 Pa. Co. Ct. 227; Bucks County v. Gill, 17 Pa. Co. Ct. 584; Opening of Hansberry St., 7 Pa. Dist. 505; Philadelphia, etc., R. Co.'s Appeal, 1 Pa. Super. Ct. 63.

Rhode Island. — Providence v. Union R. Co., 12 R. I. 473.

South Carolina. — State v. Young, 30 S. Car. 399.

Texas. — Ellis v. Batts, 26 Tex. 703.

Utah. — State University v. Richards, 20 Utah 457, 77 Am. St. Rep. 928.

Virginia. — Com. v. Richmond, etc., R. Co., 81 Va. 355.

Washington. — Cascades R. Co. v. Sohns, 1 Wash. Ter. 557; Tacoma Land Co. v. Pierce County, 1 Wash. 485; Northern Pac. R. Co. v. Haas, 2 Wash. 376; State v. Parker, 12 Wash. 685.

West Virginia. — Conley v. Calhoun County, 2 W. Va. 420; Chesapeake, etc., R. Co. v. Hoard, 16 W. Va. 270; Mason v. Harper's Ferry Bridge Co., 17 W. Va. 396; Powell v. Parkersburg, 28 W. Va. 698; Sturm v. Fleming, 31 W. Va. 701.

Wisconsin. — Mead v. Bagnall, 15 Wis. 156; Walworth County v. Whitewater, 17 Wis. 193; Janesville v. Markoe, 18 Wis. 351; State v. Public Land Com'rs, 106 Wis. 584.

The rule is *generalia specialibus non derogant*. It is, however, always a question of intention. When, in a general act, a prior special act inconsistent with it is not mentioned, it is thought that the attention of the legislature was not called to the special act, and therefore the general act was not intended to repeal the special act. Hartford v. Hartford Theological Seminary, 66 Conn. 475. See also Garant v. Carrier, 15 Quebec Super. Ct. 601; State v. Purdy, 14 Wash. 343.

Rule Applied to Revenue Laws. — Movius v. Arthur, 95 U. S. 144; Arthur v. Lahey, 96 U. S. 112; Arthur v. Rheims, 96 U. S. 143; Victor v. Arthur, 104 U. S. 498; Barber v. Schell, 107 U. S. 617; Chung Yune v. Kelly, 14 Fed. Rep. 643.

Effect of General Laws on Particular Customs. — In England it has been held that a general act will not supersede a particular custom. Rex v. Pugh, 1 Dougl. 188; Simpson v. Moss, 2 B. & Ad. 543, 22 E. C. L. 135; Leicester v. Burgess, 5 B. & Ad. 246, 27 E. C. L. 75; Rex v. St. James, 5 Ad. & El. 391, 31 E. C. L. 362; Green v. Reg., 1 App. Cas. 513. But see *contra*, Rex v. Hogg, 1 T. R. 721; Dunbar v. Roxburghe, 3 Cl. & F. 354.

In several cases, too, certain customs of London have been held to be superseded by general laws. See *Salters' Co. v. Jay*, 3 Q. B. 109, 43 E. C. L. 654; *Reg. v. London*, 13 Q. B. 1, 66 E. C. L. 1; *Truscott v. Merchant Tailors' Co.*, 11 Exch. 855. This rule has no application in the *United States*, as these customs seem to be unknown to American law. See the title *USAGES AND CUSTOMS*.

Effect of Revised Code — Special Provisions. — The *Mississippi Code* of 1892 provides that no special law shall be thereby repealed, except as expressly declared therein. *Vicksburg v. Sun Mut. Ins. Co.*, 72 Miss. 67.

Express Provision for Repeal. — Where the general statute contains an express provision that all previous legislation on the subject is thereby repealed, it operates to repeal special acts, as well as general acts on the subject. *Felts v. Delaware, etc., R. Co.*, 170 Pa. St. 432. See also *Fraim v. Lancaster County*, 171 Pa. St. 436.

1. Rule of Construction. — *Fraim v. Lancaster County*, 171 Pa. St. 436.

2. Reason of Rule. — *Fitzgerald v. Champneys*, 2 Johns. & H. 54.

Inconsistency of Provisions. — But where the later general act is necessarily inconsistent with the prior special act, or with the special provisions of an earlier act, the legislature must be deemed to have intended to repeal the special law.¹

When the Later Act Is Exclusive, that is, when it covers the whole subject to which it relates, and is manifestly designed by the legislature to embrace the entire law on the subject, it will be held to repeal by implication all prior statutes on that matter whether they are general or special,² even though

1. General Act Inconsistent with Prior Special Act — *England.* — *Rex v. Poor Law Com'rs*, 6 Ad. & El. 48, 33 E. C. L. 11; *Great Cent. Gas Consumers' Co. v. Clarke*, 13 C. B. N. S. 838, 106 E. C. L. 838; *Parry v. Croydon Commercial Gas, etc., Co.*, 11 C. B. N. S. 579, 103 E. C. L. 579, affirmed 15 C. B. N. S. 568, 109 E. C. L. 568; *Duncan v. Scottish North-Eastern R. Co.*, L. R. 2 H. L. Sc. 20; *Stuart v. Jones*, 1 El. & Bl. 23, 72 E. C. L. 23; *Bramston v. Colchester*, 6 El. & Bl. 246, 88 E. C. L. 246; *Luckraft v. Pridham*, 6 Ch. D. 205; *In re Williams*, 36 Ch. D. 577; *Mersey Docks, etc., Board v. Lucas*, 8 App. Cas. 891.

United States. — *Union Pac. R. Co. v. Cheyenne*, 113 U. S. 517; *Louisville Water Co. v. Clark*, 143 U. S. 11.

Alabama. — *Maxwell v. State*, 89 Ala. 150.

Arkansas. — *Davis v. St. Louis, etc., R. Co.*, 53 Ark. 117.

California. — *State v. Conkling*, 19 Cal. 501; *People v. Burt*, 43 Cal. 560; *People v. Sargent*, 44 Cal. 430; *Fraser v. Alexander*, 75 Cal. 147; *People v. Henshaw*, 76 Cal. 436; *Ex p. Ah You*, 82 Cal. 339; *Kennedy v. Board of Education*, 82 Cal. 483; *McGivney v. Pierce*, 87 Cal. 124.

Illinois. — *Water Com'rs v. Conkling*, 113 Ill. 340; *Dutton v. Aurora*, 114 Ill. 138; *Culbertson v. Fulton*, 127 Ill. 41.

Louisiana. — *Garrett v. Aby*, 47 La. Ann. 618.

Maine. — *Starbird v. Brown*, 84 Me. 238.

Maryland. — *Frederick v. Groshon*, 30 Md. 436, 96 Am. Dec. 591; *Willing v. Bozman*, 52 Md. 44; *State v. Falkenham*, 73 Md. 463.

Massachusetts. — *Howe v. Starkweather*, 17 Mass. 240; *Brown v. Lowell*, 8 Met. (Mass.) 172.

Minnesota. — *O'Connor v. Finnegan*, 60 Minn. 455; *Merriman v. Great Northern Express Co.*, 63 Minn. 543.

Missouri. — *State v. Percy*, 44 Mo. 159; *Pacific R. Co. v. Cass County*, 53 Mo. 17; *State v. Severance*, 55 Mo. 378; *State v. Dallas County Ct.*, 72 Mo. 329; *Pool v. Brown*, 98 Mo. 675; *State v. Bennett*, 102 Mo. 356.

Montana. — *Campana v. Calderhead*, 17 Mont. 548.

New Jersey. — *Mechanics, etc., Bank v. Bridges*, 30 N. J. L. 112; *State v. Miller*, 30 N. J. L. 368, 86 Am. Dec. 188; *State v. Railroad Taxation Com'rs*, 37 N. J. L. 228; *Brown v. Mullica Tp.*, 48 N. J. L. 449; *Bowyer v. Camden*, 50 N. J. L. 87; *Hoetzel v. East Orange*, 50 N. J. L. 354; *Haynes v. Cape May*, 52 N. J. L. 180; *Vreeland v. Jersey City*, 54 N. J. L. 49; *Harrington Tp. Road Commission v. Collector*, 54 N. J. L. 274; *Bogardus v. Gordon*, 53 N. J. Eq. 40.

New York. — *People v. Jaehne*, 103 N. Y. 182; *Buffalo v. Neal*, 86 Hun (N. Y.) 76; *Matter of Reddish*, 45 N. Y. App. Div. 37; *Harrington v. Rochester*, 10 Wend. (N. Y.) 547.

Ohio. — *Knox County v. McComb*, 19 Ohio St. 320; *Ex p. Van Hagan*, 25 Ohio St. 426.

Pennsylvania. — *Nusser v. Com.*, 25 Pa. St. 126; *Keller v. Com.*, 71 Pa. St. 413; *Cumru Tp. v. Poor Directors*, 112 Pa. St. 268; *Com. v. Weir*, 165 Pa. St. 284; *Bruce v. Pittsburgh*, 166 Pa. St. 152; *Com. v. Schneipp*, 166 Pa. St. 401; *Com. v. Wunch*, 167 Pa. St. 186; *Bridgeport v. Schneipp*, 15 Pa. Co. Ct. 150; *Com. v. Benson*, 15 Pa. Co. Ct. 235; *Com. v. Straughas*, 24 Pa. Co. Ct. 145; *Com. v. McCandless*, (Pa. 1888) 12 Atl. Rep. 440.

South Carolina. — *Dill v. Durham*, 56 S. Car. 423.

Tennessee. — *State v. Butcher*, 93 Tenn. 679. *Wisconsin.* — *Kellogg v. Oshkosh*, 14 Wis. 623.

If the language of the later statute is so repugnant to that of the earlier one that the two cannot possibly stand together, then the earlier one is repealed by the later, and it makes no difference that one is a general act and the other special. *Covington v. East St. Louis*, 78 Ill. 548; *Gage v. Currier*, 4 Pick. (Mass.) 399; *Chesapeake, etc., R. Co. v. Hoard*, 16 W. Va. 270.

2. Later Statute Exclusive — *United States.* — *U. S. v. Claflin*, 97 U. S. 546; *Red Rock v. Henry*, 106 U. S. 596.

Connecticut. — *Hartford v. Hartford Theological Seminary*, 66 Conn. 475.

Delaware. — *Wilmington City R. Co. v. People's R. Co.*, (Del. Ch. 1900) 47 Atl. Rep. 245.

Kansas. — *Howard v. Hulbert*, 63 Kan. 793, 88 Am. St. Rep. 267.

Kentucky. — *Hawesville v. Board of Education*, 99 Ky. 292.

Maryland. — *State v. Northern Cent. R. Co.*, 90 Md. 447.

Minnesota. — *State v. Sullivan*, 62 Minn. 283.

Mississippi. — *Adams v. Yazoo, etc., R. Co.*, 77 Miss. 194, affirmed 180 U. S. 1.

New Hampshire. — *Opinion of Justices*, 66 N. H. 629.

New Jersey. — *Acquackanonk Water Co. v. Passaic*, 65 N. J. L. 476.

New York. — *Lyddy v. Long Island City*, 104 N. Y. 218.

North Carolina. — *Schaal v. Charlotte*, 118 N. Car. 733.

Pennsylvania. — *Quinn v. Cumberland County*, 162 Pa. St. 55; *McCleary v. Allegheny County*, 163 Pa. St. 578, *distinguishing* *Bell v. Allegheny County*, 149 Pa. St. 381; *Com. v. Weir*, 165 Pa. St. 284; *Com. v. Schneipp*, 166 Pa. St. 401; *Mansel v. Fulmer*, 175 Pa. St. 377; *Chalfant v. Edwards*, 176 Pa. St. 67, *overruling* *Hutchinson's Appeal*, 47 Pa. St. 84; *Com. v. Cline*, 17 Pa. Co. Ct. 442; *Com. v. Dimer*, 17 Pa. Co. Ct. 504; *Com. v. McDonnell*, 3 Pa. Dist. 767; *Com. v. Middletown*, 3 Pa. Dist. 639; *Schultzman v. McCarthy*, 5 Pa. Dist. 10.

Thus a general provision that an action against a railroad company for injuries to per-

they are not repugnant,¹ unless it is expressly provided that prior special acts shall not be affected.² Within this principle, when an earlier statute is special only in the sense that it applies to a single case, of which there are many in the state, and the later statute is general in its operation and applies to all such cases, then the earlier one is repealed by the later, because the whole includes the several parts.³

Special Provisions in General Act. — The rule against the implied repeal of a special act by a later general act applies to special provisions in the earlier of the two general acts.⁴

(b) **Later Special Act.** — A general act will be repealed *pro tanto* by a subsequent special act when the two acts cannot stand together;⁵ but if, on a reasonable construction, the two acts are not inconsistent and may stand together, the general act is not repealed by the later special act.⁶

sons or property shall be commenced within one year next after the cause of action accrued, repeals by implication a provision in an existing railroad charter that such actions must be brought within six months. Louisville, etc., R. Co. v. Williams, (Ky. 1897) 41 S. W. Rep. 287.

1. **Repugnancy Not Essential.** — Barker v. Floyd, 61 N. Y. App. Div. 92, affirming 32 Misc. (N. Y.) 474.

2. **Express Saving of Prior Special Acts.** — Powell v. Richmond, 94 Va. 79.

3. Southport v. Ogden, 23 Conn. 128; Coe v. Meriden, 45 Conn. 155; Nusser v. Com., 25 Pa. St. 126.

4. **Special Provisions in General Act.** — Churchill v. Crease, 5 Bing. 180, 15 E. C. L. 409; Mahoney v. Wright, 10 Ir. C. L. 420; Taylor v. Oldham, 4 Ch. D. 395; U. S. v. Sampson, 19 App. Cas. (D. C.) 419; Doggett v. Walter, 15 Fla. 355; Gunnarsson v. Sterling, 92 Ill. 569; Titcomb v. Union M. & F. Ins. Co., 8 Mass. 326; Finney v. Brant, 19 Mo. 42; St. Louis v. Alexander, 23 Mo. 508; Albertson v. State, 9 Neb. 429; Richardson County v. Miles, 14 Neb. 311; Dawson County v. Clark, 58 Neb. 756.

Thus, a particular provision of the Bankruptcy Act of 1849 rendered traders, having privilege of Parliament, liable to the bankruptcy laws, but the privilege of freedom from personal arrest was expressly reserved to them. The act of 1861 made all debtors (nontraders as well as traders) liable to the bankruptcy laws, but nothing was said in the act to reserve to debtors, who had privilege of Parliament, their freedom from personal arrest. It was held that the provision of the Bankruptcy Act of 1849, reserving freedom from personal arrest, applied to the persons designated by the act of 1861. Newcastle v. Morris, L. R. 4 H. L. 661.

General and specific provisions in apparent contradiction, whether in the same or different statutes, and without regard to priority of enactment, may subsist together, the specific qualifying and supplying exceptions to the general. Townsend v. Little, 109 U. S. 504.

5. **General Act Repealed by Later Special Act** — England. — Ex p. Kelly, 9 Ir. R. C. L. 114; Hill v. Hall, 1 Ex. D. 411; Yarmouth v. Simmons, 10 Ch. D. 528.

United States. — Kankakee County v. Aetna L. Ins. Co., 106 U. S. 668; U. S. v. 10,000 Cigars, Woolw. (U. S.) 123.

Alabama. — Brinson v. State, 89 Ala. 105.

California. — Pierpont v. Crouch, 10 Cal. 315;

Ex p. Smith, 40 Cal. 419; Talcott v. Harbor Com'rs, 53 Cal. 199.

Georgia. — Macon v. Macon, etc., R. Co., 7 Ga. 221.

Illinois. — Gardner v. People, 20 Ill. 431; Berry v. People, 36 Ill. 423; Fant v. People, 45 Ill. 259; Seibold v. People, 86 Ill. 33.

Indiana. — Walsh v. State, 142 Ind. 357.

Kentucky. — Com. v. Pointer, 5 Bush (Ky.) 301; Adams Express Co. v. Owensboro, 85 Ky. 265.

Massachusetts. — Hussey v. Manufacturers', etc., Bank, 10 Pick. (Mass.) 421.

Michigan. — Howell v. Cassopolis, 35 Mich. 471; Dewey v. Central Car, etc., Co., 42 Mich. 399.

Minnesota. — Tierney v. Dodge, 9 Minn. 166; State v. Routh, 61 Minn. 205.

Mississippi. — Shelton v. Baldwin, 26 Miss. 439.

Missouri. — Baldwin v. Green, 10 Mo. 410; Dunscomb v. Maddox, 21 Mo. 144; Deters v. Renick, 37 Mo. 599; State v. Clark, 54 Mo. 17, 14 Am. Rep. 471; Smith v. Clark County, 54 Mo. 69; State v. Greene County, 54 Mo. 550; State v. De Bar, 58 Mo. 395; State v. Lewis, 5 Mo. App. 465.

New Jersey. — State v. Clarke, 25 N. J. L. 54; State v. Kelly, 34 N. J. L. 75; McGavish v. State, 34 N. J. L. 509.

New York. — Bowen v. Lease, 5 Hill (N. Y.) 221; Excelsior Petroleum Co. v. Lacey, 63 N. Y. 422; Excise Com'rs v. Burtis, 103 N. Y. 136.

Pennsylvania. — Egypt St., 2 Grant Cas. (Pa.) 455.

Vermont. — Isham v. Bennington Iron Co., 19 Vt. 230; In re Snell, 58 Vt. 207; Wells v. Austin, 59 Vt. 159; St. Johnsbury v. Thompson, 59 Vt. 300, 59 Am. Rep. 731.

West Virginia. — McConiha v. Guthrie, 21 W. Va. 134.

6. **Consistency Between General and Special Acts.** — Barber County v. Savings Soc., (C. C. A.) 101 Fed. Rep. 767; Hutchinson v. Self, 153 Ill. 542; People v. Raymond, 186 Ill. 407; People v. Wenzel, 105 Mich. 70; State v. Snow, 117 N. Car. 774.

Thus, a general act which forbids the extension of a street railway from one town to any other town in the public highway so as to parallel any steam railroad, until the Superior Court, on application in the prescribed form, has found that public convenience and necessity require the construction of such street railway, is not

Where a Special Act Refers to or Incorporates a General One, the provisions of the special act will prevail over those of the general one conflicting therewith.¹ In such case, the repeal or amendment of the general law does not affect the special law,² and on repeal of the special law the general law is revived.³

(c) **Contemporaneous General and Special Acts.** — When a general and a special act are contemporaneous or substantially so, the special act will be considered as an exception to the general act.⁴

(d) **Successive Special Acts.** — The *English* rule is that a private act will not repeal an earlier private act except by express enactment,⁵ but this has not been followed in the *United States*, the general rules as to repeal by implication being held applicable in such cases.⁶

3. Effect of Repeal. — *a. GENERAL RULES.* — The repeal of a statute, as a rule, repeals everything contained in it,⁷ and the result is the same whether the repeal is express or implied.⁸

Repeal of Amended Act. — An amendment, in such terms as to stand in the stead of an original section of an act, is repealed with the repeal of the act in which it stands,⁹ and so the repeal of an act "as amended" repeals not only the amendatory act, but the original act also.¹⁰

Adopting Acts. — But where a subsequent act adopts, by reference, the provisions of a prior act,¹¹ it is the same thing as if the words of the prior act had been repeated in the later one, so that the adopted provisions will remain in

repealed by a provision in a street railway company's charter subsequently enacted, authorizing the extension of the street railway parallel to a steam railroad. The franchise granted by the charter is still subject to the action of the court on the question of public convenience and necessity. *Skelly v. Montville St. R. Co.*, 67 Conn. 261.

1. Reference to or Incorporation of General Act. — *Purnell v. Wolverhampton New Waterworks Co.*, 10 C. B. N. S. 576, 100 E. C. L. 576; *Matter of Westminster Estate*, 4 De G. J. & S. 232; *Simpson v. South Staffordshire Waterworks Co.*, 4 De G. J. & S. 679; *Atty.-Gen. v. Great Eastern R. Co.*, L. R. 7 Ch. 475, *affirmed* L. R. 6 H. L. 367; *London, etc., R. Co. v. Board of Works*, L. R. 8 C. P. 185; *Metropolitan Dist. R. Co. v. Sharpe*, 5 App. Cas. 425.

2. Schwenke v. Union Depot, etc., Co., 7 Colo. 512; *Nunes v. Wellisch*, 12 Bush (Ky.) 363; *Darmstaetter v. Moloney*, 45 Mich. 621; *Gloversville v. Howell*, 70 N. Y. 287.

3. Repeal of Special Act. — *London, etc., R. Co. v. Board of Works*, L. R. 8 C. P. 185; *People v. Hunt*, 41 Cal. 435. Compare *McConiha v. Guthrie*, 21 W. Va. 134. But see *State v. Lewis*, 5 Mo. App. 465, in which it was held that the repeal of the provision of the charter of St. Louis which repealed the general laws providing for the suppression of prostitution in the city of St. Louis did not revive the general law.

4. Contemporaneous General and Special Acts. — *Nelden v. Clark*, 20 Utah 382, 77 Am. St. Rep. 917.

5. Successive Special Acts — Rule in England. — *Czse* 11, *Jenkins* 198; *Birkenhead Docks v. Laird*, 4 De G. M. & G. 732; *Purnell v. Wolverhampton New Waterworks Co.*, 10 C. B. N. S. 587, 100 E. C. L. 587. See also *London, etc., R. Co. v. Board of Works*, 3 Kay & J. 123.

But in *Daw v. Metropolitan Board of Works*, 12 C. B. N. S. 161, 104 E. C. L. 161, it was held that where two special statutes gave authority to two public bodies to exercise powers which

could not consistently with the object of the legislature coexist, the earlier was necessarily repealed by the later statute.

6. Rule in United States as to Successive Special Acts. — *Red Rock v. Henry*, 106 U. S. 596; *Savannah v. Kelly*, 108 U. S. 184; *Ex p. Trapnall*, 6 Ark. 9, 42 Am. Dec. 676; *McDonough County v. Campbell*, 42 Ill. 490; *People v. Barr*, 44 Ill. 198; *Yunger v. State*, 78 Md. 574; *Cumberland v. Magruder*, 34 Md. 381; *In re Contested Election*, 110 Pa. St. 502; *Schneider v. Staples*, 66 Wis. 167. See, however, *New Haven v. New Haven Water Co.*, 44 Conn. 105.

7. Extent of Repeal. — *Church v. Stadler*, 16 Ind. 463. In this case a proviso in a repealed statute was held to be repealed also, and not to continue as an independent enactment.

8. Express and Implied Repeals Same in Effect. — *Townsend Sav. Bank v. Epping*, 3 Woods (U. S.) 391; *Angel v. Hume*, 17 Hun (N. Y.) 379; *People v. Davis*, 61 Barb. (N. Y.) 456.

9. Effect on Amendment of Repealing Amended Act. — *Holbrook v. Nichol*, 36 Ill. 162; *State v. Ranson*, 73 Mo. 88; *Kamerick v. Castleman*, 21 Mo. App. 587; *Matter of Ward*, (Supm. Ct. Spec. T.) 10 Misc. (N. Y.) 424; *Griggs v. Guinn*, (Supm. Ct. Spec. T.) 29 Abb. N. Cas. (N. Y.) 144; *McKibben v. Lester*, 9 Ohio St. 627; *Greer v. State*, 22 Tex. 588. See also *State v. Elko County*, 21 Nev. 19.

Thus, where an act has been amended "to read as follows," a subsequent amendment of the original act "to read as follows" repeals the first amendatory act, though no reference is made to it. *Rowan v. Ide*, (C. C. A.) 107 Fed. Rep. 161; *Heinze v. Butte, etc., Min. Co.*, (C. C. A.) 107 Fed. Rep. 165. See also *Minnesota, etc., Land, etc., Co. v. Billings*, (C. C. A.) 111 Fed. Rep. 972.

10. Repeal of Act "As Amended." — *State v. Burk*, 88 Iowa 661.

11. See supra, this title, Amendment — Form and Contents of Amendatory Act — Extending Application of Existing Law.

force as a part of the adopting act, notwithstanding the repeal of the prior act;¹ and on the same principle, the repeal of the later or adopting act has no effect on the adopted provisions so far as they constitute a part of the original act from which they were adopted.²

The Time from Which a Repeal Takes Effect is determined by the general rules governing the time of the taking effect of statutes generally,³ unless the terms of the repealing act or the surrounding circumstances show that the legislature intended otherwise.⁴

Repeal of Exception to Statute. — The express repeal of an exception to a statute extends by so much the operation of the statute.⁵

b. MATTERS AFFECTED BY REPEAL — (1) *In General.* — A statute repealed by a later act is, in the absence of provisions to the contrary, considered, as to its operative effect, as if it had never existed, except as to matters and transactions past and closed.⁶ But nevertheless, a repealed

1. Repeal of Act After Adoption of Its Provisions in Later Act — *England.* — Reg. v. Merionethshire, 6 Q. B. 343, 51 E. C. L. 343; Reg. v. Stock, 8 Ad. & El. 405, 35 E. C. L. 414; Reg. v. Smith, L. R. 8 Q. B. 146; Reg. v. Stepney Union, L. R. 9 Q. B. 383.

California. — Spring Valley Water Works v. San Francisco, 22 Cal. 434; People v. Whipple, 47 Cal. 592; Ventura County v. Clay, 112 Cal. 65.

Colorado. — Schwenke v. Union Depot, etc., Co., 7 Colo. 512.

Illinois. — Turney v. Wilton, 36 Ill. 385.

Kentucky. — Nunes v. Wellisch, 12 Bush (Ky.) 363.

Maine. — Furbish v. Kennebec County, 93 Me. 117.

Massachusetts. — Com. v. Kendall, 144 Mass. 357.

Nebraska. — Shull v. Barton, 58 Neb. 741.

New York. — Phoenix Iron Co. v. The Vessels Hopatcong, etc., 62 Hun (N. Y.) 263; Wick v. Ft. Plain, etc., R. Co., 27 N. Y. App. Div. 577; People v. Webster, (Supm. Ct. Spec. T.) 8 Misc. (N. Y.) 133.

Wisconsin. — Wood v. Hustis, 17 Wis. 416; Crosby v. Smith, 19 Wis. 449; Sika v. Chicago, etc., R. Co., 21 Wis. 370.

Thus, where a statute giving a lien provides for its enforcement in the same manner as another lien is enforced, the repeal of the remedy in the latter case will not affect the remedy applicable to the former. Collins v. Blake, 79 Me. 218.

Adoption of Provision of Prior Section of Same Act. — Toledo, etc., R. Co. v. Anderson, 48 Ill. App. 130.

Qualification of Rule. — The rule stated in the text is subject to the qualification that in order to bring a case within its operation, the adopting statute must refer to some special section or provision of the law adopted; and therefore, where a special act incorporating a city provided for the levy and collection of taxes in accordance with the provisions of the existing general law on the subject, without referring to any particular act or section, the evident meaning is that the general law in force at the time the city tax may be levied is to govern. Newman v. North Yakima, 7 Wash. 220.

Existence of Statute Adopted. — Where some of the provisions of an act have been re-enacted by a later act which provides that the earlier

act, except as expressly re-enacted, is repealed, such re-enacted provisions of the earlier act are still in force and therefore may be adopted by an act subsequent to the re-enactment. Henry v. Simanton, (N. J. 1903) 54 Atl. Rep. 153.

2. Repeal of Adopting Act. — Clarke v. Bradlaugh, 8 Q. B. D. 69; *Ex p.* Rossmore, 8 Ir. R. Eq. 366; Ventura County v. Clay, 112 Cal. 65; Phoenix Iron Co. v. The Vessels Hopatcong, etc., 62 Hun (N. Y.) 263; Sika v. Chicago, etc., R. Co., 21 Wis. 371.

3. Time of Taking Effect in General. — See *supra*, this title, *Time of Taking Effect.*

Words in the Present Tense in a repealing statute refer to the time of taking effect, not to the time of passage. Leyner v. State, 8 Ind. 490.

A Saving Clause in a repealing act takes effect at the time the repeal takes effect, and not sooner. Rogers v. Vass, 6 Iowa 405. See Matter of Ankrum, 3 McLean (U. S.) 285; Matter of Richardson, 2 Story (U. S.) 571.

4. Time Fixed by Express or Implied Provision. — Thus, where a repealing act substitutes other provisions in lieu of those repealed, the latter remain in force until the substituted provisions come into operation. Butcher v. Henderson, L. R. 3 Q. B. 338; Leyner v. State, 8 Ind. 490; Rogers v. Vass, 6 Iowa 405; Spaulding v. Alford, 1 Pick. (Mass.) 33; McArthur v. Franklin, 16 Ohio St. 193; Moore v. Houston, 3 S. & R. (Pa.) 185.

Repealing Act to Take Effect in Future. — A statute passed to take effect immediately is not immediately repealed by another statute on the same subject passed to take effect from a future day. Weatherford v. Weatherford, 8 Port. (Ala.) 171.

Where two inconsistent statutes expressly repealed an earlier statute, and one of them was to take effect June 1st, and the other July 1st, the former was held to continue in force one month and then to be repealed by the other. Malick v. McDermot, 25 Neb. 267.

5. Effect of Repealing Exception to Statute. — Savings Bank v. Collector, 3 Wall. (U. S.) 495; Smith v. Hoyt, 14 Wis. 252; Brodhead v. Milwaukee, 19 Wis. 650, 88 Am. Dec. 711; Goodno v. Oshkosh, 31 Wis. 127; State v. Hoeflinger, 31 Wis. 262.

6. Matters Affected by Repeal in General — *England.* — Kay v. Goodwin, 4 M. & P. 341; Rex v. McKenzie, R. & R. C. C. 429; Reg. v. Mawgan, 8 Ad. & El. 496, 35 E. C. L. 447;

statute still exists as a document and may still be read for the purpose of completing the sense of another section or act which refers to it.¹

(2) *Interests Past and Closed* — (a) *In General*. — The repeal of a statute has no effect on those rights and interests which have accrued under it, and which are past and closed;² nor are any liabilities incurred under the repealed statute affected by the repeal, unless either they are released by the repealing statute,³ or the repeal includes the remedy for enforcing the liability.⁴ Sometimes the rule that rights accrued are not affected by the repeal is expressly declared by the repealing act,⁵ and in some jurisdictions it is

Surtees v. Ellison, 9 B. & C. 750, 17 E. C. L. 491; *Matter of Mexican, etc., Co.*, 4 De G. & J. 544.

United States. — *Yeaton v. U. S.*, 5 Cranch (U. S.) 281; *Ex p. McCardle*, 7 Wall. (U. S.) 514; *Hamilton Bank v. Dudley*, 2 Pet. (U. S.) 492.

Alabama. — *Medical College v. Muldon*, 46 Ala. 603.

California. — *Thorne v. Hays*, 4 Cal. 165.

Colorado. — *Hirschburg v. People*, 6 Colo. 145.

Illinois. — *Van Inwagen v. Chicago*, 61 Ill. 31.

Indiana. — *McQuilkin v. Doe*, 8 Blackf. (Ind.) 581.

Kentucky. — *Covington, etc., R. Co. v. Kenton County Ct.*, 12 B. Mon. (Ky.) 144.

Maine. — *Coffin v. Rich*, 45 Me. 507, 71 Am. Dec. 559.

Mississippi. — *Musgrove v. Vicksburg, etc., R. Co.*, 50 Miss. 677.

New Jersey. — *Den v. Dubois*, 16 N. J. L. 285; *Belvidere v. Warren, etc., R. Co.*, 34 N. J. L. 193.

New York. — *Hartung v. People*, 22 N. Y. 95; *Smith v. People*, 47 N. Y. 338; *Butler v. Palmer*, 1 Hill (N. Y.) 324; *Thompson v. Sayre*, 1 Den. (N. Y.) 175.

West Virginia. — *Curran v. Owens*, 15 W. Va. 208.

Wisconsin. — *Dillon v. Linder*, 36 Wis. 344; *Rood v. Chicago, etc., R. Co.*, 43 Wis. 146.

1. *Repealed Statute as Existing Document*. — In *Com. v. Melville*, 160 Mass. 307, the principle stated in the text was applied. Stat. 1885, c. 313, § 3, provided for the registration of pharmacists in business at the time the act took effect. Section 9 provided for the punishment of persons who, not being registered "as aforesaid," should dispense medicines. Afterwards said section 3 was repealed, and it was claimed that section 9 was thereby rendered nugatory. The court held, however, that section 3 might still be read to show the meaning of section 9, which remained in force.

2. *Vested Rights and Completed Transactions Generally* — *England*. — *Couch v. Jeffries*, 4 Burr. 2462; *Gwynne v. Drewitt*, (1894) 2 Ch. 616.

United States. — *Aspinwall v. Daviess County*, 22 How. (U. S.) 364; *Rice v. Minnesota, etc., R. Co.*, 1 Black (U. S.) 358; *U. S. v. Iselin*, 87 Fed. Rep. 194.

Alabama. — *Taylor v. Rushing*, 2 Stew. (Ala.) 160.

Arkansas. — *Worthen v. Ratcliffe*, 42 Ark. 330.

Illinois. — *Naught v. Oneal*, 1 Ill. 36.

Indiana. — *Crawford v. Hedrick*, 9 Ind. App. 356.

Maryland. — *M'Mechen v. Baltimore*, 2 Har.

& J. (Md.) 41; *Wilderman v. Baltimore*, 8 Md. 551; *State v. Warren*, 28 Md. 338.

Mississippi. — *Davis v. Minor*, 1 How. (Miss.) 183, 28 Am. Dec. 325; *Tucker v. Stokes*, 3 Smed. & M. (Miss.) 124; *Baygents v. Beard*, 41 Miss. 531; *Capital State Bank v. Lewis*, 64 Miss. 727; *Kendrick v. Kyle*, 78 Miss. 278.

Nebraska. — *Bennet v. Hargus*, 1 Neb. 419.

New Hampshire. — *Merrill v. Sherburne*, 1 N. H. 213.

New Jersey. — *Den v. Robinson*, 5 N. J. L. 793; *Den v. Du Bois*, 16 N. J. L. 285; *Belvidere v. Warren R. Co.*, 34 N. J. L. 193, 35 N. J. L. 584.

New York. — *Van Rensselaer v. Secor*, 32 Barb. (N. Y.) 469; *Butler v. Palmer*, 1 Hill (N. Y.) 333; *Dash v. Van Kleeck*, 7 Johns. (N. Y.) 503; *Church v. Rhodes*, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 284; *Thacher v. Steuben County*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 271.

South Carolina. — *Ex p. Graham*, 13 Rich. L. (S. Car.) 277.

Texas. — *McLeary v. Dawson*, 87 Tex. 524; *Grand Isle v. Milton*, 68 Vt. 234.

And see generally the titles CONSTITUTIONAL LAW, vol. 6, p. 955, note 2; IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 15, p. 1046 *et seq.*

Thus, a commitment of a lunatic to a hospital for the insane is not vacated or annulled by the subsequent repeal of the statute under which the commitment was made. *Foster v. Medfield*, 3 Met. (Mass.) 1.

The repeal of the statute securing to the purchaser at a void tax sale a lien on the land for the amount paid by him does not affect liens existing complete and vested before the repeal. *Capital State Bank v. Lewis*, 64 Miss. 727.

Final Judgments are unaffected by the repeal of the statute on which they depended. *Osborn v. Sutton*, 108 Ind. 443.

Existing Liens Not Divested by Repeal. — *H. W. Wright Lumber Co. v. Hixon*, 105 Wis. 153.

Taxes Assessed under Repealed Statute. — As to the right to collect taxes assessed under a statute repealed after the assessment, see *infra*, this section, (3) (a) *dd. Jurisdiction, Powers, and Privileges*.

As to What are Vested Rights in general, see the title CONSTITUTIONAL LAW, vol. 6, p. 956.

3. *Effect of Repeal as to Liabilities Theretofore Incurred*. — *Indianapolis v. Ritzinger*, 24 Ind. App. 65; *State v. Williams*, 10 Tex. Civ. App. 346.

4. See *infra*, this section, (3) (a) *bb. Remedies*.

5. *Express Saving of Rights Accrued*. — *Abbott v. Minister for Lands*, (1895) A. C. 425.

declared by general statutes.¹

(b) **Transactions Invalid under Repealed Statute.** — If a statute making certain contracts illegal is afterwards repealed, the repeal will not give validity to such a contract, unless it appears that the repealing act was intended to have a retrospective operation.² Other acts void when performed under the same circumstances are governed by the same rule.³

(3) **Interests Pending** — (a) **Dependent on Repealed Statute** — *aa.* **IN GENERAL.** — The effect of the repeal of a statute on interests dependent on it is not uniform, but varies according to the nature and object of the statute and the circumstances of the case.⁴ The general rule, however, may be stated to be that the repeal of a statute, in the absence of a saving clause, necessarily divests and destroys all inchoate interests which have arisen under it,⁵ while it leaves

1. Statutory Declaration as to Effect of Repeal. — *Starr v. State*, 149 Ind. 592; *People v. New York Cent., etc., R. Co.*, 156 N. Y. 570; *Denning v. Yount*, 62 Kan. 217, *affirming* 9 Kan. App. 708; *Cushman v. Hale*, 68 Vt. 444; *H. W. Wright Lumber Co. v. Hixon*, 105 Wis. 153. And see generally the statutes of the several states.

2. Transactions Prohibited by Repealed Statute — *England.* — *Hitchcock v. Way*, 6 Ad. & El. 943, 33 E. C. L. 249.

United States. — *Fletcher v. Peck*, 6 Cranch (U. S.) 87; *Petrel Guano Co. v. Jarnette*, 25 Fed. Rep. 675.

California. — *McCauley v. Brooks*, 16 Cal. 11. *New York.* — *Conley v. Palmer*, 2 N. Y. 182. For a Full Discussion of the subject of the text, see the title **ILLEGAL CONTRACTS**, vol. 15, p. 942.

A Contract for the Sale of Intoxicating Liquors made in contravention of an existing statute is not validated by the subsequent repeal of the statute. *Gorsuth v. Butterfield*, 2 Wis. 237. See also the title **INTOXICATING LIQUORS**, vol. 17, p. 306.

The Repeal of a Usury Law does not validate a contract made in violation of such law while it was in force. *Hughes v. Boone*, 102 N. Car. 137; *Wood v. Lake*, 13 Wis. 84; *Morton v. Rutherford*, 18 Wis. 298. See also the titles **ILLEGAL CONTRACTS**, vol. 15, p. 942; **USURY**.

Causes of Action Barred by Limitation are not revived by a repeal of the statute. *Cassidy v. Storms*, 1 Bush (Ky.) 452. See also the title **LIMITATION OF ACTIONS**, vol. 19, p. 168 *et seq.*

3. In *Boorman v. Juneau County*, 76 Wis. 550, it was held that the repeal of a statutory bar or condition precedent to an action did not restore an action which had been lost by failure to observe the statutory requisite.

4. See *Den v. Du Bois*, 16 N. J. L. 300.

5. Inchoate Interests Destroyed by Repeal Without Saving Clause — *England.* — *Miller's Case*, 3 Wils. C. Pl. 420.

United States. — The Schooner *Rachel* v. U. S., 6 Cranch (U. S.) 329; *Watson v. Mercer*, 8 Pet. (U. S.) 110; *Hollingsworth v. Virginia*, 3 Dall. (U. S.) 378; *Baltimore, etc., R. Co. v. Nesbit*, 10 How. (U. S.) 395; *Aspinwall v. Daviess County*, 22 How. (U. S.) 364; *Ex p. McCordle*, 7 Wall. (U. S.) 506; *National Exch. Bank v. Peters*, 144 U. S. 570.

California. — *Lamb v. Schottler*, 54 Cal. 319.

Colorado. — *Gregory v. German Bank*, 3 Colo. 332, 25 Am. Rep. 760.

Connecticut. — *Welch v. Wadsworth*, 30 Conn. 149, 79 Am. Dec. 236.

Illinois. — *Eaton v. Graham*, 11 Ill. 619; *Van Inwagen v. Chicago*, 61 Ill. 31; *Wilson v. Ohio, etc., R. Co.*, 64 Ill. 542, 16 Am. Rep. 565.

Indiana. — *Hunt v. Jennings*, 5 Blackf. (Ind.) 195, 33 Am. Dec. 465; *Moor v. Seaton*, 31 Ind. 11; *Phillips v. Jollisaint*, 7 Ind. App. 458; *State v. Helms*, 136 Ind. 122.

Kansas. — *Gilleland v. Schuyler*, 9 Kan. 569. *Kentucky.* — *Covington, etc., R. Co. v. Kenton County Ct.*, 12 B. Mon. (Ky.) 144.

Maine. — *Oriental Bank v. Freese*, 18 Me. 109, 36 Am. Dec. 701; *Coffin v. Rich*, 45 Me. 507, 71 Am. Dec. 559; *Gaul v. Brown*, 53 Me. 496.

Massachusetts. — *Williams v. Middlesex County*, 4 Met. (Mass.) 76; *Foster v. Essex Bank*, 16 Mass. 245, 8 Am. Dec. 135.

Michigan. — *Tivey v. People*, 8 Mich. 128; *Bay City, etc., R. Co. v. Austin*, 21 Mich. 390.

Minnesota. — *Bailey v. Mason*, 4 Minn. 546.

Mississippi. — *Musgrove v. Vicksburg, etc., R. Co.*, 50 Miss. 677; *Adams v. Fragiaco*, 71 Miss. 417.

Nebraska. — *Bennet v. Hargus*, 1 Neb. 419. *New Hampshire.* — *Lewis v. Foster*, 1 N. H. 61.

New Jersey. — *Belvidere v. Warren R. Co.*, 34 N. J. L. 193.

New York. — *Knox v. Baldwin*, 80 N. Y. 610; *Washburn v. Franklin*, 35 Barb. (N. Y.) 599; *Richardson v. Pulver*, 63 Barb. (N. Y.) 67; *Butler v. Palmer*, 1 Hill (N. Y.) 334; *Burch v. Newbury*, (Supm. Ct. Gen. T.) 4 How. Pr. (N. Y.) 145; *Church v. Rhodes*, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 284.

Pennsylvania. — *Hampton v. Com.*, 19 Pa. St. 329; *Grim v. Weissenberg School Dist.*, 57 Pa. St. 433, 98 Am. Dec. 237.

Texas. — *Terry v. Dale*, 27 Tex. Civ. App. 1. *Vermont.* — *Cushman v. Hale*, 68 Vt. 444.

Wisconsin. — *Pratt v. Brown*, 3 Wis. 603; *French v. Owen*, 5 Wis. 112; *State v. Ingersoll*, 17 Wis. 631; *Kertschacke v. Ludwig*, 28 Wis. 430; *Goodno v. Oshkosh*, 31 Wis. 137; *Chapin v. Crusen*, 31 Wis. 209; *State v. Hoeflinger*, 31 Wis. 263; *Dillon v. Linder*, 36 Wis. 344; *Rood v. Chicago, etc., R. Co.*, 43 Wis. 146; *State v. Stone*, 43 Wis. 481; *Smith v. Chicago, etc., R. Co.*, 43 Wis. 688, 49 Wis. 443; *Streeter v. Chicago, etc., R. Co.*, 44 Wis. 383; *State v. Campbell*, 44 Wis. 529; *State v. Van Stralen*, 45 Wis. 437.

While the rule stated in the text seems to be assented to as an abstract proposition by all the cases, yet there is some difference of opinion as to when rights are vested or inchoate respectively (see generally the title **CONSTITUTIONAL**

unimpaired those which either have become vested,¹ or, though connected with it, have an independent existence.²

A **Saving Clause** in the repealing statute, or in a general statute, preserves pending interests;³ but a statute which saves pending "suits" and "civil causes" from the effect of the repeal of the statute under which they were brought is construed to include only actions which are commenced in a court of justice or which may come to such court on appeal from the decision of the tribunal before which they were commenced, and such other proceedings as they require to be commenced before tribunals not courts, as a condition precedent to giving courts jurisdiction in the matter involved in such proceedings.⁴ Neither does an act which saves pending actions relate to matters of practice, such as venue, but merely saves the right to prosecute the action to final judgment.⁵

Appeals. — Though it is, as a general rule, the province of an appellate court to inquire only whether the judgment appealed from was in accordance with law at the time it was rendered, yet if, pending the appeal, the law which authorized the judgment is repealed, the judgment must be reversed.⁶

LAW, vol. 6, p. 956). The general rule seems to be that a right of action given by statute is inchoate merely so long as it has not been reduced to judgment unless it has entered into and become a part of a contract (see the cases cited *supra*, this note). There are, however, decisions which seem to regard the right as vested, as soon as all the facts have occurred which give the right of recovery, as, for instance, a statute giving a right of recovery in the case of injuries caused by the negligence of a fellow servant. *International, etc., R. Co. v. Culpepper*, (Tex. Civ. App. 1897) 38 S. W. Rep. 818.

1. See *supra*, this section, 3. b. (2) *Interests Past and Closed — In General*.

2. See *infra*, this subdivision, (b) *Connected with but Independent of Repealed Statute*.

3. **Effect of Saving Clause — United States.** — *Kemish v. Ball*, 30 Fed. Rep. 759; *U. S. v. Keokuk, etc., Bridge Co.*, 45 Fed. Rep. 178.

Connecticut. — *Chittenden v. Judson*, 57 Conn. 333.

Colorado. — *In re House Bill No. 238*, 12 Colo. 337.

Indiana. — *Backes v. Dant*, 55 Ind. 181; *Daggy v. Ball*, 7 Ind. App. 64; *Hochstetter v. Mosier Coal, etc., Co.*, 8 Ind. App. 442; *Bruce v. Cook*, 136 Ind. 214.

Iowa. — *Brotherton v. Brotherton*, 41 Iowa 112.

Kansas. — *State v. Boyle*, 10 Kan. 113; *State v. Crawford*, 11 Kan. 32; *Troy v. Atchison, etc., R. Co.*, 11 Kan. 532; *Challiss v. Parker*, 11 Kan. 394; *School-Dist. No. 13 v. State*, 15 Kan. 49; *Gardenhire v. Mitchell*, 21 Kan. 86; *Jockers v. Borgman*, 29 Kan. 113, 44 Am. Rep. 625.

Kentucky. — *Waddell v. Com.*, 84 Ky. 276; *Com. v. Duff*, 87 Ky. 586.

Louisiana. — *New Orleans v. Graihle*, 9 La. Ann. 562; *New Orleans v. St. Romes*, 9 La. Ann. 574.

Massachusetts. — *Com. v. Desmond*, 123 Mass. 407; *Com. v. Sullivan*, 150 Mass. 315.

Missouri. — *Rogers v. Pacific R. Co.*, 35 Mo. 153; *State v. Proctor*, 90 Mo. 334.

New Hampshire. — *Hall v. Hall*, 64 N. H. 295.

New York. — *People v. Campbell*, 152 N. Y.

51; *Geneva, etc., R. Co. v. New York Cent., etc., R. Co.*, 163 N. Y. 228.

North Dakota. — *National Bank v. Lemke*, 3 N. Dak. 154; *McCann v. Mortgage Bank, etc., Co.*, 3 N. Dak. 172.

Tennessee. — *Wallace v. Goodlett*, 104 Tenn. 670.

Wisconsin. — *Lincoln County v. Oneida County*, 80 Wis. 267.

See also *supra*, this title, VII. 2. *Provisos, Exceptions, and Saving Clauses*.

As to when a suit or action is pending in general, see *COMMERCE*, vol. 6, p. 216; *PENDING*, vol. 22, p. 655.

Foreclosure of Mortgage. — An action brought for the foreclosure of a real estate mortgage and to recover a judgment *in personam* for any deficiency which might result on the sale is a "pending action" for the recovery of a personal judgment, within the meaning of the *Nebraska* statute, not merely from the time of sale by which a deficiency has been ascertained to exist, but from the inception of the suit, and therefore the right to recover a deficiency judgment is not affected by the repeal before the sale of the statute authorizing deficiency judgments in foreclosure suits. *Hanscom v. Meyer*, 61 Neb. 798.

4. **Meaning of "Suits" and "Civil Causes" Within Saving Clause.** — *Burlington v. Burlington Traction Co.*, 70 Vt. 491, in which it was held that the saving clause did not include proceedings before a board whose functions are merely administrative or ministerial, although it may possess so much of the judicial function as may be involved in making inquiry only before a board whose decision is final.

5. **Matters of Mere Practice Not Affected by Clause Saving Pending Actions.** — *Bookwalter v. Conrad*, 15 Mont. 464.

6. *U. S. v. Schooner Peggy*, 1 Cranch (U. S.) 103; *U. S. v. Jacobus*, (C. C. A.) 96 Fed. Rep. 260; *Hirschburg v. People*, 6 Colo. 145; *State v. King*, 12 La. Ann. 593; *Keller v. State*, 12 Md. 322, 71 Am. Dec. 596; *Price v. Nesbitt*, 29 Md. 263; *Wade v. St. Mary's Industrial School*, 43 Md. 178; *Musgrove v. Vicksburg, etc., R. Co.*, 50 Miss. 677; *Hartung v. People*, 22 N. Y. 95; *Wikel v. Jackson County*, 120 N. Car. 451.

bb. REMEDIES. — The general rule is that there is no vested right in a particular remedy, unless the remedy is part of the right itself.¹ Aside from this exception, the legislature has complete control over the remedy and mode of procedure, and the repeal of a statute giving a remedy takes away the right thereto, even as to cases pending at the time of the repeal.²

Changing Rules of Evidence. — Within this principle there is no vested right in a rule of evidence or a presumption of law.³

Competency of Witnesses. — The rule as to the competency of witnesses is not a vested right within the principle under discussion.⁴

Liens of Mechanics and Others. — It is also generally held that a law giving a lien, such as the lien of a mechanic, laborer, etc., does not create a vested interest and is therefore within the rule stated above, so that the right to the lien will be lost if the statute is repealed before the lien has been perfected and the repealing act does not contain a saving clause,⁵ though there are some cases

It is a settled doctrine that courts in deciding questions before them will look to the law as it is at the time, and are not to be governed by what it may have been, unless proceedings under a prior existing law had been complete or rights had become vested. This principle has been held to apply as well to cases before an appellate court as to those that are pending in courts of original jurisdiction. *Wade v. St. Mary's Industrial School*, 43 Md. 181.

In *Admiralty Cases* an appeal suspends a sentence altogether, and it is not *res judicata* until final sentence of the appellate court be pronounced. Hence, the repeal of a statute after an appeal has been taken and before final judgment in such a case prevents the recovery of a penalty based on the statute. *Yeaton v. U. S.*, 5 Cranch (U. S.) 281.

1. Remedy as Part of Right. — *McMinn v. Bliss*, 31 Cal. 122; *Woods v. Soucy*, 166 Ill. 407; *Gilleland v. Schuyler*, 9 Kan. 569; *Musgrove v. Vicksburg*, etc., R. Co., 50 Miss. 681; *Anding v. Levy*, 57 Miss. 58, 34 Am. Rep. 435; *Bennet v. Hargus*, 1 Neb. 419; *Van Rensselaer v. Snyder*, 13 N. Y. 299; *Allen v. Farrow*, 2 Bailey L. (S. Car.) 584. See also the titles CONSTITUTIONAL LAW, vol. 6, p. 946 *et seq.*; IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 15, p. 1052 *et seq.*

Statute of Frauds. — In *Gilmore v. Shuter*, 2 Lev. 227, 2 Mod. 310, it was held that the enactment of the statute of frauds was in effect a repeal of so much of the former law as allowed actions on parol agreements, and that the statute would therefore not be allowed to operate on existing causes of action. See the title STATUTE OF FRAUDS, *ante*.

2. No Vested Right in Remedy as General Rule — *England.* — *Dean v. Mellard*, 15 C. B. N. S. 19, 109 E. C. L. 19; *Linton v. Blakeney Joint Co-operative Industrial Soc.*, 3 H. & C. 853; *Brown v. Black*, 21 Nova Scotia 349.

California. — *Horton v. Los Angeles*, 119 Cal. 602.

Connecticut. — *Mechanics', etc., Bank's Appeal*, 31 Conn. 63.

Georgia. — *Western Union Tel. Co. v. Lumpkin*, 99 Ga. 647.

Illinois. — *Farmer v. People*, 77 Ill. 322; *Templeton v. Horne*, 82 Ill. 491.

Kansas. — *Gilleland v. Schuyler*, 9 Kan. 569.

Maine. — *Colby v. Dennis*, 36 Me. 13.

Mississippi. — *Dismukes v. Stokes*, 41 Miss. 431; *Musgrove v. Vicksburg*, etc., R. Co., 50 Miss. 677; *Mastronada v. State*, 60 Miss. 86.

Nevada. — *Kennedy v. Adams*, 24 Nev. 217.

New York. — *Matter of Palmer*, 40 N. Y. 561; *Stocking v. Hunt*, 3 Den. (N. Y.) 274; *Onondaga County v. Briggs*, 3 Den. (N. Y.) 173; *Schoepflin v. Calkins*, (Supm. Ct. Spec. T.) 5 Misc. (N. Y.) 159; *Wirt v. Allegany County*, 90 Hun (N. Y.) 205; *Lazarus v. Metropolitan El. R. Co.*, 83 Hun (N. Y.) 553; *McCrea v. Champlain*, 35 N. Y. App. Div. 89.

Ohio. — *Knoup v. Piqua Branch of State Bank*, 1 Ohio St. 603.

Oregon. — *Newsom v. Greenwood*, 4 Oregon 119.

Pennsylvania. — *Hickory Tree Road*, 43 Pa. St. 139; *Keener v. Fouch*, 4 Pa. Dist. 338.

Texas. — *Treasurer v. Wygall*, 46 Tex. 447.

Vermont. — *Danforth v. Smith*, 23 Vt. 247; *Harris v. Townshend*, 56 Vt. 716.

Washington. — *Wooding v. Puget Sound Nat. Bank*, 11 Wash. 527.

3. Changing Rules of Evidence. — *Herbert v. Easton*, 43 Ala. 547; *Fogg v. Holcomb*, 64 Iowa 621; *Stephenson v. Osborne*, 41 Miss. 119, 90 Am. Dec. 358; *Hickox v. Tallman*, 38 Barb. (N. Y.) 608; *Journey v. Gibson*, 56 Pa. St. 57. See also the titles CONSTITUTIONAL LAW, vol. 6, p. 950; IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 15, p. 1050.

Stamped Instruments. — Accordingly, the repeal of a law providing that certain written instruments should not be admissible in evidence unless stamped was held to dispense with the necessity of the stamp, where the action is pending at or brought after the time of the repeal, though the instrument was executed while the stamp law was in force. *Reynolds v. Furlong*, 10 Md. 321; *Atwell v. Grant*, 11 Md. 101.

4. Competency of Witnesses. — *Laughlin v. Com.*, 13 Bush (Ky.) 261. See also the titles CONSTITUTIONAL LAW, vol. 6, p. 950; IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 15, p. 1051.

5. Statutory Right to Lien Not Vested Right — *Colorado.* — *Woodbury v. Grimes*, 1 Colo. 100; *Purmort v. Tucker Lumber Co.*, 2 Colo. 470; *Sayre-Newton Lumber Co. v. Union Bank*, 6 Colo. App. 541.

Florida. — *National Bank v. Williams*, 38 Fla. 305.

Illinois. — *Holcomb v. Boynton*, 151 Ill. 294,

which take the opposite view.¹ After the lien has been perfected, however, it becomes a vested right and cannot be divested by a repeal of the statute.²

Rule as to Costs. — The power to award costs and also the amount and items which may be allowed are generally held to depend on the statute in force at the time of the termination of a suit, and therefore the right to costs in any case may be taken away by the repeal of the statute pending the suit.³ But it has been held that where a suit is brought under a repealed statute to enforce a right that vested before the repeal, the court may award costs as provided by such statute.⁴

Right to Bail. — Where the right to bail after conviction is given by statute the repeal of the statute destroys the right, even in a case pending at the time of the repeal.⁵

Modification of Remedy. — If a repealing statute merely modifies a remedy, or takes away one remedy, leaving another, interests under the statute are not affected,⁶ though in the latter case pending suits will be determined.⁷ The interests, however, may be enforced under the modified procedure or the remaining remedy.⁸

cc. CONTRACTS. — The repeal of a statute which has entered into and become part of a contract will not deprive the parties of their rights under the contract, for such a repeal is as much a violation of the constitution as the passage

affirming Boynton v. Holcomb, 49 Ill. App. 503. See Turney v. Saunders, 5 Ill. 527.

Maine. — Bangor v. Goding, 35 Me. 73, 56 Am. Dec. 688; Frost v. Ilsley, 54 Me. 345.

Maryland. — Wilson v. Simon, 91 Md. 1.

Michigan. — Hanes v. Wade, 73 Mich. 178.

Minnesota. — Bailey v. Mason, 4 Minn. 546; Dunwell v. Bidwell, 8 Minn. 34. See Tell v. Woodruff, 45 Minn. 10.

Missouri. — Christman v. Charleville, 36 Mo. 610; Deters v. Renick, 37 Mo. 597.

New York. — Heckmann v. Pinkney, (C. Pl. Gen. T.) 6 Abb. N. Cas. (N. Y.) 371.

Canada. — Walker v. Walton, 24 Grant Ch. (U. C.) 209.

1. Right to Mechanics' Lien Held a Vested Right — *Indiana.* — Goodbub v. Hornung, 127 Ind. 181.

Kansas. — Weaver v. Sells, 10 Kan. 609; Groesbeck v. Barger, 1 Kan. App. 61.

North Carolina. — Warren v. Woodard, 70 N. Car. 382.

Oregon. — Steamer Gazelle v. Lake, 1 Oregon 120.

Texas. — Blanton v. Langston, 60 Tex. 149.

Wisconsin. — Streubel v. Milwaukee, etc., R. Co., 12 Wis. 71.

2. Perfected Lien Not Divested by Repeal of Statute. — Florence Gas, etc., Co. v. Hanby, 101 Ala. 15; Waters v. Dixie Lumber, etc., Co., 106 Ga. 592, 71 Am. St. Rep. 281; Craig v. Herzman, 9 N. Dak. 140.

3. Rule as to Costs. — See the title CONSTITUTIONAL LAW, vol. 6, p. 948, in this work; and the title COSTS in the ENCYC. OF PL. AND PR., vol. 5, p. 111 *et seq.*

4. Award of Costs under Repealed Statute. — Restall v. London, etc., R. Co., L. R. 3 Exch. 141.

5. Right to Bail. — Shoemaker's Application, 2 Okla. 606.

6. Modification of Remedy. — Whitehead v. Wells, 29 Ark. 99; Musgrove v. Vicksburg, etc., R. Co., 50 Miss. 684; Newsom v. Greenwood, 4 Oregon 120; Danforth v. Smith, 23 Vt. 247.

7. Effect on Pending Suits of Taking Away Alternative Remedy. — Jones v. Com., 86 Va. 661.

The repeal of an act allowing the auditor of a state to assess a tax under certain circumstances to pay a subscription, put an end to proceeding against the auditor to compel the levy of a tax, but did not destroy the right to enforce the tax by another remedy provided by law. Musgrove v. Vicksburg, etc., R. Co., 50 Miss. 677.

8. Enforcement of Right by Means of Remaining Remedy — *Illinois.* — Farmer v. People, 77 Ill. 322.

Indiana. — Bate v. Sheets, 64 Ind. 209; Gortley v. Sewell, 77 Ind. 316; Moss v. State, 101 Ind. 321; Mulcahey v. Givens, 115 Ind. 286; State v. Blend, 121 Ind. 514, 16 Am. St. Rep. 411; Mayne v. Huntington County, 123 Ind. 132.

New York. — Matter of New York Express Co., 23 Hun (N. Y.) 615.

Ohio. — Knoup v. Piqua Branch of State Bank, 1 Ohio St. 603.

Pennsylvania. — Uwchlan Tp. Road, 30 Pa. St. 156; Kille v. Reading Iron Works, 134 Pa. St. 225.

Substitution of Remedy by Repealing Act. — Where a statutory remedy for a right created by that statute is repealed, but the repealing statute provides a substantially similar remedy, the right may be prosecuted under the repealing statute. Knoup v. Piqua Branch of State Bank, 1 Ohio St. 603; Mitchell v. Eyster, 7 Ohio 257; Debolt v. Ohio L. Ins., etc., Co., 1 Ohio St. 563; McMullen v. Guest, 6 Tex. 275.

This has been similarly held in criminal actions as to mere changes in procedure. Jones v. Com., 86 Va. 661.

Where No New Remedy Has Been Substituted for the enforcement of a right accrued under a statute afterwards repealed, the old remedy remains, notwithstanding the repeal of the statute by force of constitutional provision. Wilson v. Herbert, 41 N. J. L. 454, 32 Am. Rep. 243. See also Harris v. Townshend, 56 Vt. 716.

of a new and different statute.¹ And where the effect of a statute is to declare that certain future voluntary acts of parties shall be a contract by which they shall be bound, the repeal of the statute after such acts have been performed does not affect the rights of the parties so contracting.² But if a contract is against sound morals, natural justice, and right, it falls with the repeal.³

dd. JURISDICTION, POWERS, AND PRIVILEGES. — If a law conferring jurisdiction is repealed, expressly or by implication, without any reservation or saving clause, the right to exercise the jurisdiction is lost,⁴ and proceedings pending under

1. Statute Becoming Part of Contract — Effect of Repeal — *United States*. — *Hawthorne v. Calef*, 2 Wall. (U. S.) 10; *Von Hoffman v. Quincy*, 4 Wall. (U. S.) 535; *Woodruff v. Trapnall*, 10 How. (U. S.) 199; *Curran v. Arkansas*, 15 How. (U. S.) 304; *Lathrop v. Brown*, 1 Woods (U. S.) 474. See also *Louisiana State Lottery Co. v. Fitzpatrick*, 3 Woods (U. S.) 222. *Arkansas*. — *Files v. Fuller*, 44 Ark. 273.

California. — *People v. Wood*, 7 Cal. 579; *People v. Bond*, 10 Cal. 563; *Creighton v. Pragg*, 21 Cal. 115.

Georgia. — *Bennett v. Woolfolk*, 15 Ga. 213. *Indiana*. — *Bryson v. McCreary*, 102 Ind. 1.

Kentucky. — *Sinking Fund Com'rs v. Northern Bank*, 1 Met. (Ky.) 174.

Missouri. — *Provident Sav. Inst. v. Jackson Place Skating, etc.*, Rink, 52 Mo. 552.

New York. — *Conant v. Van Schaick*, 24 Barb. (N. Y.) 87.

Texas. — *Flewelling v. Proetzel*, 80 Tex. 191; *Allen v. Stovall*, 94 Tex. 618, reversing (Tex. Civ. App. 1901) 62 S. W. Rep. 87.

Wisconsin. — *State v. Madison*, 15 Wis. 30; *Smith v. Appleton*, 19 Wis. 468.

See generally the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 15, p. 1030.

The repeal of a license law does not affect a right to recover for a breach of a bond given under the law. *Coggeshall v. Groves*, 16 R. I. 18.

The repeal of a law authorizing a municipality to issue bonds "exempt from taxation" does not affect bonds issued before the repeal, for that would change the obligation of the contract between the municipality and the bondholders. But as the authority did not create a contract between the state and the municipality, the authority could be withdrawn, and bonds issued after the repeal were subject to taxation. *Merchants' Ins. Co. v. Newark*, 54 N. J. L. 138.

2. Acts Declared by Statute to Constitute Contract. — *U. S. v. Williams*, 8 Mont. 85; *Streubel v. Milwaukee, etc., R. Co.*, 12 Wis. 67.

In *Pacific Mail Steamship Co. v. Joliffe*, 2 Wall. (U. S.) 450, it was decided that the repeal of an act declaring that when a vessel is spoken by a pilot and his services are declined, he shall be entitled to one-half pilotage fees, does not affect claims for fees accrued before its repeal.

3. Contract Against Sound Morals, Justice, or Right. — *Osborn v. Nicholson*, 1 Dill. (U. S.) 219; *Norris v. Crocker*, 13 How. (U. S.) 429; *Kimbro v. Colgate*, 5 Blatchf. (U. S.) 229.

A Usurious Contract does not contravene either sound morals or any principle of natural justice, and therefore the repeal of a statute creating certain exceptions to the usury law

does not, within the principle stated in the text, vitiate a contract within the terms of such statute and made while it was in force. *Edworthy v. Iowa Sav., etc., Assoc.*, 114 Iowa 220.

4. Repeal of Statute Conferring Jurisdiction — *England*. — *Maggs v. Hunt*, 12 Moo. 357, 4 Bing. 212, 13 E. C. L. 404; *Miller's Case*, 1 W. Bl. 451; *Crisp v. Bunbury*, 8 Bing. 394, 21 E. C. L. 333; *Cates v. Knight*, 3 T. R. 442.

United States. — *Hollingsworth v. Virginia*, 3 Dall. (U. S.) 378; *Yeaton v. U. S.*, 5 Cranch (U. S.) 281; *U. S. v. Boisdoré*, 8 How. (U. S.) 121; *McNulty v. Batty*, 10 How. (U. S.) 79; *Merchants' Ins. Co. v. Ritchie*, 5 Wall. (U. S.) 541; *Ex p. McCardle*, 7 Wall. (U. S.) 506; *Assessors v. Osborne*, 9 Wall. (U. S.) 569; *U. S. v. Tynen*, 11 Wall. (U. S.) 88; *Baltimore, etc., R. Co. v. Grant*, 98 U. S. 398; *South Carolina v. Gaillard*, 101 U. S. 433; *Morey v. Lockhart*, 123 U. S. 56; *Wilkinson v. Nebraska*, 123 U. S. 286; *Sherman v. Grinnell*, 123 U. S. 679; *Gurnee v. Patrick County*, 137 U. S. 141.

California. — *Lamb v. Schottler*, 54 Cal. 319. *Colorado*. — *Smith v. District Ct.*, 4 Colo. 235.

Indiana. — *Hunt v. Jennings*, 5 Blackf. (Ind.) 196, 33 Am. Dec. 465; *Stephenson v. Doe*, 8 Blackf. (Ind.) 508, 46 Am. Dec. 489; *Roush v. Morrison*, 47 Ind. 414.

Louisiana. — *Todd v. Landry*, 5 Mart. (La.) 459, 12 Am. Dec. 479.

Maine. — *Thayer v. Seavey*, 11 Me. 284; *Cummings v. Chandler*, 26 Me. 453; *Saco v. Gurney*, 34 Me. 14; *Macnawhoc Plantation v. Thompson*, 36 Me. 365.

Maryland. — *Wade v. St. Mary's Industrial School*, 43 Md. 178.

Massachusetts. — *Springfield v. Hampden County*, 6 Pick. (Mass.) 501; *Com. v. Kimball*, 21 Pick. (Mass.) 373; *New London, etc., R. Co. v. Boston, etc., R. Co.*, 102 Mass. 386.

Mississippi. — *Rice v. Wright*, 46 Miss. 679; *Musgrove v. Vicksburg, etc., R. Co.*, 50 Miss. 677.

New Jersey. — *Belvidere v. Warren R. Co.*, 34 N. J. L. 195; *State v. Passaic*, 36 N. J. L. 382; *State v. Jersey City*, 38 N. J. L. 85.

New York. — *Angel v. Hume*, 17 Hun (N. Y.) 377; *Butler v. Palmer*, 1 Hill (N. Y.) 324.

Pennsylvania. — *Hatfield Tp. Road*, 4 Yeates (Pa.) 392; *Stoever v. Immell*, 1 Watts (Pa.) 258; *North Canal St. Road*, 10 Watts (Pa.) 351, 36 Am. Dec. 185; *Fenelon's Petition*, 7 Pa. St. 173; *Hampton v. Com.*, 19 Pa. St. 329; *Uwchlan Tp. Road*, 30 Pa. St. 156.

South Carolina. — *Grant v. Grant*, 12 S. Car. 29, 32 Am. Rep. 506.

West Virginia. — *State v. Brookover*, 22 W. Va. 214.

The rule is the same where the statute expires by limitation. *Stoever v. Immell*, 1 Watts

it fall with the law.¹

Statutes Conferring Powers or Privileges. — So the naked repeal of a statute conferring a power or privilege destroys the right to exercise it, and abates suits pending to enforce it.²

Authority to Collect Taxes and Assessments. — According to the foregoing rule the repeal of a tax law revokes the authority to collect a tax theretofore assessed under it, where the collection as well as the assessment of the tax was pro-

(Pa.) 258; *Com. v. Beatty*, 1 Watts (Pa.) 382; *Assessors v. Osborne*, 6 Wall. (U. S.) 567; *Illinois, etc., Canal v. Chicago*, 14 Ill. 334.

1. Pending Proceeding Terminated by Repeal — *United States*. — *Hamilton Bank v. Dudley*, 2 Pet. (U. S.) 492; *U. S. v. Boisdoré*, 8 How. (U. S.) 121; *McNulty v. Batty*, 10 How. (U. S.) 79; *Assessors v. Osborne*, 6 Wall. (U. S.) 567; *U. S. v. Six Fermenting Tubs*, 1 Abb. (U. S.) 269.

Indiana. — *Hunt v. Jennings*, 5 Blackf. (Ind.) 195, 33 Am. Dec. 465; *Stephenson v. Doe*, 8 Blackf. (Ind.) 508, 46 Am. Dec. 489.

Mississippi. — *French v. State*, 53 Miss. 651. *New York*. — *Church v. Rhodes*, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 281.

Pennsylvania. — *Matter of North St.*, 1 Pearson (Pa.) 199; *North Canal St. Road*, 10 Watts (Pa.) 351, 36 Am. Dec. 185; *Fenelon's Petition*, 7 Pa. St. 173.

A statute repealing all divorce laws of a state ousts the court of jurisdiction in pending divorce cases. *Grant v. Grant*, 12 S. Car. 29, 32 Am. Rep. 506.

Cases Pending on Appeal. — If laws which give the court jurisdiction in certain cases expire, the jurisdiction ceases, although an appeal is actually pending at the time of the expiration. *U. S. v. Boisdoré*, 8 How. (U. S.) 121; *McNulty v. Batty*, 10 How. (U. S.) 79.

Repeal After Decree of Foreclosure of Mechanic's Lien. — Where a statute giving jurisdiction to a certain court to foreclose mechanics' liens was repealed after a decree of foreclosure but before a sale, without a saving clause, the right to proceed under the decree is taken away. *Holcomb v. Boynton*, 151 Ill. 295, affirming 49 Ill. App. 503.

2. Statutes Conferring Powers or Privileges — *England*. — *Warne v. Beresford*, 2 M. & W. 848; *Butcher v. Henderson*, L. R. 3 Q. B. 335.

United States. — *South Carolina v. Gaillard*, 101 U. S. 433.

Connecticut. — *Downs v. Huntington*, 35 Conn. 588; *Veats v. Danbury*, 37 Conn. 412.

Colorado. — *Smith v. District Ct.*, 4 Colo. 235. *Illinois*. — *Illinois, etc., Canal v. Chicago*, 14 Ill. 334.

Indiana. — *Hunt v. Jennings*, 5 Blackf. (Ind.) 195, 33 Am. Dec. 465; *Stephenson v. Doe*, 8 Blackf. (Ind.) 508, 46 Am. Dec. 489.

Kansas. — *Gilleland v. Schuyler*, 9 Kan. 560.

Louisiana. — *Todd v. Landry*, 5 Mart. (La.) 459, 12 Am. Dec. 479.

Maine. — *Macnawhoc Plantation v. Thompson*, 36 Me. 365; *Holmes v. French*, 68 Me. 525.

Massachusetts. — *Williams v. Middlesex County*, 4 Met. (Mass.) 76; *Com. v. Highway Com'rs*, 6 Pick. (Mass.) 501; *New London, etc., R. Co. v. Boston, etc., R. Co.*, 102 Mass. 389.

Missouri. — *Freleigh v. State*, 8 Mo. 606.

New Jersey. — *Den v. Du Bois*, 16 N. J. L. 285.

New York. — *Church v. Rhodes*, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 281.

Oregon. — *Young v. Territory*, 1 Oregon 213.

Pennsylvania. — *Hatfield Tp. Road*, 4 Yeates (Pa.) 392; *Stoeve v. Immell*, 1 Watts (Pa.) 258; *Com. v. Beatty*, 1 Watts (Pa.) 382; *Fenelon's Petition*, 7 Pa. St. 173; *Hampton v. Com.*, 19 Pa. St. 329; *Uwchlan Tp. Road*, 30 Pa. St. 156; *Com. v. Standard Oil Co.*, 101 Pa. St. 119.

Tennessee. — *McRee v. McLemore*, 8 Heisk. (Tenn.) 440.

West Virginia. — *State v. Brookover*, 22 W. Va. 214.

Authority of Public Officers. — The repeal of an act which authorized a course of proceedings by a public officer invalidates the proceedings, if unfinished, at whatever state they have arrived. *De Groot v. U. S.*, 5 Wall. (U. S.) 419; *Lamb v. Schottler*, 54 Cal. 319; *Williams v. Lincoln County*, 35 Me. 345; *Tivey v. People*, 8 Mich. 128; *Hampton v. Com.*, 19 Pa. St. 329.

A Power to Dispose of Public Lands given by Congress to a territory is a mere trust in its nature, and unless executed is destroyed by a repeal of the law granting it. *Rice v. Minnesota, etc., R. Co.*, 1 Black (U. S.) 358.

A Gratuitous Pension granted by a statute is not a vested right in the recipient and is destroyed by the repeal of the granting statute. *Dale v. Governor*, 3 Stew. (Ala.) 387. And see the title PENSIONS AND BOUNTIES, vol. 22, p. 658, paragraph *Pension Mcre Gratuity*.

Exemptions. — As to the repeal of a statute granting exemptions, see the titles EXEMPTIONS (FROM EXECUTION), vol. 12, p. 75; EXEMPTIONS (FROM TAXATION), vol. 12, p. 383.

Location of County Seat. — A statute locating the seat of justice in any county is subject to repeal like any other statute. *Monet v. Jones*, 10 Smed. & M. (Miss.) 237.

Repeal of Usury Law. — The defense of usury cannot be set up or relied on after the repeal of the statute permitting such defense, even in suits pending at the time of the repeal. *Curtis v. Leavitt*, 15 N. Y. 152; *Ellwell v. Daggs*, 108 U. S. 143.

A Proceeding to Condemn Land is terminated by the repeal of the statute authorizing the condemnation proceedings. *Detroit v. Chapin*, 108 Mich. 136.

A Sale by an Administrator under an order of court is void where the law empowering the court to make such order is repealed after the making of the order but before the sale. *Campau v. Chene*, 1 Mich. 411; *Hamilton Bank v. Dudley*, 2 Pet. (U. S.) 523; *Davis v. Livingston*, 6 Ohio 225; *Paine v. Skinner*, 8 Ohio 162; *Perry v. Clarkson*, 16 Ohio 573; *Ludlow v. Wade*, 5 Ohio 503.

vided for by the repealed act.¹ In case, however, the proceedings for the collection of the tax depend, not on the repealed act, but on another act which remains in force, the tax may be collected notwithstanding the repeal of the act under which it was levied.²

ee. PENALTIES AND FORFEITURES. — The repeal of a statute prescribing a penalty or forfeiture recoverable in a civil action, without a saving clause in the repealing act, takes away the right of recovery,³ even though an action has been

1. Repeal of Tax Law as Revoking Authority to Collect Tax Previously Levied. — *Gorley v. Sewell*, 77 Ind. 316; *McQuilkin v. Doe*, 8 Blackf. (Ind.) 581; *Mount v. State*, 6 Blackf. (Ind.) 25; *Bleidorn v. Abel*, 6 Iowa 5.

But where the re-enactment of the tax sections constitutes the repeal by implication, the re-enactment itself furnishes the inference that the legislature intended to preserve the right to collect the taxes. *Gorley v. Sewell*, 77 Ind. 319.

Assessments for Public Improvements. — By the repeal of the statute authorizing the making of assessments for the building of a plank road and the collection thereof, not only the remedy for the collection of the assessments, but also the lien or right itself is taken away. *Marion Tp. Gravel Road Co. v. Sleeth*, 53 Ind. 35; *Bradley v. Brandywine, etc.*, *Turnpike Co.*, 53 Ind. 70.

2. Authority to Collect Dependent on Another Statute. — *Louisville Water Co. v. Com.*, (Ky. 1896) 34 S. W. Rep. 1064; *Belvidere v. Warren R. Co.*, 34 N. J. L. 196; *Pacific, etc.*, *Tel. Co. v. Com.*, 66 Pa. St. 70. See also *Com. v. Standard Oil Co.*, 101 Pa. St. 119.

3. Repeal of Statute Imposing Penalty or Forfeiture — England. — *Rex v. McKenzie, R. & R. C. C.* 429; *Miller's Case*, 1 W. Bl. 451.

Canada. — *L'Association Pharmaceutique de Québec*, 9 Québec Q. B. 243.

United States. — *Seymour v. McCormick*, 16 How. (U. S.) 480; *Kring v. Missouri*, 107 U. S. 221; *Medley, Petitioner*, 134 U. S. 160; *Dinsmore v. Southern Express Co.*, 183 U. S. 115; *Union Iron Co. v. Pierce*, 4 Biss. (U. S.) 328; *Snell v. Campbell*, 24 Fed. Rep. 880; *Eastman v. Clackamas County*, 32 Fed. Rep. 24.

Alabama. — *Tombeckbee Bank v. State, Minor* (Ala.) 425; *Crawford v. State, Minor* (Ala.) 143; *Judson v. State, Minor* (Ala.) 150; *Broughton v. Branch Bank*, 17 Ala. 828; *Carlisle v. State*, 42 Ala. 523.

California. — *San Luis Obispo First Nat. Bank v. Henderson*, 101 Cal. 307.

Colorado. — *Gregory v. German Bank*, 3 Colo. 332, 25 Am. Rep. 760; *Denver, etc.*, *R. Co. v. Crawford*, 11 Colo. 598.

Connecticut. — *Hartford v. Champion*, 58 Conn. 268.

Illinois. — *Parmelee v. Lawrence*, 44 Ill. 415; *Menard County v. Kincaid*, 71 Ill. 587; *Mix v. Illinois Cent. R. Co.*, 116 Ill. 502.

Indiana. — *Hunt v. Jennings*, 5 Blackf. (Ind.) 195, 33 Am. Dec. 465; *Stephenson v. Doe*, 8 Blackf. (Ind.) 508, 46 Am. Dec. 489; *State v. Youmans*, 5 Ind. 281; *Thompson v. Bassett*, 5 Ind. 535; *Wood v. Kennedy*, 19 Ind. 68; *Western Union Tel. Co. v. Scircle*, 103 Ind. 227.

Kentucky. — *Com. v. Welch*, 2 Dana (Ky.) 330; *Com. v. Cain*, 14 Bush (Ky.) 525; *Speckert v. Louisville*, 78 Ky. 287; *Mason, etc.*, *Co.*

v. Com., (Ky. 1896) 36 S. W. Rep. 570; *Pannell v. Louisville Tobacco Warehouse Co.*, (Ky. 1902) 68 S. W. Rep. 662.

Maine. — *Thayer v. Seavey*, 11 Me. 284; *Cummings v. Chandler*, 26 Me. 453; *Saco v. Gurney*, 34 Me. 14; *Heald v. State*, 36 Me. 62; *Gaul v. Brown*, 53 Me. 496.

Massachusetts. — *Nichols v. Squire*, 5 Pick. (Mass.) 168; *Springfield v. Highway Com'rs*, 6 Pick. (Mass.) 501; *Com. v. Kimball*, 21 Pick. (Mass.) 373.

Michigan. — *People v. Hiller*, 113 Mich. 209.

Mississippi. — *Musgrove v. Vicksburg, etc.*, *R. Co.*, 50 Miss. 677; *Anding v. Levy*, 57 Miss. 57, 34 Am. Rep. 435.

Nebraska. — *Globe Pub. Co. v. State Bank*, 41 Neb. 175; *Kleckner v. Turk*, 45 Neb. 176.

New Jersey. — *Belvidere v. Warren R. Co.*, 34 N. J. L. 193.

New York. — *Hartung v. People*, 22 N. Y. 95; *Fisher v. New York Cent., etc.*, *R. Co.*, 46 N. Y. 656; *Van Dyck v. McQuade*, 86 N. Y. 38.

North Carolina. — *Governor v. Howard*, 1 Murph. (5 N. Car.) 465; *Dyer v. Ellington*, 126 N. Car. 941.

Ohio. — *Cleveland, etc.*, *R. Co. v. Wells*, 65 Ohio St. 313.

Pennsylvania. — *Com. v. Shopp*, 1 Woodw. (Pa.) 123; *Chaiker v. Ives*, 55 Pa. St. 81; *Com. v. Standard Oil Co.*, 101 Pa. St. 119.

Wisconsin. — *State v. Van Stralen*, 45 Wis. 437.

See also the title CONSTITUTIONAL LAW, vol. 6, p. 954.

In *New York*, before distress for rent was abolished by statute, a penalty was imposed for the benefit of the landlord on one who assisted a tenant in removing goods from the leased premises in order to avoid the payment of rent. It was held that the right of the landlord to recover the penalty was not affected by the subsequent abolishment of the right of distress for rent. Though this decision proceeded on the theory that the latter act did not operate retroactively on the prior statute, still the court stated that when a penalty is given to an individual as a satisfaction for injury done him in violating a statute, as well as punishment to the offender, the right to the penalty is vested in the injured person whether suit is begun or not, and is not affected by the subsequent repeal of the statute. *Palmer v. Conly*, 4 Den. (N. Y.) 374, affirmed 2 N. Y. 182.

In later cases, however, in the same state, it is decided that had the later statute actually repealed the first, the right to the penalty would have been destroyed. *Fisher v. New York Cent., etc.*, *R. Co.*, 46 N. Y. 656. See also *Sturgis v. Spofford*, 45 N. Y. 446, and the *New York* cases cited *supra*, this note.

begun,¹ for there is no vested right in an unenforced penalty until its actual recovery by final judgment.²

Recovery on Common-law Grounds. — In some cases, however, where the right to recover a penalty is destroyed by the repeal of the statute giving it, there may be still a recovery for the violation of the statute on common-law grounds. Thus, where a statute prohibits an act, and a violation of its provisions is such an act of negligence as, on common-law principles, subjects the offender to a civil action for damages on account of the loss or injury thereby caused, the repeal of the statute, while it destroys the right to recover the penalty, does not take away or impair a right of action which has already accrued by reason of such negligence.³ On the same principle, in cases where by statute it is made unlawful to demand and receive compensation, as interest, freights, duties, etc., in excess of that named in the statute, from one who protests against it, and a penalty for a violation is given to the one wronged, the repeal of the statute, while it prevents the recovery of the penalty, does not affect the common-law right to recover the excess wrongfully received and detained.⁴

Saving Clause. — Where a statute prescribing a penalty and forfeiture is repealed, the repealing act sometimes contains a saving clause as to liabilities incurred before the date of the repeal,⁵ and in some states there are general

1. Effect of Repeal on Pending Actions — *England*. — *Rex v. London*, 3 Burr. 1456.

United States. — *The Schooner Rachel v. U. S.*, 6 Cranch (U. S.) 329; *The Irresistible*, 7 Wheat. (U. S.) 551; *U. S. v. Preston*, 3 Pet. (U. S.) 57.

Alabama. — *Pope v. Lewis*, 4 Ala. 489.

Connecticut. — *Welch v. Wadsworth*, 30 Conn. 149, 79 Am. Dec. 239.

Michigan. — *Bay City, etc., R. Co. v. Austin*, 21 Mich. 390.

New Hampshire. — *Lewis v. Foster*, 1 N. H. 61.

New York. — *People v. Westchester County*, 4 Barb. (N. Y.) 64; *Van Dyck v. McQuade*, 86 N. Y. 38; *Smith v. Banker*, (Supm. Ct. Spec. T.) 3 How. Pr. (N. Y.) 142; *Fire Dept. v. Ogden*, (Supm. Ct.) 59 How. Pr. (N. Y.) 21.

Wisconsin. — *Dillon v. Linder*, 36 Wis. 344; *Rood v. Chicago, etc., R. Co.*, 43 Wis. 147.

Repeal After Verdict but Before Judgment. — Where the act giving a penalty was repealed after the verdict but before final judgment, the right of recovery was lost. *Bay City, etc., R. Co. v. Austin*, 21 Mich. 390.

2. No Vested Right in Penalty Before Judgment — *United States*. — *Yeaton v. U. S.*, 5 Cranch (U. S.) 281; *Royston v. Miller*, 76 Fed. Rep. 50. *Alabama*. — *State v. Tombeckbee Bank*, 1 Stew. (Ala.) 347.

Colorado. — *Gregory v. German Bank*, 3 Colo. 332, 25 Am. Rep. 760; *Denver, etc., R. Co. v. Crawford*, 11 Colo. 600.

Kentucky. — *Com. v. Welch*, 2 Dana (Ky.) 330.

Maine. — *Gaul v. Brown*, 53 Me. 496.

Massachusetts. — *Nichols v. Squire*, 5 Pick. (Mass.) 168.

Michigan. — *Bay City, etc., R. Co. v. Austin*, 21 Mich. 390.

New York. — *Hoppock v. Stone*, 49 Barb. (N. Y.) 527.

But see *Taylor v. Rushing*, 2 Stew. (Ala.) 161, in which a penalty accruing to an individual under a statute was held to be a vested right, and the repeal of the statute pending a writ of error was held not to divest the right;

distinguishing Yeaton v. U. S., 5 Cranch (U. S.) 281, and *State v. Tombeckbee Bank*, 1 Stew. (Ala.) 347.

3. Recovery on Common-law Grounds After Repeal of Statute. — *Grey v. Mobile Trade Co.*, 55 Ala. 387, 28 Am. Rep. 729; *Vanderkar v. Rensselaer, etc., R. Co.*, 13 Barb. (N. Y.) 393.

Thus, the repeal of a statute requiring fire escapes does not destroy a right of action for an injury caused by a prior accident due to the failure to provide fire escapes. *Gorman v. McArdle*, 67 Hun (N. Y.) 484.

4. Recovery of Money Paid under Protest. — *Whitaker v. Pope*, 2 Woods (U. S.) 463; *Noyes v. State*, 46 Wis. 250, 32 Am. Rep. 710; *Smith v. Chicago, etc., R. Co.*, 49 Wis. 443; *Graham v. Chicago, etc., R. Co.*, 53 Wis. 486. See also *Pacific Mail Steamship Co. v. Joliffe*, 2 Wall. (U. S.) 450; *Harris v. Townshend*, 56 Vt. 716; *Rood v. Chicago, etc., R. Co.*, 43 Wis. 146.

So where a usury law expressly provided that a person paying usurious interest might sue for and recover three times the excess of the money paid over and above the lawful interest, it was held that the borrower might waive his right under the statute and sue for and recover simply the excess over and above the legal rates fixed by the statute. *Lee v. Peckham*, 17 Wis. 383; *Wood v. Lake*, 13 Wis. 84. See *Gill v. Kice*, 13 Wis. 549; *Fay v. Lovejoy*, 20 Wis. 407; *Dole v. Northrop*, 19 Wis. 249.

Voluntary Payments. — Whether an excess voluntarily paid can be recovered back is doubtful, for the payment being voluntary the plaintiff cannot complain of any force or wrong done by the defendant, but must rest his recovery entirely upon the unlawfulness of the act of the defendant in receiving the same in violation of the statute. *Graham v. Chicago, etc., R. Co.*, 53 Wis. 486. See also *Noyes v. State*, 46 Wis. 254, 32 Am. Rep. 710. *Compare Mobile, etc., R. Co. v. Steiner*, 61 Ala. 594, where it was said that the payment of excess of freight is from its nature involuntary and may be recovered though not paid under protest.

5. Saving Clause. — *Broughton v. Branch Bank*, 17 Ala. 828; *Thompson v. Bassett*, 5 Ind. 535.

statutes providing that the repeal of a statute imposing a penalty or forfeiture shall not operate to relieve any one from liability for any penalty or forfeiture incurred before the repeal without an express provision to that effect in the repealing act.¹

Case Pending on Appeal. — Even the recovery of a judgment for a statutory penalty or forfeiture does not give a vested right thereto, where an appeal has been taken, because the judgment, under such circumstances, is not immediately enforceable; and therefore the repeal of the statute pending the appeal will necessitate the reversal of the judgment and the dismissal of the action.²

ff. CRIMES AND PUNISHMENTS — (aa) *Effect in General of Repeal of Statute.* — Where a statute prescribing the punishment for a crime is repealed after such crime has been committed but before final judgment of conviction, though after a verdict of guilty, no punishment can be imposed, because the act must be punishable when judgment is demanded, and authority to render judgment must still reside in the court.³ But where sentence has been pronounced, and

1. General Statute Saving Previously Incurred Forfeitures. — *Denning v. Yount*, 62 Kan. 217, affirming 9 Kan. App. 708; *State v. Crusius*, 57 N. J. L. 279; *Seawell v. Hendricks*, 4 Okla. 435.

Distinction Between Penalty and Punishment for Crime. — A provision that the repeal of a criminal statute shall not affect a prosecution for any crime committed before the repeal does not apply to a civil suit by the state for the recovery of the statutory penalty for any act that is not made a crime. *Pensacola, etc., R. Co. v. State*, (Fla. 1903) 33 So. Rep. 985.

2. Case Pending on Appeal — *England.* — *Kay v. Goodwin*, 6 Bing. 576, 19 E. C. L. 169.

United States. — *Union Iron Co. v. Pierce*, 4 Biss. (U. S.) 327.

California. — *San Luis Obispo First Nat. Bank v. Henderson*, 101 Cal. 307.

Colorado. — *Denver, etc., R. Co. v. Crawford*, 11 Colo. 598; *Union Pac. R. Co. v. Proctor*, 12 Colo. 194.

Florida. — *State v. Canfield*, 40 Fla. 36; *Pensacola, etc., R. Co. v. State*, (Fla. 1903) 33 So. Rep. 985.

Georgia. — *Western Union Tel. Co. v. Smith*, 96 Ga. 569.

Illinois. — *Mix v. Illinois Cent. R. Co.*, 116 Ill. 502.

Kentucky. — *Speckert v. Louisville*, 78 Ky. 287.

New York. — *Butler v. Palmer*, 1 Hill (N. Y.) 324.

North Carolina. — *Governor v. Howard*, 1 Murph. (5 N. Car.) 465.

3. Repeal of Statute Prescribing Punishment for Crime Previously Committed — *England.* — *Miller's Case*, 1 W. Bl. 451; *Rex v. McKenzie*, R. & R. C. C. 429; *Charrington v. Meatheringham*, 2 M. & W. 228; *Reg. v. Mawgan*, 8 Ad. & El. 496, 35 E. C. L. 447; *Reg. v. Swan*, 4 Cox C. C. 108.

United States. — *Yeaton v. U. S.*, 5 Cranch (U. S.) 281; *U. S. v. Ship Helen*, 6 Cranch (U. S.) 203; *The Schooner Rachel v. U. S.*, 6 Cranch (U. S.) 329; *The Irresistible*, 7 Wheat. (U. S.) 551; *Norris v. Crocker*, 13 How. (U. S.) 429; *Pacific Mail Steamship Co. v. Joliffe*, 2 Wall. (U. S.) 450; *U. S. v. Tynen*, 11 Wall. (U. S.) 88; *Anonymous*, 1 Wash. (U. S.) 84; *U. S. v. Finlay*, 1 Abb. (U. S.) 364; *U. S. v. Six Fermenting Tubs*, 1 Abb. (U. S.) 268; *U. S. v. Passmore*, 4 Dall. (U. S.) 373.

Alabama. — *Freeman v. State*, 6 Port. (Ala.) 372; *State v. Allaire*, 14 Ala. 435; *Griffin v. State*, 39 Ala. 541; *Aaron v. State*, 40 Ala. 307; *Carlisle v. State*, 42 Ala. 523.

California. — *People v. Tisdale*, 57 Cal. 104. *Colorado.* — *Hirschburg v. People*, 6 Colo. 145.

Florida. — *Donaldson v. State*, 9 Fla. 402; *Higginbotham v. State*, 19 Fla. 557.

Georgia. — *St. Mary's Bank v. State*, 12 Ga. 475.

Indiana. — *Taylor v. State*, 7 Blackf. (Ind.) 93; *State v. Loyd*, 2 Ind. 659; *Howard v. State*, 5 Ind. 183.

Iowa. — *Jones v. State*, 1 Iowa 395.

Kansas. — *State v. Boyle*, 10 Kan. 116.

Kentucky. — *Com. v. Welch*, 2 Dana (Ky.) 330; *Acree v. Com.*, 13 Bush (Ky.) 353; *Com. v. Cain*, 14 Bush (Ky.) 525; *Speckert v. Louisville*, 78 Ky. 287; *Com. v. Sherman*, 85 Ky. 686.

Louisiana. — *State v. O'Connor*, 13 La. Ann. 486; *State v. Brewer*, 22 La. Ann. 273.

Maine. — *Heald v. State*, 36 Me. 62.

Maryland. — *State v. Baltimore, etc., R. Co.*, 12 Gill & J. (Md.) 399, 38 Am. Dec. 319; *Keller v. State*, 12 Md. 322, 71 Am. Dec. 596; *Annapolis v. State*, 30 Md. 112; *Beard v. State*, 74 Md. 130.

Massachusetts. — *Com. v. Davis*, 11 Gray (Mass.) 48; *Com. v. Marshall*, 11 Pick. (Mass.) 350, 22 Am. Dec. 377; *Com. v. Kimball*, 21 Pick. (Mass.) 373; *Com. v. Pattee*, 12 Cush. (Mass.) 501; *Com. v. McDonough*, 13 Allen (Mass.) 581. See also *Com. v. Kelliher*, 12 Allen (Mass.) 480.

Michigan. — *Bay City, etc., R. Co. v. Austin*, 21 Mich. 390; *People v. Hobson*, 48 Mich. 27.

Mississippi. — *Teague v. State*, 39 Miss. 516; *Mastronada v. State*, 60 Miss. 86; *Wheeler v. State*, 64 Miss. 462; *Lindzey v. State*, 65 Miss. 542, 7 Am. St. Rep. 674.

Missouri. — *State v. Patrick*, 65 Mo. App. 653, 2 Mo. App. Rep. 1149.

New Hampshire. — *Lewis v. Foster*, 1 N. H. 61.

New Jersey. — *Den v. DuBois*, 16 N. J. L. 285; *State v. Crusius*, 57 N. J. L. 279.

New York. — *Hartung v. People*, 22 N. Y. 95; *Palmer v. Conly*, 4 Den. (N. Y.) 377; *Butler v. Palmer*, 1 Hill (N. Y.) 329; *People v. Board of Police*, (Supm. Ct. Gen. T.) 16 Abb. Pr. (N. Y.) 473; *Smith v. Banker*, (Supm. Ct. Spec. T.) 3 How. Pr. (N. Y.) 142; *People v. Van Pelt*, (Oyer & T. Ct.) 4 How. Pr. (N. Y.) 36.

nothing remains but to fix the day when it shall be executed, the case is not affected by the repeal of the law, because the court in fixing the day of execution does not exercise a judicial power.¹

Pending Appeal. — Where the law under which a conviction has been had is repealed pending a writ of error or appeal from the judgment of conviction, the effect is the same as if the repeal had occurred while the prosecution was pending in the trial court.² While the rule stated is fully established by the authorities, there is some variety of opinion as to the reason on which the rule is based. In one case it is said to be founded on the presumption of legislative pardon.³ The more satisfactory reason, however, is that the decision of the appellate court must be in accordance with the existing law, and if the law under which the judgment of conviction was rendered has been repealed, the appellate court is without authority to affirm the judgment.⁴

Statutory Modifications of Rule. — In some jurisdictions the rule just stated has been changed by statute.⁵

North Carolina. — *State v. Nutt*, Phil. L. (61 N. Car.) 20; *Governor v. Howard*, 1 Murph. (5 N. Car.) 465; *State v. Cress*, 4 Jones L. (49 N. Car.) 421; *State v. Wise*, 66 N. Car. 120; *State v. Long*, 78 N. Car. 571; *State v. Williams*, 97 N. Car. 455; *State v. Massey*, 103 N. Car. 356.

Ohio. — *Calkins v. State*, 14 Ohio St. 222.

Oregon. — *State v. Gaunt*, 13 Oregon 115.

Pennsylvania. — *Com. v. Crowley*, 1 Ashm. (Pa.) 179; *Stoeber v. Immell*, 1 Watts (Pa.) 258; *Abbott v. Com.*, 8 Watts (Pa.) 517, 34 Am. Dec. 492; *Com. v. Duane*, 1 Binn. (Pa.) 601, 2 Am. Dec. 497; *Nusser v. Com.*, 25 Pa. St. 126; *Genkinger v. Com.*, 32 Pa. St. 99; *Com. v. Brown*, 20 Pa. Co. Ct. 139.

Rhode Island. — *State v. Fletcher*, 1 R. I. 193.

South Carolina. — *State v. Addington*, 2 Bailey L. (S. Car.) 516, 23 Am. Dec. 150.

Tennessee. — *Roberts v. State*, 2 Overt. (Tenn.) 423; *Bennett v. State*, 2 Yerg. (Tenn.) 472; *Brothers v. State*, 2 Coldw. (Tenn.) 201.

Texas. — *Wall v. State*, 18 Tex. 699, 70 Am. Dec. 302; *Greer v. State*, 22 Tex. 588; *Montgomery v. State*, 2 Tex. App. 618; *Tuton v. State*, 4 Tex. App. 472; *Pinckard v. State*, 13 Tex. App. 373; *Mulkey v. State*, 16 Tex. App. 53.

Vermont. — *State v. Meader*, 62 Vt. 458.

Virginia. — *Com. v. Leftwich*, 5 Rand. (Va.) 657; *Harrison v. Allen*, Wythe (Va.) 33; *Scutt v. Com.*, 2 Va. Cas. 54.

Washington. — *Leschi v. Territory*, 1 Wash. Ter. 13; *State v. Oliver*, 12 Wash. 547; *State v. Allen*, 14 Wash. 103.

Wisconsin. — *State v. Ingersoll*, 17 Wis. 631; *State v. Gumber*, 37 Wis. 298; *Rood v. Chicago*, etc., R. Co., 43 Wis. 146; *State v. Campbell*, 44 Wis. 529.

Increasing Punishment. — As to the effect of an increase of punishment by the repealing act, see *supra*, this section, 2 b. (4) *Penal Acts*.

Extent of Applicability of Law Providing for Punishment Where None Is Provided by Statute. — A statute providing that in case of legal conviction, where no punishment is provided by statute, the court shall award such sentence as is conformable to the common usage and practice of the state, according to the nature of the offense, does not apply to a case where at the time of the commission of the offense a punishment was provided by a statute which was subsequently repealed. *Com. v. McDonough*, 13 Allen (Mass.) 581.

1. Repeal After Sentence. — *State v. Addington*, 2 Bailey L. (S. Car.) 516, 23 Am. Dec. 150. In this case the defendant was sentenced to death on a conviction of horse stealing. He was pardoned on condition of submitting to a whipping and leaving the state, never to return. Being afterwards found in the state, he was brought before the court on a rule to show cause why a day should not be appointed for the execution of the death sentence, and it was held that the repeal, after sentence had been imposed, of the statute imposing the death penalty for horse stealing did not affect the case. *Compare Aaron v. State*, 40 Ala. 307.

2. Pending Appeal. — *Spears v. Modoc County*, 101 Cal. 303; *Speckert v. Louisville*, 78 Ky. 287; *State v. Johnson*, 12 La. 547; *State v. King*, 12 La. Ann. 593; *Mouras v. Schooner A. C. Brewer*, 17 La. Ann. 82; *Hubbard v. State*, 2 Tex. App. 506.

Repeal After Argument in Appellate Court. — The rule stated in the text applies to every case where the repeal occurs before decision on a pending writ of error or appeal. Thus in a case where the law under which a conviction was had was repealed after the cause had been argued in the appellate court, but this was not brought to the notice of the court until after the judgment had been affirmed, it was held that a motion might be had within the term to correct the ruling of the court and enter a judgment of reversal. *Keller v. State*, 12 Md. 322, 71 Am. Dec. 596.

3. Reason of Rule — Legislative Pardon. — *State v. King*, 12 La. Ann. 593.

4. Doctrine that Appellate Court Must Decide According to the Existing Law. — *Keller v. State*, 12 Md. 322, 71 Am. Dec. 596. See also *Lewis v. Foster*, 1 N. H. 61.

5. Statutory Modification of Rule. — In Kentucky a different rule exists by statute, which provides that no new law shall be construed to repeal a former law as to any offense committed against the former law. *Com. v. Sherman*, 85 Ky. 686.

The Texas Statute provides that no violation of a statute shall be punished after it has been repealed, unless the repealing act substitutes another penalty. *Kenyon v. State*, 31 Tex. Crim. 13.

In California the statute provides that "the repeal of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already

Statutes Regulating Procedure. — In case, however, an act creating an offense and prescribing the punishment is kept in force, and the section providing procedure only is repealed, but other procedure is provided by the repealing act, a prosecution after the repeal is governed by the requirement of the repealing act.¹

(bb) *Saving Clause in Repealing Act.* — It is usual, in repealing acts, to insert a saving clause, preventing the operation of the repeal and continuing the repealed law in force as to all pending prosecutions, and often as to all violations of the existing law already committed.² But under some of these clauses the defendant has the option of selecting the punishment prescribed by the new law, in lieu of that to which he was liable before its enactment.³

(cc) *General Statutes Limiting Effect of Repealing Laws.* — In some jurisdictions there are general statutes providing in substance that no new law shall be construed to repeal a former law as to any offense committed against the former law before the new law takes effect. Under such a provision an offender may, and usually must be, punished in accordance with the provisions of the law in force at the time the offense was committed, though such law has, at the time of conviction, been repealed and superseded by a subsequently enacted statute; unless, of course, such subsequent statute contains a provision to the contrary.⁴ Usually, however, under the provisions of those general statutes, if the new law mitigates the punishment prescribed by the existing law, the mitigated punishment may, by the consent of the defendant, be imposed by a sentence pronounced after the new law has gone into effect.⁵ But under a

committed in violation of the law so repealed, unless the intention to bar such indictment or information and punishment is expressly declared in the repealing act." *People v. McNulty*, 93 Cal. 427.

As to the rule in *Indiana*, see *State v. Hardman*, 16 Ind. App. 357; *State v. Houck*, 16 Ind. App. 698.

1. **Procedure in Criminal Cases.** — *Batt v. Matkinson*, 19 Cox C. C. 532.

2. **Saving Clause — England.** — *Abbott v. Minister for Lands*, (1895) A. C. 425.

Alabama. — *Aaron v. State*, 40 Ala. 307.

California. — *People v. Gill*, 7 Cal. 357.

Kentucky. — *Wooten v. Com.*, 98 Ky. 468.

Massachusetts. — *Com. v. Marshall*, 11 Pick. (Mass.) 350, 22 Am. Dec. 377; *Com. v. McDonough*, 13 Allen (Mass.) 581; *Com. v. Edwards*, 4 Gray (Mass.) 1.

Mississippi. — *Clarke v. State*, 23 Miss. 261.

New Hampshire. — *State v. Arlin*, 39 N. H. 179.

New York. — *Oneida v. Thompson*, 92 Hun (N. Y.) 16.

Texas. — *Wall v. State*, 18 Tex. 682, 70 Am. Dec. 302.

And see *supra*, this title, VII. 2. *Provisos, Exceptions, and Saving Clauses.*

A Prosecution Is Not "Pending" within the meaning of a statute which reduces the punishment formerly prescribed for an offense, but excepts from its operation criminal prosecutions "pending" at the time of its passage, where no indictment had been found, but only preliminary proceedings had been instituted before a magistrate. *State v. Arlin*, 39 N. H. 179.

3. **Option of Defendant as to Punishment.** — *Clarke v. State*, 23 Miss. 261.

4. **General Statutes Limiting Effect of Repealing Laws — United States.** — *U. S. v. Mathews*, 23 Fed. Rep. 74; *U. S. v. Ulrici*, 3 Dill (U. S.) 532, 28 Fed. Cas. No. 16,594.

California. — *People v. McNulty*, 93 Cal. 427. But see *People v. Tisdale*, 57 Cal. 104.

Georgia. — *Gibson v. State*, 35 Ga. 224; *Jordan v. State*, 38 Ga. 585.

Idaho. — *In re Davis*, (Idaho 1899) 59 Pac. Rep. 544.

Illinois. — *Johnson v. People*, 173 Ill. 131; *Kossakowski v. People*, 177 Ill. 563.

Kansas. — *State v. Boyle*, 10 Kan. 113; *State v. Crawford*, 11 Kan. 32.

Kentucky. — *Acree v. Com.*, 13 Bush (Ky.) 353; *Waddell v. Com.*, 84 Ky. 276; *Com. v. Sherman*, 85 Ky. 686; *Com. v. Duff*, 87 Ky. 586.

Minnesota. — *State v. McDonald*, 20 Minn. 136, overruled *State v. Smith*, 62 Minn. 540.

Texas. — *Walker v. State*, 7 Tex. App. 245, 32 Am. Rep. 595; *Simms v. State*, 8 Tex. App. 230, *Myers v. State*, 8 Tex. App. 321; *Herber v. State*, 7 Tex. 69; *Wall v. State*, 18 Tex. 682, 70 Am. Dec. 302; *McInturf v. State*, 20 Tex. App. 335.

West Virginia. — *State v. Abbott*, 8 W. Va. 741.

Repeal of Municipal Ordinances. — The *California* statute (Pol. Code, § 329) is limited in its application to the repeal of a "law," and does not extend to the repeal of a municipal ordinance. *Spears v. Modoc County*, 101 Cal. 303.

5. **Imposition of Mitigated Punishment with Defendant's Consent.** — *Kossakowski v. People*, 177 Ill. 563; *Acree v. Com.*, 13 Bush (Ky.) 353; *Jones v. Com.*, 104 Ky. 468; *Wall v. State*, 18 Tex. 682, 70 Am. Dec. 302; *State v. Abbott*, 8 W. Va. 741.

Under the *Texas* statute (Penal Code, art. 15) providing that when, by the provisions of the new law, the punishment of the offense is ameliorated, "the defendant shall be punished under such last enactment unless he elect to receive the penalty prescribed by the law in force when the offense was committed," the defendant on conviction must have been pun-

provision of this character, if a judgment had been pronounced before the new law took effect, there cannot be a reversal thereof in order that the mitigated punishment may be imposed.¹

Power to Enact General Saving Law Doubted. — In respect, however, to general laws limiting the effect of repealing statutes, it has been said that the legislature cannot declare in advance the intent of subsequent legislatures or the effect of subsequent legislation on existing statutes.²

(b) **Connected with, but Independent of, Repealed Statute.** — While rights of action which are expressly given by statute and do not exist outside thereof, are necessarily destroyed by a repeal, rights or causes of action which accrue to a party and indirectly depend on the statute, but which can be enforced independently thereof, are not necessarily destroyed by its repeal. Under such circumstances the right to recover is based on the common law, not on the statute.³

c. **REPEAL AND RE-ENACTMENT** — (1) *Re-enactment Without Express Repeal.* — The mere re-enactment of a previous statute, or a provision of it, is construed not to be an implied repeal of such previous statute, but a continuation thereof, so that all interests under it remain unimpaired.⁴

(2) *Simultaneous Repeal and Re-enactment* — (a) **Majority Rule.** — Where a statute is repealed and its provisions are at the same time re-enacted by the repealing act, the effect, according to the great weight of authority, is that

ished according to the latter enactment unless he elected to receive the penalty affixed by the former law. *Allen v. State*, 7 Tex. App. 298; *Veal v. State*, 8 Tex. App. 474; *McInturf v. State*, 20 Tex. App. 335; *Maul v. State*, 25 Tex. 166; *Perez v. State*, 8 Tex. App. 610.

As to What Constitutes an Amelioration of punishment within the meaning of this provision, see *Cockrum v. State*, 24 Tex. 394; *Martin v. State*, 24 Tex. 61.

1. *Jones v. Com.*, 104 Ky. 468.

2. *Mongeon v. People*, 55 N. Y. 613. See also *People v. Cleary*, (Ct. Sess.) 13 Misc. (N. Y.) 546.

3. *Graham v. Chicago, etc.*, R. Co., 53 Wis. 486; *Grey v. Mobile Trade Co.*, 55 Ala. 387, 28 Am. Rep. 729; *Coggeshall v. Groves*, 16 R. I. 18. See *Palmer v. Conly*, 4 Den. (N. Y.) 378, affirmed 2 N. Y. 182.

4. **Re-enactment of Existing Statute** — *United States*. — *Pacific Mail Steamship Co. v. Joliffe*, 2 Wall. (U. S.) 450.

Colorado. — *Callahan v. Jennings*, 16 Colo. 471.

Florida. — *Forbes v. Board of Health*, 27 Fla. 189, 26 Am. St. Rep. 63.

Idaho. — *Barton v. Moscow Independent School Dist.* No. 5, 2 Idaho 998.

Indiana. — *Alexander v. State*, 9 Ind. 337; *Martindale v. Martindale*, 10 Ind. 566; *Cordell v. State*, 22 Ind. 1; *Gorley v. Sewell*, 77 Ind. 319.

Iowa. — *Hancock v. District Tp.*, 78 Iowa 550.

Kansas. — *Junction City v. Webb*, 44 Kan. 71. *Massachusetts*. — *Wright v. Oakley*, 5 Met. (Mass.) 400.

Minnesota. — *Burwell v. Tullis*, 12 Minn. 572.

Nebraska. — *State v. Wish*, 15 Neb. 448.

Nevada. — *Capron v. Strout*, 11 Nev. 304.

New Jersey. — *Randolph v. Larned*, 27 N. J. Eq. 557.

New York. — *Ely v. Holton*, 15 N. Y. 595; *Fisher v. New York Cent., etc.*, R. Co., 46 N.

Y. 656; *Moore v. Mausert*, 49 N. Y. 332; *People v. Montgomery County*, 67 N. Y. 109, 23 Am. Rep. 94; *Syracuse Sav. Bank v. Seneca Falls*, 86 N. Y. 317; *Goillotel v. New York*, 87 N. Y. 441; *Matter of Prime*, 136 N. Y. 347; *Calhoun v. Delhi*, 28 Hun (N. Y.) 379; *Mortimer v. Chambers*, 63 Hun (N. Y.) 335.

North Carolina. — *Kesler v. Smith*, 66 N. Car. 154; *State v. Sutton*, 100 N. Car. 474.

Pennsylvania. — *Barclay v. Leas*, 9 Pa. Co. Ct. 314.

Vermont. — *State v. Kibling*, 63 Vt. 646.

Wisconsin. — *Fullerton v. Spring*, 3 Wis. 667; *Cramer v. Milwaukee*, 18 Wis. 257; *Laude v. Chicago, etc.*, R. Co., 33 Wis. 640; *Cox v. North Wisconsin Lumber Co.*, 82 Wis. 141.

A city does not, by releasing its charter under a prior legislative act and accepting one under a later act, release its right to priority of lien for taxes, although the later act specifies priority "from and after the passage of this act," where the two acts are identical; the later being a re-enactment and continuation of the earlier. *Barclay v. Leas*, 9 Pa. Co. Ct. 314.

A re-enactment by an amendatory statute does not prevent a prosecution for a felony previously committed, where the two acts interfuse and blend so fully and completely that between them there is no period of intervening time in which the act was not an offense. *Sage v. State*, 127 Ind. 15.

Re-enactment of Inconsistent Statutes. — Of two inconsistent statutes re-enacted in a subsequent act, the one originally passed at the later date will prevail and operate as a repeal of the other; since, even though the re-enactment purports to repeal all prior acts, such original statute will be treated, not as a new enactment but as a continuation. *Northern Pac. R. Co. v. Ellison*, 3 Wash. 226.

Validity of Re-enactment. — A statute declaring that a repealed statute "is hereby re-enacted and declared to be in full force," is a valid enactment. *Barry's Petition*, 12 R. I. 51.

the earlier statute is not in fact repealed, but its provisions continue in active operation so that all rights and liabilities incurred thereunder are preserved and may be enforced,¹ and in some jurisdictions this is the rule by statute.² But if the law re-enacted had, before the re-enactment, wholly accomplished its purpose and exhausted its force, then the re-enactment is to be considered as a new law and not merely a continuation of the old one.³

Re-enactment and Repeal by Successive Acts. — The rule stated above as to the effect of a simultaneous repeal and re-enactment applies as well where the re-enactment and repeal were by successive acts passed on the same day, as where both results were accomplished by the same act.⁴

Interval Between Repeal and Re-enactment. — In case, however, the repeal and re-enactment are not simultaneous but an interval of time is allowed to come between the two legislative operations, the continuity fails, and all rights acquired under the earlier statute fall with its repeal, as in the case of other repeals.⁵

(b) **Minority Rule.** — In some jurisdictions the rule has been laid down that even where a statute is repealed and re-enacted at the same time, the repeal has the same effect as to rights acquired under the repealed act as if its provisions had not been re-enacted,⁶ but this view, as has already been seen, is opposed to the weight of authority.⁷

1. **Simultaneous Repeal and Re-enactment** — *United States*. — *Pacific Mail Steamship Co. v. Joliffe*, 2 Wall. (U. S.) 450.

California. — *Central Pac. R. Co. v. Shackelford*, 63 Cal. 261. As to the rule under the earlier California cases see *Billings v. Harvey*, 6 Cal. 381; *Billings v. Hall*, 7 Cal. 3; *Morton v. Folger*, 15 Cal. 284; *Clarke v. Huber*, 25 Cal. 594.

Connecticut. — *State v. Baldwin*, 45 Conn. 134.

Florida. — *Florida Cent., etc., R. Co. v. Foxworth*, 41 Fla. 1.

Georgia. — *Ballin v. Ferst*, 55 Ga. 546.

Indiana. — *Alexander v. State*, 9 Ind. 337; *State v. Kates*, 149 Ind. 46.

Iowa. — *Hancock v. District Tp.*, 78 Iowa 550; *Robinson v. Ferguson*, (Iowa 1903) 93 N. W. Rep. 350.

Maryland. — *Dashiell v. Baltimore*, 45 Md. 615.

Massachusetts. — *Wright v. Oakley*, 5 Met. (Mass.) 400; *United Hebrew Benev. Assoc. v. Benishmol*, 130 Mass. 327; *Com. v. Kenneson*, 143 Mass. 418.

Minnesota. — *State v. McDonald*, 20 Minn. 136, *overruled State v. Smith*, 62 Minn. 540.

Mississippi. — *Anding v. Levy*, 57 Miss. 59, 34 Am. Rep. 435.

Nebraska. — *State v. McColl*, 9 Neb. 204; *State v. Wish*, 15 Neb. 448; *State v. Bemis*, 45 Neb. 724; *Stenberg v. State*, 50 Neb. 127.

New Hampshire. — *Lisbon v. Clark*, 18 N. H. 234.

New Jersey. — *Middleton v. New Jersey West Line R. Co.*, 26 N. J. Eq. 269; *Randolph v. Larned*, 27 N. J. Eq. 562.

New York. — *Ely v. Holton*, 15 N. Y. 595; *Moore v. Mausert*, 49 N. Y. 332.

North Carolina. — *State v. Sutton*, 100 N. Car. 474; *State v. Williams*, 117 N. Car. 753; *Abbott v. Beddingfield*, 125 N. Car. 256; *State v. Southern R. Co.*, 125 N. Car. 666; *Robinson v. Goldsboro*, 122 N. Car. 211.

Ohio. — *Knoup v. Piqua Branch of State Bank*, 1 Ohio St. 603.

Texas. — *San Antonio, etc., R. Co. v. Keller*, 11 Tex. Civ. App. 569.

Vermont. — *State v. Kibling*, 63 Vt. 636.

Washington. — *Northern Pac. R. Co. v. Ellison*, 3 Wash. 225.

West Virginia. — *Burns v. Hays*, 44 W. Va. 503.

Wisconsin. — *Scheffels v. Tabert*, 46 Wis. 439; *Fullerton v. Spring*, 3 Wis. 667; *Hurley v. Texas*, 20 Wis. 634; *Laude v. Chicago, etc., R. Co.*, 33 Wis. 640; *Glentz v. State*, 38 Wis. 549.

Corporations Formed under Repealed Act. — A simultaneous repeal and re-enactment of a general corporation law does not terminate the existence of corporations formed under the first act. *United Hebrew Benev. Assoc. v. Benishmol*, 130 Mass. 325.

Ordinances Adopted under Repealed Act. — The validity of the by-laws or ordinances of a town or city is not affected by the repeal and re-enactment of the law giving power and authority to make them. *Chamberlain v. Evansville*, 77 Ind. 542; *Lisbon v. Clark*, 18 N. H. 234.

Revisions. — The rule stated in the text has been applied to general revisions of existing laws which are substantially re-enacted. *Ballin v. Ferst*, 55 Ga. 546; *State v. Brewer*, 22 La. Ann. 273; *Middleton v. New Jersey West Line R. Co.*, 26 N. J. Eq. 269; *Scheffels v. Tabert*, 46 Wis. 439.

2. **Statutory Rule.** — *Emporia v. Norton*, 16 Kan. 236.

3. **Re-enactment of a Statute Not in Force.** — *Emporia v. Norton*, 16 Kan. 236.

4. **Re-enactment and Repeal by Successive Acts.** — *Abbott v. Beddingfield*, 125 N. Car. 256.

5. **Repeal and Re-enactment Not Simultaneous.** — *Kane v. New York, etc., R. Co.*, 49 Conn. 139. But see *State v. Southern R. Co.*, 125 N. Car. 666.

6. **Minority Rule.** — *Hirschburg v. People*, 6 Colo. 145; *Coffin v. Rich*, 45 Me. 507, 71 Am. Dec. 559.

7. See the next preceding subdivision of this section, *Majority Rule*.

d. REPEAL OF REPEALING ACT — (1) *Rule at Common Law.* — At common law when a statute or a rule of the common law is repealed and afterwards the repealing act is itself repealed by a later statute, the earlier law is thereby revived,¹ and it is immaterial whether the repeal of the repealing act is in express terms or by implication only.² But a mere intent, as evidenced by an attempt, to repeal the repealing act is not sufficient to revive the original law. The repeal must be accomplished, and therefore where an act purporting to repeal a repealing act is unconstitutional, the original repealing act remains in force, and the original law is not revived.³

Original Law Merely Suspended by Repeal. — The time the intermediate repealing statute is in force is regarded as a suspension only of the original law,⁴ and offenses committed before the suspension may be punished after the revival of the original act.⁵

Intent Not to Revive Original Law. — But the revival of the original law, resting as it does on the presumption of legislative intent, does not occur in any case where the contrary intent appears,⁶ and such intent is apparent from the fact that the act repealed was a re-enactment,⁷ an amendment so as to read as

1. Repeal of Repealing Act Revives Original Law — *England.* — Case of Bishops, 12 Coke 7; Phillips v. Hopwood, 10 B. & C. 39, 21 E. C. L. 25; Tattle v. Grimwood, 3 Bing. 496, 13 E. C. L. 62; Fuller v. Redman, 26 Beav. 600.

United States. — U. S. v. Philbrick, 120 U. S. 52; James v. Buzzard, Hempst. (U. S.) 259; Mathewson v. Phoenix Iron Foundry, 20 Fed. Rep. 281.

Georgia. — Harrison v. Walker, 1 Ga. 32; Gray v. Obea, 54 Ga. 231.

Indiana. — Doe v. Naylor, 2 Blackf. (Ind.) 32; Lindsay v. Lindsay, 47 Ind. 283; Longlois v. Longlois, 48 Ind. 60; Teter v. Clayton, 71 Ind. 237; Baum v. Thoms, 150 Ind. 378, 65 Am. St. Rep. 368.

Massachusetts. — Com. v. Getchell, 16 Pick. (Mass.) 452; Com. v. Mott, 21 Pick. (Mass.) 492; Com. v. Churchill, 2 Met. (Mass.) 118; Hastings v. Aiken, 1 Gray (Mass.) 163.

Michigan. — Alexander v. Big Rapids, 70 Mich. 224.

New Hampshire. — State v. Rollins, 8 N. H. 550.

New Jersey. — Den v. Du Bois, 16 N. J. L. 285; Wallace v. Bradshaw, 54 N. J. L. 175, reversing 53 N. J. L. 315.

New York. — People v. Davis, 61 Barb. (N. Y.) 456; Wheeler v. Roberts, 7 Cow. (N. Y.) 536; Gale v. Mead, 4 Hill (N. Y.) 109; Ely v. Holton, 15 N. Y. 595; Van Denburgh v. Greenbush, 66 N. Y. 1; New York v. Broadway, etc., R. Co., 97 N. Y. 284; Matter of Livingston St., 82 N. Y. 621; Ottman v. Hoffman, (N. Y. City Ct. Gen. T.) 6 Misc. (N. Y.) 56; Matter of Sweetley, (Supm. Ct. Spec. T.) 12 Misc. (N. Y.) 174.

North Carolina. — Brinkley v. Swicegood, 65 N. Car. 626; State v. Kent, 65 N. Car. 311; State v. Rogers, 94 N. Car. 862; State v. Sutton, 100 N. Car. 474; State v. Massey, 103 N. Car. 356.

Pennsylvania. — Poor Directors v. Wrightsville, etc., R. Co., 7 W. & S. (Pa.) 236; Ex p. Doran, 2 Pars. Eq. Cas. (Pa.) 467; Zimmerman v. Perkiomen, etc., Turnpike Co., 81* Pa. St. 96; Buckwalter v. Lancaster County, 12 Pa. Super. Ct. 272.

Washington. — Emigh v. State Ins. Co., 3 Wash. 122.

Wisconsin. — Fullerton v. Spring, 3 Wis. 667; Hurley v. Texas, 20 Wis. 634; Laude v. Chicago, etc., R. Co., 33 Wis. 640; Gilkey v. Cook, 60 Wis. 133.

In a majority of the states here enumerated the rule stated in the text has been changed by statute. See *infra*, this division of this section, *Statutory Rule.*

Special Proceedings, Out of the Course of the Common Law, which depended for their validity on the original act, and were abated by its repeal, are not revived with it by the repeal of the repealing act. Com. v. Leech, 24 Pa. St. 55. See Van Valkenburgh v. Torrey, 7 Cow. (N. Y.) 252.

State Law Suspended by Act of Congress. — When an act of Congress which has suspended a state law is repealed the state law comes into force again. Henderson v. Spofford, 59 N. Y. 131; Sturgis v. Spofford, 45 N. Y. 446; Pilot Com'rs v. Pacific Mail Steamship Co., 52 N. Y. 609.

A Repealing Act Repealed Before It Was to Take Effect by its own terms has no effect on the original act, which continues in force. Adam v. Wright, 84 Ga. 720.

Where There Were Two Repealing Acts, the repeal of one of them does not revive the original act. Wheeler v. Roberts, 7 Cow. (N. Y.) 536.

2. No Distinction Between Express and Implied Repeals. — Hastings v. Aiken, 1 Gray (Mass.) 163; People v. Davis, 61 Barb. (N. Y.) 456.

3. Ineffectual Attempt to Repeal Repealing Act. — Virtue v. Essex County, 67 N. J. L. 139.

4. Original Law Regarded as Suspended Only. — Shipman v. Henbest, 4 T. R. 109; Phipoe's Case, 2 East P. C. 599; Morgan's Case, 2 East P. C. 601; Winter v. Dickerson, 42 Ala. 92; Johnson v. Meeker, 1 Wis. 436.

5. Offenses Committed Before Repeal of Original Law. — Com. v. Getchell, 16 Pick. (Mass.) 452; Com. v. Mott, 21 Pick. (Mass.) 492.

6. Intent Against Revival. — Patapsco Guano Co. v. Board of Agriculture, 52 Fed. Rep. 690, affirmed 171 U. S. 345.

7. Repeal of Re-enactment. — People v. Montgomery County, 67 N. Y. 109, 23 Am. Rep. 94; Harris v. Niagara County, 33 Hun (N. Y.) 279; Moody v. Seaman, 46 Mich. 74; Goodno v. Osh-

prescribed in the amending act,¹ or a revision of the original act,² or from the fact that the repealing act was abrogated for the purpose of substituting new provisions in its place.³

Repeal of Act Repealing Special Law. — Where a local or special act is repealed by another local or special act, and the repealing act is then repealed, the earlier special law is not revived if there is a general law covering the subject.⁴

(2) **Statutory Rule.** — In a majority of the states it is now provided by statute that a law once repealed shall not be revived by the subsequent repeal of the repealing act,⁵ and there is no distinction in this respect between an express repeal and a repeal resulting by implication from the enactment of a repugnant act.⁶

Extent of Statutory Rule — Suspension as Distinguished from Repeal of Repealing Act. — These statutes, being in derogation of the common law, are strictly construed, and according to such construction an act temporarily suspending the operation of a repealing act leaves the repealed act in force during the period of suspension, because the suspension of an act is not a repeal of it.⁷

Repeal of Modifying Act. — And so, too, the statutory rule is inapplicable to cases where the original act has been modified only and not repealed by the later one, as where an act merely excepts a particular class of cases from the operation of a previously existing general law, which continues to be in force. By the repeal of the act creating the exception, the general statute which was in force all the time then becomes applicable to all cases, according to its terms.⁸

kosh, 31 Wis. 127. See *People v. Assessors*, (Supm. Ct. Gen. T.) 8 Abb. Pr. N. S. (N. Y.) 150.

But where by other provisions of the latest repealing act it is evident that it was the intention of the legislature that the original statute should be revived, then such an effect will follow as an exception to the exception in the text. *People v. Wilmerding*, 62 Hun (N. Y.) 391.

1. **Amendment "So as to Read."** — *People v. Montgomery County*, 67 N. Y. 109, 23 Am. Rep. 94; *People v. Wilmerding*, 136 N. Y. 363.

Even in the case of such amendments the legislature may manifest an intent to revive the original law, but the intent must appear from the language employed, and from statutes *in pari materia* all read in the light of the purpose sought to be attained. *Bank of Metropolis v. Faber*, 1 N. Y. App. Div. 341, *affirmed* 150 N. Y. 200.

2. **Repeal of Revision.** — *Butler v. Russel*, 3 Cliff. (U. S.) 251.

3. **Substitution of New Provisions.** — *Butner v. Boifeuillet*, 100 Ga. 743; *Com. v. Churchill*, 2 Met. (Mass.) 123; *Milligan v. Cromwell*, 3 N. Mex. 327; *Seewald v. Reynolds*, 3 N. Mex. 344.

Where an act absolutely repealed a prior one and substituted other provisions which were to endure for only a limited time, the expiration of the time limited does not, in the absence of an express intention, revive the repealed act. *U. S. v. Twenty-five Cases Cloths, Crabbe* (U. S.) 356; *Warren v. Windle*, 3 East 205.

4. **Repeal of Act Repealing Special Law.** — *Opening of Knox St.*, 7 Pa. Dist. 500.

5. **Statutory Rule — United States.** — *Brown v. Barry*, 3 Dall. (U. S.) 365 (reciting *Virginia Stat. of 1789*).

California. — *Yolo County v. Colgan*, 132 Cal. 265.

Colorado. — *Heinssen v. State*, 14 Colo. 228.

Illinois. — *Sullivan v. People*, 15 Ill. 233.

Indiana. — *Peter v. Clayton*, 71 Ind. 237;

Baum v. Thoms, 150 Ind. 378, 65 Am. St. Rep. 368.

Kentucky. — *Cassell v. Lexington, etc., Turnpike R. Co.*, (Ky. 1888) 9 S. W. Rep. 502; *Rice v. Com.*, (Ky. 1901) 61 S. W. Rep. 473.

Louisiana. — *Tallamon v. Cardenas*, 14 La. Ann. 514; *Witkouski v. Witkouski*, 16 La. Ann. 232.

Missouri. — *State v. Slaughter*, 70 Mo. 484.

South Carolina. — *Addison v. Sujette*, 50 S. Car. 192.

Texas. — *Stirman v. State*, 21 Tex. 734.

Washington. — *Cochrane v. King County*, 12 Wash. 518.

Wisconsin. — *Smith v. Hoyt*, 14 Wis. 252; *Goodno v. Oshkosh*, 31 Wis. 127.

See also the statutes of the following states: Arkansas, Arizona, Dakota, Florida, Idaho, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, New York, Ohio, Rhode Island, Utah, Virginia, West Virginia.

Amendments. — The same rule applies to amendments of laws which constitute repeals. *Tallamon v. Cardenas*, 14 La. Ann. 514; *Goodno v. Oshkosh*, 31 Wis. 132.

A Constitutional Provision that no law shall be revived unless set out in the reviving act prevents a revivor by mere repeal of the repealing statute. *Renter v. Bauer*, 3 Kan. 505; *Trosper v. Horr*, 4 Kan. 59.

6. **Statutory Rule Applicable to Repeal by Repugnant Act.** — *Milne v. Huber*, 3 McLean (U. S.) 212.

7. **Statutory Rule Not Applicable to Suspension of Repealing Act.** — *Brown v. Barry*, 3 Dall. (U. S.) 365; *State v. Sawell*, 107 Wis. 300.

8. **Repeal of Modifying Act.** — *Mount v. Taylor*, L. R. 3 C. P. 645; *Savings Bank v. Col-*

Repeal of Amendatory Act. — It seems, also, when a statute is merely amended by some addition or elimination so that it is technically repealed by the amendatory act taking its place,¹ that the repeal of the amendatory act revives the original act, because the repeal merely takes away the amendment.²

Act Repealing Common Law. — It is also held that the statutory rule does not apply to the case of the repeal of a statute which had repealed the common law, but that in such case the common-law rule is revived.³

X. EVIDENCE — 1. Proof of Statutes — a. DOMESTIC STATUTES — (1) Proof of Public Acts. — All the courts of a state or country take judicial notice of the public statutes enacted by the law-making body, and therefore no proof is required of either the existence or provisions of such statutes.⁴

(2) *Proof of Private Acts* — (a) *Necessity for Proof.* — The general rule is that courts will not take judicial notice of private or special statutes, but that they must be proved by competent evidence.⁵ This rule, however, is subject to statutory modification, since a private act may contain a clause that the courts shall take judicial notice of it, or the courts may be required by statute to take judicial notice of private acts generally.⁶

(b) *Mode of Proof* — *aa. AT COMMON LAW.* — At common law a printed statute book is not evidence of a private act,⁷ but such act must be proved by an exemplified copy, a certified copy, or an examined copy.⁸

bb. BY STATUTE. — The inconvenience of the common-law rule has been obviated both in *England* and in the *United States* by statutes providing that copies of private acts, printed by authority, shall be admissible in evidence in the courts of the jurisdiction in which such acts were passed.⁹

If a Private Act Contain a Clause Providing that It Shall Be Judicially Noticed, the production of an examined copy, or a copy printed by public authority, cannot be required.¹⁰

lector, 3 Wall. (U. S.) 495; *Smith v. Hoyt*, 14 Wis. 252. See *Mirfin v. Attwood*, L. R. 4 Q. B. 340; *Glaholm v. Barker*, L. R. 1 Ch. 229.

Thus, the *West Virginia* Code of 1868 abolished the common-law rule that no time runs against the state, and made the rights of the state subject to the statute of limitations, the same as individual rights. The Act of 1875 made subject to the statute of limitations judgments and money claims in favor of the state but did not affect other rights of the state. It was held that the repeal of the Act of 1875 merely abolished the exception with respect to judgments and money claims, and brought them again within the operation of the code provision. *State v. Mines*, 38 W. Va. 125.

Curative Acts. — A statute curing the illegality of certain usurious contracts is not a repeal of the usury laws as to such contracts, and therefore the statutory rule that the repeal of a repealing act shall not revive the original law does not apply to the case of the repeal of such curative act. *Edworthy v. Iowa Sav., etc., Assoc.*, 114 Iowa 220.

What Constitutes Repeal. — Where a statute repeals or supersedes certain sections of the previous statute, a mere declaration in a still later act that the repealing statute "shall not repeal" the specified section is not a law reviving or re-enacting it. There can be no law without a legislative intent that it become a law, and such intent being manifested declaring the legislative will. *State v. Conkling*, 19 Cal. 501.

1. See *supra*, this section, 2. b. (3) (c) cc. *Amendments "So as to Read."*

2. **Repeal of Amendment.** — *Haugh v. Smelser*, (Ind. App. 1903) 66 N. E. Rep. 506.

3. **Revival of Common Law.** — *Baum v. Thoms*, 150 Ind. 378, 65 Am. St. Rep. 368.

4. **Domestic Public Statutes Not Required to Be Proved.** — See the titles DOCUMENTARY EVIDENCE, vol. 9, p. 881; JUDICIAL NOTICE, vol. 17, p. 928 *et seq.*

5. **Proof of Private or Special Statutes Required.** — See the title JUDICIAL NOTICE, vol. 17, p. 931 *et seq.*

6. See *infra*, this division of this section, *Mode of Proof — By Statute*. See also the title JUDICIAL NOTICE, vol. 17, pp. 931, 932.

7. **Proof of Private Acts at Common Law — Printed Statute Book Not Admissible.** — *Duncan v. Dubois*, 3 Johns. Cas. (N. Y.) 125. In this case, however, the court said there had been instances in which the printed statute book had been admitted as evidence of a private act, and it was intimated that this might be done as against the party for whose benefit the act was passed, since he was presumed to be consant of it and could not be surprised by the evidence.

8. See the titles DOCUMENTARY EVIDENCE, vol. 9, p. 881; RECORDS, vol. 24, p. 198 *et seq.*

9. **Statutory Mode of Proof — Printed Copies.** — 13 & 14 Vict. ch. 21, § 7; *Lacon v. Higgins*, 3 Stark. 178, 14 E. C. L. 176.

See the various codes and statutes in the *United States*. See also the title RECORDS, vol. 24, p. 206.

10. **Private Acts Made Subjects of Judicial Notice.** — *Beaumont v. Mountain*, 10 Bing. 404, 25 E. C. L. 183; *Woodward v. Cotton*, 6 C. & P. 491, 25 E. C. L. 505; *Forman v. Dawes, C. & M.*

b. FOREIGN STATUTES.—The subject of the proof of foreign statutes has been fully treated in another part of this work.¹

2. Statutes as Evidence.—Recitals in a Public Statute are admissible as evidence of the facts alleged.² But such recital, whether of fact or law, is not conclusive, and the court is at liberty to consider the fact or the law to be different from the statement in the recital;³ unless, it has been held, it is clear that the legislature intended that the recital should be accepted as a fact in the case.⁴

Recitals in Private Statutes are not evidence against those who are neither parties nor privies to the enactment.⁵

STATUTES OF DESCENT AND DISTRIBUTION.—See the title SUCCESSION.

STATUTE STAPLE.—See the title ESTATES, vol. 11, p. 382.

STATUTORY ALLOWANCES.—See the title ALLOWANCES, vol. 2, p. 156.

STATUTORY AWARD.—See note 6.

127, 41 E. C. L. 75. See also the title JUDICIAL NOTICE, vol. 17, pp. 931, 932.

1. Proof of Foreign Statutes.—See the title FOREIGN LAWS, vol. 13, p. 1064. See also the title DOCUMENTARY EVIDENCE, vol. 9, p. 881.

2. Recitals.—As, for example, where an information for a libel contained an introductory averment that great outrages had been committed in certain parts of the country, the preamble of an act of Parliament reciting the existence of outrages of that description was held admissible for the purpose of proving the averment. *Rex v. Sutton*, 4 M. & S. 532.

A recital of a state of war in the preamble of a public statute may be evidence of the existence of a state of war. *Rex v. De Berenger*, 3 M. & S. 68.

3. Not Conclusive—General Rule.—*Reg. v. Haughton*, 1 El. & Bl. 516, 72 E. C. L. 516; *Mersey Docks v. Cameron*, 11 H. L. Cas. 519; *Leicester v. Heydon*, Plowd. 398; *Dwyer v. Port Arthur*, 22 Can. Sup. Ct. 241; *Dougherty v. Bethune*, 7 Ga. 90; *State v. Reed*, 4 Har. & M. (Md.) 7; *Campbell's Case*, 2 Bland (Md.) 233; *Frederick Female Seminary v. State*, 9 Gill (Md.) 379; *Priewe v. Wisconsin State Land, etc., Co.*, 103 Wis. 537, 74 Am. St. Rep. 904.

A Recital that an Act Was Repealed by later acts is not conclusive. *U. S. v. Claffin*, 97 U. S. 546.

A Recital in the Preamble of an Act is entitled to less weight than if it were found in the body of the act. *Goodykoontz v. Acker*, 19 Colo. 360.

4. Kinkead v. U. S., 150 U. S. 483.

Recital Held Conclusive as to Facts Recited.—*Ex p. Fedderwitz*, 62 Pac. Rep. 935, 130 Cal. xviii.

5. Private Statutes.—*Beaufort v. Smith*, 4 Exch. 450; *Polini v. Gray*, 12 Ch. D. 411; *Taylor v. Parry*, 1 M. & G. 604, 39 E. C. L. 569; *Shrewsbury Peerage*, 7 H. L. Cas. 1; *Brett v. Beales*, M. & M. 421, 22 E. C. L. 347; *Cowell v. Chambers*, 21 Beav. 619; *Scott v. Berkeley*, 3 C. B. 925, 54 E. C. L. 925; *Rex v. Greene*, 6 Ad. & El. 548, 33 E. C. L. 145; *Reg. v. Haughton*, 1 El. & Bl. 501, 72 E. C. L. 501. See *Wharton Peerage*, 12 Cl. & F. 295.

Recitals in Private Statutes Are Evidence as Between the Commonwealth and the Applicant or party for whose benefit the act was passed, but not as between the latter and other individuals. *Branson v. Wirth*, 17 Wall. (U. S.) 32; *Lothrop v. Stedman*, 42 Conn. 583; *State v. Beard*, 1 Ind. 460; *Elmondorff v. Carmichael*, 3 Litt. (Ky.) 472, 14 Am. Dec. 86; *Farnelee v. Thompson*, 7 Hill (N. Y.) 77; *Lord v. Bigelow*, 8 Vt. 445.

An Act of the Legislature Granting an Absolute Divorce to the husband, obtained pending a suit for divorce *a mensa* and alimony instituted by the wife, has been held admissible as evidence in the latter proceeding. *Roberts v. Roberts*, 54 Pa. St. 265.

6. Statutory Award. (See also the title ARBITRATION AND AWARD, vol. 2, p. 533.)—In *Hedrick v. Judy*, 23 Ind. 549, it was said: "A statutory award is where the agreement of submission to arbitrators requires such submission to be made a rule of a designated court." See also *Estep v. Larsh*, 16 Ind. 82; *Carson v. Earlywine*, 14 Ind. 256.

STATUTORY CRIMES.

The Various Statutory Crimes are specifically treated in this work under the particular headings to which they belong. In some states, however, particular crimes are designated by the statutes, or are commonly known, by names other than the most usual ones which have been selected as the titles under which such crimes have been treated. And again, there are various minor statutory offenses which are within the scope of some general article. For the purpose of facilitating reference to the cases bearing on these particular offenses, there are given in the note a number of cross-references showing where a treatment of each of these offenses may be found.¹ And in addition to these,

1. Adulteration of Food and Milk.— See the title ADULTERATION, vol. 1, p. 738.

Allowing Cattle to Roam at Large.— See the title POLICE POWER, vol. 22, p. 930.

Altering Ballots.— See the title ELECTIONS, vol. 10, p. 352.

Barn Burning.— See the title ARSON, vol. 4, p. 917.

Bestiality.— See the title SODOMY, vol. 25, p. 1144.

Betting on Elections.— See the titles ELECTIONS, vol. 10, pp. 798, 854; GAMING, vol. 14, p. 687.

Betting on Horse Races.— See the titles GAMING, vol. 14, p. 664; GAMING HOUSES, vol. 14, p. 692.

Blacklisting Employees.— See the title CONSPIRACY, vol. 6, p. 861.

Bribery at Elections.— See the title ELECTIONS, vol. 10, p. 853.

Buggery.— See the title SODOMY, vol. 25, p. 1144.

Burning of Buildings.— See the title ARSON, vol. 2, p. 917.

Carnal Abuse of Children.— See the title RAPE, vol. 23, p. 845.

Carrying Weapons at Election Precincts.— See the title ELECTIONS, vol. 10, p. 854.

Challenges to Fight.— See the title DUELING, vol. 10, p. 312.

Cheating.— See the title FALSE PRETENSES AND CHEATS, vol. 12, p. 792.

Child Murder.— See the titles CONCEALMENT OF BIRTH OR DEATH, vol. 6, p. 424; MURDER AND MANSLAUGHTER, vol. 21, p. 83.

Child Stealing.— See the title KIDNAPPING, vol. 18, p. 60.

Concealed Weapons.— See the title CARRYING WEAPONS, vol. 5, p. 729.

Cruelty to Children.— See the titles PARENT AND CHILD, vol. 21, p. 1034; SCHOOLS, vol. 25, p. 4.

Dealing in Slaves.— See the title SLAVES AND SLAVERY, vol. 25, p. 1088.

Defacing Tombstones, etc.— See the title CEMETERIES, vol. 5, p. 795.

Defilement.— See the title SEDUCTION, vol. 25, p. 183.

Deflowering.— See the title SEDUCTION, vol. 25, p. 183.

Disturbances in Places of Public Worship.— See the title DISTURBING MEETINGS, vol. 9, p. 664.

Doing Business Without License.— See the title OCCUPATION, BUSINESS, AND PRIVILEGE TAXES, vol. 21, p. 770.

Drunkenness.— See the titles HABITUAL DRUNKARDS, vol. 15, p. 221; INTOXICATION, vol. 17, p. 398; POLICE POWER, vol. 22, p. 926.

Election Offenses.— See the title ELECTIONS, vol. 10, p. 552.

Enticing Servants to Leave Employment.— See the title MASTER AND SERVANT, vol. 20, p. 185.

False Personation of Voters.— See the title ELECTIONS, vol. 10, p. 849.

False Returns of Election.— See the title ELECTIONS, vol. 10, p. 852.

False Tokens.— See FALSE PRETENSES AND CHEATS, vol. 12, p. 792.

Fishing Out of Season.— See the title GAME AND GAME LAWS, vol. 14, p. 654.

Fraud.— See the title FALSE PRETENSES AND CHEATS, vol. 12, p. 792.

Fraud in Registration of Voters.— See the title ELECTIONS, vol. 10, p. 847.

Gambling.— See the title GAMING, vol. 14, p. 664.

Homicide.— For reasons given in vol. 15, p. 743, this is treated under the title MURDER AND MANSLAUGHTER, vol. 21, p. 83.

House Breaking.— See the title BURGLARY, vol. 5, p. 44.

Hunting Out of Season.— See the title GAME AND GAME LAWS, vol. 14, p. 654.

Illegal Voting.— See the title ELECTIONS, vol. 10, p. 848.

Illicit Stills.— See the titles INTOXICATING LIQUORS, vol. 17, p. 189; REVENUE LAWS, vol. 24, p. 883.

Indecent Exposure.— See the title EXPOSURE OF PERSON, vol. 12, p. 536.

Infanticide.— See the titles CONCEALMENT OF BIRTH OR DEATH, vol. 6, p. 424; MURDER AND MANSLAUGHTER, vol. 21, p. 83.

Injuries to Property.— See the title MALICIOUS MISCHIEF, vol. 19, p. 633.

Intimidating Voters.— See the title ELECTIONS, vol. 10, p. 854.

Keeping Intoxicating Liquors for Sale.— See the title INTOXICATING LIQUORS, vol. 17, p. 189.

reference must be had for the more well-known crimes to the various titles in this work treating of those crimes.¹

Lewdness.— See the title LEWD AND LASCIVIOUS COHABITATION AND CONDUCT, vol. 18, p. 841.

Liquor Nuisance.— See the title INTOXICATING LIQUORS, vol. 17, p. 189.

Malicious Injuries to Property.— See the title MALICIOUS MISCHIEF, vol. 19, p. 633.

Maiming.— See the title MAYHEM, vol. 20, p. 246.

Maiming and Killing Cattle and Other Animals.— See the title MALICIOUS MISCHIEF, vol. 19, p. 633.

Maintenance.— See the title CHAMPERTY AND MAINTENANCE, vol. 5, p. 815.

Malfeasance, Misfeasance, or Nonfeasance in Office.— See the title PUBLIC OFFICERS, vol. 23, p. 382.

Manslaughter.— See the title MURDER AND MANSLAUGHTER, vol. 21, p. 843.

Miscegenation.— See the titles MARRIAGE, vol. 19, p. 1156; MISCEGENATION, vol. 20, p. 800.

Misconduct of Election Officers.— See the title ELECTIONS, vol. 10, p. 850.

Misprision of Felony.— See the titles ACCESSORIES, vol. 1, p. 257; COMPOUNDING OFFENSES, vol. 6, p. 400.

Obscene Publications.— See the titles OBSCENITY, vol. 21, p. 759; POLICE POWER, vol. 22, p. 926.

Obstructing Election Officers in Performance of Duties.— See the title ELECTIONS, vol. 10, p. 853.

Obtaining Money or Other Property Fraudulently by Means of Contract of Employment.— See the title MASTER AND SERVANT, vol. 20, p. 185.

Offenses Against Revenue Laws.— See the title REVENUE LAWS, vol. 24, p. 883.

Offenses Relating to Dead Bodies.— See the title DEAD BODY, vol. 8, p. 839.

Open and Notorious Lewdness.— See the title LEWD AND LASCIVIOUS COHABITATION AND CONDUCT, vol. 18, p. 841.

Opium Traffic.— See the title POLICE POWER, vol. 22, p. 927.

Peddling, etc., at Camp Meetings.— See the title POLICE POWER, vol. 22, p. 925.

Pollution of Water Supply.— See the title POLICE POWER, vol. 22, p. 923.

Polygamy.— See the title BIGAMY, vol. 4, p. 34.

Possession of Counterfeit Money.— See the title COUNTERFEITING, vol. 7, p. 875.

Prison Breaking.— See the title ESCAPE, vol. 11, p. 258.

Procuring.— See the titles ABDUCTION, vol. 1, p. 162; PROCURE, vol. 23, p. 163.

Profanity.— See the title BLASPHEMY AND PROFANITY, vol. 4, p. 580.

Ravishing.— See the title RAPE, vol. 23, p. 845.

Receiving Stolen Goods.— See the title RECEIVING STOLEN PROPERTY, vol. 24, p. 43.

Rescue.— See the title ESCAPE, vol. 11, p. 258.

Riot.— See the titles AFFRAY, vol. 1, p. 915; RIOT, vol. 24, p. 971; UNLAWFUL ASSEMBLY.

Sabbath Breaking.— See the titles POLICE POWER, vol. 22, p. 929; SABBATH BREAKING, vol. 24, p. 1012; SUNDAYS AND HOLIDAYS.

Sale of Intoxicating Liquors to Minors.— See the title INTOXICATING LIQUORS, vol. 17, p. 189.

Selling Intoxicating Liquors.— See the title INTOXICATING LIQUORS, vol. 17, p. 189.

Sepulture.— See the title DEAD BODY, vol. 8, p. 834.

Setting Fire.— See the title ARSON, vol. 2, p. 917.

Setting Spring Guns.— See the title NUISANCES, vol. 21, p. 701.

Shanty Boatmen.— See the title POLICE POWER, vol. 22, p. 924.

Shooting Out of Season.— See the title GAME AND GAME LAWS, vol. 14, p. 654.

Slander.— See the title LIBEL AND SLANDER, vol. 18, p. 851.

Smoking in Crowded Halls.— See the title POLICE POWER, vol. 22, p. 923.

Spring Guns.— See the title NUISANCES, vol. 21, p. 701.

Stealing.— See the title LARCENY, vol. 18, p. 456.

Subornation of Perjury.— See the title PERJURY, vol. 22, p. 680.

Theft.— See the title LARCENY, vol. 18, p. 456.

Unlawfully Leaving Service.— See the title MASTER AND SERVANT, vol. 20, p. 185.

Unlicensed Hawking and Peddling.— See the titles HAWKERS AND PEDDLERS, vol. 15, p. 290; OCCUPATION, BUSINESS, AND PRIVILEGE TAXES, vol. 21, p. 770.

Uttering, Tendering, etc., Counterfeit Money.— See the title COUNTERFEITING, vol. 7, p. 875.

Violation of Labor Contracts.— See the title MASTER AND SERVANT, vol. 20, p. 185.

1. See the titles ABDUCTION, vol. 1, p. 162; ABDORTION, vol. 1, p. 186; ADULTERATION, vol. 1, p. 738; ADULTERY (AS A CRIME), vol. 1, p. 746; AFFRAY, vol. 1, p. 915; ARSON, vol. 2, p. 917; ASSAULT AND BATTERY, vol. 2, p. 952; BARRATRY, vol. 3, p. 859; BIGAMY, vol. 4, p. 34; BLACKLISTING EMPLOYEES, vol. 4, p. 577; BLACKMAIL, vol. 4, p. 577; BLASPHEMY AND PROFANITY, vol. 4, p. 580; BREACH OF THE PEACE, vol. 4, p. 902; BRIBERY, vol. 4, p. 907; BURGLARY, vol. 5, p. 44; CARRYING WEAPONS, vol. 5, p. 729; CHAMPERTY AND MAINTENANCE, vol. 5, p. 815; COMPOUNDING OFFENSES, vol. 6, p. 400; CONCEALMENT OF BIRTH OR DEATH, vol. 6, p. 424; CONSPIRACY, vol. 6, p. 830; COUNTERFEITING, vol. 7, p. 875; CRIMINAL CONVERSATION, vol. 8, p. 260; CRUELTY TO ANIMALS, vol. 8, p. 443; DISTURBING MEETINGS, vol. 9, p. 664; DWELLING, vol. 10, p. 312; EMBEZZLEMENT, vol. 10, p. 976; EMBRACERY, vol. 10, p. 1040; ESCAPE, vol. 11, p. 258; EXPOSURE OF PERSON, vol. 12, p. 536; FALSE PERSONATION, vol. 12, p. 786; FALSE PRETENSES AND CHEATS, vol. 12, p. 792; FORGERY, vol. 13, p. 1081; FORNICATION, vol. 13, p. 1118; GAMING, vol. 14, p. 664; INCEST, vol. 16, p. 134; KIDNAPPING, vol. 18, p. 60; LARCENY, vol. 18, p. 456; LEWD AND LASCIVIOUS COHABITATION AND CONDUCT, vol. 18, p. 841; LIBEL AND SLANDER, vol. 18, p. 851; LOTTERIES, vol. 19, p. 588; MALICIOUS MISCHIEF, vol. 19, p. 633; MAYHEM, vol. 20, p. 246; MURDER AND MANSLAUGHTER, vol. 21, p. 83; NUISANCES, vol. 21, p. 679; OBSCENITY, vol. 21, p. 759; PERJURY, vol. 22, p. 680; PIRACY, vol. 22, p. 826; RAPE, vol. 23, p. 845; RECEIVING STOLEN PROPERTY, vol. 24, p.

The Rules as to the Construction of Criminal Statutes, being well settled and applying alike to all statutes of that class, are all collected elsewhere in this work.¹

The Doctrine of Attempts is also treated elsewhere.²

STATUTORY FORECLOSURE. — See note 3.

STATUTORY LIENS. — See note 4.

STAY. — See note 5.

43; RIOT, vol. 24, p. 971; ROBBERY, vol. 24, p. 990; SEDUCTION, vol. 25, p. 183; SODOMY, vol. 25, p. 1144; SWINDLING, *post*; THREATS AND THREATENING LETTERS; UNLAWFUL ASSEMBLY; USURY.

1. See the title STATUTES, *ante*. See also the title FINES AND PENALTIES, vol. 13, p. 55.

2. See the title ATTEMPTS TO COMMIT CRIME, vol. 3, p. 250. See also the title ELECTIONS, vol. 10, p. 849, as to attempts at illegal voting.

3. **Statutory Foreclosure.** — See the title FORECLOSURE OF MORTGAGES, vol. 13, p. 776, and see *Mowry v. Sanborn*, 11 Hun (N. Y.) 548.

4. **Statutory Liens.** (See also the title LIENS, vol. 19, p. 3.) — In *Quimby v. Hazen*, 54 Vt. 138, it was said: "The lien accorded under this act belongs to a class known as *statutory liens*, as distinguished from certain well-known liens existing at common law. The common law recognized the right of innkeepers, carriers, and certain artisans and mechanics to hold a lien upon property delivered to them for their charges. Innkeepers and carriers had such lien upon the theory that they were bound to serve all persons who required their services; and artisans upon the theory that by their labor and skill the specific property bailed to them had been increased in value. In both cases, to make the lien operative, it is necessary that the lienholder keep the actual possession of the property to which the lien attached. *Statutory liens*, like the one in question, are analogous to the latter class of common-law liens named above, but unlike them, no possession of the

property is required. The protection afforded at common law by possession is, in the case of *statutory liens*, accomplished through an attachment of the property."

5. **Stay.** — An order of court was that all suits and proceedings on the part of certain named parties to collect a certain debt against a bankrupt should be *stayed*. In construing this order it was said: "Although, in a certain technical sense, the term *stay* may be said to apply to proceedings already commenced, yet its general meaning is 'to forbear to act'; 'to stop' (Webst. Dict.); and by this meaning of the word *stay* in the phrase above quoted from the injunction order, the intent is plainly expressed to stop all proceedings to collect the debts referred to. To stop proceedings necessarily means to stop not past proceedings alone, but future ones also, and applies equally to proceedings pending and to proceedings *de novo*." In *re Schwarz*, 14 Fed. Rep. 788.

Stay and Trade. — A policy of insurance was upon a ship during her *stay* and trade on the southwest coast of Africa. In construing this provision, Cockburn, C. J., said: "I think the language used means that the vessel may *stay* for a trading purpose, but for no other; that is, for any purpose which, having regard to the usage of the African trade, may fairly be regarded as a 'trade purpose.'" And it was accordingly held that a *stay* at a port for some weeks, for a purpose in no way connected with the trade, vitiated the policy. *African Merchants Co. v. British, etc., Marine Ins. Co., L. R. 8 Exch. 156.*

STAY LAWS.

I. DEFINITION, 767.

II. CONSTITUTIONALITY, 767.

III. EFFECT, 768.

I. DEFINITION. — At several periods of financial distress in the history of the United States, the legislatures of many of the various states have passed laws providing for a postponement of the trial of actions, or a stay of execution or foreclosure proceedings, or for some other method of delaying the enforcement of legal liabilities for a time, in order to prevent hardship and save debtors from financial ruin. These laws are usually denominated stay laws. They made their appearance during the war of 1812 between Great Britain and the United States; and during the war of secession and the period immediately following it many of the Southern and some of the Northern states enacted similar statutes to encourage volunteers to enlist in their respective armies, the statutes in some cases applying only in favor of debtors who were in the military service.¹

II. CONSTITUTIONALITY. — Various constitutional objections have been raised to laws of this character, in their application to pre-existing contracts; mainly that they impaired the obligation of contracts, but also that they delayed the administration of justice, destroyed vested rights, were not laws of uniform operation, or were in contravention of the spirit of the constitution. And while the courts have almost universally recognized the strength of the arguments in favor of such laws on the grounds of humanity and public policy, the great weight of judicial opinion has always been to the effect that they are unconstitutional as being open to some of the objections above set forth.²

1. See generally cases cited throughout this article.

Georgia "Relief Law." — See *Cutts v. Hardee*, 38 Ga. 350.

2. Laws Unconstitutional — **Arkansas.** — *Burt v. Williams*, 24 Ark. 91.

California. — See *People v. Hays*, 4 Cal. 127.

Florida. — *Garlington v. Priest*, 13 Fla. 559.

Georgia. — *Aycock v. Martin*, 37 Ga. 124, 92 Am. Dec. 56.

Indiana. — *Dormire v. Cogly*, 8 Blackf. (Ind.) 177; *Strong v. Daniel*, 5 Ind. 348.

Mississippi. — *Coffman v. Kentucky Bank*, 40 Miss. 29, 90 Am. Dec. 311.

Missouri. — *Stevens v. Andrews*, 31 Mo. 205; *Bumgardner v. Circuit Ct.*, 4 Mo. 50; *Brown v. Ward*, 1 Mo. 209. See also *Baily v. Gentry*, 1 Mo. 164, 13 Am. Dec. 484.

North Carolina. — *Jacobs v. Smallwood*, 63 N. Car. 112; *Miller v. Gibson*, 63 N. Car. 635; *Barnes v. Barnes*, 8 Jones L. (53 N. Car.) 366; *Jones v. Crittenden*, 1 Law Repos. (4 N. Car.) 385, 6 Am. Dec. 531.

South Carolina. — *State v. Carew*, 13 Rich. L. (S. Car.) 498, 91 Am. Dec. 245. See also *Wardlaw v. Buzzard*, 15 Rich. L. (S. Car.) 158, 94 Am. Dec. 148.

Tennessee. — *Webster v. Rose*, 6 Heisk. (Tenn.) 93, 19 Am. Rep. 583, *overruling Farns-*

worth v. Vance, 2 Coldw. (Tenn.) 108. See also *Townsend v. Townsend*, Peck (Tenn.) 1, 14 Am. Dec. 722.

Texas. — *Luter v. Hunter*, 30 Tex. 689, 98 Am. Dec. 494; *Jones v. McMahan*, 30 Tex. 719. **Virginia.** — *Taylor v. Stearns*, 18 Gratt. (Va.) 244.

Wisconsin. — *Hasbrouck v. Shipman*, 16 Wis. 296.

Alabama Decisions. — In Alabama a statutory provision postponing the trial of an action for at least twelve months after the commencement thereof has been held valid. *Ex p. Pollard*, 40 Ala. 77, *Walker, C. J.*, dissenting; *Curry v. Reynolds*, 44 Ala. 349.

But provisions staying the issuance or enforcement of executions on judgments have been held unconstitutional. *Ex p. Pollard*, 40 Ala. 77; *Hudspeth v. Davis*, 41 Ala. 389; *Ashurst v. Phillips*, 43 Ala. 158.

Pennsylvania Decisions. — A statute providing for a stay of execution against a defendant upon proof of an agreement in writing to that effect of a majority of his creditors, whose demands exceed two-thirds of his indebtedness, has been held void as impairing the obligation of contracts. *Bunn v. Gorgas*, 41 Pa. St. 441.

But the ruling in this case has been said to give rise to the inference that in respect to con-

STAY LAWS—STEADY AND PERMANENT EMPLOYMENT.

There are, however, a few decisions which have sustained such laws.¹ Of course, there can be no doubt as to the power of the legislature to pass such statutes with reference to future contracts or that such statutes are perfectly valid when applied to contracts made or causes of action accruing after their passage.²

III. EFFECT.—Statutes of this class have usually been so clear in their provisions that there could be but little question as to their effect, questions concerning them relating almost entirely to their constitutionality. There have been, however, a few decisions as to the effect of these statutes, which are set out in the note.³

STAY OF PROCEEDINGS.—See the title SUPERSEDEAS AND STAY OF PROCEEDINGS, 20 ENCYC. OF PL. AND PR. 1207.

STEADY AND PERMANENT EMPLOYMENT.—See note 4.

tracts which do not treat of remedies the court will hold any law to be constitutional which gives a stay for a time that is definite and not unreasonable, but not constitutional if the stay be for an indefinite time or for a time that is unreasonable though definite. *Breitenbach v. Bush*, 44 Pa. St. 313, 84 Am. Dec. 442.

Accordingly, a statute providing that "no civil process shall issue or be enforced against any person mustered into the service of this state or of the United States during the term for which he shall be engaged in such service, nor until thirty days after he shall have been discharged therefrom," has been held constitutional, the court considering that as the act of Congress under which persons were enlisted at the time of the passage of the Pennsylvania statute provided for an enlistment of three years, the extreme limit of the stay under the Pennsylvania statute would be three years and thirty days, and this limit was reasonable. *Breitenbach v. Bush*, 44 Pa. St. 313, 84 Am. Dec. 442; *Coxe v. Martin*, 44 Pa. St. 322. See also *Clark v. Martin*, 3 Grant Cas. (Pa.) 393, affirmed 49 Pa. St. 299.

This law has been held applicable to the case of a person who, under the act of Congress providing for enlistments of three years, enlisted for the term of three years or during the war, for in such case the reference to the duration of the war was a restriction of the term and not an extension of it beyond the three years and thirty days. *Breitenbach v. Bush*, 44 Pa. St. 313, 84 Am. Dec. 442.

But it has been held not to apply to a person who enlisted and was mustered into service under an act of Congress providing merely for the mustering of volunteers into service for "during the war," as, the term for which such person enlisted being necessarily indefinite, the stay law as applied to his case would be unconstitutional. *Clark v. Martin*, 3 Grant Cas. (Pa.) 393, affirmed 49 Pa. St. 299.

It has been held that a provision in a stay law allowing a stay notwithstanding a waiver thereof by the debtor was unconstitutional. *Lewis v. Lewis*, 47 Pa. St. 127; *Billmeyer v. Evans*, 40 Pa. St. 324.

1. Laws Held Valid.—*McCormick v. Rusch*, 15 Iowa 127, 83 Am. Dec. 401; *Johnson v. Higgins*, 3 Met. (Ky.) 566, distinguishing *Blair v. Williams*, 4 Litt. (Ky.) 35; *Lapsley v. Brashers*, 4 Litt. (Ky.) 47; *Johnson v. Duncan*, 3 Mart. (La.) 530.

2. Laws Applying to Future Contracts.—*Bruns v. Crawford*, 34 Mo. 330; *Barry v. Iseman*, 14 Rich. L. (S. Car.) 129, 91 Am. Dec. 262. See also *Wardlaw v. Buzzard*, 15 Rich. L. (S. Car.) 158, 94 Am. Dec. 148.

See Further the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 15, pp. 1055, 1056, where the constitutionality of such statutes is discussed. And see generally the title CONSTITUTIONAL LAW, vol. 6, p. 882.

3. Effect.—In *Missouri* the stay laws of 1861 and 1863 have been construed as not prohibiting the institution of suit, but as merely requiring that the case shall be continued and all further proceedings suspended for the time prescribed in the said act. *Donnell v. Stephens*, 35 Mo. 441, modifying *Bruns v. Crawford*, 34 Mo. 330.

Effect as to Running of Statute of Limitations.—In *South Carolina* it has been held that a stay law suspended the statute of limitations during the continuance of the act. *Pegues v. Warley*, 14 S. Car. 180; *Wardlaw v. Buzzard*, 15 Rich. L. (S. Car.) 158, 94 Am. Dec. 148.

But in *Maryland* it has been held that a statute providing for a stay of execution and sale for a certain time did not affect the right of the plaintiff to keep his judgment alive by scire facias during the stay of execution, and that therefore the time during which the stay was operative must be included in computing the twelve years' limitation on the life of the judgment. *Kirkland v. Krebs*, 34 Md. 93.

What Is Civil Process.—The *Pennsylvania* stay law providing for a stay of "civil process" has been held to extend to a *levari facias* sur mortgage. *Breitenbach v. Bush*, 44 Pa. St. 313, 84 Am. Dec. 442. A writ of scire facias upon a mortgage. *Coxe v. Martin*, 44 Pa. St. 322. And a writ of assistance with *fi. fa.* for costs. *Clark v. Martin*, 3 Grant Cas. (Pa.) 393, affirmed 49 Pa. St. 299.

4. Steady and Permanent Employment. (See also the title MASTER AND SERVANT, vol. 20, p. 16, and see PERMANENT—PERMANENTLY, ETC., vol. 22, p. 699, note.)—A railroad company, in consideration of injuries received in its service by an employee, agreed to give him *steady and permanent employment*. In construing this contract, the court said: "The words *steady and permanent* usually signify stability and duration; and this is especially true when they are applied to the subject-matter and the peculiar circumstances under which they are here used. We think, when reasonably

STEAL. (See also the titles LARCENY, vol. 18, p. 456; LIBEL AND SLANDER, vol. 18, p. 851; RECEIVING STOLEN PROPERTY, vol. 24, p. 43; REWARDS, vol. 24, p. 940; and see TAKE.) — The word “steal” has a uniform signification, and in common as well as in legal parlance means the felonious taking and carrying away of the personal goods of another.¹

LARCENY. — The word “steal” or “stealing” in a criminal statute, when

construed, they show an agreement on the part of appellant to furnish appellee with employment as long as the latter is able, ready, and willing to perform such services as the company may have for him to perform.” *Pennsylvania Co. v. Dolan*, 6 Ind. App. 116, 51 Am. St. Rep. 289.

1. **Steal.** — *State v. Chambers*, 2 Greene (Iowa) 311.

Steal is defined by Webster to mean, “to take without right, with intent to keep;” “to take and carry away feloniously, as the personal goods of another.” *People v. Lopez*, 90 Cal. 572; *People v. Lammerts*, 164 N. Y. 137.

Asportation. — The word *steal* implies a carrying away. *State v. Parry*, 48 La. Ann. 1483; *State v. Chambers*, 2 Greene (Iowa) 311; *State v. Mann*, 25 Ohio St. 668. But see *Barnhart v. State*, 154 Ind. 177.

In *Green v. Com.*, 111 Mass. 419, it was said: “The language of the Gen. Stat., c. 161, is ‘whoever *steals*,’ and this phrase is sufficient for all practical purposes. No one misunderstands it. In order to find a defendant guilty under it, a taking and carrying away must be proved. So under this complaint it was no less necessary to prove a taking and carrying away than if those words had been inserted in the complaint.”

A statute provided that every person who should “inveigle, *steal*, carry, or entice away” any slave “with a view to convert such slave to his own use or the use of any other person, or to enable such slave to reach some other state or country,” should be guilty of felony. In *Mooney v. State*, 8 Ala. 331, it was said: “The word *steal*, being technical, ordinarily imports a larceny; but here it is evidently employed as a synonym of ‘carry away;’ for the act declares that the offense shall be complete though there is no intention to convert the slave to the use of the taker or of any other person, which is an essential ingredient in larceny. These are, then, all offenses of precisely the same grade, although there may be a slight distinction between the two classes of ‘*stealing* and carrying away,’ and ‘inveigling and enticing.’” See also *Williams v. State*, 15 Ala. 262.

Intent. — The word *steal* imports a felonious intent. *People v. Lopez*, 90 Cal. 572; *People v. Tomlinson*, 102 Cal. 24.

In *State v. Dewitt*, 152 Mo. 85, it was said: “As to the objection that it [an indictment] does not allege the intent with which the cattle were taken, it is sufficient to observe that the statute makes the felonious *stealing*, taking, and carrying away neat cattle belonging to another grand larceny, and renders it wholly unnecessary to allege any intent to *steal*, as that word itself means ‘to take and carry away, feloniously; to take without right or leave, and with intent to keep, wrongfully’ (Webst. Int.

Dict. 1408); so that when the indictment avers that the persons therein named did feloniously *steal*, take, and carry away two head of neat cattle, the property of one A. C. Street, it means that they took them without right or leave, and with the intent to keep them, wrongfully.”

Conclusion of Law. — In *Williams v. State*, 12 Tex. App. 401, it was said: “The indictment * * * simply charges that the defendant ‘did *steal*, take, and carry away.’ The word *steal* is a legal result of facts — a mere conclusion of law.” See also *Young v. State*, 12 Tex. App. 614, where it was held that an indictment which charges that the defendant “did *steal* one head of neat cattle, of the value of ten dollars, from J. T. P.” fails to charge a single ingredient of theft. Such an indictment, or an indictment using the synonymous term “theft,” charges merely a conclusion of law.

In *State v. Hall*, 97 Iowa 403, it was said: “It is true that the words *stole* and *stolen* may indicate a legal conclusion, as distinguished from a fact to which a witness would be called to testify. The words are, however, often used to express the act of taking and carrying away.”

Innkeeper's Lien. — A hotel keeper locked up the room of a guest containing the latter's baggage and effects, for nonpayment of charges for board and lodging, and notified the guest thereof. The landlord afterwards granted permission to the guest to remove some specified articles and allowed him free access to the room for that purpose. It was held that if the owner removed any baggage as to which the permission did not extend, he was guilty of *stealing*. *Reg. v. Hollingsworth*, 2 Can. Crim. Cas. (N. W. Ter.) 291.

Stealing and Receiving Stolen Goods Distinct Offenses. — *Redman v. State*, 1 Blackf. (Ind.) 431.

Steal, Stolen, and Theft. — “So, it would seem that with regard to theft of cattle, in particular, the code makes the words *steal* and *stolen* synonymous in signification with ‘theft.’” *Carr v. State*, 9 Tex. App. 464.

In *Sands v. State*, 30 Tex. App. 580, it was said: “The defect supposed to exist in the recognizance is that the word *stolen* is used instead of the statutory words ‘acquired * * * in such manner as that the acquisition comes within the meaning of the term ‘theft.’” This objection is met by the provision of article 739 of the Penal Code, and which article is embraced in the same chapter of the code that contains article 743, which relates to the subject of ‘theft in general.’ By article 739 it is provided that ‘the word *steal* or *stolen*, when used in this code in reference to the acquisition of property, includes property acquired by theft.’ Thus we have a fixed, definite meaning to the word *stolen*; and giving to it this meaning, we are of opinion that the offense is sufficiently set forth and described in the recognizance.”

unqualified by the context, signifies a taking which at common law would have been denominated felonious, and imports the common-law offense of larceny.¹ "To steal" is the verb employed as meaning to commit larceny; and 'stealing,' when used as a noun, is equivalent to and interchangeable with 'larceny,' though less technical, and hence liable to be found in connections where the context shows an intended deviation from the strict sense."² So the word "steal" may be shown by the connection in which it is used not to import larceny.³

STEAM.—See note 4.

STEAMSHIP. (See generally the title SHIPS AND SHIPPING, vol. 25, p. 854.)—A steamship is a vessel whose principal motive power is steam, and not sails.⁵

1. **Larceny and Stealing Equivalent.**—Williams v. State, 15 Ala. 262; People v. Lopez, 90 Cal. 572; People v. Urquidas, 96 Cal. 241; People v. Tomlinson, 102 Cal. 24; State v. Dresden, 1 Marv. (Del.) 522; State v. Schatz, 71 Mo. 504; Gardner v. State, 55 N. J. L. 24; Hughes v. Territory, 8 Okla. 28.

In Hughes v. Territory, 8 Okla. 32, it was said: "An examination of the authorities will show that 'larceny' and *stealing*, at common law, had the same meaning; and consequently *stealing*, as here defined, is the wrongful or fraudulent taking and removing of personal property, by trespass, with a felonious intent to deprive the owner thereof, and to convert the same to his (the taker's) own use." See also Sullivan v. Territory, 8 Okla. 499.

Contra.—But in Barnhart v. State, 154 Ind. 182, it was said: "Under our statutory definition (as at common law), the word *stealing* cannot be accepted as the equivalent of 'larceny.' *Steal* is but one word in the definition, and it will not do to say that the remainder is mere surplusage. *Steal* does not even denote all the verb-action in the definition. From the time when Latin was the language of the courts, the three verbs *steal*, 'take,' and 'carry away' (*furatus fuit, cepit, et asportavit*) have been indissolubly conjoined, each as essential as the other. 1 Hale P. C. 508. Though one *animus furandi* took the personal goods of another, if instead of carrying them away he put them down, he would not be chargeable with larceny; and if that were the fulness of his intent in breaking and entering a dwelling, he would not be chargeable with burglary. If the word *steal* cannot displace the words 'take and carry away,' much less can it eliminate the remainder of the definition of larceny, namely, the personal goods of another. It is the transitive verb *steal* that is used in this definition, and it must have an object. If the object, for either of the two reasons heretofore given, is not susceptible of larceny, the pleader's averment that the accused *stole* such object would not state the offense of larceny."

2. **Less Technical than Larceny.**—Abb. L. Dict., quoted in State v. Lee Yan Yan, 10 Oregon 366.

3. **When Term Does Not Import Larceny.**—Wing v. Wing, 66 Me. 62. See also Alexander v. State, 12 Tex. 540.

"The natural and most obvious meaning of the word *steal* is the felonious taking of property, or larceny. But it may be qualified by accompanying words so as to show that such

was not the meaning." Darling v. Clement, 69 Vt. 297. See to the same effect Dunnell v. Fiske, 11 Met. (Mass.) 554.

Statute.—By statute a broader meaning has sometimes been given to the word "larceny" than it has at common law. Sullivan v. Territory, 8 Okla. 499; Hughes v. Territory, 8 Okla. 28.

Stealing a Person.—In Davenport v. Com., 1 Leigh (Va.) 592, it was said: "It is argued that *stealing* is a technical word, that it means a larceny, and that there cannot be a larceny except of the personal goods of another, and a free person is not property. It is true that the word is usually applied to the taking of property, but it is certainly competent for the legislature to apply it to the felonious taking of a free person, although the common law does not so apply it; and to the court it seems clear that it is the appropriate phrase."

Embezzlement.—Although the word *stole* primarily imports larceny, it may be shown to import a charge of embezzlement. Taylor v. Short, 40 Ind. 511.

4. **Steam and Power Distinguished.**—See POWER, vol. 22, p. 1083, note.

Steam as Motive Power.—An agreement between two street railway companies provided that if one of the companies should use *steam* as a motive power, either party might terminate the contract on six months' notice. In construing this provision the court said: "We cannot agree with the General Term that the use of the words '*steam* as a motive power' was only another form of referring to rapid transit by whatever means accomplished." It was accordingly held that the adoption of the trolley system by the company did not entitle either party to terminate the contract. Prospect Park, etc., R. Co. v. Coney Island, etc., R. Co., 144 N. Y. 157.

5. **Steamship.**—Fraser v. Telegraph Constr., etc., Co., L. R. 7 Q. B. 569, 3 Moak 205. In that case goods were shipped by the plaintiffs on board of the defendant's vessel under a bill of lading stating that the vessel was a *steamship*. It was held, in accordance with the definition given above, that a ship depending chiefly upon its sails, though using an auxiliary screw, did not answer the description of the vessel in the bill of lading.

Navigation Act.—See The Parthian, 5 U. S. App. 317; The Captain Weber, (C. C. A.) 89 Fed. Rep. 959.

Steamboat Public Place.—Coleman v. State, 13 Ala. 602; Dickey v. State, 68 Ala. 510.

STEATITE. — See note 1.

STEEL. — See note 2.

STEER. (See also CATTLE, vol. 5, p. 771.) — A steer is "a castrated taurine male from two to four years old."³

STENCIL. — "A stencil may be defined to be a thin plate or sheet of any substance in which a figure, letter, or pattern is formed by cutting completely through the plate."⁴

1. **Steatite.**—In *Jenkins v. Johnson*, 9 Blatchf. (U. S.) 519, it was said: "*Steatite* is defined as 'a variety of talc—soapstone.'" This was a patent case. See SOAPSTONE, vol. 25, p. 1128.

2. **Steel.** — In *Wallace v. Noyes*, 13 Fed. Rep. 177, it was said: "The new processes in the manufacture of iron with carbon have left the distinctions between *steel* and iron in an unsettled condition, and so there have been for some years two contending definitions of *steel*—one which excludes all compounds of iron and carbon which do not have the tempering quality, and another which includes all malleable products produced by fusion, whether or not the percentage of iron is sufficient to give the tempering quality." See also *Gary v. Cockley*, (C. C. A.) 65 Fed. Rep. 500; IRON, vol. 17, p. 481.

3. **Steer.** — Webst. Dict., quoted in *Milligan v. Jefferson County*, 2 Mont. 546, in which case it was held that *steer* did not include "calf," within a statute requiring a taxpayer to give a list of his *steers*, heifers, etc.

Steer and Neat Cattle.—See NEAT CATTLE, vol. 21, p. 448.

Steer and Cattle.—In *State v. Abbott*, 20 Vt. 537, it was said: "The objection is that the defendant is charged with wounding a *steer*, without alleging that a *steer* is 'cattle or other beast'—which are the words of the statute. It is very possible that some of the old cases may have adopted a degree of strictness equal to this, even. But no modern case of this character exists, it is believed; but the contrary has often been decided."

"**Steers**" and "**Working Cattle**" Synonymous. — "In common parlance, and in every-day conversation, *steers* and 'working cattle' are applied and used to designate one and the same thing, to wit, cattle that have worked." *Wessels v. Territory*, 1 Kan. 527.

Steer and Ox.—See OX — OXEN, vol. 21, p. 1026.

4. **Stencil.** — *A. B. Dick Co. v. Fuerth*, 57 Fed. Rep. 836.

STENOGRAPHERS.

BY WILLIAM HOWARD BUCHANAN.

I. DEFINITIONS, 773.

1. *Stenographer*, 773.
2. *Stenography*, 773.
3. *Transcript*, 773.

II. STENOGRAPHER OFFICER OF COURT, 773.

III. WHO MAY APPOINT, 774.

1. *Courts*, 774.
 - a. *In General*, 774.
 - b. *Temporary Stenographer*, 774.
 - c. *Refusal to Appoint*, 774.
2. *Parties*, 774.
3. *Common Councils*, 774.
4. *Miscellaneous*, 774.
5. *Stenographer Before Grand Jury*, 774.

IV. OATH OF OFFICE, 775.

V. DUTIES, 775.

1. *In General*, 775.
2. *Duty to Note Exceptions*, 775.
3. *Duty to Attend Court*, 775.
4. *Duty to Read Notes*, 775.
5. *Duty to File Transcript and Original Notes*, 776.
6. *Duty to Furnish Transcript to Litigants*, 776.
7. *Duty to Propound Questions to Jurors upon Their Voir Dire*, 776.

VI. CERTIFICATE OF STENOGRAPHER, 776.

1. *In General*, 776.
2. *By Whom Made*, 776.
3. *What Certificate Should Set Forth*, 777.

VII. COMPENSATION FOR SERVICES, 777.

1. *Before Courts*, 777.
2. *Before Referee*, 777.
3. *At Coroner's Inquest*, 777.
4. *As Special Examiner*, 777.
5. *Mode of Payment*, 777.
6. *Who Liable*, 777.
 - a. *In General*, 777.
 - b. *For Transcript of Notes*, 778.
 - c. *Where Defendant in Criminal Action Is Too Poor to Pay for Transcript*, 778.
 - d. *Where Stenographer Is Employed Before Referee*, 778.
 - (1) *By Parties*, 778.
 - (2) *By Referee*, 778.
 - e. *Where Stenographer Is Employed in Contest Between Coexecutors*, 778.
 - f. *Where Stenographer Is Employed by Attorney for Receiver*, 778.
 - g. *Where Attorney Employs Stenographer*, 778.
7. *Payment in Advance*, 779.
8. *Refusal to Pay*, 779.
9. *How Estimated*, 779.
10. *Delivery of Notes to Referee Before Payment of Fees*, 779.

VIII. WHEN FEES TAXABLE AS COSTS OR DISBURSEMENTS, 779.

1. *In General*, 779.
2. *Transcript to Aid Court in Reaching Decision*, 780.
3. *Transcript for Convenience of One Party*, 780.
4. *Notes Paid for on Previous Trial*, 780.

IX. STENOGRAPHER'S NOTES IN EVIDENCE, 780.

1. *In General*, 780.
2. *Notes of Testimony Taken on Preliminary Examination*, 780.
3. *Notes Taken Before Grand Jury*, 781.
4. *Admissibility of Notes on Appeal*, 781.
5. *Notes of Testimony on Former Trial*, 781.
6. *Notes Taken and Transcribed by Different Stenographers*, 782.
7. *Notes of Testimony Given in Foreign Language*, 782.
8. *Notes Cannot Be Introduced to Show Who Is Petitioner in Action*, 783.
9. *Harmless Error in Admitting Notes*, 783.

X. STENOGRAPHER AS WITNESS, 783.

1. *Right to Use Notes to Refresh Memory*, 783.
2. *Impeachment of Stenographer's Testimony*, 783.
3. *To What Stenographer May Not Testify*, 783.
4. *Necessity of Oath—Waiver of*, 783.
5. *Stenographer Not Only Witness Who May Be Examined*, 783.

XI. REMOVAL, 783.**XII. COMBINATION OF STENOGRAPHERS, 784.****CROSS-REFERENCES.**

As to Incorporation of Reporters' Notes in Bill of Exceptions, see ENCYC. OF PL. AND PR., title *BILLS OF EXCEPTIONS*, vol. 3, p. 436.

Admissibility of Stenographer's Notes as Depositions, see in this work the title DEPOSITIONS, vol. 9, p. 298.

I. DEFINITIONS — 1. **Stenographer.** — A stenographer is one who writes in shorthand by using abbreviations or characters for words.¹

A Court Stenographer is a shorthand writer or reporter who officially takes down testimony and the rulings and charge in a case on trial.²

2. **Stenography.** — Stenography is the taking down of oral testimony word for word in shorthand or phonetic characters.³

3. **Transcript.** — A transcript of the stenographer's notes is an intelligible translation of testimony originally taken in shorthand or phonetic characters into characters generally understood.⁴ The shorthand report is the original, and the transcript is to be regarded as a copy to be used because the other cannot be read by all persons.⁵

II. STENOGRAPHER OFFICER OF COURT. — When appointed and qualified, the stenographer becomes an officer of the court appointing him.⁶

1. **Definition.** — Bouv. L. Dict. See also Black's L. Dict.; *In re Appropriations for Deputies*, 25 Neb. 662.

2. And. L. Dict.

Stenographer Not Clerk. — A stenographer does not come within the common-law definition of the word "clerk." *In re Appropriations for Deputies*, 25 Neb. 662.

3. *Nichols v. Harris*, 32 La. Ann. 646.

Stenographic Characters Not in English Language. — The characters used in stenography cannot be said to be in the English language. *Merrick v. State*, 63 Ind. 327.

"Taking Down." — Testimony is not taken down, in a proper or legal sense, until it is put into language that can be easily read and under-

stood by those whose duty it is to record it upon the minutes of the court. The marks or signs made by the stenographer only serve him with means by which the testimony may be taken down. *Henderson v. Parry*, 93 Ga. 255, 775. See also *Ragland v. Palmer*, 93 Ga. 777; *Lamb v. Toomer*, 91 Ga. 621.

4. *Nichols v. Harris*, 32 La. Ann. 646.

5. *Lowe v. Lowe*, 40 Iowa 220.

The Stenographer's Notes Are "in Writing" although not transcribed. *Nichols v. Harris*, 32 La. Ann. 646.

6. **Officer of Court.** — *Keady v. Owers*, (Colo. 1902) 69 Pac. Rep. 509; *Raft River Land, etc., Co. v. Langford*, (Idaho 1898) 51 Pac. Rep. 1027; *Manatt v. Scott*, 106 Iowa 203, 68 Am. St.

III. WHO MAY APPOINT — 1. Courts — a. IN GENERAL. — Experience has demonstrated that the testimony of witnesses can be literally recorded by persons skilled in the stenographic art, and it is the almost universal habit of courts, under the authority of statutes, to employ such persons for the purpose of facilitating the business of trials and preserving statements of the evidence.¹ But unless authorized by statute, a court cannot employ a stenographer at the expense of the government, nor of the parties without their consent.²

b. TEMPORARY STENOGRAPHER. — Where a temporary stenographer is appointed for a limited time, the fact that the judge appointing him is ill and is unable to appoint a regular stenographer at the expiration of such time does not operate to extend the appointment; services rendered by him after the expiration of his term are to be deemed voluntary, and he cannot maintain an action for payment.³

c. REFUSAL TO APPOINT. — A refusal by the court to delay a trial until a stenographer can be secured is not reversible error unless it causes a hardship to the party whose request is refused.⁴

2. Parties. — Either party to an action may employ a private stenographer to assist him during the trial.⁵

3. Common Councils. — A common council may adopt a resolution to employ a stenographer.⁶

4. Miscellaneous. — In *New York* coroners may appoint stenographers.⁷ In *Pennsylvania* the statute authorizes the appointment of stenographers before examiners, masters, referees, commissioners, and auditors.⁸ In *New Mexico* a master cannot appoint a stenographer.⁹

5. Stenographer Before Grand Jury. — As to the right to appoint a stenographer to act before the grand jury, there is a conflict of opinion. There are decisions to the effect that where there is no statute prohibiting such procedure a stenographer may be appointed by the district attorney to take the testimony for the latter's use in the discharge of his official duties.¹⁰ On the other hand, it has been held that such an appointment cannot be made where neither public justice nor the establishment of private rights requires that the testimony

Rep. 293; *State v. Clerk*, 47 La. Ann. 358; *State v. Wofford*, 121 Mo. 61; *Varnum v. Wheeler*, (Supm. Ct. Spec. T.) 9 Civ. Pro. (11. Y.) 421; *Chase v. Vandergrift*, 88 Pa. St. 217; *Rosenthal v. Ehrlicher*, 154 Pa. St. 396; *Com. v. Arnold*, 161 Pa. St. 320; *Cummings v. Armstrong*, 34 W. Va. 1.

A Stenographer on a Reference holds no official position. *Coale v. Suckert*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 76.

1. Court May Appoint. — *Chicago, etc.*, R. Co. v. Robinson, 16 Ill. App. 229; *Wright v. Wright*, 58 Kan. 525; *Harris v. Philadelphia Traction Co.*, 180 Pa. St. 184; *Killfoil v. Moore*, (Tex. Civ. App. 1898) 45 S. W. Rep. 1024.

Before Commissioner. — A statute authorizing the appointment of a stenographer on the trial of causes in court does not authorize the employment of a stenographer before a commissioner executing an order or decree of reference. *Weigand v. Alliance Supply Co.*, 44 W. Va. 133.

Presumption of Authority. — Where it appears that a stenographer took in shorthand the proceedings occurring at a trial, it will be assumed that he did so in pursuance of an order of the court. *Keady v. Owers*, (Colo. 1902) 69 Pac. Rep. 509.

Evidence Not Taken by Stenographer. — Though a shorthand reporter be appointed and act in the trial of a cause, it is wholly immaterial by whom the evidence has been written out if such evi-

dence be shown by a bill of exceptions purporting to contain all the evidence. *Hill v. Hagaman*, 84 Ind. 287.

Appointment to Be Made Matter of Record. — The appointment of a stenographer is the act of the court and should be made a matter of record. *Rosenthal v. Ehrlicher*, 154 Pa. St. 396.

2. Cannot Employ Unless under Statutory Authority. — *Givens v. Veeder*, 9 N. Mex. 405.

3. Temporary Stenographer. — *Matter of O'Sullivan*, 54 N. Y. App. Div. 374.

4. Refusal to Appoint. — *Home F. Ins. Co. v. Johnson*, 43 Neb. 71. See also *Schoenfeldt v. State*, 30 Tex. App. 695.

5. Parties May Appoint. — *State v. Dreany*, 65 Kan. 292.

But one party cannot employ a stenographer at the expense of another by having the expense treated as taxable costs. *Givens v. Veeder*, 9 N. Mex. 405.

6. Common Council May Appoint. — *Salmon v. Haynes*, 50 N. J. L. 97.

7. Coroner May Appoint. — *Baker v. New York*, 17 N. Y. App. Div. 435.

8. Examiners, etc., May Appoint. — *Taylor's Estate*, 3 Pa. Super. Ct. 275.

9. Master Cannot Appoint. — *Givens v. Veeder*, 9 N. Mex. 405.

10. District Attorney May Appoint Before Grand Jury. — *State v. Bates*, 148 Ind. 610; *U. S. v. Simmons*, 46 Fed. Rep. 65.

of witnesses shall be disclosed in the presence of a stenographer whose appointment is not authorized by statute or custom.¹

IV. OATH OF OFFICE. — The stenographer should be sworn,² and the fact that he was sworn, or better, a copy of his oath of office, should appear among the records of the court.³

V. DUTIES — 1. In General. — It will be presumed that the stenographer has performed his duties, and this presumption will prevail in the absence of any showing to the contrary.⁴ It is his duty to record fully and accurately all that takes place upon the trial of causes,⁵ all the testimony given,⁶ the objections and exceptions of counsel,⁷ all the instructions given by the trial judge to the jury,⁸ the rulings of the court,⁹ and the charge of the judge.¹⁰ When an offer is made to prove a fact or to use a person as a witness, the offer should be entered at length on the stenographer's notes.¹¹

2. Duty to Note Exceptions. — The stenographer should not attempt to note an exception simply because an objection has been made and overruled in his hearing or because counsel request him to do so. The direction to note an exception must come from the judge.¹²

3. Duty to Attend Court. — It is the duty of the official stenographer to attend court and personally devote his time to the performance of his official duties.¹³

4. Duty to Read Notes. — In *North Dakota* and *Rhode Island* it is the stenographer's duty to read his notes when requested to do so by the judge.¹⁴

1. When Stenographer Cannot Act Before Grand Jury. — *State v. Bowman*, 90 Me. 363, 60 Am. St. Rep. 266.

2. Stenographer Should Be Sworn. — *Wright v. Wright*, 58 Kan. 525; *State v. Ford*, 41 Mo. App. 122; *Rosenthal v. Ehrlicher*, 154 Pa. St. 396.

3. Oath Should Appear of Record. — *Rosenthal v. Ehrlicher*, 154 Pa. St. 396.

4. Presumption that Duties Are Performed. — *Manatt v. Scott*, 106 Iowa 203, 68 Am. St. Rep. 293; *State v. Smith*, 99 Iowa 26, 61 Am. St. Rep. 219.

5. Duty to Record What Transpires. — *Keady v. Owers*, (Colo. 1902) 69 Pac. Rep. 509; *Baker v. New York*, 17 N. Y. App. Div. 435; *Varnum v. Wheeler*, (Supm. Ct. Spec. T.) 9 Civ. Pro. (N. Y.) 421; *Woodward v. Heist*, 180 Pa. St. 161; *Rosenthal v. Ehrlicher*, 154 Pa. St. 396; *Heyer v. Cunningham Piano Co.*, 6 Pa. Super. Ct. 504.

6. Duty to Record Testimony. — *Moore v. State*, 65 Ark. 330; *People v. Raymond*, 186 Ill. 407; *Varnum v. Wheeler*, (Supm. Ct. Spec. T.) 9 Civ. Pro. (N. Y.) 421; *Rosenthal v. Ehrlicher*, 154 Pa. St. 396; *Woodward v. Heist*, 180 Pa. St. 161; *Heyer v. Cunningham Piano Co.*, 6 Pa. Super. Ct. 504.

7. Duty to Record Objections and Exceptions. — *People v. Raymond*, 186 Ill. 407; *Woodward v. Heist*, 180 Pa. St. 161; *Rosenthal v. Ehrlicher*, 154 Pa. St. 396; *Connell v. O'Neil*, 154 Pa. St. 582.

8. Duty to Record Instructions of Judge. — *Rosenthal v. Ehrlicher*, 154 Pa. St. 396.

9. Duty to Record Rulings of Court. — *People v. Raymond*, 186 Ill. 407; *Rosenthal v. Ehrlicher*, 154 Pa. St. 396; *Woodward v. Heist*, 180 Pa. St. 161.

10. Duty to Record Charge of Judge. — *Heyer v. Cunningham Piano Co.*, 6 Pa. Super. Ct. 504; *Underwood v. Lawrence County*, 6 S. Dak. 5.

11. Duty to Record Offer to Prove Fact. — *Rosen-*

thal v. Ehrlicher, 154 Pa. St. 396; *Woodward v. Heist*, 180 Pa. St. 161.

12. Direction to Note Exception Must Come from Judge. — *Woodward v. Heist*, 180 Pa. St. 161; *Rosenthal v. Ehrlicher*, 154 Pa. St. 396; *Connell v. O'Neil*, 154 Pa. St. 582; *Heyer v. Cunningham Piano Co.*, 6 Pa. Super. Ct. 504.

13. Duty to Attend Court. — *Magoohan v. Curran*, 71 Conn. 551; *Kearney v. State*, 101 Ga. 803, 65 Am. St. Rep. 344; *State v. Slover*, 113 Mo. 211.

A stenographer duly appointed by a circuit judge may be required by such judge to attend a term of court regularly held by such judge in a circuit other than his own whenever, in his judgment, the public interest so demands. *Underwood v. Lawrence County*, 6 S. Dak. 5.

Need Not Remain until End of Trial. — It is not incumbent upon the judge to require the official reporter or stenographer of the court to remain in attendance until the end of a trial, in order that, in case of disputes between counsel as to what the evidence was, a party may not be "deprived of the privilege of referring to the official report of the case to refresh the recollection of the jury." *Kearney v. State*, 101 Ga. 803, 65 Am. St. Rep. 344.

Effect of Absence for Short Period. — The official stenographer should be present at all times during the progress of a trial except during the argument of counsel. His absence without obtaining the consent of the court might be a reason why he should be removed or subjected to loss of pay. But his absence for two or three minutes, unknown to the judge and unnoticed by counsel, will not render the proceedings of the court while he is gone void or erroneous. *Magoohan v. Curran*, 71 Conn. 551.

14. Duty to Read Notes. — *Kaeppler v. Pollock*, 8 N. Dak. 59; *Alexander v. Gardiner*, 14 R. I. 15.

Need Not Be Compensated for Reading Notes. — "The fact that the statute fixes no compensation to the stenographer for such services is of no

But in *South Dakota* the stenographer cannot be required to read his notes.¹

5. Duty to File Transcript and Original Notes. — It is the stenographer's duty to file a transcript of his notes,² unless such filing is rendered unnecessary,³ and it has been held that it is also necessary to file the original shorthand notes.⁴

6. Duty to Furnish Transcript to Litigants. — It is the duty of a stenographer to furnish to a litigant a transcript of his notes when demand therefor is made and payment or offer of payment for doing the work is tendered.⁵ And it has been held that the stenographer must furnish such transcript even when the court orders him not to do so.⁶

7. Duty to Propound Questions to Jurors upon Their Voir Dire. — Upon the direction of the court it may be the duty of the stenographer to relieve the solicitor-general of propounding questions to jurors when put upon their *voir dire*. But in no case does this duty impose upon the stenographer the right to represent the solicitor-general in accepting or rejecting jurors.⁷

VI. CERTIFICATE OF STENOGRAPHER — 1. In General. — The stenographer is, in many cases, the only person who can read the notes, and he should certify to the translation thereof.⁸ And while the certificate of a judge who cannot read the notes ought not to be regarded as sufficient,⁹ it has been held that the certification by the stenographer sufficiently presents the evidence.¹⁰

2. By Whom Made. — The stenographer's notes must be certified by the person taking them. It is not sufficient that they are certified by deputy or in the firm name by the firm of which the stenographer is a member.¹¹

consequence. He knows such services may be required of him, and he accepts the office *cum onere*." *Kaeppler v. Pollock*, 8 N. Dak. 59.

1. Cannot Be Required to Read Notes in South Dakota. — *Myers v. Campbell*, 11 S. Dak. 433, wherein it was held that judges are not justified in demanding services which are not within the provisions of the statute, and for which reporters receive no compensation. This case is in direct conflict with *Kaeppler v. Pollock*, 8 N. Dak. 59, *supra*.

2. Duty to File Transcript. — *Hampton v. Moorhead*, 62 Iowa 91; *Manatt v. Scott*, 106 Iowa 203, 68 Am. St. Rep. 293; *Bell v. Pate*, 48 Mich. 640; *Detroit, etc., R. Co. v. Hayt*, 55 Mich. 347; *Thurstin v. Luce*, 61 Mich. 486; *Langley v. Hill*, 63 Mich. 271; *Kaeppler v. Pollock*, 8 N. Dak. 59; *Briggs v. Erie County*, 98 Pa. St. 570. See also *Baker v. New York*, 17 N. Y. App. Div. 435.

Presumption. — It is the duty of the stenographer to file his notes, and it will be presumed that this has been done. *Manatt v. Scott*, 106 Iowa 203, 68 Am. St. Rep. 293; *Hampton v. Moorhead*, 62 Iowa 91.

Form of Transcript. — The court may direct that the transcribed notes be put in narrative form. *Cummings v. Armstrong*, 34 W. Va. 1. See also as to the proper form for such notes, *State v. Otis*, 71 Minn. 511.

Transcript Is Memorial of Evidence and Rulings. — *Sanders v. State*, 74 Miss. 531.

3. When Filing Is Unnecessary. — Where in a criminal action the accused is discharged, the reporter is not required to file his notes unless the statute requires it. *Mattingly v. Nichols*, 133 Cal. 332.

The stenographer's notes need not be filed where a motion is made for a new trial on "the minutes of the court." *Distad v. Shanklin*, 11 S. Dak. 1.

Where there is a mistrial, no appeal being

possible, a transcript is unnecessary. *Louisville, etc., R. Co. v. Ray*, 101 Tenn. 1.

4. Duty to File Original Shorthand Notes. — *Lowe v. Lowe*, 40 Iowa 220, wherein it was held that questions as to the accuracy of the transcript may arise, and the original notes should be accessible for the correct determination of such questions.

5. Duty to Furnish Transcript to Litigants. — *Keady v. Owers*, (Colo. 1902) 69 Pac. Rep. 509; *Raft-River, etc., Co. v. Langford*, (Idaho 1898) 51 Pac. Rep. 1027; *Arcana Gas Co. v. Moore*, 8 Ind. App. 482; *Maynard v. Vinton*, 59 Mich. 155; *State v. Supple*, 22 Mont. 184; *State v. Ledwidge*, 27 Mont. 197; *Briggs v. Erie County*, 98 Pa. St. 570; *Louisville, etc., R. Co. v. Ray*, 101 Tenn. 1.

Refusal to Furnish Transcript. — The stenographer cannot excuse his failure to furnish a transcript by asserting that the party does not need such transcript. The stenographer cannot raise or solve such a question. *State v. Ledwidge*, 27 Mont. 197.

6. Order of Court of No Avail. — *Keady v. Owers*, (Colo. 1902) 69 Pac. Rep. 509.

7. Duty to Propound Questions to Jury. — *West v. State*, 79 Ga. 773.

8. Should Certify Translation. — *Ross v. Loomis*, 64 Iowa 432; *Heyer v. Cunningham Piano Co.*, 6 Pa. Super. Ct. 504.

9. Certificate of Judge Not Sufficient. — *Ross v. Loomis*, 64 Iowa 432; *Merrill v. Bowe*, 69 Iowa 653.

10. Stenographer's Certificate Sufficient. — *People v. Morine*, 61 Cal. 367; *Ross v. Loomis*, 64 Iowa 432. *Contra*, *State v. Freidrich*, 4 Wash. 204.

11. Notes Must Be Certified by Stenographer Personally. — *Heyer v. Cunningham Piano Co.*, 6 Pa. Super. Ct. 504; *Rosenthal v. Ehrlicher*, 154 Pa. St. 396; *Woodward v. Heist*, 180 Pa. St. 161.

3. What Certificate Should Set Forth. — The stenographer's certificate should set forth in substance that the proceedings, evidence, and charge were fully and accurately taken on the trial, and that the transcript is a correct translation of the notes.¹

VII. COMPENSATION FOR SERVICES — **1. Before Courts.** — The rate of compensation to be allowed to official stenographers in legal proceedings is either prescribed directly by statute,² or fixed by the court under authority conferred by statute.³

2. Before Referee — In the absence of an agreement to that effect a stenographer is not entitled to fees for attendance before a referee on days when adjournments are had.⁴

3. At Coroner's Inquest. — Where a stenographer is employed under the direction of the prosecuting attorney at a coroner's inquest, his fees may be allowed.⁵

4. As Special Examiner. — Where a stenographer is appointed a special examiner in chancery, his rate of compensation, in the absence of a statute providing therefor, or unless a special contract is made with him, will be founded on the established rate of stenographers' charges in the courts.⁶

5. Mode of Payment — **Where Compensation Is Fixed by Statute.** — Under the *Georgia* statute fixing the amount of the stenographer's salary and providing that the judge shall issue an order as to the number of days during which the stenographer has been employed, the stenographer must present such order to the county treasurer, and if the latter refuses to honor a proper order, mandamus will lie against him to compel its payment.⁷

Where Compensation Is Fixed by Court. — Where the magistrate has authority to fix the compensation of the stenographer, it is the duty of the county auditor to draw his warrant on the treasurer for the amount so fixed, and mandamus will lie to compel him to do this.⁸

6. Who Liable — *a. IN GENERAL.* — The stenographer is paid out of the public treasury for all his services in attending court and taking stenographic notes. But a county is not liable for a transcript of the notes unless such transcript is ordered by the court or is made to be filed in the performance of the stenographer's general duty. The liability of the county cannot be enlarged by any action of the counsel in the case.⁹

1. Matter Set Forth by Certificate. — *Heyer v. Cunningham Piano Co.*, 6 Pa. Super. Ct. 504.

Insufficient Certificate. — *People v. Carty*, 77 Cal. 213.

2. Compensation Fixed by Statute. — *State v. Slover*, 113 Mo. 202; *Baker v. New York*, 17 N. Y. App. Div. 435; *Wright v. Nostrand*, (N. Y. Super. Ct. Spec. T.) 58 How. Pr. (N. Y.) 184; *Guth v. Dalton*, (C. Pl. Spec. T.) 58 How. Pr. (N. Y.) 289; *Lehigh County v. Meyer*, 102 Pa. St. 479; *Chosen Friends Home Loan, etc., League v. Otterson*, 7 Wyo. 89.

When Salary a County Charge. — *Munson v. New York*, (Supm. Ct. Spec. T.) 57 How. Pr. (N. Y.) 497.

Apportionment of Salary Among Counties of Circuit. — *Goodall v. Marquette County*, 45 Mich. 47.

Effect of Statute. — Where the stenographer's fees are regulated by statute, the compensation can be only that given by such statute. *McCarthy v. Bonyng*, 12 Daly (N. Y.) 356; *Matter of Tinsley*, 90 N. Y. 231.

But it seems that when the statute prescribing his duties does not contemplate that he shall devote his entire time to the public service, he may recover for work done under a special contract not falling within his official duties. *Langley v. Hill*, 63 Mich. 271.

Where a statute provides that a stenographer shall receive ten dollars per day for every day actually spent in court and that the whole compensation shall not exceed one thousand two hundred dollars per annum, the stenographer is not entitled to compensation for any time during which he is engaged in court after one hundred and twenty days. *Lehigh County v. Meyer*, 102 Pa. St. 479.

3. Compensation Fixed by Court. — *McAllister v. Hamlin*, 83 Cal. 361; *Ex p. Reis*, 64 Cal. 233; *People v. Raymond*, 186 Ill. 407; *Knight v. Ocean County*, 49 N. J. L. 485; *Cox v. Patten*, (Tex. Civ. App. 1902) 66 S. W. Rep. 64.

4. Before Referee. — *Matter of Maritch*, (Surrogate Ct.) 29 Misc. (N. Y.) 270; *Blanck v. Spies*, (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 19.

5. At Coroner's Inquest. — *Turner v. Smith*, 101 Mich. 212.

6. As Special Examiner. — *Indianapolis Water Co. v. American Straw-Board Co.*, 65 Fed. Rep. 534.

7. Mode of Payment under Statute. — *Lamb v. Toomer*, 91 Ga. 621.

8. Mode of Payment When Fixed by Statute. — *McAllister v. Hamlin*, 83 Cal. 361; *Knight v. Ocean County*, 49 N. J. L. 485.

9. Liability of County. — *Briggs v. Erie*

b. FOR TRANSCRIPT OF NOTES. — The party who procures a transcript of the stenographer's notes is liable, except as hereinafter noted, for the fees of the stenographer in making such transcript;¹ and his liability is not affected by the fact that he did not know that the services performed by the stenographer in making the transcript were to be paid for in addition to such stenographer's salary.²

c. WHERE DEFENDANT IN CRIMINAL ACTION IS TOO POOR TO PAY FOR TRANSCRIPT. — Where it appears that a defendant in a criminal prosecution is unable to pay for a transcript of the stenographer's notes of evidence, the court may, in its discretion, order such transcript to be made at the expense of the county.³

d. WHERE STENOGRAPHER IS EMPLOYED BEFORE REFEREE — (1) *By Parties.* — Where there is no express agreement, all the parties to an action are jointly liable to a stenographer employed to take the official report of proceedings before a referee and to furnish copies of the same.⁴

(2) *By Referee.* — Where there is no statutory provision, if a referee finds it necessary, more economical, or indispensable, to engage the services of a stenographer, it is in the discretion of the court to consider that fact in ordering compensation to be made to the referee.⁵

e. WHERE STENOGRAPHER IS EMPLOYED IN CONTEST BETWEEN COEXECUTORS. — In a contest between personal representatives over the question of proper apportionment of their commissions, the stenographer's fees should be paid out of the commissions, as the question concerns such representatives only; and each party's portion should bear its *pro rata* share.⁶

f. WHERE STENOGRAPHER IS EMPLOYED BY ATTORNEY FOR RECEIVER. — Where one as the attorney and known agent of a receiver engages a stenographer to act at a reference ordered by the court to state the receiver's accounts, the receiver is individually liable for the stenographer's fees, and the attorney is under no personal liability.⁷

g. WHERE ATTORNEY EMPLOYS STENOGRAPHER. — As a general rule, an attorney will incur no personal liability by simply requesting the performance by a stenographer of services rendered necessary by the progress of the case, unless he expressly binds himself.⁸

County, 98 Pa. St. 570; Lehigh County *v.* Meyer, 102 Pa. St. 479.

1. *Who Liable for Transcript.* — Keady *v.* Owers, (Colo. 1902) 69 Pac. Rep. 509; Merrick *v.* State, 63 Ind. 327; Miller *v.* Palmer, 25 Ind. App. 357; Godfrey *v.* McKean, 54 Iowa 127; State *v.* Ledwidge, 27 Mont. 197; State *v.* Supple, 22 Mont. 184; State *v.* Moore, 8 Neb. 22; Briggs *v.* Erie County, 98 Pa. St. 570.

2. Miller *v.* Palmer, 25 Ind. App. 357.

3. *Where Defendant in Criminal Action Is Too Poor to Pay.* — *Ex p.* Morgan, 122 Ind. 428; Merrick *v.* State, 63 Ind. 327; State *v.* Ledwidge, 27 Mont. 197; State *v.* Second Judicial Dist. Ct., 24 Mont. 566. See also State *v.* Wofford, 121 Mo. 61. *Contra*, State *v.* Moore, 8 Neb. 22.

4. *Stenographer Employed Before Referee by Parties.* — Adams *v.* New York, etc., R. Co., (Supm. Ct.) 20 Abb. N. Cas. (N. Y.) 180. This case also decides who is the "successful party" within the meaning of that phrase as used in an agreement that such party shall pay the stenographer's fees.

Facts from Which Employment May Be Inferred. — Macvey *v.* Metropolitan El. R. Co., (Supm. Ct. Gen. T.) 19 N. Y. Supp. 133.

5. *Employed by Referee.* — Cummins *v.* Robinson, 2 Okla. 494.

6. *Stenographer Employed in Contest Between Coexecutors.* — Hill *v.* Nelson, 1 Dem. (N. Y.) 357.

7. *Stenographer Employed by Attorney for Receiver.* — Ryan *v.* Rand, (N. Y. City Ct. Gen. T.) 20 Abb. N. Cas. (N. Y.) 313.

8. *Client Liable for Stenographer Employed by Attorney.* — Whitton *v.* Sullivan, 96 Cal. 480; Miller *v.* Palmer, 25 Ind. App. 357; Bonyng *v.* Field, 81 N. Y. 159; Query *v.* Cooney, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 161; Tyrrel *v.* Hammerstein, (Supm. Ct. Tr. T.) 33 Misc. (N. Y.) 505; Coale *v.* Suckert, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 76; Thornton *v.* Tuttle, (Supm. Ct. Gen. T.) 20 Abb. N. Cas. (N. Y.) 308; Ryan *v.* Rand, (N. Y. City Ct. Gen. T.) 20 Abb. N. Cas. (N. Y.) 313; Harry *v.* Hilton, (C. Pl. Gen. T.) 64 How. Pr. (N. Y.) 199. See also the title ATTORNEY AND CLIENT, vol. 3, p. 406.

Upon Reference of Special Issue. — Thornton *v.* Tuttle, (Supm. Ct. Gen. T.) 20 Abb. N. Cas. (N. Y.) 308.

Where Attorney Exceeds His Authority. — The client is responsible for the stenographer's fees contracted by his attorney even where the attorney contracts to pay a larger amount than is included in his authority of agency. Whitton *v.* Sullivan, 96 Cal. 480.

7. Payment in Advance. — It has been held that a stenographer is entitled to demand payment of his fees or a satisfactory security therefor, in advance, for making a transcript.¹ But it has also been held that a court has no authority to allow compensation to the official stenographer before the services are rendered.²

8. Refusal to Pay. — It has been held that if an attorney wrongfully refuses to pay the legal charges of a court stenographer, the court may protect the latter by a summary order against the attorney.³ After the commencement of a trial it is error for the court to refuse to hear one of the parties because of his refusal to pay his proportion of the stenographer's fees.⁴

9. How Estimated. — It has been held that the custom among stenographers of estimating the number of folios to the page of copy furnished will not prevail as against an actual count reducing the number charged for.⁵

10. Delivery of Notes to Referee Before Payment of Fees. — A stenographer is not obliged to part with his notes before his fees have been paid, but if he delivers them to a referee, to be examined by such referee and used as a basis of his report, the stenographer cannot limit the effect of such delivery. It is the duty of the referee to file the notes with his report, even though the fees of the stenographer remain unpaid.⁶

VIII. WHEN FEES TAXABLE AS COSTS OR DISBURSEMENTS — 1. In General. — There are decisions to the effect that the charges of the stenographer may be taxed as costs against the unsuccessful party,⁷ but the prevailing opinion seems to be to the contrary.⁸

1. Payment in Advance. — *Merrick v. State*, 63 Ind. 327; *State v. Wofford*, 126 Mo. 435; *State v. Moore*, 8 Neb. 22; *Guth v. Dalton*, (C. Pl. Spec. T.) 58 How. Pr. (N. Y.) 289.

2. Ragland v. Palmer, 93 Ga. 777.

In *Montana* the official stenographer cannot require the state or its attorney-general to pay the amount of his fees in advance. *State v. Ledwidge*, 27 Mont. 197.

In *New York* the decisions do not agree. In *Guth v. Dalton*, (C. Pl. Spec. T.) 58 How. Pr. (N. Y.) 289, the Court of Common Pleas held that the statute permits the stenographer to require payment in advance, while in *Wright v. Nostrand*, (N. Y. Super. Ct. Spec. T.) 58 How. Pr. (N. Y.) 184, the Supreme Court decided that the stenographer cannot require compensation before the work is done.

3. Refusal of Attorney to Pay Fees. — *Wright v. Nostrand*, (N. Y. Super. Ct. Spec. T.) 58 How. Pr. (N. Y.) 184. See also *supra*, this section, *Mode of Payment*.

4. Wheaton v. Atlantic Giant Powder Co., 41 Mich. 718.

5. Compensation Estimated by Actual Count of Folios. — *Maltby v. Plummer*, 73 Mich. 539. See also *Wright v. Nostrand*, (N. Y. Super. Ct. Spec. T.) 58 How. Pr. (N. Y.) 184.

6. Delivery of Notes to Referee Before Payment of Fees. — *Pope v. Perault*, 22 Hun (N. Y.) 468.

7. Fees Taxable as Costs or Disbursements. — *Beebe v. Wells*, 37 Kan. 472; *The E. Luckenbach*, 19 Fed. Rep. 847.

In *Wyoming* the stenographer in criminal cases is paid by the county. In all other cases his pay is taxed as costs in the case. *Chosen Friends Home Loan*, etc., *League v. Otterson*, 7 Wyo. 89.

Particular Stipulation Construed. — *Clegg v. Aikens*, (Supm. Ct.) 17 Abb. N. Cas. (N. Y.) 88.

Stipulation Has Effect of Submitting to Court the Question of Amount to Be Allowed. — *In re Barnes*, (Mo. App. 1886) 4 West. Rep. 302.

8. Fees Not Taxable as Costs or Disbursements. — *State v. Gans*, 72 Mo. App. 638; *Colton v. Simmons*, 14 Hun (N. Y.) 75; *Provost v. Farrell*, 13 Hun (N. Y.) 303; *Matter of Maritch*, (Surrogate Ct.) 29 Misc. (N. Y.) 270; *Matter of Engelbrecht*, 15 N. Y. App. Div. 541; *Matter of Hempstead*, 36 N. Y. App. Div. 321; *Mansfield v. Hogsett*, 25 Tex. Civ. App. 66; *Bringgold v. Spokane*, 19 Wash. 333.

Where Court Orders Expense to Be Paid by Parties. — Under a statute providing that the court may direct the employment of a stenographer, if thought necessary, and may order the expense occasioned thereby to be paid by the parties, the stenographer's fees, or the part paid by the successful party as directed by the court, cannot be taxed by him as a necessary disbursement. *Gilman v. Oliver*, (N. Y. Super. Ct. Gen. T.) 14 Abb. Pr. (N. Y.) 174; *Arnoux v. Phelan*, (N. Y. Super. Ct. Spec. T.) 21 How. Pr. (N. Y.) 88. But see *Reynolds v. New York*, (C. Pl.) 14 Abb. Pr. (N. Y.) 176, note.

Stenographer Employed Before Master. — Where a stenographer is employed by a master to take testimony at an accounting before him, the expense will not be allowed as costs unless the parties agree thereto. *Bridges v. Sheldon*, 18 Blatchf. (U. S.) 507.

Stenographer Employed Before Referee. — The stenographer's fee on a trial before a referee is not a disbursement within the meaning of the law regulating the adjustment of costs, and cannot be taxed without a stipulation between the parties to that effect. *Griggs v. Guinn*, (Supm. Ct. Spec. T.) 29 Abb. N. Cas. (N. Y.) 144; *Colton v. Simmons*, 14 Hun (N. Y.) 75; *Nugent v. Keenan*, 53 N. Y. Super. Ct. 530.

Where, upon the commencement of a trial before a referee, the parties stipulate for the em-

2. Transcript to Aid Court in Reaching Decision. — Under the *New York* Code of Civil Procedure, where the stenographer's notes are required to aid the court in reaching a decision, the court may direct that one-half the expense be paid by each of the parties, and the amount so paid by compulsory order becomes a necessary disbursement.¹

3. Transcript for Convenience of One Party. — As a general rule, money paid by a party for a copy of the official stenographer's notes for the party's convenience is not taxable as costs,² although there are a few decisions which hold the opposite view.³

4. Notes Paid for on Previous Trial. — Where a stenographer's notes, used by the defendant in preparing a bill of exceptions, have been obtained and paid for on a previous trial, the plaintiff in a subsequent trial should not be taxed with such expense as costs in the suit, even where such expense might otherwise be taxable.⁴

IX. STENOGRAPHER'S NOTES IN EVIDENCE — 1. In General. — At common law the stenographer's transcript of evidence taken in a prior action is inadmissible on the ground that such transcript amounts to a mere certificate of the stenographer that the evidence has been given. It has not the sanction of an oath. The stenographer's oath of office is not a sufficient oath in the cause.⁵ Where the notes are admissible it must be by virtue of some statute.⁶

2. Notes of Testimony Taken on Preliminary Examination. — Where a statute

ployment of a stenographer whose fees are to be paid by them in equal proportion, the expense of an extra copy of the minutes ordered by the referee for his own use is included in the agreement, and consequently is not taxable against the unsuccessful party. *Mark v. Buffalo*, 87 N. Y. 184.

1. Transcript to Aid Court in Reaching Decision. — N. Y. Code Civ. Pro., § 289; *King v. Munzer*, (N. Y. Super. Ct. Spec. T.) 31 Abb. N. Cas. (N. Y.) 482; *Abendroth v. Manhattan R. Co.*, (N. Y. Super. Ct. Spec. T.) 9 Civ. Pro. (N. Y.) 406. *Contra*, *Cohen v. Weill*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 764.

Cost of Carbon Copies for Party's Own Use — Not Taxable. — *Atwood v. Jaques*, 63 Fed. Rep. 561.

2. Transcript for Convenience of One of Parties. — *Gunther v. Liverpool, etc., Ins. Co.*, 2 Blatchf. (U. S.) 390; *Monahan v. Godkin*, 100 Fed. Rep. 196; *The William Branfoot*, 8 U. S. App. 129; *Senior v. Anderson*, 130 Cal. 290; *Albin v. Louisville R. Co.*, (Ky. 1902) 67 S. W. Rep. 17; *Detroit, etc., R. Co. v. Hayt*, 55 Mich. 347; *Hamilton v. Butler*, (N. Y. Super. Ct. Spec. T.) 30 How. Pr. (N. Y.) 36; *Spring v. Day*, (Super. Ct. Spec. T.) 44 How. Pr. (N. Y.) 390; *Pfandler Barm Extracting Apparatus Co. v. Pfandler*, (Supm. Ct. Gen. T.) 3 How. Pr. N. S. (N. Y.) 253, 39 Hun (N. Y.) 191; *Pfaudler Barm Extracting Bunting Apparatus Co. v. Sargent*, 43 Hun (N. Y.) 154; *Whitney v. Roe*, 75 Hun (N. Y.) 508; *Shaver v. Eldred*, 86 Hun (N. Y.) 51; *Varnum v. Wheeler*, (Supm. Ct. Spec. T.) 9 Civ. Pro. (N. Y.) 421; *Louisville, etc., R. Co. v. Ray*, 101 Tenn. 1; *Tingley v. Bellingham Bay Boom Co.*, 5 Wash. 644.

3. Fee for Transcript Taxable as Costs. — *Raft River Land, etc., Co. v. Langford*, (Idaho 1898) 51 Pac. Rep. 1027; *Maynard v. Vinton*, 59 Mich. 155; *Whitney v. Roe*, 75 Hun (N. Y.) 508; *Varnum v. Wheeler*, (Supm. Ct. Spec. T.) 9 Civ. Pro. (N. Y.) 421; *Stevens v. New York El. R. Co.*, 58 N. Y. Super. Ct. 569.

Agreement of Parties. — Where it appears that there was a misunderstanding between the attorneys about how many copies there should be, but also that there was sufficient acquiescence of the attorney of the losing party in the printing of the extra copy, the prevailing party should be allowed to tax the cost of such copy. *Brown v. Sears*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 559.

Notes on Former Trial. — The expense of copies of the stenographer's notes of the first trial, procured for the use of a party on the second trial, is not a necessary disbursement under Code Civ. Pro. N. Y., § 3256, and cannot be taxed as such by the party procuring them. *Hamilton v. Butler*, (N. Y. Super. Ct. Spec. T.) 19 Abb. Pr. (N. Y.) 446; *Spring v. Day*, (Super. Ct. Spec. T.) 44 How. Pr. (N. Y.) 390; *Pfandler Barm Extracting Bunting Apparatus Co. v. Pfandler*, 39 Hun (N. Y.) 191; *Hudson v. Erie R. Co.*, 57 N. Y. App. Div. 98.

The contrary was held by the *New York* Supreme Court at special term, in *Flood v. Moore*, (Supm. Ct. Spec. T.) 2 Abb. N. Cas. (N. Y.) 91; and by the Court of Common Pleas at special term, in *Zelmanovitz v. Manhattan R. Co.*, (C. Pl. Spec. T.) 24 Civ. Pro. (N. Y.) 402.

Transcript Procured to Enable Party to Propose Amendment. — In *New York* the fees of a stenographer for a copy of his minutes are a taxable item of disbursement when procured for the purpose of enabling a party to propose amendments to a case on appeal. *Sebley v. Nichols*, (Supm. Ct. Gen. T.) 32 How. Pr. (N. Y.) 182; *Stevens v. New York El. R. Co.*, 58 N. Y. Super. Ct. 569. *Compare* *Pfaudler Barm Extracting Bunting Apparatus Co. v. Sargent*, 43 Hun (N. Y.) 154.

4. Notes Paid for on Previous Trial. — *George W. Roby Lumber Co. v. Gray*, 73 Mich. 363.

5. Notes Inadmissible at Common Law. — *Reid v. Reid*, 73 Cal. 206.

6. Notes Admissible under Statute. — *Reid v. Reid*, 73 Cal. 206; *Phares v. Barber*, 61 Ill. 271.

places stenographers' transcripts on the footing of depositions, such transcripts taken on a preliminary examination may be read in evidence by either party at the trial, upon its appearing that the witness is unable to attend by reason of his death, insanity, sickness, infirmity, or continued absence from the state.¹ But before the notes are admissible on the trial they must be transcribed in longhand.²

3. Notes Taken Before Grand Jury. — Where a stenographer takes testimony before a grand jury, he may be permitted upon the trial to read his notes of such testimony.³

4. Admissibility of Notes on Appeal. — A longhand transcript of the evidence taken in shorthand, to be made available on appeal, must, in some states, be incorporated bodily into the bill of exceptions,⁴ certified to the appellate court,⁵ and filed within a certain time.⁶

5. Notes of Testimony on Former Trial. — In many states the notes taken on a former trial may be read on a subsequent trial of the same action,⁷ and it has been held that notes taken in one case may be read in a different case,

1. Notes of Testimony Taken on Preliminary Hearing. — *People v. Grundell*, 75 Cal. 301, wherein it was said that in *California* the statute places the stenographer's transcripts of evidence in criminal cases upon the footing of depositions. There is no similar provision relating to transcripts of the evidence in civil cases.

2. Must Be Transcribed. — *People v. Carty*, 77 Cal. 213, holding that the stenographer must also affirm both the correctness of the transcription and the correctness of his notes; *Lipscomb v. Lyon*, 19 Neb. 511, holding that the stenographer's notes of the testimony before a coroner or committing magistrate must not only be transcribed, but they must be read to, approved, and signed by the witness before they can be read to contradict the testimony of such witness on the trial.

3. Notes Taken Before Grand Jury. — *Higgins v. State*, 157 Ind. 57.

4. Transcript Must Be Incorporated into Bill of Exceptions. — *Moore v. State*, 65 Ark. 330; *Dick v. Mullins*, 128 Ind. 365; *Fahlor v. State*, 108 Ind. 387; *Marshall v. State*, 107 Ind. 173; *Lowery v. Carver*, 104 Ind. 447; *Woollen v. Wishmier*, 70 Ind. 108; *Shirk v. Coyle*, 2 Ind. App. 354; *Lowe v. Lowe*, 40 Iowa 220. And see the title *BILLS OF EXCEPTIONS*, 3 ENCYC. OF PL. AND PR. 436 *et seq.*

More Reference to Notes in Bill of Exceptions Not Sufficient. — *Dick v. Mullins*, 128 Ind. 365; *Lowe v. Lowe*, 40 Iowa 220. *Compare* *Garrett v. State*, 149 Ind. 264.

5. Must Be Certified. — *Shirk v. Coyle*, 2 Ind. App. 354; *Hammond v. Wolf*, 78 Iowa 227; *Kavalier v. Machula*, 77 Iowa 121; *Harrison v. Snair*, 76 Iowa 558; *De Long v. Lee*, 73 Iowa 53; *Merrill v. Bowe*, 69 Iowa 653; *Richards v. Lounsbury*, 65 Iowa 587; *Lowe v. Lowe*, 40 Iowa 220; *McAllister v. Connecticut Mut. L. Ins. Co.*, 78 Ky. 531.

When Certification Should Be Made. — Where a statute requires that evidence be certified within six months, it apparently means that the transcript of the shorthand notes should be certified within that time, because it alone constitutes the written evidence. *Hammond v. Wolf*, 78 Iowa 227; *Merrill v. Bowe*, 69 Iowa 653.

Certification by Judge Who Cannot Read Shorthand Notes. — The certificate of a judge who

cannot read the shorthand notes will not give them the character of written evidence, and when the statute requires the certification of the evidence within six months from the rendition of the judgment, the translation of the shorthand notes, properly certified, must be filed within that time. *Hammond v. Wolf*, 78 Iowa 227.

6. Must Be Filed. — *Hammond v. Wolf*, 78 Iowa 227; *Kavalier v. Machula*, 77 Iowa 121; *Merrill v. Bowe*, 69 Iowa 653.

7. Notes Taken on Former Trial May Be Read. — *Chicago, etc., R. Co. v. Myers*, (C. C. A.) 80 Fed. Rep. 361; *Chicago, etc., R. Co. v. Robinson*, 16 Ill. App. 229; *Sage v. State*, 127 Ind. 15; *Bass v. State*, 136 Ind. 165; *State v. Smith*, 99 Iowa 26, 61 Am. St. Rep. 219; *Wright v. Wright*, 58 Kan. 525; *State v. Frederic*, 69 Me. 400; *Noyes v. Gilman*, 71 Me. 394; *Stewart v. Port Huron First Nat. Bank*, 43 Mich. 257; *Labar v. Crane*, 56 Mich. 585; *Pickard v. Bryant*, 92 Mich. 430; *Lawson v. Jones*, (C. Pl. Gen. T.) 1 Civ. Pro. (N. Y.) 247; *Merchants' Nat. Bank v. Stebbins*, 10 S. Dak. 466; *Quinn v. Halbert*, 57 Vt. 178; *Klepsch v. Donald*, 8 Wash. 162. See also *Mawich v. Elseay*, 47 Mich. 10. *Compare* *Byrd v. Hartman*, 70 Mo. App. 57; *Dempsey v. Lawson*, 76 Mo. App. 522.

Stenographer May Read Testimony from Original Notes. — Where a party has been examined in the first trial and is rendered incompetent by the death of his adversary before the second trial, the testimony of such party may be read in evidence by the stenographer who took it down at the former trial, from his notes, and it need not be in the form of a deposition reduced to writing and subscribed by the party. *Lawson v. Jones*, (C. Pl. Gen. T.) 1 Civ. Pro. (N. Y.) 247. See generally the title *EVIDENCE*, vol. 11, p. 523.

Certified Copy of Notes Admissible. — A duly certified copy of a stenographer's report is admissible in all cases where it would be proper to use the original. *Spielman v. Flynn*, 19 Neb. 342.

Testimony of Dumb Witness. — Where the statute makes the notes competent evidence, they are admissible even where the stenographer transcribes in words the signs of a dumb witness. *Quinn v. Halbert*, 57 Vt. 178.

May Be Read Even though Deposition Has Been Taken. — A stenographer's notes of testimony

even where the parties are not the same;¹ but stenographers are no more infallible than any other human beings, and while they may be generally accurate, intelligent, and honest, they are not always so, and it will not do to lay down as a rule that the stenographer's notes, when translated by him, are the best evidence of what the witness has said on a former trial,² so as to exclude the testimony of an intelligent bystander who has heard and paid particular attention to the testimony of the witness.³

6. Notes Taken and Transcribed by Different Stenographers. — Where notes are taken by one stenographer and transcribed by another, the transcript must be compared with the original notes, or it is not admissible in evidence.⁴

7. Notes of Testimony Given in Foreign Language. — Where the stenographer takes down the statements of a witness as they are translated by an interpreter, the notes of the testimony cannot be read at a subsequent trial by the stenographer unless he understood the language in which the testimony was given. The interpreter or some other person who was present at the first trial and

given on a former trial may be admitted even though the deposition of the witness himself has since been taken. *Labar v. Crane*, 56 Mich. 585.

Where Stenographer Has No Independent Recollection. — Where the stenographer testifies that he has correctly taken the testimony of a witness on a former trial, he may read his notes of such testimony, although he has no independent recollection of the testimony. *Wright v. Wright*, 58 Kan. 525.

Notes Need Not Be Intelligible to Persons Generally. — A stenographer may testify from his notes concerning a matter occurring on a former trial, notwithstanding he has no independent recollection of the facts. That the shorthand notes are not intelligible to persons generally does not remove the application of the rule, any more than if they had been written in a foreign language. *State v. Smith*, 99 Iowa 26, 61 Am. St. Rep. 219.

Immaterial Whether Translation Is Oral or in Writing. — When seeking to ascertain the testimony of a witness who has died, it is desirable that such testimony should be exactly reproduced if it is possible to do so. When the official stenographer is called for that purpose, his shorthand notes must be translated, either by himself or by some one else who is able to do it. It is immaterial whether the translation is oral or in writing. *Bass v. State*, 136 Ind. 165.

May Be Read to Refresh Memory of Witness When Introduced for Another Purpose. — The stenographer's notes of the testimony of a witness may be read to such witness in order to refresh his memory, even where the notes were at first introduced for another purpose. *Pickard v. Bryant*, 92 Mich. 430.

Stenographer's Report May Be Treated as Deposition. — A stenographer's report of the testimony of a witness given on a former trial may be admitted as evidence when it is shown that the attendance of such witness cannot be secured and that he was fully examined and cross-examined on the first trial; and the same weight may be accorded to such report as to a deposition duly taken upon notice. *Chicago, etc., R. Co. v. Myers*, (C. C. A.) 80 Fed. Rep. 361.

The Notes Must Be Authenticated in order to be admissible. Their accuracy cannot be assumed from the mere fact that the person who made them was the official stenographer. *Mis-*

ner v. Darling, 44 Mich. 438; *Klepsch v. Donald*, 8 Wash. 162.

And while the transcript is taken as *prima facie* correct if the stenographer testifies thereto, it may be shown that it is incorrect. *Reid v. Reid*, 73 Cal. 206.

To Impeach a Witness who has testified at a former trial, a party may produce the stenographer who took the report of such trial and have him read his notes. But it must be shown that the stenographer took the testimony at the time when it was uttered, that the notes are correct, and that the stenographer has no independent recollection of what the witness said. *Klepsch v. Donald*, 8 Wash. 162. See also *State v. Freidrich*, 4 Wash. 204.

Certificate Must Be Made Within Reasonable Time. — Part of the ground upon which public documents or copies thereof are admissible is the publicity of the subject-matter, and where a stenographer's certificate as to the evidence is admissible, it is a material circumstance that it was made not long after the testimony was given. *Reid v. Reid*, 73 Cal. 206.

Hearing for New Trial. — A transcript may be used on the hearing of a bill in equity for a new trial in a suit at law, the stenographer testifying to the correctness of the copy, that the witnesses were sworn, etc. *Brown v. Luehrs*, 79 Ill. 581.

1. Notes Taken in Different Action. — *Brown v. Willoughby*, 5 Colo. 1; *Kreuger v. Sylvester*, 100 Iowa 647; *Kerr v. Lunsford*, 31 W. Va. 659. *Contra*, *Lyon v. Brown*, 31 N. Y. App. Div. 67.

2. Not Best Evidence. — *Brice v. Miller*, 35 S. Car. 537.

And in *Pennsylvania*, although the statute provides that the stenographic notes, together with the charge of the judge, "shall be deemed and held to be official and the best authority in any matter of dispute," it has been held that the notes are the best evidence only when made up under the eye and direction and with the approval of the court, and they are subject to be modified and moulded in accordance with what may be judicially found to be the fact. *Taylor v. Preston*, 79 Pa. St. 436.

3. Other Evidence Not Excluded by Notes. — *Brice v. Miller*, 35 S. Car. 537.

4. Notes Taken and Transcribed by Different Stenographers Must Be Compared. — *People v. McKinney*, 49 Mich. 334.

understood the language in which the statements were given should be called to prove such notes.¹

8. Notes Cannot Be Introduced to Show Who Is Petitioner in Action. — The judgment of the stenographer, as expressed by the entry in his minutes, as to who is the petitioner in an action or as to who employs certain counsel is no proof of either fact.²

9. Harmless Error in Admitting Notes. — Where a stenographer's report was erroneously admitted as evidence, but such evidence was merely cumulative, the error was held to be harmless.³

X. STENOGRAPHER AS WITNESS. — **1. Right to Use Notes to Refresh Memory.** — A stenographer who is called to testify as to what was stated by a witness on a former examination may use his notes to refresh his memory,⁴ and he may do this although independently of such notes he has no recollection of the testimony.⁵

2. Impeachment of Stenographer's Testimony. — Where the testimony is taken down by a stenographer who is an officer of the court, the mere statement of the witness afterwards that he does not recollect giving such testimony is not an impeachment of the stenographer's testimony, nor does it justify a court or jury in finding that he did not so testify.⁶

3. To What Stenographer May Not Testify. — A stenographer cannot testify, for purposes of impeachment, to detached portions of testimony on a former trial to which the witness's notice has not been called.⁷

4. Necessity of Oath — Waiver of. — Although the stenographer is a sworn officer of the court, he must take the oath of a witness when he takes the stand to testify. But if the failure to take the oath is known to the opposite party, an objection thereto must be raised within a reasonable time or it is waived.⁸

5. Stenographer Not Only Witness Who May Be Examined. — Where it is sought to impeach a witness by proving his testimony at a former trial, the stenographer is not the only witness who may be called, but any one who heard the testimony may be examined.⁹

XI. REMOVAL. — A stenographer may be removed at any time, upon proper charges entered of record, for incompetency or misconduct in office. The

1. Testimony in Foreign Language. — *People v. Ah Yute*, 56 Cal. 119.

2. Notes Cannot Be Introduced to Show Who Is Petitioner in Action. — *Williams v. Lewis*, 13 N. Y. App. Div. 130.

3. Harmless Error in Admitting Notes. — *Byrd v. Hartman*, 70 Mo. App. 57.

4. May Use Notes to Refresh Memory. — *People v. Lem-You*, 97 Cal. 224; *People v. Carty*, 77 Cal. 213; *Keith v. State*, 157 Ind. 376; *State v. Smith*, 99 Iowa 26, 61 Am. St. Rep. 219; *State v. Baldwin*, 36 Kan. 1; *Stahl v. Duluth*, 71 Minn. 341; *State v. George*, 60 Minn. 503; *Kellogg v. Scheuerman*, 18 Wash. 293; *State v. Freidrich*, 4 Wash. 204.

5. Where Stenographer Has No Independent Recollection of Testimony. — Chicago, etc., R. Co. v. Robinson, 16 Ill. App. 229; *State v. Smith*, 99 Iowa 26, 61 Am. St. Rep. 219; *State v. Baldwin*, 36 Kan. 1; *Stahl v. Duluth*, 71 Minn. 341. Compare *Moore v. Moore*, 39 Iowa 461.

When Stenographer May Resort to Notes. — While a stenographer who is called as a witness may refresh his memory from his notes if he has no independent recollection of the facts, it is only when the memory needs assistance that such resort may be had to the notes. *State v. Baldwin*, 36 Kan. 1.

Notes Must Be Produced in Court. — Chicago, etc., R. Co. v. Robinson, 16 Ill. App. 229.

Right to Read Notes. — In *Washington* it has been held that a stenographer called as a witness may use his notes of the testimony to refresh his recollection, but he cannot read such testimony except by agreement of the parties, and even then the record must clearly show such agreement. *Kellogg v. Scheuerman*, 18 Wash. 293.

In *Indiana* a stenographer may be allowed to testify and to read his shorthand notes regarding the testimony of witnesses before the grand jury. *Keith v. State*, 157 Ind. 376.

6. Impeachment of Stenographer's Testimony. — *Gillespie v. Beecher*, 96 Mich. 486.

7. To What Stenographer May Not Testify. — *Seligman v. Ten Eyck*, 53 Mich. 285.

8. Necessity of Oath — Waiver of. — *State v. Hannett*, 54 Vt. 83.

Unsworn Statement of Stenographer. — In *Penberthy v. Lee*, 51 Wis. 261, it was held that an unofficial and unsworn statement of a stenographer, probably made long after the trial, that he took down the judge's charge, but had lost it, was not sufficient to show that the charge was taken down by him.

9. Other Witnesses May Be Examined. — *State v. McDonald*, 65 Me. 466. See also *Brice v. Miller*, 35 S. Car. 537.

nature of the misconduct should be specified and the stenographer should have an opportunity to be heard.¹

XII. COMBINATION OF STENOGRAPHERS. — It has been held that an association of stenographers whose leading object is to control the prices charged by its members is an illegal combination, and its rules will not be enforced.²

STENOGRAPHY. — See note 3.

STEPCHILDREN. — See CHILD — CHILDREN, vol. 5, p. 1098; GRANDCHILD, vol. 14, p. 1110; ISSUE (DESCENDANTS), vol. 17, p. 544.

STEPFATHER. — A stepfather has been defined as "the husband of one's mother who is not one's father."⁴

STEP IN THE PROCEEDINGS. — See note 5.

STERLING MONEY. — See note 6.

STEVEDORE. (See also the title SEAMEN, vol. 25, p. 1027.) — A stevedore is one whose occupation is to load and unload vessels in port.⁷

STICKS. — See note 8.

STIFFENING ORDER. — See note 9.

1. **Removal.** — *State v. Slover*, 113 Mo. 202. See also *Magoohan v. Curran*, 71 Conn. 551.

2. **Combination of Stenographers.** — *More v. Bennett*, 140 Ill. 69, 33 Am. St. Rep. 216.

3. **Stenography.** (See also the title STENOGRAPHERS, *ante*.) — In *Cummings v. Armstrong*, 34 W. Va. 7, it was said: "There are technically two modes of writing in shorthand — one called *stenography*, and the other, the more modern method, called 'phonography.' From the Greek derivation, however, of the term *stenography*, we perceive that it means to write in narrow compass, and hence the word *stenography* may well serve to express the generic term for shorthand writing; and its use in this sense is sanctioned by custom and the authority of Webster and other standard lexicographers. It is so used in the Pennsylvania law, and our legislators might well have retained it, as synonymous with 'shorthand,' without any danger of misinterpretation."

4. **Stepfather.** — Whart. L. Dict., *quoted* in *Thornburg v. American Strawboard Co.*, 141 Ind. 446, in which case it was held that a man who married the mother of a bastard child did not become the *stepfather* of such child.

5. **Step in the Proceedings.** — By section 4 of the *English Arbitration Act*, 1889, it was provided that "if any party to a submission * * * commences any legal proceedings in any court against any other party to the submission * * * in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other *steps in the proceedings*, apply to that court to stay the proceedings." In construing this provision, the court said: "Subsequently to the amendment of the counterclaim, upon the hearing of the defendant's summons for directions, the plaintiff applied for and obtained leave to administer interrogatories to the defendant. That I think clearly amounted to a *step* by the plaintiff *in the proceedings*, and consequently the judge was right in holding that he had no jurisdiction to make the order asked for." *Chappell v. North*, (1891) 2 Q. B. 256.

In *Ford's Hotel Co. v. Bartlett*, (1896) A. C. 1, it was held that where a defendant took out

a summons and obtained an order for further time for delivering his defense, he took a *step in the proceedings*.

In *Ives v. Willans*, (1894) 2 Ch. 478, *affirming* (1894) 1 Ch. 68, it was held that a notice by the defendant requiring a statement of claim was not a *step in the proceedings*.

A mere filing of affidavits in answer to a motion for a receiver, in an action for dissolution of a partnership, has been held not to be a *step in the proceedings*. *Zalinoff v. Hammond*, (1898) 2 Ch. 92.

In *Brighton Marine Palace Co. v. Woodhouse*, (1893) 2 Ch. 486, it was held that an application by letter, under a rule of court, for extension of time to put in a statement of defense was not a *step in the proceedings*.

6. **Sterling Money.** — See *Warder v. Whittall*, 1 N. J. L. 98; *Curtis v. Leavitt*, 17 Barb. (N. Y.) 324.

7. **Stevedore.** — *Rankin v. Merchants', etc., Transp. Co.*, 73 Ga. 232, *quoting* Webst. Dict.

8. **Sticks.** — A railroad company gave an order for a quantity of timber for building cars. After the expiration of some time, none of the timber having been delivered, the company countermanded the order, stating that the contractor might deliver the *sticks* he had then ready, but need not saw any more. In construing this contract, in *Cincinnati, etc., R. Co. v. Dickey*, 30 Ohio St. 19, the court said: "The first clause of the countermanding order is a full revocation of the original order, and the reason assigned is that the company 'could not wait, and had to get the timber elsewhere.' The word 'timber' in this clause evidently refers to the sawed lumber originally ordered. In the next clause, permission is given to deliver 'the few *sticks*' then ready. The word *sticks* here evidently refers to the word 'timber' in the sense it is used in the former clause, meaning *sticks* of timber then ready. The word *sticks* cannot mean the unsawed logs on hand, as if the writing had said, 'You may send us the logs you have now ready.' It evidently refers to the sawed *sticks* of timber then ready for delivery."

9. **A Stiffening Order** "appears to be an order permitting a vessel to take on board heavy goods to steady the ship in lieu of ballast, which when necessary appears to be given with-

STIPEND. — See note 1.

STIPULATED. — See note 2.

STIPULATED DAMAGES. — See the title LIQUIDATED DAMAGES, vol. 19, p. 394.

STIPULATIONS. — See the title STIPULATIONS, 20 ENCYC. OF PL. AND PR. 604.

STIPULATIONS IN ADMIRALTY. — See the title ADMIRALTY, 1 ENCYC. OF PL. AND PR. 257, 264 *et seq.*

STIRPES. — See CAPITA, vol. 5, p. 134, and see the title SUCCESSION.

STOCK, STOCK IN TRADE, ETC. (See also the title EXEMPTIONS (FROM EXECUTION), vol. 12, pp. 133, 134; FIRE INSURANCE, vol. 13, pp. 113, 114; WILLS.) — The word "stock" used in connection with "farm" or "land" has a settled meaning whereby it is restricted to the animals which are used with, supported by, or reared upon it.³ For other meanings of the term and

out a regular entry outwards." *Mersey Docks, etc., Board v. Henderson*, 13 App. Cas. 600.

1. **Stipend.** — A balance due on a contract to build a bridge is not a *stipend*. *Morse v. Robertson*, 9 Hawaii 197.

2. **Stipulated Term of Payment.** — The provision in a statutory form of a bill of sale that there must be a *stipulated* time of payment has been held to mean that the time at which the payment must become obligatory upon the grantor must be fixed. *De Braam v. Ford*, (1900) 1 Ch. 142.

3. **Stock — Live Stock.** (See also LIVE, vol. 19, p. 427.) — *Graham v. Davidson*, 2 Dev. & B. Eq. (N. Car.) 171, *quoted* in *Baker v. Baker*, 51 Wis. 546.

The word *stock* in agriculture means domestic animals collected, raised, or used on a farm. *Webst. Dict., followed* in *State v. Clark*, 65 Iowa 338; *Inman v. Chicago, etc., R. Co.*, 60 Iowa 461.

Confined to Live Stock. — A testator devised and bequeathed a certain farm and "all the *stock*, grain, and farming utensils." It was held, in accordance with the definition above, that *stock* did not include wool. *Baker v. Baker*, 51 Wis. 544.

A testator bequeathed all his *stock* and movable property to a certain legatee. The court, in construing this bequest, said: "By his *stock* the testator seems, from the context and tenor of the entire instrument, to have intended nothing more than his live *stock*." *Wood v. George*, 6 Dana (Ky.) 344.

A testator directed his executors "in case there is not a sufficiency of *stock* to pay my debts, then to dispose of so much of the land as will satisfy the balance." In construing this provision the court said: "If, in thus using the term *stock*, the testator intended to include his whole personal estate, then the court below erred; but if he meant by it only domestic animals, such as horses, cattle, sheep, swine, and the like, then the judgment should be affirmed. We are of opinion that the term *stock* was used by the testator in its agricultural sense, as signifying domestic animals and nothing more. The context seems to forbid any larger definition." *Heagy v. Cheesman*, 33 Ind. 98.

In *Saunders v. Greever*, 85 Va. 279, the term *stock* was confined to live *stock*, and not extended to farming implements and kitchen furniture.

But in *England* it has been held that the terms

"*stock* of my farm" and "farming *stock*" include all the movable property upon or belonging to the farm, and even the growing crops. *Harvey v. Harvey*, 32 Beav. 441; *In re Roose*, 17 Ch. D. 696; *West v. Moore*, 8 East 339. In *Howze v. Howze*, 19 Tex. 557, however, this English construction of "farm *stock*" was particularly noticed, and was held not to be applicable to the United States, a bequest of *stock* in that case being held not to include a wagon. See also *Pratte v. Coffman*, 27 Mo. 427.

A will provided that all of the testator's "notes, bonds, *stock*, and money on hand" should be divided between certain persons. In construing this will, the court said: "It is contended by the plaintiffs that the word *stock*, used in the fourteenth paragraph, means choses, bonds of corporate bodies or of governments, or evidence of shares in corporations or joint-*stock* companies, while the defendants contend that it means live *stock*, horses, mules, cattle, etc. The court below adopted the defendants' contention, and held that it meant live *stock* — domestic animals. In this, we are of the opinion, there was error, and that the plaintiffs' contention is correct; that is, that it means dead *stock*, choses, bonds, evidence of an interest in capital *stock* of some incorporated or joint-*stock* company. This is the primary meaning, in law language, of the word *stock*." *Capehart v. Burrus*, 122 N. Car. 122.

Swine. — In *State v. Clark*, 65 Iowa 336, it was held that the word *stock*, as used in a statute making it a misdemeanor to release distrained *stock*, had its ordinary meaning and included swine.

Team of Horses. — In *Inman v. Chicago, etc., R. Co.*, 60 Iowa 462, a team of horses which were harnessed to a wagon, but had escaped from the control of the owner, were held to be "live *stock* running at large," within a statute allowing damages against a railroad company for *stock* killed or injured.

But in *Dudley v. Deming*, 34 Conn. 173, it was said that "the term *stock*, as used in the finding, uniformly imports cattle, and not horses, and such is its popular meaning when used in respect to a farm."

Dogs Are Not Stock within the meaning of the *Texas* statute (now Rev. Stat. Tex. 1895, art. 4528) requiring railroads to fence against *stock*. *Texas, etc., R. Co. v. Scott*, 4 Tex. App. Civ. Cr., § 277.

Stock on Farm. — A testator gave all his

phrases in which it occurs, see note 1.

"*stock* of cattle, horses, and carriages" to his wife absolutely, and gave his farm "*and stock and crop thereon*" to his said wife during widowhood. It was held that the live *stock* upon the farm given to the wife during widowhood passed to her absolutely under the former clause. *Randall v. Russell*, 3 Meriv. 190. See also for a construction of this term in a will, *Brooksbank v. Wentworth*, 3 Atk. 64.

1. **Railroads.**—An *Indiana* statute required the president or other accounting officer of every railroad company in the state to furnish to the auditor of the county in which the principal office of the road was situated a list of *stock* for taxation. It was held that the word *stock* as here used did not mean the subscriptions of *stock*, but the actual, tangible property of such company. The court, *per Perkins, J.*, said: "The word *stock* is used, both in common parlance and statutory enactments, in a variety of senses, some broader, some more limited. Its use may open a wide field for the work of interpretation, and require a close consideration of the whole subject-matter in relation to which it is applied. We speak of the goods of a merchant as his *stock*; of the lumber and materials of the manufacturer as his *stock* of raw materials; of the cattle, hogs, etc., of the farmer as his *stock*; of the cars, locomotives, etc., of the railroad companies as their *stock* of these articles respectively; and we speak of the subscriptions and shares in these companies as *stock*, though these are more properly, it would seem, denominated the capital *stock* of such corporations." *State v. Hamilton*, 5 Ind. 313. See also *Auditor v. New Albany, etc.*, R. Co., 11 Ind. 570; *Michigan Cent. R. Co. v. Porter*, 17 Ind. 380.

Ironworks.—A testator bequeathed his estate, together with his share of the personal *stock* held in certain ironworks, to his daughters. In construing this provision the court said: "But, say the appellants, pig iron and castings, at the end of the year when a settlement took place, was entered into a book of account of *stock*. I answer, it was not 'personal *stock*,' such as E. Dorsey's will contemplated. But suppose this to be the case, yet the annual profits made were never intended by the testator, E. Dorsey, to pass by the devise to C. Dorsey; they were disposed of in another manner. What are the words of the will? 'All his share of personal *stock*,' which obviously means the negroes, teams, etc., necessary and used for carrying on ironworks; not the increase or profits acquired after the testator's death." *Dorsey v. Dorsey*, 4 Har. & M. (Md.) 236.

Rolling Stock.—See *ROLLING STOCK*, vol. 24, p. 1007.

Leather.—A testator by his will gave his plantation and tannery with "the *stock* of every kind." It was held that the term *stock* included leather in the vats. *Cameron v. Raleigh*, 1 Ired. Eq. (N. Car.) 436.

Stock of Goods.—Where a mortgage described property as a *stock* of goods, and provided that the mortgagor might retain and use them until default in payment, it was held that the "use" of the goods, consisting of liquors, etc., did not necessarily imply that the mortgagor

might sell them, although he was a trader in liquors, as wines and liquors are frequently kept in store to improve by age, as one of their uses by the owner. *Cleaves v. Herbert*, 61 Ill. 126.

Stock on Hand—Baker.—A mortgage was given on the "*stock on hand*" of a baker. In holding this description not to be sufficient, the court said: "The words of the mortgage attempting to describe this class of property are '*stock on hand*.' This may be a convenient phrase to cover a *stock* of merchandise in some transactions; but it is not such a description as would show to third persons, with reasonable certainty, what particular goods the mortgage applied to. It may well be asked, and asked in vain, what *stock* of goods was intended? Was it the *stock on hand* when the mortgage was made, or the *stock* which might be on hand when the debt to be secured became due? The phrase used is so convertible, capable of such dilation and contraction, and such diversity of construction and application, it is, doubtful whether the parties to the mortgage both intended one and the same thing by it." *Rocheleau v. Boyle*, 11 Mont. 471.

Same—Parol Evidence.—In *Brady v. Cassidy*, 104 N. Y. 147, parol evidence was held to be inadmissible to explain what was meant by "*stock on hand*" in a bill of sale of "the entire manufactured *stock* * * * now on hand at foundry and storerooms."

Stock of Hair.—In *Medina v. Builders' Mut. F. Ins. Co.*, 120 Mass. 225, it was held that a policy of insurance upon a "*stock* of hair, wrought, raw, and in process, as retail hair store," did not extend to fancy goods made of other materials, although such as were usually kept and sold in a retail hair store.

"Stock of a Porkhouse"—**Insurance Policy.**—See *Ætna Ins. Co. v. Jackson*, 16 B. Mon. (Ky.) 257.

Stock of Watches.—See *Crosby v. Franklin Ins. Co.*, 5 Gray (Mass.) 505, stated under the title *FIRE INSURANCE*, vol. 13, p. 114.

"Stock of Ladies' Notions."—A mortgage described the goods as "the general *stock* of millinery goods, *stock* of ladies' notions, consisting of hats," etc., "and all other goods now on hand or to be purchased and used in the business of a general millinery store." It was held that by the phrase "*stock* of ladies' notions," only such property was conveyed as was described immediately following such phrase, and that by the last clause was meant only such millinery as might be on hand for sale, or might be purchased for sale, or might be made up for sale. *Chapin v. Garretson*, 85 Iowa 380.

Stock in Trade.—*Stock in trade*, when applied to any specified business in a policy of insurance, has been held to include not only the materials used, but everything necessary for carrying on the business. *Phoenix Ins. Co. v. Taylor*, 5 Minn. 492.

Same—Animals.—The word *stock* "generally comprehends articles accumulated in a business or calling for use and disposal in its regular prosecution. To speak of sheep purchased for feeding as merchandise, and of a flock as the *stock* of a merchant, would not be

giving the words used their ordinary significance." *Jewell v. Sumner Tp.*, 113 Iowa 51.

Same — Bailments. — An application was for insurance on the applicants' "*stock in trade* consisting of grain, guano, and salt in forwarding house." It was held that the policy embraced only such *stock in trade* as belonged to the applicants, and did not embrace fertilizers consigned to them for sale on commission. *Planters' Mut. Ins. Co. v. Engle*, 52 Md. 479.

A *Mississippi* statute fixed a privilege tax upon each store in proportion to the *stock* carried therein. It was held that *stock*, as here used, comprised only the goods, etc., kept by the merchant for sale in the course of business, and did not include cotton taken by the merchant in payment of debts. *Harness v. Williams*, 64 Miss. 600.

Same — Barges. — In *Re Richardson*, 50 L. J. Ch. 488, it was held that old barges accepted by a barge builder in part payment of new ones, and let out by him on hire, formed a part of his *stock in trade*.

Same — Goods to Be Manufactured Held to Be Included. — See the title EXEMPTIONS (FROM EXECUTION), vol. 12, pp. 133, 134, and see *Elliott v. Elliott*, 9 M. & W. 23.

But in *Woodman v. American Print Works*, 6 R. I. 472, it was held that *stock in trade* did not include goods in the course of manufacture. The court held that the words meant "goods for sale — a *stock* of goods offered for sale."

Same — Good Will. — Upon a dissolution of partnership and division of the *stock in trade*,

property, etc., it was held that the good will was not within the phrase *stock in trade*. *Chapman v. Hayman*, 1 Times Rep. 397.

Same — Income. — In *Wilcox v. Middlesex County*, 103 Mass. 545, it was held that a merchant's income from his business was taxable, though he was also taxed on his *stock in trade*.

Same — Liquors. — In *Weil v. Nevitt*, 18 Colo. 10, it was held that *stock in trade*, in an exemption statute, applied to a merchant or shopkeeper as well as to a mechanic and included the *stock* of goods kept on sale by a merchant. And it was further held that so long as the government recognizes the sale of intoxicating liquors as lawful, any one regularly carrying on business as a saloon keeper is entitled to the benefit of the exemption statute as a liquor merchant, his liquors being his *stock in trade*.

Same — Merchants. — See the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 133.

Railroad Cars used by a manufacturer in the transportation of his manufactures are not *stock in trade*. *Comstock v. Grand Rapids*, 54 Mich. 646.

Same — Revenue Stamps. — Where one carried on the business of selling United States internal revenue stamps, it was held that the revenue stamps which he had on hand were not subject to taxation under the *Massachusetts* statute as *stock in trade*. *Palfrey v. Boston*, 101 Mass. 329.

Tools. — See the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 133.

STOCK AND PRODUCE EXCHANGES.

By X. P. HUDDY.

- I. SCOPE OF TITLE, 789.
- II. DEFINITIONS, 789.
 - 1. *Stock Exchanges*, 789.
 - 2. *Produce Exchanges*, 790.
- III. NATURE AND LEGAL STATUS, 790.
 - 1. *Stock Exchanges*, 790.
 - 2. *Produce Exchanges*, 791.
- IV. ORIGIN AND HISTORY, 792.
 - 1. *Stock Exchanges*, 792.
 - 2. *Produce Exchanges*, 792.
- V. PROPERTY RIGHTS OF STOCK-EXCHANGE MEMBERS, 792.
- VI. INDIVIDUAL LIABILITY OF STOCK-EXCHANGE MEMBERS, 792.
- VII. SEATS IN STOCK AND PRODUCE EXCHANGES, 793.
 - 1. *Legal Character and Status*, 793.
 - 2. *Acquisition*, 795.
 - 3. *Disposition*, 795.
 - a. *Voluntary Transfer*, 795.
 - b. *Involuntary Transfer*, 795.
 - (1) *At Law*, 795.
 - (2) *In Equity*, 795.
 - (3) *Disposal of Forfeited Seat*, 796.
 - (4) *Disposal of Deceased Member's Seat*, 796.
- VIII. EXPULSION OF MEMBERS, 796.
 - 1. *Inherent Power to Expel*, 796.
 - 2. *Power to Expel under Express Regulations*, 797.
 - 3. *Proceedings for Expulsion*, 798.
 - a. *In General*, 798.
 - b. *Nature of Proceedings*, 798.
 - c. *Members' Rights*, 798.
- IX. REMEDY FOR IMPROPER EXPULSION — INTERFERENCE OF COURTS, 799.
 - 1. *In General*, 799.
 - 2. *Mandamus*, 799.
 - 3. *Injunction*, 800.
 - 4. *Action for Damages*, 801.
- X. QUOTATIONS — RIGHT OF PROPERTY IN, 801.
 - 1. *Stock Exchange*, 801.
 - 2. *Board of Trade*, 801.
- XI. RULES AND REGULATIONS, 803.
 - 1. *Right to Adopt*, 803.
 - 2. *Legality*, 803.
 - 3. *Members as Preferred Creditors*, 804.
 - a. *Proceeds from Defaulting or Insolvent Member's Seat*, 804.
 - b. *Fund Arising from Closing Defaulting Member's Transactions on Exchange*, 804.
 - c. *Proceeds from Deceased Member's Seat*, 805.
 - 4. *Arbitration Clause*, 805.
 - a. *In General*, 805.
 - b. *Jurisdiction of Arbitration Committee or Board*, 805.

- c. Operation and Effect of Arbitrators' Decision*, 805.
- d. Effect of Clause on Jurisdiction of Courts*, 806.
- 5. *Gratuity or Benefit Fund*, 806.
 - a. In General*, 806.
 - b. Beneficiaries*, 806.
 - c. Nature of Beneficial Interest*, 807.

CROSS-REFERENCES.

For matters of *PROCEDURE*, see in the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE* the following titles: *CORPORATIONS*, vol. 5, p. 52; *CREDITORS' BILLS AND FRAUDULENT CONVEYANCES*, vol. 5, p. 388; *INJUNCTIONS*, vol. 10, p. 869; *MANDAMUS*, vol. 13, p. 479; *PARTIES TO ACTIONS*, vol. 15, p. 456; *SOCIETIES AND CLUBS*, vol. 20, p. 272; *SUPPLEMENTARY PROCEEDINGS*, vol. 21, p. 85; *UNINCORPORATED SOCIETIES*, vol. 22, p. 228.

For other matters of *SUBSTANTIVE LAW and EVIDENCE* related to this subject, see the following titles in this work: *AGENCY*, vol. 1, p. 930; *AMOTION*, vol. 2, p. 310; *ARBITRATION AND AWARD*, vol. 2, p. 533; *BROKERS*, vol. 4, p. 959; *BY-LAWS*, vol. 5, p. 86; *CLEARING HOUSE*, vol. 6, p. 113; *CORPORATIONS (PRIVATE)*, vol. 7, p. 620; *DAMAGES*, vol. 8, p. 537; *DISFRANCHISEMENT*, vol. 9, p. 477; *EXECUTIONS*, vol. 11, p. 604; *FACTORS OR COMMISSION MERCHANTS*, vol. 12, p. 625; *GAMBLING CONTRACTS*, vol. 14, p. 576; *INJUNCTIONS*, vol. 16, p. 337; *JOINT-STOCK COMPANIES*, vol. 17, p. 636; *MANDAMUS*, vol. 19, p. 709; *PARTNERSHIP*, vol. 22, p. 2; *SOCIETIES, CLUBS, AND UNINCORPORATED ASSOCIATIONS*, vol. 25, p. 1129; *STOCK AND STOCKHOLDERS*, *post*; *STOCKBROKERS*, *post*; *TAXATION*. And see *BOARD OF TRADE OR PRODUCE EXCHANGE*, vol. 4, p. 594.

I. SCOPE OF TITLE. — It is the purpose of this title to treat of the principles of law as established by the cases pertaining to the associations known as stock and produce exchanges, including other similar associations such as boards of brokers, boards of trade, merchants' exchanges, commercial associations, and chambers of commerce, both incorporated and unincorporated, which are organized for substantially the same general purposes in their own particular business as stock and produce exchanges.

II. DEFINITIONS — 1. *Stock Exchanges.* — The associations known as stock exchanges may be defined as private¹ voluntary unincorporated associations,² which are neither partnerships³ nor joint-stock companies,⁴ and are organized

1. *Associations Private.* — *Wilson v. Commercial Telegram Co.*, (Supm. Ct. Spec. T.) 3 N. Y. Supp. 633; *Commercial Telegram Co. v. Smith*, 47 Hun (N. Y.) 494; *Matter of Renville*, 46 N. Y. App. Div. 37.

2. *Associations Voluntary* — *United States*. — *Hyde v. Woods*, 94 U. S. 523; *In re Gaylord*, 111 Fed. Rep. 717.

California. — *Swift v. San Francisco Stock, etc.*, Board, 67 Cal. 567; *Clute v. Loveland*, 68 Cal. 254; *Lowenberg v. Greenebaum*, 99 Cal. 162, 37 Am. St. Rep. 42; *Rorke v. San Francisco Stock, etc.*, Board, 99 Cal. 196.

Maryland. — *Baltimore v. Johnson*, 96 Md. 737.

New York. — *White v. Brownell*, 2 Daly (N. Y.) 329; *Hutchinson v. Lawrence*, (Supm. Ct.) 67 How. Pr. (N. Y.) 38; *Wilson v. Commercial Telegram Co.*, (Supm. Ct. Spec. T.) 3 N. Y. Supp. 633; *Commercial Telegram Co. v. Smith*, 47 Hun (N. Y.) 494; *Matter of Renville*, 46 N. Y. App. Div. 37; *Young v. Eames*, 78 N. Y. App.

Div. 229; *Belton v. Hatch*, 109 N. Y. 593, 4 Am. St. Rep. 495, 21 Am. & Eng. Corp. Cas. 365; *Lewis v. Wilson*, 121 N. Y. 284; *People v. Feitner*, 167 N. Y. 1, 82 Am. St. Rep. 698; *Bernheim v. Keppler*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 321.

Pennsylvania. — *Leech v. Harris*, 2 Brews. (Pa.) 571; *Thompson v. Adams*, 12 Phila. (Pa.) 484, 34 Leg. Int. (Pa.) 382.

The *Toronto Stock Exchange* was incorporated by the statute 41 Vict., c. 65 (o). London, etc., Loan, etc., Co. v. Morphy, 10 Ont. 86, 12 Am. & Eng. Corp. Cas. 96. See also *Temple v. Toronto Stock Exch.*, 8 Ont. 705.

3. *Not Partnerships.* — *Caldicott v. Griffiths*, 8 Exch. 898; *Belton v. Hatch*, 109 N. Y. 593, 4 Am. St. Rep. 495, 21 Am. & Eng. Corp. Cas. 365; *Leech v. Harris*, 2 Brews. (Pa.) 571. See also *Wilson v. Commercial Telegram Co.*, (Supm. Ct. Spec. T.) 3 N. Y. Supp. 633; *White v. Brownell*, 2 Daly (N. Y.) 329.

4. *Not Joint-stock Companies.* — *Leech v. Har-*

for the purposes of affording to the members certain facilities for the transaction of their business as brokers in stocks and securities and establishing convenient exchange or sales rooms for the conduct of such transactions; also for the purpose of maintaining a high standard of integrity and commercial honesty among the members.¹

2. Produce Exchanges.—Produce exchanges, including boards of trade, merchants' exchanges, commercial associations, and chambers of commerce, are generally private incorporated associations composed of merchants, which are organized for substantially the same general purposes as stock exchanges. Thus, it is generally provided in the charters of these associations that the purposes of the corporation are to provide an exchange, to inculcate just and equitable principles in trade, to establish and maintain uniformity in commercial usages, to acquire, preserve, and disseminate valuable business information, and to adjust controversies and misunderstandings between persons engaged in business; and in some of the associations a declared purpose is to make provision for the widows and families of deceased members.²

Term "Exchange" Used to Designate Place.—The term "exchange" is used not only to designate the association but to designate the place, building, room, or market where stocks or commodities are bought and sold.³

III. NATURE AND LEGAL STATUS — 1. Stock Exchanges.—The legal status of many, if not most, of the stock exchanges is anomalous; though they are not

ris, 2 Brews. (Pa.) 571. See also White v. Brownell, 2 Daly (N. Y.) 329.

1. Bernheim v. Keppler, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 321; People v. Feitner, 167 N. Y. 1, 82 Am. St. Rep. 698; Belton v. Hatch, 109 N. Y. 593, 4 Am. St. Rep. 495, 21 Am. & Eng. Corp. Cas. 365. See also White v. Brownell, 2 Daly (N. Y.) 329; Wilson v. Commercial Telegram Co., (Supm. Ct. Spec. T.) 3 N. Y. Supp. 633; Commercial Telegram Co. v. Smith, 47 Hun (N. Y.) 494; Leech v. Harris, 2 Brews. (Pa.) 571.

Stock Exchange in England Defined.—See Brown's L. Dict.

The Baltimore Stock Exchange was organized for the purpose "of affording to its members * * * facilities for the transaction of business by providing them with a convenient exchange or salesroom rented for that purpose." See Baltimore v. Johnson, 96 Md. 737.

Purposes of New York Stock Exchange Not Expressly Enumerated, but Declared by Judicial Construction.—Bernheim v. Keppler, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 321.

2. The Purposes of the New York Produce Exchange are substantially those enumerated in the text. Haebler v. New York Produce Exch., 149 N. Y. 414.

The Chicago Board of Trade was organized for the following purposes: "To maintain a commercial exchange; to promote uniformity in the customs and usages of merchants; to inculcate principles of justice and equity in trade; to facilitate the speedy adjustments of business disputes; to acquire and disseminate valuable commercial and economic information, and generally to secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits." Board of Trade v. Nelson, 162 Ill. 431, 53 Am. St. Rep. 312.

The Merchants' Exchange of St. Louis was organized for substantially the same purposes as the New York Produce Exchange. Warren v. Merchants' Exch., 52 Mo. App. 157; Albers

v. Merchants' Exch., 138 Mo. 140; Goddard v. Merchants' Exch., 9 Mo. App. 290; Eliot v. Merchants' Exch., 14 Mo. App. 234.

The Chamber of Commerce of Minneapolis was incorporated and organized, among other purposes, to facilitate the buying and selling of all products and to inculcate principles of justice and equity in trade. State v. Chamber of Commerce, 77 Minn. 308.

The Cincinnati Chamber of Commerce was organized to inculcate, to encourage, and to maintain a high standard of mercantile honor. Blumenthal v. Cincinnati Chamber of Commerce, 8 Ohio Dec. (Reprint) 622.

The Importers' and Grocers' Exchange of New York was organized "to foster trade and commerce in groceries and East Indian and South American products, to protect such trade from unjust and unlawful exactions, to reform abuses in such trade, to diffuse accurate and reliable information among its members, to produce uniformity and certainty in customs and usages of the trade in said merchandise, to settle differences between the members of said corporation, and to promote a more enlarged and friendly intercourse between merchants engaged in said trade, and generally to increase the facilities for conducting the trade in groceries and East Indian and South American products." Matter of Importers, etc., Exchange, 15 Daly (N. Y.) 413.

3. Term Used to Designate Place.—Abb. L. Dict.; Cent. Dict.; Webst. Int. Dict.; Cyclopedic Dict.

"A place where merchants and brokers meet for business, at specified hours. Contracted into 'Change. Called 'stock' exchange, 'produce' exchange, 'petroleum' exchange, 'grain' exchange, 'pork' exchange, etc., from the nature of the business in which contracts for the purchase and sale of securities or commodities are made. The distinctive word may designate the association itself, as well as the place where its meetings are held." And. L. Dict. See also

partnerships and ordinarily are not corporations,¹ yet they possess some of the characteristics of both.² They may, perhaps, be more properly classified with voluntary societies and clubs than with any other institutions known to the law.³

Like Corporations, unincorporated associations such as stock exchanges may adopt constitutions and sets of by-laws, which are laws as to the members of the association,⁴ and they have a continued existence, unless voluntarily dissolved, and are unaffected by the death, resignation, suspension, or removal of members.⁵

Unlike Corporations, unincorporated stock exchanges have no charters,⁶ and are not organized in pursuance of any statute or legislative act.⁷ There are no special privileges conferred upon such associations by the state, and they owe no special duties to the public.⁸

There Is No Stock Issued to the Members of the Association, and the individual members cannot claim any rights of property in the association as stockholders.⁹

The Privilege of Membership in a voluntary association of this kind is derived exclusively from the body that bestows it, and may be conferred or withheld at its pleasure.¹⁰

Unlike a Partnership, there is no contribution of capital by the members of the association for the prosecution of a common business,¹¹ and the members do not share each other's profits or losses; neither is there a division among the members of any profits which may accrue to the association from such property as it possesses;¹² nor does the death, resignation, or suspension of a member work a dissolution of the organization.¹³

2. Produce Exchanges. — As has been seen, produce exchanges, boards of trade, merchants' exchanges, commercial associations, and chambers of commerce are generally private corporations,¹⁴ but unlike ordinary business corporations and like the stock exchanges, these associations do not carry on business for pecuniary gain, issue stock, or pay dividends to their members; and, because the successful carrying out of the purposes for which produce

White v. Brownell, 2 Daly (N. Y.) 329, 4 Abb. Pr. N. S. (N. Y.) 192.

1. See *supra*, this title, *Definitions — Stock Exchanges*.

2. See *Belton v. Hatch*, 109 N. Y. 593, 4 Am. St. Rep. 495, 21 Am. & Eng. Corp. Cas. 369; *Wilson v. Commercial Telegram Co.*, (Supm. Ct. Spec. T.) 3 N. Y. Supp. 633.

In *Leech v. Harris*, 2 Brews. (Pa.) 571, the court said, in speaking of the Philadelphia Board of Brokers, an association similar to a stock exchange: "These associations have some elements in common with corporations, joint-stock companies, and partnerships, such as association, and being governed by regulations adopted by themselves for that purpose."

3. See *Biddle on Stock Brokers* 43; *Dos Passos on Stock-brokers* 13 *et seq.*; *Wilson v. Commercial Telegram Co.*, (Supm. Ct. Spec. T.) 3 N. Y. Supp. 633; *Young v. Eames*, 78 N. Y. App. Div. 229; *Belton v. Hatch*, 109 N. Y. 593, 4 Am. St. Rep. 495, 21 Am. & Eng. Corp. Cas. 365. See also *White v. Brownell*, 2 Daly (N. Y.) 329; *Leech v. Harris*, 2 Brews. (Pa.) 571.

Stock Exchange Similar to Club. — See *Wilson v. Commercial Telegram Co.*, (Supm. Ct. Spec. T.) 3 N. Y. Supp. 633; *Biddle on Stock Brokers* 43.

Stock Exchange Distinguished from Club by Legal Character of Seat or Membership. — See *infra*, this title, *Seats in Stock and Produce Exchanges — Legal Character and Status*.

4. See *infra*, this title, *Rules and Regulations — Right to Adopt*.

5. *White v. Brownell*, 2 Daly (N. Y.) 329; *Dos Passos on Stock-brokers* 14.

6. *Belton v. Hatch*, 109 N. Y. 593, 4 Am. St. Rep. 495, 21 Am. & Eng. Corp. Cas. 365. See also *Wilson v. Commercial Telegram Co.*, (Supm. Ct. Spec. T.) 3 N. Y. Supp. 633.

7. *White v. Brownell*, 2 Daly (N. Y.) 329. See also *Commercial Telegram Co. v. Smith*, 47 Hun (N. Y.) 494; *Leech v. Harris*, 2 Brews. (Pa.) 571.

8. *Wilson v. Commercial Telegram Co.*, (Supm. Ct. Spec. T.) 3 N. Y. Supp. 633; *Commercial Telegram Co. v. Smith*, 47 Hun (N. Y.) 494.

9. *White v. Brownell*, 2 Daly (N. Y.) 329.

10. **Membership Conferred or Withheld at Pleasure.** — *White v. Brownell*, 2 Daly (N. Y.) 329, holding that the law cannot compel such an organization to admit an individual to membership.

11. *Belton v. Hatch*, 109 N. Y. 593, 4 Am. St. Rep. 495, 21 Am. & Eng. Corp. Cas. 365; *White v. Brownell*, 2 Daly (N. Y.) 329; *Leech v. Harris*, 2 Brews. (Pa.) 575.

12. *White v. Brownell*, 2 Daly (N. Y.) 329; *Leech v. Harris*, 2 Brews. (Pa.) 571. See also the title *PARTNERSHIP*, vol. 22, p. 14 *et seq.*

13. *White v. Brownell*, 2 Daly (N. Y.) 329.

14. See *supra*, this title, *Definitions — Produce Exchanges*.

exchanges and like associations are organized depends upon the personal character and conduct of the members, they possess a power of suspending or expelling members which does not exist in ordinary business corporations.¹

IV. ORIGIN AND HISTORY — 1. Stock Exchanges. — The stock exchanges as they now exist cannot be said to have originated at any particular epoch, either in the United States or in Europe.² They are comparatively modern institutions, and have developed step by step in response to the demands of business necessity.³

2. Produce Exchanges. — Commercial exchanges have been in existence in Europe for centuries, and in the United States such organizations have existed since 1768.⁴ Many of the incorporated commercial exchanges of the United States to-day were originally voluntary unincorporated associations.⁵

V. PROPERTY RIGHTS OF STOCK-EXCHANGE MEMBERS. — Although it is not one of the functions of a stock exchange to hold property or to accumulate profits for the benefit of its members, nevertheless such bodies possess more or less property as a necessary incident to their existence,⁶ and in respect to the ownership of property, it has been said that the rights of the members are equal and are not substantially different from those of partners; the interest of each member being, however, subject to the constitution and by-laws of the association.⁷

A Member Has No Severable Proprietary Interest in the property or right to any proportionable part of it upon withdrawing, and is entitled merely to the enjoyment and use of it while he is a member, the property remaining with and belonging to the body while it continues to exist; and when the body ceases to exist, those who may then be members become entitled to their proportionate share of its assets.⁸

The Title to Real Estate used by unincorporated bodies of this kind is usually held by a corporation organized for that purpose, or by individual trustees,⁹ because of the common-law difficulties in the way of the acquisition, holding, and conveyance of title to real property by such a voluntary association in its own name.¹⁰

VI. INDIVIDUAL LIABILITY OF STOCK-EXCHANGE MEMBERS. — This topic has already been fully discussed.¹¹

1. See *supra*, this section, *Stock Exchanges*; *infra*, this title, *Expulsion of Members — Inherent Power to Expel*.

2. Biddle on Stock Brokers 43, 44, 49; Dos Passos on Stock-brokers 9.

3. Biddle on Stock Brokers 44; Dos Passos on Stock-brokers 9. See also *White v. Brownell*, 2 Daly (N. Y.) 329.

4. See Bisbee & Simonds on Law of Produce Exchange, §§ 10, 11.

5. *The Merchants' Exchange of St. Louis* was incorporated in 1863; prior to that time it existed as an unincorporated voluntary association. *Eliot v. Merchants' Exch.*, 14 Mo. App. 234; *Warren v. Merchants' Exch.*, 52 Mo. App. 157; *Albers v. Merchants' Exch.*, 138 Mo. 140. See also *Goddard v. Merchants' Exch.*, 9 Mo. App. 290.

The Chicago Board of Trade, prior to 1859, was a voluntary unincorporated association, but in that year it was incorporated. *Board of Trade v. Nelson*, 162 Ill. 431, 53 Am. St. Rep. 312.

"*The New York Produce Exchange* was created under an act of the legislature passed April 19, 1862. It was incorporated under the name of the New York Commercial Association. In 1867 its name was changed to New York Produce Exchange." *Haebler v. New York Produce Exch.*, 149 N. Y. 414.

The Importers' and Grocers' Exchange of New York was incorporated in August, 1883, and was dissolved in 1889. *Matter of Importers', etc., Exch.*, 15 Daly (N. Y.) 413.

6. *White v. Brownell*, 2 Daly (N. Y.) 329, 4 Abb. Pr. N. S. (N. Y.) 162.

7. *Belton v. Hatch*, 109 N. Y. 596, 4 Am. St. Rep. 495, 21 Am. & Eng. Corp. Cas. 365; *White v. Brownell*, 2 Daly (N. Y.) 329.

8. *White v. Brownell*, 2 Daly (N. Y.) 329. This is merely the general rule applicable to voluntary unincorporated associations. See the title *SOCIETIES, CLUBS, AND UNINCORPORATED ASSOCIATIONS*, vol. 25, pp. 1135, 1136.

9. See *Liggett v. Ladd*, 17 Oregon 89; *Clute v. Loveland*, 68 Cal. 254.

10. *East Haddam Cent. Baptist Church v. East Haddam Baptist Ecclesiastical Soc.*, 44 Conn. 259; *Liggett v. Ladd*, 17 Oregon 89. See also the title *SOCIETIES, CLUBS, AND UNINCORPORATED ASSOCIATIONS*, vol. 25, pp. 1132, 1133.

11. See the title *SOCIETIES, CLUBS, AND UNINCORPORATED ASSOCIATIONS*, vol. 25, p. 1136 *et seq.*

Where a Produce Exchange Was Incorporated for the Purpose of Dealing in Gambling and Wagering Contracts, it was held that the individual members were liable for money received by the agent of the concern and that it was no defense that the corporation was alone liable,

VII. SEATS IN STOCK AND PRODUCE EXCHANGES — 1. Legal Character and Status. — The term "seat" in a stock or produce exchange is used as synonymous with membership in the association,¹ the seat representing the member's rights in the exchange.²

Analogy to Membership in Social Club. — A seat in a stock or produce exchange is similar in nature to a membership in a social club in that its acquisition depends upon an election to membership in the association; but it is different in nature from a membership in a social club in that it can be bought or sold subject to the rules of the association, and has a money value, while a membership in a social club is not subject to sale, and has no marketable value.³

Seat Property of Pecuniary Value. — Because of the valuable facilities afforded to the owner of a seat, it possesses a pecuniary value,⁴ and although it is not a tangible thing,⁵ yet in a certain sense it is a species of property⁶ which may be bought and sold⁷ and may be applied in satisfaction of the owner's debts.⁸ However, it is not subject to absolute acquisition, ownership, or disposition,⁹

as the corporation was used merely as a cloak to cover the illegal acts. *McGrew v. City Produce Exch.*, 85 Tenn. 572, 4 Am. St. Rep. 771.

1. **Seats.** — See *In re Warder*, 10 Fed. Rep. 275; *Habenicht v. Lissak*, 78 Cal. 351, 12 Am. St. Rep. 63; *Londheim v. White*, (N. Y. City Ct. Spec. T.) 67 How. Pr. (N. Y.) 467; *Belton v. Hatch*, 109 N. Y. 593, 4 Am. St. Rep. 495, 21 Am. & Eng. Corp. Cas. 365; *Platt v. Jones*, 96 N. Y. 24; *McCabe v. Emmons*, 51 N. Y. Super. Ct. 219, *affirmed* 109 N. Y. 665.

2. *Lowenberg v. Greenebaum*, 99 Cal. 162, 37 Am. St. Rep. 42.

3. See *Grocers' Bank v. Murphy*, (C. Pl. Gen. T.) 60 How. Pr. (N. Y.) 426.

4. *Page v. Edmunds*, 187 U. S. 596; *In re Warder*, 10 Fed. Rep. 275; *Nashua Sav. Bank v. Abbott*, 181 Mass. 531; *Ritterband v. Baggett*, (N. Y. Super. Ct. Spec. T.) 4 Abb. N. Cas. (N. Y.) 67; *People v. Feitner*, 167 N. Y. 1, 82 Am. St. Rep. 698; *Belton v. Hatch*, 109 N. Y. 593, 4 Am. St. Rep. 495, 21 Am. & Eng. Corp. Cas. 365; *Platt v. Jones*, 96 N. Y. 24; *Powell v. Waldron*, 89 N. Y. 328, 42 Am. Rep. 301; *Matter of Glendinning*, 68 N. Y. App. Div. 125, *affirmed* 171 N. Y. 684; *London, etc., Loan, etc., Co. v. Morphy*, 10 Ont. 86, 12 Am. & Eng. Corp. Cas. 53.

Value of Seat Capital Invested in Business. — *People v. Feitner*, 167 N. Y. 1, 82 Am. St. Rep. 698. See *Matter of Glendinning*, 68 N. Y. App. Div. 125.

5. *McCabe v. Emmons*, 51 N. Y. Super. Ct. 219. See also *Baltimore v. Johnson*, 96 Md. 737; *Ritterband v. Baggett*, (N. Y. Super. Ct. Spec. T.) 4 Abb. N. Cas. (N. Y.) 67.

Whether in a Given Case It Is a Chose in Action depends upon whether the party entitled to it has rights under it which a purchaser from him or a transferee by operation of law can enforce. *McCabe v. Emmons*, 51 N. Y. Super. Ct. 219, *affirmed* 109 N. Y. 665.

6. *United States.* — *Page v. Edmunds*, 187 U. S. 596; *Sparhawk v. Yerkes*, 142 U. S. 1; *Hyde v. Woods*, 94 U. S. 523; *In re Gaylord*, 111 Fed. Rep. 717; *In re Page*, (C. C. A.) 107 Fed. Rep. 89; *In re Warder*, 10 Fed. Rep. 275.

California. — *Habenicht v. Lissak*, 78 Cal. 351, 12 Am. St. Rep. 63.

Maryland. — *Baltimore v. Johnson*, 96 Md. 737.

Massachusetts. — See *Fish v. Fiske*, 154 Mass. 302. See also *Currier v. Studley*, 159 Mass. 17.

Minnesota. — *State v. Chamber of Commerce*, 77 Minn. 308.

New York. — *Ritterband v. Baggett*, (N. Y. Super. Ct. Spec. T.) 4 Abb. N. Cas. (N. Y.) 67; *Londheim v. White*, (N. Y. City Ct. Spec. T.) 67 How. Pr. (N. Y.) 467; *Sewell v. Ives*, (N. Y. Super. Ct. Spec. T.) 61 How. Pr. (N. Y.) 54; *Grocers' Bank v. Murphy*, (C. Pl. Gen. T.) 60 How. Pr. (N. Y.) 426; *Matter of Hellman*, 174 N. Y. 254; *People v. Feitner*, 167 N. Y. 1, 82 Am. St. Rep. 698; *Belton v. Hatch*, 109 N. Y. 593, 4 Am. St. Rep. 495, 21 Am. & Eng. Corp. Cas. 365; *Platt v. Jones*, 96 N. Y. 24; *Powell v. Waldron*, 89 N. Y. 328, 42 Am. Rep. 301; *McCabe v. Emmons*, 51 N. Y. Super. Ct. 219, *affirmed* 109 N. Y. 665; *Matter of Glendinning*, 68 N. Y. App. Div. 125, *affirmed* 171 N. Y. 684.

Pennsylvania. — *Thompson v. Adams*, 12 Phila. (Pa.) 484, 34 Leg. Int. (Pa.) 382.

Canada. — *London, etc., Loan, etc., Co. v. Morphy*, 10 Ont. 86, 12 Am. & Eng. Corp. Cas. 53.

Membership in Board of Trade, Property. — *Nelson v. Board of Trade*, 58 Ill. App. 399.

Seat in Cotton Exchange, Property. — *Powell v. Waldron*, 89 N. Y. 328, 42 Am. Rep. 301; *Ritterband v. Baggett*, 42 N. Y. Super. Ct. 556.

Membership in Chamber of Commerce, Property. — *State v. Chamber of Commerce*, 77 Minn. 308.

Seat in Produce Exchange, Property. — *In re Warder*, 10 Fed. Rep. 275.

7. *Page v. Edmunds*, 187 U. S. 596; *Nashua Sav. Bank v. Abbott*, 181 Mass. 531; *Sewell v. Ives*, (N. Y. Super. Ct. Spec. T.) 61 How. Pr. (N. Y.) 54; *Grocers' Bank v. Murphy*, (C. Pl. Gen. T.) 60 How. Pr. (N. Y.) 426; *Platt v. Jones*, 96 N. Y. 24; *London, etc., Loan, etc., Co. v. Morphy*, 10 Ont. 86, 12 Am. & Eng. Corp. Cas. 53. See *Belton v. Hatch*, 109 N. Y. 593, 4 Am. St. Rep. 495, 21 Am. & Eng. Corp. Cas. 365; *Matter of Glendinning*, 68 N. Y. App. Div. 125, *affirmed* 171 N. Y. 684.

8. *Habenicht v. Lissak*, 78 Cal. 351, 12 Am. St. Rep. 63; *Londheim v. White*, (N. Y. City Ct. Spec. T.) 67 How. Pr. (N. Y.) 467; *Leggett v. Waller*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 408. See also *infra*, this section, *Disposition — Involuntary Transfer*.

9. *Page v. Edmunds*, 187 U. S. 596; *Nashua Sav. Bank v. Abbott*, 181 Mass. 531; *Platt v.*

because it is acquired, held, and disposed of subject to the conditions and restrictions of the constitution and by-laws of the association.¹

Whether a Seat in a Stock Exchange Is Considered as Property for the Purpose of Taxation within a statute imposing a tax upon personal property or the transfer thereof depends upon what is considered as personal property within the purview of the statute.²

Seat Taxable under Inheritance Transfer Tax Law. — It has been held that a seat is taxable under an inheritance or transfer tax law imposing a tax upon the transfer of personal property.³

Seat Property Passing to Assignee in Bankruptcy. — It is well settled that a seat is property that passes to an assignee in bankruptcy subject to the rules of the association,⁴ who takes such an interest in the seat as the owner has,⁵ and the assignee may realize thereon by selling the seat under the rules of the association, as an asset of the estate;⁶ but the seat cannot be available to a transferee unless the association decides to recognize and seat him.⁷

A Bankrupt Member May Be Compelled to Perform Such Acts and Execute Such Instruments as may be necessary to vest the title to the seat in the assignee in bankruptcy,⁸

Jones, 96 N. Y. 24; Thompson v. Adams, 12 Phila. (Pa.) 484, 34 Leg. Int. (Pa.) 382. See also Belton v. Hatch, 109 N. Y. 593, 4 Am. St. Rep. 495, 21 Am. & Eng. Corp. Cas. 365.

1. Page v. Edmunds, 187 U. S. 596; Nashua Sav. Bank v. Abbott, 181 Mass. 531; Londheim v. White, (N. Y. City Ct. Spec. T.) 67 How. Pr. (N. Y.) 467; Grocers' Bank v. Murphy, (C. Pl. Gen. T.) 60 How. Pr. (N. Y.) 426; Platt v. Jones, 96 N. Y. 24; Thompson v. Adams, 12 Phila. (Pa.) 484, 34 Leg. Int. (Pa.) 382. See also Hyde v. Woods, 94 U. S. 523; Belton v. Hatch, 109 N. Y. 593, 4 Am. St. Rep. 495, 21 Am. & Eng. Corp. Cas. 365.

2. See Baltimore v. Johnson, 96 Md. 737; People v. Feitner, 167 N. Y. 1, 82 Am. St. Rep. 698, affirming 56 N. Y. App. Div. 280; Matter of Hellman, 77 N. Y. App. Div. 355, reversed 174 N. Y. 254; Matter of Glendinning, 68 N. Y. App. Div. 125, affirmed 171 N. Y. 684. See also the title TAXATION.

In *California*, in *San Francisco v. Anderson*, 103 Cal. 69, 42 Am. St. Rep. 98, the court, in deciding that an attempt to tax a seat in the San Francisco Stock and Exchange Board after all the real and personal property owned by the association had been taxed was void as double taxation, expressed the opinion that the seat was merely a personal privilege and had no such qualities as to make it taxable as property.

In *Maryland* it has been held that a seat in the Baltimore Stock Exchange is not taxable property within the bill of rights and revenue statutes of that state. *Baltimore v. Johnson*, 96 Md. 737.

In *New York* a seat is not taxable as personal property under the restricted definition of personal property as contained in the Tax Law of 1896, c. 908, § 2, subdiv. 4. *People v. Feitner*, 167 N. Y. 1, 82 Am. St. Rep. 698.

3. **Seat Subject to Transfer Tax.** — Matter of Glendinning, 68 N. Y. App. Div. 125, affirmed 171 N. Y. 684. This case related to a tax imposed upon a transfer prior to the revision of the Tax Law in 1896.

It was erroneously held in *Matter of Hellman*, 77 N. Y. App. Div. 355, that a transfer of a seat is not taxable, on the ground that the seat itself is not taxable annually as personal property within the restricted definition of such property

as contained in the Tax Law of 1896, c. 908, § 2, subdiv. 4, according to the decision in *People v. Feitner*, 167 N. Y. 1, 82 Am. St. Rep. 698; but *Matter of Hellman* was reversed in 174 N. Y. 254, wherein it was held that a seat is property liable to the transfer tax within the definition given in the controlling section 242 of chapter 908 of the Revised Laws of 1896 relating to taxable transfers, which provides that the words "estate" and "property" shall include all the property or interest therein.

4. *In re Page*, 102 Fed. Rep. 746, affirmed (C. C. A.) 107 Fed. Rep. 89; *In re Ketchum*, 1 Fed. Rep. 840; Hyde v. Woods, 94 U. S. 523; Page v. Edmunds, 187 U. S. 596; Sparhawk v. Yerkes, 142 U. S. 1; McCabe v. Emmons, 51 N. Y. Super. Ct. 219, affirmed 109 N. Y. 665; Matter of Hellman, 174 N. Y. 254; Leggett v. Waller, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 408. *Contra*, *In re Sutherland*, 6 Biss. (U. S.) 526. This case is not followed by the later decisions, which expressly and emphatically refuse to be guided by it. See *In re Page*, (C. C. A.) 107 Fed. Rep. 89, affirming 102 Fed. Rep. 746; *In re Ketchum*, 1 Fed. Rep. 840. See also *In re Warder*, 10 Fed. Rep. 275.

Membership in Produce Exchange Property Passing to Assignee in Bankruptcy. — *In re Werder*, 15 Fed. Rep. 789; *In re Warder*, 10 Fed. Rep. 275.

5. *In re Werder*, 15 Fed. Rep. 789; *People v. Feitner*, 167 N. Y. 1, 82 Am. St. Rep. 698; McCabe v. Emmons, 51 N. Y. Super. Ct. 219; affirmed 109 N. Y. 665.

6. *In re Page*, 102 Fed. Rep. 746, affirmed (C. C. A.) 107 Fed. Rep. 89.

7. See *People v. Feitner*, 167 N. Y. 1, 82 Am. St. Rep. 698.

8. *In re Warder*, 10 Fed. Rep. 275; *In re Ketchum*, 1 Fed. Rep. 840.

Bankrupt Cannot Be Compelled to Transfer Seat After His Discharge. — Matter of Nichols, 1 Fed. Rep. 842. In this case, which was decided in 1880, an application was made three years after the bankrupt was discharged to compel the bankrupt to execute necessary instruments to enable the assignee to make available as an asset a seat in the New York Stock Exchange, and the court held that the bankrupt was not liable under the statute to the summary order of the court after his discharge.

and in such a person as the assignee may procure who may be acceptable to the association in accordance with its rules.¹

2. Acquisition. — A seat can be acquired only by an election to membership in the association in accordance with the constitution and by-laws,² and ordinarily the good standing of a prospective member is a matter of investigation before admission.³ It is generally required that the constitution and by-laws be signed or agreed to by the applicant as a condition of acquiring membership or a seat in the association,⁴ and the new member elected is required to pay an initiation fee.⁵

3. Disposition — *a. VOLUNTARY TRANSFER.* — A member may sell or transfer his seat in an exchange; but such sale or transfer, in order to be available to the transferee, must be made in accordance with the rules and regulations of the association.⁶

b. INVOLUNTARY TRANSFER — (1) *At Law.* — As a general rule it is held that a seat in a stock or produce exchange is not property subject to seizure and sale on execution against the holder thereof.⁷

(2) *In Equity.* — It seems, however, that such a seat may be reached by proceedings in equity to compel an insolvent member to transfer his seat under the rules of the association and to apply the proceeds in satisfaction of a debt of a judgment creditor.⁸

1. *In re Ketchum*, 1 Fed. Rep. 840.

2. *Hyde v. Woods*, 94 U. S. 523; *Lowenberg v. Greenebaum*, 99 Cal. 162, 37 Am. St. Rep. 42; *American Live Stock Commission Co. v. Chicago Live Stock Exch.*, 143 Ill. 210, 36 Am. St. Rep. 385; *Eliot v. Merchants' Exch.*, 14 Mo. App. 234; *White v. Brownell*, (C. Pl. Spec. T.) 3 Abb. Pr. N. S. (N. Y.) 318, *affirmed* 4 Abb. Pr. N. S. (N. Y.) 162, 2 Daly (N. Y.) 329; *Grocers' Bank v. Murphy*, (C. Pl. Gen. T.) 60 How. Pr. (N. Y.) 426; *People v. Feitner*, 167 N. Y. 1, 82 Am. St. Rep. 698; *Platt v. Jones*, 96 N. Y. 24; *Thompson v. Adams*, 12 Phila. (Pa.) 484, 34 Leg. Int. (Pa.) 382; *London, etc., Loan, etc., Co. v. Morphy*, 10 Ont. 86, 12 Am. & Eng. Corp. Cas. 53.

3. *Bernheim v. Keppler*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 321. See generally the rules of the Philadelphia Stock Exchange as stated in *In re Page*, (C. C. A.) 107 Fed. Rep. 89; the rules of the San Francisco Stock Exchange Board as stated in *Habenicht v. Lissak*, 78 Cal. 351, 12 Am. St. Rep. 63; and the rules of the Chamber of Commerce of Minneapolis as stated in *State v. Chamber of Commerce*, 77 Minn. 308.

4. *American Live Stock Commission Co. v. Chicago Live Stock Exch.*, 143 Ill. 210, 36 Am. St. Rep. 385; *State v. Chamber of Commerce*, 77 Minn. 308; *Bernheim v. Keppler*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 321; *Belton v. Hatch*, 109 N. Y. 593, 4 Am. St. Rep. 495, 21 Am. & Eng. Corp. Cas. 364.

5. *Platt v. Jones*, 96 N. Y. 24. See also *American Live Stock Commission Co. v. Chicago Live Stock Exch.*, 143 Ill. 210, 36 Am. St. Rep. 385; *Londheim v. White*, (N. Y. City Ct. Spec. T.) 67 How. Pr. (N. Y.) 467; *London, etc., Loan, etc., Co. v. Morphy*, 10 Ont. 86, 12 Am. & Eng. Corp. Cas. 53.

6. See *Habenicht v. Lissak*, 78 Cal. 351, 12 Am. St. Rep. 63; *Londheim v. White*, (N. Y. City Ct. Spec. T.) 67 How. Pr. (N. Y.) 467; *People v. Feitner*, 167 N. Y. 1, 82 Am. St. Rep. 698; *Powell v. Waldron*, 89 N. Y. 328, 42 Am. Rep. 301.

Consent of Association Necessary When Specified in Constitution and By-laws. — *San Francisco v. Anderson*, 103 Cal. 69, 42 Am. St. Rep. 98; *Habenicht v. Lissak*, 78 Cal. 351, 12 Am. St. Rep. 63; *Platt v. Jones*, 96 N. Y. 24. See also *Londheim v. White*, (N. Y. City Ct. Spec. T.) 67 How. Pr. (N. Y.) 467; *London, etc., Loan, etc., Co. v. Morphy*, 10 Ont. 86, 12 Am. & Eng. Corp. Cas. 53.

Rules Concerning Sale of Membership. — See the rules of the Philadelphia Stock Exchange as stated in *In re Page*, (C. C. A.) 107 Fed. Rep. 89, and the rules of the Chamber of Commerce of Minneapolis as stated in *State v. Chamber of Commerce*, 77 Minn. 308.

In the New York Stock Exchange, a member has a right to sell his membership by submitting the name of the proposed purchaser to the standing committee, and if such committee approves of the transfer it may be made provided the member selling has no unsettled contracts. *People v. Feitner*, 167 N. Y. 1, 82 Am. St. Rep. 698. See also *In re Page*, (C. C. A.) 107 Fed. Rep. 89; *Londheim v. White*, (N. Y. City Ct. Spec. T.) 67 How. Pr. (N. Y.) 467.

In the Baltimore Stock Exchange, a member cannot voluntarily dispose of his membership unless the proposed transferee is elected by the governing committee. *Baltimore v. Johnson*, 96 Md. 737.

7. *San Francisco v. Anderson*, 103 Cal. 69, 42 Am. St. Rep. 98; *Barclay v. Smith*, 107 Ill. 349, 47 Am. Rep. 437, *distinguished* in *Weaver v. Fisher*, 110 Ill. 152; *Thompson v. Adams*, 93 Pa. St. 55. See also the title *EXECUTIONS*, vol. 11, pp. 623, 624.

Seat Not Subject to Sequestration. — *London, etc., Loan, etc., Co. v. Morphy*, 10 Ont. 86, 12 Am. & Eng. Corp. Cas. 53.

A Certificate of Ownership in Board of Trade is not property which is subject to the payment of debts of a holder by legal proceedings. *Weaver v. Fisher*, 110 Ill. 146.

8. *Eliot v. Merchants' Exch.*, 14 Mo. App. 234; *Platt v. Jones*, 96 N. Y. 24.

Proceedings Supplementary to Execution, which are a substitute for a creditor's bill in equity,¹ may be instituted in some jurisdictions to apply a seat and the proceeds thereof in satisfaction of a judgment debt.²

(3) *Disposal of Forfeited Seat.* — Usually the right to dispose of a member's seat if forfeited by misconduct of the member, cognizable by the laws of the association, is reserved by the constitution of the association.³

(4) *Disposal of Deceased Member's Seat.* — It is generally provided in the constitution or laws of the association that when a member dies his seat may be sold by the association or a committee thereof, and after satisfaction of the claims of the members of the exchange the balance may be paid to the legal representatives of the deceased member.⁴

VIII. EXPULSION OF MEMBERS — 1. Inherent Power to Expel. — It is well settled that an incorporated association established for purposes other than business and pecuniary gain has inherent power, without express authority by statute or in its charter, to expel members for committing infamous offenses or acts against the association which tend to its destruction or injury.⁵ It is conceded that this power inherently exists in incorporated associations such as produce exchanges,⁶ boards of trade,⁷ and chambers of commerce,⁸ which have among their purposes the maintaining of a high degree of integrity in

Seat May Be Reached in Equity by Creditor's Bill. — *Eliot v. Merchants' Exch.*, 14 Mo. App. 234. Compare *Barclay v. Smith*, 107 Ill. 349, 47 Am. Rep. 437, wherein it was held that a certificate of membership in the Chicago Board of Trade was not property liable to be subjected by a creditor's bill to the payment of the debts of the holder. But in *Weaver v. Fisher*, 110 Ill. 146, it was held that a bill in chancery would lie to compel the surrender of a certificate of membership in the Chicago Board of Trade which was procured with the complainant's money, but taken in the name of the defendant, who was her agent. The court said: "It is a misapprehension to suppose * * * that we held in *Barclay v. Smith*, 107 Ill. 349, that there are no property rights of any kind in a certificate of membership in the Board of Trade of the city of Chicago. We simply there held that such a certificate is not property which is liable to be subjected to the payment of the debts of the holder by legal proceedings."

1. Substitute for Creditor's Bill. — See the title SUPPLEMENTARY PROCEEDINGS, 21 ENCYC. OF PL. AND PR. 90.

2. Habenicht v. Lissak, 78 Cal. 351, 12 Am. St. Rep. 63; *Grocers' Bank v. Murphy*, (C. Pl. Gen. T.) 60 How. Pr. (N. Y.) 426; *Roome v. Swan*, (N. Y. City Ct. Spec. T.) 15 Civ. Pro. (N. Y.) 344; *Leggett v. Waller*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 408. See also *Eliot v. Merchants' Exch.*, 14 Mo. App. 234; *Powell v. Waldron*, 89 N. Y. 328, 42 Am. Rep. 301; *Ritterband v. Baggett*, (N. Y. Super. Ct. Spec. T.) 4 Abb. N. Cas. (N. Y.) 67.

Member of Exchange Required to Sign "Consent" Vesting Rights of Membership in Purchaser from Receiver. — Where a receiver of a member of the Consolidated Stock and Petroleum Exchange of New York sold a member's seat and executed to the purchaser a bill of sale, and the member refused to consummate the title of the purchaser by signing a "consent" according to the rules of the association, an order was granted upon motion compelling the defendant to sign the required consent. *Roome v. Swan*, (N. Y. City Ct. Spec. T.) 15 Civ. Pro. (N. Y.) 344.

Seat in Stock Exchange Not Necessary Working Tool Exempt from Judgment Creditors. — *Leggett v. Waller*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 408.

3. See Hutchinson v. Lawrence, (Supm. Ct.) 67 How. Pr. (N. Y.) 38; *Belton v. Hatch*, 109 N. Y. 593, 4 Am. St. Rep. 495, 21 Am. & Eng. Corp. Cas. 365. See also the rules of the San Francisco Stock Exchange Board as stated in *Rorke v. San Francisco Stock, etc., Board*, 99 Cal. 196; the rules of the Toronto Stock Exchange as stated in *London, etc., Loan, etc., Co. v. Morphy*, 10 Ont. 86, 12 Am. & Eng. Corp. Cas. 53; the rules of the Philadelphia Stock Exchange as stated in *In re Page*, (C. C. A.) 107 Fed. Rep. 89, and *Page v. Edmunds*, 187 U. S. 596; the rules of the New York Stock Exchange as stated in *Bernheim v. Keppler*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 321; and the rules of the Philadelphia Board of Brokers, an institution similar to a stock exchange, as stated in *Leech v. Harris*, 2 Brews. (Pa.) 571.

4. People v. Feitner, 167 N. Y. 1, 82 Am. St. Rep. 698. See also the rules of the Philadelphia Stock Exchange as stated in *In re Page*, (C. C. A.) 107 Fed. Rep. 89, and in *Page v. Edmunds*, 187 U. S. 596; and the rules of the Toronto Stock Exchange as stated in *London, etc., Loan, etc., Co. v. Morphy*, 10 Ont. 86, 12 Am. & Eng. Corp. Cas. 53.

Only Claims Arising Between Members as Such Are Preferred to Members. — *Bernheim v. Keppler*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 321. See also *Matter of Hayes*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 274.

5. See the title DISFRANCHISEMENT, vol. 9, p. 479.

6. People v. New York Commercial Assoc., (Supm. Ct. Spec. T.) 18 Abb. Pr. (N. Y.) 271. See also *Haelbler v. New York Produce Exch.*, 149 N. Y. 414.

7. People v. Board of Trade, 45 Ill. 112, quoted under the title DISFRANCHISEMENT, vol. 9, p. 479, note 6.

8. Blumenthal v. Cincinnati Chamber of Commerce, 8 Ohio Dec. (Reprint) 622; *Dickenson v. Chamber of Commerce*, 29 Wis. 45, 9 Am.

business transactions, the successful carrying out of which purpose depends to a great extent upon the personal character of the members;¹ and it seems that unincorporated associations such as stock exchanges have the same power independent of any express provision concerning the expulsion of members in the by-laws or articles of association.²

2. Power to Expel under Express Regulations.—Stock exchanges, produce exchanges, and similar associations, both incorporated and unincorporated, generally have express disciplinary rules and regulations concerning the business conduct of their members which provide for the suspension and expulsion of members for certain specified causes.³ These regulations, if not in conflict with the law of the land,⁴ are binding upon those who become members of the association, and such members are subject to suspension or expulsion for a violation of the rules, after a fair and orderly hearing in the manner and for the causes provided.⁵ Thus, it has been held under express regulations and by-laws of such an association that a member may be suspended for unmer-

Rep. 544; *State v. Chamber of Commerce*, 20 Wis. 63.

1. In *People v. New York Commercial Assoc.*, (Supm. Ct. Spec. T.) 18 Abb. Pr. (N. Y.) 271, it was held that the corporation might expel a member for a breach of his duty toward it or for any act in contravention of the purposes for which the charter was obtained; and that, as the charter stated that the company was formed among other things to inculcate just and equitable principles in trade, it might expel a member for wrongfully obtaining goods, although the offense was not committed on the floor of the exchange nor against a member of the association.

Grounds of Expulsion under Inherent Authority.—*People v. Board of Trade*, 45 Ill. 112; *People v. New York Commercial Assoc.*, (Supm. Ct. Spec. T.) 18 Abb. Pr. (N. Y.) 271; *Blumenthal v. Cincinnati Chamber of Commerce*, 8 Ohio Dec. (Reprint) 622; *Leech v. Harris*, 2 Brews. (Pa.) 571; *Dickenson v. Chamber of Commerce*, 29 Wis. 45, 9 Am. Rep. 544; *State v. Chamber of Commerce*, 20 Wis. 68.

The Presumption Should Be Against the Power to Expel except for the causes recognized by the adjudged cases, because it is in the nature of a forfeiture, which the law does not favor. *People v. New York Cotton Exch.*, 8 Hun (N. Y.) 216.

2. In *Leech v. Harris*, 2 Brews. (Pa.) 571, the court considered the powers of expulsion vested in the Philadelphia Board of Brokers, an unincorporated voluntary association similar to a stock exchange, and tested the liability of a member to expulsion by a consideration of the express regulations of the board and the inherent or common-law power of the association to expel the member for an infamous offense or for an offense against his duty as a member of the association. See also *White v. Brownell*, 2 Daly (N. Y.) 329, citing *Innes v. Wylie*, 1 C. & K. 257, 47 E. C. L. 257, wherein it was asserted that a member may be expelled upon notice, opportunity to be heard, and a majority vote. And see *Otto v. Journeymen Tailors' Protective, etc., Union*, 75 Cal. 308, 7 Am. St. Rep. 156; *People v. Board of Trade*, 80 Ill. 134, set out under the title DISFRANCHISEMENT, vol. 9, p. 479, note 7.

3. **Express Regulations.**—*Page v. Edmunds*, 187 U. S. 596; *Savannah Cotton Exch. v. State*, 54 Ga. 668; *Board of Trade v. Nelson*, 162 Ill.

431, 53 Am. St. Rep. 312; *Albers v. Merchants' Exch.*, 138 Mo. 140; *White v. Brownell*, 2 Daly (N. Y.) 329; *Hutchinson v. Lawrence*, (Supm. Ct.) 67 How. Pr. (N. Y.) 38; *People v. New York Produce Exch.*, 149 N. Y. 401; *Belton v. Hatch*, 109 N. Y. 593, 4 Am. St. Rep. 495, 21 Am. & Eng. Corp. Cas. 365; *Kuehnemundt v. Smith*, (N. Y. Super. Ct. Spec. T.) 2 N. Y. Supp. 625; *Lewis v. Wilson*, 50 Hun (N. Y.) 166, affirmed 121 N. Y. 284; *Leech v. Harris*, 2 Brews. (Pa.) 571; *Thompson v. Adams*, 93 Pa. St. 55; *State v. Milwaukee Chamber of Commerce*, 47 Wis. 670; *London, etc., Loan, etc., Co. v. Morphy*, 10 Ont. 86, 12 Am. & Eng. Corp. Cas. 53.

To Justify the Expulsion of a Member under a By-law of an Incorporated Exchange the by-law must have been authorized by the charter, and in addition must state the causes of expulsion with such a reasonable degree of certainty that a member may know the transgressions which will subject him to the penalty. *People v. New York Produce Exch.*, 149 N. Y. 401. See generally the title BY-LAWS, vol. 5, pp. 95, 100.

4. **Legality of Rules and Regulations.**—See *infra*, this title, *Rules and Regulations—Legality*, and see the title BY-LAWS, vol. 5, p. 91 *et seq.*

5. *Illinois.*—*Green v. Board of Trade*, 174 Ill. 585; *Board of Trade v. Nelson*, 162 Ill. 431, 53 Am. St. Rep. 312; *Pitcher v. Board of Trade*, 121 Ill. 412; *People v. Board of Trade*, 45 Ill. 112.

Missouri.—*Farmer v. Board of Trade*, 78 Mo. App. 557.

New York.—*Baum v. New York Cotton Exch.*, (Supm. Ct.) 21 Abb. N. Cas. (N. Y.) 253; *White v. Brownell*, 2 Daly (N. Y.) 329; *Lewis v. Wilson*, 121 N. Y. 284; *Belton v. Hatch*, 109 N. Y. 593, 4 Am. St. Rep. 495, 21 Am. & Eng. Corp. Cas. 365; *Weston v. Ives*, 97 N. Y. 222; *Kuehnemundt v. Smith*, (N. Y. Super. Ct. Spec. T.) 2 N. Y. Supp. 625.

Ohio.—*Blumenthal v. Cincinnati Chamber of Commerce*, 8 Ohio Dec. (Reprint) 622.

Pennsylvania.—*Leech v. Harris*, 2 Brews. (Pa.) 571; *MacDowell v. Ackley*, 93 Pa. St. 277; *Thompson v. Adams*, 93 Pa. St. 55; *Sexton v. Commercial Exch.*, 10 Pa. Co. Ct. 607.

Canada.—*Temple v. Toronto Stock Exch.*, 8 Ont. 705.

And see the title DISFRANCHISEMENT, vol. 9, p. 482 *et seq.*

cantile conduct,¹ smoking on the floor of the exchange during prohibited hours,² inequitably failing to perform a contract,³ fraud and insolvency,⁴ and obtaining goods under false pretenses.⁵ But a member is not guilty of improper conduct in obtaining an injunction against an exchange restraining it from disposing of a seat claimed by him.⁶

3. Proceedings for Expulsion — *a.* IN GENERAL. — The procedure for instituting, investigating, and determining cases arising under the laws of the association for the expulsion of members is usually provided by the constitution or by-laws of the association.⁷

b. NATURE OF PROCEEDINGS. — The proceedings for expulsion are *quasi-judicial* in their nature,⁸ and the tribunal, when acting within the powers conferred upon it in investigating charges of misconduct, constitutes a corporate court⁹ whose sentence is like an award made by a tribunal of the party's own choosing;¹⁰ and while the proceedings are not governed by the strict rules applicable to actions at law or suits in equity, or even by the rules which obtain in regard to arbitration, yet it is declared that there is a strong analogy between the principles which govern in arbitration and those which relate to proceedings of this character.¹¹

c. MEMBERS' RIGHTS. — In every proceeding for expulsion the member who is charged with a violation of the rules is entitled to have the investigation conducted *bona fide*, upon notice to him and an opportunity to be heard, and it is his right that the decision shall be within the scope of the jurisdiction conferred on the tribunal of the association.¹² But a mere inquiry to determine whether complaints or rumors shall be investigated and tried before the association's tribunal on charges preferred against a member is in no sense a trial, and there is no necessity for giving notice to the member,¹³ and a member charged with misconduct against the laws of the association has no constitutional right to a trial by jury;¹⁴ nor, it has been declared, has a member a right to be represented by professional counsel at the trial where a by-law refuses this right.¹⁵

Where a Member Commits an Indictable or Infamous Offense, it has been held, expulsion

1. Unmercantile Conduct. — In *Blumenthal v. Cincinnati Chamber of Commerce*, 8 Ohio Dec. (Reprint) 622, a member was suspended on the ground of unmercantile conduct because he sold meat and charged the customer with overweight, thereby injuring the business of another member from whom, it was said by the expelled member, he had obtained the meat.

2. Smoking on Floor of Exchange. — *Albers v. Merchants' Exch.*, 138 Mo. 140.

3. Jurisdiction to Suspend Member of Incorporated Produce Exchange. — Where a member was suspended because he inequitably failed to perform a contract, and the jurisdiction of the exchange to suspend him was questioned on the ground that the contract was for "cement," which it was claimed was not an article of produce, it was held that the exchange had jurisdiction, as the statute creating it, and its by-laws did not limit the contracts which could be made between the members and over which the exchange had jurisdiction, to those relating to agricultural products; that the word "produce" as a part of the name of the exchange was not sufficient to indicate that the purpose of the statute was so to limit the jurisdiction of the exchange; and that cement is an article of produce. *Haebler v. New York Produce Exch.*, 149 N. Y. 414.

4. Kuehnemundt v. Smith. (N. Y. Super. Ct. Spec. T.) 2 N. Y. Supp. 625.

5. People v. New York Commercial Assoc., (Supm. Ct. Spec. T.) 18 Abb. Pr. (N. Y.) 271, stated under the title DISFRANCHISEMENT, vol. 9, p. 485, note 1.

6. People v. New York Cotton Exch., 8 Hun (N. Y.) 216.

7. See the rules as stated in the cases cited *supra*, this section, *Power to Expel under Express Regulations*. See generally the title DISFRANCHISEMENT, vol. 9, p. 490 *et seq.*

8. See *Farmer v. Board of Trade*, 78 Mo. App. 557; *Leech v. Harris*, 2 Brews. (Pa.) 571.

9. *Albers v. Merchants' Exch.*, 138 Mo. 140.

10. *Bartlett v. Bartlett, etc., Co.*, (Wis. 1903) 93 N. W. Rep. 473. See also *Leech v. Harris*, 2 Brews. (Pa.) 571.

11. *Hutchinson v. Lawrence*, (Supm. Ct.) 67 How. Pr. (N. Y.) 38.

12. *People v. New York Produce Exch.*, 149 N. Y. 401; *Lewis v. Wilson*, 121 N. Y. 284; *Neukirch v. Keppler*, 56 N. Y. App. Div. 225; *Bartlett v. Bartlett, etc., Co.*, (Wis. 1903) 93 N. W. Rep. 473. See also *Matter of Hayes*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 274. And see the title DISFRANCHISEMENT, vol. 9, pp. 490, 492.

13. *Green v. Board of Trade*, 174 Ill. 585.

14. *People v. New York Commercial Assoc.*, (Supm. Ct. Spec. T.) 18 Abb. Pr. (N. Y.) 271.

15. *Green v. Board of Trade*, 174 Ill. 585.

cannot be made under the inherent power of such an association without a previous conviction by a jury according to the law of the land.¹

IX. REMEDY FOR IMPROPER EXPULSION — INTERFERENCE OF COURTS — 1. In General. — Where a member is expelled from the association in accordance with the lawful disciplinary regulations enacted in the charter or constitution or by-laws of the association, the sentence of expulsion is final and conclusive,² and the courts will not, as a general rule, interfere to control the enforcement of the regulations³ by inquiring into the merits of a case which has been decided by the tribunal of the association duly empowered to act in such matters,⁴ but the association will be left to enforce its rules and regulations in the manner it has adopted for its own government.⁵ But the courts will entertain jurisdiction to correct abuses by inquiring into the regularity of the proceedings under the constitution and rules of the association for the purpose of holding the association to a fair administration of its rules, and will inquire whether such rules are reasonable; also whether the proceedings of the association are within the bounds of its proper jurisdiction.⁶

Review Within Association. — Where a remedy has been provided whereby a member who has been wrongfully expelled may have the matter reviewed within the association, the courts will not, as a general rule, interfere until the party complaining has exhausted his remedy before the tribunal provided by the association.⁷

2. Mandamus — Incorporated Exchanges. — The visitatorial supervision over the affairs of corporations inherent in the courts, when not regulated by statute, extends to the investigation of their proceedings for the purpose of keeping them within their charter powers and protecting the rights of members against usurpation of the governing body to their prejudice; consequently, where the tribunal of an incorporated association such as a produce exchange or similar association transcends its authority and by an unwarranted suspension or expulsion deprives a member of the association of the valuable rights appertaining to membership, the member may, as a rule, avail himself of mandamus to restore him to his rights and privileges;⁸ but over unincorporated associations, such as stock exchanges, which are generally private insti-

1. *Leech v. Harris*, 2 Brews. (Pa.) 571.

2. **Expulsion Conclusive.** — *Pitcher v. Board of Trade*, 121 Ill. 412; *White v. Brownell*, 2 Daly (N. Y.) 329; *Hutchinson v. Lawrence*, (Supm. Ct.) 67 How. Pr. (N. Y.) 38; *People v. New York Produce Exch.*, 149 N. Y. 401; *Lewis v. Wilson*, 121 N. Y. 284, *affirming* 50 Hun (N. Y.) 166; *Belton v. Hatch*, 109 N. Y. 593, 4 Am. St. Rep. 495, 21 Am. & Eng. Corp. Cas. 365; *Leech v. Harris*, 2 Brews. (Pa.) 571.

3. *Green v. Board of Trade*, 174 Ill. 585; *Board of Trade v. Nelson*, 162 Ill. 431, 53 Am. St. Rep. 312; *People v. Board of Trade*, 80 Ill. 134. See also *Bartlett v. Bartlett, etc., Co.*, (Wis. 1903) 93 N. W. Rep. 473.

4. *Pitcher v. Board of Trade*, 121 Ill. 412; *Young v. Eames*, 78 N. Y. App. Div. 229; *Neukirch v. Keppler*, 56 N. Y. App. Div. 225, *affirmed* 174 N. Y. 509; *Leech v. Harris*, 2 Brews. (Pa.) 571; *State v. Milwaukee Chamber of Commerce*, 47 Wis. 670. See also *People v. New York Produce Exch.*, 149 N. Y. 401.

Total Absence of Evidence to Support Expulsion, Cause for Review. — See *People v. New York Produce Exch.*, 149 N. Y. 401.

5. *Green v. Board of Trade*, 174 Ill. 585; *Board of Trade v. Nelson*, 162 Ill. 431, 53 Am. St. Rep. 312; *Ryan v. Cudahy*, 157 Ill. 108, 48 Am. St. Rep. 305; *Pitcher v. Board of Trade*, 121 Ill. 412; *Sturges v. Board of Trade*, 86 Ill.

441; *Baxter v. Board of Trade*, 83 Ill. 146; *People v. Board of Trade*, 80 Ill. 134; *Fisher v. Board of Trade*, 80 Ill. 85; *Bartlett v. Bartlett, etc., Co.*, (Wis. 1903) 93 N. W. Rep. 473. And see the title DISFRANCHISEMENT, vol. 9, p. 496.

6. *White v. Brownell*, 2 Daly (N. Y.) 329; *Hutchinson v. Lawrence*, (Supm. Ct.) 67 How. Pr. (N. Y.) 38; *People v. New York Produce Exch.*, 149 N. Y. 401; *Leech v. Harris*, 2 Brews. (Pa.) 571; *State v. Milwaukee Chamber of Commerce*, 47 Wis. 670; *Bartlett v. Bartlett, etc., Co.*, (Wis. 1903) 93 N. W. Rep. 473. See also the title DISFRANCHISEMENT, vol. 9, pp. 496, 497.

7. *White v. Brownell*, 2 Daly (N. Y.) 329; *Hutchinson v. Lawrence*, (Supm. Ct.) 67 How. Pr. (N. Y.) 38; *Lewis v. Wilson*, 50 Hun (N. Y.) 166, *affirmed* 121 N. Y. 284. See generally the title DISFRANCHISEMENT, vol. 9, pp. 495, 496.

Exception to Rule. — It is stated that there is an exception to the proposition set forth in the text where by evasion, intentional delays, or other unjust procedure a member is practically deprived of the benefit of the remedy provided by the association. *White v. Brownell*, 2 Daly (N. Y.) 329.

8. **Mandamus.** — *Savannah Cotton Exch. v. State*, 54 Ga. 668; *State v. Union Merchants' Exch.*, 2 Mo. App. 96; *Matter of Lurman*, 90

tutions receiving nothing from and owing nothing to the public or the state,¹ the courts, independently of statutes, do not as a general rule exercise the same visitatorial power as they do over corporations, and it is generally held that mandamus is not the proper remedy of a suspended or expelled member of such an association to compel reinstatement.²

3. Injunction. — Where members of voluntary unincorporated associations, such as are generally the stock exchanges, have been unlawfully suspended or expelled or threatened with such suspension or expulsion, and judicial interference has been invoked, the remedy generally applied for and granted has been that of an injunction to restrain the association from suspending or expelling the member, and where a member of such an association is threatened with an unlawful suspension or expulsion under proceedings contrary to natural justice and in violation of the constitution or by-laws of the association, he may invoke the equitable power of the court by injunction to restrain the association from a commission of the unlawful act and to compel it to restore him to his rights and privileges of membership in the association.³

Whether an Injunction Will Issue Against Incorporated Exchanges, such as produce exchanges and similar associations, to restrain an unlawful suspension or expulsion of a member, has not often been made the subject of judicial determination, because the legal remedy of mandamus is generally pursued in such cases to restore a suspended or expelled member to his rights and privileges in the association;⁴ but there seems to be no reason why an injunction should not issue to restrain a threatened unlawful suspension or expulsion from such an association, if the remedy at law is inadequate, and it has been held, under a statute authorizing the issuance of an injunction whenever in the opinion of the court an adequate remedy cannot be afforded by an action for damages, that an action for damages is not an adequate remedy in such cases, and that an injunction will lie to restrain the association from interfering with the exercise by the suspended member of his rights and privileges as a member of the exchange.⁵

Hun (N. Y.) 303, *affirmed* 149 N. Y. 588; *Haebler v. New York Produce Exch.*, 149 N. Y. 414; *People v. New York Produce Exch.*, 149 N. Y. 401; *State v. Milwaukee Chamber of Commerce*, 27 Wis. 670 [*disapproving* *People v. Board of Trade*, 80 Ill. 134]; *State v. Chamber of Commerce*, 20 Wis. 68. See also *Albers v. Merchants' Exch.*, 39 Mo. App. 583, and see the titles *DISFRANCHISEMENT*, vol. 9, p. 500; *MANDAMUS*, vol. 19, pp. 868, 883, 884.

Mandamus Compelling Exchange to Transfer Membership. — *State v. Chamber of Commerce*, 77 Minn. 308.

1. *Matter of Renville*, 46 N. Y. App. Div. 37; *Wilson v. Commercial Telegram Co.*, (Supm. Ct. Spec. T.) 3 N. Y. Supp. 633; *Commercial Telegram Co. v. Smith*, 47 Hun (N. Y.) 494. And see *supra*, this title, *Nature and Legal Status — Stock Exchanges*. See also *infra*, this section, *Injunction*, and the title *MANDAMUS*, vol. 19, pp. 882, 883.

2. Mandamus Not Applicable to Unincorporated Association. — *Fritz v. Muck*, (Supm. Ct. Spec. T.) 62 How. Pr. (N. Y.) 69, *citing* *White v. Brownell*, 2 Daly (N. Y.) 329.

In *Rorke v. San Francisco Stock, etc., Board*, 99 Cal. 196, mandamus was issued against the San Francisco Stock and Exchange Board, an unincorporated association, commanding it to restore the applicant to membership, but the question of the propriety of this remedy was not passed upon, and the case was decided against the applicant because his suspension was lawful. See Code Civ. Pro. Cal., § 1085.

3. Injunction. — *White v. Brownell*, 2 Daly (N. Y.) 329; *Hutchinson v. Lawrence*, (Supm. Ct.) 67 How. Pr. (N. Y.) 38. See also *Albers v. Merchants' Exch.*, 39 Mo. App. 583, *citing* *Leech v. Harris*, 2 Brews. (Pa.) 571, and *Powell v. Abbott*, 9 W. N. C. (Pa.) 231. And see the title *DISFRANCHISEMENT*, vol. 9, p. 502.

Proceedings Contrary to Natural Justice. — *Young v. Eames*, 78 N. Y. App. Div. 229; *Hutchinson v. Lawrence*, (Supm. Ct.) 67 How. Pr. (N. Y.) 38.

Violation of Constitution or By-laws. — *White v. Brownell*, 2 Daly (N. Y.) 329; *Hutchinson v. Lawrence*, (Supm. Ct.) 67 How. Pr. (N. Y.) 38.

Court Will Not Reinstate Member Suspended in Conformity to Constitution. — *Lewis v. Wilson*, 121 N. Y. 284. See also *Greer v. Stoller*, 77 Fed. Rep. 1, wherein restoration to the privilege of membership in the Kansas City Live Stock Exchange was sought and denied.

4. See *supra*, this section, *Mandamus*.

5. Injunction Sustained. — *Albers v. Merchants' Exch.*, 39 Mo. App. 583.

In *Bartlett v. Bartlett, etc., Co.*, (Wis. 1903) 93 N. W. Rep. 473, the court held that an injunction was proper.

In *Cannon v. Toronto Corn Exch.*, 27 Grant Ch. (U. C.) 23, a bill was filed against the Toronto Corn Exchange, a corporation, to cancel a resolution of expulsion and to restore the plaintiff to his position as a member of the exchange, and the court granted the relief sought.

In *Kolff v. St. Paul Fuel Exch.*, 48 Minn. 215, an injunction restraining the St. Paul Fuel Ex-

4. Action for Damages. — The cases are not numerous wherein actions for damages have been brought against stock and produce exchanges and similar associations for the unlawful suspension or expulsion of their members; yet such actions have been instituted, and it has been held that a plaintiff is entitled to a recovery where the committee of management of a stock exchange excluded him from his seat and erased his name from the list of members contrary to the provisions of the by-laws of the corporation,¹ and that an action for damages is maintainable against a stock exchange for wrongfully and unlawfully disposing of a seat of a member who had been unlawfully and wrongfully expelled.² But it has been held that an action for damages is not maintainable for suspending a member from an incorporated merchants' exchange,³ chamber of commerce,⁴ or coffee exchange,⁵ even though the suspension was improper and unauthorized,⁶ if the member was suspended in good faith and not by reason of malice, since the association, or the tribunal thereof, acts in a *quasi-judicial* capacity in relation to the suspension or expulsion of a member, and is not liable for errors of judgment by which damage results to a member of the association unless the act complained of is maliciously and wilfully done.⁷

X. QUOTATIONS — RIGHT OF PROPERTY IN — 1. Stock Exchange. — It is held that a stock exchange possesses a property right in its quotations and is under no obligation to furnish quotations of prices to the public; that as it is a private unincorporated association which has received nothing from and owes nothing to the public, it may furnish or refuse to furnish information of the business transactions on its floor to such persons or companies as it sees fit.⁸

2. Board of Trade. — It is generally conceded that a board of trade has at

change, a corporation, from disfranchising a member of the association under illegal by-laws which were beyond the authority of the corporation to enact was sustained.

Injunction Denied. — In *Hurst v. New York Produce Exch.*, 100 N. Y. 605, an order granting a temporary injunction restraining the exchange from entertaining a complaint against a member was reversed and the injunction was dissolved by a concurrence of four judges against three; but the question whether an injunction would be a proper remedy against the exchange if sufficient circumstances were shown was not decided.

In *Goddard v. Merchants' Exch.*, 9 Mo. App. 290, *affirmed* 78 Mo. 609, an injunction was denied to restrain the exchange from suspending or expelling the plaintiff, but the court refrained from deciding whether injunction was the proper remedy.

In Illinois it has been held that a court of equity cannot by injunction restore a member who has been unlawfully expelled from a board of trade, because whatever remedy an expelled member has is at law. *Fisher v. Board of Trade*, 80 Ill. 85; *Baxter v. Board of Trade*, 83 Ill. 146; *Sturges v. Board of Trade*, 86 Ill. 441; *Pitcher v. Board of Trade*, 121 Ill. 412. See also *Green v. Board of Trade*, 174 Ill. 585; *Board of Trade v. Riordan*, 94 Ill. App. 298.

Early Illinois Decisions Distinguished and Explained. — *Ryan v. Cudahy*, 157 Ill. 108, 48 Am. St. Rep. 305; *Montreal Bank v. Waite*, 105 Ill. App. 373; *Board of Trade v. Riordan*, 94 Ill. App. 298.

Early Illinois Decisions Disapproved. — In *Albers v. Merchants' Exch.*, 39 Mo. App. 583, the early Illinois cases were cited in support of the contention that an injunction will not lie to restore a suspended member of a merchants'

exchange to his rights and privileges in the association, but the court refused to be guided by the cases cited, and emphatically disapproved of the doctrine laid down by the Illinois Supreme Court.

1. Action for Damages. — *Temple v. Toronto Stock Exch.*, 8 Ont. 705. See also generally the title *DISFRANCHISEMENT*, vol. 9, pp. 503, 504.

2. *Sewell v. Ives*, (N. Y. Super. Ct. Spec. T.) 61 How. Pr. (N. Y.) 54.

3. *Albers v. Merchants' Exch.*, 138 Mo. 140.

4. *Blumenthal v. Cincinnati Chamber of Commerce*, 8 Ohio Dec. (Reprint) 622.

5. *Lurman v. Jarvie*, 82 N. Y. App. Div. 37.

6. Where Suspension Was Improper. — *Albers v. Merchants' Exch.*, 39 Mo. App. 583; *Matter of Lurman*, 90 Hun (N. Y.) 303, *affirmed* 149 N. Y. 588. See also *Albers v. Merchants' Exch.*, 138 Mo. 140; *Lurman v. Jarvie*, 82 N. Y. App. Div. 37.

7. No Liability Where Member Is Suspended in Good Faith and Without Malice. — *Albers v. Merchants' Exch.*, 138 Mo. 140; *Lurman v. Jarvie*, 82 N. Y. App. Div. 37. See also *Blumenthal v. Cincinnati Chamber of Commerce*, 8 Ohio Dec. (Reprint) 622.

Declaration Against Board of Trade for Suspending Member by Reason of Conspiracy Not Sustained. — *Olds v. Chicago Open Board of Trade*, 18 Ill. App. 465.

8. Property Right in Quotations. — *Commercial Telegram Co. v. Smith*, 47 Hun (N. Y.) 494; *Wilson v. Commercial Telegram Co.*, (Supm. Ct. Spec. T.) 18 N. Y. St. Rep. 78. See also *Matter of Renville*, 46 N. Y. App. Div. 37, wherein the Illinois doctrine was disapproved. And see *Exchange Tel. Co. v. Gregory*, (1896) 1 Q. B. 147.

Competency of Quotations as Evidence. — *Vogt v. Cope*, 66 Cal. 31.

least a qualified property right in its quotations and in the distribution thereof,¹ and although the cases have not defined the exact limitations of this property right, it is held that the right is of such a nature that a court of equity will protect it by injunction to restrain an unauthorized acquisition and use of such quotations;² but where a board of trade had for a series of years voluntarily engaged in the business of compiling market quotations, showing the fluctuations of the prices of commodities bought and sold on the board, and had furnished such quotations for a consideration, by telegraph, to all members of the public who desired to obtain them, it was held that since the board had for a long time voluntarily and intentionally devoted its quotations to public use, it had in effect granted to the public an interest in that use when they were given out, and that so long as it continued to compile and furnish them to any one, it was bound to do so without unjust discrimination and upon the same terms to one as to others.³

1. Board of Trade v. Christie Grain, etc., Co., 116 Fed. Rep. 944; Board of Trade v. Hadden-Krull Co., 109 Fed. Rep. 705; Cleveland Tel. Co. v. Stone, 105 Fed. Rep. 794; Board of Trade v. C. B. Thomson Commission Co., 103 Fed. Rep. 902; New York, etc., Grain, etc., Exch. v. Board of Trade, 127 Ill. 153, 11 Am. St. Rep. 107.

Common-law Property Right Before Publication. — It has been declared that at common law the right of property of a board of trade in its quotations is well established and that it is entitled to withhold them entirely from publication. Board of Trade v. Hadden-Krull Co., 109 Fed. Rep. 705 [citing New York, etc., Grain, etc., Exch. v. Board of Trade, 127 Ill. 153, 11 Am. St. Rep. 107]; Board of Trade v. C. B. Thomson Commission Co., 103 Fed. Rep. 902. See also Cleveland Tel. Co. v. Stone, 105 Fed. Rep. 794.

Board of Trade May Convey Property Right in Quotations. — Cleveland Tel. Co. v. Stone, 105 Fed. Rep. 794.

Common-law Right Preserved until Voluntary Publication. — Board of Trade v. Hadden-Krull Co., 109 Fed. Rep. 705.

Giving Quotations to Limited Number of Persons for Individual Use Not Publication Defeating Common-law Property Right. — Board of Trade v. C. B. Thomson Commission Co., 103 Fed. Rep. 902.

2. **Injunction Against Unauthorized Use of Quotations.** — Board of Trade v. Hadden-Krull Co., 109 Fed. Rep. 705.

A Board of Trade Has Such a Property Interest in Its Quotations that it may require telegraph companies with whom it has contracted for their transmission and distribution to secure from every person desiring the quotations a signed application, in which is embodied an agreement that the quotations shall not be used in the conduct of a bucket shop, and that they are for the private and individual use of the applicant and the business in which he is engaged; and a court of equity will restrain a defendant from receiving or surreptitiously acquiring quotations in noncompliance with this requirement. Board of Trade v. Christie Grain, etc., Co., 116 Fed. Rep. 944. See also Sullivan v. Postal Tel. Cable Co., (C. C. A.) 123 Fed. Rep. 411.

Contract Between Board of Trade and Telegraph Company Prohibiting Quotations from Being Used in Bucket-shop Business Not in Violation of "Sherman Anti-trust Act." — Board of Trade v.

Christie Grain, etc., Co., 121 Fed. Rep. 608. See generally the title MONOPOLIES AND CORPORATE TRUSTS, vol. 20, p. 844.

Equity Will Protect Property Right of Telegraph Company in Board of Trade Quotations. — Cleveland Tel. Co. v. Stone, 105 Fed. Rep. 794; National Tel. News Co. v. Western Union Tel. Co., (C. C. A.) 119 Fed. Rep. 294; Illinois Commission Co. v. Cleveland Tel. Co., (C. C. A.) 119 Fed. Rep. 301. See also Kiernan v. Manhattan Quotation Tel. Co., (Supm. Ct. Spec. T.) 50 How. Pr. (N. Y.) 194.

Injunction Refused to Protect Quotations Resulting from Gambling Transactions. — Where an injunction was applied for to restrain certain commission companies from receiving or using market quotations claimed to be the property of a board of trade, and it was proved that the quotations were the result of gambling transactions, the court refused to grant the injunction on the ground that whatever property right the applicant had in the quotations was tainted with immorality. Board of Trade v. Donovan Commission Co., 121 Fed. Rep. 1012.

Preliminary Injunction Denied. — Board of Trade v. Ellis, 122 Fed. Rep. 319.

3. New York, etc., Grain, etc., Exch. v. Board of Trade, 127 Ill. 153; 11 Am. St. Rep. 107. See also American Live Stock Commission Co. v. Chicago Live Stock Exch., 143 Ill. 210, 36 Am. St. Rep. 385; Central Stock, etc., Exch. v. Board of Trade, 196 Ill. 396, affirming Board of Trade v. Central Stock, etc., Exch., 98 Ill. App. 212, wherein the above case is distinguished. See further Board of Trade v. C. B. Thomson Commission Co., 103 Fed. Rep. 902; Board of Trade v. Hadden-Krull Co., 109 Fed. Rep. 705; Christie St. Commission Co. v. Board of Trade, 94 Ill. App. 229. Compare Metropolitan Grain, etc., Exch. v. Chicago Board of Trade, 15 Fed. Rep. 847; Bryant v. Western Union Tel. Co., 17 Fed. Rep. 825; Marine Grain, etc., Exch. v. Western Union Tel. Co., 22 Fed. Rep. 23.

Board of Trade Cannot Be Compelled to Furnish Quotations to Be Used in Criminal Enterprises. — Christie St. Commission Co. v. Board of Trade, 94 Ill. 229.

Telegraph Company Cannot Be Compelled to Furnish Board of Trade Quotations to Be Used in Bucket-shop Transactions. — Smith v. Western Union Tel. Co., 84 Ky. 664.

No Legal Obligation Rests upon Board of Trade to Gather and Distribute Quotations. — Board of Trade v. Christie Grain, etc., Co., 116 Fed. Rep.

XI. RULES AND REGULATIONS—1. Right to Adopt.—Stock and produce exchanges are authorized and have the power to enact such rules and regulations concerning the government of their affairs as may be necessary to carry out their purposes, provided there is nothing in such rules and regulations contrary to law; and the members are bound by these rules and regulations, after they are regularly adopted, as the laws of the association.¹

Incorporated Exchanges, such as produce exchanges, boards of trade, chambers of commerce, and commercial associations, are generally expressly authorized by their charters to make all proper and lawful by-laws for the purpose of carrying out their objects.²

2. Legality.—As has been seen, when a person becomes a member of an exchange he voluntarily submits to its regulations;³ but the regulations to which a member agrees to submit are such as are authorized by the nature of the association and the law of the land, and hence if a by-law is unreasonable and contrary to the law of the land it cannot be enforced.⁴

944; New York, etc., Grain, etc., Exch. v. Board of Trade, 127 Ill. 153, 11 Am. St. Rep. 107.

Illinois Doctrine Disapproved.—In Matter of Renville, 46 N. Y. App. Div. 37, New York, etc., Grain, etc., Exch. v. Board of Trade, 127 Ill. 153, 11 Am. St. Rep. 107, was disapproved, in so far as the Illinois case appears to justify an interference by the public or the courts with a voluntary association. See Board of Trade v. Christie Grain, etc., Co., 116 Fed. Rep. 944.

1. Dillard v. Paton, 19 Fed. Rep. 619; White v. Brownell, 2 Daly (N. Y.) 329; Hutchinson v. Lawrence, (Supm. Ct.) 67 How. Pr. (N. Y.) 38; Belton v. Hatch, 109 N. Y. 593, 4 Am. St. Rep. 495, 21 Am. & Eng. Corp. Cas. 365; Weston v. Ives, 97 N. Y. 222; Leech v. Harris, 2 Brews. (Pa.) 571; Thompson v. Adams, 93 Pa. St. 55. See also Kuehnemundt v. Smith, (N. Y. Super. Ct. Spec. T.) 2 N. Y. Supp. 625. And see generally the titles BY-LAWS, vol. 5, pp. 88, 100; SOCIETIES, CLUBS, AND UNINCORPORATED ASSOCIATIONS, vol. 25, p. 1131.

Operation of Rules on Dealings Between Members.—Bassett v. Irons, 8 Mo. App. 127; Gill v. O'Rourke, 6 Pa. Super. Ct. 605.

Customers Dealing with Member of Board of Trade Presumed to Deal with Him in Reference to Rules.—Bailey v. Bensley, 87 Ill. 556; Green v. Board of Trade, 174 Ill. 585.

Party Acting as Member of Board of Trade Estopped to Deny Membership and Bound by Rules.—Chicago Packing, etc., Co. v. Tilton, 87 Ill. 547.

Those Who Become Members of the Association Are Presumed to Know the Rules and to have assented to them. White v. Brownell, 2 Daly (N. Y.) 329.

The Rules Were Held to Be Inadmissible as Evidence in an action to recover a balance due for money paid at the request of the defendant for his use in buying and selling cotton in the New York Cotton Exchange, where it was not shown that the defendant either knew of or assented to such rule. Riordan v. Doty, 50 S. Car. 537.

2. Green v. Board of Trade, 174 Ill. 585, affirming 63 Ill. App. 446; State v. Union Merchants' Exch., 2 Mo. App. 96; People v. New York Cotton Exch., 8 Hun (N. Y.) 216; Haebler v. New York Produce Exch., 149 N. Y. 414; People v. New York Produce Exch., 149 N. Y. 401; State v. Milwaukee Chamber of Commerce, 47 Wis. 670. See generally the titles BY-LAWS,

vol. 5, p. 88; CORPORATIONS (PRIVATE), vol. 7, p. 694.

By-laws Must Be Authorized by Charter.—Kolf v. St. Paul Fuel Exch., 48 Minn. 215; People v. New York Produce Exch., 149 N. Y. 401; Parish v. New York Produce Exch., 60 N. Y. App. Div. 11, affirmed 169 N. Y. 34. And see the title BY-LAWS, vol. 5, p. 95.

A By-law Providing for the Expulsion of a Member must state the causes of expulsion with such a reasonable degree of certainty that the member may know the transgressions which will subject him to the penalty. People v. New York Produce Exch., 149 N. Y. 401.

By-law Held to Be Sufficiently Certain.—State v. Milwaukee Chamber of Commerce, 47 Wis. 670.

3. See *supra*, this title, *Seats in Stock and Produce Exchanges—Acquisition*.

4. Green v. Board of Trade, 174 Ill. 585; Board of Trade v. Nelson, 162 Ill. 431, 53 Am. St. Rep. 312; Ryan v. Cudahy, 157 Ill. 108, 48 Am. St. Rep. 305; Pitcher v. Board of Trade, 121 Ill. 412; Sturges v. Board of Trade, 86 Ill. 441; Baxter v. Board of Trade, 83 Ill. 146; People v. Board of Trade, 80 Ill. 134; Fisher v. Board of Trade, 80 Ill. 85; Farmer v. Board of Trade, 78 Mo. App. 557; Parish v. New York Produce Exch., 60 N. Y. App. Div. 11, affirmed 169 N. Y. 34. See also *supra*, this title, *Expulsion of Members—Power to Expel under Express Regulations*, and see generally the title BY-LAWS, vol. 5, p. 91 *et seq.*

By-law Not Invalid Because It Introduces New Rule Different from Common Law.—Goddard v. Merchants' Exch., 9 Mo. App. 290, affirmed 78 Mo. 609.

Rule Prohibiting Member from Forming Market Before and After Exchange Hours Valid.—State v. Milwaukee Chamber of Commerce, 47 Wis. 670.

Rule Denying Representation by Counsel in Investigations Before Board of Trade Valid.—Green v. Board of Trade, 174 Ill. 585, affirming 63 Ill. App. 446.

By-law Prohibiting Smoking in Exchange Room During Certain Hours Valid.—Albers v. Merchants' Exch., 138 Mo. 140.

By-law Compelling Members to Submit Controversies to Arbitration on Pain of Suspension Unreasonable.—State v. Union Merchants' Exch., 2 Mo. App. 96.

3. Members as Preferred Creditors — a. PROCEEDS FROM DEFAULTING OR INSOLVENT MEMBER'S SEAT. — As has been seen, the seat of a member of a stock or produce exchange is a species of property over which the member cannot exercise an unqualified property right, because his membership is subject to the conditions prescribed in the rules and regulations of the exchange, which enter into and become an incident of the property right in the seat when it is created, and remain a part of it into whose hands soever it may come.¹ Consequently, a rule of a stock exchange which provides that the proceeds of a defaulting or insolvent member's seat may be applied first to the payment of his debts to his fellow members is not contrary to the established principles of law or opposed to public policy, and therefore may be enforced.²

Under Such a Rule a Seat Is a Continuing Security to all members with whom the owner of the seat may deal, for the performance and fulfilment of his exchange contracts and engagements.³

Where a Member Forfeits His Right to Membership, it has been held, the association has the right to dispose of the forfeited seat and the member has no further interest in it or in the proceeds thereof.⁴

But Where a Stock Exchange Wrongfully Expelled a Member and a disposition of his seat was made predicated upon the unauthorized expulsion, it was held that the association was liable in an action for damages to the amount realized by it for the seat, and that it was incompetent to show for the purpose of mitigating the damages that the proceeds of the unlawful sale were applied in satisfaction of the member's debts to his fellow-members.⁵

Authority for Appropriating the Proceeds of a Seat of an Insolvent Member in favor of fellow members must be sought in the constitution and by-laws of the association, which are assented to and binding upon the members as a contract, and where such laws make an exception of certain classes of debts the courts will also exclude these debts in the application of the rule.⁶

b. FUND ARISING FROM CLOSING DEFAULTING MEMBER'S TRANSACTIONS ON EXCHANGE. — The rule by which members of a stock exchange are preferred to outside creditors of a defaulting member is not always confined to the application of the proceeds of such member's seat or membership. The fund arising from the closing of a defaulting member's transactions on the exchange and the payment of differences in his favor by his fellow members with whom he has dealt may also, under the rules of the exchange, be applied to the payment of his debts to his fellow members in preference to the debts to outside creditors.⁷ But the application of this rule is confined to the distribution of the proceeds of property of which the defaulting member's ownership is subject to the rules of the exchange, or to funds which owe their existence to the enforcement of such rules; the general estate of a bankrupt

Parties Not Members of Exchange Cannot Object to By-laws. — *Russell v. New York Produce Exch.*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 381.

1. See *supra*, this title, *Seats in Stock and Produce Exchanges — Legal Character and Status*.

2. *Hyde v. Woods*, 94 U. S. 523; *Belton v. Hatch*, 109 N. Y. 593, 4 Am. St. Rep. 495, 21 Am. & Eng. Corp. Cas. 365; *Thompson v. Adams*, 93 Pa. St. 55; *Clarkson v. Toronto Stock Exch.*, 13 Ont. 213, 19 Am. & Eng. Corp. Cas. 386.

This Rule Has Been Enforced Against an Outside Creditor, who furnished the money with which a seat was purchased and who contended that he was the equitable owner of the seat, on the ground that the party furnishing the money

was unknown and was a stranger to the association. *Thompson v. Adams*, 93 Pa. St. 55.

3. *Rorke v. San Francisco Stock, etc., Board*, 99 Cal. 196. See also *In re Gaylord*, 111 Fed. Rep. 717; *Berheim v. Keppler*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 321.

4. *Belton v. Hatch*, 109 N. Y. 593, 4 Am. St. Rep. 495, 21 Am. & Eng. Corp. Cas. 365. Compare *In re Gaylord*, 111 Fed. Rep. 717.

5. *Sewell v. Ives*, (N. Y. Super. Ct. Spec. T.) 61 How. Pr. (N. Y.) 54.

6. *Weston v. Ives*, 97 N. Y. 222.

7. *Application of Fund under Rules of London Stock Exchange.* — *Ex p. Grant*, 13 Ch. D. 667 [*distinguishing Tomkins v. Saffery*, 3 App. Cas. 213]; *Nicholson v. Gooch*, 5 El. & Bl. 999, 85 E. C. L. 999.

or insolvent member cannot be distributed among his creditors in the exchange in preference to outside creditors.¹

c. PROCEEDS FROM DECEASED MEMBER'S SEAT. — A rule providing that when a member dies his membership may be disposed of by the association, and that after paying the claims of the members of the exchange as allowed by the association the balance is to be paid to the legal representatives of the deceased, is quite general, and under such a rule it has been held that the claims of members that are to be satisfied out of the proceeds of the sale of the decedent's seat are not all claims of whatever nature and description, but only those claims which arise from dealings between members as such are contemplated.²

4. Arbitration Clause — *a. IN GENERAL.* — A prominent feature in the constitutions of stock and produce exchanges is a provision establishing a domestic forum or board, or committee of arbitration, before which violations of the association's laws and regulations are inquired into and certain matters of dispute arising out of transactions among the members are investigated and determined.³

b. JURISDICTION OF ARBITRATION COMMITTEE OR BOARD. — The jurisdiction of the association's tribunal is ordinarily defined by the constitution of the association, which gives to the board or committee of arbitration jurisdiction to investigate and determine certain claims or matters of dispute between the members of the association. Generally the jurisdiction of these bodies is confined to matters which arise out of transactions conducted by the members as such,⁴ but it has been held that an incorporated exchange has jurisdiction to try a member for an act in contravention of its purposes, and that where the charter stated that the company was formed to inculcate just and equitable principles in trade, it might try and expel a member for an act inconsistent with the purposes of the association which was not committed on the floor of the exchange nor against a member of the association.⁵

c. OPERATION AND EFFECT OF ARBITRATORS' DECISION. — Since each member, on joining the association, becomes bound by its laws, a decision of the association's arbitration committee or board, pronounced after a fair and orderly trial in accordance with the laws of the association and relating to matter which is within the jurisdiction of the tribunal, bears a similarity to an award made by arbitrators chosen by the parties, which is conclusive and with which the courts will generally refuse to interfere.⁶

If the Association's Tribunal Unlawfully Takes Cognizance of Matters which the members have not agreed to submit to the arbitration of the domestic forum, the courts

1. *Ex p. Saffery*, 4 Ch. D. 555, *affirmed sub nom. Tompkins v. Saffery*, 3 App. Cas. 213, which latter case was distinguished in *Ex p. Grant*, 13 Ch. D. 667.

2. *Bernheim v. Keppler*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 321. See also *Cochran v. Adams*, 180 Pa. St. 289.

3. **Arbitration Clause.** — *Savannah Cotton Exch. v. State*, 54 Ga. 668; *Farmer v. Board of Trade*, 78 Mo. App. 557; *Heath v. Gold Exch.*, (C. Pl. Spec. T.) 7 Abb. Pr. N. S. (N. Y.) 251; *White v. Brownell*, 2 Daly (N. Y.) 329; *People v. New York Cotton Exch.*, 8 Hun (N. Y.) 216; *Sonneborn v. Lavarello*, 2 Hun (N. Y.) 201; *Russell v. New York Produce Exch.*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 381; *People v. New York Produce Exch.*, 149 N. Y. 401; *Bartlett v. Bartlett, etc., Co.*, (Wis. 1903) 93 N. W. Rep. 473; *State v. Chamber of Commerce*, 20 Wis. 68.

Force and Effect. — An arbitration clause in the constitution of an exchange has the same force and effect as an agreement in writing to

submit to arbitration. *Heath v. Gold Exch.*, (C. Pl. Spec. T.) 7 Abb. Pr. N. S. (N. Y.) 251. See generally the title **ARBITRATION AND AWARD**, vol. 2, p. 562 *et seq.*

4. *Bernheim v. Keppler*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 321; *Cochran v. Adams*, 180 Pa. St. 289.

Jurisdiction of Stock-exchange Committee on Securities to Arbitrate. — *Morris v. Grant*, 34 Hun (N. Y.) 377.

5. *People v. New York Commercial Assoc.*, (Supm. Ct. Spec. T.) 18 Abb. Pr. (N. Y.) 271; *Haebler v. New York Produce Exch.*, 149 N. Y. 414. See also *supra*, this title, *Expulsion of Members — Inherent Power to Expel; Power to Expel under Express Regulations.*

6. **Determination Similar to Award.** — *Heath v. Gold Exch.*, (C. Pl. Spec. T.) 7 Abb. Pr. N. S. (N. Y.) 251; *Hutchinson v. Lawrence*, (Supm. Ct.) 67 How. Pr. (N. Y.) 38; *Leech v. Harris*, 2 Brews. (Pa.) 576; *Bartlett v. Bartlett, etc., Co.*, (Wis. 1903) 93 N. W. Rep. 473. See generally the title **ARBITRATION AND AWARD**, vol. 2,

may interfere by injunction to prevent the unauthorized determination,¹ or, as has been seen, in the case of an incorporated exchange where a member has been unlawfully expelled as the result of an unauthorized determination, mandamus may issue to compel the restoration of the member to his rights.²

d. **EFFECT OF CLAUSE ON JURISDICTION OF COURTS.** — In accordance with the well-established principle of law that parties cannot by an agreement to submit future disputes to arbitration oust the courts of jurisdiction,³ where a by-law of an incorporated merchants' exchange was designed to enforce the arbitration of disputes among its members on pain of suspension or expulsion, thus preventing a recourse to the courts of justice, it was held to be contrary to public policy and void.⁴

5. Gratuity or Benefit Fund — *a.* **IN GENERAL.** — Some stock and produce exchanges have established a gratuity or benefit fund which is payable to certain beneficiaries on the death of a member, and which is maintainable by members of the association by payment of dues and assessments.⁵

b. **BENEFICIARIES.** — It is generally provided that upon the death of a member a specified sum of money is payable out of the fund to such persons or objects as have been designated by the member, and certain parties are designated in the constitution to whom the sum is payable in case a member fails to make a designation.⁶

p. 794 *et seq.* And see *supra*, this title, *Remedy for Improper Expulsion — Interference of Courts — In General*.

There Must Be Reasonable Certainty in the Award to render it conclusive upon the rights of the parties. *Redmond v. Bedford*, 40 Ill. 267.

Finding of Arbitration Committee Reversed by Committee of Appeals. — Where an award was made by a committee of arbitration of a board of trade and an appeal was taken from the award to the committee of appeals, which body simply reversed the finding of the committee of arbitration, it was held that the parties were left in the exact position where they stood before the arbitration, with their rights undetermined. *Redmond v. Bedford*, 40 Ill. 267.

1. *Bartlett v. Bartlett, etc., Co.*, (Wis. 1903) 93 N. W. Rep. 473. See also *supra*, this title, *Remedy for Improper Expulsion — Interference of Courts — Injunction*.

Injunction Granted Against Incorporated Chamber of Commerce. — *Bartlett v. Bartlett, etc., Co.*, (Wis. 1903) 93 N. W. Rep. 473.

2. See *supra*, this title, *Remedy for Improper Expulsion — Interference of Courts — Mandamus*.

3. See the title **ARBITRATION AND AWARD**, vol. 2, p. 570.

4. *State v. Union Merchants' Exch.*, 2 Mo. App. 96. The decision in this case rested on the character and objects of the corporation and the inconvenience to which a member is subjected who is expelled from the chief mart of commerce in the place of which he is a citizen and a trader. But in a later opinion of the same court concerning the expulsion of a member from an unincorporated board of trade it was declared that the association may have a rule requiring all differences between members to be settled by arbitration, imposing expulsion as a penalty for disobedience of such a rule, and that although the association may not enforce the agreement to arbitrate, it may enforce the penalty for refusing, because the refusal is a violation of its rules, which the member has agreed to obey. *Farmer v. Board of Trade*, 78

Mo. App. 557, citing *Lewis v. Wilson*, 121 N. Y. 284, and *Greer v. Stoller*, 77 Fed. Rep. 1.

The Fact that an Opportunity to Arbitrate Differences, Before Reference Shall Be Made to a Board of Managers, is given to a member of an exchange does not affect the reasonableness of the by-law or its validity, as he is not required to submit his differences to arbitration, but may do so or not as he chooses. *Haebler v. New York Produce Exch.*, 149 N. Y. 414.

Cannot Compel Arbitration of Subject-matter of Suit Already Commenced. — *State v. Chamber of Commerce*, 20 Wis. 68.

Refusal to Arbitrate Does Not Violate Duty to Association. — *State v. Chamber of Commerce*, 20 Wis. 68.

5. See *Swift v. San Francisco Stock, etc., Board*, 67 Cal. 567; *McCord v. McCord*, 40 N. Y. App. Div. 275; *Kemp v. New York Produce Exch.*, 34 N. Y. App. Div. 175; *MacDowell v. Ackley*, 93 Pa. St. 277. And see generally the title **BENEVOLENT OR BENEFICIAL ASSOCIATIONS**, vol. 3, p. 1041.

Right to Fund Forfeited by Failure to Pay Dues and Assessments. — *MacDowell v. Ackley*, 93 Pa. St. 277.

The New York Produce Exchange was specially authorized by the legislature "to make provision for the widows and families of deceased members." See *McCord v. McCord*, 40 N. Y. App. Div. 275. See also *Parish v. New York Produce Exch.*, 60 N. Y. App. Div. 11, affirmed 169 N. Y. 34.

Association Not Engaged in Business of Life Insurance. — *Swift v. San Francisco Stock, etc., Board*, 67 Cal. 567. See also *McCord v. McCord*, 40 N. Y. App. Div. 275.

6. See the constitutional provisions of the San Francisco Stock Exchange Board as stated in *Swift v. San Francisco Stock, etc., Board*, 67 Cal. 567, and the constitutional provisions of the Philadelphia Stock Exchange as stated in *MacDowell v. Ackley*, 93 Pa. St. 277.

Estate of Deceased Member Not Entitled to Gratuity Fund. — *Swift v. San Francisco Stock, etc., Board*, 67 Cal. 567.

c. NATURE OF BENEFICIAL INTEREST. — The rules and regulations concerning the gratuity fund generally provide that the fund is to be deemed a gift or gratuity only, to the beneficiary,¹ and it has been held that the interest which a beneficiary has in the gratuity fund during the life of the member is not assignable.²

The Act Which Authorized the New York Produce Exchange to Establish a Gratuity Fund provided that the fund "may be paid to the widow, children, next of kin of, or other persons dependent upon, said deceased member, in such manner as the said by-laws shall prescribe." *Kemp v. New York Produce Exch.*, 34 N. Y. App. Div. 175; *McCord v. McCord*, 40 N. Y. App. Div. 275; *Parish v. New York Produce Exch.*, 60 N. Y. App. Div. 11, *affirmed* 169 N. Y. 34.

Adopted Child Entitled to Fund under By-laws of New York Produce Exchange. — *Kemp v. New*

York Produce Exch., 34 N. Y. App. Div. 175.

Gratuity Fund Cannot Be Diverted from Purposes Expressed in Charter. — *Parish v. New York Produce Exch.*, 169 N. Y. 34, *affirming* 60 N. Y. App. Div. 11.

1. See *Swift v. San Francisco Stock, etc., Board*, 67 Cal. 567; *McCord v. McCord*, 40 N. Y. App. Div. 275; *Kemp v. New York Produce Exch.*, 34 N. Y. App. Div. 175; *MacDowell v. Ackley*, 93 Pa. St. 277.

2. **Interest Not Assignable.** — *McCord v. McCord*, 40 N. Y. App. Div. 275.

STOCK AND STOCKHOLDERS.

BY THE EDITORIAL STAFF.

I. DEFINITION AND NATURE OF CORPORATE STOCK, 822.

1. *Stock in General*, 822.
2. *Capital Stock*, 823.
3. *Shares of Stock*, 825.
 - a. *General Nature*, 825.
 - b. *Capital Stock Distinguished*, 826.
 - c. *Personalty or Realty*, 826.
 - d. *As Chose in Action*, 828.
 - e. *Statute of Frauds*, 828.
 - f. *Identification*, 828.
 - g. *Situs*, 828.
 - h. *Number and Amount of Shares*, 829.
4. *Certificates of Stock*, 829.
 - a. *General Nature*, 829.
 - b. *Negotiability*, 830.
 - c. *As Contract*, 831.

II. KINDS OF STOCK, 832.

1. *Common Stock*, 832.
2. *Preferred or Guaranteed Stock*, 832.
 - a. *Definition*, 832.
 - b. *Issue and Validity*, 832.
 - c. *Status and Rights of Preferred Stockholders*, 832.
 - (1) *In General*, 832.
 - (2) *Preferred Shareholders Not Creditors*, 832.
 - (3) *Right to Dividends*, 834.
 - (4) *Preference in Distribution of Assets*, 834.
 - (5) *Right to Vote*, 835.
 - (6) *Exchange of Common for Preferred Stock*, 835.
3. *Interest-bearing Stock*, 835.
4. *Special Stock*, 835.
5. *Other Kinds of Stock*, 836.

III. ISSUE OF STOCK, 836.

1. *In General*, 836.
2. *Power to Issue*, 836.
 - a. *In General*, 836.
 - b. *Preferred Stock*, 837.
 - c. *Special Stock under Massachusetts Statute*, 838.
 - d. *Overissue or Ultra Vires Issue*, 838.
 - e. *Reissue of Surrendered or Purchased Shares*, 839.
 - f. *Fraudulent Issue*, 839.
3. *Mode of Issue*, 839.
4. *Consideration for Issue*, 839.
 - a. *What May Be Received in Payment for Stock*, 839.
 - (1) *In General*, 839.
 - (2) *Money or Cash*, 839.
 - (3) *Property*, 840.
 - (4) *Labor and Services*, 841.
 - (5) *Negotiable Paper*, 841.
 - (6) *Satisfaction of Debts*, 841.

STOCK AND STOCKHOLDERS.

- b. Sufficiency of Consideration, 842.*
 - (1) *Issue for Less than Par, 842.*
 - (2) *Issue for Property or Services, 843.*
- 5. *Issue of Stock by Corporate Officers to Themselves, 844.*
- 6. *Remedies in Respect to Invalid or Irregular Stock, 845.*
 - a. In General, 845.*
 - b. Overissued Stock, 845.*
 - (1) *Remedy of Purchaser, 845.*
 - (2) *Remedy of Corporation and Stockholders, 846.*
 - c. Stock Issued for Less than Par, 846.*
 - d. Stock Fraudulently Issued, 847.*
 - e. Special Stock under Massachusetts Statute, 847.*
- 7. *Acquiescence, Laches, and Estoppel as Bar to Relief, 847.*
 - a. General Rule, 847.*
 - b. Application of Rule, 848.*
 - (1) *Overissued Stock, 848.*
 - (2) *Preferred Stock, 848.*
 - (3) *Stock Issued for Less than Par, 848*
 - (4) *Fraudulent Stock, 848.*

IV. INCREASE AND REDUCTION OF STOCK, 849.

- 1. *Power to Increase or Reduce Stock, 849.*
 - a. Express Authority Necessary, 849.*
 - b. Sufficiency of Authority, 850.*
 - c. Constitutionality of Statutes Granting Power, 850.*
 - d. Preferred or Common Stock, 851.*
- 2. *Who May Exercise Power, 851.*
- 3. *Mode of Exercising Power, 851.*
 - a. Increase of Stock, 851.*
 - b. Reduction of Stock, 852.*
- 4. *Issue of Securities Convertible into Shares, 854.*
- 5. *Distribution of Surplus After Reduction, 854.*
- 6. *Right to Subscribe for New Shares, 854.*
- 7. *Liability of Stockholders as Affected by Increase or Reduction of Stock, 854.*

V. SALES AND CONVEYANCES, 854.

- 1. *Sales, 854.*
 - a. Right of Alienation, 854.*
 - (1) *In General, 854.*
 - (2) *By-laws Restraining Alienation, 855.*
 - (3) *Agreement Between Stockholders, 855.*
 - (4) *Sales by Directors, 856.*
 - b. Contract of Sale, 856.*
 - (1) *In General, 856.*
 - (2) *Parties to Sale, 856.*
 - (3) *Certainty, 856.*
 - c. Performance, 857.*
 - (1) *Tender of Stock, 857.*
 - (2) *Delivery, 857.*
 - d. Implied Warranty, 857.*
 - e. Rescission, 858.*
 - f. Title to Dividends, 859.*
 - g. Remedies and Defenses, 859.*
 - h. Lis Pendens, 860.*
 - i. Bona Fide Purchasers, 860.*
- 2. *Gifts, 861.*
 - a. Inter Vivos, 861.*
 - (1) *In General, 861.*
 - (2) *Delivery, 861.*
 - (a) *In General, 861.*
 - (b) *Delivery of Certificate, 862.*

STOCK AND STOCKHOLDERS.

- (c) *Written Assignment*, 862.
- (d) *Transfer on Books of Corporation*, 862.
- (3) *Gift of Dividends*, 863.
- (4) *Retention of Dividends by Donor*, 863.
- (5) *Subsequent Legacy Including Stock*, 863.
- (6) *Proof of Gift*, 863.
 - (a) *Declarations*, 863.
 - (b) *Possession by Donee*, 863.

(7) *Revocation*, 863.

b. *Causa Mortis*, 863.

- 3. *Legacies*, 864.
- 4. *Mortgages*, 864.
- 5. *Pledges*, 864.

VI. EXECUTION, ATTACHMENT, AND GARNISHMENT, 864.

1. *Execution*, 864.

a. *At Common Law*, 864.

b. *By Statute*, 864.

- (1) *In General*, 864.
- (2) *On What Stock Levied*, 865.
 - (a) *In General*, 865.
 - (b) *Stock in National Bank*, 865.
 - (c) *Stock in Foreign Corporation*, 865.
- (3) *Levy*, 865.
- (4) *Sale*, 866.

2. *Attachment*, 866.

3. *Garnishment*, 866.

VII. LIEN OF CORPORATION ON SHARES, 866.

1. *Right to Lien*, 866.

a. *At Common Law*, 866.

b. *Under Statutes and Charters*, 867.

- (1) *In General*, 867.
- (2) *What Language Sufficient to Create Lien*, 867.
- (3) *Corporation May Assert Lien in Another State*, 867.
- (4) *Effect of Repeal of Statute*, 867.
- (5) *Notice to Third Persons*, 868.

c. *Under Contracts*, 868.

(1) *In General*, 868.

(2) *By Express Contract*, 868.

(3) *By-laws*, 869.

(a) *Power to Enact*, 869.

(b) *Effect of Valid By-law*, 869.

(c) *Unauthorized By-law Giving Lien*, 869.

(d) *Prohibited By-law Giving Lien*, 870.

(e) *Enactment After Transfer and Before Recording*, 870.

(f) *What Constitutes Notice of Existence*, 870.

(4) *Usage*, 870.

2. *To What Shares Lien Attaches*, 871.

a. *Shares Held in Trust by Debtor*, 871.

b. *Shares Held in Trust for Debtor*, 871.

c. *Where Debtor's Title to Stock One in Remainder*, 871.

3. *For What Debts Lien Enforceable*, 871.

a. *As Dependent on Character of Debt*, 871.

b. *As Dependent on Time of Contracting*, 872.

(1) *Debts Contracted Before Acquisition of Shares*, 872.

(2) *Debts Contracted Subsequent to Transfer but Before Notice*, 872.

c. *Debts Not Due*, 872.

d. *Debts Barred by Statute of Limitations*, 873.

e. *Debts Contracted Prior to Enactment of Statute or By-law*, 873.

STOCK AND STOCKHOLDERS.

4. *Enforcement of Lien*, 873.
5. *Waiver of Lien*, 874.
 - a. *In General*, 874.
 - b. *Acceptance of Additional Security*, 874.
 - c. *Consent to Transfer*, 874.
6. *Estoppel*, 874.

VIII. ISSUANCE OF CERTIFICATE, TRANSFER, AND REGISTRATION, 875.

1. *Issuance of Certificate*, 875.
 - a. *Scope of Section*, 875.
 - b. *What Sufficient Issuance to Constitute Holder Stockholder*, 875.
 - c. *Place of Issuance*, 875.
 - d. *Forged or Spurious Certificates*, 875.
 - e. *Compelling Issuance of Certificate*, 876.
 - f. *Right of Owner of Lost Certificate to New Certificate*, 877.
2. *Transfer and Registration*, 877.
 - a. *Right to Transfer*, 877.
 - (1) *In General*, 877.
 - (2) *Right of Pledgee to Transfer on Corporate Records*, 877.
 - (3) *Right of Executor or Administrator to Transfer*, 877.
 - (4) *Right of Purchaser at Execution Sale to Transfer*, 878.
 - b. *Formalities of Transfer and Registration*, 878.
 - (1) *Assignment of Certificate*, 878.
 - (a) *In General*, 878.
 - (b) *Assignment in Blank*, 878.
 - (2) *Transfer on Books of Corporation or Registration*, 879.
 - (a) *Necessity*, 879.
 - aa. *In Absence of Statute, Charter Provision, or By-law*, 879.
 - bb. *Under Statute, Charter Provision, or By-law Requiring Registration*, 880.
 - (aa) *As Between Parties to Assignment*, 880.
 - (bb) *As Between Corporation and Assignor*, 881.
 - (cc) *As Affecting Stockholder's Liability to Corporate Creditors*, 881.
 - (dd) *As Affecting Rights of Assignor's Creditors*, 881.
 - (ee) *As Affecting Rights of Assignee's Creditors*, 883.
 - (ff) *To Effect Valid Pledge*, 884.
 - (gg) *As to Subsequent Bona Fide Purchasers*, 884.
 - (b) *What Constitutes Registration or Transfer on Books*, 884.
 - (3) *Deposit of Certificate of Transfer in Public Office*, 885.
 - (4) *Surrender of Old and Issuance of New Certificate*, 885.
 - (a) *Necessity of Surrender of Old Certificate as Between Parties*, 885.
 - (b) *Issuance of New Certificate to Assignee*, 885.
 - (c) *Liability of Corporation for Issuance of New Without Surrender of Assigned Certificate*, 885.
 - c. *Obligation of Corporation to Transfer and Issue New Certificate*, 886.
 - (1) *In General*, 886.
 - (2) *Compelling Transfer by Corporation*, 886.
 - (a) *By Bill in Equity*, 886.
 - (b) *By Writ of Mandamus*, 887.
 - (3) *Recovery of Damages for Wrongful Refusal to Transfer*, 887.

STOCK AND STOCKHOLDERS.

d. Wrongful Transfer by Corporation, 888.

(1) *In General, 888.*

(2) *Transfer Pursuant to Forged Assignment or Power of Attorney, 889.*

(a) *Rights and Remedies of Person Whose Shares Are Transferred, 889.*

(b) *Rights, Liabilities, and Remedies of Transferee under Forged Assignment, 889.*

(c) *Remedy of Corporation, 890.*

(3) *At Instance of Trustee in Violation of Trust, 890.*

IX. WHO ARE STOCKHOLDERS, 892.

1. *Definitions, 892.*

2. *Necessity of Certificate and Registration, 893.*

3. *Irregularities in Transfer, 893.*

4. *Legal Owner of Shares, 893.*

5. *Equitable Owner of Shares, 894.*

6. *Trustees, 894.*

7. *Principal or Agent, 894.*

8. *Option Holders, 894.*

9. *Holders of Convertible Securities, 894.*

10. *Pledgors and Pledgees, 894.*

11. *Subscribers for Shares, 894.*

12. *Knowledge, Consent, and Acquiescence, 896.*

13. *Construction of Certificate or Agreement, 896.*

14. *Termination of Membership, 896.*

15. *Liability as Stockholders to Creditors, 897.*

16. *Right to Vote as Stockholders, 897.*

17. *Evidence, 897.*

X. STATUS AND RELATION OF STOCKHOLDERS INTER SE AND AS TO CORPORATION, 899.

1. *In General, 899.*

2. *Contractual Relation, 899.*

3. *Relation to Corporate Property, 899.*

4. *Relation to Corporate Creditors, 900.*

5. *Fiduciary or Trust Relation, 900.*

6. *Corporation as Separate Entity, 901.*

7. *Representation of Stockholders by Corporation, 901.*

XI. SUBSCRIPTION TO STOCK, 902.

1. *General Nature of Subscription, 902.*

a. *Subscription Contract, 902.*

b. *Contract Must Be Mutual, 902.*

c. *Corporation Must Have Right to Issue Stock, 902.*

d. *Subscription Before Incorporation Binding, 902.*

2. *Creation of Contract, 903.*

a. *Form of Subscription, 903.*

(1) *Any Form Showing Intent to Subscribe Sufficient, 903.*

(a) *Rule Stated, 903.*

(b) *Variance from Statutory Mode or Formula, 903.*

(c) *Variance from Form Prescribed by Charter, 903.*

(d) *Mistake in or Omission of Name of Corporation, 903.*

(e) *Mutual Agreement to Subscribe, 903.*

(f) *Offers or Promises to Subscribe, 904.*

(g) *Authority to Agent to Subscribe, 904.*

(h) *Entry of Name as Subscriber by Secretary of Corporation, 904.*

(i) *Inference from Acquiescence, 904.*

(j) *Option to Resell to Corporation, 905.*

(k) *Indefinite Agreement, 905.*

(2) *Strict Rule, 905.*

STOCK AND STOCKHOLDERS.

- b. Necessity of Writing, 905.*
- c. Instruments Necessary or Sufficient to Create Contract, 905.*
 - (1) *Articles or Certificate of Incorporation or Association, 905*
 - (2) *Subscription Book, 906.*
 - (3) *Stock Book, 906.*
 - (4) *Private Memorandum Book, 906.*
 - (5) *Application for Stock, 906.*
- d. Delivery of Subscription in Escrow, 906.*
- e. Acceptance, 907.*
- f. Allotment, 907.*
 - (1) *In General, 907.*
 - (2) *Power to Allot, 907.*
 - (a) *Allotment by Commissioners, 907.*
 - (b) *Delegation of Power, 907.*
 - (3) *Wrong Apportionment, 907.*
- g. Withdrawal of Subscription, 907.*
- 3. Parties to Contract, 909.**
 - a. Who May Subscribe, 909.*
 - (1) *In General, 909.*
 - (2) *Other Corporations, 909.*
 - (3) *Commissioners Appointed to Receive Subscriptions, 909*
 - (4) *Subscription by Husband in Name of Wife, 909.*
 - b. Who May Receive Subscriptions, 909.*
 - (1) *Authority Necessary, 909*
 - (2) *Commissioners, 909.*
- 4. Consideration, 909.**
 - a. In General, 909.*
 - b. What Constitutes Valid and Sufficient Consideration, 911.*
 - (1) *Mutual Promises of Subscribers, 911.*
 - (2) *Mutual Promises of Subscriber and Corporation, 911.*
 - (3) *Advantages of Membership, 911.*
 - (4) *Concessions to Subscriber, 911.*
 - c. Consideration Implied, 911.*
- 5. Conditional Subscriptions, 911.**
 - a. Nature, 911.*
 - b. Validity, 911.*
 - (1) *In General, 911.*
 - (2) *Written Subscriptions Cannot Be Varied by Parol Conditions, 911.*
 - c. Performance, 912.*
 - (1) *Sufficiency in General, 912.*
 - (2) *When Performance Excused, 912.*
 - (3) *Burden of Proof, 912.*
 - (4) *Question for Jury, 912.*
 - (5) *Decision of Directors, 912.*
 - d. Evidence, 912.*
- 6. Subscriber's Right to Stock, 912.**
- 7. Liability of Subscriber, 912.**
 - a. In General, 912.*
 - b. Necessity for Promise to Pay, 912.*
 - c. Statutory Liability May Be Varied by Contract, 913.*
 - d. Liability Prior to Incorporation and for Preliminary Expenses, 913.*
 - e. Agreement that Only Portion Shall Be Paid In, 913.*
 - f. Secret Agreement that Subscriber Not Bound Void, 914.*
 - g. Full-paid Stock Not Liable to Calls, 914.*
 - h. Extent of Liability Where Corporation Insolvent, 914.*
 - i. What Law Governs Liability, 914.*
- 8. Calls, 914.**
 - a. Definitions and Distinctions, 914.*

STOCK AND STOCKHOLDERS.

- b. Necessity for Calls, 915.*
 - (1) *In General, 915.*
 - (2) *Where Time of Payment Fixed, 915.*
 - (3) *Where Corporation Insolvent, 915.*
 - (4) *Waiver of Calls, 915.*
- c. Who May Levy Calls, 915.*
 - (1) *Directors, 915.*
 - (a) *Power in General, 915.*
 - (b) *Number of Directors Who Must Concur, 916.*
 - (c) *Directors Cannot Delegate Power, 916.*
 - (d) *Calls by de Facto Directors, 916.*
 - (e) *Extent of Power, 916.*
 - (2) *Stockholders, 916.*
 - (a) *In General, 916.*
 - (b) *Delegation to Directors of Power Vested in Stockholders, 916.*
 - (3) *Courts, 917.*
 - (4) *Receivers, Trustees, or Assignees, 918.*
- d. How Formulated, 918.*
- e. Requisites and Validity, 918.*
 - (1) *In General, 918.*
 - (2) *Fixing Number of Shares, 919.*
 - (3) *Full Subscription, 919.*
 - (4) *Rule as to Conditional Subscriptions, 919.*
 - (5) *Stipulations in Contract Must Be Respected, 919.*
 - (6) *What Law Governs, 919.*
 - (7) *Waiver of Irregularities, 920.*
- f. Notice and Demand, 920.*
 - (1) *Necessity for, 920.*
 - (2) *Time, 920.*
 - (3) *Form and Contents, 920.*
 - (a) *Form Immaterial, 920.*
 - (b) *Notice by Mail, 920.*
 - (c) *Notice by Publication, 921.*
 - (d) *Verbal Notice, 921.*
- g. Maturity, 921.*
- h. Interest, 921.*
 - (1) *Liability for, 921.*
 - (2) *Time from Which Interest Runs, 922.*
- i. Evidence, 922.*
- j. Effect of Transfer of Stock on Liability for Call, 922.*
 - (1) *As Between Corporation and Stockholder, 922.*
 - (2) *As Between Parties to Transfer, 923.*
- 9. Assessments on Paid-up Stock, 923.*
 - a. General Rule, 923.*
 - b. Assessments under Statutes, 924.*
 - (1) *Statutory Power to Make Assessments, 924.*
 - (2) *Strict Construction of Statutes, 924.*
 - (3) *Restriction of Statutory Power by Corporate By-laws, 924.*
 - (4) *Purposes for Which Assessments Proper, 924.*
 - (5) *Power Resides in Stockholders, 925.*
 - (6) *Retrospective Effect of Statutes, 925.*
 - c. Assent to Assessments, 925.*
- 10. Payment, 925.*
 - a. Must Be in Money or Equivalent, 925.*
 - b. Time and Place of Payment — To Whom Payment Made, 925.*
 - c. Interest on Anticipated Payments, 925.*
 - d. Presumption of Payment, 926.*
- 11. Actions and Remedies, 926.*
 - a. Action for Amount Due, 926.*

STOCK AND STOCKHOLDERS.

- (1) *Right of Action*, 926.
- (2) *Prerequisites to Bringing of Action*, 926.
 - (a) *Delivery, Tender, or Issuance of Stock*, 926.
 - (b) *Demand*, 926.
- (3) *By Whom Action Brought*, 926.
 - (a) *Corporation*, 926.
 - (b) *Receivers, Assignees, or Trustees*, 926.
- (4) *Separate Actions Against Subscribers*, 927.
- b. *Forfeiture*, 927.
 - (1) *Nature, Origin, and Authority*, 927.
 - (a) *In General*, 927.
 - (b) *Remedy Purely Statutory*, 927.
 - (c) *Remedy Cumulative*, 928.
 - (d) *Calls Must Be Legal*, 928.
 - (2) *How Power to Forfeit Stock Exercised*, 929.
 - (a) *Compliance with Statutory Requirements*, 929.
 - (b) *Action of Directors*, 929.
 - (c) *Notice*, 929.
 - (3) *Effect of Forfeiture and Sale*, 930.
 - (a) *Deficiency*, 930.
 - (b) *Surplus*, 931.
 - (4) *Stockholders' Protective Remedies*, 931.
 - (a) *Injunction*, 931.
 - (b) *Annulment of Forfeiture*, 931.
 - (c) *Action for Damages*, 931.
 - (d) *Tender*, 931.
12. *Defenses in Actions on Subscriptions*, 931.
 - a. *In General*, 931.
 - b. *Particular Defenses Considered*, 932.
 - (1) *Change in Corporate Name*, 932.
 - (2) *Alterations in Charter*, 932.
 - (3) *Failure of Corporate Enterprise*, 932.
 - (4) *Abandonment or Delay in Enterprise*, 932.
 - (5) *Change in Corporate Design*, 933.
 - (6) *Nonperformance of Conditions*, 934.
 - (7) *Capital Stock Not Fully Subscribed*, 934.
 - (a) *General Rule*, 934.
 - (b) *Modification or Abrogation of Rule*, 935.
 - (c) *What Subscriptions May Be Counted*, 936.
 - (8) *Nonpayment of Percentage Required to Be Paid in Cash*, 937.
 - (9) *Fraud in Procuring Subscription*, 937.
 - (10) *Increase of Capital Stock*, 938.
 - (11) *Irregular Organization*, 938.
 - (12) *Mismanagement*, 938.
 - (13) *Release*, 939.
 - (a) *In General*, 939.
 - (b) *What Amounts to Release — Validity*, 939.
 - (14) *Set-off and Counterclaim*, 940.
 - (15) *Illegal Object of Corporation*, 940.
 - (16) *Payment*, 940.
 - (17) *Defendant Not Subscriber*, 940.
 - (18) *Inability of Corporation to Issue Stock*, 940.
 - (19) *Call for Unwarranted Purpose*, 940.
 - (20) *Exercise of Option to Pay Otherwise than in Cash*, 940.
 - (21) *Failure to Incorporate*, 940.
 - (22) *Improper Issue of Stock to Others*, 940.
 - (23) *Receipt of Depreciated Currency in Payment of Subscriptions*, 941.
 - (24) *Secret Agreement to Release Other Subscribers*, 941.
 - (25) *Making of Premature Contract*, 941.

STOCK AND STOCKHOLDERS.

- (26) *Taking of Invalid Subscriptions*, 941.
- (27) *Violations of Charter*, 941.
- (28) *Impeachment of Corporate Existence*, 941.
- (29) *Nonpayment of Other Subscriptions*, 941.
- (30) *Statute of Limitations*, 941.
 - (a) *May Be Set Up*, 941.
 - (b) *Time from Which Statute Runs*, 941.
 - (c) *Effect of One Call Becoming Barred on Other Calls*, 942.
 - (d) *What Law Governs*, 942.
- c. *Waiver and Estoppel*, 942.
 - (1) *In General*, 942.
 - (2) *Circumstances Showing Waiver*, 942.
 - (a) *Participation in Corporate Affairs*, 942.
 - (b) *Acquiescence*, 943.
 - (c) *Payment*, 943.
 - (d) *Knowledge Necessary*, 943.

- 13. *Rescission of Contract*, 943.
 - a. *For Fraud or False Representations*, 943.
 - b. *Fraudulent Intent*, 944.
 - c. *Statements as to Future Event*, 944.
 - d. *Damage*, 944.
 - e. *Subscriber Must Act Promptly*, 944.
 - f. *Ratification*, 944.
 - g. *Surrender of Stock*, 944.
 - h. *Insolvency of Corporation*, 944.

XII. RIGHTS, POWERS, AND PREROGATIVES OF STOCKHOLDERS IN GENERAL, 945.

- 1. *General Rights*, 945.
- 2. *Rights as Regards Corporate Property*, 946.
- 3. *Participation in Management of Corporation*, 947.
- 4. *Rights as Creditors of Corporation*, 947.
- 5. *Sharing in Distribution of New Stock*, 947.
 - a. *In General*, 947.
 - b. *Rule as to Stock Untaken, Reissued, or Issued for Property Purchased*, 948.
 - c. *Who May Exercise Right*, 948.
 - d. *Waiver of Right*, 949.
 - e. *Sale of Right*, 949.
 - f. *Remedies for Violation of Right*, 949.
 - (1) *Suit in Equity or Action for Damages*, 949.
 - (2) *Mandamus to Compel Issuance of Shares*, 950.
 - (3) *Demand for Shares and Offer to Subscribe as Conditions Precedent*, 950.
 - (4) *Measure of Damages*, 950.
- 6. *Right to Exchange Common for Preferred Stock*, 951.
- 7. *Right to Alienate Stock*, 951.
- 8. *Right to Inspect Corporate Books and Records*, 951.
 - a. *Inspection Common-law and Statutory Right*, 951.
 - b. *Nature of Right — Whether Qualified or Absolute*, 951.
 - c. *By-laws Affecting Right of Inspection*, 953.
 - d. *Duty of Foreign Corporation to Keep Books Within State*, 953.
 - e. *Who Entitled to Inspection*, 953.
 - f. *What Books and Records May Be Inspected*, 954.
 - g. *Examination by Agent, Attorney, or Expert Accountant*, 954.
 - h. *Right to Take Copies*, 954.
 - i. *Right to Be Exercised at Reasonable Times Only*, 954.
 - j. *Interests of Corporation and of Third Persons to Be Safeguarded*, 954.
 - k. *Remedies for Denial of Right*, 955.
 - (1) *Mandamus*, 955.

STOCK AND STOCKHOLDERS.

- (a) *In General*, 955.
- (b) *Foreign Corporations*, 956.
- (c) *Conditions Precedent*, 956.
- (2) *Action at Law for Damages*, 956.
- (3) *Remedies in Equity*, 956.
- (4) *Action to Recover Statutory Penalty*, 957.
- 9. *General Right to Information Regarding Corporate Affairs*, 957.
- 10. *Right to Contract with Corporation*, 957.
- 11. *Right to Enter into Business Competition with Corporation*, 958.
- 12. *Right to Sue Corporation*, 958.
- 13. *No Right to Deny Existence of Corporation*, 958.
- 14. *Rights on Consolidation or Reorganization*, 958.

XIII. RIGHTS AND REMEDIES OF MINORITY STOCKHOLDERS, 959.

- 1. *In General*, 959.
 - a. *No Ground for Complaint Where Act Not Ultra Vires, Illegal, or Fraudulent*, 959.
 - b. *Majority Entitled to Control as Against Minority*, 960.
 - c. *Duty of Majority Towards Minority*, 960.
- 2. *Rights as Regards Ultra Vires or Illegal Acts*, 961.
 - a. *In General*, 961.
 - b. *Acts Impairing Obligation of Contract*, 962.
 - c. *Attempts to Change Nature of Corporate Enterprise*, 962.
 - d. *Acts in Violation of Laws Against Monopoly*, 962.
 - e. *Assessment of Fully Paid Stock*, 963.
- 3. *Right to Relief Against Fraud*, 963.
 - a. *In General*, 963.
 - b. *Funds Converted by Officers*, 963.
 - c. *Excessive Salaries Voted or Paid*, 963.
 - d. *One Corporation Wrecked in Interests of Another*, 963.
- 4. *Right to Disaffirm Voidable Contracts*, 964.
- 5. *Rights as Regards Purchase or Sale of Property by Corporation*, 964.
 - a. *Purchase of Property in General*, 964.
 - b. *Purchase from Stockholders or Directors*, 965.
 - c. *Sale of Part of Corporate Property*, 965.
 - d. *Sale of All Corporate Property and Assets*, 965.
 - e. *Sale to Majority Stockholders or Directors*, 966.
- 6. *Rights as Regards Leases by or to Corporation*, 966.
- 7. *Rights as Regards Consolidation with Other Corporations*, 967.
- 8. *Rights as Regards Reorganization of Corporation*, 967.
- 9. *Rights as Regards Issue and Sale of Stock*, 967.
- 10. *Right to Compel or Restrain Declaration of Dividends*, 968.
- 11. *Rights as Regards Election of Directors*, 968.
- 12. *Right to Compel Officers to Perform Duties*, 969.
- 13. *Right to Information Regarding Corporate Affairs*, 969.
- 14. *Right to Accounting*, 969.
- 15. *Right to Have Receiver Appointed*, 969.
- 16. *Right to Have Corporation Dissolved and Business Wound Up*, 970.
- 17. *No Right to Enforcement of Unlawful Agreement*, 970.
- 18. *No Right to Sue in Own Behalf on Corporate Cause of Action*, 970.
- 19. *Right to Sue or Defend on Behalf of Corporation*, 970.
 - a. *In General*, 970.
 - b. *Nature of Stockholders' Suits*, 972.
 - c. *Equity Jurisdiction*, 973.
 - d. *When Stockholder May Sue*, 973.
 - (1) *General Grounds of Action*, 973.
 - (2) *Specific Grounds of Action*, 974.
 - e. *When Allowed to Defend*, 976.
 - f. *Demand and Refusal of Corporate Action as Condition Precedent*, 976.

STOCK AND STOCKHOLDERS.

- (1) *In General*, 976.
- (2) *When Demand Is Not Essential*, 978.
- (3) *Excuses for Failure to Make Demand*, 978.
- (4) *Suits in Federal Courts under Ninety-fourth Equity Rule*, 979.
 - (a) *Origin and Application of Rule*, 979.
 - (b) *When Rule Does Not Apply*, 980.
 - (c) *Stockholder Required to Show Merits in Addition to Compliance with Rule*, 980.
- (5) *What Demand Sufficient*, 980.
 - (a) *In General*, 980.
 - (b) *To Whom Addressed*, 981.
 - (c) *Necessity of Appeal to Other Stockholders*, 981.
- (6) *What Refusal Sufficient*, 981.
- g. *Who May Sue or Defend*, 982.
 - (1) *In General*, 982.
 - (2) *Ownership of Stock at Time of Transaction Complained of*, 982.
- h. *Waiver of Right to Sue or Defend*, 982.
- i. *Power of Majority Stockholders to Ratify Wrongful Acts*, 982.
- j. *Suit Dismissed When Not Brought in Good Faith*, 983.
- k. *Successive Suits by Different Stockholders*, 983.
20. *Who May Sue to Enforce Rights*, 983.
21. *Necessity of Showing Injury from Acts Complained of*, 984.
22. *Motive in Bringing Suit*, 984.
23. *Rights of Majority and of Strangers Entitled to Consideration*, 984.
24. *Waiver of Rights by Laches, Acquiescence, or Participation*, 985.

XIV. STOCKHOLDERS' MEETINGS, 986.

1. *Purpose and Necessity*, 986.
2. *Legality*, 986.
 - a. *Time and Place*, 986.
 - (1) *Time*, 986.
 - (2) *Place*, 987.
 - b. *Call*, 987.
 - (1) *Necessity*, 987.
 - (2) *Sufficiency*, 988.
 - (a) *Authority to Call*, 988.
 - (b) *Manner of Making Call*, 988.
 - (3) *Remedy Where Constituted Authorities Refuse to Make Call*, 989.
 - (4) *Presumption and Burden of Proof*, 989.
 - (5) *Waiver*, 989.
 - c. *Notice*, 989.
 - (1) *Necessity*, 989.
 - (2) *Sufficiency*, 990.
 - (a) *By Whom Made*, 990.
 - (b) *To Whom Made*, 991.
 - (c) *How Given*, 991.
 - (d) *Time of Notice*, 992.
 - (e) *Form and Contents*, 992.
 - (3) *Presumption and Burden of Proof*, 993.
 - d. *Quorum*, 993.
 - e. *Divided Meetings*, 994.
 - f. *Waiver, Estoppel, and Ratification*, 994.
3. *Proceedings at Meetings*, 995.
 - a. *Scope of Topic*, 995.
 - b. *Organization and Moderation*, 995.
 - c. *What Business May Be Transacted*, 995.
 - d. *Voting*, 996.

STOCK AND STOCKHOLDERS.

- (1) *Who May Vote*, 996.
 - (a) *In General*, 996.
 - (b) *Necessity and Effect of Registration of Stock*, 997.
 - (c) *Statutory, Charter, and By-law Restrictions on Voting*, 998.
 - (d) *Determination of Right to Vote*, 999.
 - (e) *As to Particular Classes of Persons and Stock*, 999.
 - aa. *Preferred Stockholders*, 999.
 - bb. *Directors*, 999.
 - cc. *Corporate Stockholders*, 999.
 - dd. *Executors and Administrators*, 1000.
 - ee. *Trustees*, 1000.
 - ff. *Joint Owners*, 1001.
 - gg. *Nonresident Stockholders*, 1001.
 - hh. *Stockholders Interested in Matter to Be Voted on*, 1001.
 - ii. *Stock Owned by Corporation Itself*, 1001.
 - jj. *Pledged Stock*, 1001.
 - kk. *Stock Covered by Contracts of Sale or Options*, 1002.
 - ll. *Stock Not Paid For*, 1002.
 - mm. *Stock Illegally Issued*, 1002.
 - nn. *Bondholders*, 1002.
 - (f) *Effect of Errors in Receiving or Rejecting Votes*, 1002.
- (2) *Manner of Voting*, 1003.
 - (a) *In General*, 1003.
 - (b) *In Person or by Proxy*, 1003.
 - (c) *By Heads or by Shares*, 1003.
 - (d) *Cumulative Voting*, 1004.
- (3) *Voting Agreements*, 1004.
- (4) *Number of Votes Essential to Corporate Action*, 1004.
- e. *Minutes*, 1005.
- f. *Adjournment*, 1005.
- 4. *Judicial Control of Meetings*, 1005.

XV. LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS, 1007.

- 1. *Nature and Extent*, 1007.
 - a. *Equitable Liability*, 1007.
 - (1) *Trust-fund Doctrine*, 1007.
 - (2) *Application of Doctrine*, 1007.
 - (a) *Liability of Stockholders for Unpaid Subscription*, 1007.
 - aa. *In General*, 1007.
 - bb. *Power of Corporation to Exempt*, 1009.
 - (aa) *In General*, 1009.
 - (bb) *Agreements in Sale of Stock*, 1009.
 - (cc) *Release of Unpaid Balance*, 1010.
 - (dd) *Rescission of Subscription and Surrender of Stock*, 1010.
 - (ee) *Reduction of Capital Stock*, 1011.
 - (ff) *Forfeiture of Stock*, 1011.
 - cc. *Defenses*, 1011.
 - (b) *Liability on Bonus Stock*, 1012.
 - (c) *Liability of Stock Issued for Overvalued Consideration*, 1012.
 - aa. *Stock Issued in Payment of Property*, 1012.
 - bb. *Stock Issued in Payment of Services*, 1014.
 - cc. *Stock Issued in Payment of Antecedent Debt*, 1014.
 - dd. *Payment in Depreciated Stock*, 1014.
 - (d) *Liability for Corporate Assets Withdrawn by Stockholders*, 1014.

STOCK AND STOCKHOLDERS.

- aa. *In General*, 1014.
 - bb. *Division of Property Among Stockholders* 1015.
 - cc. *Payment of Dividend Out of Capital Stock*, 1015.
 - (e) *Extent of Liability*, 1015.
 - (f) *Waiver of Liability by Creditor*, 1016.
 - aa. *By Express Agreement*, 1016.
 - bb. *By Knowledge of Facts*, 1016.
 - (3) *Rule in England*, 1016.
- b. *Additional Statutory Liability*, 1017.
 - (1) *In General*, 1017.
 - (2) *Validity and Effect of Constitutional and Statutory Provisions*, 1017.
 - (a) *Constitutional Provisions*, 1017.
 - (b) *Statutory Provisions*, 1018.
 - (c) *Effect on Existing Relations*, 1018.
 - aa. *In General*, 1018.
 - bb. *Reservation of Right to Amend*, 1019.
 - cc. *Statutes Affecting Remedy Merely*, 1019.
 - (3) *Construction*, 1019.
 - (4) *Nature of Statutory Liability*, 1020.
 - (a) *Contractual or Penal*, 1020.
 - (b) *Joint or Several*, 1020.
 - (c) *Primary or Secondary*, 1021.
 - (d) *In Personam or in Rem*, 1021.
 - (5) *Extent of Liability*, 1021.
 - (a) *Proportional Liability*, 1021.
 - (b) *Liability for Amount Equal to Subscription*, 1021.
 - (c) *Liability for Double Amount of Subscription*, 1022.
 - (d) *Debts and Demands to Which Liability Extends*, 1022.
 - aa. *Claims ex Contractu*, 1022.
 - (aa) *In General*, 1022.
 - (bb) *Wages Due Laborers, Servants, etc.*, 1022.
 - aaa. *In General*, 1022.
 - bbb. *Who Are Laborers, Servants, etc.*, 1023.
 - (cc) *Materials Furnished to Manufacturing Corporations*, 1023.
 - (dd) *Liability for Antecedent Debts*, 1024.
 - (ee) *Liability on Renewal Note*, 1024.
 - (ff) *Maturity of Debt*, 1024.
 - bb. *Claims ex Delicto*, 1024.
 - cc. *Interest and Costs*, 1025.
 - (6) *Defenses*, 1025.
 - (a) *Defects in Organization*, 1025.
 - (b) *Extension of Time of Payment to Corporation*, 1025.
 - (c) *Discharge of Corporation in Bankruptcy*, 1025.
 - (d) *Dissolution of Corporation*, 1026.
 - (e) *Payment of Corporate Debts*, 1026.
 - (f) *Waiver by Creditor*, 1026.
 - aa. *Express Waiver*, 1026.
 - bb. *Implied Waiver*, 1027.
 - (g) *Release of Stockholder*, 1027.
- c. *Individual or Partnership Liability*, 1027.
 - (1) *For Ante-corporate Debts*, 1027.
 - (2) *When Incorporation Is Fraudulent*, 1027.
 - (3) *When Incorporation Is Defective*, 1027.
 - (4) *Failure to Comply with Statutory Requirements*, 1028.
 - (a) *In General*, 1028.

STOCK AND STOCKHOLDERS.

- (b) *When Statutes Impose Liability for Failure*, 1028.
 - aa. *Nature of Liability Created*, 1028.
 - bb. *Provisions Enforcing Publicity*, 1029.
 - cc. *Publishing Statement of Liabilities*, 1029.
 - dd. *Payment of Capital Stock*, 1029.
 - (aa) *In General*, 1029.
 - (bb) *Payment in Property*, 1030.
 - ee. *Filing Certificate of Payment*, 1030.
 - (5) *Engaging in Illegal Business*, 1031.
 - (6) *Debts Incurred in Excess of Statutory Liability*, 1031.
 - (7) *Debts Incurred Ultra Vires*, 1031.
 - (8) *Fraud of Corporation*, 1031.
 - (9) *Dissolution of Corporation*, 1031.
- 2. *Who Are Liable*, 1032.
 - a. *In General*, 1032.
 - b. *Estate of Deceased Stockholder*, 1032.
 - c. *Pledgee Holding Stock as Collateral*, 1032.
 - d. *Stock Held in Fiduciary Capacity*, 1033.
 - e. *Showing Character as Stockholder*, 1034.
 - (1) *Necessity for Proof*, 1034.
 - (2) *Sufficiency of Proof*, 1034.
 - (3) *Estoppel to Deny*, 1035.
 - f. *Effect of Transfer*, 1035.
 - (1) *Liability of Transferrer*, 1035.
 - (a) *In General*, 1035.
 - (b) *As Affected by Statute*, 1037.
 - (2) *Liability of Transferee*, 1037.
 - (a) *In General*, 1037.
 - (b) *As Affected by Statute*, 1038.
 - (3) *Sufficiency of Transfer to Shift Liability*, 1039.
 - g. *Corporations Exempted from Operation of Statute*, 1041.
- 3. *Who May Enforce Liability*, 1041.
 - a. *Creditors*, 1041.
 - (1) *In General*, 1041.
 - (2) *Creditors by Assignment*, 1042.
 - (a) *In General*, 1042.
 - (b) *Holder of Negotiable Paper*, 1042.
 - (3) *Creditors Who Are Also Stockholders*, 1043.
 - (a) *Legal Remedies*, 1043.
 - (b) *Equitable Remedies*, 1043.
 - b. *Assignees for Benefit of Creditors*, 1044.
 - c. *Receivers*, 1044.
- 4. *Mode of Enforcement*, 1044.
 - a. *Enforcement by Action*, 1044.
 - (1) *In General*, 1044.
 - (2) *Necessity of Exhausting Remedy Against Corporation*, 1045.
 - (3) *Effect of Judgment Against Corporation on Stockholders*, 1047.
 - b. *Execution Against Stockholder on Judgment Against Corporation*, 1048.
- 5. *Limitations and Laches*, 1048.
 - a. *When Statute Begins*, 1048.
 - (1) *Necessity for Exhausting Remedy Against Corporation*, 1048.
 - (2) *Circumstances Rendering Judgment and Execution Against Corporation Unnecessary*, 1049.
 - (3) *Where Stockholder's Liability Is Primary*, 1049.
 - (4) *Effect of Extending Time of Payment*, 1049.
 - b. *Period of Limitation*, 1050.
 - (1) *How Determined*, 1050.
 - (2) *What General Statute Applicable*, 1050.
 - (3) *What Law Governs*, 1050.

- c. *Laches*, 1050.
- 6. *Set-off of Debt of Corporation*, 1051.
 - a. *Against Subscription Liability*, 1051.
 - b. *Against Additional Statutory Liability*, 1051.
- 7. *Contribution Between Stockholders*, 1052.

CROSS-REFERENCES.

For matters of *PROCEDURE*, see *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, title *STOCK AND STOCKHOLDERS*, vol. 20, p. 672, and the cross-references there given.

As to admissions by stockholders, see the title *ADMISSIONS*, vol. 1, p. 707.

Attachment of shares of stock, see the title *ATTACHMENT*, vol. 3, p. 181.

Consent of stockholders to assignment by corporation, see the title *ASSIGNMENT FOR BENEFIT OF CREDITORS*, vol. 3, p. 1.

Discharge in bankruptcy as affecting stockholders' liability, see the title *INSOLVENCY AND BANKRUPTCY*, vol. 16, p. 776.

Duty of stockholders towards each other, see the title *ILLEGAL CONTRACTS*, vol. 15, p. 948.

Enforcement of statutory liability of stockholders in equity, see the title *EQUITY*, vol. 11, p. 188.

Garnishment of shares of stock, see the title *GARNISHMENT*, vol. 14, p. 731.

Implied warranty in sale of shares, see the title *IMPLIED WARRANTIES*, vol. 15, p. 1241.

Insurable interest in corporate property, see the title *FIRE INSURANCE*, vol. 13, p. 176.

Proof of value of stock, see the title *EXPERT AND OPINION EVIDENCE*, vol. 12, p. 482.

Stock gambling, see the title *GAMBLING CONTRACTS*, vol. 14, p. 576.

Subscription to stock by municipality, see the titles *MUNICIPAL AID*, vol. 20, p. 1082; *MUNICIPAL CORPORATIONS*, vol. 20, p. 1144.

For particular kinds of corporations, see the titles *AGRICULTURAL SOCIETIES*, vol. 2, p. 18; *BANKNOTES*, vol. 3, p. 779; *BANKS AND BANKING*, vol. 3, p. 787; *BUILDING AND LOAN ASSOCIATIONS*, vol. 4, p. 999; *INSURANCE*, vol. 16, p. 830; *NATIONAL BANKS*, vol. 21, p. 319; *RAILROADS*, vol. 23, p. 667.

For other matters of *SUBSTANTIVE LAW AND EVIDENCE* related to this subject, see the following titles in this work: *BY-LAWS*, vol. 5, p. 86; *CAPITAL*, vol. 5, p. 134; *CONSOLIDATION OF CORPORATIONS*, vol. 6, p. 800; *CONSTITUTIONAL LAW*, vol. 6, p. 882; *CONTRIBUTION AND EXONERATION*, vol. 7, p. 325; *CORPORATIONS (PRIVATE)*, vol. 7, p. 620; *CUMULATIVE VOTING*, vol. 8, p. 494; *DE FACTO CORPORATIONS*, vol. 8, p. 747; *DEBENTURES*, vol. 8, p. 960; *DISSOLUTION OF CORPORATIONS*, vol. 9, p. 544; *DIVIDENDS*, vol. 9, p. 679; *DOCUMENTARY EVIDENCE*, vol. 9, p. 877; *EXEMPTIONS (FROM TAXATION)*, vol. 12, p. 266; *IMPAIRMENT OF OBLIGATION OF CONTRACTS*, vol. 15, p. 1030; *OFFICERS AND AGENTS OF PRIVATE CORPORATIONS*, vol. 21, p. 833; *OPTIONS*, vol. 21, p. 924; *PLEDGE AND COLLATERAL SECURITY*, vol. 22, p. 839; *PROMOTERS*, vol. 23, p. 232; *PROXIES*, vol. 23, p. 294; *QUORUM*, vol. 23, p. 589; *RAILROAD SECURITIES*, vol. 23, p. 795; *RECEIVERS*, vol. 23, p. 992; *STOCK AND PRODUCE EXCHANGES*, *ante*, p. 788.

I. DEFINITION AND NATURE OF CORPORATE STOCK — 1. Stock in General. — Stock has been succinctly designated as "the sum of all the rights and duties" of the shareholders.¹ But the term "stock" is often employed in different

¹ **1. Stock Defined.** — Lowell on Transfer of Ky. 623. Compare Morawetz on Corp. (2d ed.) Stock, § 4; Henderson Bridge Co. v. Com., 99 226.

senses by juridical writers, being used now to denote capital stock, and now shares of stock, and again being applied so as apparently to include both, and sometimes as meaning property of the corporation. It is evident, therefore, that these various meanings must be understood and these different elements examined separately before a satisfactory definition can be reached. The term "stock" is also sometimes used in the plural to denote bonds or other corporate and government securities, but its use in this sense is of doubtful accuracy.¹ When used in a charter before subscriptions have been taken, stock means no more than power in the directors to receive subscriptions for shares.² While stock is commonly associated with corporate enterprise, the connection is not a necessary one, and the term is sometimes used in relation to partnerships and unincorporated joint-stock companies,³ and even voluntary associations.⁴ Indeed, it is only within a comparatively recent period of the history of corporations that the issue of stock has become a feature of their life and organization.⁵

2. Capital Stock. — Capital stock is the fund of money or other property fixed as the basis for conducting the business of the corporation.⁶ That fund becomes the property of the corporation,⁷ but the capital stock of a corporation is not the same thing as the property of the corporation.⁸ The property

1. Various Meanings of Term Stock. — Lowell on Transfer of Stock, § 6; Cook on Stock and Stockholders, § 569, n. 1. See generally, Cadett v. Earle, 5 Ch. D. 712; Central R., etc., Co. v. Wright, 164 U. S. 327; Parker v. Otis, 130 Cal. 322; Bibb v. Central R., etc., Co., 40 Ga. 650; Rome R. Co. v. Rome, 14 Ga. 275; Henderson Bridge Co. v. Com., 99 Ky. 623; Christensen v. Eno, 106 N. Y. 100; Howland v. Edmonds, 24 N. Y. 315; People v. Tax, etc., Com'rs, 23 N. Y. 220; Burr v. Wilcox, 22 N. Y. 556; People v. Coleman, (N. Y. 1891) 34 Am. & Eng. Corp. Cas. 223; State v. Hood, 15 Rich. L. (S. Car.) 177; State v. Cheraw, etc., R. Co., 16 S. Car. 528.

2. Before Subscription. — Sturges v. Stetson, 1 Biss. (U. S.) 246. See generally *infra*, this title, *Issue of Stock*.

3. Stock Not Peculiar to Corporations. — See Lockwood v. Weston, 61 Conn. 211; Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412; Barry v. Merchants' Exch. Co., 1 Sandf. Ch. (N. Y.) 307. See also the title JOINT STOCK COMPANIES, vol. 17, p. 636.

4. See Crawford v. Gross, 7 R. & Corp. L. J. 123. Compare Bryant v. Ohio Dental College, 1 Cinc. Super. Ct. 307.

5. In McKim v. Odum, 3 Bland (Md.) 418, Chancellor Bland says that the history of colonial America affords no instance of a business corporation with capital stock. See also Cook on Stock and Stockholders, § 1; and an interesting sketch of the history of company law in Lindley on Partnership, vol. 1, p. 5 *et seq.* The "corporations" treated of by Blackstone and Kent were mostly counterparts of the non-trading and stockless, though incorporated, companies of the present day.

6. Capital Stock Defined. — Bailey v. Clark, 21 Wall. (U. S.) 286; Farrington v. Tennessee, 95 U. S. 686.

There have been many judicial definitions of the phrase "capital stock," but they correspond in substance with that given in the text. See the following cases:

United States. — Sanger v. Upton, 91 U. S. 60.

Alabama. — Commercial F. Ins. Co. v. Board of Revenue, 99 Ala. 4.

Arkansas. — St. Louis, etc., R. Co. v. Loftin, 30 Ark. 693.

California. — Martin v. Zellerbach, 38 Cal. 300, 99 Am. Dec. 365.

Connecticut. — State v. Norwich, etc., R. Co., 30 Conn. 290.

Georgia. — Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412.

Kentucky. — Henderson Bridge Co. v. Com., 99 Ky. 623.

Massachusetts. — Field v. Pierce, 102 Mass. 261.

Missouri. — Bent v. Hart, 10 Mo. App. 146.

New Jersey. — State v. Morristown F. Assoc., 23 N. J. L. 195.

New York. — People v. Tax, etc., Com'rs, 40 Barb. (N. Y.) 353; People v. Wemple, 78 Hun (N. Y.) 63; Barry v. Merchants' Exch. Co., 1 Sandf. Ch. (N. Y.) 307; People v. Coleman, 126 N. Y. 439; Christensen v. Eno, 106 N. Y. 100; Williams v. Western Union Tel. Co., 93 N. Y. 187; Burrall v. Bushwick R. Co., 75 N. Y. 216; Mutual Ins. Co. v. Erie County, 4 N. Y. 442.

Ohio. — Lee v. Sturges, 46 Ohio St. 160.

South Carolina. — State Bank v. Charleston, 3 Rich. L. (S. Car.) 346; State v. Cheraw, etc., R. Co., 16 S. Car. 524.

Tennessee. — Tradesman Pub. Co. v. Knoxville Car Wheel Co., 95 Tenn. 634, 49 Am. St. Rep. 943.

Wisconsin. — State Bank v. Milwaukee, 18 Wis. 284.

See also generally the title CAPITAL — CAPITAL STOCK, vol. 5, p. 134.

7. Distinguished from Property or Assets. — Burrall v. Bushwick R. Co., 75 N. Y. 216; People v. Coleman, (N. Y. 1891) 34 Am. & Eng. Corp. Cas. 223; Union Bank v. State, 9 Yerg. (Tenn.) 490. See also *infra*, this section, *Shares of Stock — Capital Stock Distinguished*.

8. Commercial F. Ins. Co. v. Board of Revenue, 99 Ala. 4; Henderson Bridge Co. v. Com., 99 Ky. 623. See Beach, Priv. Corp. 426; Central R., etc., Co. v. Wright, 164 U. S. 327; Memphis, etc., R. Co. v. Gaines, 97 U. S. 697; State v. Morristown F. Assoc., 23 N. J. L. 195; Barry v. Merchants' Exch. Co., 1 Sandf. Ch. (N. Y.) 307.

This same distinction exists in respect to the

of a corporation fluctuates and may be greater or less than the original capital invested according as the business has resulted in a profit or a loss. But the capital stock remains fixed and unaffected by the accidents of business.¹ The sum total of all the assets of a corporation is sometimes said to constitute its capital, but the term "capital" is here used in its economic sense as "wealth in use," and not as synonymous with capital stock, in which sense it is also sometimes used.² Undivided profits or surplus form no part of the capital stock, though they do form part of the general capital or assets of the corporation.³ Money borrowed by the corporation forms no part of its capital stock.⁴ The franchise of a corporation constitutes no part or element of its capital stock.⁵ A corporation is not limited in its ownership of property to the amount fixed as its capital stock.⁶ So it is said that capital stock "exists only nominally" and is the mere representative of the actual property or assets of the corporation.⁷ The value of the capital stock is measured by that of the corporate property,⁸ but the amount remains as fixed by the charter until changed in some authorized mode.⁹ The amount of capital stock is not confined to the sum actually paid in, but includes the amount originally subscribed for whether fully paid up or not.¹⁰ Upon the other hand the amount

capital and property of a partnership. See title PARTNERSHIP, vol. 22, p. 84.

"Capital stock, or that kind of property designated as such, is not the identical lands, chattels, and other articles of property possessed by the corporation, but as this court defined it, in *Porter v. Rockford, etc., R. Co.*, 76 Ill. 561, means, as used in the act of 1872, not shares of stock, either separately or in the aggregate, but [is] intended to designate the property of the corporation subject to taxation, not in separate parcels, but as an homogeneous unit, 'partaking of the nature of personalty, and subject to the burdens imposed upon it at the domicile of the owner.'" *Quincy R. Bridge Co. v. Adams County*, 88 Ill. 621.

1. Capital Stock Does Not Fluctuate. — *Farrington v. Tennessee*, 95 U. S. 686; *Commercial F. Ins. Co. v. Board of Revenue*, 99 Ala. 4; *State v. Morristown F. Assoc.*, 23 N. J. L. 196; *Barry v. Merchants' Exch. Co.*, 1 Sandf. Ch. (N. Y.) 307; *Tradesman Pub. Co. v. Knoxville Car Wheel Co.*, 95 Tenn. 634, 49 Am. St. Rep. 943.

2. Capital Distinguished from Capital Stock. — *United States*. — *Bank of Commerce v. Tennessee*, 104 U. S. 495. But see *Chicago Union Traction Co. v. State Board of Equalization*, 112 Fed. Rep. 611.

Connecticut. — *State v. Norwich, etc., R. Co.*, 30 Conn. 290.

Illinois. — *Ohio, etc., R. Co. v. Weber*, 96 Ill. 443; *Pacific Hotel Co. v. Lieb*, 83 Ill. 602.

Massachusetts. — *Traders', etc., Ins. Co. v. Brown*, 142 Mass. 403, 14 Am. & Eng. Corp. Cas. 615.

New York. — *People v. Wemple*, 78 Hun (N. Y.) 67; *People v. Knight*, 75 N. Y. App. Div. 164; *Howland v. Edmonds*, 24 N. Y. 315; *People v. Tax, etc., Com'rs*, 23 N. Y. 219. See *Christensen v. Eno*, 106 N. Y. 100.

South Carolina. — *State v. Cheraw, etc., R. Co.*, 16 S. Car. 528.

Tennessee. — *Tradesman Pub. Co. v. Knoxville Car Wheel Co.*, 95 Tenn. 634, 49 Am. St. Rep. 943.

Wisconsin. — *State Bank v. Milwaukee*, 18 Wis. 284.

But see *Northern Pac. R. Co. v. Barnes*, 2 N. Dak. 327; *Lee v. Sturges*, 46 Ohio St. 160.

Compare Bibb v. Central R., etc., Co., 40 Ga. 650.

3. Surplus and Undivided Profits. — *Farrington v. Tennessee*, 95 U. S. 686; *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412; *People v. Wemple*, 78 Hun (N. Y.) 63; *Barry v. Merchants' Exch. Co.*, 1 Sandf. Ch. (N. Y.) 307; *Williams v. Western Union Tel. Co.*, 93 N. Y. 187, 3 Am. & Eng. Corp. Cas. 139; *People v. Coleman*, (N. Y. 1891) 34 Am. & Eng. Corp. Cas. 223; *Sun Mut. Ins. Co. v. New York*, 8 N. Y. 241; *State v. Bank of Commerce*, 95 Tenn. 221; *State Bank v. Milwaukee*, 18 Wis. 281. See *Burden v. Burden*, 159 N. Y. 287. But see *PHELPS v. Farmers', etc., Bank*, 26 Conn. 272; *Henderson Bridge Co. v. Com.*, 99 Ky. 623.

Surplus May Become Capital by means of a stock dividend duly authorized. *Gibbons v. Mahon*, 136 U. S. 549.

4. Money Borrowed. — *State v. Cheraw, etc., R. Co.*, 16 S. Car. 528.

5. Corporate Franchises. — *People v. Coleman*, (N. Y. 1891) 34 Am. & Eng. Corp. Cas. 223.

6. Ownership of Property Not Limited by Capital Stock. — *State v. Morristown F. Assoc.*, 23 N. J. L. 195; *Barry v. Merchants' Exch. Co.*, 1 Sandf. Ch. (N. Y.) 307. See generally title CORPORATIONS (PRIVATE), vol. 7, p. 620.

7. Capital Stock Represents Assets. — *Hannibal, etc., R. Co. v. Shacklett*, 30 Mo. 550.

The capital stock of a corporation represents whatever it may be invested in. *Farrington v. Tennessee*, 95 U. S. 686.

8. Value of Capital Stock. — *Coit v. North Carolina Gold Amalgamating Co.*, 14 Fed. Rep. 12; *Henderson Bridge Co. v. Com.*, 99 Ky. 623; *Raleigh, etc., R. Co. v. Wake County*, 87 N. Car. 414, 17 Am. & Eng. R. Cas. 466. *Compare People v. Howell*, 69 N. Y. 607.

9. Increase or Reduction of Stock. — See *infra*, this title, *Increase and Reduction of Stock*.

Reducing the Book Value of Shares by charging losses *pro rata* against the stock of the shareholders does not amount to a reduction of the capital stock of the company. *People v. Bankers Loan, etc., Co.*, (C. Pl. Gen. T.) 13 Misc. (N. Y.) 221.

10. Amount Subscribed But Not Paid In. — *Farrington v. Tennessee*, 95 U. S. 686; *Ward*

of capital stock is limited to the amount actually subscribed for and issued, and is not necessarily the amount named in the articles of association, which latter is merely the authorized capital stock.¹

3. Shares of Stock — *a. GENERAL NATURE.* — For the purpose of fixing the amount and subdivisions of the respective contributions of the corporators to the common fund, their proportionate interests in the corporate property, the voice which each shall have in its control and management, and the apportionment of the profits or losses of the enterprise, the whole of the capital stock is usually divided into equal portions called shares.² Shares of stock are a species of incorporeal property consisting of rights in the profits, management, and assets of the company.³ They represent the extent of the interest which the various shareholders have in the capital and net earnings of the corporation.⁴ In the *United States* the term "stock" is used synonymously with shares. But in *England* there is a slight distinction. There "share" is used in its ordinary sense to indicate an indivisible proportionate interest, and the term "stock" is used to indicate a consolidation of paid-up shares which may be in turn subdivided into fractional interests of any amount; but in most respects

v. Griswoldville Mfg. Co., 16 Conn. 593; *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412; *People v. Tax*, etc., Com'rs, 23 N. Y. 222; *State Bank v. Richmond*, 79 Va. 113. See *Lane's Appeal*, 105 Pa. St. 60; *Tradesman Pub. Co. v. Knoxville Car Wheel Co.*, 95 Tenn. 634. *Contra. Com. v. Lehigh Ave. R. Co.*, 129 Pa. St. 414. See also *infra*, this title, *Issue of Stock*; *Subscription to Stock*; *Liability of Stockholders for Corporate Debts*.

1. Subscribed and Authorized Capital. — *Fisk v. Chicago*, etc., R. Co., (Supm. Ct. Spec. T.) 36 How. Pr. (N. Y.) 22; *Pratt v. Munson*, 17 Hun (N. Y.) 475; *Greenpoint Sugar Co. v. Whitin*, 69 N. Y. 338; *Com. v. Lehigh Ave. R. Co.*, 129 Pa. St. 414; *Philadelphia v. Ridge Ave. Pass. R. Co.*, 102 Pa. St. 190; *Philadelphia v. Philadelphia*, etc., R. Co., 52 Pa. St. 177. Compare *Coddington v. Gilbert*, 17 N. Y. 489. See also title CAPITAL — CAPITAL STOCK, vol. 5, p. 140.

2. Division of Capital into Shares. — *Christensen v. Eno*, 106 N. Y. 100; *Barry v. Merchants' Exch. Co.*, 1 Sandf. Ch. (N. Y.) 305; *State v. Cheraw*, etc., R. Co., 16 S. Car. 528. See *Parker v. Otis*, 130 Cal. 322.

3. Shares of Stock Defined — *England.* — *Morrice v. Aylmer*, L. R. 7 H. L. 717, L. R. 10 Ch. 155; *Oakbank Oil Co. v. Crum*, 8 App. Cas. 65. See also *Wildman v. Wildman*, 9 Ves. Jr. 174.

United States. — *Van Allen v. Assessors*, 3 Wall. (U. S.) 585.

Alabama. — *Commercial F. Ins. Co. v. Board of Revenue*, 99 Ala. 4.

California. — *Payne v. Elliot*, 54 Cal. 339, 35 Am. Rep. 80.

Iowa. — *Bridgman v. Keokuk*, 72 Iowa 42; *Allen v. Pegram*, 16 Iowa 173.

Kentucky. — *Spalding v. Paine*, 81 Ky. 416, 3 Am. & Eng. Corp. Cas. 187.

Louisiana. — *Parker v. Sun Ins. Co.*, 42 La. Ann. 1172, 32 Am. & Eng. Corp. Cas. 334.

Massachusetts. — *Fisher v. Essex Bank*, 5 Gray (Mass.) 377; *Field v. Pierce*, 102 Mass. 261.

Missouri. — *Caffery v. Choctaw Coal*, etc., Co., 95 Mo. App. 184; *Bent v. Hart*, 10 Mo. App. 143.

New York. — *People v. Tax*, etc., Com'rs, 40 Barb. (N. Y.) 353; *Plimpton v. Bigelow*, 93 N. Y. 599; *Jermain v. Lake Shore*, etc., R. Co., 91

N. Y. 492; *Bunall v. Bushwick R. Co.*, 75 N. Y. 211; *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159.

Ohio. — *Bradley v. Bauder*, 36 Ohio St. 35, 38 Am. Rep. 547; *Jones v. Davis*, 35 Ohio St. 477.

Oregon. — *Budd v. Multnomah St. R. Co.*, 12 Oregon 272, 53 Am. Rep. 355.

Rhode Island. — *Arnold v. Ruggles*, 1 R. I. 165.

Tennessee. — *Brightwell v. Mallory*, 10 Yerg. (Tenn.) 196.

Texas. — *Harrison v. Vines*, 46 Tex. 21.

Virginia. — *Barksdale v. Finney*, 14 Gratt. (Va.) 357.

In *Neiler v. Kelley*, 69 Pa. St. 407, *Sharswood, J.*, said: "A share of stock is an incorporeal, intangible thing. It is a right to a certain proportion of the capital stock of a corporation — never realized except upon the dissolution and winding up of the corporation — with the right to receive in the meantime such profits as may be made and declared in the shape of dividends."

4. Shares Represent Interest of Stockholders — *England.* — *Borland v. Steel*, (1901) 1 Ch. 279, 70 L. J. Ch. 51, 49 W. R. 120.

United States. — *Ashley v. Quintard*, 90 Fed. Rep. 84. See also *Gibbons v. Mahon*, 136 U. S. 559.

Alabama. — *Cunningham v. Alabama L. Ins.*, etc., Co., 4 Ala. 657.

California. — *Atkins v. Gamble*, 42 Cal. 99, 10 Am. Rep. 282.

Iowa. — *Bridgman v. Keokuk*, 72 Iowa 42.

New Jersey. — *Donnell v. Wyckoff*, 49 N. J. L. 52; *Graydon v. Graydon*, 23 N. J. Eq. 229.

New York. — *Christensen v. Eno*, 106 N. Y. 101; *Jermain v. Lake Shore*, etc., R. Co., 91 N. Y. 492; *Howland v. Edmonds*, 24 N. Y. 315; *People v. Tax*, etc., Com'rs, 23 N. Y. 220; *Burr v. Wilcox*, 22 N. Y. 556.

Ohio. — *Jones v. Davis*, 35 Ohio St. 477; *Marble v. Van Wert Nat. Bank*, 2 Ohio Cir. Dec. 265, 3 Ohio Cir. Ct. 464.

South Carolina. — *State v. Cheraw*, etc., R. Co., 16 S. Car. 528.

Tennessee. — *Brightwell v. Mallory*, 10 Yerg. (Tenn.) 196; *Cates v. Baxter*, 97 Tenn. 443.

Texas. — *Waco Nat. Bank v. Rogers*, 51 Tex. 608; *Harrison v. Vines*, 46 Tex. 21.

"Each share represents an aliquot part of the

even in England shares and stocks mean substantially the same.¹ Shares of stock are in no sense debts due to the owner;² hence they are not credits.³ Nor are they securities for money,⁴ nor representatives thereof,⁵ and they will not pass under a bequest of money,⁶ even if they are shares in a financial institution like the Bank of England.⁷

b. CAPITAL STOCK DISTINGUISHED. — Capital stock is property belonging to the corporation, but the shares of stock are property belonging to the stockholders individually and represent their interest in the corporate property,⁸ and, therefore, it is held that if each is separately taxed, the result is not double taxation.⁹

c. PERSONALTY OR REALTY. — It has been said that shares of stock are property.¹⁰ Their status as such has finally been fixed as personalty,¹¹ irre-

capital stock." *Farrington v. Tennessee*, 95 U. S. 687.

1. *Distinction Between "Shares" and "Stock."* — *Rapalje & L. Law Dict.* 1224; *Cook on Stock and Stockholders*, § 5; *Morrice v. Aylmer*, L. R. 10 Ch. 154, L. R. 7 H. L. 717; *Ex p. Copeland*, 2 De G. M. & G. 917; *Waco Nat. Bank v. Rogers*, 51 Tex. 608; *Harrison v. Vines*, 46 Tex. 15. See *In re New Zealand Trust, etc., Co.*, (1893) 1 Ch. 403. See also *Trinder v. Trinder*, L. R. 1 Eq. 695.

2. *Shares Are Not Debts Due Owner.* — *Coltrane v. Blake*, (C. C. A.) 113 Fed. Rep. 785; *Bridgman v. Keokuk*, 72 Iowa 42; *Cates v. Baxter*, 97 Tenn. 443; *Commercial Nat. Bank v. Chambers*, 21 Utah 324. See *Ashley v. Quintard*, 90 Fed. Rep. 89; *Burrall v. Bushwick R. Co.*, 75 N. Y. 215. But see *Albia First Nat. Bank v. Albia*, 86 Iowa 35. *Compare Cottingham v. Equitable Bldg., etc., Assoc.*, 114 Ga. 940.

Guaranty capital of the stock department of a mutual insurance company is neither a debt owed by, nor a loan to, the corporation. *Traders', etc., Ins. Co. v. Brown*, 142 Mass. 403, 14 Am. & Eng. Corp. Cas. 615.

3. *Not Credits.* — *New Orleans Nat. Banking Assoc. v. Wiltz*, 4 Woods (U. S.) 43; *Bridgman v. Keokuk*, 72 Iowa 42; *Smith v. Crescent City Live-Stock Landing, etc., Co.*, 30 La. Ann. 1378; *Commercial Nat. Bank v. Chambers*, 21 Utah 324. *Contra, Albia First Nat. Bank v. Albia*, 86 Iowa 35.

4. *Not Securities for Money.* — *Ogle v. Knipe*, L. R. 8 Eq. 434; *Atkins v. Gamble*, 42 Cal. 99, 10 Am. Rep. 282; *Graydon v. Graydon*, 23 N. J. Eq. 229; *Mechanics' Bank v. New York, etc., R. Co.*, 13 N. Y. 626. See *Commercial Nat. Bank v. Chambers*, 21 Utah 324.

5. *Borland v. Steel*, (1901) 1 Ch. 279; *Mechanics' Bank v. New York, etc., R. Co.*, 13 N. Y. 626.

6. *Not Money.* — *Lowe v. Thomas*, 5 De G. M. & G. 315; *Gosden v. Dotterill*, 1 Myl. & K. 56; *Jones v. Brinley*, 1 East 1. *Compare Nightingal v. Devisme*, 5 Burr. 2589; *Douglas v. Congreve*, 1 Keen 410.

7. *Sir W. M. James, V. C.*, in *Ogle v. Knipe*, L. R. 8 Eq. 434. See *Union Bank v. State*, 9 Yerg. (Tenn.) 501; *Commercial Nat. Bank v. Chambers*, 21 Utah 324.

8. *Ownership of Capital Stock and Shares* — *England.* — *Watson v. Spratley*, 10 Exch. 236.

United States. — *Sturges v. Stetson*, 1 Biss. (U. S.) 251; *Taylor v. South, etc., Alabama R. Co.*, 13 Fed. Rep. 152; *Farrington v. Tennessee*, 95 U. S. 691.

Alabama. — *Commercial F. Ins. Co. v. Board of Revenue*, 99 Ala. 5.

Illinois. — *Quincy R. Bridge Co. v. Adams County*, 88 Ill. 616.

Iowa. — *Bridgman v. Keokuk*, 72 Iowa 44.

Kentucky. — *Henderson Bridge Co. v. Com.*, 99 Ky. 623.

New York. — *People v. Tax, etc., Com'rs*, 40 Barb. (N. Y.) 354; *People v. Board of Assessors*, 39 N. Y. 88; *People v. Tax, etc., Com'rs*, 23 N. Y. 220; *People v. Coleman*, (N. Y. 1891) 34 Am. & Eng. Corp. Cas. 223.

Ohio. — *Lee v. Sturges*, 46 Ohio St. 161; *Bradley v. Bauder*, 36 Ohio St. 28, 38 Am. Rep. 547.

Tennessee. — *Brightwell v. Mallory*, 10 Yerg. (Tenn.) 196; *Union Bank v. State*, 9 Yerg. (Tenn.) 490; *State v. Bank of Commerce*, 95 Tenn. 221.

Texas. — *Waco Nat. Bank v. Rogers*, 51 Tex. 608.

Virginia. — *State Bank v. Richmond*, 79 Va. 113.

See also title CAPITAL — CAPITAL STOCK, vol. 5, p. 139, note 2.

The connection in which the terms are used may sometimes be such that the term "capital stock" will include the term "shares of stock." See *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 17 Am. St. Rep. 319.

9. *Separate Taxation of Capital and Shares.* — *Farrington v. Tennessee*, 95 U. S. 687; *Lee v. Sturges*, 46 Ohio St. 162; *Bradley v. Bauder*, 36 Ohio St. 28, 38 Am. Rep. 547; *Memphis v. Ensley*, 6 Baxt. (Tenn.) 553, 32 Am. Rep. 532; *Union Bank v. State*, 9 Yerg. (Tenn.) 490; *State v. Bank of Commerce*, 95 Tenn. 221; *Memphis v. Union, etc., Bank*, 91 Tenn. 546; *Memphis v. Home Ins. Co.*, 91 Tenn. 558; *State Bank v. Richmond*, 79 Va. 113. See *Griffith v. Watson*, 19 Kan. 26. See generally title TAXATION (CORPORATE).

10. *Shares Are Property.* — See *supra*, this subdivision, *General Nature*; *Capital Stock Distinguished*.

Stock is "property" within the meaning of the *Kentucky Civil Code*, § 180, authorizing the suing out of an order of arrest for a debtor about to leave the state, without leaving "property" sufficient to satisfy the claims against him. *Field v. Montmollin*, 5 Bush (Ky.) 455.

11. *Stock Is Personal Property* — *England.* — *Bligh v. Brent*, 2 Y. & C. Exch. 268; *Ex p. Lancaster Canal Co.*, 1 Deac. & C. 411; *Bradley v. Holdsworth*, 3 M. & W. 422; *Watson v.*

spective of whether the property of the corporation is realty or personalty, tangible or intangible.¹ This result has not been reached without some conflict of judicial opinion, and in several jurisdictions the present state of the law is the result of legislative interference in direct opposition to the courts.² Some of the older authorities hold that shares are realty or personalty according to the nature of the corporate capacity and enterprise.³ Accordingly, shares in a turnpike company,⁴ a waterworks company,⁵ a canal company,⁶ a navigation improvement company authorized to collect tolls,⁷ and even a railroad company,⁸ have been held in some instances to be real estate. But these decisions are practically obsolete and possess chiefly an historical interest. It is now settled that stock is personal property.⁹ Generally throughout the *United States* trover lies to recover shares of stock,¹⁰ though a different doctrine obtains in *Pennsylvania*.¹¹ Replevin does not lie to recover shares in a corporation, as they are incorporeal, intangible property, incapable of manual seizure.¹²

Spratley, 10 Exch. 222, 28 Eng. L. & Eq. 507; *Edwards v. Hall*, 6 De G. M. & G. 74.

United States.—*Jellenik v. Huron Copper Min. Co.*, 82 Fed. Rep. 778.

Alabama.—*Wilson v. Matthews*, 32 Ala. 349. *Berney Nat. Bank v. Pinckard*, 87 Ala. 577, 30 Am. & Eng. Corp. Cas. 52.

California.—*Calkins v. Equitable Bldg., etc., Assoc.*, 126 Cal. 531; *Mattingly v. Roach*, 84 Cal. 207; *Tregear v. Etiwanda Water Co.*, 76 Cal. 537, 9 Am. St. Rep. 245; *San Francisco v. Flood*, 64 Cal. 504, 3 Am. & Eng. Corp. Cas. 404; *Payne v. Elliot*, 54 Cal. 339, 35 Am. Rep. 80; *Atkins v. Gamble*, 42 Cal. 99, 10 Am. Rep. 282.

Connecticut.—*Lockwood v. Weston*, 61 Conn. 211.

Georgia.—*South-Western R. Co. v. Thomason*, 40 Ga. 408.

Illinois.—*Cooper v. Corbin*, 105 Ill. 224, 13 Am. & Eng. R. Cas. 394.

Indiana.—*Seward v. Rising Sun*, 79 Ind. 351, 13 Am. & Eng. R. Cas. 315; *Manns v. Brookville Nat. Bank*, 73 Ind. 243; *Weyer v. Franklin Second Nat. Bank*, 57 Ind. 198.

Iowa.—*Allen v. Pegram*, 16 Iowa 173.

Kansas.—*Griffith v. Watson*, 19 Kan. 23.

Maryland.—*Baltimore City Pass. R. Co. v. Sewell*, 35 Md. 238, 6 Am. Rep. 402.

Massachusetts.—*Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90, 19 Am. Dec. 306; *Tippets v. Walker*, 4 Mass. 596.

Missouri.—*Watson v. Sidney F. Wood Printing Co.*, 56 Mo. App. 145; *Caffery v. Choctaw Coal, etc., Co.*, 95 Mo. App. 174; *Vanstone v. Goodwin*, 42 Mo. App. 39.

New Hampshire.—*Champollion v. Corbin*, 71 N. H. 78.

New York.—*People v. Tax, etc., Com'rs*, 40 Barb. (N. Y.) 353; *Weaver v. Barden*, 49 N. Y. 286.

Ohio.—*Lee v. Sturges*, 46 Ohio St. 161; *Bradley v. Bauder*, 36 Ohio St. 35, 38 Am. Rep. 547; *Johns v. Johns*, 1 Ohio St. 350.

Oregon.—*Budd v. Multnomah St. R. Co.*, 12 Oregon 272, 53 Am. Rep. 355.

Rhode Island.—*Dyer v. Osborne*, 11 R. I. 321, 23 Am. Rep. 460; *Arnold v. Ruggles*, 1 R. I. 165.

Tennessee.—*Cornick v. Richards*, 3 Lea (Tenn.) 1; *McClung v. Colwell*, 107 Tenn. 601; *Herring v. Ruskin Co-op. Assoc.*, (Tenn. Ch. 1899) 52 S. W. Rep. 327.

1. *Seward v. Rising Sun*, 79 Ind. 351, 13 Am. & Eng. R. Cas. 315; *Cooper v. Dismal Swamp Canal Co.*, 2 Murph. (6 N. Car.) 195; *Bradley v. Bauder*, 36 Ohio St. 35, 38 Am. Rep. 547; *Herring v. Ruskin Co-op. Assoc.*, (Tenn. Ch. 1899) 52 S. W. Rep. 327.

2. **Statutory Provisions.**—In *Connecticut*, after the decision in *Welles v. Cowles*, 2 Conn. 567, and in *Kentucky*, after that of *Copeland v. Copeland*, 7 Bush (Ky.) 349, statutes were enacted providing that shares of stock should thereafter be regarded as personalty. See also *Cates v. Baxter*, 97 Tenn. 443.

3. **View that Shares May Be Realty.**—*Cruise on Real Property* (Greenleaf) 39, 40.

4. *Knapp v. Williams*, 4 Ves. Jr. 430, note; *Welles v. Cowles*, 2 Conn. 567.

5. *Townsend v. Ash*, 3 Atk. 336; *Drybutter v. Bartholomew*, 2 P. Wms. 127. See the review of these cases by *Thurman, J.*, in *Johns v. Johns*, 1 Ohio St. 351.

6. *Tomlinson v. Tomlinson*, 9 Beav. 459.

7. *Buckeridge v. Ingram*, 2 Ves. Jr. 652. *Compare* *Meason's Estate*, 4 Watts (Pa.) 346.

8. *Price v. Price*, 6 Dana (Ky.) 107. *Compare* *Copeland v. Copeland*, 7 Bush (Ky.) 349.

9. See cases cited above.

10. **Trover Lies for Shares of Stock.**—*Payne v. Elliot*, 54 Cal. 341, 35 Am. Rep. 80; *Ayres v. French*, 41 Conn. 151. See also *Nabring v. Mobile Bank*, 58 Ala. 204; *Sturges v. Keith*, 57 Ill. 451, 11 Am. Rep. 28; *Bank of America v. McNeil*, 10 Bush (Ky.) 54; *Maryland F. Ins. Co. v. Dalrymple*, 25 Md. 242, 89 Am. Dec. 779; *Jarvis v. Rogers*, 15 Mass. 389; *Morton v. Preston*, 18 Mich. 60, 100 Am. Dec. 146; *Freeman v. Harwood*, 49 Me. 195; *Boylan v. Huguet*, 8 Nev. 345; *Anderson v. Nichols*, 28 N. Y. 600; *Barry v. Calder*, 48 Hun (N. Y.) 449; *Godfrey v. Pell*, 49 N. Y. Super. Ct. 226; *Budd v. Multnomah St. R. Co.*, 12 Oregon 271, 53 Am. Rep. 355, 22 Am. & Eng. R. Cas. 27; *Kuhn v. McAllister*, 1 Utah 273, 96 U. S. 87. *Compare* *Atkins v. Gamble*, 42 Cal. 86, 10 Am. Rep. 282.

11. "Trover can no more be maintained for a share of the capital stock of a corporation than it can for the interest of a partner in a commercial firm." *Sharswood, J.*, in *Neiler v. Kelley*, 69 Pa. St. 407. See also *Sewall v. Lancaster Bank*, 17 S. & R. (Pa.) 285.

12. **Replevin.**—*Ashton v. Heydenfeldt*, 124 Cal. 14.

d. AS CHOSE IN ACTION.—Shares of stock have been often said to be in the nature of choses in action,¹ but this is true only in a most general sense.²

e. STATUTE OF FRAUDS.—The application of the statute of frauds to shares of stock is considered elsewhere in this work.³

f. IDENTIFICATION.—One of the peculiar features of this species of property is its entire want of legal identity. Shares of stock are without "earmarks," and one cannot be distinguished from others of the same company and issue.⁴ Hence a transfer in which, by mistake, the shares are incorrectly numbered, has been held to pass title to those actually owned by the transferrer.⁵ So a pledgee of shares is not bound to retain and restore the identical shares or rather certificates which were pledged with him. It is sufficient if the pledgee has always had a sufficient number of shares of like kind and value on hand to comply with his contract.⁶

g. SITUS.—Shares of stock being intangible, incorporeal, personal property, can have no actual situs of their own, and must, therefore, of necessity

1. *Shares in Nature of Chose in Action*—*England*.—*Humble v. Mitchell*, 11 Ad. & El. 205, 39 E. C. L. 46; *Ex p. Union Bank, L. R.* 12 Eq. 354; *Société Générale v. Tramway Union Co.*, 14 Q. B. D. 424.

United States.—*Jellenik v. Huron Copper Min. Co.*, 177 U. S. 1.

Iowa.—*Allen v. Pegram*, 16 Iowa 173.

Massachusetts.—*Fisher v. Essex Bank*, 5 Gray (Mass.) 377; *Hutchins v. State Bank*, 12 Met. (Mass.) 426; *Howe v. Starkweather*, 17 Mass. 243.

Missouri.—*Vanstone v. Goodwin*, 42 Mo. App. 39.

New York.—*Denton v. Livingston*, 9 Johns. (N. Y.) 96, 6 Am. Dec. 264; *James v. Woodruff*, 10 Paige (N. Y.) 541, *affirmed* 2 Den. (N. Y.) 574; *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159.

North Carolina.—*Cooper v. Dismal Swamp Canal Co.*, 2 Murph. (6 N. Car.) 195.

Oregon.—*Budd v. Multnomah St. R. Co.*, 12 Oregon 272, 53 Am. Rep. 355.

Pennsylvania.—*People's Bank v. Kurtz*, 99 Pa. St. 349, 44 Am. Rep. 112; *Slaymaker v. Gettysburg Bank*, 10 Pa. St. 373.

Rhode Island.—*Arnold v. Ruggles*, 1 R. I. 165.

Tennessee.—*Union Bank v. State*, 9 Yerg. (Tenn.) 500; *McClung v. Colwell*, 107 Tenn. 601; *Cates v. Baxter*, 97 Tenn. 443.

Virginia.—*Chesapeake, etc., R. Co. v. Paine*, 29 Gratt. (Va.) 506; *Barksdale v. Finney*, 14 Gratt. (Va.) 338; *Richmond First Nat. Bank v. Holland*, 99 Va. 495.

"A share of stock is an incorporeal, intangible thing. The property interest of the shareholder is an intangible and invisible thing and cannot be actually seized by an officer. Such property is neither a specific chattel nor a debt, but a mere chose in action." *Caffery v. Choctaw Coal, etc., Co.*, 95 Mo. App. 184 [*citing Foster v. Potter*, 37 Mo. 526; *Neiler v. Kelley*, 69 Pa. St. 403; *Fisher v. Essex Bank*, 5 Gray (Mass.) 373].

2. *Colonial Bank v. Whitney*, 30 Ch. D. 261.

Shares of Stock Are Not Simply and Purely Choses in Action, but the shares represent the interest of the owner in the corporation. They are a peculiar species of property *sui generis*.

Cates v. Baxter, 97 Tenn. 443, *citing Cornick v. Richards*, 3 Lea (Tenn.) 26. See also *McClung v. Colwell*, 107 Tenn. 601.

"In some respects, they resemble a chose in action, and thus are so treated in the relation of husband and wife and in other relations. More accurately, I think, they may be called equitable estates, which entitle the holders to share in the income of the capital, which is legally vested in and managed by the corporate body." *People v. Tax, etc., Com'rs*, 23 N. Y. 220.

3. See the title VERBAL AGREEMENTS (STATUTE OF FRAUDS).

4. **Shares Incapable of Identification**.—*Le Croy v. Eastman*, 10 Mod. 499; *Hubbell v. Drexel*, 11 Fed. Rep. 115; *Craig v. Hesperia Land, etc., Co.*, 113 Cal. 12, 54 Am. St. Rep. 316; *Krouse v. Woodward*, 110 Cal. 643; *Atkins v. Gamble*, 42 Cal. 99, 10 Am. Rep. 282; *Hawley v. Brumagim*, 33 Cal. 394. See *Brundage v. Brundage*, 60 N. Y. 548.

In *Skowhegan Bank v. Cutler*, 52 Me. 517, the court, by Davis, J., said: "A share in the capital stock of a corporation is merely some aliquot part of it, and not any particular part. Any designation, therefore, except by stating the owner or owners, would seem to be impossible. Even if the shares were consecutively numbered, of which there is no evidence, this would be the same. For, as a share is not any particular part, but merely an intangible, undivided proportion of the whole, the number would but designate the successive owners."

5. **Mistake in Description by Number**.—*In re International Contract Co.*, L. R. 7 Ch. 485.

6. **Conversion by Pledgee**.—*Le Croy v. Eastman*, 10 Mod. 499; *Hubbell v. Drexel*, 11 Fed. Rep. 115; *Krouse v. Woodward*, 110 Cal. 643; *Atkins v. Gamble*, 42 Cal. 86, 10 Am. Rep. 282; *Donnell v. Wyckoff*, 49 N. J. L. 52; *Horton v. Morgan*, 6 Duer (N. Y.) 56, 19 N. Y. 172, 75 Am. Dec. 311; *Allen v. Dykers*, 3 Hill (N. Y.) 593; *Nourse v. Prime*, 4 Johns. Ch. (N. Y.) 490, 8 Am. Dec. 606, 7 Johns. Ch. (N. Y.) 87, 11 Am. Dec. 403; *Gilpin v. Howell*, 5 Pa. St. 42, 45 Am. Dec. 720; *Hubbell v. Drexel*, (Pa.) 21 Am. L. Reg. N. S. 452, and note. Compare *Wilson v. Little*, 2 N. Y. 443, 51 Am. Dec. 307. See generally title PLEDGE AND COLLATERAL SECURITY, vol. 22, p. 839.

follow the person of the owner,¹ except in those instances where for special purposes they have been localized elsewhere by statute.² For many purposes, however, shares of stock have been held to have a situs in the state wherein the company was incorporated.³ But shares have not a situs in a state merely because the corporation does business in that state, the corporation and the shareholders being citizens and residents of other states.⁴

h. NUMBER AND AMOUNT OF SHARES.—The number and par value of shares are usually fixed by provisions in the charter or by the statute under which the corporation is organized.⁵ When so fixed the number and amount or par value can be neither increased nor decreased except in accordance with duly authorized proceedings.⁶ Sometimes the corporation or its directors are authorized to fix the number of shares, keeping within certain limits.⁷ Where the charter does not fix the number it is presumed that the legislature intended that it should be fixed by the stockholders or directors.⁸ Failure of the charter to fix a maximum amount for capital stock does not render the charter void.⁹ In the absence of legislative authority it seems that a share cannot be further subdivided.¹⁰

4. Certificates of Stock — *a. GENERAL NATURE.*—Certificates of stock are distinct from the shares themselves,¹¹ and, therefore, deserving of separate treatment. The former are not the stock itself, but merely the evidence of its ownership.¹² They are assurances to the commercial world that the stock

1. Situs at Domicil of Owner.—*Tappan v. Merchants' Nat. Bank*, 19 Wall. (U. S.) 490; *Ashley v. Quintard*, 90 Fed. Rep. 86; *Griffith v. Watson*, 19 Kan. 26; *Great Barrington v. Berkshire County*, 16 Pick. (Mass.) 572; *Oliver v. Washington Mills*, 11 Allen (Mass.) 268; *Newark City Bank v. Assessor*, 30 N. J. L. 13; *State v. Branin*, 23 N. J. L. 484; *Lee v. Sturges*, 46 Ohio St. 161; *Bradley v. Bauder*, 36 Ohio St. 35, 38 Am. Rep. 547; *Whitesell v. Northampton County*, 49 Pa. St. 526; *Union Bank v. State*, 9 Yerg. (Tenn.) 490.

2. Situs Fixed by Statute.—*Tappan v. Merchants' Nat. Bank*, 19 Wall. (U. S.) 490; *Jellenik v. Huron Copper Min. Co.*, 82 Fed. Rep. 778; *Smith v. Pilot Min. Co.*, 47 Mo. App. 409; *Bradley v. Bauder*, 36 Ohio St. 35, 38 Am. Rep. 547.

The Situs of Shares May Shift according to the special purpose for which they are sought to be acted upon. *Ashley v. Quintard*, 90 Fed. Rep. 89.

3. Situs in State of Incorporation.—*Jellenik v. Huron Copper Min. Co.*, 177 U. S. 1, reversing 82 Fed. Rep. 778; *Ashley v. Quintard*, 90 Fed. Rep. 86; *Caffery v. Choctaw Coal, etc., Co.*, 95 Mo. App. 174. See *Quincy R. Bridge Co. v. Adams County*, 88 Ill. 616; *National Bank v. Lake Shore, etc., R. Co.*, 21 Ohio St. 221.

4. Situs in State Where Corporation Does Business.—*Ashley v. Quintard*, 90 Fed. Rep. 84; *Caffery v. Choctaw Coal, etc., Co.*, 95 Mo. App. 174; *Plimpton v. Bigelow*, 93 N. Y. 593. But compare *Smith v. Pilot Min. Co.*, 47 Mo. App. 409.

5. Fixed by Statute or Charter.—See *Skowhegan, etc., R. Co. v. Kinsman*, 77 Me. 371; *Somerset R. Co. v. Clarke*, 61 Me. 384; *Somerset, etc., R. Co. v. Cushing*, 45 Me. 524.

6. Increase or Reduction.—*Sturges v. Stetson*, 1 Biss. (U. S.) 250; *Scovill v. Thayer*, 105 U. S. 143; *Tschumi v. Hills*, 6 Kan. App. 557. See *infra*, this title, *Increase and Reduction of Stock*.

Directors have no authority to change the

number or par value of the shares of capital stock as set forth in the charter. *Tschumi v. Hills*, 6 Kan. App. 549.

7. Corporation Authorized to Fix.—*Skowhegan, etc., R. Co. v. Kinsman*, 77 Me. 371; *Pike v. Bangor, etc., Shore Line R. Co.*, 68 Me. 447; *Bucksport, etc., R. Co. v. Buck*, 65 Me. 541; *Somerset, etc., R. Co. v. Cushing*, 45 Me. 524; *Lexington, etc., R. Co. v. Chandler*, 13 Met. (Mass.) 311.

8. Somerset R. Co. v. Clarke, 61 Me. 384; *Somerset, etc., R. Co. v. Cushing*, 45 Me. 524. See *Com. v. Central Pass. R. Co.*, 52 Pa. St. 514.

9. State v. Bank of Commerce, 95 Tenn. 221.

10. Subdivision of Single Shares—*Cressona Bldg. Assoc.*, 1 Leg. Rec. (Pa.) 177.

11. Certificates Distinct from Stock.—*McAllister v. Kuhn*, 96 U. S. 89; *Burr v. Wilcox*, 22 N. Y. 551; *Kinnan v. Forty-second St. R. Co.*, (N. Y. Super. Ct. Gen. T.) 1 Misc. (N. Y.) 457.

In *Payne v. Elliot*, 54 Cal. 339, 35 Am. Rep. 80, it was held, in an action for the conversion of shares of stock of a corporation, that it is the shares of stock which constitute the property, and not the certificate; and that an action is maintainable for the conversion of the share of stock which the certificate represents, as well as for that of the certificate. *Quoted in Budd v. Multnomah St. R. Co.*, 12 Oregon 275, 53 Am. Rep. 355.

In *Pennsylvania*, while trover will not lie for a share of stock, it will lie for the certificate. *Neiler v. Kelley*, 69 Pa. St. 403.

12. Certificate Merely Evidence of Ownership—*United States*.—*Van Allen v. Assessors*, 3 Wall. (U. S.) 598; *McAllister v. Kuhn*, 96 U. S. 89; *Farrington v. Tennessee*, 95 U. S. 687; *Merritt v. American Steel Barge Co.*, (C. C. A.) 79 Fed. Rep. 228; *Manhattan Beach Co. v. Harned*, 27 Fed. Rep. 484; *Hubbell v. Drexel*, 11 Fed. Rep. 115.

Alabama.—*Wilson v. Matthews*, 32 Ala. 349; *Cunningham v. Alabama L. Ins., etc., Co.*, 4 Ala. 658.

is the property of the person designated,¹ and the corporation is estopped to deny their validity when issued to *bona fide* purchasers.² Still they are no more than *prima facie* evidence either of the validity of the issue,³ or of the stockholder's title.⁴ It has been said that "the certificate has no intrinsic value disconnected from the stock it represents,"⁵ but on the other hand, certificates issued by a corporation without capital stock have been recognized as conferring substantial rights.⁶

b. NEGOTIABILITY. — Certificates of stock are not negotiable instruments,⁷

California. — Craig v. Hesperia Land, etc., Co., 113 Cal. 7, 54 Am. St. Rep. 316; Atkins v. Gamble, 42 Cal. 99, 10 Am. Rep. 282; Mitchell v. Beckman, 64 Cal. 117, 1 Am. & Eng. Corp. Cas. 40; Hawley v. Brumagim, 33 Cal. 399.

Georgia. — Fulgam v. Macon, etc., R. Co., 44 Ga. 597.

Illinois. — Campbell v. Morgan, 4 Ill. App. 100.

Indiana. — Cincinnati, etc., R. Co. v. Pearce, 28 Ind. 502.

Maine. — Bates v. Androscoggin, etc., R. Co., 49 Me. 491.

Missouri. — Watson v. Sidney F. Woody Printing Co., 56 Mo. App. 145; Vanstone v. Goodwin, 42 Mo. App. 39; Caffery v. Choctaw Coal, etc., Co., 95 Mo. App. 184; Armour Bros. Banking Co. v. St. Louis Nat. Bank, 113 Mo. 12.

New Jersey. — Donnell v. Wyckoff, 49 N. J. L. 52; Graydon v. Graydon, 23 N. J. Eq. 229.

New York. — Cross v. Sackett, (N. Y. Super. Ct. Gen. T.) 6 Abb. Pr. (N. Y.) 247; People v. Tax, etc., Com'rs, 40 Barb. (N. Y.) 353; Arnold v. Suffolk Bank, 27 Barb. (N. Y.) 424; Johnson v. Albany, etc., R. Co., (Supm. Ct. Spec. T.) 40 How. Pr. (N. Y.) 193; Buker v. Steele, (County Ct.) 43 N. Y. Supp. 346; Burr v. Wilcox, 22 N. Y. 556.

Ohio. — Cincinnati, etc., R. Co. v. Urbana Third Nat. Bank, 1 Ohio Cir. Dec. 109, 1 Ohio Cir. Ct. 199.

Oregon. — Budd v. Multnomah St. R. Co., 12 Oregon 272, 53 Am. Rep. 355.

Pennsylvania. — People's Bank v. Kurtz, 99 Pa. St. 344, 44 Am. Rep. 112; Willis v. Fry, 13 Phila. (Pa.) 33, 36 Leg. Int. (Pa.) 47.

Tennessee. — Union Bank v. State, 9 Yerg. (Tenn.) 490; Cates v. Baxter, 97 Tenn. 446.

The Issuance of a New Certificate in Place of a Lost Certificate Does Not Constitute an Overissue of Stock, since the new certificate merely takes the place of the lost certificate and represents the same shares. Kinnan v. Forty-second St. R. Co., (N. Y. Super. Ct. Gen. T.) 1 Misc. (N. Y.) 457.

Stock Certificates Are Property in such a sense that a court having jurisdiction thereof *in rem* may establish a lien thereon. Merritt v. American Steel-Barge Co., (C. C. A.) 79 Fed. Rep. 228.

A Conversion of a Certificate of Stock is, in legal effect, a conversion of the stock. Condouris v. Imperial Turkish Tobacco, etc., Co., (C. Pl. Gen. T.) 3 Misc. (N. Y.) 66.

1. Joslyn v. St. Paul Distilling Co., 44 Minn. 183.

2. See *infra*, this title, *Issuance of Certificate, Transfer, and Registration*. But see First Ave. Land Co. v. Parker, 111 Wis. 1.

3. *Prima Facie Evidence Merely.* — Hall v. Rose Hill, etc., R. Co., 70 Ill. 673.

4. Courtright v. Deeds, 37 Iowa 503; Walker v. Detroit Transit R. Co., 47 Mich. 338; Broadway Bank v. McElrath, 13 N. J. Eq. 24.

5. *Value of Certificate Apart from Stock.* — Ayres v. French, 41 Conn. 151. Compare Payne v. Elliot, 54 Cal. 339, 35 Am. Rep. 80.

6. **A Certificate Issued by a College Corporation,** not empowered to issue stock, declaring the holder entitled to one share in the real property of the corporation, and drawing six per cent. interest, though not a certificate of stock, will be sustained as a contract to pay annual interest during the existence of the corporation; but it creates no lien on the realty. Bryant v. Ohio Dental College, 1 Cinc. Super. Ct. 307.

7. **Certificates Not Negotiable** — *England.* — Société Générale v. Tramways Union Co., 14 Q. B. D. 424; London, etc., Banking Co. v. London, etc., Bank, 20 Q. B. D. 232, 19 Am. & Eng. Corp. Cas. 469; Tayler v. Great Indian Peninsula R. Co., 4 De G. & J. 559.

United States. — Hammond v. Hastings, 134 U. S. 401, 31 Am. & Eng. Corp. Cas. 421.

Alabama. — East Birmingham Land Co. v. Dennis, 85 Ala. 565, 7 Am. St. Rep. 73.

California. — Craig v. Hesperia Land, etc., Co., 113 Cal. 13, 54 Am. St. Rep. 316; Swim v. Wilson, 90 Cal. 129, 25 Am. St. Rep. 110; Graves v. Mono Lake Hydraulic Min. Co., 81 Cal. 304; Barstow v. Savage Min. Co., 64 Cal. 388, 49 Am. Rep. 705; Sherwood v. Meadow Valley Min. Co., 50 Cal. 412; Atkins v. Gamble, 42 Cal. 99, 10 Am. Rep. 282.

Illinois. — Hall v. Rose Hill, etc., R. Co., 70 Ill. 673.

Iowa. — Clark v. American Coal Co., 86 Iowa 436.

Louisiana. — Parker v. Sun Ins. Co., 42 La. Ann. 1172; Harris v. Mobile Bank, 5 La. Ann. 538.

Maryland. — Tiedeman v. Knox, 53 Md. 612.

Massachusetts. — Shaw v. Spencer, 106 Mass. 382, 1 Am. Rep. 115; Sewall v. Boston Water Power Co., 4 Allen (Mass.) 282, 81 Am. Dec. 701.

Missouri. — Watson v. Sidney F. Woody Printing Co., 56 Mo. App. 145; State v. State Bank, 45 Mo. 528.

Nevada. — Bercich v. Marye, 9 Nev. 312.

New York. — Weaver v. Barden, 3 Lans. (N. Y.) 338; Knox v. Eden Musee American Co., 148 N. Y. 441, 51 Am. St. Rep. 700; Mechanics' Bank v. New York, etc., R. Co., 13 N. Y. 599; Mechanics' Bank v. New York, etc., R. Co., 4 Duer (N. Y.) 480; Hawes v. Gas Consumers' Ben. Co., (C. Pl. Eq. T.) 9 N. Y. Supp. 490; Weaver v. Barden, 49 N. Y. 286; Anderson v. Nicholas, 28 N. Y. 600; Cowles v. Kiehel, (Supm. Ct. Spec. T.) 65 N. Y. Supp. 349.

Ohio. — Citizens' Nat. Bank v. Cincinnati, etc., R. Co., 9 Ohio Dec. (Reprint) 147, 11

and hence a purchaser takes them subject to all equities existing against the seller.¹ So even a *bona fide* purchaser of a lost certificate acquires no title.² Again, where certificates indorsed in blank are stolen, purchasers from the thief are not protected,³ and it is held that such purchasers become liable in damages to the real owner.⁴ But the transferee, after intervening registry, of a stolen certificate, has been held to acquire a good title.⁵ In *England*, while certificates are not generally negotiable,⁶ they may become so by the usages of trade, and will be treated by the courts accordingly.⁷

Quasi-Negotiability. — But while certificates of stock are not negotiable instruments, they do, however, possess attributes in common with negotiable instruments,⁸ which has given rise to the statement that they are “quasi-negotiable.”⁹ The use of this term is condemned by the text writers as misleading.¹⁰ Apparently the law on this question is in a transitional stage. The tendency of modern decisions is to regard certificates of stock attached to an executed blank assignment and power to transfer as approximating to negotiable securities though neither in form nor character negotiable.¹¹

c. AS CONTRACT. — The stock certificates together with the charter and statutes under which the company is organized constitute the contract of association between the various stockholders and between the stockholders and the corporation.¹²

Cinc. L. Bul. 86; Krebs v. Forbriger, 10 Ohio Dec. (Reprint) 506, 21 Cinc. L. Bul. 313; Cincinnati, etc., R. Co. v. Urbana Third Nat. Bank, 1 Ohio Cir. Dec. 109, 1 Ohio Cir. Ct. 199; Cincinnati, etc., R. Co. v. Citizens' Nat. Bank, 56 Ohio St. 351.

Pennsylvania. — Burton v. Peterson, 12 Phila. (Pa.) 397, 35 Leg. Int. (Pa.) 144.

Tennessee. — Young v. South Tredegar Iron Co., 85 Tenn. 189, 4 Am. St. Rep. 752.

Virginia. — Shenandoah Valley R. Co. v. Griffith, 76 Va. 913.

But see Bridgeport Bank v. New York, etc., R. Co., 30 Conn. 231. See also generally *infra*, this title, *Sales and Conveyances*; *Issuance of Certificate, Transfer, and Registration*.

Bona Fide Purchasers. — See generally *infra*, this title, *Sales and Conveyances*.

Negotiability of Trust Certificates. — See Shepaug Voting Trust Cases, 60 Conn. 553.

1. Purchaser Takes Subject to Equities. — Hammond v. Hastings, 134 U. S. 401, 31 Am. & Eng. Corp. Cas. 421; Craig v. Hesperia Land, etc., Co., 113 Cal. 7, 54 Am. St. Rep. 316; State v. State Bank, 45 Mo. 528; Conant v. Reed, 1 Ohio St. 298; First Ave. Land Co. v. Parker, 111 Wis. 1; Campbell v. Morgan, 4 Ill. App. 100. See generally *infra*, this title, *Lien of Corporation on Shares*.

2. Lost Certificates. — Craig v. Hesperia Land, etc., Co., 113 Cal. 13, 54 Am. St. Rep. 316; Sherwood v. Meadow Valley Min. Co., 50 Cal. 412; Knox v. Eden Musee American Co., 148 N. Y. 441, 51 Am. St. Rep. 700. Compare Mandelbaum v. North American Min. Co., 4 Mich. 465. See also *infra*, this title, *Sales and Conveyances*.

3. Stolen Certificates. — East Birmingham Land Co. v. Dennis, 85 Ala. 565, 7 Am. St. Rep. 73, 5 R. & Corp. L. J. 296; Barstow v. Savage Min. Co., 64 Cal. 388, 49 Am. Rep. 705, 3 Am. & Eng. Corp. Cas. 194; Knox v. Eden Musee American Co., 148 N. Y. 441, 51 Am. St. Rep. 700; Aull v. Colkett, 33 Leg. Int. (Pa.) 44; Given's Appeal, (Pa. 1888) 16 Atl. Rep. 75. Compare Winter v. Belmont Min. Co., 53 Cal.

428. See also *infra*, this title, *Sales and Conveyances*; *Issuance of Certificate, Transfer, and Registration*.

4. Liability of Purchaser. — Bercich v. Marye, 9 Nev. 312.

5. Effect of Intervening Registration. — Mandelbaum v. North American Min. Co., 4 Mich. 465. See also *infra*, this title, *Issuance of Certificate, Transfer, and Registration*.

6. English Rule as to Negotiability. — Shropshire Union R., etc., Co. v. Reg., L. R. 7 H. L. 496.

7. Rumbell v. Metropolitan Bank, 2 Q. B. D. 194; Goodwin v. Roberts, 1 App. Cas. 476. But see Pickard v. Sears, 6 Ad. & El. 469, 33 E. C. L. 115. Compare East Birmingham Land Co. v. Dennis, 85 Ala. 565, 7 Am. St. Rep. 73, holding that certificates of stock are not negotiable notwithstanding a usage among stockholders to the contrary.

8. South Bend First Nat. Bank v. Lanier, 11 Wall. (U. S.) 377; Matthews v. Massachusetts Nat. Bank, Holmes (U. S.) 396; Supply Ditch Co. v. Elliott, 10 Colo. 333; Bridgeport Bank v. New York, etc., R. Co., 30 Conn. 275; Smith v. Crescent City Live-Stock Landing, etc., Co., 30 La. Ann. 1378; Parker v. Sun Ins. Co., 42 La. Ann. 1172; Merchants' Nat. Bank v. Richards, 6 Mo. App. 454; Leitch v. Wells, 48 N. Y. 613. See also *infra*, this title, *Transfer and Registration*.

9. East Birmingham Land Co. v. Dennis, 85 Ala. 565, 7 Am. St. Rep. 73; Mechanics' Bank v. New York, etc., R. Co., 13 N. Y. 599; Burton v. Peterson, 12 Phila. (Pa.) 397, 35 Leg. Int. (Pa.) 144.

10. 1 Cook on Stock & Stockholders, § 413; 2 Thompson on Corporations, § 2348 *et seq.* (compare § 2589).

11. Scott v. Pequonnock Nat. Bank, 15 Fed. Rep. 501. See also South Bend First Nat. Bank v. Lanier, 11 Wall. (U. S.) 369; Bridgeport Bank v. New York, etc., R. Co., 30 Conn. 270.

12. Pronick v. Spirits Distributing Co., 58 N. J. Eq. 97; Cincinnati, etc., R. Co. v. Citizens' Nat. Bank, 11 Ohio Dec. (Reprint) 50, 24 Cinc.

II. KINDS OF STOCK—1. **Common Stock**.—Common stock is stock which entitles the owner to *pro rata* dividends without any priority or preference over any other shareholder or class of shareholders but equally with all other stockholders except preferred stockholders.¹

2. **Preferred or Guaranteed Stock**—*a. DEFINITION*.—Preferred stock is stock entitling the owner thereof to certain dividends out of the profits earned by the corporation in priority to any distribution of profits to the holders of common stock. The term "guaranteed stock" is sometimes used as synonymous with preferred stock.² A distinction is sometimes drawn to the effect that guaranteed stock is entitled to arrears of dividends, while ordinary preferred stock is not.³

b. ISSUE AND VALIDITY.—This subject will be treated in a subsequent section of this article.⁴

c. STATUS AND RIGHTS OF PREFERRED STOCKHOLDERS—(1) *In General*.—Calling stock preferred stock does not *per se* define the rights of such stock, but in order to determine in what respect the holder of such stock is to be preferred to the holder of ordinary or common stock, regard must be had to the statute or contract under which it is issued.⁵ But speaking generally, in the absence of any controlling provision in the statute or contract, preferred stockholders stand upon substantially the same footing as ordinary shareholders.

(2) *Preferred Shareholders Not Creditors*.—The owners of preferred shares are stockholders and not creditors of the corporation,⁶ and the preferred stock

L. Bul. 198; *Daley v. People's Bldg., etc., Assoc.*, 172 Mass. 533, holding that the covenants of a certificate of stock in a building and loan association are subject to the statute under which it is incorporated, though there is no express stipulation to that effect; *Heslin v. Eastern Bldg., etc., Assoc.*, (Supm. Ct. Tr. T.) 28 Misc. (N. Y.) 376, affirmed 61 N. Y. App. Div. 458, holding that a stipulation in a certificate of corporate stock that any action against the corporation shall be brought in the county where its principal office is located is binding. Preferred stock affords a familiar illustration. See *infra*, this title, *Kinds of Stock—Preferred or Guaranteed Stock*.

1. **Common Stock**.—1 *Cook on Stock & Stockholders*, § 13; *Storrow v. Texas Consol. Compress, etc., Mfg. Co.*, (C. C. A.) 87 Fed. Rep. 612. Generally as to dividends, see title *DIVIDENDS*, vol. 9, p. 679.

2. **Preferred or Guaranteed Stock**.—Henry v. Great Northern R. Co., 4 Kay & J. 1; *Crawford v. North-eastern R. Co.*, 3 Jur. N. S. 1093; *Storrow v. Texas Consol. Compress, etc., Mfg. Co.*, (C. C. A.) 87 Fed. Rep. 612; *Totten v. Tison*, 54 Ga. 139; *Belfast, etc., R. Co. v. Belfast*, 77 Me. 445; *Taft v. Hartford, etc., R. Co.*, 8 R. I. 310, 5 Am. Rep. 575; *State v. Cheraw, etc., R. Co.*, 16 S. Car. 530; *Chaffee v. Rutland R. Co.*, 55 Vt. 110; "Preferred Stock," 20 Am. L. Reg. N. S. 633, article by John D. Lawson. See generally title *DIVIDENDS*, vol. 9, p. 697.

The holder of preferred shares may say, "Nobody shall have any portion of the profits of the company until I have been paid my dividend." *Henry v. Great Northern R. Co.*, 4 Kay & J. 1, 1 De G. & J. 606.

3. **Preferred and Guaranteed Stock Distinguished**.—*Cook on Stock and Stockholders* (2d ed.) 267; *Henry v. Great Northern R. Co.*, 4 Kay & J. 1; *Boardman v. Lake Shore, etc., R. Co.*, 84 N. Y. 157; *Dickinson v. Chesapeake, etc., R. Co.*, 7

W. Va. 390. As to right to arrears, or cumulative dividends, see title *DIVIDENDS*, vol. 9, p. 679.

4. See *infra*, this title, *Issue of Stock—Power to Issue—Preferred Stock*.

5. **Rights Dependent upon Contract or Statute**.—*Savannah Real Estate Loan, etc., Co. v. Silverberg*, 108 Ga. 281; *Heller v. National Marine Bank*, 89 Md. 602; *Phonick v. Spirits Distributing Co.*, 58 N. J. Eq. 97; *Elkins v. Camden, etc., R. Co.*, 36 N. J. Eq. 236, 9 Am. & Eng. R. Cas. 639; *McGregor v. Home Ins. Co.*, 33 N. J. Eq. 181; *Boardman v. Lake Shore, etc., R. Co.*, 84 N. Y. 171. See also *Taft v. Hartford, etc., R. Co.*, 8 R. I. 310, 5 Am. Rep. 575.

"Generally, the rights, powers, and privileges of preferred stockholders depend upon the terms upon which it is issued; preferred stock taking a multiplicity of forms, according to the desire or ingenuity of the stockholders, and the necessity of the corporation itself. The percentage of preferred stock dividends is always fixed before it is issued." *Storrow v. Texas Consol. Compress, etc., Mfg. Co.*, (C. C. A.) 87 Fed. Rep. 612.

Mandamus will not lie to compel redemption in accordance with its terms of preferred stock of a corporation, issued in disregard of the provisions of its organic law, though all persons interested acquiesced in the unauthorized issue. *Smith v. Ferracute Mach. Co.*, (N. J. 1902) 52 Atl. Rep. 231.

6. **Preferred Shareholders Are Stockholders and Not Creditors**—*United States*.—*St. John v. Erie R. Co.*, 22 Wall. (U S.) 136; *Hamlin v. Toledo, etc., R. Co.*, (C. C. A.) 78 Fed. Rep. 664; *Nickals v. New York, etc., R. Co.*, 15 Fed. Rep. 575, 13 Am. & Eng. R. Cas. 139.

Connecticut.—*State v. Norwich, etc., R. Co.*, 30 Conn. 295.

Maine.—*Belfast, etc., R. Co. v. Belfast*, 77 Me. 445, 23 Am. & Eng. R. Cas. 736; *Bates v. Androscooggin, etc., R. Co.*, 49 Me. 491.

forms part of the capital stock of the corporation.¹ As between the preferred shareholders and outside creditors, the latter have priority.² It is sometimes a question of doubt whether holders of so-called preferred stock are in fact stockholders or creditors. In such a case the legal intention, as ascertained from a view of the whole transaction, governs.³ If by the terms of their creation the holders of so-called preferred stock certificates are deprived of the rights and exempted from the liabilities of stockholders, the transaction is a loan, and the certificate holders are creditors and not stockholders.⁴ The issue of preferred stock has been declared to be "a form of mortgage,"⁵ and there is even authority for the view that the status of the owner of preferred shares is dual, including rights both of stockholders and creditors.⁶ So parties from

Michigan.—Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156.

Ohio.—Miller v. Ratterman, 47 Ohio St. 141, 43 Am. & Eng. R. Cas. 339.

Pennsylvania.—Pittsburg, etc., R. Co. v. Allegheny County, 63 Pa. St. 126; Marshall v. American Caramel Co., 9 Pa. Dist. 152.

Rhode Island.—Taft v. Hartford, etc., R. Co., 8 R. I. 310, 5 Am. Rep. 575.

South Carolina.—State v. Cheraw, etc., R. Co., 16 S. Car. 528.

Vermont.—Chaffee v. Rutland R. Co., 55 Vt. 110, 16 Am. & Eng. R. Cas. 408.

"There is a sense in which every shareholder is a creditor of the corporation to the extent of his contribution to the capital stock. In that sense every corporation includes its capital stock among its liabilities. But that creditor relation is one which exists only between the corporation and its shareholders. It is a liability which is postponed to every other liability, and no part of the capital stock can be lawfully returned to the stockholders until all debts are paid or provided for." Hamlin v. Toledo, etc., R. Co., (C. C. A.) 78 Fed. Rep. 671.

1. Preferred Stock Part of Capital Stock.—State v. Norwich, etc., R. Co., 30 Conn. 295, citing Ward v. Griswoldville Mfg. Co., 16 Conn. 593.

2. Priority of Creditors Over Preferred Stockholders.—St. John v. Erie R. Co., 22 Wall. (U. S.) 137, 10 Blatchf. (U. S.) 271; Branch v. Atlantic, etc., R. Co., 3 Woods (U. S.) 481; Warren v. King, 108 U. S. 389; Belfast, etc., R. Co. v. Belfast, 77 Me. 445, 23 Am. & Eng. R. Cas. 736; Heller v. National Marine Bank, 89 Md. 602; Garrett v. May, 19 Md. 177; Chaffee v. Rutland R. Co., 55 Vt. 110, 16 Am. & Eng. R. Cas. 408.

As to the right to dividends on preferred stock as dependent upon the existence of surplus profits, see title DIVIDENDS, vol. 9, p. 679.

3. Whether Stockholder or Creditor.—Storrow v. Texas Consol. Compress, etc., Mfg. Co., (C. C. A.) 87 Fed. Rep. 612; Hamlin v. Toledo, etc., R. Co., (C. C. A.) 78 Fed. Rep. 664; Savannah Real Estate Loan, etc., Co. v. Silverberg, 108 Ga. 281; Cook v. Equitable Bldg., etc., Assoc., 104 Ga. 814; Marshall v. American Caramel Co., 9 Pa. Dist. 152. See State v. Cheraw, etc., R. Co., 16 S. Car. 528.

In Burt v. Rattle, 31 Ohio St. 116, the purchasers were secured by a bond and mortgage, and the court, in determining their status, said: "To call a thing by a wrong name does not change its nature. A mortgage creditor, although denominated a 'preferred stockholder,' is a mort-

gage creditor nevertheless; and interest is not changed into a 'dividend' by calling it a dividend. Nothing is more common in the construction of statutes and contracts than for the court to correct such self-evident misnomers by supplying the proper words. To use the language of the court in Corcoran v. Powers, 6 Ohio St. 19, 'the question in such cases is not what did the parties call it, but what do the facts and circumstances require the court to call it.' A man who advances his money to a corporation, and takes a bond and mortgage for its repayment, and who, by express agreement between the parties, takes no interest or risk in the concerns of the company, is a creditor of the company, and to call him a 'stockholder' is a simple misnomer. He is a creditor and remains a creditor, until by some future act of his own he elects to become a stockholder, or otherwise changes his relation. The right to become a stockholder does not make its possessor a stockholder."

Where preferred shares are issued to redeem bonded indebtedness, as allowed under the Ohio statute, they are held to be certificates of stock and not evidences of debt, unless the latter were clearly intended. Miller v. Ratterman, 47 Ohio St. 141, 43 Am. & Eng. R. Cas. 339.

4. When Transaction Deemed a Loan.—Savannah Real Estate Loan, etc., Co. v. Silverberg, 108 Ga. 281; Cook v. Equitable Bldg., etc., Assoc., 104 Ga. 828; Burt v. Rattle, 31 Ohio St. 129; Chaffee v. Rutland R. Co., 55 Vt. 110, 16 Am. & Eng. R. Cas. 408.

An issuance by a building and loan association of fully paid stock on which dividends are guaranteed, the holders having no further interest in profits, is a mere borrowing of money by the association, and does not contravene the principle of mutuality of an association on the building and loan plan. Cottingham v. Equitable Bldg., etc., Assoc., 114 Ga. 940, citing Cook v. Equitable Bldg., etc., Assoc., 104 Ga. 814.

5. Preferred Stock as a Form of Mortgage.—West Chester, etc., R. Co. v. Jackson, 77 Pa. St. 321; Rutland, etc., R. Co. v. Thrall, 35 Vt. 536. But compare Chaffee v. Rutland R. Co., 55 Vt. 110, wherein a contrary view is maintained.

"The issue of preferred stock is a mode by which a corporation obtains funds for its enterprise without borrowing money or contracting a debt." State v. Cheraw, etc., R. Co., 16 S. Car. 532.

6. Dual Relation.—Emerson v. New York, etc., R. Co., 14 R. I. 555. 16 Am. & Eng. R. Cas. 404.

whom the corporation effects a loan, securing them by the issue of stock indorsed "preferred," and which is afterwards surrendered for mortgage bonds, have been held to be *bona fide* creditors.¹ The mere fact that the preferred stock is redeemable by a certain time or upon certain conditions does not render the holder a creditor. The original relation of stockholder remains until such change is made.²

(3) *Right to Dividends.*— This subject has been fully treated in a special article of this work.³

(4) *Preference in Distribution of Assets.*— In addition to the preference as to dividends, preferred stockholders are sometimes given the right to a repayment of the principal of such stock in preference to ordinary stockholders, in case of a dissolution of the corporation and a distribution of its assets. Such a preference is valid;⁴ but in the absence of express provision by law or contract, the preference is confined to dividends, and does not extend to capital.⁵ The question is simply one of contract.⁶ As against bondholders or general creditors without notice, a corporation cannot make its preferred stock a lien upon its assets in the absence of statutory authority.⁷

where the court says: "As a stockholder he had rights to dividends and to repayment of the principal of his stock in preference to any of the ordinary stockholders. As a creditor he was entitled to be paid the amount of his debt in the same manner as other creditors, but with no preference over them." But compare *Chaffee v. Rutland R. Co.*, 55 Vt. 110, wherein the court said that "the struggle has been to gain for the preferred guaranteed stockholders the double advantage of a shareholder and creditor, but without success."

"One cannot well be a creditor as respects creditors proper, and a stockholder by virtue of a certificate evidencing his contribution to the capital of the corporation. Stock is capital, and a stock certificate but evidences that the holder has ventured his means as a part of the capital. It is a fixed characteristic of capital stock that no part of it can be withdrawn for the purpose of reimbursing the principal of the capital stock until the debts of the corporation are paid. These principles are elementary. *Warren v. King*, 108 U. S. 389; *Cook on Stock and Stockholders* (3d ed.), § 271. The chance of gain throws on the stockholder, as respects creditors, the entire risk of the loss of his contribution to capital. 'He cannot be both a creditor and debtor by virtue of his ownership of stock.' *Warren v. King*, *supra*." *Hamlin v. Toledo, etc., R. Co.*, (C. C. A.) 78 Fed. Rep. 670.

1. *Totten v. Tison*, 54 Ga. 139.

2. *Redeemable Preferred Stock.*— *Taft v. Hartford, etc., R. Co.*, 8 R. I. 310, 5 Am. Rep. 575.

3. See title *DIVIDENDS*, vol. 9, p. 679.

4. *Preference as to Principal Valid.*— *In re Bangor, etc., Slate, etc., Co.*, L. R. 20 Eq. 59; *Eichbaum v. Chicago Grain Elevators*, (1891) 3 Ch. 459; *Toledo, etc., R. Co. v. Continental Trust Co.*, (C. C. A.) 95 Fed. Rep. 497; *Hamlin v. Toledo, etc., R. Co.*, (C. C. A.) 78 Fed. Rep. 664; *Heller v. National Marine Bank*, 80 Md. 602; *McGregor v. Home Ins. Co.*, 33 N. J. Eq. 181; *Gordon v. Richmond, etc., R. Co.*, 78 Va. 501. See *Underwood v. London Music Hall*, (1901) 2 Ch. 309; *Storow v. Texas Consol. Compress, etc., Mfg. Co.*, (C. C. A.) 87 Fed. Rep. 612; *Emerson v. New York, etc., R. Co.*, 14 R. I. 555, 16 Am. & Eng. R. Cas. 406.

"In the absence of charter regulation or prohibition by the law of the state under which a corporation is organized, a corporation, at its organization, may classify its stock, and provide for a preference of one class over another in respect of both capital and dividends." *Hamlin v. Toledo, etc., R. Co.*, (C. C. A.) 78 Fed. Rep. 670 [citing *Cook on Stock, Stockholders, etc.* (3d ed.), §§ 266-278; *Warren v. King*, 108 U. S. 389; *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156; *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159; *McGregor v. Home Ins. Co.*, 33 N. J. Eq. 181; *Miller v. Ratterman*, 47 Ohio St. 163].

5. *In Absence of Express Provision.*— *In re Bangor, etc., Slate, etc., Co.*, L. R. 20 Eq. 59; *Birch v. Cropper*, 14 App. Cas. 525, 32 Am. & Eng. Corp. Cas. 586; *Griffith v. Paget*, 6 Ch. D. 511; *In re London India Rubber Co.*, L. R. 5 Eq. 519; *McGregor v. Home Ins. Co.*, 33 N. J. Eq. 181.

6. *Question One of Contract.*— *McGregor v. Home Ins. Co.*, 33 N. J. Eq. 181.

"Ordinarily preferred stock is entitled to no preference over other stock, in relation to capital. But where there is an expressed agreement giving such a preference, not prohibited by local law, nor the charter, we see no reason why it is not a valid contract, as between the corporation and such preferred stockholders, and binding upon the common stockholders. *Cook on Stock, Stockholders, etc.*, § 278; *Warren v. King*, 108 U. S. 389; *Chaffee v. Rutland R. Co.*, 55 Vt. 110; *In re Bangor, etc., Slate, etc., Co.*, L. R. 20 Eq. 59; *Lockhart v. Van Alstyne*, 31 Mich. 79, 18 Am. Rep. 156; *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159. Such a preference would not be inconsistent with their relation as stockholders and would not affect creditors." *Hamlin v. Toledo, etc., R. Co.*, (C. C. A.) 78 Fed. Rep. 672.

The giving of a prior lien over any subsequently created mortgage or incumbrance, by statute, to preferred stock issued by a corporation to obtain money, is not against public policy. *Heller v. National Marine Bank*, 89 Md. 602.

7. *As Against Creditors.*— *Hamlin v. Toledo, etc., R. Co.*, (C. C. A.) 78 Fed. Rep. 664; *Con-*

(5) *Right to Vote*. — The ownership of preferred stock carries with it a right to vote at corporate meetings in the absence of contrary stipulation.¹ Indeed, an express withholding of the right to vote goes far to stamp the transaction as a loan rather than an issue of preferred stock.² But the mere deprivation of the right to vote will not of itself prevent the certificate holder from being a member or stockholder, if in all other respects his rights and liabilities are consistent with that relation.³

(6) *Exchange of Common for Preferred Stock*. — This subject is treated in a subsequent section of this article.⁴

3. Interest-bearing Stock. — Closely allied to preferred stock is another and at present a less common variety, issued by corporations with a promise to pay thereon a certain rate of interest. Such an issue of shares is generally valid and the promise enforceable in accordance with its terms.⁵ So, railroad companies may invite subscriptions by guaranteeing interest on the par value of the shares from the time the latter are fully paid up until some particular stage is reached in the prosecution of the enterprise;⁶ but an indefinite arrangement, fixing no mode or time of payment, is invalid.⁷ And in general, the contract, in order to be lawful, must be construed as providing for the payment of interest only out of corporate profits; a promise to pay interest when the company has no resources for payment except its capital is *ultra vires*, and will not be enforced.⁸ Payment of interest by the directors out of the capital has been held to render them jointly and severally liable for the amounts so paid.⁹ Holders of interest-bearing stock are stockholders.¹⁰

4. Special Stock. — The statutes of *Massachusetts* provide for a peculiar variety of stock known as "special stock."¹¹ Its characteristics have been thus summarized: "It is limited in amount to two-fifths of the actual capital; it is subject to redemption by the corporation at par after a fixed time, to be expressed in the certificates; the corporation is bound to pay a fixed half-yearly

dividend Trust Co. v. Toledo, etc., R. Co., 72 Fed. Rep. 92. Compare *Heller v. National Marine Bank*, 89 Md. 602, construing Md. Acts 1868, c. 471, § 219.

1. *Right to Vote*. — *Warren v. King*, 108 U. S. 397; *Burt v. Rattle*, 31 Ohio St. 116. Compare *Rutland, etc., R. Co. v. Thrall*, 35 Vt. 536. Generally as to the right to vote, see *infra*, this title, *Stockholders' Meetings — Proceedings at Meetings — Voting*.

2. *Burt v. Rattle*, 31 Ohio St. 129. See also *supra*, this subdivision, *Preferred Shareholders Not Creditors*.

3. *Hamlin v. Toledo, etc., R. Co.*, 78 Fed. Rep. 664, 47 U. S. App. 422; *Savannah Real Estate Loan, etc., Co. v. Silverberg*, 108 Ga. 281.

4. See *infra*, this title, *Issue of Stock*.

5. *Interest-bearing Stock Valid*. — *Evansville, etc., Straight Line R. Co. v. Evansville*, 15 Ind. 395; *Louisville, etc., R. Co. v. Hart County*, (Ky. 1903) 75 S. W. Rep. 288; *Hardin County v. Louisville, etc., R. Co.*, 92 Ky. 412; *Barnard v. Vermont, etc., R. Co.*, 7 Allen (Mass.) 512; *Cunningham v. Vermont, etc., R. Co.*, 12 Gray (Mass.) 411; *Waterman v. Troy, etc., R. Co.*, 8 Gray (Mass.) 433; *Richardson v. Vermont, etc., R. Co.*, 44 Vt. 613; *Rutland, etc., R. Co. v. Thrall*, 35 Vt. 536. See also *Wright v. Vermont, etc., R. Corp.*, 12 Cush. (Mass.) 68; *Ohio v. Cleveland, etc., R. Co.*, 6 Ohio St. 490; *Miller v. Pittsburgh, etc., R. Co.*, 40 Pa. St. 239, 80 Am. Dec. 570.

Bonds in Lieu of Interest. — The owner of such stock cannot be compelled to accept bonds of the

corporation in lieu of interest. *McLaughlin v. Detroit, etc., R. Co.*, 8 Mich. 100.

6. *Interest until Fixed Time*. — *McLaughlin v. Detroit, etc., R. Co.*, 8 Mich. 100; *Racine County Bank v. Ayres*, 12 Wis. 512; *Milwaukee, etc., R. Co. v. Field*, 12 Wis. 340; *Rutland, etc., R. Co. v. Thrall*, 35 Vt. 536.

Until "Completion" of Road. — Where the promise is to pay interest "until the road is completed," the stockholder is not entitled to interest as beyond the time when the enterprise, as originally designed, is completed. The fact that an extension of the road to other points is subsequently authorized will not extend the interest-bearing period. *Pittsburg, etc., R. Co. v. Allegheny County*, 63 Pa. St. 126.

7. *Indefinite Arrangement*. — *Wright v. Vermont, etc., R. Corp.*, 12 Cush. (Mass.) 75.

8. *Interest Payable Only Out of Profits*. — *In re National Funds Assur. Co.*, 10 Ch. D. 118; *Salisbury v. Metropolitan R. Co.*, 38 L. J. Ch. 249; *Cunningham v. Vermont, etc., R. Co.*, 12 Gray (Mass.) 411; *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156; *Troy, etc., R. Co. v. Tibbits*, 18 Barb. (N. Y.) 307; *Painesville, etc., R. Co. v. King*, 17 Ohio St. 534; *Pittsburg, etc., R. Co. v. Allegheny County*, 63 Pa. St. 126; *Macdougall v. Jersey Imperial Hotel Co.*, 2 Hem. & M. 528.

9. *In re National Funds Assur. Co.*, 10 Ch. D. 118.

10. *Holders Are Stockholders*. — *McLaughlin v. Detroit, etc., R. Co.*, 8 Mich. 100.

11. *Special Stock — Massachusetts Statute*. — *Mass. Pub. Stat.*, c. 106, §§ 42, 61.

sum, or dividend upon it, as a debt; the holders of it are in no event liable for the debts of the corporation beyond their stock; and the issue of special stock makes all the general stockholders liable for all debts and contracts of the corporation until the special stock is fully redeemed."¹ It differs also from preferred stock in being payable absolutely and without regard to corporate earnings.²

5. Other Kinds of Stock — Treasury Stock. — Some corporations issue what they term "treasury stock," which is simply stock issued to and held by the corporation itself.³

Debenture Stock. — In *England* the Companies Clauses Act provides for the creation of "debenture stock," which is a charge on the net earnings and profits of the corporation. It is simply preferred stock under another name.⁴

Deferred Stock. — The phrase "deferred stock," which appears often to be used as a synonym for common stock, is applied to that variety whose holders are entitled to no dividends until some other class of stockholders is paid.⁵

Overissued Stock. — Overissued or spurious stock is that issued in excess of the authorized capital, and, therefore, void.⁶

Watered Stock. — Watered or fictitious stock is that which has been issued as fully paid up, when in fact it is not.⁷

III. ISSUE OF STOCK — 1. In General. — Merely authorized capital stock has no existence or validity until it is actually issued.⁸ The unissued shares of a corporation are not assets.⁹ Stock is issued when it is put into possession of shareholders,¹⁰ or when it has been subscribed for,¹¹ although, as will be seen, the actual issuance and delivery to the stockholder of a certificate of stock is not necessary.¹²

2. Power to Issue — a. IN GENERAL. — The power of a corporation to issue stock depends primarily upon its charter and the laws of the state under which it was organized. Stock issued in violation of the charter is void.¹³ Every corporation having a capital stock has, of course, power to issue such stock and thereby acquire stockholders. But the stock issued must be of the kind and description authorized by the charter or statute.¹⁴ Stock cannot be issued after the purpose for which it was authorized has ceased to be attainable.¹⁵ The right to issue stock is a franchise held in trust for the stockholders, and must generally be exercised for the benefit of all.¹⁶ It is said that the power to issue stock is not to be extended by implication.¹⁷

1. Allen, J., in *American Tube Works v. Boston Mach. Co.*, 139 Mass. 9.

2. *Williams v. Parker*, 136 Mass. 204, 6 Am. & Eng. Corp. Cas. 566; *Allen v. Herrick*, 15 Gray (Mass.) 274.

3. **Treasury Stock.** — *Alling v. Wenzell*, 133 Ill. 264, 30 Am. & Eng. Corp. Cas. 133.

4. **Debenture Stock.** — *Attree v. Hawe*, 9 Ch. D. 337, James, L. J.

5. **Deferred Stock.** — *Cook on Stock, Stockholders, etc.*, § 13.

6. **Overissued Stock.** — See *infra*, this title, *Issue of Stock — Overissue or Ultra Vires Issue*.

7. **Watered Stock.** — *Cook on Stock, Stockholders, etc.*, § 13. And see the next subdivision.

8. **Authorized but Unissued Stock.** — *Sturges v. Stetson*, 1 Biss. (U. S.) 248.

9. *Christensen v. Eno*, 106 N. Y. 101.

10. **What Constitutes Issuance.** — *In re Heaton's Steel, etc., Co.*, 4 Ch. D. 140; *In re Ambrose Lake Tin, etc., Co.*, 8 Ch. D. 635; *In re Tunnel Min. Co.*, 35 Ch. D. 579.

11. *American Pig Iron Storage Co. v. State Board of Assessors*, 56 N. J. L. 389.

12. **Issuance and Delivery of Certificate.** — See *infra*, *Who Are Stockholders*, and *supra*, *Certificates of Stock*.

13. **Power Dependent on Statute or Charter.** — *People v. Sterling Burial Case Mfg. Co.*, 82 Ill. 457. See also *infra*, this title, *Overissue or Ultra Vires Issue*.

14. **Power Limited to Kind Authorized.** — Where the directors of a corporation, who had voted to increase the par value of its stock from one dollar each, as the charter provided, to five dollars each, thereafter and without any other authority than such note issued shares purporting to be of the par value of five dollars each, such shares were held void. *Tschumi v. Hills*, 6 Kan. App. 549.

Authority to issue increased stock and to make such increased stock preferred stock has been held not to authorize an increase consisting partly of preferred stock and partly of common stock. *Covington, etc., Bridge Co. v. Sargent*, 1 Cinc. Super. Ct. 354.

15. **Purpose of Issue Unattainable.** — *Matter of Joint Stock Co.'s Winding-up Acts*, 4 Kay & J. 305.

16. **Power to Be Exercised for Equal Benefit of All.** — *Reese v. Montgomery County Bank*, 31 Pa. St. 78, 72 Am. Dec. 726.

17. **Power Not Extended by Implication.** — *Covington, etc., Bridge Co. v. Sargent*, 1 Cinc. Super. Ct. 354.

b. PREFERRED STOCK. — The issue of preferred stock is undoubtedly valid when authorized.¹ Under the general power to issue stock, it seems that a corporation may, in the beginning and before the issue of any shares, classify them into common and preferred.² But after the nature and amount of the various classes of shares have been fixed and the shares have been issued, the corporation has no implied power to issue additional preferred stock or to change existing common stock into preferred stock. This can only be done where express authority is conferred by statute or charter. The reason is that upon the issue of stock, the rights of the stockholders become vested and cannot be changed without their unanimous consent.³ Even a statute authorizing such action, but passed after the original issue of stock, is unavailing, because it would impair the obligation of a contract, unless the right to pass such statute had been originally reserved.⁴ But it is immaterial that the capital stock has already been fixed and issued, if authority may be found for issuing additional and preferred shares.⁵ A general authority to increase the capital stock will, as a rule, warrant the enactment of by-laws providing for the issue of preferred shares,⁶ and new charter clauses may be substituted for the original ones which afford such authority,⁷ or it may be entirely supplied by amendment in cases where the power of amendment exists.⁸ So the

1. Authorized Issue of Preferred Stock — England. — *Melhado v. Hamilton*, 28 L. T. N. S. 578, 29 L. T. N. S. 364; *Fielden v. Lancashire*, etc., R. Co., 2 De G. & Sm. 531; *In re South Durham Brewery Co.*, 31 Ch. D. 261; *Guinness v. Ireland Land Corp.*, 22 Ch. D. 349; *Ashbury v. Watson*, 30 Ch. D. 376, 16 Am. & Eng. Corp. Cas. 383; *Hutton v. Scarborough Cliff Hotel Co.*, 2 Drew. & Sm. 521; *Matthews v. Great Northern R. Co.*, 5 Jur. N. S. 284, 28 L. J. Ch. 375; *Henry v. Great Northern R. Co.*, 1 De G. & J. 606; *In re Brighton*, etc., R. Co., 44 Ch. D. 28; *In re Anglo-Danubian Steam Nav.*, etc., Co., L. R. 20 Eq. 339.

United States. — *St. John v. Erie R. Co.*, 22 Wall. (U. S.) 136, 10 Blatchf. (U. S.) 271; *Taylor v. South*, etc., Alabama R. Co., 4 Woods (U. S.) 575; *Bard v. Banigan*, 39 Fed. Rep. 16.

Georgia. — *Hazlehurst v. Savannah*, etc., R. Co., 43 Ga. 15.

Indiana. — *Evansville*, etc., Straight Line R. Co. v. *Evansville*, 15 Ind. 395.

Kentucky. — *Covington v. Covington*, etc., Bridge Co., 10 Bush (Ky.) 69.

Maine. — *Bates v. Androscoggin*, etc., R. Co., 49 Me. 497.

Massachusetts. — *Barnard v. Vermont*, etc., R. Co., 7 Allen (Mass.) 512; *Wright v. Vermont*, etc., R. Corp., 12 Cush. (Mass.) 68; *Cunningham v. Vermont*, etc., R. Co., 12 Gray (Mass.) 411; *Waterman v. Troy*, etc., R. Co., 8 Gray (Mass.) 433.

Michigan. — *Lockhart v. Van Alstyne*, 31 Mich. 81, 18 Am. Rep. 156; *McLaughlin v. Detroit*, etc., R. Co., 8 Mich. 100.

New York. — *Prouty v. Michigan Southern*, etc., R. Co., 1 Hun (N. Y.) 655; *Kent v. Quicksilver Min. Co.*, 78 N. Y. 177.

Pennsylvania. — *West Chester*, etc., R. Co. v. *Jackson*, 77 Pa. St. 321.

Rhode Island. — *Taft v. Hartford*, etc., R. Co., 8 R. I. 310, 5 Am. Rep. 575.

Tennessee. — *Memphis Grain*, etc., Co. v. *Memphis*, etc., R. Co., 85 Tenn. 703, 4 Am. St. Rep. 798, 30 Am. & Eng. R. Cas. 522.

Vermont. — *Richardson v. Vermont*, etc., R.

Co., 44 Vt. 613; *Rutland*, etc., R. Co. v. *Thrall*, 35 Vt. 537.

2. Implied Power — Original Issue. — *Hazlehurst v. Savannah*, etc., R. Co., 43 Ga. 13; *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159.

3. Subsequent Issue. — *Campbell v. American Zylonite Co.*, 122 N. Y. 455; *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159; *Knoxville*, etc., R. Co. v. *Knoxville*, 98 Tenn. 1. See *Memphis Grain*, etc., Co. v. *Memphis*, etc., R. Co., 85 Tenn. 703, 4 Am. St. Rep. 798. See also *Harrison v. Mexican R. Co.*, L. R. 19 Eq. 358; *Underwood v. London Music Hall*, (1901) 2 Ch. 309. See also *infra*, this title, *Status and Relation of Stockholders Inter Se and as to Corporations; Rights, Powers, and Prerogatives of Stockholders in General; Rights and Remedies of Minority Stockholders*.

A Mere By-law authorizing such issue of preferred stock is not binding upon a dissenting minority. *Guinness v. Ireland Land Corp.*, 2 Ch. D. 349; *Hutton v. Scarborough Cliff Hotel Co.*, 4 De G. J. & S. 672; *Ashbury v. Watson*, 30 Ch. D. 376, 16 Am. & Eng. Corp. Cas. 383.

4. Subsequent Statute Authorizing Issue. — See *Covington v. Covington*, etc., Bridge Co., 10 Bush (Ky.) 69; *Rutland*, etc., R. Co. v. *Thrall*, 35 Vt. 545; *Gordon v. Richmond*, etc., R. Co., 78 Va. 501. But see *Curry v. Scott*, 54 Pa. St. 277; *Everhart v. West Chester*, etc., R. Co., 28 Pa. St. 339.

5. Power Reserved. — *Harrison v. Mexican R. Co.*, L. R. 19 Eq. 358; *Underwood v. London Music Hall*, (1901) 2 Ch. 309.

6. Issue under Authority to Increase Stock. — *Harrison v. Mexican R. Co.*, L. R. 19 Eq. 358; *In re South Durham Brewery Co.*, 31 Ch. D. 261, 34 W. R. 126; *Hoffman v. Pennsylvania Warehousing*, etc., Co., 1 Pa. Co. Ct. 598; *Rutland*, etc., R. Co. v. *Thrall*, 35 Vt. 545; *Gordon v. Richmond*, etc., R. Co., 78 Va. 501, 22 Am. & Eng. R. Cas. 33. But see *Moss v. Syers*, 32 L. J. Ch. 711.

7. In re Bridgewater Nav. Co., 39 Ch. D. 1.

8. Authority under Power to Amend. — *Covington v. Covington*, etc., Bridge Co., 10 Bush

validity of such an issue has been sustained on the ground of a right to raise funds by a sale of shares,¹ and on the power to borrow money,² but the latter ground has been repudiated by eminent authority.³

c. **SPECIAL STOCK UNDER MASSACHUSETTS STATUTE.** — In Massachusetts the statute provides for the issue of special stock at a meeting duly called for that purpose and upon a vote of three-fourths of the general stockholders.⁴ Hence, it has been held that a vote to issue such stock at a meeting called to consider the matter of preferred shares is invalid,⁵ and it must affirmatively appear from the record that the required number voted for the issue.⁶

d. **OVERISSUE OR ULTRA VIRES ISSUE.** — The power of a corporation to issue stock is limited to the amount fixed as the capital stock by the charter or articles of incorporation,⁷ or to that amount as subsequently increased by duly authorized proceedings.⁸ Stock sought to be created in excess of the legalized capital is wholly void, even in the hands of *bona fide* holders.⁹ A holder of such unauthorized stock is not entitled to any of the rights or subject to any of the liabilities of a holder of authorized stock.¹⁰ An unauthorized overissue may afterwards be rendered valid by a duly authorized increase,¹¹ but not by a surrender to the corporation of an equivalent amount of valid shares, without the knowledge or consent of the holder of the overissued shares.¹²

(Ky.) 69; *Curry v. Scott*, 54 Pa. St. 277; *Everhart v. West Chester, etc., R. Co.*, 28 Pa. St. 339.

1. **Issue under Power to Sell Shares.** — *State v. Cheraw, etc., R. Co.*, 16 S. Car. 524; *Chaffee v. Rutland R. Co.*, 55 Vt. 110, 16 Am. & Eng. R. Cas. 408.

2. **Issue under Power to Borrow.** — *Harrison v. Mexican R. Co.*, L. R. 19 Eq. 358; *Hazlehurst v. Savannah, etc., R. Co.*, 43 Ga. 13; *Rutland, etc., R. Co. v. Thrall*, 35 Vt. 545.

3. *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159. The opinion of Folger, J., in this case is especially valuable for its full review of the authorities.

4. **Special Stock under Massachusetts Statute.** — Mass. Pub. Stat., 1870, c. 224, § 25.

5. *American Tube Works v. Boston Mach. Co.*, 139 Mass. 5 [citing *People's Mut. Ins. Co. v. Westcott*, 14 Gray (Mass.) 440; *Wiggin v. First Freewill Baptist Church*, 8 Met. (Mass.) 310; *In re Bridport Old Brewery Co.*, L. R. 2 Ch. 191].

6. *American Tube Works v. Boston Mach. Co.*, 139 Mass. 5 [citing *Morrison v. Lawrence*, 98 Mass. 219; *Andrews v. Boylston*, 110 Mass. 214; *Judd v. Thompson*, 125 Mass. 553].

7. **Amount Limited by Statute and Articles.** — *Schenck v. Andrews*, 46 N. Y. 589. See *supra*, this title, *Definition and Nature of Corporate Stock — Capital Stock*.

Authority to issue preferred stock does not extend to more than the prescribed number of shares. *Melhado v. Hamilton*, 28 L. T. N. S. 578.

The Issue of New Certificates to Take the Place of Lost Certificates does not constitute an over-issue. *Kinnan v. Forty-second St. R. Co.*, (N. Y. Super. Ct. Gen. T.) 1 Misc. (N. Y.) 157.

Mere Oversubscription does not constitute an overissue where in fact no more than the authorized number of shares are issued. *Tulare Sav. Bank v. Talbot*, 131 Cal. 45.

Evidence of Stock Outstanding. — A stock certificate book complying with the statutory requirements of a "stock and transfer book," but

not so called, is competent evidence to show the amount of stock outstanding. *Knowles v. Sandercock*, 107 Cal. 629.

8. See *infra*, this title, *Increase and Reduction of Stock*.

9. **Overissued Stock Absolutely Void.** — *In re London, etc., Ins. Corp.*, L. R. 4 Ch. 682, and note; *Chicago City R. Co. v. Allerton*, 18 Wall. (U. S.) 233; *Scovill v. Thayer*, 105 U. S. 143; *Bruff v. Mali*, 36 N. Y. 200; *New York, etc., R. Co. v. Schuyler*, 34 N. Y. 30; *Mechanics' Bank v. New York, etc., R. Co.*, 13 N. Y. 599; *Kisterbock's Appeal*, 127 Pa. St. 601, 14 Am. St. Rep. 868.

So where the consideration for a promissory note was expressed in the note to be the stock of a railway corporation, and the directors of the corporation subsequently made an illegal and unauthorized increase in the stock of the company, which was not distinguishable from the valid stock, it was held that such illegal increase would constitute a defense to an action upon the note, there being a failure of consideration inasmuch as the corporation could not deliver legal stock. *Merrill v. Gamble*, 46 Iowa 615; *Merrill v. Reaver*, 50 Iowa 404.

10. **Holder Not a Stockholder.** — *Scovill v. Thayer*, 105 U. S. 143; *Clark v. Turner*, 73 Ga. 1; *Haskell v. Read*, (Neb. 1903) 93 N. W. Rep. 998. See also *Page v. Austin*, 10 Can. Sup. Ct. 132.

A transferee of overissued shares cannot assert against the corporation rights which he could not assert in the case of genuine stock because of his indebtedness to the corporation and a consequent lien on his stock. *Mt. Holly Paper Co.'s Appeal*, 99 Pa. St. 513.

11. **Subsequent Increase of Capital Stock.** — *In re New Zealand Banking Corp.*, L. R. 3 Ch. 131; *New York, etc., R. Co. v. Schuyler*, 34 N. Y. 30. But see *Fisk v. Chicago, etc., R. Co.*, 53 Barb. (N. Y.) 513; *O'Brien v. Chicago, etc., R. Co.*, 52 Barb. (N. Y.) 568.

12. **Surrender of Valid Shares.** — *Archer v. Cassell Pub. Co.*, 89 Hun (N. Y.) 387.

e. REISSUE OF SURRENDERED OR PURCHASED SHARES. It seems that a corporation has implied authority to reissue shares of its own stock which have been accepted in payment of or as security for debts due it,¹ and such a reissue is not a creation of new stock within the meaning of charter clauses relating to original subscriptions,² nor does it constitute an overissue.³

f. FRAUDULENT ISSUE. — An issue of stock by a corporation which is not beyond the amount authorized by its charter, but which is brought about by fraud, is not *ultra vires*, and neither the corporation nor a stockholder will be allowed to claim that it is void as against a *bona fide* holder.⁴

3. Mode of Issue. — There are two general methods of issuing stock; first, in pursuance of the contract of subscription,⁵ and, second, by a stock dividend.⁶

4. Consideration for Issue — a. WHAT MAY BE RECEIVED IN PAYMENT FOR STOCK — (1) In General. — Statutes of the various states very generally provide what may be received by a corporation in exchange for shares of its capital stock.⁷

(2) *Money or Cash.* — In the absence of provision in the charter or governing statute to that effect, payment for stock issued by the corporation need not be made in cash,⁸ but may be made in property, labor and services, negotiable paper, or by way of satisfaction of debts due from the corporation to the subscriber.⁹ Where payment in cash is expressly required, the corporation cannot receive anything else in discharge of the liability for stock subscribed.¹⁰ But it has been held that any *bona fide* transaction between the company and the stockholder, which in an action for calls would support a plea of payment, is sufficient.¹¹

1. Reissue of Surrendered or Purchased Shares. — *Williams v. Savage Mfg. Co.*, 3 Md. Ch. 418.

2. *City Bank v. Bruce*, 17 N. Y. 507.

3. The issue of surrendered stock does not constitute an overissue of stock although the full amount of stock authorized had previously been issued. *Wells v. Thompson Mfg. Co.*, 54 Mo. App. 41.

4. Bona Fide Purchasers of Fraudulent Stock. — *American Wire-Nail Co. v. Bayless*, 91 Ky. 94.

Shares of stock being valid in the hands of an innocent purchaser, he cannot have the contract of sale rescinded on the ground that the shares were void in the hands of the seller because obtained by him from the corporation through fraud. *Foushee v. Snyder*, (Ky. 1900) 54 S. W. Rep. 730.

5. See *infra*, this title, *Subscription to Stock*.

6. See the title *DIVIDENDS*, vol. 9, p. 693.

7. See codes and statutes of the various states.

8. Necessity of Cash in Absence of Statute — England. — *In re Matlock Old Bath Hydro-pathic Co.*, L. R. 9 Ch. 60; *In re Harmony*, etc., Tin, etc., Min. Co., L. R. 8 Ch. 412; *In re China Steamship, etc.*, Coal Co., L. R. 4 Ch. 772; *In re Heyford Ironworks Co.*, L. R. 5 Ch. 270.

United States. — *Foreman v. Bigelow*, 4 Cliff. (U. S.) 544; *Stacy v. Little Rock, etc.*, R. Co., 5 Dill. (U. S.) 348.

Alabama. — *Frenkel v. Hudson*, 82 Ala. 158, 60 Am. Rep. 736, 19 Am. & Eng. Corp. Cas. 231.

Indiana. — *Coffin v. Ransdell*, 110 Ind. 417, 16 Am. & Eng. Corp. Cas. 432.

Maryland. — *Brant v. Ehlen*, 59 Md. 1.

Massachusetts. — *New Haven Horse Nail Co. v. Linden Spring Co.*, 142 Mass. 349, 13 Am. & Eng. Corp. Cas. 71.

New Hampshire. — *Ashuelot Boot, etc., Co. v. Hoyt*, 56 N. H. 548.

New York. — *East New York, etc., R. Co. v. Lighthall*, (N. Y. Super. Ct. Gen. T.) 5 Abb. Pr. N. S. (N. Y.) 458, 36 How. Pr. (N. Y.) 481.

Tennessee. — *Searight v. Payne*, 6 Lea (Tenn.) 283.

Contra. — Some of the older American cases incline to a different doctrine. See *Neuse River Nav. Co. v. Newbern*, 7 Jones L. (52 N. Car.) 275; *Henry v. Vermillion, etc.*, R. Co., 17 Ohio 187; *Crocker v. Crane*, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228.

9. See *infra*, the following subdivisions of this title.

10. Cash Required by Statute. — *Crocker v. Crane*, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228; *People v. Troy House Co.*, 44 Barb. (N. Y.) 625.

Payments in the following classes of property have been held insufficient where the statute required payment in money or cash, viz.: Patent rights of unascertained value, *Tasker v. Wallace*, 6 Daly (N. Y.) 364. Cancellation or satisfaction of debts due from the company. *In re Metropolitan Public Carriage, etc., Co.*, L. R. 14 Eq. 387. A transfer of lands, *Appleyard's Case*, 49 L. J. Ch. 290. Newspaper advertising, *In re Church, etc.*, F. Ins. Fund, 8 Ch. D. 126; *In re Church, etc.*, F. Ins. Co., 6 Ch. D. 681; *In re Government Security F. Ins. Co.*, 12 Ch. D. 511. Checks not drawn against funds in bank, and not intended to be paid on presentation, *Crocker v. Crane*, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228. *Compare Thorp v. Woodhull*, 1 Sandf. Ch. (N. Y.) 411; *Matter of Staten Island Rapid Transit R. Co.*, 37 Hun (N. Y.) 422.

11. What Constitutes Payment in Cash. — *In re Harmony, etc.*, Tin, etc., Min. Co., L. R. 8 Ch. 407; *In re Pen Allt Silver Lead Min. Co.*, L. R.

(3) *Property*.—Under the statutes of most states, either by express provision, or by reason of the absence of any provision to the contrary, property may be received by a corporation in exchange for its stock.¹ But the property must be such as the corporation may lawfully acquire and hold for carrying out the objects and purposes for which it was organized.² Thus, a plank-road or railroad company may accept materials for use in the construction of its line;³ and corporations empowered to purchase land may take the land in payment.⁴ Patent rights,⁵ and even prospective patents,⁶ good will,⁷ and stock in other corporations,⁸ have all been held to be a sufficient consideration for the issue of stock. But it seems that the possibility of obtaining a patent is not a valid consideration under a constitutional clause

8 Ch. 270; *In re Church, etc.*, F. Ins. Fund, 8 Ch. D. 126.

A set-off is not the same thing as a payment in cash. *In re Metropolitan Public Carriage, etc.*, Co., L. R. 14 Eq. 391. Unless the debt set off is immediately payable in cash. *In re Church, etc.*, F. Ins. Fund, 8 Ch. D. 128; *In re Church, etc.*, F. Ins. Co., 6 Ch. D. 681; *In re Government Security F. Ins. Co.*, 12 Ch. D. 511; *In re Regent United Service Stores*, 12 Ch. D. 850; *Veeder v. Mudgett*, 95 N. Y. 315.

A certified check drawn against funds actually in bank is a payment in cash within the meaning of the statute. *Matter of Staten Island Rapid Transit R. Co.*, 37 Hun (N. Y.) 422, affirmed 101 N. Y. 636.

Money paid in and expended for corporate purposes before the corporation was fully organized is a valid consideration for the issue of stock. *Geneva Mineral Spring Co. v. Coursey*, 45 N. Y. App. Div. 268.

1. *Payment in Property*.—*Tompkins v. Sperry*, 96 Md. 560; *Fargason v. Oxford Mercantile Co.*, 78 Miss. 65; *Donald v. American Smelting, etc.*, Co., 62 N. J. Eq. 729; *Schenck v. Andrews*, 46 N. Y. 589, *limited and distinguished* in 57 N. Y. 149; *Cole v. Adams*, 92 Tex. 171; *La Crosse Brown Harvester Co. v. Goddard*, 114 Wis. 610; *Clark v. Farrington*, 11 Wis. 306. See *Bucks County R. Co. v. Guarantors' Finance Co.*, 23 Pa. Co. Ct. 101.

In *New Haven Horse Nail Co. v. Linden Spring Co.*, 142 Mass. 349, 13 Am. & Eng. Corp. Cas. 71, it is said: "That in the absence of fraud, an agreement may ordinarily be made by which stockholders can be allowed to pay for their shares in patents, mines, or other property, to which it is not easy to assign a determinate value, appears to be well settled."

2. *What Property May Be Received*.—*Phelan v. Hazard*, 5 Dill. (U. S.) 45; *Lester v. Bemis Lumber Co.*, (Ark. 1903) 74 S. W. Rep. 518; *Coffin v. Ransdell*, 110 Ind. 417; *Brant v. Ehlen*, 59 Md. 1; *Liebke v. Knapp*, 79 Mo. 22, 49 Am. Rep. 212, 6 Am. & Eng. Corp. Cas. 520; *Kehlor v. Lademann*, 11 Mo. App. 550; *Kimball v. New England Roller Grate Co.*, 69 N. H. 485; *Van Cott v. Van Brunt*, (Supm. Ct. Spec. T.) 2 Abb. N. Cas. (N. Y.) 283; *American Silk Works v. Salomon*, 4 Hun (N. Y.) 135; *Rafferty v. Buffalo City Gas Co.*, 37 N. Y. App. Div. 618; *Philadelphia, etc.*, R. Co. v. Hickman, 28 Pa. St. 318; *Carr v. Le Fevre*, 27 Pa. St. 413; *Bedford County v. Nashville, etc.*, R. Co., 14 Lea (Tenn.) 525; *Clark v. Farrington*, 11 Wis. 306.

3. *Materials for Construction of Road*.—*In re*

Matlock Old Bath Hydropathic Co., L. R. 9 Ch. 60, 22 W. R. 119; *In re Bosworthen, etc.*, Min. Co., L. R. 6 Ch. 48; *Peck v. Coalfield Coal Co.*, 11 Ill. App. 88; *Ohio, etc.*, R. Co. v. Cramer, 23 Ind. 490; *Cincinnati, etc.*, R. Co. v. Clarkson, 7 Ind. 595; *Phillips v. Covington, etc.*, Bridge Co., 2 Met. (Ky.) 219; *Brant v. Ehlen*, 59 Md. 1; *Van Cott v. Van Brunt*, (Supm. Ct. Spec. T.) 2 Abb. N. Cas. (N. Y.) 283; *Haywood, etc.*, Plank Road Co. v. Bryan, 6 Jones L. (51 N. Car.) 82; *Philadelphia, etc.*, R. Co. v. Hickman, 28 Pa. St. 318; *Bedford County v. Nashville, etc.*, R. Co., 14 Lea (Tenn.) 525; *Clark v. Farrington*, 11 Wis. 306.

A subscription made payable in materials to be used in operation becomes demandable in money, if the materials are not furnished. *Haywood, etc.*, Plank Road Co. v. Bryan, 6 Jones L. (51 N. Car.) 82. See generally title PAYMENT, vol. 22, p. 513.

4. *Land*.—*In re Matlock Old Bath Hydropathic Co.*, L. R. 9 Ch. 60, 22 W. R. 119; *In re Barrow-in-Furness, etc.*, Land, etc., Co., 14 Ch. D. 400; *In re Bosworthen, etc.*, Min. Co., L. R. 6 Ch. 48; *Frenkel v. Hudson*, 82 Ala. 158, 60 Am. Rep. 736, 19 Am. & Eng. Corp. Cas. 231; *Foreman v. Bigelow*, 4 Cliff. (U. S.) 508; *Peck v. Coalfield Coal Co.*, 3 Ill. App. 619; *Cincinnati, etc.*, R. Co. v. Clarkson, 7 Ind. 595; *Brant v. Ehlen*, 59 Md. 1; *O'Meara v. North American Min. Co.*, 2 Nev. 112; *Goodin v. Evans*, 18 Ohio St. 150.

5. *Patent Rights*.—*Kimball v. Chicago Hydraulic Press Brick Co.*, (C. C. A.) 119 Fed. Rep. 102; *Edwards v. Bringier Sugar Extracting Co.*, 27 La. Ann. 118; *New Haven Horse Nail Co. v. Linden Spring Co.*, 142 Mass. 349; *Way v. American Grease Co.*, 60 N. J. Eq. 263; *Insurance Press v. Montauk Fire Detecting Wire Co.*, 83 N. Y. App. Div. 259. But see *Tasker v. Wallace*, 6 Daly (N. Y.) 364. Compare *Kimball v. New England Roller Grate Co.*, 69 N. H. 485.

6. *Prospective Patents*.—*Whitehall v. Jacobs*, 75 Wis. 476.

7. *Good Will*.—*In re Heyford Co.*, L. R. 5 Ch. 11; *Washburn v. National Wall-Paper Co.*, (C. C. A.) 81 Fed. Rep. 17.

8. *Stock in Other Corporations*.—*Smith v. Martin*, 135 Cal. 247; *Leathers v. Janney*, 41 La. Ann. 1120, 31 Am. & Eng. Corp. Cas. 399; *East New York, etc.*, R. Co. v. Lighthall, 6 Robt. (N. Y.) 407; *Rafferty v. Buffalo City Gas Co.*, 37 N. Y. App. Div. 618. Generally as to the power of a corporation to take and hold stock in another corporation, see title CORPORATIONS (PRIVATE), vol. 7, p. 620.

authorizing the issue of stock for property only when "actually received;"¹ nor is a mere option upon a mine.²

(4) *Labor and Services.* — Labor and services may be received in payment for stock under conditions similar to those which authorize the acceptance of property.³ Stock in a railroad may be issued in consideration of the construction of the road.⁴

(5) *Negotiable Paper.* — In most cases promissory notes may be taken, where the power is inferable from the corporate charter;⁵ and so generally in payment of a subscription to corporate stock, bonds may be taken,⁶ and checks.⁷

(6) *Satisfaction of Debts.* — The satisfaction of debts due from the corporation is a lawful equivalent for the issue of stock,⁸ except where

1. *Possibility of Obtaining Patent.* — *State v. Webb*, 97 Ala. 111, 38 Am. St. Rep. 151.

2. *Option upon a Mine.* — *State v. Hogan*, 163 Mo. 43. But see *Calivada Colonization Co. v. Hays*, 119 Fed. Rep. 202.

3. *Labor and Services.* — *Woodfall's Case*, 3 De G. & Sim. 63; *Ex p. Currie*, 11 W. R. 675; *Calivada Colonization Co. v. Hays*, 119 Fed. Rep. 202; *Cincinnati, etc., R. Co. v. Clarkson*, 7 Ind. 595; *Phillips v. Covington, etc., Bridge Co.*, 2 Met. (Ky.) 219; *Liebke v. Knapp*, 79 Mo. 22, 49 Am. Rep. 212, 6 Am. & Eng. Corp. Cas. 520; *Van Cott v. Van Brunt*, (Supm. Ct. Spec. T.) 2 Abb. N. Cas. (N. Y.) 283; *Drake v. New York Suburban Water Co.*, 26 N. Y. App. Div. 499; *Philadelphia, etc., R. Co. v. Hickman*, 28 Pa. St. 318; *La Crosse Brown Harvester Co. v. Goddard*, 114 Wis. 610. See also *Branch v. Jesup*, 106 U. S. 468; *Jackson v. Traer*, 64 Iowa 469, 52 Am. Rep. 449; *Reed v. Hayt*, 51 N. Y. Super. Ct. 121; *Western Bank v. Tallman*, 17 Wis. 530; *Clark v. Farrington*, 11 Wis. 306.

A Representation by an Agent that subscriptions might be paid in provisions or labor will not bar a recovery in money, unless the subscriber had offered to pay in that way and been refused, and was damaged by the refusal. *Walker v. Mobile, etc., R. Co.*, 34 Miss. 245.

4. *Construction of Railroad.* — *Lake St. El. R. Co. v. Ziegler*, 99 Fed. Rep. 114, 39 C. C. A. 431; *Brown v. Duluth, etc., R. Co.*, 53 Fed. Rep. 889; *Coe v. East, etc., R. Co.*, 52 Fed. Rep. 531; *Drake v. New York Suburban Water Co.*, 26 N. Y. App. Div. 499; *Doak v. Stahlman*, (Tenn. Ch. 1899) 58 S. W. Rep. 741; *Clark v. Farrington*, 11 Wis. 306. See also *Vermont Cent. R. Co. v. Claves*, 21 Vt. 30; *Boody v. Rutland, etc., R. Co.*, 24 Vt. 660; *Moore v. Hudson River R. Co.*, 12 Barb. (N. Y.) 156; *Porter v. Buckfield Branch R. Co.*, 32 Me. 539; *Barker v. Troy, etc., R. Co.*, 27 Vt. 767.

5. *Promissory Notes.* — *Pacific Trust Co. v. Dorsey*, 72 Cal. 55, 15 Am. & Eng. Corp. Cas. 539; *Stoddard v. Shetucket Foundry Co.*, 34 Conn. 422; *Goodrich v. Reynolds*, 31 Ill. 490, 83 Am. Dec. 240; *Hardy v. Merriweather*, 14 Ind. 203; *Magee v. Badger*, 30 Barb. (N. Y.) 246; *Union Cent. L. Ins. Co. v. Curtis*, 35 Ohio St. 343; *Vermont Cent. R. Co. v. Claves*, 21 Vt. 30; *Western Bank v. Tallman*, 17 Wis. 530; *Andrews v. Hart*, 17 Wis. 297; *Lyon v. Ewings*, 17 Wis. 61; *Cornell v. Hichens*, 11 Wis. 353; *Blunt v. Walker*, 11 Wis. 349, 78 Am. Dec. 709; *Clark v. Farrington*, 11 Wis. 306. See *McDowell v. Chicago Steel Works*, 124 Ill. 491, 21 Am. & Eng. Corp. Cas. 633; *Chetlain v. Republic L.*

Ins. Co., 86 Ill. 220. But compare *Farmers, etc., Bank v. Nelson*, 12 Md. 35; *Leighty v. Susquehanna, etc., Turnpike Co.*, 14 S. & R. (Pa.) 434.

New York Rev. Stat., c. 18, § 2, prohibits payment by the subscriber's own note. So in *Tennessee* such payment is not legal, but the subscriber will be credited with the amount collected on notes so given by him. *Moses v. Ocoee Bank*, 1 Lea (Tenn.) 398.

A note given to a corporation in payment for stock is valid in the hands of a bona fide indorsee, *Magee v. Badger*, 30 Barb. (N. Y.) 246; even though the statute forbids acceptance of notes in payment of instalments actually required to be paid, *Willmarth v. Crawford*, 10 Wend. (N. Y.) 341.

In *England*, while payment by note is irregular it is not fraudulent, so as to entitle the debtor to repudiate it. *Power v. Hoey*, 19 W. R. 916.

Giving a worthless note is not payment. *Bouton v. Dement*, 123 Ill. 142. But Confederate bonds agreed to be taken must be accepted at their face value, though they have since become worthless. *In re Mercantile Trading Co.*, L. R. 11 Eq. 131.

6. *Bonds.* — *Southern L. Ins., etc., Co. v. Lanier*, 5 Fla. 110, 58 Am. Dec. 448; *Leavitt v. Pell*, 27 Barb. (N. Y.) 322; *Valk v. Crandall*, 1 Sandf. Ch. (N. Y.) 179. See *Yard v. Pacific Mut. Ins. Co.*, 10 N. J. Eq. 480, 64 Am. Dec. 467.

Where stock is not taken up, the corporation may issue certificates thereof and take in payment its own money bonds. *Lohman v. New York, etc., R. Co.*, 2 Sandf. (N. Y.) 39.

7. *Checks.* — *Matter of Staten Island Rapid Transit Co.*, 37 Hun (N. Y.) 422, affirmed 101 N. Y. 636. See also *Thorp v. Woodhull*, 1 Sandf. Ch. (N. Y.) 411. But see *In re Disderi*, L. R. 11 Eq. 242, 19 W. R. 175.

8. *Satisfaction and Discharge of Debt.* — *In re Bosworthen, etc., Min. Co.*, L. R. 6 Ch. 48; *In re Baglan Hall Colliery Co.*, L. R. 5 Ch. 346; *Bennet's Case*, 15 W. R. 1058, 16 L. T. N. S. 475; *Ex p. Manchester Finance Corp.*, 29 L. T. N. S. 441, 22 W. R. 41; *Appleyard's Case*, 49 L. J. Ch. 290; *Ex p. Thomas*, 42 L. J. Ch. 781; *Woodfall's Case*, 3 De G. & Sm. 63; *Lohman v. New York, etc., R. Co.*, 2 Sandf. (N. Y.) 39; *Reed v. Hayt*, 51 N. Y. Super. Ct. 121; *Philadelphia, etc., R. Co. v. Hickman*, 28 Pa. St. 318; *Carr v. Le Fevre*, 27 Pa. St. 413. But see *In re Pen 'Allt Silver Lead Min. Co.*, L. R. 8 Ch. 270.

payment in cash is necessary.¹

b. SUFFICIENCY OF CONSIDERATION—(1) *Issue for Less than Par.*—The issue of shares fictitiously paid up has often been condemned by the courts² as fraudulent,³ and declared to be *ultra vires*.⁴ Constitutional and statutory provisions in many of the states prohibit such an issue of stock, and this provision is designed to protect the public as well as the stockholders.⁵ According to some of the authorities the stock so issued is void,⁶ while others regard it as voidable at most,⁷ and not necessarily fraudulent.⁸ These statements are far too general to be of much practical use. The truth is that the issue of stock without consideration or for an inadequate consideration may be impeached as between some parties and under some circumstances while as between other parties and under other circumstances the transaction cannot be impeached.⁹ At common law and in the absence of statute watered stock is valid and imposes no liability as between the corporation and the stockholders to whom it is issued,¹⁰ and this rule has been applied even under

1. *In re Metropolitan Public Carriage, etc., Co.*, L. R. 14 Eq. 387. See also *supra*, this subsection, *Money or Cash*.

2. **Stock Fictitiously Paid Up.**—*Sturges v. Stetson*, 1 Biss. (U. S.) 246; *Fosdick v. Sturges*, 1 Biss. (U. S.) 255; *Mann v. Cooke*, 20 Conn. 188; *Osgood v. King*, 42 Iowa 478; *Oliphant v. Woodburn Coal, etc., Co.*, 63 Iowa 338; *Fisk v. Chicago, etc., R. Co.*, 53 Barb. (N. Y.) 513; *O'Brien v. Chicago, etc., R. Co.*, 53 Barb. (N. Y.) 568; *Barnes v. Brown*, 80 N. Y. 534 [*citing* *Mechanics' Bank v. New York, etc., R. Co.*, 13 N. Y. 599; *Bruff v. Mali*, 36 N. Y. 200; *Morgan v. Skiddy*, 62 N. Y. 319; *Shotwell v. Mali*, 38 Barb. (N. Y.) 445]; *Neuse River Nav. Co. v. Newbern*, 7 Jones L. (52 N. Car.) 275. *Compare* *Tobey v. Robinson*, 99 Ill. 228; *Ex p. Daniell*, 1 De G. & J. 372.

3. **Held Fraudulent.**—*Oliphant v. Woodburn Coal, etc., Co.*, 63 Iowa 338; *Wallace v. Carpenter Electric Heating Mfg. Co.*, 70 Minn. 321, 68 Am. St. Rep. 530; *Manhattan Trust Co. v. Seattle Coal, etc., Co.*, 16 Wash. 499. But see *Higgins v. Lansingh*, 154 Ill. 301.

The sale of stock in a company by the directors at a less rate than the price fixed in the charter is a fraud upon the law and the stockholders. *Sturges v. Stetson*, 1 Biss. (U. S.) 246.

4. **Ultra Vires.**—*Welton v. Saffery*, (1897) A. C. 299; *Lake St. El. R. Co. v. Ziegler*, (C. C. A.) 99 Fed. Rep. 114; *Garrett v. Kansas City Coal Min. Co.*, 113 Mo. 330, 35 Am. St. Rep. 713; *Fisk v. Chicago, etc., R. Co.*, 53 Barb. (N. Y.) 513, 36 How. Pr. (N. Y.) 22. See also *Ex p. Daniell*, 1 De G. & J. 372; *Matter of Electric Tel. Co.*, 2 De G. F. & J. 275; *West Cornwall R. Co. v. Mowatt*, 12 Jur. 407.

It is not necessary that the charter contain a prohibition against taking subscriptions at less than the charter price. *Sturges v. Stetson*, 1 Biss. (U. S.) 246.

A power given to the directors by the charter to sell the property of the company, or notes and bonds belonging to it, does not apply to the capital stock, nor does the power to determine the time and terms of payment of subscriptions for stock have any reference to its price. *Sturges v. Stetson*, 1 Biss. (U. S.) 246.

5. **Constitutional and Statutory Prohibitions.**—*Ooregum Gold Min. Co. v. Roper*, (1892) A. C. 125; *Memphis, etc., R. Co. v. Dow*, 120 U. S.

287; *Minnesota v. Guaranty Trust, etc., Co.*, 73 Fed. Rep. 914; *Williams v. Evans*, 87 Ala. 725, 30 Am. & Eng. Corp. Cas. 109; *Fitzpatrick v. Dispatch Pub. Co.*, 83 Ala. 604, 19 Am. & Eng. Corp. Cas. 423; *Peoria, etc., R. Co. v. Thompson*, 103 Ill. 187, 7 Am. & Eng. R. Cas. 101; *Wallace v. Carpenter Electric Heating Mfg. Co.*, 70 Minn. 321, 68 Am. St. Rep. 530; *Rogers v. Gross*, 67 Minn. 224.

6. **Fictitiously Paid Up Stock Held Void.**—*In re Railway Time Tables Pub. Co.*, 43 W. R. 117; *Sturges v. Stetson*, 1 Biss. (U. S.) 246; *Congress, etc., Spring Co. v. Knowlton*, 103 U. S. 49, 14 Blatchf. (U. S.) 364; *Smith v. Alabama Fruit Growing, etc., Assoc.*, 123 Ala. 538; *Rogers v. Gross*, 67 Minn. 224; *Kimball v. New England Roller Grate Co.*, 69 N. H. 485; *Knowlton v. Congress, etc., Spring Co.*, 57 N. Y. 518; *First Ave. Land Co. v. Parker*, 111 Wis. 1.

7. **Fictitiously Paid Up Stock Held Voidable.**—*Fosdick v. Sturges*, 1 Biss. (U. S.) 255; *Flinn v. Bagley*, 7 Fed. Rep. 785; *Smith v. Ferries, etc., R. Co.*, (Cal. 1897) 51 Pac. Rep. 710; *Olson v. State Bank*, 67 Minn. 267; *Dunn v. State Bank*, 59 Minn. 221. See *Gasquet v. Crescent City Brewing Co.*, 49 Fed. Rep. 496. *Compare* *Gilman, etc., R. Co. v. Kelly*, 77 Ill. 426; *Campbell v. Morgan*, 4 Ill. App. 100.

8. **Not Necessarily Fraudulent.**—*Barcus v. Gates*, 89 Fed. Rep. 783, 32 C. C. A. 337; *Brant v. Ehlen*, 59 Md. 1; *New Haven Horse Nail Co. v. Linden Spring Co.*, 142 Mass. 349, 13 Am. & Eng. Corp. Cas. 71; *Douglass v. Ireland*, 73 N. Y. 100; *Schenck v. Andrews*, 57 N. Y. 133; *Boynton v. Andrews*, 63 N. Y. 93; *Lake Superior Iron Co. v. Drexel*, 90 N. Y. 87.

9. See *infra*, this title, *Remedies in Respect to Irregular or Invalid Stock*, and *infra*, this section, *Acquiescence, Laches, and Estoppel as Bar to Relief*.

10. **Validity as Between Corporation and Holder.**—*Scovill v. Thayer*, 105 U. S. 153; *Barcus v. Gates*, 32 C. C. A. 337, 89 Fed. Rep. 783; *Beitman v. Steiner*, 98 Ala. 241; *Ross v. Saylor*, 104 Ill. App. 24; *Hill v. Atoka Coal, etc., Co.*, 124 Mo. 153; *Roll v. St. Louis, etc., Smelting, etc., Co.*, 52 Mo. App. 60; *Insurance Press v. Montauk Fire Detecting Wire Co.*, 83 N. Y. App. Div. 259; *San Antonio St. R. Co. v. Adams*, (Tex. Civ. App. 1894) 25 S. W. Rep. 639; *Wells v. Green Bay, etc., Canal Co.*, 90 Wis. 442.

The issue of stock by a corporation for much

statutes which prohibit the issue of stock for less than par.¹ But dissenting stockholders are entitled to relief against stock issued for less than its value.² As to creditors, holders of watered stock may usually be held liable to the extent that such stock is in fact unpaid.³ Under statutory or constitutional provisions stock issued without consideration or for an inadequate consideration has been held void even in the hands of *bona fide* purchasers to whom new certificates have been issued.⁴ Even as between the stockholders and the corporation, according to some statutes, the holder of so-called full paid shares issued for less than par is liable for the unpaid balance when called for any company purpose.⁵ The issue of stock for less than par is a good defense to an action upon an executory contract for the purchase of such stock,⁶ and the issuance of full paid shares to subscribers or others for less than par cannot be enforced.⁷ There are dicta to the effect that where the original capital has become impaired new stock may be issued at its actual or market value, but this is doubtful.⁸ Stock may be sold for less than par on execution or under the charter on default of payment, as this is not an issue for less than par and the gain or loss is that of the delinquent stockholder, the other stockholders not being in any way affected.⁹

(2) *Issue for Property or Services.* — Where stock is issued in exchange for property or services, the parties to the transaction, including the corporation and assenting stockholders, are bound by the valuation which they have put upon such property or services, and anything will be regarded as payment in full which the parties have agreed shall be so considered.¹⁰ But dissenting

more than the value of land which constitutes its only capital, when there are no other stockholders or creditors of the company to complain, cannot be held to be a fraud on the company itself. *Higgins v. Lansingh*, 154 Ill. 301.

It is well established that a corporation may sell its stock at such price as seems to it proper, if by so doing it does not prejudice its creditors or stockholders. *Ross v. Saylor*, 104 Ill. App. 19 [citing *Union Mut. L. Ins. Co. v. Frear Stone Mfg. Co.*, 97 Ill. 537, 37 Am. Rep. 129; *Winston v. Dorsett Pipe, etc., Co.*, 129 Ill. 64; *Bouton v. Dement*, 123 Ill. 142.]

1. *Thompson v. Knight*, 74 N. Y. App. Div. 316.

2. *Dissenting Stockholders Entitled to Relief.* — *Kimball v. New England Roller Grate Co.*, 69 N. H. 485; *Fisk v. Chicago, etc., R. Co.*, (Supm. Ct. Spec. T.) 36 How. Pr. (N. Y.) 22; *Kraft v. Griffon Co.*, 82 N. Y. App. Div. 29. See *Smith v. Ferries, etc., R. Co.*, (Cal. 1897) 51 Pac. Rep. 710; *San Antonio St. R. Co. v. Adams*, (Tex. Civ. App. 1894) 25 S. W. Rep. 639. See also *Coler v. Tacoma R., etc., Co.*, (N. J. 1903) 54 Atl. Rep. 413.

The issuing by the directors of a bond convertible into stock is the same in effect as the sale of so much stock, and the sale of such a bond at a discount is unlawful and void. Stock thus taken is, in the hands of a party with notice, subject to the right of prior subscribers to have it reduced to the charter value of the shares. *Sturges v. Stetson*, 1 Biss. (U. S.) 246.

3. *Rights of Creditors.* — See *infra*, this title, *Liability of Stockholders for Corporate Debts*. See also generally *Fogg v. Blair*, 139 U. S. 118; *Scovill v. Thayer*, 105 U. S. 143; *Doak v. Stahlman*, (Tenn. Ch. 1899) 58 S. W. Rep. 741; *Wells v. Green Bay, etc., Canal Co.*, 90 Wis. 442.

4. *Bona Fide Holders.* — *Lake St. El. R. Co. v. Ziegler*, 99 Fed. Rep. 114, 39 C. C. A. 431;

Smith v. Alabama Fruit Growing, etc., Assoc., 123 Ala. 538; *Kellerman v. Maier*, 116 Cal. 416; *First Ave. Land Co. v. Parker*, 111 Wis. 1. But compare *Stein v. Howard*, 65 Cal. 616; *Smith v. Ferries, etc., R. Co.*, (Cal. 1897) 51 Pac. Rep. 715; *Olson v. State Bank*, 67 Minn. 267; *Dunn v. State Bank*, 59 Minn. 221.

5. *Stockholder Held Liable for Calls.* — *Welton v. Saffery*, (1897) A. C. 305; *In re Railway Time Tables Pub. Co.*, 43 W. R. 117, following *In re Almada, etc., Co.*, 38 Ch. D. 415; *In re Weymouth, etc., Steam Packet Co.*, (1891) 1 Ch. 66. But see *Webb v. Shropshire R. Co.*, 7 Reports 231, (1893) 3 Ch. 307.

6. *Defense to Executory Contract.* — *Sturges v. Stetson*, 1 Biss. (U. S.) 246.

7. *Issuance Not Enforceable.* — *Rogers v. Gross*, 67 Minn. 224; *Garrett v. Kansas City Coal Min. Co.*, 113 Mo. 330, 35 Am. St. Rep. 713; *Morton v. Timken*, 48 N. J. L. 87, 12 Am. & Eng. Corp. Cas. 34; *Kraft v. Griffon Co.*, 82 N. Y. App. Div. 34.

8. *New Stock.* — *Handley v. Stutz*, 139 U. S. 417; *Morrow v. Iron, etc., Co.*, 87 Tenn. 262, 10 Am. St. Rep. 658. Compare *Kraft v. Griffon Co.*, 82 N. Y. App. Div. 32.

9. *Sale under Execution or Lien.* — *Sturges v. Stetson*, 1 Biss. (U. S.) 246.

Shares of stock issued to the promoters of a corporation illegally and without consideration, and by them transferred to be held for the benefit of the corporation, cannot be legally disposed of at less than their par value unless sold at auction for nonpayment of assessments. *Kimball v. New England Roller Grate Co.*, 69 N. H. 485.

10. *Agreed Valuation Binding between Parties.* — *Memphis, etc., R. Co. v. Dow*, 120 U. S. 287; *Dickerman v. Northern Trust Co.*, 80 Fed. Rep. 450, 53 U. S. App. 270, affirming 75 Fed. Rep. 936; *Brown v. Duluth, etc., R. Co.*, 53 Fed. Rep. 889; *Beitman v. Steiner*, 98 Ala. 241; *Smith v.*

stockholders are entitled to relief against stock issued in exchange for property worth less than the par value of such stock,¹ and as to them the fair, reasonable value of the property or services at the time received determines whether or not the stock is fully paid.² As to creditors, there is much conflict and confusion in the decisions as to whether stock paid for in property or services is to be regarded as fully paid or not. This subject is discussed in a subsequent section of this article.³ Stock issued in exchange for property, though worth less than the par value of such stock, is not a "fictitious" issue of stock within the meaning of statutory or constitutional provisions providing that all fictitious issues of stock shall be void.⁴ The value of the property or services received may be shown by any competent evidence,⁵ and the burden of showing overvaluation is upon the party asserting it.⁶ Fraud is established by proving that the stock was issued with knowledge that it exceeded in value the consideration.⁷ Gross overvaluation is evidence of fraud.⁸ But a mere difference of opinion as to the value of property accepted in exchange for shares will not render their issue fraudulent.⁹

5. Issue of Stock by Corporate Officers to Themselves.—Where officers of a corporation have general authority to issue stock under certain prescribed formalities, they may issue it to themselves in the same manner as to others.¹⁰ Moreover, a transaction by which an officer reissues to himself, at par, shares previously issued to another, but reconveyed to the corporation, and standing at a premium, is at most only voidable, and if the stockholders have acquiesced therein, the company cannot compel a surrender of the certificate.¹¹ But where an officer, who completely controls the board of directors, procures the issue of stock to himself, under pretense of paying a claim, the transaction will be closely scrutinized by the court and set aside upon a showing of unfairness.¹² So an issue by corporate officers to themselves, immediately after the sale of valuable property and before the declaration of a dividend therefrom, of stock previously unissued, is a breach of duty and will be enjoined.¹³ The

Ferries, etc., R. Co., (Cal. 1897) 51 Pac. Rep. 723; Higgins v. Lansingh, 154 Ill. 301; Hill v. Atoka Coal, etc., Co., 124 Mo. 166; Roll v. St. Louis, etc., Smelting, etc., Co., 52 Mo. App. 60; Coler v. Tacoma R., etc., Co., (N. J. 1902) 53 Atl. Rep. 680; Wells v. Green Bay, etc., Canal Co., 90 Wis. 442. See Scovill v. Thayer, 105 U. S. 143.

1. Dissenting Stockholders Entitled to Relief.—Sturges v. Stetson, 1 Biss. (U. S.) 250; Smith v. Ferries, etc., R. Co., (Cal. 1897) 51 Pac. Rep. 723. See Hill v. Atoka Coal, etc., Co., 124 Mo. 165; Rafferty v. Buffalo City Gas Co., 37 N. Y. App. Div. 618. See also *infra*, this section, *Issue of Stock by Corporate Officers to Themselves*.

2. Real Value Decisive.—Kimbell v. Chicago Hydraulic Press Brick Co., (C. C. A.) 119 Fed. Rep. 102; Brown v. Duluth, etc., R. Co., 53 Fed. Rep. 889; Wetherbee v. Baker, 35 N. J. Eq. 501; Langan v. Francklyn, (Brooklyn City Ct. Spec. T.) 29 Abb. N. Cas. (N. Y.) 102; Rafferty v. Buffalo City Gas Co., 37 N. Y. App. Div. 618.

Judgment of Directors as to Value.—Donald v. American Smelting, etc., Co., 62 N. J. Eq. 729.

3. Rights of Creditors.—See *infra*, this title, *Liability of Stockholders for Corporate Debts*.

4. Fictitious Issue.—Memphis, etc., R. Co. v. Dow, 120 U. S. 287; Lake St. El. R. Co. v. Ziegler, 99 Fed. Rep. 114, 39 C. C. A. 431; Continental Trust Co. v. Toledo, etc., R. Co., 82 Fed. Rep. 642; Smith v. Ferries, etc., R. Co., (Cal. 1897) 51 Pac. Rep. 715 [citing Stein v. Howard, 65 Cal. 616]; Peoria, etc., R. Co. v.

Thompson, 103 Ill. 187. See also San Antonio St. R. Co. v. Adams, (Tex. Civ. App. 1894) 25 S. W. Rep. 639.

5. Evidence of Value.—Dickerman v. Northern Trust Co., 80 Fed. Rep. 450, 53 U. S. App. 276.

6. Burden of Proof.—Dickerman v. Northern Trust Co., 80 Fed. Rep. 450, 53 U. S. App. 270; Davis v. Montgomery Furnace, etc., Co., 101 Ala. 127.

7. Evidence of Fraud.—Douglass v. Ireland, 73 N. Y. 100.

8. Manhattan Trust Co. v. Seattle Coal, etc., Co., 16 Wash. 499.

9. Medler v. Albuquerque Hotel, etc., Co., 6 N. Mex. 331.

10. Issue to Corporate Officers by Themselves.—Titus v. Great Western Turnpike Road Co., 61 N. Y. 237. Compare Hill v. C. F. Jewett Pub. Co., 154 Mass. 172, 26 Am. St. Rep. 230.

11. Voidable Issue.—St. Croix Lumber Co. v. Mittlestadt, 43 Minn. 91, citing Kelsey v. National Bank, 69 Pa. St. 426; Mt. Washington Hotel Co. v. Marsh, 63 N. H. 230; Fleckner v. U. S. Bank, 8 Wheat. (U. S.) 338; Omaha Hotel Co. v. Wade, 97 U. S. 13; Indianapolis Rolling Mill v. St. Louis, etc., R. Co., 120 U. S. 256.

12. Unfairness in Issue.—Perry v. Tuskalooza Cotton Seed Oil Mill Co., 93 Ala. 364, 33 Am. & Eng. Corp. Cas. 346. See also Straman v. North Baltimore Waterworks Co., 4 Ohio Cir. Dec. 339, 8 Ohio Cir. Ct. 89.

13. Injunction.—Arkansas Valley Agricultural Soc. v. Eichholtz, 45 Kan. 164, 36 Am. & Eng. Corp. Cas. 79.

issue of fictitious paid-up stock by directors to themselves is especially condemned by the courts.¹ Thus, transactions by which stock is issued to a director for land at a gross overvaluation,² or to an officer who does not pay the full price therefor,³ or in payment of unaudited accounts for labor performed under contract with the president, who sought to place the shares where they would be held for his benefit,⁴ are fraudulent. The acceptance by directors of a worthless consideration for stock issued to one of their number charges them with its full value.⁵ An officer who is active in effecting an issue of stock to which he subscribes cannot afterward recover back the amount paid by him on the ground that the issue was *ultra vires*;⁶ but a corporation is not estopped to impeach the validity of an unauthorized issue of shares to himself by its president⁷ or secretary.⁸ The officers of a corporation will not be permitted to obtain an unfair advantage over other stockholders by the issuance of stock to themselves.⁹

6. Remedies in Respect to Invalid or Irregular Stock — *a. IN GENERAL.* — The issuance of invalid stock creates a cloud upon the rights of the other stockholders which equity will remove by cancellation at the instance of a complaining stockholder,¹⁰ or the creation of which will be received by injunction.¹¹ Where the invalid stock cannot be distinguished from the valid stock, though the amount of invalid stock is known, it seems that equity cannot cancel a proportionate part of the whole stock in the proportion that the invalid stock bears to the whole stock.¹²

b. OVERISSUED STOCK — (1) *Remedy of Purchaser.* — While a *bona fide* holder of overissued shares acquires no rights thereunder and is not a stockholder, he has a remedy against the corporation in damages,¹³ the measure of which has been diversely viewed as the market value of the stock at the time of demanding transfer,¹⁴ or as the price paid therefor with interest.¹⁵ The

1. **Stock Fictitiously Paid Up.** — *Ex p. Daniell*, 1 De G. & J. 372; *Osgood v. King*, 42 Iowa 483; *Hill v. Atoka Coal, etc., Co.*, 124 Mo. 165. See also *Insurance Press v. Montauk Fire Detecting Wire Co.*, 83 N. Y. App. Div. 259. But see *Tompkins v. Sperry*, (Md. 1903) 54 Atl. Rep. 254.

2. *Tutwiler v. Tuskaloosa Coal, etc., Co.*, 89 Ala. 391, 31 Am. & Eng. Corp. Cas. 445; *Hill v. Atoka Coal, etc., Co.*, 124 Mo. 153.

3. *Huiskamp v. West*, 47 Fed. Rep. 236.

4. *Perry v. Tuskaloosa Cotton Seed Oil Mill Co.*, 93 Ala. 364, 33 Am. & Eng. Corp. Cas. 346.

5. *Van Cott v. Van Brunt*, (Supm. Ct. Spec. T.) 2 Abb. N. Cas. (N. Y.) 283; *Ottawa, etc., R. Co. v. Black*, 79 Ill. 262.

6. **Estoppel of Officer.** — *Banigan v. Bard*, 134 U. S. 291, 31 Am. & Eng. Corp. Cas. 327.

7. **Estoppel of Corporation.** — *Hill v. C. F. Jewett Pub. Co.*, 154 Mass. 172, 26 Am. St. Rep. 230.

8. *Cincinnati, etc., R. Co. v. Citizens' Nat. Bank*, 24 Ohio L. J. 198.

9. **Unfair Advantage Obtained by Officers.** — *Morris v. Stevens*, 17 Pa. Co. Ct. 209, *affirmed* 178 Pa. St. 563.

10. **Removal of Cloud.** — *Stebbins v. Perry County*, 167 Ill. 567; *Campbell v. Morgan*, 4 Ill. App. 100; *New York, etc., R. Co. v. Schuyler*, (C. App.) 7 Abb. Pr. (N. Y.) 41; *Pendleton Mfg. Co. v. Mahanna*, (Oregon 1888) 18 Pac. Rep. 563. See also *infra*, this section, *Overissued Stock* — *Remedy of Corporation and Stockholders*.

The holder of void stock may be restrained from selling or exercising acts of ownership over the certificates representing said stock.

Davis v. San Antonio, etc., R. Co., (Tex. Civ. App. 1898) 44 S. W. Rep. 1012.

11. **Injunction.** — *Kraft v. Griffon Co.*, 82 N. Y. App. Div. 29. But see *Nash v. Hall*, (Supm. Ct. Spec. T.) 11 Misc. (N. Y.) 468.

12. **Invalid Stock Not Distinguishable.** — *Church v. Citizens' St. R. Co.*, 78 Fed. Rep. 526.

13. **Corporation Liable in Damages.** — *Western Maryland R. Co. v. Franklin Bank*, 60 Md. 36; *Tome v. Parkersburg Branch R. Co.*, 39 Md. 36, 17 Am. Rep. 540; *Craft v. South Boston R. Co.*, 150 Mass. 207, 15 Am. St. Rep. 185; *Fifth Ave. Bank v. Forty-second St., etc., R. Co.*, 137 N. Y. 231, 33 Am. St. Rep. 712; *Titus v. Great Western Turnpike Road Co.*, 61 N. Y. 237; *Bruff v. Mali*, 36 N. Y. 206; *Archer v. Cassell Pub. Co.*, 89 Hun (N. Y.) 387; *New York, etc., Co. v. Schuyler*, 34 N. Y. 30; *Havens v. Tarboro Bank*, 132 N. Car. 214; *Kisterbock's Appeal*, 127 Pa. St. 601, 14 Am. St. Rep. 868; *People's Bank v. Kurtz*, 99 Pa. St. 344, 44 Am. Rep. 112; *Willis v. Fry*, 13 Phila. (Pa.) 33, 36 Leg. Int. (Pa.) 47; *Willis v. Railroad Co.*, 6 W. N. C. (Pa.) 461; *Kentucky Bank v. Schuylkill Bank*, 1 Pars. Eq. Cas. (Pa.) 180; *Cartwright v. Dickinson*, 88 Tenn. 476, 17 Am. St. Rep. 910; *First Ave. Land Co. v. Parker*, 111 Wis. 8.

14. **Measure of Damages.** — *Craft v. South Boston R. Co.*, 150 Mass. 207, 15 Am. St. Rep. 185; *Havens v. Tarboro Bank*, 132 N. Car. 214; *People's Bank v. Kurtz*, 99 Pa. St. 344, 44 Am. Rep. 112; *Willis v. Railroad Co.*, 6 W. N. C. (Pa.) 461.

15. *Tome v. Parkersburg Branch R. Co.*, 39 Md. 36, 17 Am. Rep. 540.

But where a bill was filed against a corporation by the holder of shares overissued in vio-

officers of a corporation also are personally liable, not only to the immediate purchasers from them of spurious stock falsely and fraudulently certified by them, but to any subsequent purchaser buying upon the faith of the false certificate and sustaining damage thereby.¹ And the injured party may recover from the officers in an action against them, either jointly with the corporation or separately.² The holder of overissued stock has no right of action if he receives it from an officer who is in fact his agent,³ or if the certificates are signed by less than the required number of officers.⁴ But incapacity to create the spurious stock would be no defense to an action.⁵

(2) *Remedy of Corporation and Stockholders.*—Spurious certificates form a cloud upon the title of genuine stockholders which equity will remove.⁶ The transfer of illegally issued stock will be enjoined,⁷ and the corporation⁸ or a stockholder⁹ may sue for its cancellation. There is no recourse against the *bona fide* vendor of overissued stock.¹⁰

c. **STOCK ISSUED FOR LESS THAN PAR.**—An innocent purchaser of stock purporting to be fully paid, but which is not so in fact, may maintain an action for damages against the corporation for deceit based upon the false declaration contained in the certificate,¹¹ or he may rescind his contract and recover the price paid.¹² A corporation may maintain an action for damages against its officers for the illegal issuance of stock void because issued without consideration in violation of statute.¹³ Nonassenting stockholders may maintain a bill in equity for the cancellation of stock illegally issued for less than par,¹⁴ or to enjoin the illegal issuance of such stock,¹⁵ or to have the number of shares illegally issued reduced to their par value.¹⁶ Statutory or constitutional

lation of law, praying that their legality might be inquired into; that if they should be held to be illegal the plaintiff might be repaid the amount paid by him for the shares, and the corporation might be enjoined pending the suit from disposing of so much of its property as would indemnify the plaintiff, and that a receiver of that amount might be appointed; it appearing that the money received by the corporation had not been kept separate from its general funds, and could not be traced and identified, it was held that the injunction could not be granted nor the receiver be appointed. *Whelpley v. Erie R. Co.*, 6 Blatchf. (U. S.) 271.

1. **Liability of Officers.**—*Firbank v. Humphreys*, 18 Q. B. D. 54; *Shotwell v. Mali*, 38 Barb. (N. Y.) 445; *Cazeaux v. Mali*, 25 Barb. (N. Y.) 578; *Bruff v. Mali*, 36 N. Y. 200; *Seiser v. Malis*, 41 N. Y. 619, *affirming* (Supm. Ct. Spec. T.) 6 Abb. Pr. (N. Y.) 270, note, and *reversing* 32 Barb. (N. Y.) 76, 11 Abb. Pr. (N. Y.) 129.

2. **National Exch. Bank v. Sibley, 71 Ga. 726; *Shotwell v. Mali*, 38 Barb. (N. Y.) 445; *Bruff v. Mali*, 36 N. Y. 200.**

3. *Wright's Appeal*, 99 Pa. St. 425.

4. *Holbrook v. Fauquier*, etc., *Tunpike Co.*, 3 Cranch. (C. C.) 425. *Compare* *Granger's L.*, etc., *Ins. Co. v. Kamper*, 73 Ala. 341, 6 Am. & Eng. Corp. Cas. 497; *Hill v. C. F. Jewett Pub. Co.*, 154 Mass. 172, 26 Am. St. Rep. 230, and cases cited.

5. *New York, etc., Co. v. Schuyler*, 34 N. Y. 30.

6. **Removal of Cloud by Cancellation.**—*Stebbins v. Perry County*, 167 Ill. 567; *Tucker v. Keniston*, 47 N. H. 271; *New-York, etc., R. Co. v. Schuyler*, 17 N. Y. 592.

7. **Injunction Against Transfer.**—*Sherman v.*

Clark, 4 Nev. 138, 97 Am. Dec. 516; *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159.

8. **Suit by Corporation.**—*New York, etc., R. Co. v. Schuyler*, 17 N. Y. 592. *Compare* *Lehigh Valley R. Co. v. McFarlan*, 31 N. J. Eq. 730.

9. **Suit by Stockholder.**—*Wood v. Union Gospel Church Bldg. Assoc.*, 63 Wis. 9; *Haskell v. Read*, (Feb. 1903) 93 N. W. Rep. 998.

10. **No Recourse Against Vendor.**—*People's Bank v. Kurtz*, 99 Pa. St. 344, 44 Am. Rep. 112; *State v. North Louisiana, etc., R. Co.*, 34 La. Ann. 947.

11. **Corporation Liable in Damages.**—*Sturges v. Stetson*, 1 Biss. (U. S.) 246; *First Ave. Land Co. v. Parker*, 111 Wis. 1.

12. **Rescission of Contract.**—*Fosdick v. Sturges*, 1 Biss. (U. S.) 255.

13. **Officers Liable to Corporation.**—*First Ave. Land Co. v. Parker*, 111 Wis. 1.

14. **Stockholders' Suit for Cancellation.**—*Kimball v. New England Roller-Grate Co.*, 69 N. H. 485; *Jutte v. Hutchinson*, 29 Pittsb. Leg. J. N. S. (Pa.) 87. See *Kimbell v. Chicago Hydraulic Press Brick Co.*, (C. C. A.) 119 Fed. Rep. 102; *Brown v. Duluth, etc., R. Co.*, 53 Fed. Rep. 889.

In *Peatman v. Centerville Light, etc., Co.*, 100 Iowa 245, it was held that a bill in equity would not lie to cancel stock issued for twenty-five per cent. of its par value, as there is an adequate remedy at law by action to recover the balance due. See also *Nash v. Hall*, (Supm. Ct. Spec. T.) 11 Misc. (N. Y.) 468.

15. **Injunction Against Issuance.**—*Brown v. Duluth, etc., R. Co.*, 53 Fed. Rep. 889; *Donald v. American Smelting, etc., Co.*, 62 N. J. Eq. 729; *Kraft v. Griffon Co.*, 82 N. Y. App. Div. 29; *Langan v. Franklyn*, (Brooklyn City Ct. Spec. T.) 29 Abb. N. Cas. (N. Y.) 102.

16. **Reduction to Par Value.**—*Fosdick v. Sturges*, 1 Biss. (U. S.) 257.

provisions merely prohibiting or declaring void fictitious or watered stock are intended for the protection of private rights, and the state cannot maintain a proceeding in its own name to prevent or redress a violation of such provisions.¹ But under some statutes the state by its attorney-general may maintain a proceeding to annul watered stock issued in violation of law.²

d. STOCK FRAUDULENTLY ISSUED. — Nonassenting stockholders may maintain a bill in equity to cancel stock fraudulently issued except as against *bona fide* purchasers for value.³ To justify relief, the fraud must have been in regard to the subscription or issuance of the stock, and fraud in a collateral transaction is insufficient.⁴ A purchaser or subscriber for stock may maintain a bill to rescind and have declared void stock issued to him upon the ground of fraud.⁵ A purchaser of fraudulently issued stock must elect to affirm or rescind *in toto*.⁶

e. SPECIAL STOCK UNDER MASSACHUSETTS STATUTE. — The holder of special stock which has been illegally issued cannot, by estoppel or otherwise, become a member in respect thereto,⁷ but he may rescind his contract to accept it and prove the amount of his claim against the insolvent estate of the corporation,⁸ even though such insolvency occurs before the rescission.⁹

7. Acquiescence, Laches, and Estoppel as Bar to Relief — *a. GENERAL RULE.* — Stock which the corporation has no power to issue is absolutely void, and no estoppel, acquiescence, or ratification can impart to it any validity or bind either the corporation or the stockholders.¹⁰ But stock which the corporation had general power to issue, but not in the manner in which or upon the terms upon which it was in fact issued, is merely irregular and voidable, and may be validated either generally or as to particular persons by conduct amounting to estoppel, acquiescence, laches, or ratification.¹¹

1. Proceedings in Name of State. — *Minnesota v. Guaranty Trust, etc., Co.*, 73 Fed. Rep. 914.

2. Cheatham v. Atty.-Gen., 38 W. N. C. (Pa.) 124; *Com. v. Reading Traction Co.*, 204 Pa. St. 151.

3. Stockholders' Suit for Cancellation. — *Kimball v. New England Roller Grate Co.*, 69 N. H. 485; *Bailey v. Champlin Min., etc., Co.*, 77 Wis. 453.

4. Stanley v. Luse, 36 Oregon 25.

5. Rescission. — *Dunn v. State Bank*, 59 Minn. 221. See also *infra*, this title, *Subscription to Stock*. See generally the titles FRAUD AND DECEIT, vol. 14, p. 12; RESCISSION, CANCELLATION, AND REFORMATION, vol. 24, p. 604.

6. Church v. Citizens' St. R. Co., 78 Fed. Rep. 526.

7. Special Stock — Estoppel. — *American Tube Works v. Boston Mach. Co.*, 139 Mass. 5.

8. Rescission. — *Reed v. Boston Mach. Co.*, 141 Mass. 454, 12 Am. & Eng. Corp. Cas. 153; *American Tube Works v. Boston Mach. Co.*, 139 Mass. 5.

9. Reed v. Boston Mach. Co., 141 Mass. 454, 12 Am. & Eng. Corp. Cas. 153.

10. Ultra Vires and Void Stock. — *In re Tal y Drws Slate Co.*, 1 Ch. D. 247; *Scovill v. Thayer*, 105 U. S. 143; *Stebbins v. Perry County*, 167 Ill. 567; *Olson v. State Bank*, 67 Minn. 267; *Lathrop v. Kneeland*, 46 Barb. (N. Y.) 432; *First Ave. Land Co. v. Parker*, 111 Wis. 6. See also *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159.

Though stock issued by a building association be *ultra vires*, persons becoming members by accepting it and assenting to the contract in such form are bound to take notice of the limitations on the powers of the association, and are precluded from contesting it on such ground

in a controversy solely between themselves. *Leahy v. National Bldg., etc., Assoc.*, 100 Wis. 555, 69 Am. St. Rep. 945.

11. Voidable but Not Void Stock — England. — *Matter of Joint Stock Co.'s Winding-up Acts*, 4 Kay & J. 305; *Ex p. Barclay*, 1 Jur. N. S. 1145; *In re New Zealand Banking Corp.*, L. R. 3 Ch. 131.

United States. — *Handley v. Stutz*, 139 U. S. 417, 34 Am. & Eng. Corp. Cas. 624; *Scovill v. Thayer*, 105 U. S. 143; *Pullman v. Upton*, 96 U. S. 328; *Chubb v. Upton*, 95 U. S. 665; *Upton v. Tribilcock*, 91 U. S. 45.

Kentucky. — *American Wire-Nail Co. v. Bayless*, 91 Ky. 101; *Foushee v. Snyder*, (Ky. 1900) 54 S. W. Rep. 731.

Michigan. — *Hoeft v. Kock*, 123 Mich. 171; *McLaughlin v. Detroit, etc., R. Co.*, 8 Mich. 100.

Minnesota. — *Olson v. State Bank*, 67 Minn. 267.

New York. — *Reed v. Hayt*, 109 N. Y. 659, 21 Am. & Eng. Corp. Cas. 295; *Veeder v. Mudgett*, 95 N. Y. 295, 6 Am. & Eng. Corp. Cas. 485.

Pennsylvania. — *Morris v. Stevens*, 17 Pa. Co. Ct. 209, affirmed 178 Pa. St. 563; *Shellenberger v. Patterson*, 168 Pa. St. 30; *Jutte v. Hutchinson*, 29 Pittsb. Leg. J. N. S. (Pa.) 87.

Texas. — *San Antonio St. R. Co. v. Adams*, (Tex. Civ. App. 1894) 25 S. W. Rep. 643.

See also cases cited *infra*, this subdivision, *Application of Rule*.

Holders of 'preferred stock authorized and created by the holders of common stock cannot claim to be the only stockholders, where for more than twenty years they have stood by while the holders of the common stock have elected the managers and performed all other

b. APPLICATION OF RULE — (1) Overissued Stock. — Overissued stock is wholly void because beyond the power of the corporation to issue it, and hence cannot be validated or given any binding force or effect by reason of estoppel, acquiescence, or ratification.¹

(2) *Preferred Stock.* — Acquiescence and laches will estop stockholders or purchasers from objecting to the validity of an issue of preferred stock upon the ground that it was unauthorized,² particularly where the rights of third parties have intervened.³ Thus unreasonable delay,⁴ the payment or acceptance of dividends on the preferred shares,⁵ or the enjoyment of benefits in respect to them not shared by other stockholders,⁶ will bar the right to attack the validity of the issue.

(3) *Stock Issued for Less than Par.* — Acquiescence, laches, or estoppel is a bar to relief against stock irregularly issued for less than par, except, perhaps, when such stock is made absolutely void by statute.⁷ The corporation itself, and all persons participating in and assenting to such issue, are bound thereby and will not be heard to complain.⁸ Unreasonable delay in repudiating the transaction after knowledge of the facts is such laches or acquiescence as will bar relief,⁹ especially where the rights of innocent third persons have intervened.¹⁰

(4) *Fraudulent Stock.* — Stock fraudulently issued is merely voidable, and

acts as stockholders of the company. *Higgins v. Lansingh*, 154 Ill. 301.

It is the duty of a stockholder, if he desires to set aside acts of the corporation, to act promptly, and in failing to do so he becomes bound by his acquiescence therein, and is estopped from asserting any right as against a person who has in good faith dealt with the corporation and received its securities. *Drake v. New York Suburban Water Co.*, 26 N. Y. App. Div. 499.

1. *Overissued Stock.* — *Scovill v. Thayer*, 105 U. S. 143; *Olson v. State Bank*, 67 Minn. 267. But see *Haskell v. Read*, (Neb. 1903) 93 N. W. Rep. 997.

2. *Preferred Stock.* — *Harrison v. Mexican R. Co.*, L. R. 19 Eq. 358, 44 L. J. Ch. 403; *Taylor v. South, etc., Alabama R. Co.*, 4 Woods (U. S.) 575; *Toledo, etc., R. Co. v. Continental Trust Co.*, (C. C. A.) 95 Fed. Rep. 497; *Bard v. Bani-gan*, 39 Fed. Rep. 13, 134 U. S. 291, 31 Am. & Eng. Corp. Cas. 327; *Hazlehurst v. Savannah, etc., R. Co.*, 43 Ga. 13; *Lockhart v. Van Alstyne*, 31 Mich. 81, 18 Am. Rep. 156; *McLaughlin v. Detroit, etc., R. Co.*, 8 Mich. 100; *McGregor v. Home Ins. Co.*, 33 N. J. Eq. 183; *Kent v. Quicksilver Min. Co.*, 78 N. Y. 186.

A corporation, or the holders of stock or scrip therein, cannot compel an accounting for dividends received on preferred stock, on the ground that the issue of such stock was ultra vires, after they have received full value for the stock, authorized its issue, paid dividends on it, and long treated it as valid. *Higgins v. Lansingh*, 154 Ill. 303.

3. *Kent v. Quicksilver Min. Co.*, 78 N. Y. 187.

4. *Unreasonable Delay.* — *Taylor v. South, etc., Alabama R. Co.*, 4 Woods (U. S.) 575; *Toledo, etc., R. Co. v. Continental Trust Co.*, 95 Fed. Rep. 497, 36 C. C. A. 155; *Higgins v. Lansingh*, 154 Ill. 301; *Kent v. Quicksilver Min. Co.*, 78 N. Y. 188.

5. *Payment and Acceptance of Dividends.* — *Branch v. Jesup*, 106 U. S. 468, 9 Am. & Eng.

R. Cas. 558; *Higgins v. Lansingh*, 154 Ill. 303.

6. *Enjoyment of Special Benefits.* — *Evansville, etc., Straight Line R. Co. v. Evansville*, 15 Ind. 395.

7. *Stock Issued for Less than Par.* — See *First Ave. Land Co. v. Parker*, 111 Wis. 1; *Parsons v. Hayes*, (N. Y. Super. Ct. Gen. T.) 14 Abb. J. Cas. (N. Y.) 419; *Union Pac. R. Co. v. Credit Mobilier*, 135 Mass. 371; *San Antonio St. R. Co. v. Adams*, (Tex. Civ. App. 1894) 25 S. W. Rep. 643.

8. *Participation in Issue Bars Relief* — *United States.* — *Washburn v. National Wall-Paper Co.*, (C. C. A.) 81 Fed. Rep. 17; *Gasquet v. Crescent City Brewing Co.*, 49 Fed. Rep. 496.

California. — *Smith v. Martin*, 135 Cal. 247; *Green v. Abietine Medical Co.*, 96 Cal. 322.

Illinois. — *Higgins v. Lansingh*, 154 Ill. 301.

Louisiana. — *Wisner v. Delhi Land, etc., Co.*, 46 La. Ann. 1223.

Michigan. — *Ten Eyck v. Pontiac, etc., R. Co.*, 114 Mich. 494.

New Jersey. — *Way v. American Grease Co.*, 60 N. J. Eq. 263.

New York. — *Drake v. New York Suburban Water Co.*, 26 N. Y. App. Div. 499.

Pennsylvania. — *Jutte v. Hutchinson*, 29 Pittsb. Leg. J. N. S. (Pa.) 87. See *Shellenberger v. Patterson*, 168 Pa. St. 30.

Wisconsin. — *First Ave. Land Co. v. Parker*, 111 Wis. 1.

A stockholder who consents to payment by another in property cannot afterward compel him to pay cash. *Knoop v. Bohmrich*, 49 N. J. Eq. 82, 36 Am. & Eng. Corp. Cas. 315.

9. *Unreasonable Delay.* — *Calivada Colonization Co. v. Hays*, 119 Fed. Rep. 202; *Kimbell v. Chicago Hydraulic Press Brick Co.*, (C. C. A.) 119 Fed. Rep. 102; *Higgins v. Lansingh*, 154 Ill. 301; *Foster v. Belcher's Sugar Refining Co.*, 118 Mo. 238; *Com. v. Reading Traction Co.*, 204 Pa. St. 151; *Jutte v. Hutchinson*, 189 Pa. St. 218.

10. *Com. v. Reading Traction Co.*, 204 Pa. St. 151.

the right to object thereto is lost by conduct amounting to ratification, acquiescence, or estoppel.¹ Unreasonable delay or laches, especially where the parties cannot be placed *in statu quo*, will bar relief.² *Bona fide* purchasers will be protected.³

IV. INCREASE AND REDUCTION OF STOCK — 1. Power to Increase or Reduce Stock — a. EXPRESS AUTHORITY NECESSARY. — The capital stock of a corporation can be neither increased nor reduced without express authority conferred by statute or charter.⁴ Not even the unanimous consent of the members and officers of the corporation can legalize an increase when not so authorized.⁵ An attempted unauthorized increase amounts to an overissue, and such stock is absolutely void, as is also a subscription therefor.⁶ Where the full authorized amount of stock is not originally issued, additional stock may be issued from time to time up to the limit authorized.⁷ So where the number of shares is not fixed by charter, it

1. Fraudulent Stock. — *Wisner v. Delhi Land, etc., Co.*, 46 La. Ann. 1223; *Drake v. New York Suburban Water Co.*, 26 N. Y. App. Div. 499.

2. Delay and Laches. — *Calivada Colonization Co. v. Hays*, 119 Fed. Rep. 202; *American Wire-Nail Co. v. Bayless*, 91 Ky. 95; *Dunn v. State Bank*, 59 Minn. 221.

3. Bona Fide Purchasers Protected. — *American Wire-Nail Co. v. Bayless*, 91 Ky. 101; *Foushee v. Snyder*, (Ky. 1900) 54 S. W. Rep. 731.

4. Express Authority Necessary — England. — *In re Barrow Hematite Steel Co.*, 39 Ch. D. 582; *In re Patent Invert Sugar Co.*, 31 Ch. D. 166; *Smith v. Goldsworthy*, 4 Q. B. 430, 45 E. C. L. 430; *Society, etc., v. Abbott*, 2 Beav. 559; *In re Ebbw Vale Steel, etc., Co.*, 4 Ch. D. 827; *In re Financial Corp.*, L. R. 2 Ch. 714; *Droitwich Patent Salt Co. v. Curzon*, L. R. 3 Exch. 35; *In re London, etc., Ins. Corp.*, L. R. 4 Ch. 682, and note.

United States. — *Knowlton v. Congress, etc., Spring Co.*, 14 Blatchf. (U. S.) 364; *Chicago City R. Co. v. Allerton*, 18 Wall. (U. S.) 235; *Scovill v. Thayer*, 105 U. S. 148; *Congress, etc., Spring Co. v. Knowlton*, 103 U. S. 49; *Farrington v. Tennessee*, 95 U. S. 686; *Peck v. Elliott*, (C. C. A.) 79 Fed. Rep. 10; *Ross-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co.*, 72 Fed. Rep. 957; *Seignouret v. Home Ins. Co.*, 24 Fed. Rep. 332, 10 Am. & Eng. Corp. Cas. 131.

Alabama. — *Granger's L., etc., Ins. Co. v. Kamper*, 73 Ala. 325, 6 Am. & Eng. Corp. Cas. 497.

Connecticut. — *Crandall v. Lincoln*, 52 Conn. 99, 52 Am. Rep. 560, 10 Am. & Eng. Corp. Cas. 149.

Indiana. — *Ferris v. Ludlow*, 7 Ind. 517.

Kansas. — *Tschumi v. Hills*, 6 Kan. App. 557.

Louisiana. — *Percy v. Millaudon*, 3 La. 569.

Maine. — *Oldtown, etc., R. Co. v. Veazie*, 39 Me. 571.

Massachusetts. — *Salem Mill Dam Corp. v. Ropes*, 6 Pick. (Mass.) 23.

New Jersey. — *Trenton Mut. L., etc., Ins. Co. v. McKelway*, 12 N. J. Eq. 133.

Michigan. — *Detroit Chamber of Commerce v. Secretary of State*, 109 Mich. 691.

New York. — *Lathrop v. Kneeland*, 46 Barb. (N. Y.) 432; *People v. Parker Vein Coal Co.*, (Supm. Ct. Gen. T.) 10 How. Pr. (N. Y.) 543; *Einstein v. Rochester Gas, etc., Co.*, 146 N. Y.

53; *Sutherland v. Olcott*, 95 N. Y. 100; *New York, etc., R. Co. v. Schuyler*, 34 N. Y. 30; *Mechanics' Bank v. New York, etc., R. Co.*, 14 N. Y. 599. *Compare Howell v. Chicago, etc., R. Co.*, 51 Barb. (N. Y.) 378.

Pennsylvania. — *Cooke v. Marshall*, 191 Pa. St. 315.

Texas. — *Berg v. San Antonio St. R. Co.*, 17 Tex. Civ. App. 291.

Compare Eidman v. Bowman, 58 Ill. 444, 11 Am. Rep. 90; *Gill v. Balis*, 72 Mo. 424.

"The shares of a corporation can neither be increased nor diminished in number or in their nominal value, unless this be expressly authorized by the company's charter or by act of the legislature." *Tschumi v. Hills*, 6 Kan. App. 557. See also *supra*, this title, *Definition and Nature of Corporate Stock — Shares of Stock — Number and Amount of Shares*.

The fact that, at the time when a class of preference shares was created, the articles of association of the company did not authorize any reduction of the capital, will not prevent the reduction of the amount of the preference shares, if a special resolution is previously passed altering the articles by the insertion of a power of reduction. *In re Barrow Hematite Steel Co.*, 39 Ch. D. 582.

Vested Right to Increase Stock. — A right given a company to increase its stock from time to time is a vested right. *State v. Bank of Commerce*, 95 Tenn. 236.

5. Unanimous Consent Ineffective. — *People v. Parker Vein Coal Co.*, (Supm. Ct. Gen. T.) 10 How. Pr. (N. Y.) 543.

6. Unauthorized Increase Void. — *Scoville v. Thayer*, 105 U. S. 143; *Ross-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co.*, 72 Fed. Rep. 957; *Clark v. Turner*, 73 Ga. 1; *Tschumi v. Hills*, 6 Kan. App. 556; *People v. Parker Vein Coal Co.*, (Supm. Ct. Gen. T.) 10 How. Pr. (N. Y.) 543; *Cartwright v. Dickinson*, 88 Tenn. 476, 17 Am. St. Rep. 910; *Kampman v. Tarver*, 87 Tex. 491. See also *supra*, this title, *Issue of Stock — Power to Issue — Overissue or Ultra Vires Issue*.

7. Unissued Authorized Stock. — *Gray v. Portland Bank*, 3 Mass. 364, 3 Am. Dec. 156.

An invalid resolution to increase stock may be sustained as a reissue of old stock, when the corporation has acquired old stock which it might reissue. *City Bank v. Bruce*, 17 N. Y. 507.

may be changed from time to time by vote of the stockholders or directors.¹ General statutory provisions exist in many jurisdictions authorizing and regulating the increase or reduction of capital stock.²

b. SUFFICIENCY OF AUTHORITY. — Authority to increase capital stock is not conferred by a provision authorizing the reduction of capital stock,³ and *vice versa* authority to increase does not include authority to reduce.⁴ A provision that the number of shares shall be determined from time to time by the directors authorizes an increase but not a reduction of the number.⁵ General authority to alter or annul the articles of association at a special meeting does not authorize a reduction of capital stock.⁶ Authority to make by-laws fixing the amount of capital stock and the division thereof into shares does not authorize an increase of stock after the amount has once been fixed.⁷ Direct legislative authority to increase capital stock operates as a repeal *pro tanto* of general laws prohibiting increases of capital stock.⁸ An increase exceeding the limit authorized by law is void.⁹ Authority of a corporation to buy and hold its own stock does not authorize a reduction of stock.¹⁰

c. CONSTITUTIONALITY OF STATUTES GRANTING POWER. — Since the charter or articles of incorporation form the contract between the parties, the obligation of which cannot be impaired by subsequent legislation without the consent of the parties in interest, it follows that statutes providing for an increase or reduction of capital stock cannot be effectual, where the power cannot be inferred from the language of the charter, and where there is no reservation of legislative power in the premises.¹¹ But where the power of modifying or repealing charters is reserved by the legislature, or by the state constitution to the legislature, legislative amendments authorizing an increase or reduction may be invalid and binding, even though the original charter was

1. Number of Shares Not Fixed. — *Peck v. Elliott*, (C. C. A.) 79 Fed. Rep. 24; *Somerset, etc., R. Co. v. Cushing*, 45 Me. 532; *State v. Bank of Commerce*, 95 Tenn. 235.

2. General Statutory Provisions — *England.* — *In re Union Plate Glass Co.*, 42 Ch. D. 513; *In re New Chile Gold Min. Co.*, 38 Ch. D. 475, 21 Am. & Eng. Corp. Cas. 372; *In re Ebbw Vale Steel, etc., Co.*, 4 Ch. D. 832; *In re Abstainers, etc., Ins. Co.*, (1891) 2 Ch. 124; *In re Dicio Pier Co.*, (1891) 2 Ch. 354; *Holmes v. Newcastle-upon-Tyne Freehold Abattoir Co.*, 1 Ch. D. 682; *In re Agricultural Hotel Co.*, (1891) 1 Ch. 396. *Contra, In re Gatling Gun*, 43 Ch. D. 628.

United States. — *Peck v. Elliott*, 79 Fed. Rep. 10, 47 U. S. App. 605; *Laredo Imp. Co. v. Stevenson*, 66 Fed. Rep. 633, 32 U. S. App. 97.

California. — *Ewing v. Oroville Min. Co.*, 56 Cal. 649.

Indiana. — *McCann v. Jeffersonville First Nat. Bank*, 131 Ind. 95.

Michigan. — *Continental Varnish, etc., Co. v. Secretary of State*, 128 Mich. 621.

Minnesota. — *Palmer v. Zumbrota Bank*, 72 Minn. 266.

New Jersey. — *Berger v. U. S. Steel Corp.*, 63 N. J. Eq. 506, *reversed* 63 N. J. Eq. 809.

New York. — *Strong v. Brooklyn Cross-Town R. Co.*, 93 N. Y. 433, 3 Am. & Eng. Corp. Cas. 160.

3. Sufficiency of Authority. — *Sutherland v. Olcott*, 95 N. Y. 93.

4. Seignouret v. Home Ins. Co., 24 Fed. Rep. 332.

5. Peck v. Elliott, (C. C. A.) 79 Fed. Rep. 10; *Lexington, etc., R. Co. v. Chandler*, 13 Met.

(Mass.) 314. See also *Somerset, etc., R. Co. v. Cushing*, 45 Me. 532.

6. Authority to Alter or Amend Articles. — *Smith v. Goldsworthy*, 4 Q. B. 430, 45 E. C. L. 430.

7. Authority to Fix Amount of Capital Stock. — *Ross-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co.*, 72 Fed. Rep. 957. But see *Peck v. Elliott*, 79 Fed. Rep. 10, 47 U. S. App. 605.

8. Direct Legislative Authority. — *Jones v. Concord, etc., R. Co.*, 67 N. H. 234, 68 Am. St. Rep. 650.

9. Excessive Increase. — *Laredo Imp. Co. v. Stevenson*, 66 Fed. Rep. 633, 32 U. S. App. 97; *Com. v. Boston, etc., R. Co.*, 142 Mass. 146; *Kampman v. Tarver*, 87 Tex. 491.

A statute authorizing an increase of stock by any corporation to an amount "not exceeding double the amount of its authorized capital" limits the increase to double the original authorized capital, and this limit cannot be exceeded even by successive increases. *Berg v. San Antonio St. R. Co.*, 17 Tex. Civ. App. 291.

The entire increase, and not only so much thereof as exceeds the limit, is invalid. *Kampman v. Tarver*, 87 Tex. 491.

10. Authority to Purchase and Hold Stock. — *Berger v. U. S. Steel Corp.*, 63 N. J. Eq. 506, *reversed* 63 N. J. Eq. 809.

11. Constitutionality of Statute. — *Chicago City R. Co. v. Allerton*, 18 Wall. (U. S.) 236. See also *Gloninger v. Pittsburgh, etc., R. Co.*, 139 Pa. St. 13. But see *Payson v. Withers*, 5 Biss. (U. S.) 269; *Hodge v. U. S. Steel Corp.* (N. J. 1902) 53 Atl. Rep. 601; *Berger v. U. S. Steel Corp.*, 63 N. J. Eq. 809. Compare *Oldtown, etc.,*

silent in regard thereto.¹ So, the necessary legislative power existing, the consent of the directors to its exercise may be sufficient,² or the consent of the stockholders;³ and such consent may be implied from acquiescence.⁴

d. PREFERRED OR COMMON STOCK.—Preferred stock may be reduced equally with common stock, at least where there is nothing in the bargain with the preferred stockholders which prevents the reduction of their shares.⁵ So, preferred stock may be issued with a stipulation that at the option of the corporation it may be converted into common stock or retired.⁶ Under general authority to increase the capital stock, common and not preferred stock should be issued, unless an issue of preferred stock is expressly authorized.⁷

2. Who May Exercise Power.—Where a corporation has power to increase or reduce its capital stock, the power is to be exercised by the stockholders and not by the directors unless such power has been expressly conferred upon the directors.⁸ But the unauthorized exercise of this power by the directors may be validated by the consent, acquiescence, or ratification of the stockholders.⁹ Courts have no power to direct an increase of stock even to enable the corporation to fulfil an obligation to deliver stock.¹⁰ Where the power exists, its exercise is wholly discretionary with the corporation.¹¹

3. Mode of Exercising Power—**a. INCREASE OF STOCK.**—The stock of a corporation can be increased only in the particular manner pointed out by the statute.¹² But conduct amounting to acquiescence, ratification, or estoppel will

R. Co. v. Veazie, 39 Me. 571; *Hughes v. Antietam Mfg. Co.*, 34 Md. 316.

1. Legislation under Reserved Power.—*Peoria, etc., R. Co. v. Elting*, 17 Ill. 429; *Joslyn v. Pacific Mail Steamship Co.*, (C. Pl. Spec. T.) 12 Abb. Pr. N. S. (N. Y.) 329.

2. Consent by Directors.—*Illinois River R. Co. v. Zimmer*, 20 Ill. 654.

3. Consent of Stockholders.—*Chicago City R. Co. v. Allerton*, 18 Wall. (U. S.) 235.

4. Implied Consent and Acquiescence.—*Chicago City R. Co. v. Allerton*, 18 Wall. (U. S.) 235.

5. Reduction of Preferred Stock.—*In re Barrow Hematite Steel Co.*, 39 Ch. D. 582.

6. Hackett v. Northern Pac. R. Co., (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 583.

7. Increase.—*Jones v. Concord, etc., R. Co.*, 67 N. H. 234, 68 Am. St. Rep. 650.

8. Stockholders or Directors—United States.—*Chicago City R. Co. v. Allerton*, 18 Wall. (U. S.) 233; *Matthews v. Columbia Nat. Bank*, 79 Fed. Rep. 558; *Peck v. Elliott*, (C. C. A.) 79 Fed. Rep. 10.

Illinois.—*McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203, *affirming* 63 Ill. App. 593; *Eidman v. Bowman*, 58 Ill. 444, 11 Am. Rep. 90.

Louisiana.—*Percy v. Millaudon*, 3 La. 569.

Michigan.—*Finley Shoe, etc., Co. v. Kurtz*, 34 Mich. 89.

Missouri.—*Gill v. Balis*, 72 Mo. 424.

New York.—*Matter of Wheeler*, (Supm. Ct. Spec. T.) 2 Abb. Pr. (N. Y.) 361; *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 637; *Ramsey v. Erie R. Co.*, (Supm. Ct. Spec. T.) 38 How. Pr. (N. Y.) 193, *affirmed* *New York, etc., R. Co. v. Schuyler*, 34 N. Y. 30, 38 Barb. (N. Y.) 534; *People v. Parker Vein Coal Co.*, (Supm. Ct. Gen. T.) 10 How. Pr. (N. Y.) 543; *Hackett v. Northern Pac. R. Co.*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 583; *Veeder v. Mudgett*, 95 N. Y. 309; *Sutherland v. Olcott*, 95 N. Y. 93; *People v. Bankers' Loan, etc., Co.*, (C. Pl. Gen. T.) 13 Misc. (N. Y.) 222.

Tennessee.—*Newport Cotton Mill Co. v. Mims*, 103 Tenn. 465.

But see *Somerset, etc., R. Co. v. Cushing*, 45 Me. 532.

A By-law seeking to bind the stockholders to make a future increase of stock is void. *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203.

9. Acquiescence and Ratification.—*In re New Zealand Banking Corp.*, L. R. 3 Ch. 131; *Matter of Joint-Stock Co.'s Winding-up Acts*, 1 De G. J. & S. 504; *Payson v. Withers*, 5 Biss. (U. S.) 269; *Payson v. Stoeber*, 2 Dill. (U. S.) 428; *Chicago City R. Co. v. Allerton*, 18 Wall. (U. S.) 233; *Veeder v. Mudgett*, 95 N. Y. 309; *Bailey v. Champlain Min., etc., Co.*, 77 Wis. 453, *citing* *Scovill v. Thayer*, 105 U. S. 143; *Poole v. West Point Butter, etc., Assoc.*, 30 Fed. Rep. 513. But see *Smith v. Franklin Park Land, etc., Co.*, 168 Mass. 345.

10. Courts Cannot Exercise Power.—*Smith v. North American Mfn. Co.*, 1 Nev. 429, *citing* *Mechanics' Bank v. New York, etc., R. Co.*, 13 N. Y. 599. See also *Baker v. Wasson*, 59 Tex. 140, 53 Tex. 150; *Finley Shoe, etc., Co. v. Kurtz*, 34 Mich. 89.

11. Discretion of Corporation.—*Jones v. Concord, etc., R. Co.*, 67 N. H. 119; *Sutherland v. Olcott*, 95 N. Y. 93.

12. Conformity to Statute Necessary.—*Aspinwall v. Butler*, 133 U. S. 595; *Peck v. Elliott*, 79 Fed. Rep. 10, 47 U. S. App. 605; *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203; *Lincoln v. New Orleans Express Co.*, 45 La. Ann. 729; *Lathrop v. Kneeland*, 46 Barb. (N. Y.) 432; *Einstein v. Rochester Gas, etc., Co.*, 146 N. Y. 53; *Shepp v. Norristown Pass. R. Co.*, 2 Pa. Dist. 679; *Union R. Co. v. Sneed*, 99 Tenn. 1; *Page v. Austin*, 10 Can. Sup. Ct. 167. See *Mathews v. Columbia Nat. Bank*, 77 Fed. Rep. 372. But see *Barrows v. Natchaug Silk Co.*, 72 Conn. 658.

Where the statute provides that the stockholders must direct the sale or issuance of increased stock, the stockholders cannot delegate

cure mere irregularities in the proceedings to effect the increase.¹ A vote of the stockholders at a meeting called for that purpose is the normal method of increasing the capital stock,² but a formal vote at such meeting is not indispensable,³ nor does a vote *per se* constitute an increase; the new stock must be actually issued, that is subscribed, and not merely authorized.⁴ The proceeding has been held to be vitiated by a failure to give notice of the meeting in the manner required by statute,⁵ and by a failure to announce to the public the intended increase.⁶ But it is held that the validity of the increase is not affected by holding the meeting outside of the state, at least as regards all parties participating therein,⁷ or failing to record the resolution providing for the increase.⁸ So the fact that the required time did not elapse between the passage of the resolution and its confirmation affects the stockholders *inter se* only, and does not relieve them from liability.⁹ Until the increased stock is actually issued, a resolution for its issue may be rescinded.¹⁰ A certificate of the increase, showing certain specified parts, or an amendment of the articles of incorporation is usually required to be made, filed, and recorded with a designated officer.¹¹ The fact that the capital stock is increased immediately after the original incorporation, the purpose being to save incorporation fees by incorporating originally for a small amount, is immaterial and the increase is valid and regular.¹²

b. REDUCTION OF STOCK. — A strict compliance with statutory provisions

this power to an officer of the corporation. *Smith v. Franklin Park Land, etc., Co.*, 168 Mass. 345.

Where the statute directs a sale of the new stock at public auction, one who purchases at private sale cannot compel the corporation to issue certificates to him for such stock. *Smith v. Franklin Park Land, etc., Co.*, 168 Mass. 345.

Discretion in Matters of Detail. — *Berger v. U. S. Steel Corp.*, 63 N. J. Eq. 809, reversing 63 N. J. Eq. 506.

1. Irregularities Cured by Acquiescence, Laches, or Estoppel. — *Columbia Nat. Bank v. Mathews*, 85 Fed. Rep. 934, 56 U. S. App. 636, reversing 79 Fed. Rep. 558; *Peck v. Elliott*, 79 Fed. Rep. 10, 47 U. S. App. 605; *Barrows v. Natchaug Silk Co.*, 72 Conn. 658; *Jones v. Concord, etc., R. Co.*, 67 N. H. 234, 68 Am. St. Rep. 650; *Veeder v. Mudgett*, 95 N. Y. 309; *Kreisser v. Ashtabula Gas Light Co.*, 24 Ohio Cir. Ct. 313. See *Tillinghast v. Bailey*, 86 Fed. Rep. 46. See also *supra*, this title, *Issue of Stock — Acquiescence, Laches, and Estoppel as Bar to Relief*.

2. Vote at Stockholders' Meeting. — *Ewing v. Oroville Min. Co.*, 56 Cal. 649; *Tschumi v. Hills*, 6 Kan. App. 553; *Finley Shoe, etc., Co. v. Kurtz*, 34 Mich. 89.

3. Formal Vote Not Indispensable. — *Payson v. Stoever*, 2 Dill. (U. S.) 428. And see generally *In re New Zealand Banking Corp.*, L. R. 3 Ch. 131; *Matter of Joint-Stock Co.'s Winding-up Acts*, 1 De G. J. & S. 504; *Payson v. Withers*, 5 Biss. (U. S.) 269; *Chicago City R. Co. v. Allerton*, 18 Wall. (U. S.) 233; *Scovill v. Thayer*, 105 U. S. 143; *Poole v. West Point Butter, etc., Assoc.*, 30 Fed. Rep. 513.

4. Actual Issuance Necessary. — *Terry v. Eagle Lock Co.*, 47 Conn. 141. But see *Kreisser v. Ashtabula Gas Light Co.*, 24 Ohio Cir. Ct. 313. See also *supra*, this title, *Issue of Stock — In General*.

5. Notice of Meeting. — *Jones v. Concord, etc., R. Co.*, 67 N. H. 119; *Matter of Wheeler*,

(Supm. Ct. Spec. T.) 2 Abb. Pr. N. S. (N. Y.) 361; *Veeder v. Mudgett*, 95 N. Y. 309; *Shepp v. Norristown Pass. R. Co.*, 2 Pa. Dist. 679. But see *Hallett v. Metropolitan Messenger Co.*, 69 N. Y. App. Div. 258.

6. Public Notice of Proposed Increase. — *State v. McGrath*, 86 Mo. 239.

7. Meeting Held Outside of State. — *Handley v. Stutz*, 139 U. S. 417, 34 Am. & Eng. Corp. Cas. 624.

8. Failure to Record Resolution. — *Handley v. Stutz*, 139 U. S. 417, 34 Am. & Eng. Corp. Cas. 624.

9. In re Miller's Dale, etc., Lime Co., 31 Ch. D. 211.

10. Rescission of Resolution. — *Terry v. Eagle Lock Co.*, 47 Conn. 141.

11. Certificate of Increase or Amendment of Articles. — *Tschumi v. Hills*, 6 Kan. App. 549; *Continental Varnish, etc., Co. v. Secretary of State*, 128 Mich. 621, 8 Detroit Leg. N. 795; *Detroit Chamber of Commerce v. Secretary of State*, 109 Mich. 691; *Palmer v. Zumbrota Bank*, 72 Minn. 266; *Veeder v. Mudgett*, 95 N. Y. 309; *Moosbrugger v. Walsh*, 89 Hun (N. Y.) 564.

An issue of increased stock, without having the articles amended to permit it, does not invalidate the original issue, and purchasers of the increased stock, believing that it was the entire amount, cannot maintain a bill to cancel the original. *Byers v. Rollins*, 13 Colo. 22.

Failure to file the certificate of increase as required by statute, does not invalidate a subscription to the increased stock as between the corporation and the stockholders; the object of the section being primarily for the benefit of the public. *Barrows v. Natchaug Silk Co.*, 72 Conn. 658 [*citing Johnston v. Allis*, 71 Conn. 207; *Nutter v. Lexington, etc., R. Co.*, 6 Gray (Mass.) 85; *Naugatuck Water Co. v. Nichols*, 58 Conn. 403].

12. Purpose of Increase. — *State v. Rotwitt*, 17 Mont. 537.

regulating reduction of stock is commonly exacted.¹ A reduction of capital stock must be fair and impartial as to all the stockholders.² A corporation authorized to reduce its capital stock may do so by purchasing its own shares and canceling them.³ But the mere purchase by a corporation of its own shares will not operate as a reduction of stock unless so intended.⁴ Another proper mode of effecting a reduction is for each stockholder to surrender such proportion of his stock as the amount of the proposed reduction bears to the whole amount of capital stock.⁵ So a corporation has been permitted to reduce capital stock by issuing bonds to its stockholders in exchange for shares delivered up for cancellation.⁶ But reduction cannot be effected by merely "writing off" a loss which the company has suffered.⁷ The issue of full-paid shares in exchange for shares only partly paid up, in the proportion which the payments made would justify, the remaining shares being placed in the

1. **Compliance with Statute.** — National Dwellings Soc., 78 L. T. N. S. 144; Granger's L., etc.; *Ins. Co. v. Kamper*, 73 Ala. 325, 6 Am. & Eng. Corp. Cas. 497; *Gade v. Forest Glen Brick, etc., Co.*, 165 Ill. 367; *Ferris v. Ludlow*, 7 Ind. 517; *Hodge v. U. S. Steel Corp.*, (N. J. 1902) 54 Atl. Rep. 1, (N. J. 1902) 53 Atl. Rep. 601; *Berger v. U. S. Steel Corp.*, 63 N. J. Eq. 809, *reversing* 63 N. J. Eq. 506; *Moses v. Ocoee Bank*, 1 Lea (Tenn.) 398. See *Wallasey Brick, etc., Co.*, 63 L. J. Ch. 415; *British, etc., Trustee, etc., Corp. v. Couper*, (1894) A. C. 399.

A corporation must be so far organized as to have corporate existence before the capital stock can be reduced. *Gade v. Forest Glen Brick, etc., Co.*, 165 Ill. 367. See also *Forest Glen Brick, etc., Co. v. Gade*, 55 Ill. App. 181.

An informality in the vote taken to reduce the capital stock of a railroad corporation does not affect the corporate existence of the company. *Brown v. Wyandotte, etc., R. Co.*, 68 Ark. 134.

2. **Reduction Must Be Fair and Impartial.** — *In re Direct Spanish Tel. Co.*, 34 Ch. D. 307, 16 Am. & Eng. Corp. Cas. 377; *Berger v. U. S. Steel Corp.*, 63 N. J. Eq. 809, *reversing* 63 N. J. Eq. 506. But see *In re Barrow Hematite Steel Co.*, 39 Ch. D. 582; *In re Colmer*, (1897) 1 Ch. 524; *British, etc., Trustee, etc., Corp. v. Couper*, (1894) A. C. 399.

A reduction which throws the whole burden upon the common stockholders to the exclusion of the preferred is unfair. *In re Quebrada R., etc., Co.*, 40 Ch. D. 363, 26 Am. & Eng. Corp. Cas. 380.

A statute providing for reduction does not necessarily authorize a purchase by the corporation of the shares of individual stockholders. Each stockholder should be allowed to surrender his due proportion. *Currier v. Lebanon Slate Co.*, 56 N. H. 262.

A reduction cannot be made by permitting one stockholder to withdraw his subscription. *Niagara Shoe Co. v. Tobey*, 71 Ill. App. 250.

A corporation cannot compel one of its members to submit to the retirement of his stock, nor does he waive the right to object to such proceeding by voluntarily consenting to the sale and retirement of a portion of his shares. *Bergman v. St. Paul Mut. Bldg., etc., Assoc.* No. 1, 29 Minn. 275.

Under the *English Companies Acts* of 1867 and 1877, it is not essential, though regular, that reduction should be uniform on all shares. *In*

re Barrow Hematite Steel Co., 39 Ch. D. 582.

3. **Purchase and Cancellation of Shares.** — *British, etc., Trustee, etc., Corp. v. Couper*, (1894) A. C. 399, 6 Reports 146; *Williams v. Savage Mfg. Co.*, 3 Md. Ch. 418; *Berger v. U. S. Steel Corp.*, 63 N. J. Eq. 809, *reversing* 63 N. J. Eq. 506; *State v. Smith*, 48 Vt. 266. But see *Currier v. Lebanon Slate Co.*, 56 N. H. 262.

Generally as to the power of a corporation to purchase and hold its own shares, see title *CORPORATIONS (PRIVATE)*, vol. 7, p. 620.

4. *San Luis Obispo Bank v. Wickersham*, 99 Cal. 655; *American Railway-Frog Co. v. Haven*, 101 Mass. 402, 3 Am. Rep. 377; *City Bank v. Bruce*, 17 N. Y. 507; *State v. Smith*, 48 Vt. 266. See *Berger v. U. S. Steel Corp.*, 63 N. J. Eq. 809, 63 N. J. Eq. 506. But see *Tulare Irrigation Dist. v. Kaweah Canal, etc., Co.*, (Cal. 1896) 44 Pac. Rep. 662.

5. **Surrender of Proportionate Amounts.** — *Currier v. Lebanon Slate Co.*, 56 N. H. 262.

6. **Bonds Issued in Exchange for Stock.** — *Berger v. U. S. Steel Corp.*, 63 N. J. Eq. 809, *reversing* 63 N. J. Eq. 506.

Under the *Missouri Statutes* which prohibit corporations from loaning money to stockholders, and from issuing stock or bonds except "for money paid, labor done, or money or property actually received," and make fictitious issues of stock or bonds void, it is *ultra vires* for a corporation whose plant is not susceptible of division or prudently convertible into cash to adopt a resolution reducing its capital stock one-half on the ground that the remaining capital stock is sufficient for the corporate purposes, and at the same time requiring the directors to pay to the stockholders *pro rata* the amount of the surplus thus created, and for the payment of such surplus to the stockholders to issue bonds, secure them by a trust deed on the real estate of the company, and create a sinking fund out of the earnings of the company, to pay off the principal and interest of such bonds. *Coquard v. St. Louis Cotton Compress Co.*, (Mo. 1888) 7 S. W. Rep. 176, 21 Am. & Eng. Corp. Cas. 377.

7. **Writing off Loss.** — *In re Ebbw Vale Steel, etc., Co.*, 4 Ch. D. 832.

Charging losses *pro rata* against the stock of the company's shareholders in establishing the book value of the shares does not amount to a reduction of the capital stock of the company. *People v. Bankers' Loan, etc., Co.*, (C. Pl. Gen. T.) 13 Misc. (N. Y.) 221.

treasury, does not amount to a reduction of stock.¹

4. Issue of Securities Convertible into Shares. — Aside from the normal method of increasing capital, corporations are sometimes authorized to issue bonds or notes convertible into stock, and may exercise this authority even after the full amount of stock otherwise authorized has been regularly issued.² So a corporation empowered to increase its stock may issue new shares in exchange for an equal amount of its indebtedness.³ The option to exchange is terminated by a tender of the shares on the part of the company,⁴ and holders of notes convertible at a certain date are not entitled to exercise the option prior thereto because of an independent increase in the capital stock.⁵ The holders of convertible securities are entitled to stock and dividends thereon although demand therefor is made immediately before a dividend is declared.⁶ Until the option is exercised and the securities are converted into stock the holders thereof are not stockholders and are not entitled to the rights and privileges of stockholders.⁷

5. Distribution of Surplus After Reduction. — After the capital stock has been reduced, the surplus, if any, may be apportioned among the stockholders,⁸ and an action will lie on the part of the latter to compel the apportionment.⁹ But such a disposition of the surplus is subject to the claims of those who were creditors before the reduction.¹⁰

6. Right to Subscribe for New Shares. — This subject is considered in a succeeding section of this title.¹¹

7. Liability of Stockholders as Affected by Increase or Reduction of Stock. — This subject is treated in a succeeding section of this title.¹²

V. SALES AND CONVEYANCES — **1. Sales** — *a. RIGHT OF ALIENATION* — (1) *In General.* — The right of alienation being an incident of the ownership of any species of property,¹³ and shares of stock being, as has been seen, personal property,¹⁴ the owner of shares has full dominion over them and may dispose of them at will.¹⁵ The judicial evolution of the view that the right of aliena-

1. Issuing Full-paid Shares in Exchange for Shares Partially Paid Up. — *American Alkali Co. v. Campbell*, 113 Fed. Rep. 403; *Republic L. Ins. Co. v. Swigert*, 135 Ill. 150.

Where an incorporated company agrees with its stockholders to issue certificates of stock for the amount of their subscription paid, and cancel the subscription as to the sum not paid, this is not a diminishing of its capital stock, as the remaining stock still belongs to the company to be disposed of. *Chetlain v. Republic L. Ins. Co.*, 86 Ill. 221.

2. Exchange of Convertible Securities for Shares. — *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 637.

In *Van Allen v. Illinois Cent. R. Co.*, 7 Bosw. (N. Y.) 515, a transaction was held valid by which bonds were issued at fifty per cent. of their par value, convertible into stock upon the payment of the remaining portion.

3. Lohman v. New York, etc., R. Co., 2 Sandf. (N. Y.) 39.

4. Van Allen v. Illinois Cent. R. Co., 7 Bosw. (N. Y.) 515.

5. Pratt v. American Bell Telephone Co., 141 Mass. 225, 55 Am. Rep. 465, 12 Am. & Eng. Corp. Cas. 110.

6. Ramsey v. Erie R. Co., (Supm. Ct. Spec. T.) 38 How. Pr. (N. Y.) 216; *Jones v. Terre Haute, etc., R. Co.*, 57 N. Y. 196.

7. See Pratt v. American Bell Telephone Co., 141 Mass. 225, 55 Am. Rep. 465, 12 Am. & Eng. Corp. Cas. 110, holding that the holders of convertible notes are not entitled to share in an increase of stock.

8. Distribution of Surplus After Reduction. — *Seeley v. New York Nat. Exch. Bank*, 8 Daly (N. Y.) 400; *Strong v. Brooklyn Cross-Town R. Co.*, 93 N. Y. 426, 3 Am. & Eng. Corp. Cas. 160.

9. Seeley v. New York Nat. Exch. Bank, 8 Daly (N. Y.) 400.

But where the stock of a national bank has been lawfully reduced, because of the impairment of the capital, by reason of matured and suspended claims, the fact that the latter were subsequently realized upon and carried into the assets will not entitle a stockholder to compel a distribution of the funds so realized in proportion to the stock surrendered by him. *McCann v. Jeffersonville First Nat. Bank*, 112 Ind. 354, 19 Am. & Eng. Corp. Cas. 365.

10. See infra, this section, *Liability of Stockholders as Affected by Increase or Reduction of Stock*.

11. See infra, this title, *Rights, Powers, and Prerogatives of Stockholders in General* — *Sharing in Distribution of New Stock*.

12. See infra, this title, *Rights, Powers, and Prerogatives of Stockholders in General* — *Sharing in Distribution of New Stock*.

13. Power to Alienate. — *Moore v. Bank of Commerce*, 52 Mo. 377; *Miller v. Great Republic Ins. Co.*, 50 Mo. 57. See also the title *RESTRAINTS ON ALIENATION*, vol. 24, p. 863 *et seq.*

14. See supra, this title, *Definition and Nature of Corporate Stock*.

15. England. — *Poole v. Middleton*, 29 Beav.

tion is an inseparable and inherent incident of the ownership of property¹ seems to have been established before stock was recognized as property. There are, however, cases which appear to recognize the principle that the right to alienate stock is derived from the corporate charter.² As a general rule, however, in the later decisions it is assumed that the right to transfer shares of stock is incidental to their ownership, and this assumption is based upon the broad ground that they are characterized by the same features as other forms of property.³

Cessation of Right. — The right of a stockholder to sell and transfer his stock and pass the legal title to the purchaser ceases upon the dissolution of the corporation.⁴

(2) *By-laws Restraining Alienation.* — The exercise of this right cannot be interfered with by an unreasonable by-law restraining the alienation of the stock.⁵

The Provision of a Stock Certificate that the stock shall be offered first to the corporation at a value fixed by the directors of the corporation is binding upon the stockholders even though the by-laws containing such condition of transfer may have been invalid as such.⁶

Sales by Indebted Stockholders. — The stockholder's right of alienation may be limited by a statutory provision prohibiting the transfer of certificates on the books of the corporation as long as the holder thereof is indebted to the corporation, unless consent is given thereto by the board of directors.⁷

(3) *Agreement Between Stockholders.* — The holders of the majority of the stock of the corporation may, by an agreement between themselves, contract not to dispose of any of their stock during a certain period without their joint consent. Such a contract is not void as against public policy.⁸

Agreement to Offer to Particular Party. — The owners of the stock in a corporation may contract that in the event that either wishes to dispose of his stock the other shall have the right to purchase, and such a contract is not void as restraining the right to alienate the stock.⁹

646; *In re Stranton Iron, etc., Co.*, L. R. 16 Eq. 559; *In re Cawley*, 42 Ch. D. 209; *In re Smith*, L. R. 4 Ch. 20.

United States. — *Gould v. Head*, 41 Fed. Rep. 240.

Alabama. — *Mobile Mut. Ins. Co. v. Cullom*, 49 Ala. 558; *Allen v. Montgomery R. Co.*, 11 Ala. 451.

Iowa. — *Farmer's, etc., Bank v. Wasson*, 48 Iowa 336.

Louisiana. — *Trisconi v. Winship*, 43 La. Ann. 45, 26 Am. St. Rep. 175; *State v. American Cotton Oil Trust*, 40 La. Ann. 8.

Massachusetts. — *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90, 19 Am. Dec. 306.

Missouri. — *Moore v. Bank of Commerce*, 52 Mo. 377; *Miller v. Great Republic Ins. Co.*, 50 Mo. 57; *Chouteau Spring Co. v. Harris*, 20 Mo. 382.

New York. — *Ingraham v. National Salt Co.*, 72 N. Y. App. Div. 582.

North Carolina. — *Heart v. State Bank*, 2 Dev. Eq. (17 N. Car.) 111.

Tennessee. — *Brightwell v. Mallory*, 10 Yerg. (Tenn.) 196.

Virginia. — *Feckheimer v. National Exch. Bank*, 79 Va. 80.

Wisconsin. — *In re Klaus*, 67 Wis. 401.

1. See the titles *DEEDS*, vol. 9, p. 94 *et seq.*; *PERSONAL PROPERTY*, vol. 22, p. 751, and cross-references there given.

2. *Johnson v. Laffin*, 5 Dill. (U. S.) 74; *At-*

tica Bank v. Manufacturers', etc., Bank, 20 N. Y. 501.

Statutory Authority Essential to Authorize Alienation of Stock. — *Duvergier v. Fellows*, 5 Bing. 248, 15 E. C. L. 436.

3. *Poole v. Middleton*, 29 Beav. 646; *In re Smith*, L. R. 4 Ch. 20; *In re Cawley*, 42 Ch. D. 209; *Moffatt v. Farquhar*, 7 Ch. D. 605; *Trisconi v. Winship*, 43 La. Ann. 45, 26 Am. St. Rep. 175; *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90, 19 Am. Dec. 306; *In re Klaus*, 67 Wis. 401.

4. *James v. Woodruff*, 10 Paige (N. Y.) 541, *affirmed* 2 Den. (N. Y.) 574.

5. See the title *BY-LAWS*, vol. 5, p. 93. See also *Gould v. Head*, 41 Fed. Rep. 240; *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203; *Ingraham v. National Salt Co.*, 72 N. Y. App. Div. 582; *Kinnan v. Sullivan County Club*, 26 N. Y. App. Div. 213; *Reynolds v. Mt. Vernon Bank*, 6 N. Y. App. Div. 62; *Herring v. Ruskin Co-op. Assoc.*, (Tenn. Ch. 1899) 52 S. W. Rep. 327.

6. *New England Trust Co. v. Abbott*, 162 Mass. 148. *Compare Herring v. Ruskin Co-op. Assoc.*, (Tenn. Ch. 1899) 52 S. W. Rep. 327.

7. *Pittsburgh, etc., R. Co. v. Clarke*, 29 Pa. St. 146. See also the title *BY-LAWS*, vol. 5, p. 93.

8. *Hey v. Dolphin*, 92 Hun (N. Y.) 230.

9. *Scruggs v. Cotterill*, 67 N. Y. App. Div. 583.

(4) *Sales by Directors.* — In the earlier decisions it seems to have been doubted whether a director could transfer his shares.¹ The subject was somewhat further obscured by other decisions, where either attempted transfers by directors were fraudulent,² or the directors were required by the charter to continue in office.³ By later decisions, however, the director's right to mortgage his qualification shares,⁴ or to transfer his shares when not indebted to the company, was upheld even though he was seeking to evade liability.⁵ It may, therefore, be accepted as the settled law that the status of directors in this regard is not different from that of ordinary stockholders.⁶

b. CONTRACT OF SALE — (1) *In General.* — The same legal principles govern with regard to the elements of a contract for the sale of stock as apply in the case of contracts generally, and a repetition of these principles, which have been treated elsewhere, is not deemed essential.⁷

(2) *Parties to Sale.* — As in the case of contracts generally, it is essential to a contract for a sale of stock that the parties should be capable of contracting at the time when they enter into the undertaking.⁸ Sales by intoxicated persons⁹ and those *non compos mentis*¹⁰ may be set aside. A contract to sell stock to one forbidden by law to hold it is unenforceable.¹¹ The purchase of stock by a married woman is not a contract within the purview of a statute rendering a woman incapable during coverture of making any contract to affect her real or personal estate without the written consent of her husband.¹²

Corporations as Purchasers. — The legality and effect of the purchase by a corporation of stock of itself or of another corporation have been fully treated elsewhere in this work.¹³

Sales by Partners and Joint Owners. — One partner may sell firm stock,¹⁴ but the rule does not apply to one of two joint owners.¹⁵ A previous transfer by the surviving owner conveys the whole, however.¹⁶

Sales by Brokers. — The powers, duties, and liabilities of brokers in the sale and purchase of stock are treated under another title.¹⁷

Guardians, Executors, Etc. — The general legal principles governing the powers, duties, and liabilities of executors; administrators, and others occupying a fiduciary relation in dealing with the trust property, and the duties and liabilities of persons dealing with them in their fiduciary relation, apply also to the purchase and sale of stock by them. These principles are fully treated elsewhere in this work.¹⁸

(3) *Certainty.* — The same requirements exist in regard to the certainty of the subject-matter of a contract for the sale of stock as in the case of contracts ordinarily.¹⁹ A contract for the sale of stock whereby the seller undertakes that all debts of the company shall be paid on the day of the transfer, and the buyer is to retain a sufficiency of the price to assure him that the company is

1. Gilbert's Case, L. R. 5 Ch. App. 559.

2. *In re South London Fish Market Co.*, 39 Ch. D. 324, 60 L. T. N. S. 68.

3. *Portal v. Emmens*, 1 C. P. D. 664.

4. *Reeves v. Bainbridge*, Wkly. Notes (1889) 228.

5. *In re Cawley*, 42 Ch. D. 209.

6. *Trisconi v. Winship*, 43 La. Ann. 45, 26 Am. St. Rep. 175.

7. See the title *CONTRACTS*, vol. 7, p. 88.

8. See generally the title *CONTRACTS*, vol. 7, p. 100.

9. *Thackrah v. Haas*, 119 U. S. 499.

10. *Chew v. Baltimore Bank*, 14 Md. 299.

11. *State v. Ohio, etc.*, R. Co., 3 Ohio Cir. Dec. 518, 6 Ohio Cir. Ct. 415.

12. *Robinson v. Turrentine*, 59 Fed. Rep. 554.

13. See the titles *CORPORATIONS (PRIVATE)*, vol. 7, pp. 810, 818; *NATIONAL BANKS*, vol. 21, p. 378 *et seq.*

14. *Quiner v. Marblehead Social Ins. Co.*, 10 Mass. 476. Compare *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90, 19 Am. Dec. 306.

15. *Standing v. Bowring*, 27 Ch. D. 341; *Comstock v. Buchanan*, 57 Barb. (N. Y.) 127.

16. *Slaymaker v. Gettysburg Bank*, 10 Pa. St. 373.

17. See the title *STOCKBROKERS*, *post*. See also generally the title *AGENCY*, vol. 1, p. 930.

18. See the titles *EXECUTORS AND ADMINISTRATORS*, vol. 11, p. 720; *GUARDIAN AND WARD*, vol. 15, p. 16; *TRUSTS AND TRUSTEES*. See also *infra*, this title, *Issuance of Certificate, Transfer, and Registration* — *Transfer and Registration*.

Transfer of Stock by Foreign Executor. — See the title *FOREIGN EXECUTORS AND ADMINISTRATORS*, vol. 13, p. 943.

19. See the title *CONTRACTS*, vol. 7, p. 116.

free from debt, is not void for uncertainty in not stating the debts, where the amount to be paid is fixed and definite, since, if default is made in the payment, the amounts to be deducted can be shown.¹

c. **PERFORMANCE** — (1) *Tender of Stock*. — To entitle one who has bargained for specific shares of corporate stock to recover the purchase price, he must have kept his tender of the stock good, and have been able at any time to deliver upon demand the identical shares sold. The fact that stock is pledged is not necessarily inconsistent with the pledgor's ability to deliver it upon demand pursuant to bargain and sale.² The unqualified refusal of the purchaser to accept the shares of stock when a tender thereof is made by the seller relieves the seller from the duty of making a more formal tender, even though at the time when he made the tender he did not have the certificates with him, where the purchaser made no objection on the ground of the failure to produce the certificates.³ The purchaser may refuse a tender of the certificates unless accompanied by a registration of the transfer,⁴ or if they are indorsed in blank by some previous owner and not by the seller,⁵ or if the stock has been attached;⁶ but not on the ground that the company has, since the formation of the contract, issued other shares at a discount.⁷ The party who contracts to sell need not tender the identical shares owned by him when the agreement was made.⁸ Where the contract provides that the certificates and the purchase money are to be left with a trust company, tender is unnecessary.⁹ The duty of furnishing the deed by which a transfer of shares is effected is controlled in *England* by the usage of the market.¹⁰

(2) *Delivery*. — The delivery of the certificate to the purchaser is analogous to the delivery of chattels upon a sale thereof, and the assignment of it is a symbolical sale of the shares themselves. An executory contract for the sale of stock is sufficiently performed by a delivery of the certificate.¹¹ This being as complete a delivery as the subject-matter admits, the title to the stock passes by the tender of the certificate, and a refusal on the purchaser's part to receive it leaves the certificate in the hands of the seller as a trustee or bailee of the purchaser.¹² Neither an immediate delivery of certificates nor a stipulated time therefor is essential.¹³ In *England* it is even held that one who contracts to "deliver" performs when he places the other party in the position of legal owner.¹⁴

d. **IMPLIED WARRANTY**. — There is an implied warranty by the vendor that he is the owner of the stock sold and is authorized to transfer the title thereto.¹⁵ There is also an implied warranty on his part that the stock sold is genuine.¹⁶ He warrants that it is issued by the duly constituted officers of the

1. Northern Cent. R. Co. v. Walworth, 193 Pa. St. 207, 74 Am. St. Rep. 683.

2. Ortmann v. Fletcher, 117 Mich. 501.

3. West v. Averill Grocery Co., 109 Iowa 488.

4. White v. Salisbury, 33 Mo. 150. Compare Wilkinson v. Lloyd, 7 Q. B. 27, 53 E. C. L. 27.

5. Hare v. Waring, 3 M. & W. 362.

6. Eastman v. Fiske, 9 N. H. 182.

7. Noyes v. Spaulding, 27 Vt. 427.

8. Shales v. Seignoret, 1 Ld. Raym. 440; Frost v. Clarkson, 7 Cow. (N. Y.) 24; Noyes v. Spaulding, 27 Vt. 427.

9. Reed v. Hayt, 109 N. Y. 659, 21 Am. & Eng. Corp. Cas. 295.

10. Shaw v. Rowley, 16 M. & W. 810; Stephens v. De Medina, 4 Q. B. 422, 45 E. C. L. 422.

11. Howe v. Starkweather, 17 Mass. 243; Sargent v. Franklin Ins. Co., 8 Pick. (Mass.) 98, 19 Am. Dec. 306.

12. Bruce v. Smith, 44 Ind. 1; Merchants' Nat. Bank v. Richards, 6 Mo. App. 454; Eastman v. Fiske, 9 N. H. 182; Munn v. Barnum, 24 Barb. (N. Y.) 283; Noyes v. Spaulding, 27 Vt. 427.

13. Bruce v. Smith, 44 Ind. 1; Currie v. White, 45 N. Y. 822.

14. Hunt v. Gunn, 13 C. B. N. S. 226, 106 E. C. L. 226.

15. **Implied Warranty**. — Foote v. Illinois Trust, etc., Bank, 194 Ill. 600; Higgins v. Illinois Trust, etc., Bank, 193 Ill. 394; Strong v. Leoffler, 85 Ill. 73; Allen v. Pegram, 16 Iowa 163; State v. North Louisiana, etc., R. Co., 34 La. Ann. 947; Wood v. Sheldon, 42 N. J. L. 421, 36 Am. Rep. 523; Shotwell v. Mali, 38 Barb. (N. Y.) 445; People's Bank v. Kurtz, 99 Pa. St. 344, 44 Am. Rep. 112.

16. Foote v. Illinois Trust, etc., Bank, 194 Ill. 600; Higgins v. Illinois Trust, etc., Bank, 193 Ill. 394; Rogan v. Illinois Trust, etc., Bank, 93 Ill. App. 39; Strong v. Leoffler, 85 Ill. 73; Allen v. Pegram, 16 Iowa 163; Lincoln v. New Orleans Express Co., 45 La. Ann. 729; Wood v. Sheldon, 42 N. J. L. 421, 36 Am. Rep. 523; Fifth Ave. Bank v. Forty-second St., etc., R. Co., 137 N. Y. 231, 33 Am. St. Rep. 712; Shotwell v. Mali, 38 Barb. (N. Y.) 445; Seizer v. Mali, 32

company and is sealed with the genuine seal of the corporation. He does not, however, warrant that it has not been fraudulently issued by the officers in excess of their charter powers, and in such a case the vendee has no recourse against him.¹ Where there has been a fraud on the part of the officers in the issuance of the stock, the vendee may recover back from the corporation the amount which has been paid by him.² In the latter event, the purchaser's right of action against the officers of a corporation concerned in issuing certificates of spurious stock is complete upon the purchase. And that right will not be affected by any subsequent action of the directors of the corporation, in turning over other property to him, to an amount exceeding the sum paid by him for the false certificates.³ A sale by the corporation of the stock issued by it without authority violates the implied warranty on the part of the vendor of the existence and validity of the stock and entitles the vendee to recover the price.⁴

Value Not Warranted. — The vendor of the stock does not impliedly warrant the quality or value of the stock.⁵ There is, however, an implied warranty, upon a sale of shares of stock, that the vendor will deliver marketable shares free from lien, and stock worth as much as any other share of the same class.⁶

No Warranty of Corporation's Title. — The transferrer of stock, without representation or specification as to the particular property held by the corporation, warrants only his title to the stock, and not the title of the corporation to the property held by it. In the absence of fraudulent concealment or misrepresentation, failure of title of the corporation to its property furnishes no ground for action of nullity of transfers of stock, based on error or breach of warranty.⁷

Stock of De Facto Corporation. — The vendor of shares of stock does not impliedly warrant that the corporation by which the certificates are issued is a corporation *de jure*. The existence of the corporation as a *de facto* corporation is sufficient to relieve him from liability on account of any implied warranty as to its existence.⁸

Breach of Warranty. — If the vendor makes a representation as to the value of the stock which is intended as a warranty, and this representation enters as a constituent element into the transaction between the parties, it then becomes a part of the contract and may be enforced as a warranty.⁹

e. RESCISSION. — Elsewhere in this work will be found a full treatment of the general principles covering rescission, cancellation, and reformation of contracts. These principles are applicable to sales of stock.¹⁰ That the stock was originally conveyed to the vendor through fraud on his part is no ground for the rescission of a contract of sale of the stock to a *bona fide* purchaser for value and without notice.¹¹

Purchase from Officer. — No such confidential or fiduciary relation exists between the officers of a corporation and the stockholders as will enable a stockholder to rescind a sale of his stock to the secretary where the latter, at the time of his purchase, discloses all the information he has, and conceals

Barb. (N. Y.) 76; *People's Bank v. Kurtz*, 99 Pa. St. 344, 44 Am. Rep. 112.

1. *People's Bank v. Kurtz*, 99 Pa. St. 344, 44 Am. Rep. 112.

2. *Shotwell v. Mali*, 38 Barb. (N. Y.) 445; *People's Bank v. Kurtz*, 99 Pa. St. 344, 44 Am. Rep. 112. Compare *Seizer v. Mali*, 32 Barb. (N. Y.) 76.

3. *Shotwell v. Mali*, 38 Barb. (N. Y.) 445.

4. *Lincoln v. New Orleans Express Co.*, 45 La. Ann. 729.

5. *Peck Colorado Co. v. Stratton*, 95 Fed. Rep. 741; *Allen v. Pegram*, 16 Iowa 163; *Renton v. Maryott*, 21 N. J. Eq. 123; *Jones v. Garlington*, 44 S. Car. 533. Compare *Van Arsdale v. Brown*, 9 Ohio Cir. Dec. 488.

6. *McClure v. Central Trust Co.*, 165 N. Y. 108.

Warranty Against Assessments Construed. — *Humphrey v. Merriam*, 46 Minn. 413.

7. *State v. North Louisiana, etc.*, R. Co., 34 La. Ann. 947.

8. *Harter v. Eltzroth*, 111 Ind. 159.

9. *Titus v. Poole*, 145 N. Y. 414, affirming 73 Hun (N. Y.) 383. See the title WARRANTY.

10. See the title RESCISSION, CANCELLATION, AND REFORMATION, vol. 24, p. 604.

Waiver of Right of Rescission. — *Jessop v. Ivory*, 158 Pa. St. 71. See also title RESCISSION, CANCELLATION, AND REFORMATION, vol. 24, p. 647.

11. *Foushee v. Snyder*, (Ky. 1900) 54 S. W. Rep. 730.

nothing concerning the condition of the corporation or the value of its stock.¹

f. TITLE TO DIVIDENDS. — The right to dividends as between the transferor and transferee has been treated elsewhere in this work.² Where the price was par value with a *pro rata* proportion of an anticipated dividend, the purchaser may recover back that portion of the price paid in anticipation of the dividend, upon the event proving that no dividend had been earned.³

g. REMEDIES AND DEFENSES — Specific Performance. — The question of the specific performance of contracts for the sale of stock has been discussed elsewhere in this work.⁴

Remedy of Buyer. — The rights of the buyer of stock where no title has passed are no greater than those of the purchaser of any other personal property. In such a case he cannot maintain trover against the seller.⁵ Where there is neither fraud nor warranty in the sale of stock, which, at the time, is apparently paid up, but is found to be in arrears, owing to a subsequent resolution of the directors, the transferee cannot recover from the seller the unpaid amount.⁶ A transferee from one who is entitled to receive stock from a corporation upon the performance of certain acts cannot plead their nonperformance as a ground of forfeiture, if the corporation does not.⁷

Measure of Damages for Nondelivery. — Where the purchase price has not been paid, the measure of damages for the breach of the contract, though there has been no delivery by the vendor, is the difference between the agreed contract price and the market value of the stock on the day fixed for delivery.⁸

Measure of Damages Fixed in Contract. — In the case of contracts for the sale of stock, as in the case of other contracts, if the parties themselves limit the damages by stipulations in the contract the measure of damages is controlled thereby.⁹ So in the case of an agreement for the sale of certain specific shares of a corporation represented by a particular certificate, where the vendor has tendered the delivery of the particular shares of stock as required by the contract, he is entitled to the purchase price, for in fixing the purchase price to be paid for the specific shares, the parties to the contract fixed that as the measure of damages.¹⁰

Breach — Waiver. — Where one of the parties to the contract dispenses with the performance of it, his act excuses performance on the part of the other.¹¹ So the omission on the part of the purchaser of stock to pay the second instalment therefor does not constitute a breach where his omission was caused by the seller procuring a waiver from one of the purchasers of his right to take his portion of the stock.¹²

Contract Not Enforceable by Third Person. — A promise by a stockholder of a corporation to a purchaser of his stock to pay an indebtedness of the corporation, so as to make its earnings available to payment of dividends and subsequent obligations, cannot be enforced by the corporation.¹³

Defenses. — It is no defense to an action upon a contract for the purchase of stock that the company was at the time insolvent,¹⁴ or has suffered a loss of its

1. *Krumbhaar v. Griffiths*, 151 Pa. St. 223.

2. See the title *DIVIDENDS*, vol. 9, p. 720. See also *Kaufman v. Charlottesville Woolen Mills*, 93 Va. 677.

3. *Riggs v. Tayloe*, 2 Cranch (C. C.) 687.

4. See the title *SPECIFIC PERFORMANCE*, *ante*, p. 7.

5. See the title *SALES*, vol. 24, p. 1149. See also *Reid v. Caldwell*, 114 Ga. 676.

6. *Cunningham v. Spier*, 13 Johns. (N. Y.) 392.

7. *Bradley v. Chase*, 22 Me. 511.

8. *Wildes v. Robinson*, 50 N. Y. App. Div. 192. See also the title *SALES*, vol. 24, p. 1150 *et seq.*

9. *Leathe v. Needles*, 81 Ill. App. 134. See

also the titles *DAMAGES*, vol. 8, p. 636; *LIQUIDATED DAMAGES*, vol. 19, p. 421 *et seq.*

10. *Reynolds v. Callender*, 19 Pa. Super. Ct. 610.

11. See the title *CONTRACTS*, vol. 7, p. 151.

12. *Jones v. Brown*, 171 Mass. 318.

13. *German State Bank v. Northwestern Water, etc., Co.*, 104 Iowa 717. See also the title *CONTRACTS*, vol. 7, p. 107.

14. *Rudge v. Bowman*, L. R. 3 Q. B. 689; *Gordon v. Parker*, 10 La. 56.

A contract to deliver stock free from incumbrances is not broken by the existence of liens against the corporation. *Williams v. Hanna*, 40 Ind. 535.

property,¹ or is being wound up,² or is only proven to be a *de facto* government,³ or has since effected an *ultra vires* issue of stock at a discount.⁴ The statute of limitations is, of course, available as a defense.⁵

Fraud and Deceit. — The same principles which apply to sales of personal property in general, where there has been fraud or deceit, apply to sales of stock.⁶

h. LIS PENDENS. — The applicability of the doctrine of *lis pendens* to transfers of stock has been considered elsewhere.⁷

i. BONA FIDE PURCHASERS. — As in the case of sales generally, to constitute a purchaser of stock a *bona fide* purchaser he must have taken the stock for value, in good faith, and without notice of the adverse interest sought to be enforced against him. The presence of all these elements is essential.⁸ Where there is a *bona fide* transfer for value, the transferee having no notice or knowledge of the adverse interest, his rights will be protected. So a transfer of stock owned by a married woman to such a *bona fide* purchaser is valid though the transfer is procured by duress and coercion.⁹ The question of the purchaser's title depends upon the further one of what constitutes notice.¹⁰ Thus, a purchase by a *bona fide* purchaser of stock issued by *de facto* directors is valid where the purchaser was without knowledge or notice that the stock was not issued under proper authority.¹¹

Purchaser from Agent. — Where the real owner has conferred upon another the apparent power to dispose of stock, a *bona fide* purchaser from such transferrer

1. Kerchner v. Gettys, 18 S. Car. 521. Compare Donahue v. McCosh, 70 Iowa 733.

2. Crabb v. Miller, 19 W. R. 519.

3. Reynolds v. Myers, 51 Vt. 444.

4. Faulkner v. Hebard, 26 Vt. 452.

But the fact that shares are issued at less than the charter price is a good defense to an action for the purchase thereof, though the corporation is also liable to the holder. Sturges v. Stetson, 1 Biss. (U. S.) 246.

5. Williams v. Meyer, 41 Hun (N. Y.) 545.

6. See generally the title FRAUD AND DECEIT, vol. 14, p. 12.

Artifice to Prevent Inquiry as to Truth of Representation. — See the title FRAUD AND DECEIT, vol. 14, p. 123. See also Nysewander v. Lowman, 124 Ind. 584.

False Representation as to Value of Stock. — See the title FRAUD AND DECEIT, vol. 14, p. 42. See also Shelton v. Healy, 74 Conn. 265; Coolidge v. Rhodes, 199 Ill. 24; Morrison v. Snow, (Utah 1903) 72 Pac. Rep. 924.

False Statement by Promoter or Officer. — See the titles FRAUD AND DECEIT, vol. 14, p. 151; PROMOTERS, vol. 23, p. 239.

Rescission for False Representation as to Condition of Corporation. — See the title FRAUD AND DECEIT, vol. 14, p. 27. See also Merrill v. Florida Land, etc., Co., (C. C. A.) 60 Fed. Rep. 17; Merritt v. Ehrman, 116 Ala. 278; Shelton v. Healy, 74 Conn. 265; Coolidge v. Rhodes, 199 Ill. 24; Murray v. Tolman, 162 Ill. 417; Gutheil v. Goodrich, (Ind. 1903) 66 N. E. Rep. 446; Yeomans v. Bell, 79 Hun (N. Y.) 215; National Bank v. Taylor, 5 S. Dak. 99.

Measure of Damages. — See the title FRAUD AND DECEIT, vol. 14, p. 184.

Fraudulent Representation as to Co-operation in Securing Control of Corporation Ground for Rescission. — Delano v. Rice, 23 N. Y. App. Div. 327, affirming 21 Misc. (N. Y.) 714.

Corporation Not Liable for Fraudulent Representation by Third Person. — Hart v. Globe Ins.

Co., 113 Fed. Rep. 307; Home Electric Light, etc., Co. v. Collins, (Ind. App. 1903) 66 N. E. Rep. 780. See also the title FRAUD AND DECEIT, vol. 14, p. 154.

Sufficiency of Evidence of Fraudulent Representation. — See the title FRAUD AND DECEIT, vol. 14, p. 200 *et seq.* See also Truman v. Lombard, 10 N. Y. App. Div. 430.

Laches as Bar to Rescission. — See the title FRAUD AND DECEIT, vol. 14, p. 161. See also Acetylene Light, etc., Co. v. Smith, 10 Pa. Super. Ct. 61.

Knowledge of Facts and Circumstances Equally Available to Both Parties. — See the title FRAUD AND DECEIT, vol. 14, p. 115. See also Rose v. Barclay, 191 Pa. St. 594.

Character of Representation. — See the title FRAUD AND DECEIT, vol. 14, p. 33. See also Riley v. Treanor, (Tex. Civ. App. 1894) 25 S. W. Rep. 1054.

Misrepresentation as to Law. — See the title FRAUD AND DECEIT, vol. 14, p. 54. See also Rogan v. Illinois Trust, etc., Bank, 93 Ill. App. 39.

Materiality of Representation. — Merritt v. Morris, 132 Ala. 190. See also the title FRAUD AND DECEIT, vol. 14, p. 59.

7. See the title NOTICE OF PENDENCY AND LIS PENDENS, vol. 21, p. 628. See also Morris v. Stevens, 17 Pa. Co. Ct. 209.

8. Paducah Land, etc., Co. v. Mulholland, (Ky. 1894) 24 S. W. Rep. 624; Tecumseh Nat. Bank v. Russell, 50 Neb. 277. See also the title SALES, vol. 24, p. 1168 *et seq.*; and see Clark v. American Coal Co., 86 Iowa 436; Souder v. Columbia Nat. Bank, 156 Pa. St. 374; Winter v. Belmont Min. Co., 53 Cal. 428.

9. Bryan v. Montandon, (Idaho 1898) 55 Pac. Rep. 650.

10. See generally the titles NOTICE, vol. 21, p. 580; SALES, vol. 24, p. 1174 *et seq.*

11. Morris v. Stevens, 178 Pa. St. 563.

will be protected though the latter exceeded his authority in the sale.¹

Value. — The purchaser must have parted with the value at the time when the purchase was made or before he had notice of the adverse interest sought to be enforced against him.² So one who promised to surrender his certificate of deposit in payment of a purchase of stock cannot be deemed a purchaser for value until he has complied with his agreement.³

Purchaser from Fraudulent Vendee. — Where a *bona fide* purchaser for value without notice purchases stock from a vendee who secured it at a private sale by an administrator, which was in fraud of the rights of the parties interested therein, the title of the *bona fide* purchaser will be protected.⁴

Purchaser from Trustee. — Purchasers from one who sells stock in breach of trust acquire no title as against the real owner if they have notice, even constructively, of the trust.⁵ But a *bona fide* purchaser will be protected even though it afterwards transpires that the transferor has violated his trust.⁶ The mere fact that the stock certificates are in the name of the seller as "trustee" does not of itself impute to the purchaser knowledge of intended fraud on the part of the seller where there is no reasonable possibility of learning the nature of the trust from any other reliable source. It is sufficient if the purchaser exercised reasonable care to ascertain whether the trustee was acting within the limits of his power.⁷

Loan of Stock. — Where the owner of stock by way of *mutuum*⁸ returns the new stock to the lender, the lender is a purchaser for value, and he will be protected against creditors of the person to whom the stock was loaned even though the debt was in existence before the stock was transferred back to the lender.⁹

2. Gifts — *a. INTER VIVOS* — (1) *In General.* — Shares of stock may also be aliened by gift *inter vivos*.¹⁰

(2) *Delivery* — (a) *In General.* — It is essential to the validity of a gift *inter vivos* that it shall be accompanied by either actual or constructive delivery.¹¹

Intent. — The delivery must be such as to vest the donee with the control and dominion over the property and absolutely to divest the donor of his dominion and control, and must be made with the intent to vest the title of the property in the donee. The intent is a necessary element of the transaction. Delivery without intent to vest the title in the donee

1. *Briggs v. Massey*, 42 L. T. N. S. 49; *Stinson v. Thornton*, 56 Ga. 377; *Cohen v. Gwynn*, 4 Md. Ch. 357; *Salisbury Mills v. Townsend*, 109 Mass. 115; *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41, 14 Am. Rep. 173; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341; *Bayard v. Farmers', etc., Bank*, 52 Pa. St. 232; *Caulkins v. Memphis Gas-Light Co.*, 85 Tenn. 683, 4 Am. St. Rep. 786. See also the title SALES, vol. 24, p. 1168.

2. **Value.** — See the title SALES, vol. 24, p. 1171 *et seq.*

3. *Tecumseh Nat. Bank v. Russell*, 50 Neb. 277.

4. *Nutting v. Thomason*, 46 Ga. 34. See also the title SALES, vol. 24, p. 1166.

5. *Jaudon v. National City Bank*, 8 Blatchf. (U. S.) 430, *affirmed* 15 Wall. (U. S.) 165; *Shaw v. Spencer*, 100 Mass. 382, 1 Am. Rep. 115; *White v. Price*, 39 Hun (N. Y.) 394; *Walsh v. Stille*, 2 Pars. Eq. Cas. (Pa.) 17; *Raphael v. McFarlane*, 18 Can. Sup. Ct. 183. And see generally the title TRUSTS AND TRUSTEES.

6. *Stinson v. Thornton*, 56 Ga. 377; *Nutting v. Thomason*, 46 Ga. 34; *Cohen v. Gwynn*, 4 Md. Ch. 357; *Salisbury Mills v. Townsend*, 109

Mass. 115; *Bayard v. Farmers', etc., Bank*, 52 Pa. St. 232; *Caulkins v. Memphis Gas-Light Co.*, 85 Tenn. 683, 4 Am. St. Rep. 786. See also the title SALES, vol. 24, p. 1161.

7. *Grafflin v. Robb*, 84 Md. 451.

8. See *MUTUUM*, vol. 21, p. 302. See also the title LOANS, vol. 19, p. 464.

9. *Andrews v. Worcester, etc., R. Co.*, 159 Mass. 64.

10. *Reed v. Copeland*, 50 Conn. 472, 47 Am. Rep. 663; *Adams v. Brackett*, 5 Met. (Mass.) 280; *Mize v. Bates County Nat. Bank*, 60 Mo. App. 358; *Smith v. Burnet*, 35 N. J. Eq. 314; *Duigan v. McCormack*, (Supm. Ct. Spec. T.) 53 How. Pr. (N. Y.) 411; *Com. v. Crompton*, 137 Pa. St. 138. See also the cases cited in the notes *infra*, this section. See generally the title GIFTS, vol. 14, p. 1006.

11. *Pennington v. Gittings*, 2 Gill & J. (Md.) 208; *Cummings v. Bramhall*, 120 Mass. 552; *Smith v. Burnet*, 35 N. J. Eq. 314; *Matthews v. Hoagland*, 48 N. J. Eq. 455; *Jackson v. Twenty-Third St. R. Co.*, 88 N. Y. 521; *Kernochan v. Russell*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 817; *Stevens v. Stevens*, 2 Redf. (N. Y.) 265. See also the title GIFTS, vol. 14, p. 1022.

could pass no title to him. Thus, a certificate of shares made out in the name of the donee with the intention of creating a trust for the benefit of a third person, the shares being retained by an officer of the company subject to the future control and direction of the donor and the dividends thereon being applied by the donee under the direction and with the consent of the donor for the support of the beneficiary of the trust, does not constitute a valid gift.¹ But a mere expression of an intention to make a gift, unaccompanied by any delivery or assignment to the donee, is insufficient to constitute a valid gift. It is immaterial that the donee is allowed by the donor in his lifetime to exercise the privileges pertaining to the shares.²

Parol Evidence to Show Intent. — Parol evidence has been held admissible, as against the creditors of the donor, to show that he intended a purchase in the donee's name as a gift.³

(b) **Delivery of Certificate.** — According to the view in some jurisdictions, a written assignment is not essential, but a gift of stock *inter vivos* is valid and vests an equitable title in the attorney where there has been a delivery of the certificate of stock with intent to transfer title by way of gift, as this amounts to a symbolical delivery of the stock. The validity of the gift is not affected by the fact that the stock is transferable only at the office of the company by the person named or his attorney on the surrender of his certificate.⁴ Where such a delivery, coupled with words of absolute and present gift, has been made, it invests the donee with an equitable title to the stock which the donor or a volunteer cannot successfully assail.⁵ In *New Jersey* it is the rule that a valid gift of stock cannot be made by the delivery of the certificate, although accompanied by words of gift, where there is no formal transfer or assignment and power in writing to transfer the shares. The view is taken that the delivery of a certificate merely vests in the donee an equitable title which cannot be enforced, as equity will not aid a volunteer.⁶

(c) **Written Assignment.** — A gift and transfer of stock may also be accomplished by a written assignment and delivery of the certificate with an intention to make a gift thereof to the person to whom delivered,⁷ or by the execution of a power of attorney to transfer accompanied by expressions of gift and other acts tending to show the intentions of the donor.⁸ In *England* shares of stock which are not assignable at law unless duly transferred must be so transferred, and not merely assigned or covenanted to be transferred, to constitute a valid gift. The English cases proceed on the ground that, the title not having passed by a legal assignment, equity will not interfere to enforce an equitable title of a volunteer.⁹ The effect of the decisions in *Maryland* is the same unless the transfer is made complete in the lifetime of the donor, on the ground that the power of attorney does not survive him. The delivery is not held to be complete unless performed in the manner in which the stock is susceptible of being delivered, that is, by a transfer on the books of the corporation.¹⁰

(d) **Transfer on Books of Corporation.** — The gift may also be completed by trans-

1. *Jackson v. Twenty-Third St. R. Co.*, 88 N. Y. 521.

2. *Stevens v. Stevens*, 2 Redf. (N. Y.) 265.

3. *Rider v. Kidder*, 10 Ves. Jr. 361.

4. *Reed v. Copeland*, 50 Conn. 472, 47 Am. Rep. 663; *Colton v. Williams*, 65 Ill. App. 466; *Allerton v. Lang*, 10 Bosw. (N. Y.) 362; *Com. v. Crompton*, 137 Pa. St. 138; *Richmond First Nat. Bank v. Holland*, 99 Va. 495. See also the title *GIFTS*, vol. 14, p. 1023.

5. *Com. v. Crompton*, 137 Pa. St. 138.

6. *Matthews v. Hoagland*, 48 N. J. Eq. 465.

7. *Calkins v. Equitable Bldg., etc., Assoc.*, 126

Cal. 531; *Richmond First Nat. Bank v. Holland*, 99 Va. 495. See also *De Caumont v. Bogert*, 36 Hun (N. Y.) 382.

8. *Duigan v. McCormack*, (Supm. Ct. Spec. T.) 53 How. Pr. (N. Y.) 411.

9. *Antrobus v. Smith*, 12 Ves. Jr. 39; *Dillon v. Coppin*, 4 Myl. & C. 647; *Searle v. Law*, 15 Sim. 95. See also *Re Shield*, 53 L. T. N. S. 5; *Moore v. Moore*, L. R. 18 Eq. 474, 43 L. J. Ch. 617.

10. *Baltimore Retort, etc., Brick Co. v. Mali*, 65 Md. 93, 57 Am. Rep. 304; *Pennington v. Gittings*, 2 Gill & J. (Md.) 209; *Matthews v. Hoagland*, 48 N. J. Eq. 455.

ferring the shares to the donee upon the books of the company, vesting in him the complete legal title. Such an act is as complete a delivery as the nature of the thing will admit of, and there can be no clearer evidence of a design to part with the right of property in favor of the donee. The fact that the donor retains the certificates in his possession cannot undo or qualify the ownership vested in the donee by the transfer.¹ The transfer of the stock on the books of the corporation and an issuance of new certificates to the donor as trustee for the donee also constitutes a valid gift even though the possession of the certificates is retained by the donor.²

(3) *Gift of Dividends.* — A gift of certain original shares, together with "the dividends and income thereof," does not pass new shares issued subsequently and apportioned among the holders of the original shares,³ but a gift of dividends has been held to pass the stock.⁴

(4) *Retention of Dividends by Donor.* — The validity of the gift is not affected by the fact that the donor retains the right to the dividends during his life and collects them for himself.⁵

(5) *Subsequent Legacy Including Stock.* — The validity of a gift *inter vivos* is not affected by the fact that by will a legacy is given to the donee which includes the shares of stock, and which was to be in lieu of all claims on the testator's estate, and that he had accepted the legacy. The stock given by the testator before his death constituted no part of his estate at his death.⁶ Nor will the title of the donee to a completed gift of stock be affected by the mention of the stock in a subsequent will or deed of trust of the donor to which the donee was not privy and under which he does not claim.⁷

(6) *Proof of Gift* — (a) *Declarations.* — Where it is sought to show a gift of stock from a husband to his wife, the declarations of a husband who was free from debt at the time the declarations were made are admissible to show that the gift to the wife was *bona fide* and not made for the purpose of defrauding creditors.⁸

(b) *Possession by Donee.* — Where stock stands in a donor's name on the books of the corporation, the facts that the certificate is found in the donee's possession and that the donor gave to him a power of attorney to receive and assign any scrip or dividend due to him from the company are not conclusive evidence of a gift of the stock to the donee. Nor is the gift validated by the fact that the donor declared that he intended to give the stock to the donee and afterwards that he had given it to him.⁹

(7) *Revocation.* — A donor cannot revoke a gift of stock which has been completed.¹⁰

b. CAUSA MORTIS. — Shares of stock may also be subject of a gift *causa mortis*.¹¹ As in the case of gifts *inter vivos* there must be a delivery to constitute a valid gift *causa mortis*.¹² Where the evidence shows that it was plainly the intent of the donor to make the gift, a mere manual delivery of the certificate, without assignment or power of attorney, is sufficient to constitute a valid gift, although by statute and under the by-laws of the corporation the stock

1. Roberts's Appeal, 85 Pa. St. 84. See also Deming v. Williams, 26 Conn. 226, 68 Am. Dec. 386.

2. Mize v. Bates County Nat. Bank, 60 Mo. App. 358.

3. Spooner v. Phillips, 62 Conn. 62.

4. Delamater's Estate, 1 Whart. (Pa.) 362.

5. Calkins v. Equitable Bldg., etc., Assoc., 126 Cal. 531; Richmond First Nat. Bank v. Holland, 99 Va. 495. See also Adams v. Brackett, 5 Met. (Mass.) 280.

6. Reed v. Copeland, 50 Conn. 472, 47 Am. Rep. 663.

7. Richmond First Nat. Bank v. Holland, 99 Va. 495.

8. Richmond First Nat. Bank v. Holland, 99 Va. 495.

9. Smith v. Burnet, 35 N. J. Eq. 314.

10. Standing v. Bowring, 27 Ch. D. 341; Dummer v. Pritchett, 5 Sim. 35; Francis v. New York, etc., R. Co., (Supm. Ct. Gen. T.) 17 Abb. N. Cas. (N. Y.) 1; Delamater's Estate, 1 Whart. (Pa.) 362.

11. Hatcher v. Duford, 60 Ark. 169; Leyson v. Davis, 17 Mont. 220; Walsh v. Sexton, 55 Barb. (N. Y.) 251; Grymes v. Hone, 49 N. Y. 17, 10 Am. Rep. 313.

12. Egerton v. Egerton, 17 N. J. Eq. 419; Johnson v. Williams, (Supm. Ct. Spec. T.) 63 How. Pr. (N. Y.) 233; Grymes v. Hone, 49 N. Y. 17.

is transferable only in a prescribed manner.¹ There may be a valid gift also by an assignment in writing of the shares, though not accompanied by a delivery of the certificate or transferred on the books of the corporation.²

Revocation. — Such a gift, like other gifts *causa mortis*, passes to the donee only a defeasible title and the donor has the power of revocation at any time before the title becomes absolute.³

3. Legacies. — The effect to be given to a bequest of shares of stock is discussed elsewhere in this work.⁴

4. Mortgages. — Chattel mortgages on shares of stock are discussed elsewhere in this work.⁵

5. Pledges. — The pledge of shares of stock and the liens and privileges subject to which the pledgee takes,⁶ the sale of stock so pledged,⁷ and the rules peculiarly applicable to such pledges, including the transfer of the stock and the rights and liabilities of the pledgee as stockholder, are treated elsewhere in this work.⁸

VI. EXECUTION, ATTACHMENT, AND GARNISHMENT — 1. Execution — a. AT COMMON LAW. — At common law shares of stock are not subject to execution.⁹ Even though the shares of a certain corporation are declared to be real estate by the incorporating act, for the purpose of rendering them inheritable, the shares are not thereby made liable to seizure and sale under a fi. fa.¹⁰

b. BY STATUTE — (1) In General. — By statute in the majority of the states executions are now allowed against stock of corporations.¹¹ The provisions of the charter as to levy and sale supersede those of a previous general statute governing the same subject,¹² and a general statute supersedes a different provision for the same objects contained in a prior statute incorporating the company.¹³ The remedy cannot be extended to apply to corporations other than those within the provisions of the statute. Thus, stock in a corporation organized for "sporting purposes" is not subject to execution, though the statute authorizes that proceeding as to shares in "any joint-stock com-

1. *Leyson v. Davis*, 17 Mont. 220; *Walsh v. Sexton*, 55 Barb. (N. Y.) 251; *Thomas v. Lewis*, 89 Va. 1, 37 Am. St. Rep. 848.

2. *Leyson v. Davis*, 17 Mont. 220; *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313.

3. *Collins v. Collins*, (N. Y. Super. Ct. Gen. T.) 11 Misc. (N. Y.) 28. See also the title *GIFTS*, vol. 14, p. 1065.

4. See the title *LEGACIES AND DEVISES*, vol. 18, p. 718.

5. See the title *CHATTEL MORTGAGES*, vol. 5, p. 975.

6. See the title *PLEDGE AND COLLATERAL SECURITY*, vol. 22, p. 847. See also *Herd v. Pittsburgh Nat. Bank*, 25 Pittsb. Leg. J. N. S. (Pa.) 298.

7. See the title *PLEDGE AND COLLATERAL SECURITY*, vol. 22, p. 885.

Purchase of Property by Pledgee. — *Reid v. Caldwell*, 110 Ga. 481. See also the title *PLEDGE AND COLLATERAL SECURITY*, vol. 22, p. 891.

8. See the title *PLEDGE AND COLLATERAL SECURITY*, vol. 22, p. 905 *et seq.* See also *Herbert Kraft Co. Bank v. Orland Bank*, 133 Cal. 64.

Right of Pledgee to Accrued Dividends. — *Guarantee Co. v. East Rome Town Co.*, 96 Ga. 511, 51 Am. St. Rep. 150; *Armour v. East Rome Town Co.*, 98 Ga. 458.

9. Execution — Common Law — Alabama. — *Nabring v. Mobile Bank*, 58 Ala. 204.

District of Columbia. — *Barnard v. Life Ins. Co.*, 4 Mackey (D. C.) 63.

Illinois. — *Goss, etc., Mfg. Co. v. People*, 4 Ill. App. 510.

Massachusetts. — *Howe v. Starkweather*, 17 Mass. 240; *Stedman v. Eveleth*, 6 Met. (Mass.) 114.

Michigan. — *Feige v. Burt*, 118 Mich. 243, 74 Am. St. Rep. 390; *Van Norman v. Circuit Judge*, 45 Mich. 204; *Blair v. Compton*, 33 Mich. 414.

Missouri. — *Stewart v. Jones*, 40 Mo. 140; *Foster v. Potter*, 37 Mo. 525.

New Jersey. — *Voorhis v. Terhune*, 50 N. J. L. 147, 9 Am. St. Rep. 781.

New York. — *Denton v. Livingston*, 9 Johns. (N. Y.) 96, 6 Am. Dec. 264.

North Carolina. — *Cooper v. Dismal Swamp Canal Co.*, 2 Murph. (6 N. Car.) 195.

Ohio. — *Coe v. Columbus, etc., R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518.

Pennsylvania. — *Slaymaker v. Gettysburg Bank*, 10 Pa. St. 373.

Tennessee. — *Nashville Bank v. Ragsdale*, Peck (Tenn.) 296; *Nashville Trust Co. v. Weaver*, 102 Tenn. 66.

Vermont. — *Barnes v. Hall*, 55 Vt. 420.

Washington. — *Daniel v. Gold Hill Min. Co.*, 28 Wash. 411.

See also the title *EXECUTIONS*, vol. 11, p. 623.

10. *Cooper v. Dismal Swamp Canal Co.*, 2 Murph. (6 N. Car.) 195.

11. See the statutes of the several states.

12. *Titcomb v. Union Marine, etc., Ins. Co.*, 8 Mass. 326.

13. *Howe v. Starkweather*, 17 Mass. 240.

pany."¹ Nor is the seizure of shares by a tax collector authorized, though by statute they are subject to attachment and execution.²

(2) *On What Stock Levied* — (a) *In General.* — As a general rule the statutes allow an execution to be levied upon any stock held by the judgment debtor.³ This includes shares standing in his name on the books of the corporation even though they are transferred to him by another for the purpose of enabling him to raise money thereon.⁴ The statement of the officers of the corporation that they have received notice of the sale of the shares sought to be attached prior to the attachment will not prevent a levy upon the shares where it does not appear to whom the sale is made and there has been no transfer upon the books of the corporation.⁵ An execution cannot, however, be levied against stock held by the debtor in a fiduciary relation where the execution runs against him individually.⁶ Nor does authority given by statute to take in execution shares held by a judgment debtor authorize a levy upon shares pledged as collateral security for a debt of a stockholder and transferred on the books of the company to the pledgee.⁷

Priority of Assignee. — Equity will protect the title of the assignee of a certificate of stock as against an attaching creditor of his assignor where it appears that the assignment is prior in time to the attachment and is made in good faith and upon a valuable consideration, although the stock has not been transferred upon the books of the corporation, where the failure to transfer is due to neglect, not on the part of the assignee but on the part of the corporation.⁸

Equity of Redemption. — Execution may also be levied on the equity of redemption of the mortgagor in shares of stock mortgaged by him.⁹

Effect of By-law. — A by-law of the corporation prohibiting the transfer of stock by a stockholder while he is indebted to it does not prevent a levy upon and sale of the stock of one so indebted.¹⁰

(b) *Stock in National Bank.* — There is nothing in the Constitution or laws of the United States which forbids the seizure or sale under the state law of stock in a national bank.¹¹

(c) *Stock in Foreign Corporation.* — Shares of stock of a foreign corporation which has an office in the state in which the books of the corporation are kept are within the purview of a statute authorizing writs of execution against shares of stock in any corporation.¹² Where the law of the state does not authorize the sale of the stock of a foreign corporation doing business in the state on a domestic execution against the stockholders, it will not be presumed that the law of a foreign state authorizes execution and sale under such circumstances. The presumption is that there is no law upon the subject.¹³

(3) *Levy.* — The method in which the writ is to be levied depends upon the provisions of the statute. This question is treated elsewhere.¹⁴ Where executions against stock are allowed by statute it is generally held that the statutory provisions regarding the manner in which the remedy shall be exercised are imperative.¹⁵ As a general rule the statutes require notice of the levy

1. *Lyon v. Denison*, 80 Mich. 371.

2. *Kennedy v. Mary Lee Coal, etc., Co.*, 93 Ala. 494; *Barnes v. Hall*, 55 Vt. 420. See also *Smith v. Northampton Bank*, 4 Cush. (Mass.) 1; *McNeal v. Mechanics' Bldg., etc., Assoc.*, 40 N. J. Eq. 351.

Contra. — *Parker v. Sun Ins. Co.*, 40 La. Ann. 1172.

3. See the statutes of the several states.

4. *Le Page v. Porée*, 3 Rob. (La.) 439.

5. *Trimble v. Vandegrift*, 7 Houst. (Del.) 451.

6. *Nashville Trust Co. v. Weaver*, 102 Tenn. 66.

7. *Feige v. Burt*, 118 Mich. 243, 74 Am. St. Rep. 390.

8. *Weber v. Bullock*, 19 Colo. 214.

9. *Foster v. Potter*, 37 Mo. 525.

10. *State v. Jeffersonville First Nat. Bank*, 89 Ind. 302.

11. *Braden's Estate*, 165 Pa. St. 184.

12. *Smith v. Pilot Min. Co.*, 47 Mo. App. 409.

13. *Daniel v. Gold Hill Min. Co.*, 28 Wash. 411.

14. See the title EXECUTIONS AGAINST PROPERTY, 8 ENCYC. OF PL. AND PR. 549.

15. *Stamford Bank v. Ferris*, 17 Conn. 259; *Wells v. Price*, (Idaho 1899) 56 Pac. Rep. 266; *Benson v. Smith*, 42 Me. 415, 66 Am. Dec. 285; *Feige v. Burt*, 118 Mich. 243, 74 Am. St. Rep. 390; *James v. Pontiac, etc., Plank Road Co.*, 8 Mich. 91; *Eby v. Guest*, 94 Pa. St. 160. Compare *Mooar v. Walker*, 46 Iowa 164.

to be given to some designated officer of the corporation.¹ Where this is the case levies² and sales without the statutory notice,³ or with a notice which fails to state the precise number of shares to be sold,⁴ are void.

(4) *Sale*. — If the provisions of the statute have not been substantially complied with a sale made thereunder is unauthorized and void.⁵ Thus, sales not in accordance with the advertisement,⁶ or at a time of day other than that prescribed,⁷ are invalid. The shares may be sold in bulk instead of separately.⁸

2. *Attachment*. — The attachment of the legal interest in shares of stock is allowed by statute in some jurisdictions where the shares are those of corporations to which charters in the state have been granted. This question has been treated elsewhere,⁹ as have also the effect of attachment on dividends subsequently declared¹⁰ and the priority as between attachment and alienation of stock.¹¹

3. *Garnishment*. — The question of the garnishment of stock in the hands of third persons¹² and the power to seize by garnishment the interest of a stockholder in the corporation have been discussed elsewhere in this work.¹³

VII. LIEN OF CORPORATION ON SHARES — 1. *Right to Lien* — *a*. **AT COMMON LAW**. — In the absence of a statute or charter provision or contract authorizing it a corporation is not entitled to a lien on shares of its stock owned by one indebted to it.¹⁴

1. *Method of Levy*. — See the title EXECUTIONS AGAINST PROPERTY, 8 ENCYC. OF PL. AND PR. 549. See also *Abels v. Planters'*, etc., Ins. Co., 92 Ala. 382; *Princeton Bank v. Crozer*, 22 N. J. L. 383, 53 Am. Dec. 254; *Wagner v. Marple*, 10 Tex. Civ. App. 505.

2. *Commercial Nat. Bank v. Farmers'*, etc., Nat. Bank, 82 Iowa 192.

3. *Voorhis v. Terhune*, 50 N. J. L. 147, 7 Am. St. Rep. 781; *Princeton Bank v. Crozer*, 22 N. J. L. 383, 53 Am. Dec. 254.

4. *Blair v. Compton*, 33 Mich. 443; *Keating v. J. Stone*, etc., *Live Stock Co.*, 83 Tex. 467, 29 Am. St. Rep. 670.

5. *Blair v. Compton*, 33 Mich. 414.

6. *Howe v. Starkweather*, 17 Mass. 240; *Titcomb v. Union Marine*, etc., Ins. Co., 8 Mass. 326. See also the title SHERIFFS' SALES, 20 ENCYC. OF PL. AND PR. 205.

7. *Carrick v. Myers*, 14 Barb. (N. Y.) 9.

Sale at Night Void. — *McNaughton v. McLean*, 73 Mich. 250.

8. *Morris v. Connecticut*, etc., *Rivers R. Co.*, 2 Montreal Q. B. 303.

9. See the title ATTACHMENT, vol. 3, p. 211. See also *Pinney v. Nevills*, 86 Fed. Rep. 97; *Sowles v. National Union Bank*, 82 Fed. Rep. 696; *Kohler v. Agassiz*, 99 Cal. 9; *New Jersey Sheep*, etc., *Co. v. Traders' Deposit Bank*, 104 Ky. 90; *Martin v. Mobile*, etc., *R. Co.*, 7 Bush (Ky.) 116; *Caffery v. Choctaw Coal*, etc., *Co.*, 95 Mo. App. 174; *Simpson v. Jersey City Contracting Co.*, 47 N. Y. App. Div. 17, 165 N. Y. 193; *Childs v. Digby*, 24 Pa. St. 23; *Christmas v. Biddle*, 13 Pa. St. 222.

In *Tennessee*, the compliance by a foreign corporation with a statute requiring it to file its articles with the secretary of state sufficiently renders it a domestic corporation to authorize the attachment of its stock. *Young v. South Tredegar Iron Co.*, 85 Tenn. 189, 4 Am. St. Rep. 752. Compare *Moore v. Gennett*, 2 Tenn. Ch. 375.

Attachment of Shares of Foreign Corporations under Missouri Statute. — *Smith v. Pilot Min. Co.*, 47 Mo. App. 409.

10. See the title ATTACHMENT, vol. 3, p. 211.

11. See the title ATTACHMENT, vol. 3, p. 229. See also *infra*, this title, *Issuance of Certificate, Transfer, and Registration*, and see *Ditney v. Hillsboro First Nat. Bank*, 112 Ala. 391; *Cates v. Baxter*, 97 Tenn. 443.

12. See the title GARNISHMENT, vol. 14, pp. 788, 789. See also *O. L. Packard Machinery Co. v. Laev*, 100 Wis. 644.

13. See the title GARNISHMENT, vol. 14, p. 796. See also *Farmers'*, etc., *Nat. Bank v. Mosher*, 63 Neb. 130.

14. *Right to Lien Dependent on Statute, Charter, or Contract* — *Alabama*. — *Mobile Mut. Ins. Co. v. Cullom*, 49 Ala. 558; *Birmingham Trust*, etc., *Co. v. Louisiana Nat. Bank*, 99 Ala. 379.

California. — *People v. Crockett*, 9 Cal. 113.

Connecticut. — *Vansands v. Middlesex County Bank*, 26 Conn. 144.

Iowa. — *Farmers'*, etc., *Bank v. Wasson*, 48 Iowa 336.

Kentucky. — *Fitzhugh v. Shepherdsville Bank*, 3 T. B. Mon. (Ky.) 126, 16 Am. Dec. 90.

Maryland. — *Gemmell v. Davis*, 75 Md. 546, 32 Am. St. Rep. 412.

Massachusetts. — *Massachusetts Iron Co. v. Hooper*, 7 Cush. (Mass.) 183. See also *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90, 19 Am. Dec. 306.

Mississippi. — *Holly Springs Bank v. Pinson*, 58 Miss. 421, 38 Am. Rep. 330.

Missouri. — *Atchison County Bank v. Durfee*, 118 Mo. 431, 40 Am. St. Rep. 396; *Brinkerhoff-Farris Trust*, etc., *Co. v. Home Lumber Co.*, 118 Mo. 447.

Nebraska. — *Williams v. Lowe*, 4 Neb. 382.

New York. — *Driscoll v. West-Bradley*, etc., *Mfg. Co.*, 59 N. Y. 96. See also *Bates v. New York Ins. Co.*, 3 Johns. Cas. (N. Y.) 238.

North Carolina. — *Boyd v. Redd*, 120 N. Car. 335, 58 Am. St. Rep. 792; *Heart v. State Bank*, 2 Dev. Eq. (7 N. Car.) 111.

Ohio. — *Stafford v. Produce Exch. Banking Co.*, 8 Ohio Cir. Dec. 483.

Pennsylvania. — *Steamship Dock Co. v.*

b. UNDER STATUTES AND CHARTERS — (1) *In General*. — There is, however, much of equity and justice in such a lien, and the legislatures in many jurisdictions have, either by a general law applicable to all corporations or by a provision in the charter of particular corporations, provided for such lien in favor of the corporation. Such lien is limited in operation and extent by the terms of the statute or charter, and can arise and be enforced only in the event and under the facts provided therein.¹ When a lien has been so declared, the courts in enforcing it have regarded it as intended for the security of the corporation.² The right of the corporation to assert such a lien is not affected by the fact that the organization of the corporation is defective.³ Where such provisions exist the right to a lien comes into existence simultaneously with the creation of the indebtedness.⁴

(2) *What Language Sufficient to Create Lien*. — In determining whether or not the language used in framing a statute or charter provision creates a lien in favor of the corporation the general rules for ascertaining the legislative intent as applied to the construction of statutes are resorted to.⁵ Statute or charter provisions that shares shall be transferable only on the books of the corporation and that no shareholder shall be permitted to transfer so long as he is indebted to the corporation are the usual means adopted.⁶ In some instances the statutes specifically declare that the corporation shall have a lien for any indebtedness owing to it by a shareholder.⁷ A statute providing that the board of directors may, at its option, prohibit the transfer of the shares of a stockholder indebted to the company does not of itself give a lien to the corporation. Until such option is exercised, no lien is created.⁸

(3) *Corporation May Assert Lien in Another State*. — Where a corporation is sued in a state other than that under whose laws it is organized, it may assert a lien on shares of stock owned by one indebted to it, given by the laws of the state under which it was incorporated.⁹

(4) *Effect of Repeal of Statute*. — The repeal of a statute giving a lien to the corporation on shares owned by one indebted to it does not deprive the corporation of its lien for an indebtedness incurred by the shareholder prior to

Heron, 52 Pa. St. 280; Merchants Bank v. Snouse, 102 Pa. St. 488.

Tennessee. — Ingles Land Co. v. Knoxville F. Ins. Co., (Tenn. Ch. 1899) 53 S. W. Rep. 1111. *Washington*. — Dearborn v. Washington Sav. Bank, 18 Wash. 8.

See also Hagar v. Union Nat. Bank, 63 Me. 509.

1. Birmingham Trust, etc., Co. v. Louisiana Nat. Bank, 99 Ala. 379. See also statutes of various states and notes *infra*.

Statute and Charter Provisions Giving Lien Strictly Construed. — Boyd v. Redd, 120 N. Car. 335, 58 Am. St. Rep. 792; Presbyterian Congregation v. Carlisle Bank, 5 Pa. St. 345.

2. **Lien for Benefit of Corporation.** — Mobile Mut. Ins. Co. v. Cullom, 49 Ala. 558.

3. **Defective Organization Does Not Preclude Lien.** — Boyd v. Redd, 120 N. Car. 335, 58 Am. St. Rep. 792.

4. **Creation of Indebtedness Gives Lien.** — Platt v. Birmingham Axle Co., 41 Conn. 255.

5. **Statute Held Not to Give Right to Lien.** — A statute providing that "except as against the claims of the corporation, a transfer of stock does not require a transfer on the books of the company," does not give the corporation a lien for debts owing by a stockholder to it; such provision is designed for the protection of the corporation in the matter of paying dividends and determining who are authorized to vote the shares. Buena Vista Loan, etc., Bank v. Grier,

114 Ga. 398. See generally the title STATUTES, *post*.

6. **Prohibition of Transfer While Indebted Creates Lien** — *England*. — Africa Bank v. Salisbury Gold Min. Co., (1892) A. C. 281.

United States. — *In re Peebles*, 2 Hughes (U. S.) 394; Burford v. Crandell, 2 Cranch (U. S.) 86.

Kentucky. — Kenton Ins. Co. v. Bowman, 84 Ky. 430.

Maryland. — Farmers Bank v. Case, 2 Bland (Md.) 394.

Michigan. — Citizens State Bank v. Kalamazoo County Bank, 111 Mich. 313.

New York. — Arnold v. Suffolk Bank, 27 Barb. (N. Y.) 424.

Pennsylvania. — Sproul v. Standard Plate Glass Co., 201 Pa. St. 103.

7. **Lien Specifically Declared.** — Hammond v. Hastings, 134 U. S. 401; Birmingham Trust, etc., Co. v. Louisiana Nat. Bank, 99 Ala. 379; Platt v. Birmingham Axle Co., 41 Conn. 255; Hartford First Nat. Bank v. Hartford L., etc., Ins. Co., 45 Conn. 22.

Right to Lien under Statute Not Affected by Recitals of Certificate. — Hartford First Nat. Bank v. Hartford L., etc., Ins. Co., 45 Conn. 22.

8. Perrine v. Firemens Ins. Co., 22 Ala. 575.

9. **Corporation May Assert Lien in Another State.** — Bishop v. Globe Co., 135 Mass. 132.

Presumption as to Knowledge of Laws of State Where Corporation Organized. — Bishop v.

the repeal, in the absence of language clearly indicating that the statute is to have a retrospective operation,¹ and though it does not save vested rights.²

(5) *Notice to Third Persons.* — Where the right of the corporation to a lien is given by statute or charter all persons are presumed to have notice of the right and take a transfer of a debtor's stock subject to the lien.³

c. UNDER CONTRACTS — (1) *In General.* — The decisions, in discussing the right to a lien, frequently assert that it may be created by a by-law⁴ or by usage⁵ or contract.⁶ It is to be observed, however, that the first two have that effect merely because they constitute terms of an agreement to which the shareholder is deemed to have assented.⁷

(2) *By Express Contract.* — It is competent for a shareholder and the corporation by express contract to stipulate that the latter shall have a lien on the shares of the former to secure the payment of any indebtedness owing by him.⁸

Recitals of Certificate as Constituting Agreement. — Where a stock certificate recites that no transfer of the stock described therein will be made on the books of the corporation until after the payment of all indebtedness due to the corporation, the subsequent contracting of an indebtedness by one who has received and retained such certificate without objection, without anything to negative the idea that the condition was binding, constitutes a contract for a lien in favor of the corporation.⁹ The corporation can assert a lien so created against transferees other than such as are *bona fide* transferees without notice.¹⁰

Recitals of Certificate as Notice. — It has been held that where the certificate contains such recitals, a purchaser of the certificate will be deemed to have notice of the contract whether created by a stipulation in the certificate or by a by-law.¹¹

Globe Co., 135 Mass. 132. See also Hammond v. Hastings, 134 U. S. 401.

1. **Repeal of Statute Does Not Affect Vested Lien.** — Sproul v. Standard Plate Glass Co., 201 Pa. St. 103.

2. The fact that the statute in force after the repeal provides that transfers may be made to *bona fide* purchasers without entry on the stock books does not give to a transferee of one who was indebted to the corporation before the repeal a right superior to that of the corporation. H. W. Wright Lumber Co. v. Hixon, 105 Wis. 153.

3. **Statute or Charter Provision Notice to All Persons** — *United States.* — Union Bank v. Laird, 2 Wheat. (U. S.) 390; Hammond v. Hastings, 134 U. S. 401; Curtice v. Crawford County Bank, 110 Fed. Rep. 830.

Arkansas. — Springfield Wagon Co. v. Batesville Bank, 68 Ark. 284; Oliphint v. Bank of Commerce, 60 Ark. 198.

Maryland. — Farmers Bank v. Iglehart, 6 Gill (Md.) 50.

Michigan. — Oakland County Sav. Bank v. Carson City State Bank, 113 Mich. 284, 67 Am. St. Rep. 463.

Minnesota. — Dorr v. Life Ins. Clearing Co., 71 Minn. 38, 70 Am. St. Rep. 309.

Mississippi. — Holly Springs Bank v. Pinson, 58 Miss. 421, 38 Am. Rep. 330.

New York. — Mohawk Nat. Bank v. Schenectady Bank, 78 Hun (N. Y.) 90, affirmed 151 N. Y. 665.

Virginia. — Bohmer v. City Bank, 77 Va. 445.

Wisconsin. — Williamson v. State, 74 Wis. 263.

4. **By-law.** — Holly Springs Bank v. Pinson, 58 Miss. 421, 38 Am. Rep. 330,

5. **Usage.** — Gemmell v. Davis, 75 Md. 546, 32 Am. St. Rep. 412.

6. **Contract.** — Lankershim Ranch Land, etc., Co. v. Herberger, 82 Cal. 600.

7. **By-laws Give Lien by Virtue of Contract.** — "By-laws of private corporations are not in the nature of legislative enactments, so far as third persons are concerned. They are mere regulations of the corporation for the control and management of its own affairs. They are self-imposed rules, resulting from an agreement or contract between the corporation and its members to conduct the corporate business in a particular way." Holly Springs Bank v. Pinson, 58 Miss. 421, 38 Am. Rep. 330.

8. **Express Contract.** — Lankershim Ranch Land, etc., Co. v. Herberger, 82 Cal. 600; Buckmaster v. Consumers Ice Co., 5 Daly (N. Y.) 313.

9. **Recitals of Certificate.** — Jennings v. California Bank, 79 Cal. 323, 12 Am. St. Rep. 145; Hovey's Estate, 198 Pa. St. 385; Stafford v. Produce Exch. Barking Co., 8 Ohio Cir. Dec. 483.

10. **Can Be Asserted Against Personal Representative of Debtor Shareholder.** — Hovey's Estate, 198 Pa. St. 385.

Assignee for Benefit of Creditors Takes Subject to Lien. — Vansands v. Middlesex County Bank, 26 Conn. 144.

Transferee with Notice of Contract Takes Subject to Lien. — Morrison-Wentworth Bank v. Kerdolff, 75 Mo. App. 297; Stafford v. Produce Exch. Banking Co., 8 Ohio Cir. Dec. 483.

11. **Recital of Certificate as Notice.** — Jennings v. California Bank, 79 Cal. 323, 12 Am. St. Rep. 145; Buffalo German Ins. Co. v. Buffalo Third Nat. Bank, 29 N. Y. App. Div. 137; Stafford v.

(3) *By-laws* — (a) *Power to Enact*. — The power of a corporation to pass a valid by-law providing that it shall have a lien on the shares of one indebted to it has been treated elsewhere in this work.¹

(b) *Effect of Valid By-law*. — As between the corporation and a shareholder it is clear that a shareholder contracting an indebtedness to the corporation with knowledge of a by-law giving a lien to the corporation (and knowledge thereof will be presumed)² thereby contracts that the corporation shall have a lien on his stock to secure the payment of such indebtedness.³ It is likewise clear that the corporation can assert such lien as against a transferee of the debtor shareholder who is not a *bona fide* purchaser.⁴ A valid by-law is as binding on the members of the corporation and others having notice of it as it would be were it a public law.⁵

As to Bona Fide Transferee. — Where the right to a lien is given by a statute or charter provision all persons are bound to take notice thereof, but a by-law has no extracorporate force and is binding only on persons other than stockholders who have actual notice, or who deal with the corporation under such circumstances that they are chargeable with notice of it. It follows that the corporation cannot assert a lien given by a by-law against a *bona fide* transferee of the debtor's shares.⁶

(c) *Unauthorized By-law Giving Lien*. — A by-law, though unauthorized either by charter or statute may be effectual to give a lien to the corporation on shares

Produce Exch. Banking Co., 8 Ohio Cir. Dec. 483.

Where a certificate recites that the person named therein is the owner of a certain number of shares "subject to the conditions and stipulations contained in the articles of association," an assignee thereof is chargeable with notice of a lien given by the articles of association. *Gibbs v. Long Island Bank*, 83 Hun (N. Y.) 92, affirmed 151 N. Y. 657.

1. *Power to Enact By-law*. — See the title BY-LAWS, vol. 5, pp. 88 *et seq.*, 93.

National Banks. — As to the power of national banks to enact and enforce such by-laws, see the title NATIONAL BANKS, vol. 21, p. 335.

2. *Knowledge of By-law Presumed*. — See the title BY-LAWS, vol. 5, p. 100.

3. *With Knowledge of By-law*. — *Pendergast v. Stockton Bank*, 2 Sawy. (U. S.) 108; *In re Dunkerson*, 4 Biss. (U. S.) 227; *Farmers', etc., Bank v. Haney*, 87 Iowa 101; *John C. Grafflin Co. v. Woodside*, 87 Md. 146; *Tuttle v. Walton*, 1 Ga. 43; *Costello v. Portsmouth Brewing Co.*, 69 N. H. 405.

4. *Lien Valid Against Transferee Not Bona Fide Purchaser*. — *Birmingham Trust, etc., Co. v. Louisiana Nat. Bank*, 99 Ala. 379; *Bronson Electric Co. v. Rheubottom*, 122 Mich. 608; *Morrison-Wentworth Bank v. Kerdolff*, 75 Mo. App. 297; *Young v. Vough*, 23 N. J. Eq. 325.

Assignee for Benefit of Creditors. — The corporation can assert a lien as against an assignee for the benefit of creditors. *In re Dunkerson*, 4 Biss. (U. S.) 227; *John C. Grafflin Co. v. Woodside*, 87 Md. 146.

In Knight v. Old Nat. Bank, 3 Cliff. (U. S.) 429, it was held that where the articles of association authorized the directors to make by-laws prohibiting the transfer of stock owned by any stockholder indebted to the association, a transferee was bound to take notice of a by-law enacted in pursuance of such authority. It is to be observed, however, that the transferee against whom the court permitted the lien to be

asserted was an assignee for the benefit of creditors, and it would seem that the decision could have been supported on the ground that the assignee took merely such title as his assignor had.

Attaching Creditor with Notice. — A lien so created is superior to the lien of an attaching creditor of the shareholder who has notice of the claim of lien by the corporation. *Farmers', etc., Bank v. Haney*, 87 Iowa 101.

Execution Purchaser. — An execution purchaser of the debtor shareholder's shares, under an execution against the shareholder, takes subject to the lien in favor of the corporation, since he takes no other or greater right to the stock than the debtor has. *Tuttle v. Walton*, 1 Ga. 43; *Geyer v. Western Ins. Co.*, 3 Pittsb. (Pa.) 41.

If an execution purchaser wishes to free the stock from the lien by paying the shareholder's indebtedness, he must exercise reasonable diligence in so doing; he cannot, after lapse of a long time and after the stock has greatly increased in value, claim such right. *Newberry v. Detroit, etc., Iron Mfg. Co.*, 17 Mich. 141.

5. *Geyer v. Western Ins. Co.*, 3 Pittsb. (Pa.) 41.

6. *Lien Cannot Be Asserted Against Bona Fide Transferee*. — *John C. Grafflin Co. v. Woodside*, 87 Md. 146; *Just v. State Sav. Bank*, (Mich. 1903) 94 N. W. Rep. 200; *Holly Springs Bank v. Pinson*, 58 Miss. 421, 38 Am. Rep. 330; *Butler v. Montgomery Grain Co.*, 85 Mo. App. 50; *Brinkerhoff-Farris Trust, etc., Co. v. Home Lumber Co.*, 118 Mo. 447; *Drexel v. Long Branch Gas Co.*, 3 N. J. L. J. 250. See also *People v. Crockett*, 9 Cal. 113; *Nesmith v. Washington Bank*, 6 Pick. (Mass.) 324; *Bronson Electric Co. v. Rheubottom*, 122 Mich. 608; *Stafford v. Produce Exch. Banking Co.*, 8 Ohio Cir. Dec. 483; *Steamship Dock Co. v. Heron*, 52 Pa. St. 280. Compare *McCready v. Rumsev*, 6 Duer (N. Y.) 574; *Lockwood v. Mechanics Nat. Bank*, 9 R. I. 308, 11 Am. Rep. 253. See the title BY-LAWS, vol. 5, p. 101.

owned by one indebted to it.¹ Thus, where a shareholder participates in the enactment of an unauthorized by-law, such conduct on his part constitutes an agreement with the corporation that his shares shall be held as security for any indebtedness to the corporation which he may incur, and a transferee of the shareholder who has notice thereof takes subject to the lien.² A *bona fide* transferee without notice, not being affected by a valid by-law, is of course not affected by one not authorized.³

(d) **Prohibited By-law Giving Lien.** — If, however, a by-law giving a lien to the corporation is not merely unauthorized but is one prohibited by statute, as where the statute prohibits the corporation from making a loan on the security of its own shares, the by-law is void and a transferee takes free of the right of the corporation to assert a lien.⁴

(e) **Enactment After Transfer and Before Recording.** — A by-law passed by a corporation subsequent to an assignment of his shares by a debtor, but before a transfer has been made on the books of the corporation, cannot have a retrospective operation so as to give to the corporation a lien on the stock in the hands of the transferee.⁵

(f) **What Constitutes Notice of Existence.** — If the recitals of the certificate transferred are such as to put the transferee upon inquiry, he will be chargeable with knowledge of the existence of a by-law which such inquiry would have disclosed.⁶ A recital in such a certificate that a designated person is the owner of shares "subject to the by-laws and articles of incorporation" is not sufficient of itself to charge a transferee with notice of such a by-law.⁷ Nor is a charter provision authorizing the enactment of a by-law regulating the mode and manner of transferring the stock notice of the existence of a by-law giving a lien.⁸ Nor is the fact that the transferee sought to be charged is a corporation, itself having such a by-law, sufficient to charge it with notice.⁹ Compliance by the corporation with statutory directions as to publicity may be sufficient to charge third persons with notice of the by-law.¹⁰

(4) **Usage.** — One who holds shares of stock in a corporation with knowledge that it is the invariable custom of the corporation to refuse to transfer shares unless the transferor pays all his indebtedness to the corporation impliedly contracts that the corporation shall have a lien on his shares for advances made to him. The corporation can assert the lien as against a transferee who is not a *bona fide* purchaser, such as an assignee for the benefit of creditors.¹¹

1. Thus, one who with actual knowledge of such a by-law incurs an indebtedness to the corporation thereby contracts that the corporation shall have a lien on his stock for the amount thereof. *Des Moines Nat. Bank v. Warren County Bank*, 97 Iowa 204.

2. **Transferee with Notice Takes Subject to Lien.** — *State Sav. Assoc. v. Nixon-Jones Printing Co.*, 25 Mo. App. 642; *Morrison-Wentworth Bank v. Kerdolff*, 75 Mo. App. 297; *Atchison County Bank v. Durfee*, 118 Mo. 431, 40 Am. St. Rep. 396.

3. **Bona Fide Transferee Not Affected.** — *Anglo-Californian Bank v. Grangers Bank*, 63 Cal. 359; *Carroll v. Mullanphy Sav. Bank*, 8 Mo. App. 249; *Morrison-Wentworth Bank v. Kerdolff*, 75 Mo. App. 297; *Driscoll v. West Bradley, etc., Mfg. Co.*, 59 N. Y. 96; *Lee v. Citizens Nat. Bank*, 2 Cinc. Super. Ct. 298. See also *Des Moines Nat. Bank v. Warren County Bank*, 97 Iowa 204.

4. **Prohibited By-law.** — *Nicollet Nat. Bank v. City Bank*, 38 Minn. 85, 8 Am. St. Rep. 643. See also the title NATIONAL BANKS. vol. 21, p. 335.

5. *People v. Crockett*, 9 Cal. 113.

6. **Recitals of Certificate as Constructive Notice** — *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 149; *State Sav. Assoc. v. Nixon-Jones Printing Co.*, 25 Mo. App. 642. See the title NOTICE, vol. 21, p. 584.

7. *Des Moines Nat. Bank v. Warren County Bank*, 97 Iowa 204.

8. *Holly Springs Bank v. Pinson*, 58 Miss. 421, 38 Am. Rep. 330.

9. *Anglo-Californian Bank v. Grangers Bank*, 63 Cal. 359.

10. **Posting in Place of Business Pursuant to Statute.** — Where the statute provides that a copy of the by-laws of the corporation must be posted in the principal place of doing business and be subject to public inspection, a transferee of stock is chargeable with constructive notice of a by-law giving to the corporation a lien on the stock of one indebted to it, where the by-law is posted in accordance with the requirements of the statute. *Des Moines Nat. Bank v. Warren County Bank*, 97 Iowa 204.

11. **Lien May Be Created by Usage.** — *Morgan v. Bank of North America*, 8 S. & R. (Pa.) 73, 11 Am. Dec. 575. See also *Gemmell v. Davis*, 75 Md. 546, 32 Am. St. Rep. 412.

2. To What Shares Lien Attaches — *a.* **SHARES HELD IN TRUST BY DEBTOR.** — A corporation entitled to a lien on shares owned by one indebted to it cannot assert such lien against shares held in trust by the debtor, where it has actual or constructive notice of such trust.¹

b. **SHARES HELD IN TRUST FOR DEBTOR.** — The lien may be asserted against stock of which the debtor is the beneficial owner, though the record title be in another. The corporation cannot assert the lien against a *bona fide* purchaser of the shares from the holder of the legal title, but may as against such persons as merely succeed to the title of the registered holder.²

c. **WHERE DEBTOR'S TITLE TO STOCK ONE IN REMAINDER.** — Where the articles of incorporation give to the corporation a lien on charges owned by one indebted to it, it can assert the lien against a transferee of a debtor who held as a legatee of a remainder interest, though the debt was contracted and the assignment of the shares was made before his title in possession vested.³

3. For What Debts Lien Enforceable — *a.* **AS DEPENDENT ON CHARACTER OF DEBT.** — A by-law, or charter, or statute provision prohibiting the transfer of shares owned by one indebted to the corporation does not limit the right of the corporation to assert a lien to those instances where the debt is contracted on account of such shares, but extends to all indebtedness.⁴ It includes a debt owing for an unpaid stock subscription,⁵ but only in case a call has been made for the payment of an instalment.⁶ It attaches for a debt created by an overdraft of a depositor's account with a bank,⁷ as well as a claim against the shareholder for a tort where the amount of the damage has been liquidated.⁸ The fact that the officers of the corporation have been negligent in permitting another officer and shareholder to become a defaulter does not preclude the corporation from asserting a lien on the stock owned by the defaulter for the amount of his defalcations.⁹ The corporation is entitled to a lien only for debts contracted directly with the shareholder; it cannot assert a lien for a claim purchased from a third person,¹⁰ especially where it purchases such claim for the purpose of securing to the person from whom it purchases it the benefit of the lien and giving to the latter an advantage over other creditors of the shareholder which such creditor would not otherwise have had.¹¹ Likewise, the purchase of a claim against a shareholder for the purpose of subjecting his shares to the payment thereof and thus relieving the corporation of an insolvent or undesirable member is an abuse of its powers and will not be effectuated.¹²

When Shareholder Indorser or Surety. — Such a provision applies and affords to the corporation a lien for debts owing by the shareholder as surety or indorser as

1. Shares Held in Trust by Debtor. — *Mechanic's Bank v. Seton*, 1 Pet. (U. S.) 299. Compare *New London, etc., Bank v. Brocklebank*, 21 Ch. D. 302, 51 L. J. Ch. 711.

2. Stock Held in Trust for Debtor. — *Planters, etc., Mut. Ins. Co. v. Selma Sav. Bank*, 63 Ala. 585; *Stebbins v. Phenix F. Ins. Co.*, 3 Paige (N. Y.) 350.

Where Cestui Que Trust Prohibited from Holding Stock. — *Lanier Lumber Co. v. Rees*, 103 Ala. 622, 49 Am. St. Rep. 57.

3. Remainder Interest in Stock Held by Debtor. — *Farmers Bank v. Iglehart*, 6 Gill (Md.) 50.

Invalid Stock. — *Mt. Holly Paper Co.'s Appeal*, 99 Pa. St. 513.

4. Lien Not Limited to Debts for Stock. — *Ex p. Stringer*, 9 Q. B. D. 436; *Rogers v. Huntingdon Bank*, 12 S. & R. (Pa.) 79; *Mobile Mut. Ins. Co.*, 1 Cullom, 49 Ala. 558; *Winans v. Oil, etc., Co.*, 7 Lark. Leg. N. (Pa.) 9.

5. Unpaid Stock Subscription Debt for Which Lien Given. — *In re Bachman*, 12 Nat. Bankr. Reg. 223.

6. *Hall v. U. S. Insurance Co.*, 5 Gill (Md.) 484; *Kahn v. St. Joseph Bank*, 70 Mo. 262.

7. Overdraft of Depositor's Account. — *Reese v. Bank of Commerce*, 14 Md. 271, 74 Am. Dec. 536, holding that where the charter of a corporation gives a lien for "all debts actually due and payable," an overdraft by check creates a debt to the bank which is due and payable immediately.

8. *Sproul v. Standard Plate Glass Co.*, 201 Pa. St. 103. Compare *Hotchkiss, etc., Co. v. Union Nat. Bank*, (C. C. A.) 68 Fed. Rep. 76.

9. Negligence of Corporation. — *National Bank v. Rochester Tumbler Co.*, 172 Pa. St. 614.

10. *Boyd v. Redd*, 120 N. Car. 335, 58 Am. St. Rep. 792.

11. Purchase of Claim to Give Creditor Advantage. — *Kentucky Bank v. Bonnie*, 102 Ky. 343; *White's Bank v. Toledo F. & M. Ins. Co.*, 12 Ohio St. 601.

12. *White's Bank v. Toledo F. & M. Ins. Co.*, 12 Ohio St. 601.

well as those in which he is liable as principal.¹ The corporation can assert its lien even before it has attempted to collect the debt from the principal debtor.²

Debt of Copartnership of Which Shareholder Is Member. — Where a lien for an indebtedness owing by a shareholder is given to a corporation, it is entitled to a lien for a debt owing by a copartnership of which the shareholder is a member.³

b. AS DEPENDENT ON TIME OF CONTRACTING — (1) *Debts Contracted Before Acquisition of Shares.* — Under a statute giving a lien to the corporation, it has a lien for a debt contracted before the acquisition of the shares. On the acquisition of the shares the lien for the prior indebtedness attaches.⁴

(2) *Debts Contracted Subsequent to Transfer but Before Notice.* — Where, by valid provision, a lien is given to the corporation, an assignee or pledgee of a certificate takes subject to a lien for a debt to the corporation incurred by the transferor subsequent to the assignment or pledge and before notice thereof is given to the corporation,⁵ especially where the statute or charter provides that no transfer shall be valid until made on the books of the corporation.⁶ The corporation cannot assert a lien for a debt contracted subsequent to notice of a pledge or transfer of the shares,⁷ even though the transfer is made in violation of a charter provision prohibiting the transfer of shares for a specified length of time after organization.⁸ Nor can the corporation assert a lien for a debt contracted after it has notice that the shareholder has agreed to transfer his shares and has been paid therefor.⁹

Burden of Proving Notice. — In a contest by a pledgee or transferee asserting title to the stock as against the claim of the corporation to a lien for an indebtedness incurred by the pledgor or transferor subsequent to the pledge or transfer, the burden is on the pledgee or transferee to show notice of the transfer or pledge to the corporation at the time the indebtedness was created.¹⁰

c. DEBTS NOT DUE. — Where the statutes, charter, or by-laws of a corporation prohibit the transfer of shares owned by one "indebted" to it, the corporation is entitled to a lien for debts contracted, though not due and payable

1. **Where Shareholder Liable as Surety or Indorser.** — *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 149. See also *Mobile Mut. Ins. Co. v. Cullom*, 49 Ala. 558.

2. *Kentucky Bank v. Bonnie*, 102 Ky. 343.

3. **Debt of Copartnership.** — *Matter of Bigelow*, 2 Ben. (U. S.) 469; *Cunningham v. Alabama L. Ins., etc., Co.*, 4 Ala. 652; *Mobile Mut. Ins. Co. v. Cullom*, 49 Ala. 558; *Citizens' State Bank v. Kalamazoo County Bank*, 111 Mich. 313; *Arnold v. Suffolk Bank*, 27 Barb. (N. Y.) 424; *Geyer v. Western Ins. Co.*, 3 Pittsb. (Pa.) 41; *Mechanics Bank v. Earp*, 4 Rawle (Pa.) 384.

4. **Debts Contracted Before Acquisition of Shares.** — *Schmidt v. Hennepin County Barrel Co.*, 35 Minn. 511.

5. **Debt Contracted Subsequent to Assignment but Before Notice.** — *Bradford Banking Co. v. Briggs*, 12 App. Cas. 39, reversing 31 Ch. D. 19, and overruling *Miles v. New Zealand Alford Estate Co.*, 32 Ch. D. 266; *Curtice v. Crawford County Bank*, 110 Fed. Rep. 830; *Birmingham Trust, etc., Co. v. Louisiana Nat. Bank*, 99 Ala. 379; *Jennings v. California Bank*, 79 Cal. 323, 12 Am. St. Rep. 145; *Platt v. Birmingham Axle Co.*, 41 Conn. 255; *State Sav. Assoc. v. Nixon-Jones Printing Co.*, 25 Mo. App. 642. See also *Mobile Mut. Ins. Co. v. Cullom*, 49 Ala. 558. *Contra*, *Pitot v. Johnson*, 33 La. Ann. 1286.

Contingent Liability Becoming Fixed Before Notice. — Such a provision creates a valid lien which may be asserted against the shares in the hands of an assignee of the stock, even where

the assigning shareholder is only under a contingent liability, if the assignee takes the stock with notice of the lien and gives no notice to the corporation of the transfer until the liability has become fixed. *Knight v. Old Nat. Bank*, 3 Cliff. (U. S.) 429.

6. *Michigan Trust Co. v. State Bank*, 111 Mich. 306; *Citizens' State Bank v. Kalamazoo County Bank*, 111 Mich. 313; *Leggett v. Sing Sing Bank*, 24 N. Y. 283.

7. **No Lien for Debts Contracted Subsequent to Notice.** — *Bradford Banking Co. v. Briggs*, 12 App. Cas. 29; *Curtice v. Crawford County Bank*, 110 Fed. Rep. 830; *Hotchkiss, etc., Co. v. Union Nat. Bank*, (C. C. A.) 68 Fed. Rep. 76; *Birmingham Trust, etc., Co. v. Louisiana Nat. Bank*, 99 Ala. 379; *Bank of America v. McNeil*, 10 Bush (Ky.) 54; *Just v. State Sav. Bank*, (Mich. 1903) 94 N. W. Rep. 200.

Debt Contracted Subsequent to Attachment. — Where by the terms of a valid by-law a corporation has a lien on the shares of stock owned by one indebted to it, it cannot assert a lien for advances made to the shareholder subsequent to an attachment of such shares by a third person. *Geyer v. Western Ins. Co.*, 3 Pittsb. (Pa.) 41.

8. *Nesmith v. Washington Bank*, 6 Pick. (Mass.) 324.

9. *Prince Invest. Co. v. St. Paul, etc., Land Co.*, 68 Minn. 121.

10. **Burden of Showing Notice.** — *Curtice v. Crawford County Bank*, 110 Fed. Rep. 830.

at the time a transfer is sought to be made, as well as for debts then due and payable.¹ A similar construction has been given where the transfer was prohibited unless the transferrer should previously discharge all debts "due" by him to the corporation.² In some instances the charter or statute provision limits the right to those instances where the debt is actually due and payable at the time the transfer is sought to be made.³

d. DEBTS BARRED BY STATUTE OF LIMITATIONS.—Where the corporation has a lien on shares owned by one indebted to it, it can assert the lien though its right of action on the debt for which the lien is claimed is barred by the statute of limitations.⁴

e. DEBTS CONTRACTED PRIOR TO ENACTMENT OF STATUTE OR BY-LAW.—A statute giving to the corporation a lien on shares owned by one indebted to it gives to the corporation a lien for a debt contracted before the enactment of the statute as against a transferee who takes by an assignment subsequent to its passage,⁵ or one who took the stock as a pledge prior to the enactment of the statute, where the corporation had no notice thereof until after the law went into effect and a statute in force at the time of the pledge provided that no transfer should be valid until recorded on the books of the company.⁶ A by-law passed by a corporation after the decease of a debtor shareholder is ineffectual to give a lien to the corporation as against other creditors of the decedent, his estate being insolvent, since on his death all creditors are entitled to a *pro rata* distribution of his assets.⁷

4. Enforcement of Lien.—In the absence of statute⁸ or contract authorizing it,⁹ a corporation has no power to sell stock on which it has a lien and apply the proceeds to the satisfaction of its indebtedness.¹⁰ The corporation can sue on its claim and sell the stock under an execution on the judgment so obtained, or it can, in a proper case, invoke the aid of a court of equity to work out a sale,¹¹ but equity has no jurisdiction of a bill brought solely for the purpose of foreclosing the lien and effecting a sale. If equity has jurisdiction for some other purpose, it may order a sale for the satisfaction of the lien.¹² Where a corporation has a lien on shares of its stock belonging to the estate of a decedent, the executor can maintain a bill to require the corporation to take steps to foreclose its lien, so that he can distribute the assets among those entitled thereto.¹³ But a surety on a shareholder's debt to the corporation cannot

1. Lien for Debts Not Due.—*In re* Cawley, 42 Ch. D. 209; *Downer v. Zanesville Bank*, Wright (Ohio) 477; *Pittsburgh, etc., R. Co. v. Clarke*, 29 Pa. St. 146; *Grant v. Mechanics Bank*, 15 S. & R. (Pa.) 140; *Sewell v. Lancaster Bank*, 17 S. & R. (Pa.) 285. See also *Conant v. Reed*, 1 Ohio St. 298. Compare *In re Stockton Malleable Iron Co.*, 2 Ch. D. 101.

2. In re London, etc., Banking Co., 34 Beav. 332; *Leggett v. Sing Sing Bank*, 24 N. Y. 283.

3. Reese v. Bank of Commerce, 14 Md. 271, 74 Am. Dec. 536, holding that where the transferee, at the time of making a demand for a transfer on the books of the corporation, fails to offer to pay the indebtedness then due to the corporation by the transferrer, the amount for which the corporation has a lien is augmented by an indebtedness subsequently maturing and before a transfer on the books is actually made.

4. Debt Barred by Statute of Limitations.—*Brent v. Washington Bank*, 10 Pet. (U. S.) 596; *Farmers Bank v. Iglehart*, 6 Gill (Md.) 50; *Geyer v. Western Ins. Co.*, 3 Pittsb. (Pa.) 41; *Sproul v. Standard Plate Glass Co.*, 201 Pa. St. 103.

5. Debts Contracted Before Enactment of Statute.—*Birmingham Trust, etc., Co. v. East Lake Land Co.*, 101 Ala. 304.

6. Hartford First Nat. Bank v. Hartford L., etc., Ins. Co., 45 Conn. 22.

7. By-law Passed After Death of Debtor Shareholder.—*Steamship Dock Co. v. Heron*, 52 Pa. St. 280.

8. Statute Authorizing Sale.—Code Ala. (1886), § 1674 (Civ. Code Ala., 1896, § 1268), declares a lien upon the shares of stockholders for any debt or liability incurred to the corporation by such stockholder and provides for the sale thereof. To enforce such a lien, *prima facie*, no action on the part of the directors is necessary. *Elliott v. Sibley*, 101 Ala. 344.

9. Contract Authorizing Sale.—*Costella v. Portsmouth Brewing Co.*, 69 N. H. 405.

10. No Power to Sell Shares.—*Aldine Mfg. Co. v. Phillips*, 118 Mich. 162, 74 Am. St. Rep. 380; *Tete v. Farmers', etc., Bank*, 4 Brews. (Pa.) 308. See also the title LIENS, vol. 19, p. 34. But see *Farmers Bank v. Case*, 2 Bland (Md.) 394.

11. Tete v. Farmer's, etc., Bank, 4 Brews. (Pa.) 308. See the title LIENS, vol. 19, p. 36.

12. Aldine Mfg. Co. v. Phillips, 118 Mich. 162, 74 Am. St. Rep. 380.

13. Requiring Corporation to Enforce Lien.—*Farmers Bank Case*, 2 Bland (Md.) 391.

maintain a bill to compel the corporation to enforce its lien as to the debt for which he is surety.¹ Nor can a corporation be required to appropriate a part of the shares on which it has a lien to the payment of its indebtedness and release the balance to the process of a levying creditor of the shareholder, though the value of the shares on which it has a lien is concededly greatly in excess of the amount of the shareholder's indebtedness.²

Subrogation of Surety of Debtor Shareholder to Lien. — Where one who is liable as surety on an indebtedness to a corporation owing by a shareholder, and for which the corporation has a lien, pays such indebtedness, he is entitled to subrogation to the corporation's lien.³

5. Waiver of Lien — *a.* IN GENERAL. — The corporation may, of course, waive its right to a lien on shares owned by one indebted to it.⁴ The right may be waived by express resolution of its board of directors to that effect,⁵ or by express contract,⁶ or by any conduct which indicates an intention of the parties that the right shall no longer be enforced.⁷

b. ACCEPTANCE OF ADDITIONAL SECURITY. — The mere acceptance of additional security by the corporation does not constitute a waiver of its lien,⁸ nor can a transferee of the debtor shareholder's share require the corporation to proceed first against such additional security.⁹

c. CONSENT TO TRANSFER. — Where a corporation having a lien consents to a transfer of the shares owned by its debtor it thereby waives its right to assert a lien against the shares transferred.¹⁰

6. Estoppel. — The corporation may, by the conduct or representations of its officers and agents, estop itself to assert a lien.¹¹

1. *Cross v. Phoenix Bank*, 1 R. I. 39.

2. **Corporation Not Bound to Release Part of Security.** — *Sewall v. Lancaster Bank*, 17 S. & R. (Pa.) 285.

3. **Subrogation of Surety.** — *Young v. Vough*, 23 N. J. Eq. 325; *Klopp v. Lebanon Bank*, 46 Pa. St. 88. See also *In re Morrison*, 10 Nat. Bankr. Reg. 105. And see the title SUBROGATION.

4. **Corporation May Waive Lien.** — *Hammond v. Hastings*, 134 U. S. 401; *St. Paul Nat. Bank v. Life Ins. Clearing Co.*, 71 Minn. 123; *Sproul v. Standard Plate Glass Co.*, 201 Pa. St. 103. See also *Dorr v. Life Ins. Clearing Co.*, 71 Minn. 38, 70 Am. St. Rep. 309.

5. **Waiver by Resolution of Board of Directors.** — *Hodges v. Planters Bank*, 7 Gill. & J. (Md.) 306.

6. **Waiver by Contract for Limited Period.** — *Bank of America v. McNeil*, 10 Bush (Ky.) 54.

An Express Waiver by an Officer of the corporation must be made by one having authority to do so. But if it is within the scope of his apparent duties, the corporation will be bound thereby. *Kenton Ins. Co. v. Bowman*, 84 Ky. 430. See also the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 21, p. 855.

7. **Conduct Incompatible with Assertion of Lien.** — *Africa Bank v. Salisbury Gold Min. Co.*, (1892) A. C. 281.

The fact that the corporation did not require the debtor to deposit his shares with the corporation is not a waiver of its lien. *Bohmer v. City Bank*, 77 Va. 445.

By-law Held Not to Be Waiver. — *Citizens' State Bank v. Kalamazoo County Bank*, 111 Mich. 313.

Recital of Certificate. — *Hammond v. Hastings*, 134 U. S. 401; *Reese v. Bank of Commerce*, 14 Md. 271, 74 Am. Dec. 536; *National Bank v. Rochester Tumbler Co.*, 172 Pa. St. 614.

8. **Acceptance of Additional Security No Waiver.** — *Union Bank v. Laird*, 2 Wheat. (U. S.) 390; *In re Peebles*, 2 Hughes (U. S.) 394; *Kenton Ins. Co. v. Bowman*, 84 Ky. 430; *German Nat. Bank v. Kentucky Trust Co.*, (Ky. 1897) 40 S. W. Rep. 458.

The fact that the shareholder's indebtedness is evidenced by a note indorsed by a third person as surety does not preclude the corporation from asserting a lien. *Downer v. Zanesville Bank, Wright (Ohio)* 477.

9. *Union Bank v. Laird*, 2 Wheat. (U. S.) 390.

10. **Consent to Transfer.** — *National Bank v. Watsonstown Bank*, 105 U. S. 217; *Hall v. U. S. Insurance Co.*, 5 Gill (Md.) 484; *Hill v. Pine River Bank*, 45 N. H. 300; *Downer v. Zanesville Bank, Wright (Ohio)* 477; *Sproul v. Standard Plate Glass Co.*, 201 Pa. St. 103.

Issuance of New Certificate to Debtor's Assignee for Benefit of Creditors. — *Dobbins v. Walton*, 37 Ga. 617, 95 Am. Dec. 371.

Issuance of New Certificate to Executor of Deceased Debtor. — *London, etc., Bank v. Aronstein*, (C. C. A.) 117 Fed. Rep. 601.

11. **Estoppel.** — *Oakland County Sav. Bank v. State Bank*, 113 Mich. 284, 67 Am. St. Rep. 463.

Failure to Disclose Lien. — *Des Moines L. & T. Co. v. Des Moines Nat. Bank*, 97 Iowa 668.

An Expression of Opinion by an officer of the corporation that it did not have a right to a lien, no intentional misrepresentation being imputable to him, does not estop the corporation to assert a lien. *Planters, etc., Mut. Ins. Co. v. Selma Sav. Bank*, 63 Ala. 585. See also the title ESTOPPEL, vol. 11, p. 425.

Mere Failure by the Corporation to Assert a Claim of Lien on the stock, at the time it was presented for transfer on the books of the company, by one to whom the debtor has transferred

VIII. ISSUANCE OF CERTIFICATE, TRANSFER, AND REGISTRATION —

1. **Issuance of Certificate** — *a.* SCOPE OF SECTION. — It is the purpose of this section to treat of the correlated rights and liabilities of a corporation and of persons to whom certificates of shares have been issued arising by reason of the issuance of such certificates. The nature and characteristics of certificates of stock, as well as questions concerning the issuance of stock as distinguished from the certificates representing the shares thereof, are treated elsewhere in this title.¹

b. WHAT SUFFICIENT ISSUANCE TO CONSTITUTE HOLDER STOCKHOLDER. — Where a certificate is filled up and signed by the proper officer, though not detached from the stock certificate book, and though the corporate seal be not affixed, it is sufficient issuance of the certificate to constitute the person to whom it is issued a stockholder, when such person has the custody of the certificate book and the power and right to detach it at any time.²

c. PLACE OF ISSUANCE. — Certificates may be issued by the proper officers of the corporation at places without the state under the laws of which the corporation is organized, if authorized by the charter or by-laws of the corporation.³

d. FORGED OR SPURIOUS CERTIFICATES. — Where an officer of a corporation having power to issue valid certificates, either by forging the name of some other officer of the corporation or having possession of certificates signed by such other officer, wrongfully issues a certificate which on its face appears to be genuine, but which as a matter of fact is spurious and illegal, a *bona fide* purchaser of such certificate is entitled to recognition as a shareholder if the corporation at the time had power to issue valid stock, and if it did not, then to be indemnified for the loss resulting from the wrongful acts of the corporation officer.⁴ The fact that the certificate is issued to one of the officers signing it is not of itself sufficient to charge an assignee with notice that it is not genuine.⁵ Nor does the fact that the innocent holder of a spurious

it is not a waiver of the lien nor does it estop the corporation from thereafter asserting such lien. *Hartford First Nat. Bank v. Hartford L., etc., Ins. Co., 45 Conn. 22.*

But where, by reason of the corporation's failure to assert its right to a lien, one to whom stock has been transferred as security relies on the apparent right which he has acquired and neglects by reason thereof to take other security until his debtor becomes insolvent, the corporation will be estopped to assert its lien. *National Bank v. Watsonstown Bank, 105 U. S. 217.*

To estop the corporation the representations must be made by one who has authority to make them. *Bishop v. Globe Co., 135 Mass. 132.* See also the title ESTOPPEL, vol. 11, p. 385.

1. See *supra*, this title, *Definition and Nature of Corporate Stock; Issue of Stock.*

2. **What Constitutes Sufficient Issuance.** — *Halstead v. Dodge, 51 N. Y. Super. Ct. 169.* See also *infra*, this title, *Who Are Stockholders.*

3. **Issuance of Certificate in Another State.** — *Courtright v. Deeds, 37 Iowa 503.*

4. **Corporation Liable for Spurious Stock Issued by Officers** — *England.* — *Shaw v. Port Philip, etc., Cold Min. Co., 13 Q. B. D. 103.*

Maryland. — *Tome v. Parkersburgh Branch R. Co., 39 Md. 36, 17 Am. Rep. 540.*

Massachusetts. — *Allen v. South Boston R. Co., 150 Mass. 200.*

New York. — *Titus v. Great Western Turnpike Road Co., 61 N. Y. 237; Fifth Ave. Bank v. Forty-second St., etc., Ferry R. Co., 137 N. Y.*

231, 33 Am. St. Rep. 712; Jarvis v. Manhattan Beach Co., 148 N. Y. 652, affirming 53 Hun (N. Y.) 362; New York, etc., R. Co. v. Schuyler, 34 N. Y. 30.

North Carolina. — *Havens v. Tarboro Bank, 132 N. Car. 214.*

Ohio. — *Cincinnati, etc., R. Co. v. Citizens' Nat. Bank, 56 Ohio St. 351.* See also *Citizens' Nat. Bank v. Cincinnati, etc., R. Co., 11 Ohio Dec. (Reprint) 703, 29 Cinc. L. Bul. 15.*

Pennsylvania. — *People's Bank v. Kurtz, 99 Pa. St. 344, 44 Am. Rep. 112.*

See also *supra*, this title, *Issue of Stock — Remedies in Respect to Invalid or Irregular Stock.*

Where an Officer of a Corporation Issues to Himself a certificate of shares to which he is not entitled the corporation can maintain a bill in equity to compel its surrender and cancellation. *Lakewood Gas Co. v. Smith, 62 N. J. Eq. 677.*

Estoppel of Corporation to Deny Validity of Certificate. — Where one about to purchase a certificate presents it to the officers of the corporation for the purpose of ascertaining if it is genuine, and is thereupon assured that it is, the corporation is thereafter estopped to deny its validity. *Jarvis v. Manhattan Beach Co., 148 N. Y. 652, affirming 53 Hun (N. Y.) 362.*

5. **Issuance to Officer Signing Certificate Not Notice of Spurious Character.** — *Citizens' Nat. Bank v. Cincinnati, etc., R. Co., 11 Ohio Dec. (Reprint) 703, 29 Cinc. L. Bul. 15; Titus v. Great Western Turnpike Road Co., 61 N. Y.*

ous certificate failed to ascertain whether or not an old certificate had been surrendered and canceled at the time of the issuance of the new certificate constitute such negligence on his part as precludes a recovery by him against the corporation. It is the duty of the corporation to require the surrender of the old certificate on issuing a new one, and not that of a transferee.¹

Where Officer Has No Real or Ostensible Authority. — The corporation is not liable for spurious shares issued by officers who have neither a real nor an ostensible authority to issue valid certificates.²

Negligence of Corporation. — If the officer issuing the spurious certificate has no real or ostensible authority to issue valid certificates, the corporation is not liable for spurious certificates issued by him merely by reason of the fact that it has allowed such officer to have access to the certificate book and corporate seal, or even to sign blank certificates, unless it has reasonable cause to apprehend that such conduct on its part would lead to such malfeasance on the part of the officer or employee.³

Effect of Issuance of New Certificate to Assignee of Spurious Certificate. — If a corporation, on the surrender of a spurious certificate by a *bona fide* assignee thereof, issues a new certificate to such assignee, it is thereafter estopped to deny the validity of the new certificate, if by reason of its issuance and the implied admission of the genuineness of the surrendered certificate the person to whom it is issued is induced thereby to forego asking redress against the assignor.⁴

Certificate Procured by Fraud. — Where by deceit and fraud and without having paid anything therefor a person procures the issuance of a certificate to himself, he of course acquires no title to the shares represented thereby, nor does an assignee of the certificate not a *bona fide* purchaser, but the corporation is estopped to deny the validity of its issuance as to a *bona fide* purchaser or pledgee thereof.⁵

Measure of Damages. — In those instances where the corporation is precluded from recognizing the spurious certificate as representing genuine shares, for the reason that it would constitute an overissue, the innocent purchaser can recover the market value of the shares which it purports to represent at the time when the corporation first refuses to recognize it as valid.⁶

e. COMPELLING ISSUANCE OF CERTIFICATE. — Where the officers of a corporation refuse on demand to issue a certificate to a person entitled thereto, his appropriate remedy is by action against the corporation for damages,⁷ or in equity to enforce the issue and delivery of the certificate.⁸ Ordinarily

237; *Cincinnati, etc., R. Co. v. Citizens' Nat. Bank*, 56 Ohio St. 351. See also *Havens v. Tarboro Bank*, 132 N. Car. 214. But see *Farrington v. South Boston R. Co.*, 150 Mass. 410; *Cincinnati, etc., R. Co. v. Urbana Third Nat. Bank*, 1 Ohio Cir. Dec. 109.

1. Failure to Require Surrender and Cancellation of Old Certificate. — *Allen v. South Boston R. Co.*, 150 Mass. 200. See also *infra*, this section, *Liability of Corporation for Issuance of New Without Surrender of Assigned Certificate*.

2. Where Officer Has Neither Real nor Ostensible Authority. — *Holbrook v. Fauquier, etc., Turnpike Co.*, 3 Cranch (C. C.) 425; *Hill v. C. F. Jewett Pub. Co.*, 154 Mass. 172; *Farmers' Bank v. Diebold Safe, etc., Co.*, 66 Ohio St. 367, 90 Am. St. Rep. 586. See also *Manhattan L. Ins. Co. v. Forty-second St., etc., Ferry R. Co.*, 139 N. Y. 146. Compare *Mutual L. Ins. Co. v. Forty-second St., etc., Ferry Co.*, 74 Hun (N. Y.) 505, followed in *Hellman v. Forty-second St., etc., Ferry Co.*, 74 Hun (N. Y.) 529, affirmed 148 N. Y. 727. See further the title *Officers*

and *Agents of Private Corporations*, vol. 21, p. 912.

3. Negligence of Corporation. — *Hill v. C. F. Jewett Pub. Co.*, 154 Mass. 172.

Failure to Cancel Certificate Surrendered for Transfer. — *Knox v. Eden Musee Americain Co.*, 148 N. Y. 441, 51 Am. St. Rep. 700. See also *Farmers' Bank v. Diebold Safe, etc., Co.*, 66 Ohio St. 367, 90 Am. St. Rep. 586.

4. Issuance of New Certificate in Lieu of Spurious One. — *Manhattan Beach Co. v. Harned*, 27 Fed. Rep. 486; *Hall v. Rose Hill, etc., Road Co.*, 70 Ill. 673.

5. Watson v. Sidney F. Woody Printing Co., 56 Mo. App. 145.

6. Measure of Damages Recoverable. — *Allen v. South Boston R. Co.*, 150 Mass. 200; *People's Bank v. Kurtz*, 99 Pa. St. 344, 44 Am. Rep. 112.

7. Action at Law. — *State v. Carpenter*, 51 Ohio St. 83, 46 Am. St. Rep. 556; *Withers v. Lafayette County Bank*, 67 Mo. App. 115.

8. Suit in Equity. — *Archer v. American Water Works Co.*, 50 N. J. Eq. 33; *Arbuckle*

mandamus cannot be invoked.¹ The statute of limitations does not begin to run against such a cause of action until demand and refusal to issue a certificate.²

f. RIGHT OF OWNER OF LOST CERTIFICATE TO NEW CERTIFICATE. — In some jurisdictions the statutes provide that where a certificate of shares has been lost or destroyed and the corporation refuses to issue a new one the owner may apply to the courts for an order requiring it to do so on the applicant's furnishing a bond of indemnity.³ Such statutes afford, however, merely a cumulative remedy, and do not exclude the equity jurisdiction of courts to award such relief.⁴ Where a long time has elapsed between the proven time of the loss of the certificate and the decree requiring the issuance of the new certificate, no indemnity will be required as a condition of awarding the relief.⁵

2. Transfer and Registration — a. RIGHT TO TRANSFER — (1) In General. — In the case of a sale of stock the purchaser's right to have the stock transferred from the name of the seller into his own and to surrender the old certificate, if he desires, and have a new one issued to him in his own name is unquestioned and unquestionable.⁶ The vendor may himself request that the transfer be made on the books of the corporation, and a transfer made pursuant to his request imposes on the transferee the obligation of a stockholder.⁷ It has been held that the vendor can maintain a bill in equity to compel the assignee to register himself as a stockholder.⁸ Questions concerning the validity of restrictions on the right of a shareholder to sell or transfer his shares are treated elsewhere in this work.⁹ A by-law requiring the payment, by one seeking a transfer, of a small fee to cover the necessary expense of making it is not void for unreasonableness.¹⁰

(2) *Right of Pledgee to Transfer on Corporate Records.* — A pledgee of shares, when the contract of pledge is silent on the subject, has no right to have a transfer of the shares pledged recorded on the books of the corporation and a new certificate issued to him so as to have it appear on the records that he is the absolute owner, but he is entitled to such entry on the corporation's records as will show the nature of his interest in the shares.¹¹ Of course, if the pledgor executes an assignment and power of attorney to transfer, the pledgee is entitled to a new certificate.¹²

(3) *Right of Executor or Administrator to Transfer.* — The executor or administrator of a deceased shareholder is entitled to have a new certificate

v. Woolson Spice Co., 11 Ohio Cir. Dec. 726; *Iron R. Co. v. Fink*, 41 Ohio St. 321, 52 Am. Rep. 84; *State v. Carpenter*, 51 Ohio St. 83, 46 Am. St. Rep. 556; *Wells v. Green Bay, etc.*, Canal Co., 90 Wis. 442. See also *Hill v. Rockingham Bank*, 44 N. H. 567. And see *infra*, this section, *Transfer and Registration — Obligation of Corporation to Transfer and Issue New Certificate.*

1. Mandamus Will No Lie. — *State v. Carpenter*, 51 Ohio St. 83, 46 Am. St. Rep. 556; *Arbuckle v. Woolson Spice Co.*, 11 Ohio Cir. Dec. 726. See also *Baker v. Marshall*, 15 Minn. 177. And see the title *MANDAMUS*, vol. 19, p. 881.

2. Statute of Limitations. — *Wells v. Green Bay, etc.*, Canal Co., 90 Wis. 442; *Iron R. Co. v. Fink*, 41 Ohio St. 321, 52 Am. Rep. 84.

3. Statutes Requiring Issuance of New Certificate. — *Matter of Speir*, 69 N. Y. App. Div. 149; *Hendon v. North Carolina R. Co.*, 125 N. Car. 124.

4. Kinnan v. Forty-second St., etc., R. Co., 140 N. Y. 183.

b. Decree Awarded Without Indemnity. —

Guilford v. Western Union Tel. Co., 59 Minn. 332; *State v. Southern Mineral, etc., Co.*, 108 La. 24.

6. Right of Purchaser to Transfer. — *Spreckels v. Nevada Bank*, 113 Cal. 272, 54 Am. St. Rep. 348. See also the cases cited *infra*, this subsection, *Obligation of Corporation to Transfer and Issue New Certificate.*

7. Vendor May Require Transfer. — *Webster v. Upton*, 91 U. S. 65.

8. Assignor May Compel Registration. — *Wynne v. Price*, 3 De G. & Sm. 310.

9. Restrictions on Right to Transfer. — See *supra*, this title, *Sales and Conveyances*. See also the title *BY-LAWS*, vol. 5, p. 93.

10. Transfer Fee. — *Giesen v. London, etc., American Mortg. Co.*, (C. C. A.) 102 Fed. Rep. 584.

11. Pledgee Entitled to Transfer on Corporate Records. — *Spreckels v. Nevada Bank*, 113 Cal. 272, 54 Am. St. Rep. 348; *Brown v. Hotel Assoc.*, 63 Neb. 181. But see *Gatesville First Nat. Bank v. Mings*, 11 Tex. Civ. App. 302.

12. See the title PLEDGE AND COLLATERAL SECURITY, vol. 22, p. 906.

issued to him as such.¹ The corporation may rightfully require as a condition precedent to the issuance of a new certificate that the person claiming it should surrender the old certificate and adduce satisfactory evidence of the death of the registered owner as well as of his authority to act as his personal representative; but he is not bound to supply the corporation, for permanent retention by it, with official copies of the public records which constitute such evidence.²

(4) *Right of Purchaser at Execution Sale to Transfer.* — A purchaser at execution sale of shares standing on the books of the corporation in the name of the execution debtor is entitled to a transfer thereof to himself. If the certificate issued to the debtor is in the hands of a third person who claims some right thereto which is subordinate to the right of the purchaser at execution sale, he can be compelled to surrender it for cancellation, so that a new certificate may be issued to the purchaser.³ But the corporation cannot be charged with a conversion of shares where it refuses to transfer to the execution purchaser shares which did not stand in the name of the execution debtor, but of which it is alleged he was the equitable owner.⁴ The purchaser may maintain a suit in equity to compel the corporation to make the transfer.⁵

b. FORMALITIES OF TRANSFER AND REGISTRATION — (1) *Assignment of Certificate* — (a) *In General.* — In the absence of a statute or by-law requiring it to be in writing, stock may be sold and transferred by a verbal contract.⁶ Nor need the assignment, when in writing, be under seal,⁷ nor indorsed on the certificate; it may be by a separate instrument.⁸ No formal words are required.⁹

Execution of Assignment. — An assignment of shares belonging to a copartnership executed by one of the partners in the names of both is sufficient as against creditors of the firm having notice thereof.¹⁰

(b) *Assignment in Blank.* — Where the owner of shares indorses an assignment thereof on his certificate, leaving blanks for the names of the assignee and the attorney authorized to make the transfer on the books of the corporation, he thereby authorizes the person to whom he delivers it or any subsequent holder thereof to fill in such blanks and procure a transfer on the books of the corporation and the issuance of a new certificate.¹¹ A wrongful use by a person

1. *Executor or Administrator.* — London, etc., Bank v. Aronstein, (C. C. A.) 117 Fed. Rep. 601. See also the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 992.

2. *Bird v. Chicago, etc., R. Co.*, 137 Mass. 428. See also *infra*, this subsection, *Surrender of Old and Issuance of New Certificate; Obligation of Corporation to Transfer and Issue New Certificate.*

3. *Right of Execution Purchaser to Transfer.* — West Coast Safety Faucet Co. v. Wulff, 133 Cal. 316.

4. *National Bank v. Lake Shore, etc., R. Co.*, 21 Ohio St. 221.

5. *Spencer v. James*, 10 Tex. Civ. App. 327.

6. *Assignment Need Not Be in Writing.* — Rice v. Gilbert, 173 Ill. 348, affirming 72 Ill. App. 649; State Ins. Co. v. Gennett, 2 Tenn. Ch. 100; Parker v. Bethel Hotel Co., 96 Tenn. 252. Compare Burnsville Turnpike Co. v. State, 119 Ind. 382. See also *supra*, this title, *Sales and Conveyances.*

A Mere Delivery of a Certificate, without a written assignment or power of transfer, accompanied with a declaration that it was a gift of the stock to the person to whom the certificate was delivered, has been held to vest the donee with such a title as entitled him to a transfer on the books of the corporation. *Gilkin-*

son v. Third Ave. R. Co., 47 N. Y. App. Div. 472.

A delivery of a certificate of stock for a valuable consideration with intent thereby to vest the person to whom it is delivered with the title to the shares, though no assignment thereof is executed, vests such person with title, and he can maintain a bill in equity to compel the executor of the person so delivering the shares to execute an assignment thereof. *Reed v. Copeland*, 50 Conn. 472, 47 Am. Rep. 663; *Lawler v. Kell*, 6 Ohio Dec. 311.

7. *Seal.* — *Colonial Bank v. Hepworth*, 36 Ch. D. 36; *Quiner v. Marblehead Social Ins. Co.*, 10 Mass. 476. See also *Atkinson v. Atkinson*, 8 Allen (Mass.) 15.

8. *Indorsed on Certificate.* — *Curtis v. Crossley*, 59 N. J. Eq. 358.

9. *Haldeman v. Hillsborough, etc., R. Co.*, 2 Handy (Ohio) 101.

Designation of Number of Shares Assigned. — *Skowhegan Bank v. Cutler*, 52 Me. 509.

10. *Assignment by Member of Firm.* — *Quiner v. Marblehead Social Ins. Co.*, 10 Mass. 476.

Necessity of Compliance with By-law as to Witnesses. — *Dane v. Young*, 61 Me. 160.

11. *Authority to Fill Blanks.* — *Colonial Bank v. Hepworth*, 36 Ch. D. 36; *Bridgeport Bank v. New York, etc., R. Co.*, 30 Conn. 275; *Coffey*

to whom a certificate so indorsed is delivered is a conversion of the shares.¹ The power to make the transfer, being a power coupled with an interest, is not revoked by the death of the assignor.² It cannot be executed by any person other than the one to whom the authority is delegated.³ An assignment in blank constitutes a continuing warranty on the part of the assignor that the certificate is a valid certificate for the number of shares which it purports to represent, and such warranty inures to the benefit of one receiving it in good faith from the immediate assignee of the assignor.⁴

Rights of Bona Fide Purchaser of Certificate Assigned in Blank. — Where the owner of shares assigns them in blank and delivers them to another as a pledge or for a limited or particular purpose, a *bona fide* purchaser from the pledgee or agent of the owner takes title thereto freed from the equities of the pledgor or owner. The person executing the assignment, having invested the person to whom he delivered the certificate with the apparent title and indicia of ownership, is estopped to deny it.⁵

Rights of Bona Fide Purchaser of Lost or Stolen Indorsed Certificate. — Where, however, he has not voluntarily invested another with the indicia of ownership he is not estopped, and hence where he has indorsed a certificate in blank, and it is thereafter lost or stolen, the finder thereof or the thief, as the case may be, acquires no title to the shares, nor does one who takes from such finder or thief acquire title though he be a *bona fide* purchaser.⁶ If the owner has notified the corporation of the theft or loss before it has issued a new certificate, he can at his election either recover the value of such shares from the *bona fide* purchaser or require the corporation to issue a new certificate to him.⁷ The corporation cannot be compelled to issue a new certificate to such purchaser.⁸

(2) *Transfer on Books of Corporation or Registration* — (a) **Necessity** — *aa.* IN ABSENCE OF STATUTE, CHARTER PROVISION, OR BY-LAW. — In the absence of a statute, by-law, or charter provision requiring it, a transfer on the books of

v. Coffey, 179 Ill. 283, *affirming* 74 Ill. App. 241; *Andrews v. Worcester, etc.*, R. Co., 159 Mass. 64; *Mt. Holly, etc., Turnpike Co. v. Ferree*, 17 N. J. Eq. 117; *Prall v. Tilt*, 28 N. J. Eq. 479; *McNeil v. New York Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341; *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616; *Commercial Bank v. Kortright*, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317, *affirming* 20 Wend. (N. Y.) 90; *Shattuck v. American Cement Co.*, 205 Pa. St. 197. See also *Fitchburg Sav. Bank v. Torrey*, 134 Mass. 239; *Fifth Ave. Bank v. Forty-second St., etc., Ferry R. Co.*, 137 N. Y. 231, 33 Am. St. Rep. 712.

1. **Conversion.** — *McAllister v. Kuhn*, 96 U. S. 87.

2. **Power Not Revoked by Death of Assignor.** — *Leavitt v. Fisher*, 4 Duer (N. Y.) 1; *Traser v. Charleston*, 11 S. Car. 486. See generally the title **POWERS**, vol. 22, p. 1132.

3. **Mechanics Banking Assoc. v. Mariposa Co.**, 3 Robt. (N. Y.) 395.

4. *Matthews v. Massachusetts Nat. Bank*, Holmes (U. S.) 396.

5. **Bona Fide Purchaser of Certificate Assigned in Blank** — *Alabama.* — *Winter v. Montgomery Gas-Light Co.*, 89 Ala. 544; *Nelson v. Owen*, 113 Ala. 372.

California. — *Brittan v. Oakland Sav. Bank*, 124 Cal. 282, 71 Am. St. Rep. 58.

Colorado. — *Supply Ditch Co. v. Elliott*, 10 Colo. 327, 3 Am. St. Rep. 586.

Illinois. — *Otis v. Gardner*, 105 Ill. 436.

New Jersey. — *Mt. Holly, etc., Turnpike Co. v. Ferree*, 17 N. J. Eq. 117; *Prall v. Tilt*, 28 N. J. Eq. 479.

New York. — *Leavitt v. Fisher*, 4 Duer (N. Y.) 1; *McNeil v. New York Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341; *Weaver v. Barden*, 49 N. Y. 286. See also *Knox v. Eden Musee Americain Co.*, 148 N. Y. 441, 51 Am. St. Rep. 700.

Pennsylvania. — *Wood's Appeal*, 92 Pa. St. 379, 37 Am. Rep. 694; *Gilbert v. Erie Bldg. Assoc.*, 184 Pa. St. 554; *Shattuck v. American Cement Co.*, 205 Pa. St. 197.

Tennessee. — *Cherry v. Frost*, 7 Lea (Tenn.) 1.

6. **Bona Fide Purchaser from Thief or Finder.** — *London, etc., Banking Co. v. London, etc., Bank*, 20 Q. B. D. 232; *Bangor Electric Light, etc., Co. v. Robinson*, 52 Fed. Rep. 520; *East Birmingham Land Co. v. Dennis*, 85 Ala. 565, 7 Am. St. Rep. 73; *Sherwood v. Meadow Valley Min. Co.*, 50 Cal. 412; *Barstow v. Savage Min. Co.*, 64 Cal. 388, 49 Am. Rep. 705, *criticizing* *Winter v. Belmont Min. Co.*, 53 Cal. 428; *O'Herron v. Gray*, 168 Mass. 573.

7. *Barstow v. Savage Min. Co.*, 64 Cal. 388, 49 Am. Rep. 705.

Liability of Broker Selling Certificate as Agent of Thief. — *Swim v. Wilson*, 90 Cal. 126, 25 Am. St. Rep. 110; *Bercich v. Marye*, 9 Nev. 312.

Measure of Damages. — In *Bercich v. Marye*, 9 Nev. 312, which was an action for the return of the stock or its value, the plaintiff recovered the value of the stock at the day of trial, together with the dividends which had been paid on it and of which the owner had been deprived. See also *infra*, this subsection, *Wrongful Transfer by Corporation*.

8. *Sherwood v. Meadow Valley Min. Co.*, 50 Cal. 412.

the corporation is not necessary to vest the assignee with title to the stock assigned. An assignment of the shares accompanied with a delivery of the certificate passes the assignor's title to the assignee,¹ even as against subsequent attaching creditors.² The directors of a corporation have no power, independently of powers expressly conferred by the articles of association, to refuse to register a *bona fide* assignment.³

bb. UNDER STATUTE, CHARTER PROVISION, OR BY-LAW REQUIRING REGISTRATION — (aa) As Between Parties to Assignment. — Statute or charter provisions or by-laws providing that shares shall be transferable only on the books of the corporation are regarded as being for the benefit of the corporation, to enable it to preserve an authentic record of its shareholders, and thereby to deal safely and intelligently with its members in the matter of paying dividends, giving notice of corporate meetings, determining who may vote thereat, and all other matters relating to the internal affairs and the government of the corporation. As between a shareholder and his vendee an assignment not made or registered on the corporate records is sufficient to pass the vendor's title.⁴ In some jurisdictions the assignee of a certificate not assigned or registered on the books of the corporation is regarded as having the equitable title, which equity will protect by compelling a transfer on the books of the corporation,⁵ while in other jurisdictions the assignee is regarded as having both the legal and equitable title, as against all the world except the corporation.⁶ As between the assignor and assignee, the assignee is entitled to all dividends which are declared after the assignment.⁷

1. **Transfer on Books.** — *Northrop v. Newton*, etc., *Turnpike Co.*, 3 Conn. 544. See also *Longmont First Nat. Bank v. Hastings*, 7 Colo. App. 129.

2. **Attaching Creditors.** — See the title **ATTACHMENT**, vol. 3, p. 229, and see *Haldeman v. Hillsborough*, etc., *R. Co.*, 2 Handy (Ohio) 101; *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 100. See also *Stebbins v. Phenix F. Ins. Co.*, 3 Paige (N. Y.) 361.

3. *In re Smith*, L. R. 4 Ch. 20.

4. **Unrecorded Transfer Good Between Parties — United States.** — *Bank of Commerce v. Newport Bank*, 27 U. S. App. 486; *Masury v. Arkansas Nat. Bank*, (C. C. A.) 93 Fed. Rep. 603; *Johnston v. Laffin*, 103 U. S. 800.

Alabama. — *Duke v. Cahawba Nav. Co.*, 10 Ala. 82, 44 Am. Dec. 472.

California. — *Spreckels v. Nevada Bank*, 113 Cal. 272, 54 Am. St. Rep. 348.

Georgia. — *South Western R. Co. v. Thomson*, 40 Ga. 408; *Ross v. Southwestern R. Co.*, 53 Ga. 514; *Bates-Farley Sav. Bank v. Dismukes*, 107 Ga. 212.

Kansas. — *Culp v. Mulvane*, (Kan. 1903) 71 Pac. Rep. 273.

Kentucky. — *American Wire-Nail Co. v. Bayless*, 91 Ky. 94.

Massachusetts. — *Brown v. Smith*, 122 Mass. 589; *Fitchburg Sav. Bank v. Torrey*, 134 Mass. 239.

Minnesota. — *Baldwin v. Canfield*, 26 Minn. 43.

Mississippi. — *Timberlake v. Shippers' Compress Co.*, 72 Miss. 323; *Scherck v. Montgomery*, 81 Miss. 426.

Missouri. — *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 149; *Carroll v. Mullanphy Sav. Bank*, 8 Mo. App. 249; *Haegele v. Western Stove Mfg. Co.*, 29 Mo. App. 486. Compare *White v. Salisbury*, 33 Mo. 150.

North Carolina. — *Havens v. Tarboro Bank*, 132 N. Car. 214.

See also *Winslow v. Fletcher*, 53 Conn. 390, 55 Am. Rep. 122; *Blouin v. Hart*, 30 La. Ann. 714. And see cases cited *supra*, this subsection, *As Affecting Rights of Assignor's Creditors*.

As Against Heirs of Assignor. — An assignment of a certificate and delivery thereof are sufficient to pass title thereto to the assignee without a transfer on the corporation records as against the heirs or administrator of the assignor. *Hertzler's Estate*, 22 Pa. Super. Ct. 592; *U. S. v. Cutts*, 1 Summ. (U. S.) 133. See also *Culp v. Mulvane*, (Kan. 1903) 71 Pac. Rep. 273.

5. **Equitable Title Only.** — *Becher v. Wells Flouring Mill Co.*, 1 Fed. Rep. 276; *Scott v. Pequonnock Nat. Bank*, 15 Fed. Rep. 494; *Reed v. Copeland*, 50 Conn. 472, 47 Am. Rep. 663; *Bruce v. Smith*, 44 Ind. 1; *Swift v. Smith*, 65 Md. 428, 57 Am. Rep. 336; *Noble v. Turner*, 69 Md. 519; *Gemmell v. Davis*, 75 Md. 546, 32 Am. St. Rep. 412; *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308, 11 Am. Rep. 253.

6. **Legal and Equitable Title.** — *Leitch v. Wells*, 48 N. Y. 585; *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616; *Matter of Argus Co.*, 138 N. Y. 557; *New York*, etc., *R. Co. v. Schuyler*, 34 N. Y. 30; *Knox v. Eden Musee American Co.*, 148 N. Y. 441, 51 Am. St. Rep. 700; *McNeil v. New York Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341; *Ernst v. Elmira Municipal Imp. Co.*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 583; *Smith v. American Coal Co.*, 7 Lans. (N. Y.) 317; *Cherry v. Frost*, 7 Lea (Tenn.) 1; *Parker v. Bethel Hotel Co.*, 96 Tenn. 252. See also *Union*, etc., *Bank v. Farrington*, 13 Lea (Tenn.) 333.

Holder of Legal and Equitable Title Entitled to Priority Over Merely Equitable Title. — *The Dueber Watch Case Mfg. Co. v. Daugherty*, 62 Ohio St. 589. But see *Union Bank v. Laird*, 2 Wheat. (U. S.) 387.

7. **Dividends.** — *Gemmell v. Davis*, 75 Md. 546, 32 Am. St. Rep. 412; *Farmers*, etc., *Nat.*

(bb) *As Between Corporation and Assignor.* — Under such statute or charter provisions or by-laws it may be laid down as a general rule that an assignment not made on the books of the corporation or registered thereon is of no effect as against the rights of the corporation to treat such stock as belonging to the registered owner or to deal with him on that assumption,¹ unless it has notice of the assignment.²

Payment of Dividends. — If the assignment is not made on the books of the corporation, or registered, and the corporation in good faith and without notice of the assignment pays a dividend to the person appearing as owner on its books, it will be protected;³ but not if it has notice of the unregistered assignment.⁴ Nor can the corporation set off a debt owing to it by the registered owner of shares at the time the dividend was declared where it receives notice, before it has actually appropriated the dividend to the payment of the indebtedness, that the debtor had assigned his shares prior to the time the dividend was declared, though the assignment was not recorded until afterwards.⁵

Voting and Notice of Stockholders' Meetings. — The correlated rights and obligations of the corporation and shareholders to give or have notice of stockholders' meetings and to vote thereat as dependent on the question whether the person claiming such right is a registered stockholder have been treated elsewhere in this title.⁶

(cc) *As Affecting Stockholder's Liability to Corporate Creditors.* — So, too, the assignor in an unrecorded assignment is liable to creditors of the corporation for debts contracted subsequent to the assignment and before registration or transfer on the books of the corporation as to debts for which stockholders are liable.⁷

(dd) *As Affecting Rights of Assignor's Creditors.* — **Registration Not Necessary as to Assignor's Creditors.** — In many jurisdictions, under statute or charter provisions or by-laws providing that shares shall be transferable only⁸ on the books of the corporation, or that no transfer shall be valid except as between the parties until it shall have been entered on the books of the corporation, it is held that an

Bank v. Mosher, 63 Neb. 130; *American Nat. Bank v. Nashville Warehouse, etc., Co.*, (Tenn. Ch. 1896) 36 S. W. Rep. 960. See also *Black v. Homersham*, 4 Ex. D. 24.

1. **Unregistered Transfer Invalid as to Corporation.** — *Giesen v. London, etc., American Mortg. Co.*, (C. C. A.) 102 Fed. Rep. 584; *Andrews v. Worcester, etc., R. Co.*, 159 Mass. 64; *Stockwell v. St. Louis Mercantile Co.*, 9 Mo. App. 133; *New York, etc., R. Co. v. Schuyler*, 34 N. Y. 30; *Bank of Commerce's Appeal*, 73 Pa. St. 59. See also *Becher v. Wells Flouring Mill Co.*, 1 Fed. Rep. 276. But see *Brown v. Union Sav., etc., Assoc.*, 28 Wash. 657.

Necessity of Notice of Acquisition of Equitable Title by Record Owner. — *Sabin v. Woodstock Bank*, 21 Vt. 353.

See *supra*, this title, *Lien of Corporation on Shares — For What Debts Lien Enforceable — As Dependent on Time of Contracting.*

2. *Fitchburg Sav. Bank v. Torrey*, 134 Mass. 239.

3. **Payment of Dividends to Registered Owner.** — *Gemmell v. Davis*, 75 Md. 546, 32 Am. St. Rep. 412; *Meredith Village Sav. Bank v. Marshall*, 68 N. H. 417; *Smith v. American Coal Co.*, 7 Lans. (N. Y.) 317; *Brisbane v. Delaware, etc., R. Co.*, 94 N. Y. 204.

4. **After Notice of Unregistered Assignment.** — *Gemmell v. Davis*, 75 Md. 546, 32 Am. St. Rep. 412; *Timberlake v. Shippers Compress Co.*, 72 Miss. 323; *Blooming Grove Cotton-Oil Co. v.*

Blooming Grove First Nat. Bank, (Tex. Civ. App. 1900) 56 S. W. Rep. 552. See also the title *DIVIDENDS*, vol. 9, p. 720.

Assignee to Whom Corporation Has Refused Registration After Demand May Maintain Action for Dividends Thereafter Declared. — *Robinson v. National Bank*, 95 N. Y. 637.

5. *American Nat. Bank v. Nashville Warehouse, etc., Co.*, (Tenn. Ch. 1896) 36 S. W. Rep. 960.

6. See *infra*, this title, *Stockholders' Meetings*.

7. **Status of Stockholders as to Corporate Creditors.** — *Richmond v. Irons*, 121 U. S. 27; *Hawkins v. Glenn*, 131 U. S. 319; *Plumb v. Enterprise Bank*, 48 Kan. 484; *A. Wight Co. v. Steinkemeyer*, 6 Mo. App. 574; *Adderly v. Storm*, 6 Hill (N. Y.) 624; *Worrall v. Judson*, 5 Barb. (N. Y.) 210. See also *Marlborough Mfg. Co. v. Smith*, 2 Conn. 579; *Russell v. Easterbrook*, 71 Conn. 50; *Shellington v. Howland*, 53 N. Y. 371; *Johnson v. Underhill*, 52 N. Y. 203. Compare *Dain Mfg. Co. v. Turm-bull Seed Co.*, 95 Mo. App. 144.

Failure to Provide Transfer Book. — *Chemical Nat. Bank v. Colwell*, 132 N. Y. 250.

See also *infra*, this title, *Liability of Stockholders for Corporate Debts — Who Are Liable — Sufficiency of Transfer to Shift Liability.*

8. **A Recital in a Certificate that the share evidenced thereby is transferable on the books of the corporation is equivalent to a recital**

assignment, though not made or registered on the books of the corporation, transmits to the assignee all the assignor's title, so that the stock is not thereafter subject to attachment or execution as the property of the assignor.¹

Registration Necessary as to Assignor's Creditors.—In other jurisdictions, under such statutory and charter provisions or by-laws an unregistered transfer is subordinated to an attachment or levy of an execution thereon by creditors of the assignor, if the latter have no notice of the assignment.² To give the unrecorded assignment precedence the creditor must have had notice at the

that it is transferable only on the books of the corporation. *Williams v. Mechanics' Bank*, 5 Blatchf. (U. S.) 59.

1. Registration Not Necessary to Pass Assignor's Title as to His Creditors.—*United States*.—*Scott v. Pequonock Nat. Bank*, 15 Fed. Rep. 494; *Hazard v. National Exch. Bank*, 26 Fed. Rep. 94.

Arkansas.—*Masury v. Arkansas Nat. Bank*, (C. C. A.) 93 Fed. Rep. 603.

Delaware.—*Allen v. Stewart*, 7 Del. Ch. 287.

Illinois.—*Rice v. Gilbert*, 173 Ill. 348, affirming 72 Ill. App. 649, overruling *People's Bank v. Gridley*, 91 Ill. 457.

Louisiana.—*Smith v. Crescent City Live-Stock Landing, etc., Co.*, 30 La. Ann. 1378; *Pitot v. Johnson*, 33 La. Ann. 1286; *Kern v. Day*, 45 La. Ann. 71. See also *Ribet v. Bataille*, 35 La. Ann. 1171.

Massachusetts.—A recent statute changes the rule in Massachusetts, where it is now as stated in the text. *Clews v. Friedman*, (Mass. 1903) 66 N. E. Rep. 201. See also *Sibley v. Quinsigamond Nat. Bank*, 133 Mass. 515. A contrary rule prevailed under an earlier statute. *Central Nat. Bank v. Williston*, 138 Mass. 244; *Rock v. Nichols*, 3 Allen (Mass.) 342; *Blanchard v. Dedham Gas Light Co.*, 12 Gray (Mass.) 213; *Fisher v. Essex Bank*, 5 Gray (Mass.) 373.

Minnesota.—*Lund v. Wheaton Roller Mill Co.*, 50 Minn. 36.

Nebraska.—*Farmers', etc., Nat. Bank v. Mosher*, 63 Neb. 130.

New Jersey.—*Broadway Bank v. McElrath*, 13 N. J. Eq. 24. See also *Rogers v. New Jersey Ins. Co.*, 8 N. J. Eq. 167.

New York.—*Smith v. American Coal Co.*, 7 Lans. (N. Y.) 317; *Comeau v. Guild Farm Oil Co.*, 3 Daly (N. Y.) 218. See cases cited *supra*, this subsection, *As Between Parties to Assignment*.

Pennsylvania.—*U. S. v. Vaughan*, 3 Binn. (Pa.) 394, 5 Am. Dec. 375; *Finney's Appeal*, 59 Pa. St. 398; *Telford, etc., Turnpike Co. v. Gerhab*, (Pa. 1888) 13 Atl. Rep. 90. See also *Com. v. Watnough*, 6 Whart. (Pa.) 117; *Eby v. Guest*, 94 Pa. St. 160.

South Carolina.—*Fraser v. Charleston*, 11 S. Car. 486.

Tennessee.—*Cornick v. Richards*, 3 Lea (Tenn.) 1. See also *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 105.

Texas.—*Seeligson v. Brown*, 61 Tex. 114; *Tombler v. Palestine Ice Co.*, 17 Tex. Civ. App. 596. See also *Strange v. Houston, etc., R. Co.*, 53 Tex. 162; *South Texas Nat. Bank v. Texas, etc., Lumber Co.*, (Tex. Civ. App. 1902) 70 S. W. Rep. 768.

Washington.—*Port Townsend Nat. Bank v. Port Townsend Gas, etc., Co.*, 6 Wash. 597.

Notice to Attaching Creditor Not Tamount to Registration.—*Newell v. Williston*, 138 Mass. 240.

By-law and Statute or Charter Provision Distinguished.—*Fisher v. Essex Bank*, 5 Gray (Mass.) 373; *Sargent v. Essex Marine R. Corp.*, 9 Pick. (Mass.) 202.

2. Attachment of Levy Without Notice Takes Precedence over Unrecorded Assignment.—*Alabama*.—*Berney Nat. Bank v. Pinckard*, 87 Ala. 577; *Abels v. Planters, etc., Ins. Co.*, 92 Ala. 382. See also *Fisher v. Jones*, 82 Ala. 117.

California.—*Weston v. Bear River, etc., Water, etc., Co.*, 5 Cal. 186, 63 Am. Dec. 117, 6 Cal. 425; *Naglee v. Pacific Wharf Co.*, 20 Cal. 529; *People v. Elmore*, 35 Cal. 653; *Farmers Nat. Gold Bank v. Wilson*, 58 Cal. 600; *West Coast Safety Faucet Co. v. Wulff*, 133 Cal. 315. See also *Strout v. Natoma Water, etc., Co.*, 9 Cal. 78.

Connecticut.—*Williams v. Mechanics' Bank*, 5 Blatchf. (U. S.) 59; *Northrop v. Newton, etc., Turnpike Co.*, 3 Conn. 544; *Northrop v. Curtis*, 5 Conn. 246; *Oxford Turnpike Co. v. Bunnel*, 6 Conn. 558; *Dutton v. Connecticut Bank*, 13 Conn. 493. See also *Shipman v. Aetna Ins. Co.*, 29 Conn. 245; *Colt v. Ives*, 31 Conn. 25, 81 Am. Dec. 161.

Maine.—The Maine cases merely lay down the proposition that to exempt shares from execution or attachment as the property of the assignor, the assignment must be entered on the books of the corporation. In neither case did the question arise in a contest between a creditor of the assignor and the assignee, and hence what effect actual notice of the unrecorded assignment would have on the rights of the parties in that jurisdiction is conjectural. *Fiske v. Carr*, 20 Me. 301; *Skowhegan Bank v. Cutler*, 49 Me. 315.

Maryland.—*Noble v. Turner*, 69 Md. 519.

New Hampshire.—*Scripture v. Franchestown Soapstone Co.*, 50 N. H. 571; *Buttrick v. Nashua, etc., R. Co.*, 62 N. H. 413, 13 Am. St. Rep. 578. See also *Pinkerton v. Manchester, etc., R. Co.*, 42 N. H. 424.

New Mexico.—*Lyndonville Nat. Bank v. Folsom*, 7 N. Mex. 611.

Vermont.—*Cheever v. Meyer*, 52 Vt. 66. See also *Noyes v. Spaulding*, 27 Vt. 420.

Wisconsin.—In *Murphy's Application*, 51 Wis. 519, it was held under the Wisconsin statute, which is similar to that in force in *Maine and California*, that an unrecorded assignment of shares was ineffectual to pass the assignor's title as against his creditors. It does not appear that the creditor had notice of the assignment and hence the case is no authority as to what the rule would be in case the creditor had notice of the assignment. It is to be noted, however, that the California

time his lien attached; notice subsequent to the attaching of the lien and prior to the sale is insufficient to do so.¹ In *Iowa* and *Colorado* the attachment or levy takes precedence over the unrecorded assignment though the creditor has actual notice of the assignment.² Of course, in those jurisdictions, if the creditor has no notice he takes free of the equity of the unregistered assignment.³

Effect of Diligence in Attempting to Procure Registration.—Where an assignee of shares uses reasonable diligence to procure a registration of the assignment on the books of the corporation he will be protected, even in those jurisdictions where the attachment takes precedence over the unrecorded assignment, against a levy or attachment made subsequent to the assignment and before registration and during the time which must necessarily elapse in transmitting the assignment from the place where it was delivered to the offices of the corporation.⁴ So too he will be protected where the failure to register is due to the fault or negligence of the officers of the corporation,⁵ or for any other reason if he has been diligent.⁶ A mere request by the assignee to have the assignment recorded, the officers being willing to do so, but their failure to do so being due to the fact that the officer who promised to make the registration forgot to do it, does not constitute such diligence as will entitle the assignee to hold the shares as against the attaching creditors.⁷ Where the assignee has used due diligence without procuring registration, a sale by creditors of the assignor will be enjoined.⁸

What Law Governs.—An assignment of shares of stocks made in a state other than that under the laws of which the corporation is organized, if valid in the state where made, will be given effect in the state under the laws of which the corporation is organized, but if by the laws of the state under which it is organized registration is necessary to preclude attachment, such law governs irrespective of the place of assignment.⁹

(*see As Affecting Rights of Assignee's Creditors.*)—In jurisdictions where statutory or charter provisions or by-laws similar to those hereinbefore adverted to exist, and an unrecorded assignment is held merely to vest the assignee with an equitable title,¹⁰ and only the legal title is subject to garnishment,¹¹ attachment,¹² or execution,¹³ the shares are not subject to the claims of a creditor of

cases hereinbefore cited are referred to and approved, and that they hold that actual notice would be tantamount to record on the books of the corporation and preclude attachment by the creditor.

Unrecorded Assignment Takes Precedence of Attachment with Notice.—*Black v. Zacharie*, 3 How. (U. S.) 483; *Masury v. Arkansas Nat. Bank*, (C. C. A.) 93 Fed. Rep. 603; *Mapleton Bank v. Standrod*, (Idaho 1902) 71 Pac. Rep. 119; *May v. Cleland*, 117 Mich. 45; *Newberry v. Detroit*, etc., *Iron Mfg. Co.*, 17 Mich. 141, opinion of Cooley, C. J.; *Fraser v. Charleston*, 11 S. Car. 486; *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 105; *George R. Barse Lumber Co. v. Range Valley Cattle Co.*, 16 Utah 59. See also *Coleman v. Spencer*, 5 Blackf. (Ind.) 197.

1. Notice to Creditor Subsequent to Attachment of Lien Insufficient.—*Jones v. Latham*, 70 Ala. 164; *Berney Nat. Bank v. Pinckard*, 87 Ala. 577. But see *Nagle v. Pacific Wharf Co.*, 20 Cal. 529; *Farmers Nat. Gold Bank v. Wilson*, 58 Cal. 600; *McClintock v. Central Bank*, 120 Mo. 127; *Wilson v. St. Louis*, etc., R. Co., 108 Mo. 588, 32 Am. St. Rep. 624. See the title *SHERIFFS' SALES*, vol. 25, p. 825.

2. Attachment with Notice Takes Precedence of Assignment.—*Hair v. Burrell*, 106 Fed. Rep. 280; *Longmont First Nat. Bank v. Hastings*, 7 Colo. App. 129; *Ottumwa Screen Co. v. Stodg-*

hill, 103 Iowa 437. See also *Conway v. John*, 14 Colo. 30; *Weber v. Bullock*, 19 Colo. 214.

3. Ft. Madison Lumber Co. v. Batavian Bank, 71 Iowa 270, 60 Am. Rep. 789; *Moore v. Marshalltown Opera-House Co.*, 81 Iowa 45. See also *Perkins v. Lyons*, 111 Iowa 192.

4. Diligent Assignee Protected.—*Colt v. Ives*, 31 Conn. 25, 81 Am. Dec. 161; *Pinkerton v. Manchester*, etc., R. Co., 42 N. H. 424; *State Ins. Co. v. Sax*, 2 Tenn. Ch. 507.

5. Fault or Negligence of Corporation.—*Weber v. Bullock*, 19 Colo. 214; *Longmont First Nat. Bank v. Hastings*, 7 Colo. App. 129; *Brinkerhoff-Farris Trust*, etc., *Co. v. Home Lumber Co.*, 118 Mo. 447.

6. Perkins v. Lyons, 111 Iowa 192.

7. What Constitutes Diligence.—*Abels v. Planters*, etc., Ins. Co., 92 Aja. 382; *Perkins v. Lyons*, 111 Iowa 192.

8. Sale by Assignor's Creditors Enjoined.—*Weber v. Bullock*, 19 Colo. 214.

9. What Law Governs.—*Black v. Zacharie*, 3 How. (U. S.) 483.

10. See cases cited supra.

11. See the title GARNISHMENT, vol. 14, pp. 761, 766.

12. See the title ATTACHMENT, vol. 3, p. 209.

13. See supra, this title, *Execution, Attachment, and Garnishment*.

an assignee whose assignment has not been recorded on the books of the corporation.¹ In those jurisdictions where an unrecorded assignment is held to divest the assignor's title so as to preclude attachment thereof by creditors of the assignor, it would seem to follow that the shares would be subject to attachment or levy in favor of the creditors of the assignee, provided the statutes also made shares in a corporation amenable to such writs.²

(ff) *To Effect Valid Pledge.* — As between the parties a valid pledge of shares may be effected by an assignment and delivery of the certificate without registration on the books of the corporation,³ and in some jurisdictions as to creditors of the pledgor having notice thereof.⁴ In those jurisdictions where a registration of an assignment is necessary to protect the shares from levy or attachment, such registration of pledged shares would be necessary to protect the shares in the hands of the pledgee from the claims of the assignor's creditors.⁵

(gs) *As to Subsequent Bona Fide Purchasers.* — It has been held that one to whom the owner of shares assigns them on the books of the corporation, if he is a *bona fide* purchaser, takes a title superior to that acquired by one to whom the owner had previously assigned them, though the latter had received the certificate and held it at the time of the assignment on the books of the corporation.⁶

(b) *What Constitutes Registration or Transfer on Books.* — A by-law providing that a transfer of shares shall be made by an assignment in the treasurer's books, either in person or by authorized attorney, requires a written assignment on the treasurer's books subscribed by the assignor or his attorney; an entry by the corporate officers of a credit on a person's account in the stock ledger is insufficient to constitute such person a shareholder.⁷ Nor is a by-law that no assignment shall be valid until recorded on the books of the corporation complied with by an indorsement "received for record;" it must be copied at length.⁸ Various cases in which memoranda made on the stubs of the stock certificate books have been held to be or not to be a compliance with the requirement that a transfer shall be made on the corporation books are referred to in the notes.⁹

Transfer on Books Kept Without State. — Where a transfer or registration on the books of the corporation is necessary to protect the shares from a levy or

1. Lippitt v. American Wood Paper Co., 15 R. I. 141, 2 Am. St. Rep. 886.

2. See cases *supra*.

3. *As Between Parties to Pledge.* — Haldeman v. Hillsborough, etc., R. Co., 2 Handy (Ohio) 101; Plankinton v. Hildebrand, 89 Wis. 209. But see Koons v. Jeffersonville First Nat. Bank, 89 Ind. 178. See the title PLEDGE AND COLLATERAL SECURITY, vol. 22, pp. 905, 906.

4. McClintock v. Central Bank, 120 Mo. 127.

5. See cases cited *supra*.

6. *Assignment First Registered Superior.* — Spreckels v. Nevada Bank, 113 Cal. 272, 54 Am. St. Rep. 348; New York, etc., R. Co. v. Schuyler, 34 N. Y. 30; Cady v. Potter, 55 Barb. (N. Y.) 463. See *infra*, this subsection, *Surrender of Old and Issuance of New Certificate*.

Notice of Prior Assignment. — One who takes an assignment on the books of the corporation with notice of a prior unregistered assignment does not take title as against such prior assignee. Cushman v. Thayer Mfg. Jewelry Co., 76 N. Y. 365, 32 Am. Rep. 315.

7. *By-law Requiring Assignment in Writing.* — Marlborough Mfg. Co. v. Smith, 2 Conn. 579. Compare Cecil Nat. Bank v. Watsontown Bank, 105 U. S. 217.

Assignment on Books. — Chambersburg Ins. Co. v. Smith, 11 Pa. St. 120.

A Mere Request to an Officer of the corporation to make a transfer is not sufficient to pass the legal title, no assignment having been made by him. Brown v. Adams, 5 Biss. (U. S.) 181.

8. *Recording Requires Copying at Full Length.* — Northrop v. Newton, etc., Turnpike Co., 3 Conn. 544.

Recitals of Certificate in Connection with Statutory Provisions were held to contemplate transfer by officers of corporation and not by assignor or assignee in Green Mount, etc., Turnpike Co. v. Bulla, 45 Ind. 1.

9. *Memorandum on Stub Held Sufficient.* — Bank of Commerce v. Newport Bank, 27 U. S. App. 486; Fisher v. Jones, 82 Ala. 117; Perkins v. Lyons, 111 Iowa 192; American Nat. Bank v. Oriental Mills Co., 17 R. I. 551. See also Moore v. Marshalltown Opera-House Co., 81 Iowa 45.

Memorandum on Stub Held Insufficient. — Newell v. Williston, 138 Mass. 240.

Indorsement on Stub Without Authority Insufficient. — McFall v. Buckeye Grangers' Warehouse Assoc., 122 Cal. 468, 68 Am. St. Rep. 47.

Pasting Old Certificate on Stub in Certificate Book. — Haegle v. Western Stove Mfg. Co., 29 Mo. App. 486.

attachment by creditors of the assignor, a registration on books of a transfer agent kept in a state other than that under the laws of which the corporation is organized is insufficient.¹

(3) *Deposit of Certificate of Transfer in Public Office.*—Under the Arkansas statute providing that no transfer of stock shall be valid as against any creditor of the assignor until a certificate of such transfer shall have been deposited in the office of the county clerk, an attaching creditor of the assignor acquires a title paramount to that acquired by a prior transferee where no certificate of transfer has been filed, though the attaching creditor had notice at the time of the attachment of such prior transfer.² Such statute does not apply to mere pledges of shares as collateral security, and hence a pledge by assignment and delivery, though no certificate is filed, gives to the pledgee a lien superior to that acquired by an attaching creditor.³

(4) *Surrender of Old and Issuance of New Certificate*—(a) *Necessity of Surrender of Old Certificate as Between Parties.*—Where the charter of a corporation provides that shares shall be assignable only on the books of the company, an assignment by the holder of the shares on the books of the corporation passes the title thereto to the assignee, though the assignor does not surrender for cancellation the certificate held by him.⁴ Its surrender is essential only for the protection of the corporation and may be waived by it. Where it permits a transfer to be made on its books by one in whose name the stock stands on the books of the corporation, the assignee may assume that no certificate has ever been issued, or if it has, that it has been surrendered for cancellation.⁵

(b) *Issuance of New Certificate to Assignee.*—Where an assignment of shares has been regularly made it is not essential to the perfection of the assignee's title that he should procure the issuance of a new certificate to him in his own name.⁶ Nevertheless, when an assignee presents the certificate with an assignment thereof and power of attorney to make a transfer on the books of the corporation, it is the duty of the corporation to issue a new certificate to him.⁷ The performance of this duty may be compelled by the person entitled to the certificate, by a suit in equity.⁸

(c) *Liability of Corporation for Issuance of New Without Surrender of Assigned Certificate.*—Where the certificate recites or the by-laws provide that shares shall be trans-

1. *Registration Without State Insufficient.*—Perkins v. Lyons, 111 Iowa 192; Pinkerton v. Manchester, etc., R. Co., 42 N. H. 424.

2. *Attaching Creditor with Notice Takes as Against Assignment.*—Fahrney v. Kelly, 102 Fed. Rep. 403.

3. *Statute Not Applicable to Pledge.*—Masury v. Arkansas Nat. Bank, (C. C. A.) 93 Fed. Rep. 603, reversing 87 Fed. Rep. 381; Batesville Telephone Co. v. Myer-Schmidt Grocer Co., 68 Ark. 115.

4. *Surrender of Certificate Not Necessary to Pass Title.*—Boatmen's Ins., etc., Co. v. Able, 48 Mo. 136; New York, etc., R. Co. v. Schuyler, 34 N. Y. 30. See also Chouteau Spring Co. v. Harris, 20 Mo. 382.

5. New York, etc., R. Co. v. Schuyler, 34 N. Y. 30.

In Allen v. South Boston R. Co., 150 Mass. 200, the court said: "We see no good reason for holding that there is a duty on the part of the purchaser towards the corporation to see to it that the seller of stock surrenders his certificate and transfers it on the books of the corporation. That is the duty of the corporation."

Purchaser from Corporate Officer.—The person to whom the new certificate is issued cannot, however, rely on this presumption if he is pur-

chasing from an officer of the corporation who has power to issue certificates. He cannot recover from the corporation where he accepts a new certificate as collateral for a personal indebtedness of the officer when he does not ascertain that old certificates have been surrendered, if the new certificate proves to be spurious. Under such circumstances he is bound to ascertain whether the new certificate is issued in lieu of others surrendered and canceled. Moores v. Citizens' Nat. Bank, 111 U. S. 156; Farrington v. South Boston R. Co., 150 Mass. 406. Compare Allen v. South Boston R. Co., 150 Mass. 200.

6. *Issuance of New Certificate Not Essential.*—Davenport First Nat. Bank v. Gifford, 47 Iowa 575; Agricultural Bank v. Burr, 24 Me. 256; Kerr v. Urie, 86 Md. 72, 63 Am. St. Rep. 493; Chouteau Spring Co. v. Harris, 20 Mo. 382. See also *infra*, *Certificate of Stock*.

7. *Assignee Entitled to New Certificate.*—Hawes v. Gas Consumers Ben. Co., (C. Pl. Gen. T.) 12 N. Y. Supp. 924. See *infra*, this subsection, *Obligation of Corporation to Transfer and Issue New Certificate—Compelling Transfer by Corporation*.

8. *Enforcement of Right to Certificate.*—Davenport v. Plano Implement Co., 70 Ill. App.

ferable on the books of the corporation on surrender of the certificate, a corporation which transfers shares on its books, without requiring a surrender of the certificate by the assignor, is deemed to do so with knowledge that the assignee may have previously assigned and delivered the certificate to another, and while the transferee, if a *bona fide* purchaser,¹ will take the title to the shares, the corporation will be liable to the prior assignee for the value of the shares.² So, too, the corporation is liable to a subsequent *bona fide* assignee of a certificate for which a new certificate has been issued, but which it has negligently allowed to remain uncanceled in the assignor's possession.³

C. OBLIGATION OF CORPORATION TO TRANSFER AND ISSUE NEW CERTIFICATE—(1) *In General*.—Subject to the right of the corporation to assert a lien on shares⁴ and make reasonable regulations in regard to the manner in which it shall be performed, both the assignee and the assignor have a legal right to have the transfer made on the books of the corporation and a new certificate issued to the assignee.⁵ If on the presentation of a certificate for transfer the officers of the corporation are doubtful whether the person offering it is the owner or person named in the power of attorney, or of the genuineness of the power of attorney, they can require the identity of the party in the one case and the genuineness of the document in the other to be satisfactorily established before allowing the transfer to be made.⁶ It has been doubted whether there is any obligation resting on the corporation to transfer a fractional part of a single share.⁷

(2) *Compelling Transfer by Corporation*—(a) *By Bill in Equity*.—An equitable action may be maintained by an assignee of shares to compel the corporation to transfer the shares on the company's books and issue a new certificate to him.⁸ If there are opposing claimants to the shares and the right of registration and there is a substantial doubt as to which claimant is entitled to registration, the corporation may file a bill of interpleader and

161; *Fregear v. Etiwanda Water Co.*, 76 Cal. 537, 9 Am. St. Rep. 245.

1. See *supra*, this subsection, *Transfer on Books of Corporation or Registration—Necessity—As to Subsequent Bona Fide Purchasers*.

2. *Permitting Transfer Without Surrender of Certificate*.—*South Bend First Nat. Bank v. Lanier*, 11 Wall. (U. S.) 369; *New York, etc., R. Co. v. Schuyler*, 34 N. Y. 30; *Cushman v. Thayer Mfg. Jewelry Co.*, 76 N. Y. 365, *affirming* 7 Daly (N. Y.) 330; *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616; *Cleveland, etc., R. Co. v. Robbins*, 35 Ohio St. 483; *Strange v. Houston, etc., R. Co.*, 53 Tex. 162. See also *Supply Ditch Co. v. Elliott*, 10 Colo. 327, 3 Am. St. Rep. 586; *Factors, etc., Ins. Co. v. Marine Dry Dock, etc., Co.*, 31 La. Ann. 149.

3. See cases cited *supra*.

No Liability Where Assignee Not Shown to Be Bona Fide Purchaser.—*Miller v. Houston City St. R. Co.*, 30 U. S. App. 402.

4. See *supra*, this title, *Lien of Corporation on Shares*.

5. *Transfer May Be Compelled at Instance of Assignee or Assignor*.—*Johnston v. Laffin*, 103 U. S. 800. See *supra*, this subsection, *Right to Transfer*.

6. *Identification of Person Demanding Transfer*.—*Krohn v. Central R., etc., Co.*, 6 Ohio Dec. 552. See *supra*, this subsection, *Right to Transfer—Right of Executor or Administrator to Transfer*.

7. *Fraction of Share*.—*Haegele v. Western Stove Mfg. Co.*, 20 Mo. App. 486.

8. *Bill in Equity to Compel Registration*

United States.—*Skinner v. Ft. Wayne, etc., R. Co.*, 58 Fed. Rep. 55.

California.—*Ralston v. State Bank*, 112 Cal. 208.

Connecticut.—*Tobey v. Hakes*, 54 Conn. 274, 1 Am. St. Rep. 114.

Georgia.—*Thornton v. Martin*, 116 Ga. 115.

Maryland.—*Real Estate Trust Co. v. Bird*, 90 Md. 229.

New Jersey.—*Archer v. American Water Works Co.*, 50 N. J. Eq. 49.

New York.—*Buckmaster v. Consumers' Ice Co.*, 5 Daly (N. Y.) 313; *Cushman v. Thayer Mfg. Jewelry Co.*, 76 N. Y. 365, *affirming* 7 Daly (N. Y.) 330; *Ernst v. Elmira Municipal Imp. Co.*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 583. See also *Robinson v. National Bank*, 95 N. Y. 637; *Campbell v. American Zylonite Co.*, 122 N. Y. 455; *Bedford v. American Aluminum, etc., Co.*, 51 N. Y. App. Div. 537; *Spellissy v. Cook, etc., Co.*, 58 N. Y. App. Div. 283.

New Hampshire.—See also *Hill v. Rockingham Bank*, 44 N. H. 567.

Ohio.—*Krohn v. Central R., etc., Co.*, 6 Ohio Dec. 552; *Arbuckle v. Woolson Spice Co.*, 11 Ohio Cir. Dec. 726.

See also 20 ENCYC. OF PL. AND PR. 813.

Purchaser at Execution Sale.—*Wetumpka Bridge Co. v. Kidd*, 124 Ala. 242.

Assignee of Foreign Executor or Administrator May Maintain Suit.—*Middlebrook v. Merchants Bank*, 41 Barb. (N. Y.) 481.

Assignee's Right to Transfer Barred by Laches.—*Stoddard v. Decatur Cracker Co.*, 184 Ill. 53, *affirming* 84 Ill. App. 374.

require the rival claimants to litigate their respective rights.¹

(b) **By Writ of Mandamus.** — In conformity with the general principle that mandamus will not lie where other adequate remedy is afforded in the usual course of the law, mandamus will not lie, except where exceptional circumstances exist or it is specifically authorized by statute,² to compel a corporation to register a transfer and issue a new certificate.³

(3) **Recovery of Damages for Wrongful Refusal to Transfer.** — The assignee may, if he elects, treat the wrongful refusal to register the transfer as a conversion of the shares and sue for the recovery of their value.⁴

The Measure of Damages recoverable by the assignee in case he elects to sue for damages is not uniform in all jurisdictions. Thus, it has been held in an action on the case for a wrongful refusal to register a transfer that such refusal does not constitute a conversion of the shares, since the assignee was entitled to all the rights of a stockholder without registration, and in the absence of evidence of special damages he was awarded only nominal damages.⁵ In other jurisdictions it has been held that he could recover the actual value of the shares at the time of the refusal to register,⁶ together with interest thereon at the legal rate from the time of such refusal.⁷ The interest allowed

1. Corporation May Interplead Rival Claimants for Registration. — *Skinner v. Ft. Wayne, etc.*, R. Co., 58 Fed. Rep. 55. See also 11 ENCYC. OF PL. AND PR. 444.

2. Purchaser at Execution Sale. — *Hair v. Burnell*, 106 Fed. Rep. 280; *Bailey v. Strohecker*, 38 Ga. 259, 95 Am. Dec. 388. See also the title MANDAMUS, vol. 19, p. 881.

3. Mandamus Will Not Lie to Compel Transfer — England. — *Rex v. Bank of England*, 2 Dougl. 524; *Rex v. London Assur. Co.*, 5 B. & Ald. 899, 7 E. C. L. 295.

Connecticut. — *Tobey v. Hawkes*, 54 Conn. 274, 1 Am. St. Rep. 114.

Georgia. — *Terrell v. Georgia R., etc., Co.*, 115 Ga. 104.

Massachusetts. — *Murray v. Stevens*, 110 Mass. 95.

Minnesota. — *Baker v. Marshall*, 15 Minn. 177.

Missouri. — *State v. Rombauer*, 46 Mo. 155. See also *State v. St. Louis Paint Mfg. Co.*, 21 Mo. App. 526.

Nevada. — *State v. Guerrero*, 12 Nev. 105.

New York. — *Ex p. Fireman's Ins. Co.*, 6 Hill (N. Y.) 243; *Shipley v. Mechanics' Bank*, 10 Johns. (N. Y.) 484.

Oregon. — *Durham v. Monumental Silver Min. Co.*, 9 Oregon 41; *Slemmons v. Thompson*, 23 Oregon 215.

Pennsylvania. — *Birmingham F. Ins. Co. v. Com.*, 92 Pa. St. 72.

Rhode Island. — *Wilkinson v. Providence Bank*, 3 R. I. 22.

4. Action for Damages for Conversion — United States. — *Case v. Citizens' Bank*, 100 U. S. 455.

California. — *Kimball v. Union Water Co.*, 44 Cal. 173, 13 Am. Rep. 157; *Fromm v. Sierra Nevada Silver Min. Co.*, 61 Cal. 629; *Ralston v. State Bank*, 112 Cal. 208; *Craig v. Hesperia Land, etc., Co.*, 113 Cal. 7, 54 Am. St. Rep. 316.

Connecticut. — *Bridgeport Bank v. New York, etc., R. Co.*, 30 Conn. 231; *Tobey v. Hawkes*, 54 Conn. 274, 1 Am. St. Rep. 114.

Indiana. — *Helm v. Swiggett*, 12 Ind. 194.

Maryland. — *Baltimore City Pass. R. Co. v. Sewell*, 35 Md. 238, 6 Am. Rep. 402.

Massachusetts. — *Bond v. Mount Hope Iron*

Co., 99 Mass. 505; *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90.

Missouri. — *Brinkerhoff-Farris Trust, etc., Co. v. Home Lumber Co.*, 118 Mo. 447; *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 149; *Withers v. Lafayette County Bank*, 67 Mo. App. 115.

New York. — *Buckmaster v. Consumers Ice Co.*, 5 Daly (N. Y.) 313; *Shipley v. Mechanics' Bank*, 10 Johns. (N. Y.) 484; *Commercial Bank v. Kortright*, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317, affirming 20 Wend. (N. Y.) 90.

Ohio. — *Krohn v. Central, etc., R. Co.*, 6 Ohio Dec. 552.

Oregon. — *Durham v. Monumental Silver Min. Co.*, 9 Oregon 41.

Pennsylvania. — *Telford, etc., Turnpike Co. v. Gerhab*, (Pa. 1888) 13 Atl. Rep. 90; *German Union Bldg., etc., Assoc. v. Sendmeyer*, 50 Pa. St. 67.

Rhode Island. — *Wilkinson v. Providence Bank*, 3 R. I. 22.

Texas. — *Rio Grande Cattle Co. v. Burns*, 82 Tex. 50.

See also *State Bank v. Winn*, (Ky. 1901) 61 S. W. Rep. 32.

But see *McLean v. Charles Wright Medicine Co.*, 96 Mich. 479.

When Refusal Not Wrongful. — A corporation is not liable for a refusal to make a transfer where at the time of the demand and refusal an order of a competent court is in force, restraining the corporation from making a transfer. *Purchase v. New York Exch. Bank*, 3 Robt. (N. Y.) 164.

5. Nominal Damages. — *McLean v. Charles Wright Medicine Co.*, 96 Mich. 479.

6. Value at Time of Refusal to Register. — *German Union Bldg., etc., Assoc. v. Sendmeyer*, 50 Pa. St. 67. See also *London, etc., Bank v. Aronstein*, (C. C. A.) 117 Fed. Rep. 601; *Rio Grande Cattle Co. v. Burns*, 82 Tex. 50.

How Value Determined in Absence of Market Value. — *Brinkerhoff-Farris Trust, etc., Co. v. Home Lumber Co.*, 118 Mo. 447.

7. Interest. — *Salt River Canal Co. v. Hickey*, (Ariz. 1894) 36 Pac. Rep. 171; *Ralston v. State Bank*, 112 Cal. 208; *Pinkerton v. Manchester, etc., R. Co.*, 42 N. H. 424.

on the value of the shares is regarded as in lieu of dividends which may have been declared subsequent to the refusal and prior to the commencement of the action,¹ and hence such dividends are not recoverable.² He may, however, recover in one action the value of the stock, together with dividends which had accrued thereon at the time of the demand, with interest on the whole to the date of trial.³ In other jurisdictions the assignee can recover the highest market value reached by the stock at any time after the refusal to transfer and before trial.⁴ The corporation may, for the purpose of reducing the amount recoverable, show that there are unpaid assessments against the shares sought to be transferred which are enforceable against the shares in the hands of the assignee.⁵

d. WRONGFUL TRANSFER BY CORPORATION — (1) *In General.* — A corporation, being clothed with power to protect the rights of its shareholders from unauthorized transfers of their shares, is in a sense a trustee for them and bound to execute its trust with proper diligence and care, and is responsible to its shareholders for injuries sustained by its negligence or misconduct in that regard.⁶ Its liability is based on its breach of an implied contract to hold the stock for the benefit of the true owner, rather than on the theory that it has committed a tort.⁷ If it permits a transfer and issues a new certificate to one who has possession of the certificate, but who is not the owner, without an assignment from the owner, as required by the by-laws of the corporation, it is liable in damages to the owner for the conversion of his shares,⁸ or the owner can maintain a bill in equity to compel the corporation to recognize him as a stockholder and issue to him a certificate for the shares wrongfully transferred.⁹ The owner is not bound to seek to recover from the

1. *Baltimore City Pass. R. Co. v. Sewell*, 35 Md. 238, 6 Am. Rep. 402; *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90.

2. *Dividends.* — *Ralston v. State Bank*, 112 Cal. 208.

3. *Baltimore City Pass. R. Co. v. Sewell*, 35 Md. 238, 6 Am. Rep. 402.

4. *Highest Market Value Before Trial.* — *Commercial Bank v. Kortright*, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317, affirming 20 Wend. (N. Y.) 90.

In *California*, if the assignee so elects, he may, in case he has prosecuted his action with reasonable diligence, recover the highest market value of the property at any time between the conversion and the verdict. *Ralston v. State Bank*, 112 Cal. 208. See also *Civ. Code Cal.*, § 3336.

5. *Unpaid Assessments in Reduction of Damages.* — *Craig v. Hesperia Land, etc., Co.*, 113 Cal. 7, 54 Am. St. Rep. 316. See also *infra*, this title, *Subscription to Stock — Calls — Effect of Transfer of Stock on Liability for Call.*

6. *Corporation Regarded as Trustee of Shareholders.* — *Western Union Tel. Co. v. Davenport*, 97 U. S. 369; *Woodhouse v. Crescent Mut. Ins. Co.*, 35 La. Ann. 238; *Cleveland, etc., R. Co. v. Robbins*, 35 Ohio St. 483; *Livezey v. Northern Pac. R. Co.*, 157 Pa. St. 75. See also *infra*, this subsection, *At Instance of Trustee in Violation of Trust.*

Where a transfer of stock is presented to a corporation it is bound at its peril to see that it is a genuine transfer by one who has the power of disposition over it. *Crocker v. Old Colony R. Co.*, 137 Mass. 417; *American Tel., etc., Co. v. Day*, 52 N. Y. Super. Ct. 128.

7. *Liability Based on Breach of Contract.* — *Chapman v. Charleston*, 28 S. Car. 373, 13

Am. St. Rep. 681; *Baker v. Wasson*, 53 Tex. 150.

8. *Corporation Liable as for Conversion.* — *Taft v. Presidio, etc., R. Co.*, 84 Cal. 131, 18 Am. St. Rep. 166; *Woodhouse v. Crescent Mut. Ins. Co.*, 35 La. Ann. 238; *Farmers, etc., Bank v. Wayman*, 5 Gill (Md.) 336.

Where Certificates Are Stolen after the owner thereof has indorsed an assignment and power of attorney thereon, the corporation is liable to the owner for transferring the stock pursuant to such power of attorney where the time intervening between the date of the execution of the assignment and the time of the presentation of the certificate for transfer is so great as in itself to constitute a suspicious element putting the corporation on inquiry. If, however, the owner is negligent in placing certificates with the indorsement thereon in a place where they can be abstracted by a servant of the owner, the owner cannot recover. *Pennsylvania R. Co.'s Appeal*, 86 Pa. St. 80.

Permitting Assignment Without Surrender of Old Certificate. — *Factor's, etc., Ins. Co. v. Marine Dry Dock, etc., Co.*, 31 La. Ann. 149. See also *supra*, this subsection, *Surrender of Old and Issuance of New Certificate — Liability of Corporation for Issuance of New Without Surrender of Assigned Certificate.*

9. *Bill in Equity to Compel Issuance of New Certificate.* — *Read v. Cumberland Tel., etc., Co.*, 93 Tenn. 482.

Where Shares Are Sold under a Void Decree, the owner may maintain a bill in equity against the corporation and the alleged purchaser to enjoin an assignment by the alleged purchasers and to compel a cancellation of the transfer and the payment of dividends to him by the corporation. *Dewing v. Perdicaries*, 96 U. S. 193.

person to whom the stock has been wrongfully transferred.¹

(2) *Transfer Pursuant to Forged Assignment or Power of Attorney*—

(a) **Rights and Remedies of Person Whose Shares Are Transferred.**—Where the corporation, pursuant to a forged assignment or power of attorney, cancels a person's certificate and issues another in lieu thereof to some other person, the owner is not thereby deprived of his ownership of the shares,² and may either bring suit in equity to compel a cancellation of the transfer and the issuance of a new certificate to him,³ or may maintain an action at law against the corporation for the recovery of damages as for the conversion of the shares.⁴ In addition to having his rights as a stockholder restored he may recover dividends which have been declared but not paid to him during the time his name did not appear on the corporation records as a stockholder.⁵ He can require the corporation to issue new certificates to him though new certificates in lieu of those canceled have been issued to *bona fide* purchasers.⁶ Nor does the fact that he kept the certificate in a place where the person who forged the indorsement thereon could have access to it constitute such negligence as precludes recovery by him, since the criminal act of forgery, and not the access to the certificate, was the proximate cause of the imposition on the corporation.⁷

(b) **Rights, Liabilities, and Remedies of Transferee under Forged Assignment.**—One to whom a corporation issues a new certificate pursuant to a forged assignment and power of attorney presented by the person to whom the new certificate is issued acquires no rights thereunder as against either the real owner or the corporation. The corporation is not estopped to deny the validity of the new certificate while it remains in the hands of the person at whose request it was issued, since such person was under as great or even greater obligation to ascertain the genuineness of the signature to the assignment as was the corporation.⁸ Nor is the corporation estopped to deny the validity of such certificate merely by reason of the fact that it has paid dividends to the

1. *St. Romes v. Levee Steam Cotton Press Co.*, 127 U. S. 614; *Woodhouse v. Crescent Mut. Ins. Co.*, 35 La. Ann. 238.

2. **Owner's Title Not Affected by Unauthorized Transfer.**—*Crocker v. Old Colony R. Co.*, 137 Mass. 417.

Injunction to Prevent Registration of Forged Assignment.—*Taylor v. Great Indian Peninsula R. Co.*, 4 De G. & J. 559; *Reynolds v. Teuzalin Imp. Co.*, 62 Neb. 236.

3. **Owner Has Choice of Remedies.**—*Withers v. Lafayette County Bank*, 67 Mo. App. 115. See also *Sewall v. Boston Water Power Co.*, 4 Allen (Mass.) 277.

4. **Owner May Recover Value of Shares Transferred.**—*Ashby v. Blackwell*, AmbL 503.

Owner May Maintain Suit in Equity to Compel Issuance of New Certificate.—*Midland R. Co. v. Taylor*, 8 H. L. Cas. 751; *Barton v. London*, etc., R. Co., 24 Q. B. D. 77; *St. Romes v. Levee Steam Cotton Press Co.*, 127 U. S. 614; *Baltimore v. Ketchum*, 57 Md. 23; *Pennsylvania Co. v. Franklin F. Ins. Co.*, 181 Pa. St. 40. See also *Moores v. Citizens' Nat. Bank*, 111 U. S. 156, and the cases cited in the next following note.

5. **Restoration of Rights as Shareholder and Recovery of Back Dividends—England.**—*Davis v. Bank of England*, 2 Bing. 393, 9 E. C. L. 444; *Midland R. Co. v. Taylor*, 8 H. L. Cas. 751, *affirming* 28 Beav. 287; *Johnston v. Renton*, L. R. 9 Eq. 181; *Ashby v. Blackwell*, 2 Eden 299; *Sloman v. Bank of England*, 14 Sim. 475.

United States.—*Western Union Tel. Co. v. Davenport*, 97 U. S. 369.

Georgia.—*Blaisdell v. Bohr*, 68 Ga. 56.

Maryland.—*Brown v. Howard F. Ins. Co.*, 42 Md. 384, 20 Am. Rep. 90; *Hambleton v. Central Ohio R. Co.*, 44 Md. 551.

Massachusetts.—*Pratt v. Taunton Copper Co.*, 123 Mass. 110; *Pratt v. Boston*, etc., R. Co., 126 Mass. 443.

Missouri.—*Trimble v. Union Nat. Bank*, 71 Mo. App. 467.

New York.—*Pollock v. National Bank*, 7 N. Y. 274, 57 Am. Dec. 520.

Tennessee.—*Smith v. Nashville*, etc., R. Co., 91 Tenn. 221.

6. *Chicago Edison Co. v. Fay*, 164 Ill. 323, *affirming* 62 Ill. App. 55.

7. *Pennsylvania Co. v. Franklin F. Ins. Co.*, 181 Pa. St. 40.

8. **Corporation Not Estopped to Deny Validity of Certificate in Hands of First Taker.**—*Siman v. Anglo-American Tel. Co.*, 5 Q. B. D. 188; *Brown v. Howard F. Ins. Co.*, 42 Md. 384, 20 Am. Rep. 90; *Hambleton v. Central Ohio R. Co.*, 44 Md. 551; *Trimble v. Union Nat. Bank*, 71 Mo. App. 467. See also *Moores v. Citizens' Nat. Bank*, 111 U. S. 156. Compare *Ashby v. Blackwell*, 2 Eden 299.

Right of Purchaser of Stolen Certificate.—*Mandelbaum v. North American Min. Co.*, 4 Mich. 465.

Persons to Whom Shares Are Sold and Transferred under a Void Decree cannot recover from

person to whom the certificate was issued after discovery of the forgery, when such payment is shown to have been inadvertently made by the corporate officers.¹ The corporation can recover such dividends as well as all others which have been paid to the holder of the certificate before discovery of the forgery.² If, however, the new certificate is issued to the assignee named in the forged assignment solely at the instance of the person uttering the forged assignment and without any intervention by word or act on the part of the assignee, and he parts with value because of his reliance on the truth of the recitals of the certificate, he occupies as to the corporation the same position as a *bona fide* assignee of the first taker, and can recover the value of the shares from the corporation.³

Right of Bona Fide Assignee of Certificate Issued Pursuant to Forged Assignment. — The corporation is estopped to deny the validity of the certificate if it has been assigned to a *bona fide* purchaser from the person to whom it was issued, and such *bona fide* purchaser can recover from the corporation the value thereof at the time when he purchased.⁴

Status of Subtransferee as Shareholder. — Since the transfer pursuant to the forged assignment does not divest the owner's title, it would seem on principle that if the recognition of the subtransferee's shares would create an overissue of stock he would not be entitled to recognition as a shareholder, since the corporation has no power to issue stock in excess of the authorized amount,⁵ and that in such case his only remedy would be an action for the recovery of their value; but if such new certificate does not create an overissue of shares it would seem that he would be entitled to recognition as a shareholder.⁶

(c) **Remedy of Corporation.** — Where a corporation is compelled to indemnify a *bona fide* assignee of a certificate which has been issued by it pursuant to a forged assignment and power of attorney, it can recover the amount so paid by it from the person who presented the forged assignment and requested the issuance of the new certificate, together with dividends which it has paid to persons other than the true owner by reason of the wrongful transfer. It may also recover the costs of defending a suit brought by the owner of the shares wrongfully transferred to compel the issuance of a new certificate to him, where it requested the person presenting the forged assignment to defend such suit and he failed so to do.⁷

(3) **At Instance of Trustee in Violation of Trust.** — Where shares are transferable only on the books of the corporation, it is bound to exercise reasonable care and diligence in protecting the title of an equitable or beneficial owner of its stock against an unauthorized transfer thereof by the holder of the legal title which may result in the loss thereof to the beneficial owner.⁸ If it has notice⁹ that the shares are held in trust by the person in whose name they stand of record, it can rightfully refuse to make a transfer at the instance of

the corporation for the value of their shares. *Dewing v. Perdicaries*, 96 U. S. 193.

1. *Hambleton v. Central Ohio R. Co.*, 44 Md. 551.

2. **Recovery of Dividends.** — *Brown v. Howard F. Ins. Co.*, 42 Md. 384, 20 Am. Rep. 90.

3. *Trimble v. Union Nat. Bank*, 71 Mo. App. 467.

4. **Bona Fide Subtransferee Can Recover from Corporation.** — *In re Bahia*, etc., R. Co., L. R. 3 Q. B. 584; *Moore v. Citizens' Nat. Bank*, 111 U. S. 156; *Boston, etc., R. Co. v. Richardson*, 135 Mass. 473. See also *Crocker v. Old Colony R. Co.*, 137 Mass. 417; *Machinists' Nat. Bank v. Field*, 126 Mass. 345; *Philadelphia Nat. Bank v. Smith*, 195 Pa. St. 38.

Subtransferee May Recover Amount Paid and Interest. — *Simm v. Anglo-American Tel. Co.*,

5 Q. B. D. 188; *Metropolitan Sav. Bank v. Baltimore*, 63 Md. 6.

5. *New York, etc., R. Co. v. Schuyler*, 34 N. Y. 30. See also *Moore v. Citizens' Nat. Bank*, 111 U. S. 156.

6. See *supra*, this section, *Issuance of Certificate — Forged or Spurious Certificates*.

7. *Boston, etc., R. Co. v. Richardson*, 135 Mass. 473.

8. **Unauthorized Transfer.** — *Wooten v. Wilmington, etc., R. Co.*, 128 N. Car. 119; *Bayard v. Farmers', etc., Bank*, 52 Pa. St. 232; *Peck v. Providence Gas Co.*, 17 R. I. 275; *Caulkins v. Memphis Gas-Light Co.*, 85 Tenn. 683, 4 Am. St. Rep. 786.

9. See *infra*, this subdivision, the paragraph headed *When Corporation Chargeable with Notice that Shares Are Held in Trust*.

such person until he shall furnish satisfactory evidence that he is authorized to transfer under the terms of the trust.¹ It cannot be mulcted in damages for refusing to make the transfer without such evidence,² though it may be charged with the costs of a suit to compel a transfer where it unreasonably refused to examine and be satisfied with the evidence of his authority offered by the trustee and insisted on his procuring a decree.³

Permitting Wrongful Transfer by Trustee. — It follows that the corporation is liable to the beneficial owner for the value of shares which it knowingly permits a trustee to transfer on its books in violation of his duty as trustee and for a purpose contrary to the terms of the trust, or where it has notice of the trust and fails to exercise reasonable care in ascertaining whether the transfer is authorized, and preventing it in case it is not.⁴ Fraud or collusion on the part of the corporation need not be shown.⁵ It is not, of course, liable for transferring shares where it has no notice, actual or constructive, that they are held in trust by the assignor,⁶ nor is it liable for failure to inquire into the purposes for which a transfer is made by one in whose name the title to shares stands and who has a full and complete power of disposition over such shares, though it be known that he holds them in a fiduciary capacity.⁷

When Corporation Chargeable with Notice that Shares Are Held in Trust. — Where an assignment of shares standing on the corporation records in the name of a deceased person, executed by a person purporting to act as executor of such deceased person, is presented to the corporation for registration or transfer on its books, the corporation is chargeable with notice that the decedent left a will as well as with knowledge of its contents and of any trust of such shares created thereby; and while an executor has power to sell and assign the assets of the decedent's estate for the purpose of paying his debts, the corporation is liable for permitting a transfer after the expiration of the time limited by law for the payment of decedent's debts which is in violation of the terms of a trust created by the will.⁸ If the transfer by the executor is made apparently in

1. **Evidence of Authority to Transfer.** — Bayard *v. Farmers', etc.*, Bank, 52 Pa. St. 232; Peck *v. Providence Gas Co.*, 17 R. I. 275.

2. Bayard *v. Farmers', etc.*, Bank, 52 Pa. St. 232.

A corporation is not liable in damages for refusal to transfer shares in violation of the terms of a trust under which they are held by the person seeking to make the transfer. Livezey *v. Northern Pac. R. Co.*, 157 Pa. St. 75; Davis *v. National Eagle Bank*, (R. I. 1901) 50 Atl. Rep. 530.

3. Iasigi *v. Chicago, etc.*, R. Co., 129 Mass. 46.

4. **Corporation Liable for Transfer by Trustee in Breach of Trust** — *United States*. — Lowry *v. Commercial, etc.*, Bank, Taney (U. S.) 310; Geyser-Marion Gold-Min. Co. *v. Stark*, 45 C. C. A. 467.

Indiana. — Weyer *v. Franklin Second Nat. Bank*, 57 Ind. 198.

Maryland. — Stewart *v. Firemen's Ins. Co.*, 53 Md. 564; Marbury *v. Ehlen*, 72 Md. 206; Hughes *v. Drovers', etc.*, Bank, 86 Md. 418.

Massachusetts. — Atkinson *v. Atkinson*, 8 Allen (Mass.) 15; Loring *v. Salisbury Mills*, 125 Mass. 138.

North Carolina. — Cox *v. Wilson First Nat. Bank*, 119 N. Car. 302; Wooten *v. Wilmington. etc.*, R. Co., 128 N. Car. 119.

Pennsylvania. — Bohlen's Estate, 75 Pa. St. 318.

Rhode Island. — Peck *v. Bank of America*, 16 R. I. 710.

South Carolina. — Magwood *v. South-western R. Bank*, 5 S. Car. 379.

Tennessee. — Caulkins *v. Memphis Gas-Light Co.*, 85 Tenn. 683, 4 Am. St. Rep. 786.

Where Shares Do Not Stand in Name of Trustee as Such. — Smith *v. Nashville, etc.*, R. Co., 91 Tenn. 221.

Municipal Corporation Liable for Permitting Wrongful Transfer of City Stocks. — Chapman *v. Charleston*, 28 S. Car. 373, 13 Am. St. Rep. 681.

Statutory Exemption of Corporation from Liability. — Bean *v. Taylor*, (Ky. 1901) 6 S. W. Rep. 31.

5. Loring *v. Salisbury Mills*, 125 Mass. 138.

6. **Notice of Trust.** — Albert *v. Baltimore*, 2 Md. 168.

7. **Fiduciary with Complete Power of Disposition.** Hughes *v. Drovers', etc.*, Bank, 86 Md. 418; Crocker *v. Old Colony R. Co.*, 137 Mass. 417. See also Hutchins *v. State Bank*, 12 Met. (Mass.) 421.

8. **Transfer by Executor After Expiration of Time for Paying Debts.** — Stewart *v. Firemen's Ins. Co.*, 53 Md. 564; Marbury *v. Ehlen*, 72 Md. 212; Peck *v. Bank of America*, 16 R. I. 710; Peck *v. Providence Gas Co.*, 17 R. I. 275. See also Lowry *v. Commercial, etc.*, Bank, Taney (U. S.) 310. Compare Hutchins *v. State Bank*, 12 Met. (Mass.) 421.

Knowledge of the Contents of a Will on the part of the corporation will be presumed from its knowledge that there is a will, on the terms of which the title to its stock is made to depend, as where it issues new shares on their

the course of administration, the corporation is not liable unless it has reasonable ground to believe that the executor intends unlawfully to divert the shares from the purposes of the trust declared in the will, and not for the purpose of paying debts;¹ but where the transfer is to a legatee under the will it is bound to ascertain whether such person is taking as a purchaser or under the will, and in the latter case must make the transfer in accordance with the terms of the will.² Where shares stand in the name of the person "as trustee" there is a legal presumption that he holds in a fiduciary capacity and without the power of disposition, unless that power is given by the terms of the trust or by the assent of the *cestui que trust*. The corporation is liable for a transfer made by such person in violation of his trust if by the exercise of reasonable care it could have prevented it.³

Rights of Transferee. — The rights and titles acquired by a transferee of shares which were held in trust by the transferee are treated elsewhere in this work.⁴

Measure of Recovery by Cestui Que Trust. — Where the corporation has allowed a trustee to transfer shares in breach of his duty as trustee under such circumstances as render the corporation liable to the *cestui que trust*, the latter is entitled to the same redress as is the owner of shares transferred pursuant to a forged assignment and power of attorney.⁵

IX. WHO ARE STOCKHOLDERS — 1. Definitions. — A stockholder is one who holds membership in a corporation or joint-stock company by virtue of holding or owning one or more shares of its stock.⁶ In the *United States* the term is used synonymously with "shareholder,"⁷ though the latter is less common, but in *England* the word shareholder is almost exclusively employed.⁸ Other terms often used in a sense closely approaching that of "stockholder," but

face referring to such will. *Caulkins v. Memphis Gas-Light Co.*, 85 Tenn. 683, 4 Am. St. Rep. 786. See also *Wooten v. Wilmington, etc., R. Co.*, 128 N. Car. 119.

1. *Lowry v. Commercial, etc., Bank, Taney (U. S.)* 310. See also the title EXECUTORS AND ADMINISTRATORS, vol. 11, pp. 1029, 1030.

2. *Wooten v. Wilmington, etc., R. Co.*, 128 N. Car. 119.

Thus, the corporation is liable to the remaindermen for permitting a transfer by an executor to a life tenant which is absolute in terms, where the life tenant sold and assigned the shares so that they were lost to the remaindermen. *Cox v. Wilson First Nat. Bank*, 119 N. Car. 302.

3. **Where Shares Held "as Trustee."** — *Geyser-Marion Gold-Min. Co. v. Stark*, 45 C. C. A. 467; *Marbury v. Ehlen*, 72 Md. 206. But see *Brewster v. Sime*, 42 Cal. 139. Compare *Albert v. Baltimore*, 2 Md. 168; *Graffin v. Robb*, 84 Md. 451.

4. See the titles EXECUTORS AND ADMINISTRATORS, vol. 11, p. 1030; TRUSTS AND TRUSTEES.

5. **Measure of Recovery by Cestui Que Trust.** — See *supra*, this subsection, *Rights, Liabilities, and Remedies of Transferee under Forged Assignment*.

In *Stewart v. Firemen's Ins. Co.*, 53 Md. 564, the court rendered a decree against the corporation for the issuance of a new certificate for the benefit of the *cestui que trust* and the payment of all dividends which had been withheld by reason of the transfer or for payment of the market value of the stock at the time of the unauthorized transfer with dividends declared subsequent thereto.

6. **Stockholders Defined.** — *United States.* — *Beal v. Essex Sav. Bank*, (C. C. A.) 67 Fed. Rep. 816.

California. — *Smith v. San Francisco, etc., R. Co.*, 115 Cal. 584, 56 Am. St. Rep. 119.

Indiana. — *Gowdy Gas Well, etc., Co. v. Paterson*, 29 Ind. App. 261.

Maryland. — *Magruder v. Colston*, 44 Md. 349, 22 Am. Rep. 47.

Minnesota. — *Arthur v. Clarke*, 46 Minn. 491.

Missouri. — *Shaeffer v. Missouri Home Ins. Co.*, 46 Mo. 250.

New Hampshire. — *Farnum v. Patch*, 60 N. H. 325.

New York. — *St. John v. Eberlin*, (Supm. Ct. Tr. T.) 23 Misc. (N. Y.) 585; *Mills v. Stuart*, 41 N. Y. 386.

North Dakota. — *Matter of Argus Printing Co.*, 1 N. Dak. 439, 26 Am. St. Rep. 639.

Pennsylvania. — *Curry v. Scott*, 54 Pa. St. 270.

A person who "holds" shares of stock, issued in his name, is recognized as a stockholder as well as one who "owns" them. *State v. Leete*, 16 Nev. 250.

7. **"Stockholder" and "Shareholder" Used Synonymously in United States.** — *Cook on Stock and Stockholders* (2d ed.), § 10. See also *SHAREHOLDER*, vol. 25, p. 638.

A "shareholder" is one who has a proportionate interest in the corporate assets and is entitled to take part in its control and receive dividends. *Beal v. Essex Sav. Bank*, (C. C. A.) 67 Fed. Rep. 816.

8. As to the distinction in England between "shares" and "stock," see *supra*, this title, *Definition and Nature of Corporate Stock — Shares of Stock — General Nature*.

distinguishable from it by certain shades of meaning, are "corporator,"¹ "member,"² and "subscriber."³

2. Necessity of Certificate and Registration. — A person may be a stockholder although no certificate has been issued representing the shares of stock owned by him,⁴ as the certificate is merely evidence of ownership, and not the shares themselves.⁵

Registration upon the books of the company is not necessary to render one a stockholder, unless made a condition precedent by statute or otherwise.⁶ Nor is mere registration in all cases conclusive.⁷

3. Irregularities in Transfer. — Purchasers of stock recognized by the corporation as stockholders are stockholders notwithstanding irregularities in the transfer.⁸

4. Legal Owner of Shares. — For most purposes the holder of the legal title

1. "Corporator" Used in Sense of "Stockholder." — See *CORPORATORS*, vol. 7, p. 860.

"Corporator" Distinguished from "Stockholder." — An incorporator is not necessarily a stockholder. *Medler v. Albuquerque Hotel, etc., Co.*, 6 N. Mex. 331; *Densmore Oil Co. v. Densmore*, 64 Pa. St. 43.

"Corporators exist before stockholders, and do not exist without them. When stockholders come in, corporators cease to be." *Danforth, J., in Chase v. Lord*, 77 N. Y. 11, 6 Abb. N. Cas. (N. Y.) 258. See also *CORPORATORS*, vol. 7, p. 860.

2. "Member" in Sense of Stockholder. — See *MEMBER*, vol. 20, p. 574, and see *State v. Gilmore*, 24 N. H. 470.

3. "Subscriber" means one who has stipulated to pay, not one who has paid. *Thames Tunnel Co. v. Sheldon*, 9 Dowl. & R. 278, 6 B. & C. 341, 13 E. C. L. 194.

In England the terms "owners," "proprietors," and "subscribers" are sometimes used indiscriminately. See *West London R. Co. v. Bernard*, 3 Q. B. 873, 43 E. C. L. 1015.

4. Certificate Unnecessary. — *United States*. — *Upton v. Burnham*, 3 Biss. (U. S.) 431; *Farrar v. Walker*, 3 Dill. (U. S.) 506, note; *Becher v. Wells Flouring Mill Co.*, 1 McCrary (U. S.) 62; *Cecil Nat. Bank v. Watsonstown Bank*, 105 U. S. 217; *Hawley v. Upton*, 102 U. S. 314; *Turnbull v. Payson*, 95 U. S. 418; *Pendery v. Carleton*, (C. C. A.) 87 Fed. Rep. 41; *Hill v. Glasgow R. Co.*, 41 Fed. Rep. 610.

Alabama. — *Frenkel v. Hudson*, 82 Ala. 158, 60 Am. Rep. 736.

Arkansas. — *Biscoe v. Tucker*, 11 Ark. 145.

California. — *Mitchell v. Beckman*, 64 Cal. 117, 1 Am. & Eng. Corp. Cas. 40.

Illinois. — *Corwith v. Culver*, 69 Ill. 502; *Dows v. Naper*, 91 Ill. 44; *Colton v. Williams*, 65 Ill. App. 466.

Indiana. — *Beckett v. Houston*, 32 Ind. 394; *Helm v. Swiggett*, 12 Ind. 194; *Gowdy Gas Well, etc., Co. v. Patterson*, 29 Ind. App. 261.

Iowa. — *Waukon, etc., R. Co. v. Dwyer*, 49 Iowa 121; *Davenport First Nat. Bank v. Gifford*, 47 Iowa 575.

Kansas. — *Baker v. Woolston*, 27 Kan. 185.

Maine. — *Chaffin v. Cummings*, 37 Me. 76; *Agricultural Bank v. Wilson*, 24 Me. 273; *Agricultural Bank v. Burr*, 24 Me. 256.

Massachusetts. — *Hussey v. Manufacturers, etc., Bank*, 10 Pick. (Mass.) 415; *Ellis v. Essex Merrimack Bridge*, 2 Pick. (Mass.) 243; *Bos-*

ton, etc., R. Co. v. Pearson, 128 Mass. 445; *Chester Glass Co. v. Dewey*, 16 Mass. 94, 8 Am. Dec. 128.

Minnesota. — *Holland v. Duluth Iron Min., etc., Co.*, 65 Minn. 324; *Minneapolis Harvester Works v. Libby*, 24 Minn. 327.

Missouri. — *Schaeffer v. Missouri Home Ins. Co.*, 46 Mo. 250; *Chouteau Spring Co. v. Harris*, 20 Mo. 382; *Knapp v. Knapp*, 127 Mo. 53; *Kimball v. Davis*, 52 Mo. App. 194.

New Hampshire. — *Wheeler v. Walker*, 45 N. H. 355; *New Hampshire Cent. R. Co. v. Johnson*, 30 N. H. 390, 64 Am. Dec. 300.

New Jersey. — *Matter of St. Lawrence Steamboat Co.*, 44 N. J. L. 529.

New York. — *Dennis v. Kennedy*, 19 Barb. (N. Y.) 517; *Johnson v. Albany, etc., R. Co.*, (Supm. Ct. Spec. T.) 40 How. Pr. (N. Y.) 193; *Strong v. Smith*, 15 Hun (N. Y.) 222; *Thorp v. Woodhull*, 1 Sandf. Ch. (N. Y.) 411; *McComb v. Barcelona Apartment Assoc.*, 134 N. Y. 598; *Wheeler v. Millar*, 90 N. Y. 353; *Buker v. Steele*, (County Ct.) 43 N. Y. Supp. 346; *Burr v. Wilcox*, 22 N. Y. 551; *Buffalo, etc., R. Co. v. Dudley*, 14 N. Y. 336. But see *Pray v. Todd*, 71 N. Y. App. Div. 391.

Ohio. — *Downer v. Zanesville Bank, Wright (Ohio) 477.*

Pennsylvania. — *Com. v. Woodward*, 4 Phila. (Pa.) 124, 17 Leg. Int. (Pa.) 141; *Bank of Commerce's Appeal*, 73 Pa. St. 59.

South Carolina. — *Glenn v. Rosborough*, 48 S. Car. 272.

Texas. — *Galveston City Co. v. Sibley*, 56 Tex. 269; *Hamilton v. James A. Cushman Mfg. Co.*, 15 Tex. Civ. App. 338.

West Virginia. — *Crumlish v. Shenandoah Valley R. Co.*, 46 W. Va. 627.

Wisconsin. — *Wells v. Green Bay, etc., Canal Co.*, 90 Wis. 442.

5. See *supra*, this title, *Definition and Nature of Corporate Stock — Certificates of Stock.*

6. **Registration.** — *State v. Harris*, 3 Ark. 570, 36 Am. Dec. 460; *Upton v. Burnham*, 3 Biss. (U. S.) 431. But see *Brown v. Duluth, etc., R. Co.*, 53 Fed. Rep. 894. See generally *supra*, this title, *Issuance of Certificate, Transfer, and Registration — Transfer on Books of Corporation or Registration — Necessity.*

7. See *Smith v. San Francisco, etc., R. Co.*, 115 Cal. 584, 56 Am. St. Rep. 119; *Grangers' Market Co. v. Vinson*, 6 Oregon 172.

8. **Irregularity in Transfer.** — *Murray v. Bush*, L. R. 6 H. L. 37.

to shares as shown by the corporate books and records and certificates of stock is regarded as a stockholder.¹ A corporation acting in good faith and without notice of the rights of others may treat registered shareholders as the actual owners of the shares standing in their name; but this rule applies only to such transactions as are within the express or implied powers of the corporation or its shareholders collectively.²

5. Equitable Owner of Shares.—For some purposes and between some parties the equitable owner of shares in a corporation is regarded as a stockholder.³

6. Trustees.—Trustees holding the legal title to shares are stockholders.⁴ One to whom stock is issued as trustee without the knowledge or consent of the real owners of the stock is not a *bona fide* stockholder.⁵

7. Principal or Agent.—One for whom stock is purchased by an agent is a stockholder although the agent contracted in his own name and the stock was apportioned to and stands in the name of the agent.⁶

8. Option Holders.—One who has a mere option to take stock is not a stockholder unless and until he exercises the option affirmatively and takes stock.⁷

9. Holders of Convertible Securities.—The holder of securities convertible into stock is not a stockholder, but may become such by converting his securities into stock.⁸

10. Pledgors and Pledgees.—This subject has been treated in another part of this work.⁹

11. Subscribers for Shares.—It is often broadly stated that a subscription

1. Legal Owner of Shares—*United States.*—Brown *v.* Duluth, etc., R. Co., 53 Fed. Rep. 894. See Pauly *v.* State L. & T. Co., (C. C. A.) 58 Fed. Rep. 666. But see Carey *v.* Williams, (C. C. A.) 79 Fed. Rep. 906.

Alabama.—National Commercial Bank *v.* McDonnell, 92 Ala. 387.

California.—Baines *v.* Babcock, 95 Cal. 581, 29 Am. St. Rep. 158. But see Smith *v.* San Francisco, etc., R. Co., 115 Cal. 584, 56 Am. St. Rep. 119.

Illinois.—Colton *v.* Williams, 65 Ill. App. 466.

Maryland.—Magruder *v.* Colston, 44 Md. 349, 22 Am. Rep. 47.

Minnesota.—Holland *v.* Duluth Iron Min., etc., Co., 65 Minn. 324.

Nevada.—State *v.* Leete, 16 Nev. 245.

New Jersey.—*In re* Cedar Grove Cemetery Co., 61 N. J. L. 422.

New York.—Rosevelt *v.* Brown, 11 N. Y. 151; Adderly *v.* Storm, 6 Hill (N. Y.) 624; Thorp *v.* Woodhull, 1 Sandf. Ch. (N. Y.) 411; McGill *v.* Holmes, (N. Y. City Ct. Gen. T.) 23 Misc. (N. Y.) 524; St. John *v.* Eberlin, (Supm. Ct. Tr. T.) 23 Misc. (N. Y.) 585.

Ohio.—Franklin Bank *v.* Commercial Bank, 36 Ohio St. 350, 38 Am. Rep. 594.

See also Griswold *v.* Seligman, 72 Mo. 110, overruled in Union Sav. Assoc. *v.* Seligman, 92 Mo. 635, 1 Am. St. Rep. 776. But see Grangers' Market Co. *v.* Vinson, 6 Oregon 172.

One who accepts and retains a certificate after paying face value thereof cannot be heard to say that he intended the payment as a gift to the company, but will be held as a subscriber. McDowall *v.* Sheehan, (N. Y. 1891) 36 Am. & Eng. Corp. Cas. 137.

Liability of Legal Owner to Creditors.—See

infra, this title, *Liability of Stockholders for Corporate Debts—Who Are Liable.*

2. Campbell *v.* American Zylonite Co., 122 N. Y. 455.

3. Equitable Owners.—Lloyd *v.* Preston, 146 U. S. 630; Pendery *v.* Carleton, (C. C. A.) 87 Fed. Rep. 41; Colorado Iron-Works *v.* Sierra Grande Min. Co., 15 Colo. 499, 22 Am. St. Rep. 433, 32 Am. & Eng. Corp. Cas. 201; Larwill *v.* Burke, 10 Ohio Cir. Dec. 605, 19 Ohio Cir. Ct. 449. See also Thompson *v.* Stanley, (Supm. Ct. Spec. T.) 20 N. Y. Supp. 317.

Liability of Equitable Owner to Creditors.—See *infra*, this title, *Liability of Stockholders for Corporate Debts—Who Are Liable.*

4. Trustees.—See State *v.* Cronan, 23 Nev. 437. See also *supra*, this section, *Legal Owner of Shares.*

Liability of Trustees to Creditors.—See *infra*, this title, *Liability of Stockholders for Corporate Debts—Who Are Liable.*

5. Stuart *v.* Mahoney Min. Co., 54 Cal. 149.

6. Stock Purchased by and Taken in Name of Agent.—Stover *v.* Flack, 30 N. Y. 67.

7. Option to Take Stock.—Totten *v.* Tison, 54 Ga. 139; Medler *v.* Albuquerque Hotel, etc., Co., 6 N. Mex. 331.

8. Holder of Convertible Securities.—"The right to become a stockholder does not make its possessor a stockholder." Burt *v.* Rattle, 31 Ohio St. 116, holding that an issue of so-called preferred stock, convertible into common, did not make its holders members of the corporation. See also *supra*, this title, *Issue of Stock—Issue of Convertible Securities.*

9. Pledgors and Pledgees as Stockholders.—See the title PLEDGE and COLLATERAL SECURITY, vol. 22, p. 905 *et seq.*

for stock constitutes the subscriber a stockholder,¹ and it is true that a subscriber incurs a liability of some sort to the corporation or its creditors.² But a mere subscription to stock does not *ipso facto* constitute the subscriber a stockholder, for the stock may have been oversubscribed, or the subscriber or corporation may repudiate the agreement.³ Where, however, the subscription has been accepted by the corporation and stock apportioned to meet it, then the subscriber becomes a stockholder.⁴ Any conduct expressly or impliedly showing that the corporation recognized the subscriber as a stockholder and that the subscriber assented to being a stockholder is sufficient to constitute the subscriber a stockholder.⁵

Conditions Precedent must, of course, be performed before the subscriber becomes a stockholder.⁶

A Mere Failure to Pay for the Stock subscribed does not render the subscriber any the less a stockholder.⁷ So far as the amount of the subscription remains unpaid it is a debt due the corporation.⁸

1. Subscribers as Stockholders. — Waukon, etc., R. Co. v. Dwyer, 49 Iowa 121; Instone v. Frankfort Bridge Co., 2 Bibb (Ky.) 578, 5 Am. Dec. 638. See Erie, etc., R. Co. v. Owen, 32 Barb. (N. Y.) 616; Grangers' Market Co. v. Vinson, 6 Oregon 174.

2. See *infra*, this title, *Subscription to Stock; Liability of Stockholders for Corporate Debts*.

3. Subscribers Not *Ipso Facto* Stockholders. — Wolverhampton New Waterworks Co. v. Hawkesford, 6 C. B. N. S. 336, 95 E. C. L. 336; *In re* Tal y Drws Slate Co., 1 Ch. D. 247; Greene v. Sigua Iron Co., 76 Fed. Rep. 947, 45 U. S. App. 207; Yolo Bank v. Weaver, (Cal. 1892) 31 Pac. Rep. 160; Chase v. Sycamore, etc., R. Co., 38 Ill. 215; Wheeler v. Thayer, 121 Ind. 64; Hayne v. Beauchamp, 5 Smed. & M. (Miss.) 515; Lathrop v. Kneeland, 46 Barb. (N. Y.) 432; Tracy v. Yates, 18 Barb. (N. Y.) 152; Badger Paper Co. v. Rose, 95 Wis. 145. See Butler v. Merchants' Ins. Co., 14 Ala. 777; Monterey, etc., Valley R. Co. v. Hildreth, 53 Cal. 123; Troy, etc., R. Co. v. Tibbits, 18 Barb. (N. Y.) 297; Mackey v. Burns, 16 Colo. App. 6.

A subscriber is a *locus penitentiae* holder. The association has a right to file its articles and he to withdraw. Garrett v. Dillsburg, etc., R. Co., 78 Pa. St. 465.

4. Acceptance of Subscription. — State v. Harris, 3 Ark. 570, 36 Am. Dec. 460; Baltimore City Pass. R. Co. v. Hambleton, 77 Md. 341; Downing v. Potts, 23 N. J. L. 66; Burr v. Wilcox, 22 N. Y. 551; Henderson v. Hogan, 7 Ohio Dec. (Reprint) 173, 1 Cinc. L. Bul. 227; Curry v. Scott, 54 Pa. St. 270; Badger Paper Co. v. Rose, 95 Wis. 145; Matter of London Speaker Printing Co., 16 Ont. App. 508.

5. Evidence of Acceptance and Assent. — Gowdy Gas Well, etc., Co. v. Patterson, 29 Ind. App. 261; Waukon, etc., R. Co. v. Dwyer, 49 Iowa 121; Fry v. Lexington, etc., R. Co., 2 Met. (Ky.) 314; Farmers', etc., Bank v. Jenks, 7 Met. (Mass.) 592; Chester Glass Co. v. Dewey, 16 Mass. 94; Hamilton, etc., Plank Road Co. v. Rice, 7 Barb. (N. Y.) 157; Wheeler v. Millar, 90 N. Y. 357; Beals v. Buffalo Expanded Metal Constr. Co., 49 N. Y. App. Div. 589; Glenn v. Rosborough, 48 S. Car. 272; Kelley v. Collier, 11 Tex. Civ. App. 353.

Actual Issuance Not Necessary. — See *supra*, this section, *Necessity of Certificate and Registration*.

6. Conditional Subscriptions. — Spitzel v. Chinese Corp., 80 L. T. N. S. 347; Chase v. Sycamore, etc., R. Co., 38 Ill. 215.

7. Nonpayment of Subscriptions. — Gowdy Gas Well, etc., Co. v. Patterson, 29 Ind. App. 261; Waukon, etc., R. Co. v. Dwyer, 49 Iowa 121; Instone v. Frankfort Bridge Co., 2 Bibb (Ky.) 578, 5 Am. Dec. 638; Schaeffer v. Missouri Home Ins. Co., 46 Mo. 250; Downing v. Potts, 23 N. J. L. 66; Wheeler v. Millar, 90 N. Y. 353; Henderson v. Hogan, 7 Ohio Dec. (Reprint) 173, 1 Cinc. L. Bul. 227; Curry v. Scott, 54 Pa. St. 270. But see Chase v. Sycamore, etc., R. Co., 38 Ill. 218; Baltimore City Pass. R. Co. v. Hambleton, 77 Md. 341.

But equity will sometimes deny relief to stockholders who have not paid up their subscription liability. Landes v. Globe Planter Mfg. Co., 73 Ga. 176.

Distinction Between Subscription Before and After Organization of Corporation. — "When the subscription to formative stock precedes the creation of the body corporate which will ultimately issue the certificates, there is, of necessity, at the time such subscriptions are entered into, no corporation in existence with which a contract could be made. The subscribers, as a consequence and for the very purpose of effecting an organization, become stockholders by the mere act of subscribing if there are no conditions precedent prescribed, and they are thereby invested with the privileges and subjected to the liabilities incident to that relation. * * * But the same reasons do not apply, and the same conditions do not obtain, in the case of new or additional stock, authorized to be issued by an existing and completely organized corporation. A subscription to such new stock does not necessarily of itself make the subscriber a stockholder, because, generally speaking, it is a mere contract between the subscriber and the corporation. * * * To constitute a subscriber for new stock a stockholder, something more than a mere subscription is requisite; payment is necessary. The subscription is but the contract. Payment when called by the company, and when made by the subscriber, constitutes him a shareholder, whether a certificate has been issued or not." Baltimore City Pass. R. Co. v. Hambleton, 77 Md. 341.

8. See *infra*, this title, *Subscription to Stock*.

Volume XXVI.

A Conditional Sale of Stock, however, conditioned upon payment, does not constitute the purchaser a stockholder until payment is made or waived.¹ Sales of stock for cash are substantially conditional sales within this rule.²

12. Knowledge, Consent, and Acquiescence. — A person cannot be made a stockholder by the action of other persons without his knowledge and consent,³ unless he acquiesces therein, in which case he may be estopped to deny that he is a stockholder.⁴ The relation of corporation and stockholder being contractual, the assent of both parties, either express or implied, must be shown.⁵ Even where one wrongfully refuses to perform his contract to take shares he cannot be made a stockholder by a transfer of shares to him upon the books of the company.⁶

13. Construction of Certificate or Agreement. — The intention of the parties as manifested by a correct construction of the agreement into which they have entered determines whether or not particular persons are stockholders.⁷

14. Termination of Membership. — A person ceases to be a stockholder when he ceases to hold shares in the corporation, as by transfer,⁸ forfeiture,⁹ or

1. Conditional Sale. — *Hayne v. Beauchamp*, 5 Smed. & M. (Miss.) 515; *Tracy v. Yates*, 18 Barb. (N. Y.) 152, distinguished in *W eeler v. Millar*, 90 N. Y. 358, and *Cross v. Pinckneyville Mill Co.*, 17 Ill. 58.

For common illustrations of this principle, see title *CONDITIONAL SALES*, vol. 6, p. 436.

2. Sales for Cash. — *Yolo Bank v. Weaver*, (Cal. 1892) 31 Pac. Rep. 160.

Generally as to the necessity of payment as a condition precedent to the passing of title, see title *SALES*, vol. 24, p. 1094 *et seq.*

3. Knowledge and Consent Necessary. — *American File Co. v. Garrett*, 110 U. S. 288; *Burgess v. Seligman*, 107 U. S. 20; *Stephens v. Follett*, 43 Fed. Rep. 842; *Hill v. Graham*, 11 Colo. App. 536; *Gray v. Coffin*, 9 Cush. (Mass.) 192; *Chapman v. Virginia Real Estate Invest. Co.*, 96 Va. 177.

4. Acquiescence and Estoppel. — *Stephens v. Follett*, 43 Fed. Rep. 842. See also *Griswold v. Seligman*, 72 Mo. 110; *Union Sav. Assoc. v. Seligman*, 92 Mo. 635, 1 Am. St. Rep. 776.

The Receipt of Dividends is evidence of consent and acquiescence. *Hammond v. Straus*, 53 Md. 2.

Where the Corporation Is Rechartered and stockholders accept the new organization, they become stockholders therein. *Hammond v. Straus*, 53 Md. 1.

Where the Directors Transfer the Charter without authority, and the stockholders participate in the company's affairs under the new management, they are estopped from denying the transfer and are stockholders. *Upton v. Jackson*, 1 Flipp. (U. S.) 413.

5. Assent of Both Parties Necessary. — *Carey v. Williams*, 79 Fed. Rep. 909, 51 U. S. App. 204; *Sigua Iron Co. v. Greene*, 104 Fed. Rep. 854, 44 C. C. A. 221. See *Haegele v. Western Stove Mfg. Co.*, 29 Mo. App. 486. See also *Grangers' Market Co. v. Vinson*, 6 Oregon 174.

Recognition by Corporation. — The fact that a corporation recognizes a party as owner of stock and pays him dividends thereon, binds it to nothing in the future, and does not determine the right of the party in regard to the stock. *Cady v. Potter*, 55 Barb. (N. Y.) 463.

6. Refusal to Accept Shares. — *Greene v. Sigua Iron Co.*, (C. C. A.) 76 Fed. Rep. 947.

7. Legal Construction Controlling. — *Hussey v. Manufacturers, etc., Bank*, 10 Pick. (Mass.) 415; *Union Sav. Assoc. v. Seligman*, 92 Mo. 635, 1 Am. St. Rep. 776, overruling *Griswold v. Seligman*, 72 Mo. 110; *State v. Peter Cooper Bldg., etc., Assoc.*, 78 Mo. App. 104; *Hill v. Nautilus Ins. Co.*, 4 Sandf. Ch. (N. Y.) 577.

Persons Held to Be Stockholders and Not Creditors. — *Coltrane v. Blake*, 113 Fed. Rep. 785, 51 C. C. A. 457; *Guaranty Trust Co. v. Galveston City R. Co.*, 107 Fed. Rep. 311, 46 C. C. A. 305; *United Soc. v. Eagle Bank*, 7 Conn. 456; *Field v. Lamson, etc., Mfg. Co.*, 162 Mass. 388; *McLaughlin v. Detroit, etc., R. Co.*, 8 Mich. 100.

Option to Resell. — Parties become stockholders under a contract to take stock though coupled with an option to resell to the corporation. *Melvin v. Lamar Ins. Co.*, 80 Ill. 446, 22 Am. Rep. 199.

Persons Held to Be Creditors and Not Stockholders. — *Jones v. Woolley*, 2 Idaho 790; *Thurber v. Crump*, 86 Ky. 408; *Burt v. Rattle*, 31 Ohio St. 116; *Prouty v. Prouty, etc., Boot, etc., Co.*, 155 Pa. St. 112.

Where a corporation effects a loan by issuing stock indorsed "preferred," the contract stipulating that the holders, at the end of two years, may become ordinary stockholders, or redeem their certificates, and they choose the latter plan, they are entitled to claim as *bona fide* creditors. *Totten v. Tison*, 54 Ga. 139.

8. Relation Terminated by Transfer of Shares. — *Atchinson First Nat. Bank v. Wattles*, 8 Kan. App. 136.

Effect on Liability to Creditors. — See *infra*, this title, *Liability of Stockholders for Corporate Debts*.

9. Forfeiture. — *St. Louis, etc., Coal, etc., Co. v. Sandoval Coal, etc., Co.*, 116 Ill. 170; *Mills v. Stewart*, 41 N. Y. 384.

A mere option to forfeit stock must be exercised by the corporation before the stockholder ceases to be such. *Brode v. Firemen's Ins. Co.*, 10 Rob. (La.) 440. See also *Denver Chamber of Commerce v. Green*, 8 Colo. App. 420.

Effect on Liability to Creditors. — See *infra*, this title, *Liability of Stockholders for Corporate Debts*.

otherwise. Where an attempted sale of stock is wholly void, the owner continues to be a stockholder.¹

Mere Mismanagement by Corporate Officers does not authorize stockholders to withdraw and rescind their subscription.²

A Voluntary Surrender of Stock, assented to by the corporation and other parties in interest, terminates the membership,³ unless prohibited by statute.⁴ But a stockholder cannot surrender his stock and withdraw without the consent of the corporation.⁵ Consent to withdrawal may be given in advance by provision in the contract, as evidenced by the certificate or by-laws.⁶

A Dissolution of the Corporation terminates the relation of stockholders as such.⁷

Expulsion of a Stockholder operates to terminate his membership in the corporation.⁸

15. Liability as Stockholders to Creditors.—This subject is considered in a later section.⁹

16. Right to Vote as Stockholders.—This subject is subsequently considered.¹⁰

17. Evidence—Books and Records.—It has often been broadly stated that the books and records of a corporation are *prima facie* evidence of its membership,¹¹ though, of course, they are not conclusive,¹² and must, in any event,

1. **Void Sale.**—*Merchants' Nat. Bank v. Overman Carriage Co.*, 9 Ohio Cir. Dec. '738, 17 Ohio Cir. Ct. 253.

2. **Rescission for Mismanagement.**—*American Bldg., etc., Assoc. v. Rainbolt*, 48 Neb. 434.

3. **Surrender of Stock.**—*Hill v. Atoka Coal, etc., Co.*, 124 Mo. 167; *Long Island Bottlers' Union v. S. Liebmann's Sons Brewing Co.*, 83 N. Y. App. Div. 146. But see *Tom Boy Gold Mines Co. v. Green*, 11 Colo. App. 447.

4. *Vercoutere v. Golden State Land Co.*, 116 Cal. 410.

5. **Assent to Surrender.**—*Mayfield v. Alton R., etc., Co.*, 100 Ill. App. 614.

6. *Long Island Bottlers' Union v. S. Liebmann's Sons Brewing Co.*, 83 N. Y. App. Div. 146; *Howe Grain, etc., Co. v. Jones*, 21 Tex. Civ. App. 198. But see *Vercoutere v. Golden State Land Co.*, 116 Cal. 410.

7. See the title **DISSOLUTION OF CORPORATIONS**, vol. 9, p. 544.

8. See the titles **DISFRANCHISEMENT**, vol. 9, p. 477; **SOCIETIES AND CLUBS**, vol. 25, p. 1129. See also *Purdy v. Bankers' L. Assoc.*, (Mo. App. 1903) 74 S. W. Rep. 486; *Jackson v. South Omaha Live-Stock Exch.*, 49 Neb. 687; *De Hart v. Good Will Hook, etc., Co.* No. 1, 61 N. J. L. 507.

9. See *infra*, this title, *Liability of Stockholders for Corporate Debts*.

10. See *infra*, this title, *Stockholders' Meetings—Proceedings at Meetings—Voting*.

11. **Books and Records as Prima Facie Evidence—England.**—*Wolverhampton New Waterworks Co. v. Hawksford*, 11 C. B. N. S. 456, 103 E. C. L. 456, 7 C. B. N. S. 795, 97 E. C. L. 795; *Cornwall Great Consol. Lead, etc., Min. Co. v. Bennett*, 5 H. & N. 423; *London, etc., R. Co. v. Fairclough*, 2 M. & G. 674, 40 E. C. L. 570.

United States.—*Rockville, etc., Turnpike Road v. Van Ness, 2 Cranch (C. C.) 449*; *Turnbull v. Payson*, 95 U. S. 418; *Glenn v. Liggett*, 47 Fed. Rep. 472; *Glenn v. McAllister*, 46 Fed. Rep. 883; *Stephens v. Follett*, 43 Fed. Rep. 842, 31 Am. & Eng. Corp. Cas. 466; *Liggett v. Glenn*, 4 U. S. App. 438, 51 Fed. Rep. 381.

Alabama.—*Semple v. Glenn*, 91 Ala. 245, 24 Am. St. Rep. 894.

Georgia.—*Howard v. Glenn*, 85 Ga. 238, 21 Am. St. Rep. 156.

Kansas.—*Hinsdale Sav. Bank v. New Hampshire Banking Co.*, 59 Kan. 716, 68 Am. St. Rep. 391.

Maine.—*Penobscot R. Co. v. Dummer*, 40 Me. 172, 63 Am. Dec. 654; *Whitman v. Granite Church*, 24 Me. 236; *Coffin v. Collins*, 17 Me. 440.

Minnesota.—*Holland v. Duluth Iron Min., etc., Co.*, 65 Minn. 324, 60 Am. St. Rep. 480.

New Hampshire.—*Haynes v. Brown*, 36 N. H. 545.

New Jersey.—*Matter of St. Lawrence Steamboat Co.*, 44 N. J. L. 529, 1 Am. & Eng. Corp. Cas. 359; *Downing v. Potts*, 23 N. J. L. 66; *In re Consol. Telephone, etc., Co.*, (N. J. 1899) 43 Atl. Rep. 433.

New York.—*Hoagland v. Bell*, 36 Barb. (N. Y.) 57; *Hamilton, etc., Plank Road Co. v. Rice*, 7 Barb. (N. Y.) 157.

North Carolina.—*Glenn v. Orr*, 96 N. Car. 413.

Pennsylvania.—*Bank of Commerce's Appeal*, 73 Pa. St. 59; *McHose v. Wheeler*, 45 Pa. St. 32.

Rhode Island.—*Congdon v. Winsor*, 17 R. I. 236, 36 Am. & Eng. Corp. Cas. 199.

Virginia.—*Vanderwerken v. Glenn*, 85 Va. 9; *Lewis v. Glenn*, 84 Va. 947.

West Virginia.—*Pittsburgh, etc., R. Co. v. Applegate*, 21 W. Va. 172; *South Branch R. Co. v. Long*, 43 W. Va. 131.

When Books Have Been Lost, a certified copy of the recorded list of stockholders is *prima facie* evidence as to the ownership of the stock. *Cleveland v. Burnham*, 64 Wis. 347, 10 Am. & Eng. Corp. Cas. 221.

12. Books and Records Not Conclusive.—*Waterford, etc., R. Co. v. Pidcock*, 8 Exch. 279; *Stephens v. Follett*, 43 Fed. Rep. 842, 31 Am. & Eng. Corp. Cas. 466; *Mudgett v. Horrell*, 33 Cal. 25; *Chaffin v. Cummings*, 37 Me. 76; *Brewer's F. Ins. Co. v. Burger*, 10 Hun (N. Y.) 56.

be supplemented by evidence of identity.¹ But the true rule seems to be that entries in corporate books and records with which the alleged stockholder cannot be connected are not admissible in evidence against him to show that he is a stockholder,² though they are admissible against the corporation.³ Unless restrained by statute the courts may go behind the corporate books in determining who are stockholders.⁴

Certificates of Stock are evidence that the holder named therein is a stockholder, but they are not the only evidence, because, as has been seen, certificates are not essential to constitute one a stockholder.⁵ So certificates may be shown by evidence aliunde to have been issued merely by way of pledge to secure a loan, since the certificate is not a contract.⁶

Parol Evidence. — The relation of the stockholder may be proved by parol.⁷ Any competent evidence of ownership of stock is admissible.⁸

Evidence of Mutual Recognition of the relation of stockholder may establish the legal position as such,⁹ and such recognition may be shown by conduct.¹⁰

The Admissions of a Stockholder as to the number of shares held by him are competent,¹¹ and in the absence of the stock book the treasurer may testify

1. **Evidence of Identity Necessary.** — Glenn v. Liggett, 51 Fed. Rep. 381, 4 U. S. App. 438; Moss v. Manhattan Co., 48 N. Y. App. Div. 561.

2. **Books Not Admissible Against Stockholder.** — Sigua Iron Co. v. Greene, 104 Fed. Rep. 854, 44 C. C. A. 221, (C. C. A.) 88 Fed. Rep. 207; Carey v. Williams, 79 Fed. Rep. 906, 51 U. S. App. 204; Mudgett v. Horrell, 33 Cal. 25.

3. **Admissible Against Corporation.** — Carey v. Williams, 79 Fed. Rep. 906, 51 U. S. App. 204.

4. **Going Behind Corporate Books.** — *In re* Cedar Grove Cemetery Co., 61 N. J. L. 422; Strong v. Smith, 15 Hun (N. Y.) 222. See also *infra*, this title, *Stockholders' Meetings — Proceedings at Meetings — Voting*.

5. **Certificates Competent but Not Essential.** — *England.* — Société Générale v. Walker, 11 App. Cas. 20.

United States. — Upton v. Burnham, 3 Biss. (U. S.) 431; Becher v. Wells Flouring Mill Co., 1 McCrary (U. S.) 62; Farrar v. Walker, 3 Dill. (U. S.) 506, note; Cecil Nat. Bank v. Watsontown Bank, 105 U. S. 217; Hawley v. Upton, 102 U. S. 314; Turnbull v. Payson, 95 U. S. 418.

Alabama. — Frenkel v. Hudson, 82 Ala. 161, 60 Am. Rep. 736.

California. — Mitchell v. Beckman, 64 Cal. 117, 1 Am. & Eng. Corp. Cas. 40.

Georgia. — Fulgan v. Macon, etc., R. Co., 44 Ga. 597.

Illinois. — Dows v. Naper, 91 Ill. 44; Corwith v. Culver, 69 Ill. 502; Colton v. Williams, 65 Ill. App. 466.

Indiana. — Beckett v. Houston, 32 Ind. 394; Helm v. Swiggett, 12 Ind. 194.

Iowa. — Davenport First Nat. Bank v. Gifford, 47 Iowa 575.

Kansas. — Baker v. Woolston, 27 Kan. 185.

Maine. — Chaffin v. Cummings, 37 Me. 76; Agricultural Bank v. Wilson, 24 Me. 273; Agricultural Bank v. Burr, 24 Me. 256.

Massachusetts. — Ellis v. Essex Merrimack Bridge, 2 Pick. (Mass.) 243; Boston, etc., R. Co. v. Pearson, 128 Mass. 445; Chester Glass Co. v. Dewey, 16 Mass. 94, 8 Am. Dec. 128.

Michigan. — McLaughlin v. Detroit, etc., R. Co., 8 Mich. 100.

Minnesota. — Minneapolis Harvester Works v. Libby, 24 Minn. 327.

Missouri. — Schaeffer v. Missouri Home Ins. Co., 46 Mo. 248; Chouteau Spring Co. v. Harris, 20 Mo. 382; Kimball v. Davis, 52 Mo. App. 194.

New Hampshire. — Wheeler v. Walker, 45 N. H. 355; New Hampshire Cent. R. Co. v. Johnson, 30 N. H. 390, 64 Am. Dec. 300.

New Jersey. — Matter of St. Lawrence Steamboat Co., 44 N. J. L. 529, 1 Am. & Eng. Corp. Cas. 359.

New York. — Dennis v. Kennedy, 19 Barb. (N. Y.) 517; Strong v. Smith, 15 Hun (N. Y.) 222; Johnson v. Albany, etc., R. Co., (Supm. Ct. Spec. T.) 40 How. Pr. (N. Y.) 193 Thorp v. Woodhull, 1 Sandf. Ch. (N. Y.) 411; Wheeler v. Millar, 90 N. Y. 357; Boardman v. Lake Shore, etc., R. Co., 84 N. Y. 157; Buker v. Steele, (County Ct.) 43 N. Y. Supp. 346; Burr v. Wilcox, 22 N. Y. 551; Buffalo, etc., R. Co. v. Dudley, 14 N. Y. 336.

Ohio. — Downer v. Zanesville Bank, Wright (Ohio) 477.

Pennsylvania. — Com. v. Woodward, 4 Phila. (Pa.) 124, 17 Leg. Int. (Pa.) 141; Bank of Commerce's Appeal, 73 Pa. St. 59.

Texas. — Galveston City Co. v. Sibley, 56 Tex. 269.

6. **Parol Evidence to Explain Certificate.** — Williams v. American Nat. Bank, 85 Fed. Rep. 376, 56 U. S. App. 316; Wild v. Western Union Bldg., etc., Assoc., 60 Mo. App. 200, 1 Mo. App. Rep. 70.

7. **Parol Evidence.** — Chaffin v. Cummings, 37 Me. 76; Haynes v. Brown, 36 N. H. 545.

8. **Evidence of Ownership of Stock.** — Chemical Nat. Bank v. Havermale, 120 Cal. 601, 65 Am. St. Rep. 206; Payne v. Goldbach, 14 Ind. App. 100; Wheeler v. Millar, 90 N. Y. 357; Murray v. Aiken Min., etc., Co., 37 S. Car. 468.

9. **Mutual Recognition.** — Upton v. Burnham, 3 Biss. (N. Y.) 431; Wheeler v. Millar, 90 N. Y. 353, *distinguishing* Mills v. Stewart, 41 N. Y. 384; Tracy v. Yates, 18 Barb. (N. Y.) 152; Sevmour v. Sturgess, 26 N. Y. 134.

10. See *supra*, this section, *Subscribers for Shares*.

11. **Admissions of Stockholder.** — Congdon v. Winsor, 17 R. I. 236, 36 Am. & Eng. Corp.

as to certificates issued by him.¹

Presumptions. — A stockholder is presumed to remain a stockholder until the contrary is shown.²

X. STATUS AND RELATION OF STOCKHOLDERS INTER SE AND AS TO CORPORATION — 1. In General. — The stockholders of a corporation do not stand in the relation of copartners,³ though in the case of defective or delayed organization the intending stockholders may be sometimes held liable as partners.⁴ The relation of stockholders is, however, in some respects analogous to partnership.⁵ So stockholders are not cosureties for the corporation;⁶ nor are they creditors of the corporation.⁷

2. Contractual Relation. — The relation existing between a corporation and its stockholders and between the stockholders *inter se* is a contractual relation, dependent upon the mutual assent, express or implied, of all the parties.⁸ Even where they fail to perfect the corporate organization, as between themselves, the parties are stockholders and bound by their contract.⁹ The relation being contractual, the stockholder acquires vested rights which cannot be taken away or modified without his consent.¹⁰

3. Relation to Corporate Property. — The title to all the corporal assets is in the corporation and the stockholders have neither a legal nor an equitable title thereto.¹¹ The ownership of a share of stock is but the ownership of the

Cas. 199. See generally the title ADMISSIONS, vol. 1, p. 670.

1. Secondary Evidence as to Certificates. — Congdon v. Winsor, 17 R. I. 236, 36 Am. & Eng. Corp. Cas. 199.

2. Presumption of Continuance. — Barron v. Paine, 83 Me. 312. And see generally the title PRESUMPTIONS, vol. 22, p. 1238 *et seq.*

3. Stockholders Not Partners. — Brown v. Merrill, 107 Cal. 446, 48 Am. St. Rep. 145 [*distinguishing* Bailey v. Bancker, 3 Hill (N. Y.) 188, 38 Am. Dec. 625]; Baker v. Backus, 32 Ill. 79; Verplank v. Mercantile Ins. Co. 1 Edw. (N. Y.) 84; Mickles v. Rochester City Bank, 11 Paige (N. Y.) 118, 42 Am. Dec. 103; Coburn v. Wheelock, 34 N. Y. 440; Shibley v. Angle, 37 N. Y. 626. But see Purton v. New Orleans, etc., R. Co., 3 La. Ann. 19.

4. See *infra*, this title, Liability of Stockholders for Corporate Debts.

5. Analogy to Partnership. — Barrett v. King, 181 Mass. 476.

6. Not Cosureties. — Mokelumne Hill Canal, etc., Co. v. Woodbury, 14 Cal. 265; Young v. Rosenbaum, 39 Cal. 646; Davidson v. Rankin, 34 Cal. 503. But see Coburn v. Wheelock, 34 N. Y. 440; Slaymaker v. Gundacker, 10 S. & R. (Pa.) 75.

7. Not Creditors. — Coulter v. Robertson, 24 Miss. 278, 57 Am. Dec. 168; Verplanck v. Mercantile Ins. Co., 1 Edw. (N. Y.) 84; Brightwell v. Mallory, 10 Yerg. (Tenn.) 197. See McNamara v. Oakland Bldg., etc., Assoc., 131 Cal. 336. See also *supra*, this title, *Kinds of Stock — Preferred or Guaranteed Stock.*

"It is only in a very qualified and somewhat metaphysical sense that a corporation is a debtor to its shareholders for their shares. The shareholders are the owners of the corporation, not its creditors." Ashley v. Quintard, 90 Fed. Rep. 89.

8. Relation One of Contract. — Sigua Iron Co. v. Greene, (C. C. A.) 104 Fed. Rep. 854; Carey v. Williams, 79 Fed. Rep. 909; Matter of Globe Mut. Ben. Assoc., 63 Hun (N. Y.) 263; Heslin

v. Eastern Bldg., etc., Assoc., (Supm. Ct. Tr. T.) 28 Misc. (N. Y.) 376; Hackett v. Northern Pac. R. Co., (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 583.

9. Heald v. Owen, 79 Iowa 23.

10. Vested Rights of Stockholder. — Natusch v. Irving, 2 Coop. t. Cot. 358; Delaware R. Tax, 18 Wall. (U. S.) 206; Wilmington, etc., R. Co. v. Reid, 13 Wall. (U. S.) 264; Clearwater v. Meredith, 1 Wall. (U. S.) 25; Hill v. Atoka Coal, etc., Co., 124 Mo. 167; Pronick v. Spirits Distributing Co., 58 N. J. Eq. 97; Campbell v. American Zylonite Co., 122 N. Y. 460; Livingston v. Lynch, 4 Johns. Ch. (N. Y.) 573; Kent v. Quicksilver Min. Co., 78 N. Y. 159. See also *infra*, this title, *Rights and Remedies of Minority Stockholders.* And see the title ULTRA VIRES.

11. Title in Corporation and Not in Stockholders — England. — Watson v. Spratley, 10 Exch. 236.

United States. — De La Vergne Refrigerating Mach. Co. v. German Sav. Inst., 175 U. S. 40; Humphreys v. McKissock, 140 U. S. 304, 46 Am. & Eng. R. Cas. 261; Gibbons v. Mahon, 136 U. S. 557; Farrington v. Tennessee, 95 U. S. 687; Watson v. Bonfils, (C. C. A.) 116 Fed. Rep. 157; Ashley v. Quintard, 90 Fed. Rep. 89; Pendery v. Carleton, (C. C. A.) 87 Fed. Rep. 41; Syndicate Ins. Co. v. Bohn, 65 Fed. Rep. 165, 27 U. S. App. 564.

California. — Merchants' Ad-Sign Co. v. Sterling, 124 Cal. 429, 71 Am. St. Rep. 94.

Illinois. — Sellers v. Greer, 172 Ill. 549.

Iowa. — Bridgman v. Keokuk, 72 Iowa 42.

Massachusetts. — Smith v. Hurd, 12 Met. (Mass.) 385.

Nebraska. — Home F. Ins. Co. v. Barber, (Neb. 1903) 93 N. W. Rep. 1024.

New York. — Burrall v. Bushwick R. Co., 75 N. Y. 216.

Ohio. — Lee v. Sturges, 46 Ohio St. 161; Bradley v. Bauder, 36 Ohio St. 35, 38 Am. Rep. 547.

Tennessee. — Brightwell v. Mallory, 10 Yerg. (Tenn.) 197; Union Bank v. State, 9 Yerg.

right to participate from time to time in the management and net profits of the business, and, upon a dissolution of the corporation, to a proportion of the assets after the payment of corporate debts.¹ A stockholder has no legal title to the property or profits of the corporation until a dividend is declared, or a division made on the dissolution of the corporation.² Until a dividend has been declared, the profits form part of the corporate assets.³ Stockholders are not tenants in common of the corporate property.⁴

4. Relation to Corporate Creditors.—The Rights of stockholders are subordinate to those of creditors of the corporation.⁵

The Liability of Stockholders to corporate creditors has been elsewhere considered.⁶

5. Fiduciary or Trust Relation.—As between themselves stockholders do not stand in a fiduciary relation, but deal at arm's length, and each may govern his conduct with a view to his own interest.⁷ But a majority, in exercising their delegated power to control the corporate affairs, act in a *quasi-trust* or fiduciary capacity which equity will not permit them to abuse for their private benefit at the expense of the minority.⁸

No Fiduciary Relation Exists between the corporation and its stockholders. The corporation is not a trustee, and the stockholders are not *cestuis que trustent*.⁹ But the officers and directors of the corporation do hold a fiduciary position towards the stockholders.¹⁰

(Tenn.) 490; Parker v. Bethel Hotel Co., 96 Tenn. 252.

1. Nature of Interest of Stockholder.—Bridgman v. Keokuk, 72 Iowa 42; Field v. Pierce, 102 Mass. 261; Burrall v. Bushwick R. Co., 75 N. Y. 216; Lee v. Sturges, 46 Ohio St. 161; Bradley v. Bauder, 36 Ohio St. 35, 38 Am. Rep. 547; Jones v. Davis, 35 Ohio St. 477.

Distinction Between Title of Corporation and Interest of Stockholders Stated.—Gibbons v. Mahon, 136 U. S. 557.

If stockholders of a corporation all surrender a like percentage of their stock at less than its actual value, one induced to make such surrender by fraudulent representations suffers no actionable wrong, because the proportionate interests of the stockholders will be the same after as before the surrender. Potter v. Necedah Lumber Co., 105 Wis. 25.

2. Commercial F. Ins. Co. v. Board of Revenue, 99 Ala. 4, 42 Am. St. Rep. 17; Boardman v. Lake Shore, etc., R. Co., 84 N. Y. 157; Burrall v. Bushwick R. Co., 75 N. Y. 216; Union Bank v. State, 9 Yerg. (Tenn.) 500.

3. Profits.—Gibbons v. Mahon, 136 U. S. 558; Price v. Morning Star Min. Co., 83 Mo. App. 470; Boardman v. Lake Shore, etc., R. Co., 84 N. Y. 157; Marble v. Van Wert Nat. Bank, 2 Ohio Cir. Dec. 265; McCoy Lime Co. v. Kane, 16 Montg. Co. Rep. (Pa.) 19.

4. Stockholders Not Tenants in Common.—Rothchild v. Memphis, etc., R. Co., (C. C. A.) 113 Fed. Rep. 476; Hawes v. Anglo-Saxon Petroleum Co., 111 Mass. 200; Mickles v. Rochester City Bank, 11 Paige (N. Y.) 118, 42 Am. Dec. 103.

5. Stockholders Subordinate to Creditors.—Farrington v. Tennessee, 95 U. S. 687; Drake v. New York Suburban Water Co., 26 N. Y. App. Div. 499.

6. See *infra*, this title, *Liability of Stockholders for Corporate Debts*.

7. No Fiduciary Relation Between Stockholders Inter Se.—Rothchild v. Memphis, etc., R. Co., (C. C. A.) 113 Fed. Rep. 476; Rogers v. Nashville, etc., R. Co., (C. C. A.) 91 Fed. Rep. 299;

Beitman v. Steiner, 98 Ala. 241; Tippecanoe County v. Reynolds, 44 Ind. 509, 15 Am. Rep. 245; Jones v. Green, 129 Mich. 203, 8 Detroit Leg. N. 997; Carpenter v. Danforth, 52 Barb. (N. Y.) 581; Scruggs v. Cotterill, 67 N. Y. App. Div. 583; Lewisohn v. Anaconda Copper Min. Co., (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 613; Farmers' L. & T. Co. v. New York, etc., R. Co., 78 Hun (N. Y.) 213. But see Synnot v. Cummings, 116 Fed. Rep. 40. See also *infra*, this title, *Stockholders' Meetings—Proceedings at Meetings—Voting—Right to Vote*.

8. Relation Between Majority and Minority.—Rothchild v. Memphis, etc., R. Co., (C. C. A.) 113 Fed. Rep. 476; Mumford v. Ecuador Development Co., 111 Fed. Rep. 639; Rogers v. Nashville, etc., R. Co., (C. C. A.) 91 Fed. Rep. 299; Ervin v. Oregon R., etc., Co., 20 Fed. Rep. 577; *In re Importer's, etc., Exch.*, (C. Pl. Gen. T.) 2 N. Y. Supp. 257; Russell v. Rock Run Fuel Gas Co., 184 Pa. St. 102, 41 W. N. C. (Pa.) 364. See also *infra*, this title, *Rights and Remedies of Minority Stockholders*.

9. No Fiduciary Relation Between Corporation and Stockholder.—Hanchett v. Blair, (C. C. A.) 100 Fed. Rep. 817; Rogers v. Nashville, etc., R. Co., (C. C. A.) 91 Fed. Rep. 299; Gillett v. Bowen, 23 Fed. Rep. 625; Fox v. Mackay, 125 Cal. 57; Karnes v. Rochester, etc., R. Co., (Supm. Ct. Spec. T.) 4 Abb. Pr. N. S. (N. Y.) 107; Verplanck v. Mercantile Ins. Co., 1 Edw. (N. Y.) 84; Richardson v. Graham, 45 W. Va. 134. But see Farrington v. Tennessee, 95 U. S. 687, where it was said that "every holder is a *cestui que trust* to the extent of his ownership." See also Ryan v. Williams, 100 Fed. Rep. 172; Taylor v. South, etc., Alabama R. Co., 13 Fed. Rep. 152; Jones v. Green, 129 Mich. 203, 8 Detroit Leg. N. 997; Leonhardt v. Citizens Bank, 56 Neb. 38.

In Bridgman v. Keokuk, 72 Iowa 42, Beck, J., said: "The property of the corporation is held by the corporation in trust for the stockholders."

10. See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 21, p. 833.

6. Corporation as Separate Entity. — For most purposes a corporation is regarded as a legal entity, wholly separate and distinct from the personality of the stockholders who compose it.¹ They may contract and deal with each other, and sue or be sued each by the other as freely as though no relation existed between them.² Notice to a stockholder is not notice to the corporation.³ Stockholders, as such, though owning all or a majority of the stock, cannot bind the corporation by contract or conveyance. Formal action by the corporation is necessary.⁴ In a sense, stockholders are the real parties in interest and are the joint owners of the franchise and property of the corporation, and, where justice requires it, equity will look through the fiction of separate corporate entity and deal with the stockholders as the real owners of the rights involved.⁵

7. Representation of Stockholders by Corporation. — A corporation represents its stockholders in all purely corporate matters which affect the stockholders as a body, and the stockholders are bound by its action.⁶ But the corporation does not represent stockholders in matters affecting the rights and liabilities of the stockholders as individuals.⁷ A judgment or decree against a

1. Corporation Distinct Legal Entity—*United States*. — *Antisdel v. Chicago Hotel Cabinet Co.*, 89 Fed. Rep. 308, 32 C. C. A. 216.

Alabama. — *Janney v. Merchants', etc., Nat. Bank*, 98 Ala. 515.

California. — *Brown v. Valley View Min. Co.*, 127 Cal. 630. See *Behlow v. Fischer*, 102 Cal. 208.

District of Columbia. — *German Evangelical Soc. v. Prospect Hill Cemetery*, 2 App. Cas. (D. C.) 310.

Iowa. — *Clark v. American Coal Co.*, 86 Iowa 436.

Kentucky. — *Western Dist. Warehouse Co. v. Hayes*, 97 Ky. 16.

Missouri. — *Banking House v. Rood*, 132 Mo. 256.

Nebraska. — *Solomon v. Schneider*, 56 Neb. 680.

New York. — *Hix v. Edison Electric Light Co.*, 10 N. Y. App. Div. 75.

Oregon. — *Martin v. Eagle Creek Development Co.*, 41 Oregon 448.

Vermont. — *Hyde Park Lumber Co. v. Sheppardson*, 72 Vt. 188.

Virginia. — *Biggs v. Elliston Development Co.*, 93 Va. 404.

Wisconsin. — *Jenkins v. Braley*, 104 Wis. 540.

But see *State v. Mack*, 26 Nev. 430. See also the title CORPORATIONS (PRIVATE), vol. 7, p. 633.

2. Dealings Between Corporation and Stockholder—*United States*. — *Hanchett v. Blair*, 100 Fed. Rep. 817, 41 C. C. A. 76; *Ryan v. Williams*, 100 Fed. Rep. 172; *Rogers v. Nashville, etc., R. Co.*, (C. C. A.) 91 Fed. Rep. 299.

Alabama. — *Mercantile Trust, etc., Co. v. Florence Water Co.*, 111 Ala. 119.

Idaho. — *Frantz v. Idaho Artesian Well, etc., Co.*, 5 Idaho 71.

Kansas. — *Morbach v. Home Min. Co.*, 53 Kan. 731.

Maine. — *Wiswell v. Starr*, 48 Me. 401.

Michigan. — *Moran v. Wayne Circuit Judge*, 125 Mich. 6, 7 Detroit Leg. N. 387.

Missouri. — *Kingman v. Cornell-Tebbetts Mach., etc., Co.*, 150 Mo. 282.

Nevada. — *O'Connor v. North Truckee Ditch Co.*, 17 Nev. 245.

New Jersey. — *Kane v. Lodor*, 56 N. J. Eq. 268.

New York. — *Matter of Snyder*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 1; *Farmers' L. & T. Co. v. New York, etc., R. Co.*, 78 Hun (N. Y.) 213; *Oelbermann v. New York, etc., R. Co.*, (Supm. Ct. Spec. T.) 7 Misc. (N. Y.) 352.

North Carolina. — *Langston v. Greenville Land, etc., Co.*, 120 N. Car. 132.

Pennsylvania. — *Chester Twist, etc., Co. v. Wetherill*, 7 Del. Co. Rep. (Pa.) 390.

3. Notice. — *Whittle v. Vanderbilt Min., etc., Co.*, 83 Fed. Rep. 48. But see *Mercantile Nat. Bank v. Parsons*, 54 Minn. 56; *Rapley v. Klugh*, 40 S. Car. 134.

4. Stockholders Cannot Act for Corporation—*United States*. — *Humphreys v. McKissock*, 140 U. S. 304; *Watson v. Bonfils*, (C. C. A.) 116 Fed. Rep. 157; *Colorado Springs Co. v. American Pub. Co.*, 97 Fed. Rep. 843, 38 C. C. A. 433; *De La Vergne Refrigerating Mach. Co. v. German Sav. Inst.*, 175 U. S. 40.

Illinois. — *Crown Coal, etc., Co. v. Taylor*, 184 Ill. 250; *Sellers v. Greer*, 172 Ill. 549; *Hopkins v. Roseclare Lead Co.*, 72 Ill. 373.

Indiana. — *Allemong v. Simmons*, 124 Ind. 199.

Massachusetts. — *Smith v. Hurd*, 12 Met. (Mass.) 371; *England v. Dearborn*, 141 Mass. 590.

Missouri. — *Jones v. Williams*, 139 Mo. 1, 61 Am. St. Rep. 436.

New Jersey. — *Titus v. Cairo, etc., R. Co.*, 37 N. J. L. 98; *Stokes v. New Jersey Pottery Co.*, 46 N. J. L. 237.

New York. — *McCullough v. Moss*, 5 Den. (N. Y.) 567; *Fulton Bank v. New York, etc., Canal Co.*, 4 Paige (N. Y.) 129. But see *Groh v. Groh*, 80 N. Y. App. Div. 85.

Wisconsin. — *Walworth County Bank v. Farmers' L. & T. Co.*, 14 Wis. 325.

5. Disregarding Fiction of Corporate Entity. — *Atkins v. Gamble*, 42 Cal. 99; *Sellers v. Greer*, 172 Ill. 549; *Groh v. Groh*, 80 N. Y. App. Div. 85. See also the title CORPORATIONS (PRIVATE), vol. 7, p. 634.

6. Representation of Stockholders by Corporation. — *Matter of Leeds*, 49 La. Ann. 501.

7. Taylor v. Southern Pac. Co., 122 Fed. Rep.

corporation establishing or defining corporate rights and liabilities is binding upon the stockholders in subsequent proceedings, as in such cases the corporation represents the stockholders.¹

XI. SUBSCRIPTION TO STOCK — 1. General Nature of Subscription — a. SUBSCRIPTION CONTRACT. — A subscription to the stock of an incorporated company, or in anticipation of a company expected to be incorporated, is usually in the shape of a mutual agreement, written and signed by those desiring to be corporators, or of a mutual undertaking in writing to be bound to take a share or shares in a corporation already created, in which the nature, object, and terms of the association are to some extent indicated.² It is well established, both upon natural reason and legal authority, that such a subscription to the stock of a corporation is a contract between the corporation on the one side and the subscriber on the other; and that as such the courts of justice will enforce it for or against either party,³ for whether in one shape or the other, the mutual agreement or undertaking of all the subscribers may constitute the consideration for the agreement or undertaking of each one of them, so as to make it a valid contract in favor of and against each, to be carried out or enforced by the company when organized, if not already organized. And the corporation becomes a party to the contract, either expressly or by implication, from the terms of the subscription.⁴

Trilateral Contract. — It has been said that a subscription to the stock of a corporation is a trilateral contract; it is an undertaking not only with the corporation and the commonwealth, but with all the other subscribers to the stock.⁵

b. CONTRACT MUST BE MUTUAL. — The contract of subscription must be mutual. The subscribers are bound only when the company is bound, and no unilateral subscription can be upheld.⁶

c. CORPORATION MUST HAVE RIGHT TO ISSUE STOCK. — The subscription must be for stock which the corporation owns and has a right to issue at the time;⁷ thus, a subscription after the corporation is in operation and all the stock has been issued is not effective.⁸

d. SUBSCRIPTION BEFORE INCORPORATION BINDING. — A subscriber may be bound by an actual subscription made before incorporation⁹ or organiza-

147; *Styles v. Laurel Fork Oil, etc., Co.*, 45 W. Va. 374.

1. *Furnald v. Glenn*, 64 Fed. Rep. 49, 26 U. S. App. 202; *Calloway v. Glenn*, 105 Ky. 648; *Castleman v. Templeman*, 87 Md. 546, 67 Am. St. Rep. 363; *Willoughby v. Chicago Junction R., etc., Co.*, 50 N. J. Eq. 656. But see *Anderson v. Haddon*, 33 Hun (N. Y.) 435.

2. **Form and General Nature of Subscription.** — *Galveston Hotel Co. v. Bolton*, 46 Tex. 633.

3. **Subscription Contract.** — *Acetylene Light, etc., Co. v. Beck*, 6 Pa. Super. Ct. 584; *Blunt v. Walker*, 11 Wis. 349, 78 Am. Dec. 709. See also *Path Valley R. Co. v. Brinley*, 15 Pa. Co. Ct. 339; *Pittsburgh, etc., R. Co. v. Graham*, 36 Pa. St. 77.

The Object of a Subscription in filling the stock of a corporation is to furnish evidence of the the subscriber's liability to pay up his shares, and to identify the persons who have become shareholders. *Lohman v. New York, etc., R. Co.*, 2 Sandf. (N. Y.) 39.

4. *Galveston Hotel Co. v. Bolton*, 46 Tex. 633.

5. **Subscription Trilateral Contract.** — *Graff v. Pittsburgh, etc., R. Co.*, 31 Pa. St. 489; *Brad-dock Electric R. Co. v. Bily*, 11 Pa. Super. Ct. 144; *Philadelphia, etc., R. Co. v. Conway*, 177 Pa. St. 364; *Acetylene Light, etc., Co. v. Beck*, 6 Pa. Super. Ct. 584.

6. **Contract Must Be Mutual.** — *Parker v. Northern Cent. Michigan R. Co.*, 33 Mich. 23; *Shurtz v. Schoolcraft, etc., R. Co.*, 9 Mich. 269; *Carlisle v. Saginaw Valley, etc., R. Co.*, 27 Mich. 315. See also *Powers v. Knapp*, 71 Hun (N. Y.) 371; *Glenn v. Garth*, 133 N. Y. 31.

7. **Corporation Must Have Power to Issue Stock.** — *Leigh v. Chattanooga, etc., R. Co.*, 104 Ga. 13; *Bates v. Great Western Tel. Co.*, 134 Ill. 536; *Newport Cotton Mill Co. v. Mims*, 103 Tenn. 465; *Knoxville, etc., R. Co. v. Knoxville*, 98 Tenn. 1. See also *Atlantic Constr. Co. v. Kreisler*, 40 N. Y. App. Div. 268; *Level Land Co. No. 3 v. Hayward*, 95 Wis. 109.

8. *Columbia Bank v. Rogers*, 10 Pa. Co. Ct. 61.

9. **Subscriptions Before Incorporation** — *Alabama*. — *Selma, etc., R. Co. v. Tipton*, 5 Ala. 787, 39 Am. Dec. 344.

California. — *Maryville Electric Light, etc., Co. v. Johnson*, 93 Cal. 538, 27 Am. St. Rep. 215, 36 Am. & Eng. Corp. Cas. 55; *West v. Crawford*, 80 Cal. 19, 26 Am. & Eng. Corp. Cas. 185.

Indiana. — *New Albany, etc., R. Co. v. McCormick*, 10 Ind. 499, 71 Am. Dec. 337; *Johnson v. Wabash, etc., Plank-road Co.*, 16 Ind. 389.

Iowa. — *Waukon, etc., R. Co. v. Dwyer*, 49 Iowa 121.

tion,¹ even though he makes no cash payment,² and the proceedings after incorporation are without notice to him.³

2. Creation of Contract — *a. FORM OF SUBSCRIPTION* — (1) *Any Form Showing Intent to Subscribe Sufficient* — (a) *Rule Stated*. — The weight of authority seems to support the view that no particular form is essential to the validity of a contract of subscription to the stock of a corporation, but that any form by which an intent to effect a contract of subscription appears is sufficient.⁴

(b) *Variance from Statutory Mode or Formula*. — It has been held that a departure from the method of subscription prescribed by statute will not relieve the subscriber from liability on a subscription which has been accepted,⁵ nor where the formula for subscriptions is prescribed by statute will the omission of a word in the form used prevent the subscriber from being bound.⁶

(c) *Variance from Form Prescribed by Charter*. — Similarly, where the form for subscriptions is prescribed by the charter, but there is a further provision that the company shall have common-law powers, stipulations under this head, added to the prescribed formula, but not inconsistent therewith, have been held valid.⁷

(d) *Mistake in or Omission of Name of Corporation*. — It has been held that a subscription to the stock of a corporation is not invalidated by a mistake in stating the name of the corporation, nor even by the omission of the name.⁸

(e) *Mutual Agreement to Subscribe*. — A mutual agreement executed by several persons by which each agrees to subscribe for a certain number of shares of the capital stock of a corporation proposed to be organized by them constitutes, when accepted by the corporation, a valid binding subscription for

Kentucky. — *Instone v. Frankfort Bridge Co.*, 2 Bibb (Ky.) 576, 5 Am. Dec. 638; *Wight v. Shelby R. Co.*, 16 B. Mon. (Ky.) 4, 63 Am. Dec. 522.

Maine. — *Penobscot R. Co. v. White*, 41 Me. 512, 66 Am. Dec. 257.

Maryland. — *Hughes v. Antietam Mfg. Co.*, 34 Md. 316.

Massachusetts. — *Athol Music Hall Co. v. Carey*, 116 Mass. 473.

Michigan. — *International Fair, etc., Assoc. v. Walker*, 83 Mich. 386.

Minnesota. — *Red Wing Hotel Co. v. Friedrich*, 26 Minn. 112; *Minneapolis Threshing Mach. Co. v. Davis*, 40 Minn. 110.

Mississippi. — *Thigpen v. Mississippi Cent. R. Co.*, 32 Miss. 347.

New Hampshire. — *Ashuelot Boot, etc., Co. v. Hoit*, 56 N. H. 548.

New York. — *Spear v. Crawford*, 14 Wend. (N. Y.) 20, 28 Am. Dec. 513; *Burrall v. Bushwick R. Co.*, 75 N. Y. 211; *Buffalo, etc., R. Co. v. Dudley*, 14 N. Y. 337.

Ohio. — *Milford, etc., Turnpike Co. v. Brush*, 10 Ohio 111, 36 Am. Dec. 78.

Tennessee. — *East Tennessee, etc., R. Co. v. Gammon*, 5 Sneed (Tenn.) 567; *Mobile, etc., R. Co. v. Yandal*, 5 Sneed (Tenn.) 294.

Vermont. — *Connecticut, etc., Rivers R. Co. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181.

1. *Oregon Cent. R. Co. v. Scoggin*, 3 Oregon 161.

A Subscriber to a Company Chartered but Not Organized, where the charter provides for subscription before organization, is bound, unless he expressly dissents before the acceptance of the charter. *Gleaves v. Brick Church Turnpike Co.*, 1 Sneed (Tenn.) 491.

2. Cash Payment Not Essential. — *Lake Ontario, etc., R. Co. v. Mason*, 16 N. Y. 451.

3. Subsequent Proceedings Without Notice. — *Burke v. Lechmere*, L. R. 6 Q. B. 297.

4. No Particular Form Necessary — *United States*. — *Dupee v. Chicago Horse Shoe Co.*, (C. C. A.) 117 Fed. Rep. 40.

Illinois. — See *Ottawa, etc., R. Co. v. Black*, 79 Ill. 262; *Hays v. Ottawa, etc., R. Co.*, 61 Ill. 422; *Parkhurst v. Mexican Southeastern R. Co.*, 102 Ill. App. 507.

Kentucky. — *Fry v. Lexington, etc., R. Co.*, 2 Met. (Ky.) 314; *Gill v. Kentucky, etc., Gold, etc., Min. Co.*, 7 Bush (Ky.) 635.

Maryland. — *Wellersburg, etc., Plank Road Co. v. Young*, 12 Md. 476; *Oler v. Baltimore, etc., R. Co.*, 41 Md. 583.

Mississippi. — *Kruger v. Hanover Nat. Bank*, 72 Miss. 462.

New Hampshire. — See *Anderson v. Scott*, 70 N. H. 534.

New York. — *Lohman v. New York, etc., R. Co.*, 2 Sandf. (N. Y.) 39; *Eastern Plank Road Co. v. Vaughan*, 20 Barb. (N. Y.) 155. See also *Yonkers Gazette Co. v. Taylor*, 30 N. Y. App. Div. 324.

Intention to Subscribe Must Be Apparent. — *Grangers' Market Co. v. Vinson*, 6 Oregon 172. See also the cases cited *supra*, this note.

5. Variance from Statutory Mode. — *Stuart v. Valley R. Co.*, 32 Gratt. (Va.) 146.

6. Variance from Statutory Formula. — *Hager's-town Turnpike Road So. v. Creeger*, 5 Har. & J. (Md.) 122.

7. Variance from Form Prescribed by Charter. — *Fisher v. Evansville, etc., R. Co.*, 7 Ind. 407.

8. Name. — *Oler v. Baltimore, etc., R. Co.*, 41 Md. 583.

the shares of stock therein agreed to be taken, which the corporation is entitled to enforce upon its incorporation.¹

(f) **Offers or Promises to Subscribe.** — But mere informal offers or promises to subscribe, pending corporate organization, will not constitute one a stockholder, nor support a note given for shares of stock.² And it has even been held that it is beyond the power of the legislature to provide that a promise to subscribe shall be deemed a subscription.³

(g) **Authority to Agent to Subscribe.** — The mere signing of a paper authorizing a certain person to affix the signer's name to a subscription to stock does not constitute a subscription, where the agent has never executed the power so given to him.⁴

(h) **Entry of Name as Subscriber by Secretary of Corporation.** — Where a person had given to the secretary of a corporation authority to subscribe to the stock for him, it was held that the mere entry of such person's name by the secretary in the list of the stockholders which it was his duty as secretary to keep did not constitute such person a subscriber, where the secretary did not enter such person's name as his agent nor intend such entry as a subscription to the stock.⁵

(i) **Inference from Acquiescence.** — Even without a formal subscription, or where it is irregular, the contract may be inferred from acquiescence and acceptance of the benefits of membership.⁶

1. **Mutual Agreement to Subscribe.** — *Non-Electric Fibre Mfg. Co. v. Peabody*, 21 N. Y. App. Div. 247; *Jeanette Bottle Works v. Schall*, 13 Pa. Super. Ct. 96. See also *Buffalo, etc., R. Co. v. Gifford*, 87 N. Y. 294.

As to the Necessity of Acceptance, see *infra*, this subsection, *Acceptance*.

2. **Offers or Promises to Subscribe** — *England*. — *Thames Tunnel Co. v. Sheldon*, 6 B. & C. 341, 13 E. C. L. 194.

Alabama. — *Selma, etc., R. Co. v. Tipton*, 5 Ala. 787, 39 Am. Dec. 344.

California. — *California Sugar Mfg. Co. v. Schafer*, 57 Cal. 396.

Illinois. — *Tonica, etc., R. Co. v. Stein*, 21 Ill. 96; *Thrasher v. Pike County R. Co.*, 25 Ill. 393; *Stowe v. Flagg*, 72 Ill. 397.

Kentucky. — *Mt. Sterling Coalroad Co. v. Little*, 14 Bush (Ky.) 429; *Goff v. Winchester College*, 6 Bush (Ky.) 443.

Maine. — *Starrett v. Rockland F. & M. Ins. Co.*, 65 Me. 374.

Massachusetts. — *Chester Glass Co. v. Dewey*, 16 Mass. 94, 8 Am. Dec. 128; *Phillips Limerick Academy v. Davis*, 11 Mass. 113, 6 Am. Dec. 162; *New Bedford, etc., Turnpike Corp. v. Adams*, 8 Mass. 138, 5 Am. Dec. 81; *Essex Turnpike Corp. v. Collins*, 8 Mass. 292; *Andover, etc., Turnpike Corp. v. Hay*, 7 Mass. 102.

Michigan. — *Plank's Tavern Co. v. Burkhard*, 87 Mich. 182.

New Jersey. — *Vreeland v. New Jersey Stone Co.*, 29 N. J. Eq. 188.

New York. — *Valk v. Crandall*, 1 Sandf. Ch. (N. Y.) 179; *Spear v. Crawford*, 14 Wend. (N. Y.) 20, 28 Am. Dec. 513; *Lake Ontario, etc., R. Co. v. Mason*, 16 N. Y. 451; *Troy, etc., R. Co. v. Tibbits*, 18 Barb. (N. Y.) 297; *Troy, etc., R. Co. v. Warren*, 18 Barb. (N. Y.) 310; *Lake Ontario Shore R. Co. v. Curtiss*, 80 N. Y. 219.

Ohio. — *Dayton, etc., Turnpike Co. v. Coy*, 13 Ohio St. 84; *Fanning v. Hibernia Ins. Co.*, 37 Ohio St. 339, 41 Am. Rep. 517.

Pennsylvania. — *Pittsburgh, etc., R. Co. v. Gazzam*, 32 Pa. St. 340; *Strasburg R. Co. v. Echternacht*, 21 Pa. St. 220, 60 Am. Dec. 49.

South Carolina. — *Charlotte, etc., R. Co. v. Blakely*, 3 Strobb. L. (S. Car.) 245.

3. *Pittsburgh, etc., R. Co. v. Gazzam*, 32 Pa. St. 340.

4. **Authority to Subscribe.** — *Grangers' Market Co. v. Vinson*, 6 Oregon 172.

5. **Entry of Name as Subscriber by Secretary of Corporation.** — *Grangers' Market Co. v. Vinson*, 6 Oregon 172.

6. **Inference from Acquiescence** — *England*. — *Matter of Direct Exeter, etc., R. Co.*, 2 Macn. & G. 176; *Cheltenham, etc., R. Co. v. Daniel*, 2 Q. B. 281, 42 S. C. L. 675; *West Cornwall R. Co. v. Mowatt*, 15 Q. B. 521, 69 E. C. L. 521; *Spackman v. Evans*, L. R. 3 H. L. 197; *Harrison v. Heathorn*, 6 M. & G. 81, 46 E. C. L. 81; *Ness v. Angas*, 3 Exch. 805; *Ness v. Armstrong*, 4 Exch. 21; *Moss v. Steam Gondola Co.*, 17 C. B. 180, 84 E. C. L. 180; *Bailey v. Universal Provident L. Assoc.*, 1 C. B. N. S. 557, 87 E. C. L. 557.

United States. — *Upton v. Tribilcock*, 91 U. S. 45; *Sanger v. Upton*, 91 U. S. 56.

Illinois. — *Boggs v. Olcott*, 40 Ill. 303; *Jewell v. Rock River Paper Co.*, 101 Ill. 57; See also *Parkhurst v. Mexican Southeastern R. Co.*, 102 Ill. App. 507.

Maine. — *Chaffin v. Cummings*, 37 Me. 76.

Maryland. — *Musgrave v. Morrison*, 54 Md. 161.

Massachusetts. — *Chester Glass Co. v. Dewey*, 16 Mass. 94, 8 Am. Dec. 128; *Boston, etc., R. Co. v. Wellington*, 113 Mass. 79.

Mississippi. — See *Kruger v. Hanover Nat. Bank*, 72 Miss. 462.

Missouri. — *Griswold v. Seligman*, 72 Mo. 110.

New Hampshire. — *Haynes v. Brown*, 36 N. H. 545.

New York. — *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294; *Wheeler v. Miller*, 90 N. Y. 353; *Hamilton, etc., Plank Road Co. v.*

(j) **Option to Resell to Corporation.** — A contract to take stock coupled with an option to resell to the corporation is an actual subscription, and not a mere security for a loan, the option being a right secured by contract in addition to the absolute title.¹

(k) **Indefinite Agreement.** — An indefinite agreement to subscribe for capital stock in a corporation to be organized which does not specify the amount of capital stock to be employed, what proportion of the capital stock the subscriber is to take, nor when or by whom the company is to be organized cannot be enforced.²

(2) **Strict Rule.** — Some of the cases have announced a stricter rule with regard to subscriptions, holding that where the modes for becoming a corporator and stockholder in a company are prescribed by statute, such modes must be followed,³ and that where subscriptions are taken by those authorized to take them, but in a manner exceeding the authority, the subscriber cannot enforce recognition as a stockholder.⁴

Acknowledgment. — Similarly, a provision requiring the acknowledgment of subscriptions has been held to be mandatory.⁵

Subscription in Manner Provided by By-laws. — And it has been held that where the statute requires subscriptions to the stock of a railroad company to be made "in the manner to be provided by its by-laws," subscriptions made before the by-laws are adopted create no rights or liabilities.⁶

b. **NECESSITY OF WRITING.** — A contract of subscription to the stock of a corporation, being one that may be performed within a year, is not within the statute of frauds.⁷ And while there are decisions and dicta to the effect that it is necessary to constitute a valid subscription that it shall be evidenced by a writing,⁸ it has also been held that in the absence of some statutory or charter provision a writing is not necessary, but a verbal undertaking to subscribe may be enforced.⁹

c. **INSTRUMENTS NECESSARY OR SUFFICIENT TO CREATE CONTRACT** —

(1) **Articles or Certificate of Incorporation or Association.** — A signature to the articles or certificate of incorporation or association required by statute, with the number of shares taken placed opposite to the signature, is a sufficient subscription to bind both the subscriber and the corporation,¹⁰ but it is not

Rice, 7 Barb. (N. Y.) 159; *Dorris v. French*, 4 Hun (N. Y.) 292; *Palmer v. Lawrence*, 3 Sandf. (N. Y.) 161.

Pennsylvania. — *Philadelphia, etc., R. Co. v. Cowell*, 28 Pa. St. 329, 70 Am. Dec. 128.

Wisconsin. — *Clark v. Farrington*, 11 Wis. 306.

1. **Option to Resell.** — *Melvin v. Lamar Ins. Co.*, 80 Ill. 446, 22 Am. Rep. 199, holding further that as to other stockholders such option is void, and the subscriber stands upon the same ground as other subscribers.

2. **Indefinite Agreement.** — *Nemaha Coal, etc., Co. v. Settle*, 54 Kan. 424.

3. **Compliance with Statutory Requirements.** — *Troy, etc., R. Co. v. Tibbits*, 18 Barb. (N. Y.) 297.

4. **Subscription to an Increase of Capital Stock,** made without compliance with the essential statutory conditions and requirements, cannot be enforced by the corporation. The subscriber does not thereby become a stockholder. The subscription contract is absolutely void as between the subscriber and the corporation, and he may recover back any sums paid thereon as having been paid without consideration. *Union R. Co. v. Sneed*, 99 Tenn. 1.

4. *Farmers, etc., Bank v. Nelson*, 12 Md. 35.

5. **Acknowledgment.** — *Coppage v. Hutton*, 124 Ind. 401.

6. **Subscription in Manner Provided by By-laws.** — *Carlisle v. Saginaw Valley, etc., R. Co.*, 27 Mich. 315.

7. **Not Within Statute of Frauds.** — *Miles v. Bough*, 3 Q. B. 845, 43 E. C. L. 1001; *Bullock v. Falmouth, etc., Turnpike Road Co.*, 85 Ky. 184; *Coleman v. Eyre*, 45 N. Y. 38.

8. See *supra*, this subsection, *Offers or Promises to Subscribe*.

9. **Writing Not Necessary.** — *Matter of Electric Tel. Co.*, 3 De G. & J. 170; *Walter v. Merced Academy Assoc.*, 126 Cal. 582; *Colfax Hotel Co. v. Lyon*, 69 Iowa 683; *Somerset Nat. Banking Co. v. Adams*, (Ky. 1903) 72 S. W. Rep. 1125, 24 Ky. L. R. 2083; *Manchester St. R. Co. v. Williams*, 71 N. H. 312. See also *Des Moines Sav. Bank v. Colfax Hotel Co.*, 88 Iowa 4.

10. **Renunciation of a Statutory Right** to subscribe for certain stock, to be paid for in a specified way, need not be in writing. *White v. Florence Bridge Co.*, 4 Ala. 464.

10. **Subscription to Articles or Certificate of Incorporation or Association Sufficient.** — *Dupee v. Chicago Horse Shoe Co.*, (C. C. A.) 117 Fed. Rep. 40; *Phoenix Warehousing Co. v. Badger*,

necessary, in order to constitute a valid subscription, that the subscriber should sign such instruments,¹ nor that the subscriber should be named in the certificate of incorporation.²

(2) *Subscription Book*. — It is not essential that the subscription should be in the subscription book of the corporation, but a subscription which is otherwise valid will not be invalidated by the fact that it is made on a separate paper.³

(3) *Stock Book*. — It is not necessary in order to constitute a person a subscriber that he should subscribe the stock book.⁴

(4) *Private Memorandum Book*. — It has been held that a subscription entered in a pocket memorandum book was valid and binding,⁵ but on the other hand there is a decision that the mere entering of one's name in the personal memorandum book of the president of a corporation with the amount and number of shares which were, according to an oral agreement, to be taken upon a certain contingency, could not be construed as a subscription to the stock, there being at the time nothing about the book to show that it was to contain a list of stock subscribers.⁶

(5) *Application for Stock*. — In *England* the usual form is an application for shares by the person wishing to become a stockholder.⁷

d. DELIVERY OF SUBSCRIPTION IN ESCROW. — The general rule that a delivery in escrow cannot be made to the grantee or his agent,⁸ applies in the case of a subscription to the stock of a corporation,⁹ and accordingly it has been held that a delivery of the subscription to the president of the corporation, who was also its agent to receive the subscription,¹⁰ or to commissioners appointed to receive subscriptions, cannot operate as a delivery in escrow.¹¹ But on the other hand, it has been held that a delivery to a director might operate as an escrow where he was a mere volunteer, having no authority from the corporation to receive the subscription, as such a position in the service of the company did not prevent him from holding the subscription in escrow, and he should be treated as a third person in respect to it, rather than as the agent of the corporation.¹² And even a delivery to an agent of the corporation engaged in taking subscriptions has been held good as an escrow where the subscription was not absolute but imposed a burden upon the corporation which it must accept before the contract became completely binding,¹³ or where the agent was expressly directed to hold the subscription and not to deliver it until he received directions to do so.¹⁴

67 N. Y. 294, affirming 6 Hun (N. Y.) 293; Cole v. Ryan, 52 Barb. (N. Y.) 168.

1. **Subscription to Such Instruments Not Necessary.** — Johnson v. Wabash, etc., Plank-road Co., 16 Ind. 389; Shick v. Citizens Enterprise Co., 15 Ind. App. 329, 57 Am. St. Rep. 230; Eastern Plank Road Co. v. Vaughan, 20 Barb. (N. Y.) 155; Buffalo, etc., R. Co. v. Clark, 22 Hun (N. Y.) 359; Yonkers Gazette Co. v. Taylor, 30 N. Y. App. Div. 324. But compare Sedalia, etc., R. Co. v. Wilkerson, 83 Mo. 235; Bucher v. Dillsburg, etc., R. Co., 76 Pa. St. 306.

2. **Subscriber Need Not Be Named in Certificate of Incorporation.** — Woods Motor Vehicle Co. v. Brady, (Supm. Ct. Tr. T.) 39 Misc. (N. Y.) 79.

3. **Subscription Need Not Be in Subscription Book.** — Woodruff v. McDonald, 33 Ark. 97; Brownlee v. Ohio, etc., R. Co., 18 Ind. 68; Eastern Plank Road Co. v. Vaughan, 20 Barb. (N. Y.) 155; Hamilton, etc., Plank Road Co. v. Rice, 7 Barb. (N. Y.) 157; Ashtabula, etc., R. Co. v. Smith, 15 Ohio St. 328; Stuart v. Valley R. Co., 32 Gratt. (Va.) 146. Compare Charlotte, etc., R. Co. v. Blakely, 3 Strobb. L. (S. Car.) 245.

4. Kriger v. Hanover Nat. Bank, 72 Miss. 462.

5. **Subscription in Memorandum Book.** — Buffalo, etc., R. Co. v. Gifford, 87 N. Y. 294.

6. McClelland v. Whiteley, 11 Biss. (U. S.) 444.

7. **Application for Stock.** — See *In re National Sav. Bank Assoc.*, L. R. 4 Eq. 9; *In re United Ports Co.*, L. R. 13 Eq. 474; *In re Richmond Hill Hotel Co.*, L. R. 2 Ch. 527; *In re Universal Banking Co.*, L. R. 3 Ch. 637; Tucker's Case, 20 W. R. 89.

8. See the title *Escrow*, vol. 11, p. 333.

9. **Rule Applies to Subscriptions.** — See Cass v. Pittsburg, etc., R. Co., 80 Pa. St. 31.

10. **Delivery to President.** — Madison, etc., Plankroad Co. v. Stevens, 10 Ind. 1.

11. **Delivery to Commissioners.** — Wight v. Shelby R. Co., 16 B. Mon. (Ky.) 4, 63 Am. Dec. 522.

12. **Delivery to Director.** — Ottawa, etc., R. Co. v. Hall, 1 Ill. App. 612.

13. **Delivery of Conditional Subscription to Agent.** — Cass v. Pittsburg, etc., R. Co., 80 Pa. St. 31. But compare Wight v. Shelby R. Co., 16 B. Mon. (Ky.) 4, 63 Am. Dec. 522.

14. Great Western Tel. Co. v. Loewenthal, 154 Ill. 261, affirming 51 Ill. App. 447.

Evidence of Nondelivery. — In an action upon a subscription to the stock of a corporation which was delivered in escrow, parol evidence is admissible to show that there was no delivery of the subscription to the corporation.¹

e. ACCEPTANCE. — In order to complete the contract of subscription so that the corporation may take advantage of it there must be an acceptance on the part of the corporation,² and upon such acceptance the corporation becomes a party to the contract and it becomes binding according to its terms.³

Proof of Acceptance of a subscription by the corporation may be by parol.⁴

A Liability or Expense Incurred by the corporation on the faith of a subscription is evidence of an acceptance thereof.⁵

f. ALLOTMENT — (1) *In General.* — The acceptance is usually signified by an allotment of shares, and such allotment is necessary to complete the contract,⁶ except in the case of the original signers of the memorandum of association.⁷ After shares have been allotted to an applicant therefor the directors cannot cancel the allotment of shares.⁸

(2) *Power to Allot* — (a) **Allotment by Commissioners.** — Where the act of incorporation appoints a certain number of commissioners to receive subscriptions to the capital stock and to distribute the stock among the several subscribers in such manner as they shall deem most conducive to the interests of the corporation, making no provision that a majority shall constitute a quorum for the discharge of the duties intrusted to them, all must be present to hear and consult when they come to distribute the stock, although a majority is competent to decide.⁹ In the distribution of the stock they act judicially,¹⁰ and where the allotment of shares is discretionary with them they may apportion to some and exclude others.¹¹

(b) **Delegation of Power.** — Where the deed of settlement of a company provides that the allotment or distribution of the shares shall be vested in the directors, they cannot delegate the power of allotment.¹²

(3) **Wrong Apportionment.** — A wrong apportionment is not void.¹³ But a subscriber who receives more than his proportion holds the excess in trust for the others whose allotment is deficient.¹⁴ The error cannot be corrected by issuing more than the fixed number of shares.¹⁵

g. WITHDRAWAL OF SUBSCRIPTION. — In *England* it is held that an

1. **Nondelivery May Be Shown by Parol.** — *Great Western Tel. Co. v. Loewenthal*, 154 Ill. 261, affirming 51 Ill. App. 447.

2. **Necessity for Acceptance.** — *McNaught v. Fisher*, (C. C. A.) 96 Fed. Rep. 168; *Bristol Creamery Co. v. Tilton*, 70 N. H. 239; *Gilman v. Gross*, 97 Wis. 224. See also *In re National Sav. Bank Assoc.*, L. R. 4 Eq. 9; *In re United Ports Co.*, L. R. 13 Eq. 474; *In re Richmond Hill Hotel Co.*, L. R. 2 Ch. 527; *In re Universal Banking Co.*, L. R. 3 Ch. 637; *Tucker's Case*, 20 W. R. 89; *Powers v. Knapp*, 71 Hun (N. Y.) 371; *Glenn v. Garth*, 133 N. Y. 31.

Acceptance Must Be by Person Having Authority to Bind Company. — *In re Homer Dist. Consol. Gold Mines*, 39 Ch. D. 546.

3. *McNaught v. Fisher*, (C. C. A.) 96 Fed. Rep. 168.

4. **Acceptance May Be Proved by Parol.** — *Jones v. Florence Wesleyan University*, 46 Ala. 626.

5. *Jones v. Florence Wesleyan University*, 46 Ala. 626.

6. **Allotment Necessary.** — *In re Richmond Hill Hotel Co.*, L. R. 2 Ch. 527, *distinguishing* *New Theatre Co.*, 33 Beav. 529; *Matter of Zoological, etc., Soc.*, 16 Ont. App. 543; *Matter of London Speaker Printing Co.*, 16 Ont. App. 508. See also *In re National Sav. Bank Assoc.*, L. R.

4 Eq. 9; *In re United Ports Co.*, L. R. 13 Eq. 474; *In re Richmond Hill Hotel Co.*, L. R. 2 Ch. 527; *In re Universal Banking Co.*, L. R. 3 Ch. 637; *Tucker's Case*, 20 W. R. 89; *Bristol Creamery Co. v. Tilton*, 70 N. H. 239.

7. **Signers of Memorandum of Association.** — See *In re London, etc., Consol. Coal Co.*, 5 Ch. D. 525; *In re London, etc., Exch. Bank*, L. R. 2 Ch. 427; *In re Robinson, etc., Brewery Co.*, L. R. 13 Eq. 228; *In re United Service Co.*, L. R. 5 Ch. 707, *distinguishing* *In re Natal Invest. Co.*, L. R. 5 Ch. 22. See also *Levick's Case*, 40 L. J. Ch. 180.

8. **Allotment Cannot Be Canceled.** — *In re United Ports Co.*, L. R. 13 Eq. 474.

9. **Allotment by Commissioners.** — *Crocker v. Crane*, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228.

10. *Crocker v. Crane*, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228.

11. *Walker v. Devereaux*, 4 Paige (N. Y.) 229.

12. **Power to Allot Shares Cannot Be Delegated.** — *In re Leeds Banking Co.*, L. R. 1 Ch. 561.

13. **Wrong Apportionment.** — *Walker v. Devereaux*, 4 Paige (N. Y.) 229.

14. *Walker v. Devereaux*, 4 Paige (N. Y.) 229.

15. *Smith v. North American Min. Co.*, 1 Nev. 423.

application for shares, in whatever form made, and whether or not accompanied by a deposit, amounts to nothing more than an offer to take the number of shares named, and therefore may be withdrawn at any time before it has been accepted,¹ even though such application contains a provision that the subscriber agrees to accept the number of shares named or any less number that may be allotted to him, and consents to be registered in respect to them.² But an offer to subscribe for shares, like any other offer, becomes a complete contract upon acceptance by the other party, and the subscriber cannot thereafter withdraw his offer.³

In the United States also the courts have recognized the right of the subscriber to withdraw before the acceptance of his subscription or the organization of the corporation or filing of the articles of incorporation,⁴ even though the other subscribers object.⁵ But in *Illinois* it has been held that a person who has made a subscription for the purpose of giving an agent a start and enabling him to procure other subscriptions, and has thus held himself out as a stockholder and authorized the agent so to represent him, cannot increase the burdens of other stockholders by the withdrawal of his subscription, and that an alleged secret agreement for so doing is a fraud upon the other stockholders of which the first subscriber cannot be permitted to avail himself.⁶

Notice and the Like. — In order to constitute a valid withdrawal the subscriber must give notice thereof to the proper officer or officers; that is, he must do some act or make some unequivocal or unconditional statement which shall amount to a public withdrawal from his contract.⁷

Erasure of a Subscription does not prevent suit upon it; explanatory evidence is admissible.⁸

1. Right to Withdraw. — *In re Universal Non-Tariff F. Ins. Co.*, 4 Ch. D. 774; *In re Warren's Blacking Co.*, L. R. 4 Ch. 178; *In re Joint-Stock Co.'s Acts*, 7 Jur. N. S. 981; *Ramsgate Victoria Hotel Co. v. Montefiore*, L. R. 1 Exch. 109; *In re United Ports Co.*, L. R. 13 Eq. 474, 20 W. R. 356; *Matter of Companies Act*, 4 De G. J. & S. 471; *Ex p. Wilson*, 20 L. T. N. S. 962; *Matter of Cardiff, etc., Iron Co.*, 3 De G. F. & J. 713; *Slatterys Case*, Ir. R. 7 Eq. 245; *MacLagan's Case*, 51 L. J. Ch. 841; *In re Bowron*, L. R. 5 Eq. 428. See also *In re National Sav. Bank Assoc.*, L. R. 4 Eq. 9; *In re General International Agency Co.*, L. R. 2 Eq. 567; *In re Publishers' Syndicate*, 3 Ont. L. Rep. 552.

Withdrawal May Be Oral. — *Ex p. Wilson*, 20 L. T. N. S. 962.

2. See *In re British, etc., Steam Nav. Co.*, L. R. 10 Eq. 659; *Matter of Adelphi Hotel Co.*, 2 De G. J. & S. 650; *In re General International Agency Co.*, L. R. 2 Eq. 567.

3. See *In re Imperial Land Co.*, L. R. 7 Ch. 587; *Byrne v. Van Tienhoven*, 5 C. P. D. 344; *Stevenson v. McLean*, 5 Q. B. D. 346; *Rehbein v. Rahr*, 109 Wis. 136.

Withdrawal After Allotment but Before Notice Thereof. — A written application for shares may be withdrawn after the shares have been allotted but before such allotment has been communicated to the subscriber. *In re National Sav. Bank Assoc.*, L. R. 4 Eq. 9.

4. Right to Withdraw. — *Cook v. Chittenden*, 25 Fed. Rep. 544; *Bryant's Pond Steam Mill Co. v. Felt*, 87 Me. 234, 47 Am. St. Rep. 323; *Hudson Real Estate Co. v. Tower*, 161 Mass. 10; *Painesville Nat. Bank v. King Varnish Co.*, 4 Ohio Cir. Dec. 511, 8 Ohio Cir. Ct. 563; *Garrett v. Dillsburg, etc.*, R. Co., 78 Pa. St. 465; *Muncy Traction Engine Co. v. Green*, 143 Pa.

St. 269, 21 Am. & Eng. Corp. Cas. 328; *Auburn Bolt, etc., Works v. Schultz*, 143 Pa. St. 256; *Lewis v. Hillsboro Roller-Mill Co.*, (Tex. Civ. App. 1893) 23 S. W. Rep. 338; *Patty v. Hillsboro Roller Mill Co.*, 4 Tex. Civ. App. 224. See also *Gulf, etc., R. Co. v. Neely*, 64 Tex. 344. *Compare Edinboro Academy v. Robinson*, 37 Pa. St. 210, 78 Am. Dec. 421; *Strasburg R. Co. v. Echternacht*, 21 Pa. St. 220, 60 Am. Dec. 49; *Shober v. Lancaster County Park Assoc.*, 68 Pa. St. 429.

A Conditional Offer to subscribe is revocable at the option of the person making the offer at any time before its delivery to and acceptance by the company; and his death before such delivery and acceptance works a revocation. *Wallace v. Townsend*, 43 Ohio St. 537, 54 Am. Rep. 829.

No Withdrawal After Acceptance. — *Balfour v. Baker City Gas Co.*, 27 Oregon 300; *Gulf, etc., R. Co. v. Neely*, 64 Tex. 344.

5. Subscriber May Withdraw Though Others Object. — *Hudson Real Estate Co. v. Tower*, 161 Mass. 10. In this case the court said: "It was indeed held in an early case in England that all of the other subscribers must not only have notice, but must actually consent, before one of the subscribers could withdraw. *Kidwelly Canal Co. v. Raby*, 2 Price 93. But now, in England as well as here, no such consent is necessary."

Consent of Other Subscribers Necessary. — *Chicago Bldg., etc., Co. v. Lyon*, 10 Okla. 704.

6. *Great Western Tel. Co. v. Haight*, 49 Ill. App. 633.

7. Notice and the Like. — *Hudson Real Estate Co. v. Tower*, 161 Mass. 10.

8. *Johnson v. Wabash, etc., Plank-road Co.*, 16 Ind. 389.

3. Parties to Contract — *a. WHO MAY SUBSCRIBE* — (1) *In General.* — As a general rule any person who is competent to contract may become a subscriber to the stock of a corporation. Treatment of the legal principles governing subscriptions by persons under disability should be sought under titles where the general law applicable to such parties is treated.¹

(2) *Other Corporations.* — The right of one corporation to become stockholder in another corporation has also been fully discussed elsewhere in this work.²

(3) *Commissioners Appointed to Receive Subscriptions.* — There is no reason why commissioners or others appointed to receive subscriptions should not themselves become subscribers,³ but a statute designating commissioners to open books, receive subscriptions, and organize the corporation does not give to them priority in other respects over other persons, and they cannot be permitted to appropriate the entire stock to the exclusion of others.⁴

(4) *Subscription by Husband in Name of Wife.* — In *Pennsylvania* it has been held that a husband is not liable upon a subscription made by him for his wife in her name, a married woman not being liable on her subscription. But if the husband makes a subscription to the stock of a corporation for himself, he cannot avoid liability for the amount thereof by placing it in the name of his wife.⁵

b. WHO MAY RECEIVE SUBSCRIPTIONS — (1) *Authority Necessary.* — A subscription can be validly received only by some person who has the authority to act for the corporation in so receiving it;⁶ but a subscription taken by a person who had not at the time the necessary authority may become binding if the company ratifies his act within a reasonable time.⁷

(2) *Commissioners.* — Frequently commissioners are appointed to receive subscriptions,⁸ but their powers terminate upon the organization of the corporation.⁹

Commissioners Act Ministerially. — Commissioners appointed to open books to receive subscriptions to the capital stock act ministerially in receiving the subscriptions, and it is not necessary for that purpose that even a majority be present.¹⁰

Failure to Take a Prescribed Oath will not invalidate the acts of commissioners.¹¹

4. Consideration — *a. IN GENERAL.* — Like any other contract, a subscription must be founded upon a consideration,¹² the validity and sufficiency of

1. See the titles *CONTRACTS*, vol. 7, p. 88; *HUSBAND AND WIFE*, vol. 15, p. 785; *INFANTS*, vol. 16, p. 255; *INSANITY*, vol. 16, p. 558.

2. See the title *CORPORATIONS (PRIVATE)*, vol. 7, p. 810 *et seq.*

3. *Commissioners May Subscribe.* — *Walker v. Devereaux*, 4 Paige (N. Y.) 229; *Haight v. Day*, 1 Johns. Ch. (N. Y.) 18. And where one appointed to receive subscriptions himself subscribes, he cannot release himself by taking his name from the subscription paper before returning the same. *Cheraw, etc., R. Co. v. White*, 14 S. Car. 51.

4. *Cannot Appropriate Entire Stock.* — *Brower v. Passenger R. Co.*, 3 Phila. (Pa.) 161, 15 Leg. Int. (Pa.) 221.

5. *Subscription by Husband in Name of Wife.* — *Shields v. Casey*, 155 Pa. St. 253, 35 Am. St. Rep. 879.

6. *Authority Necessary.* — *Essex Turnpike Corp. v. Collins*, 8 Mass. 292; *Shurtz v. Schoolcraft, etc., R. Co.*, 9 Mich. 270; *Parker v. Northern Cent. Michigan R. Co.*, 33 Mich. 23. *Compare* *Northeastern R. Co. v. Rodrigues*, 10 Rich. L. (S. Car.) 278.

7. *Ratification.* — *Walker v. Mobile, etc., R. Co.*, 34 Miss. 245. See also *Judah v. American*

Live Stock Ins. Co., 4 Ind. 333; *Buffalo, etc., R. Co. v. Gifford*, 87 N. Y. 294; *Mobile, etc., R. Co. v. Yandal*, 5 Sneed (Tenn.) 294.

8. *Commissioners.* — See *Hollman v. Williamsport, etc., Turnpike Co.*, 9 Gill & J. (Md.) 462; *Shurtz v. Schoolcraft, etc., R. Co.*, 9 Mich. 270; *Parker v. Northern Cent. Michigan R. Co.*, 33 Mich. 23; *Crocker v. Crane*, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228.

9. *Powers Terminate upon Organization.* — *Smith v. Bangs*, 15 Ill. 399; *Wellersburg, etc., Plank Road Co. v. Hoffman*, 9 Md. 559; *Peninsular R. Co. v. Duncan*, 28 Mich. 130; *Hardenburgh v. Farmers, etc., Bank*, 3 N. J. Eq. 68; *Walker v. Devereaux*, 4 Paige (N. Y.) 229; *Crocker v. Crane*, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228; *James v. Cincinnati, etc., R. Co.*, 2 Disney (Ohio) 261; *State v. Lehre*, 7 Rich. L. (S. Car.) 234.

10. *Commissioners Act Ministerially.* — *Crocker v. Crane*, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228.

11. *Hollman v. Williamsport, etc., Turnpike Co.*, 9 Gill & J. (Md.) 462.

12. *Necessity for Consideration.* — See *Parker v. Northern Cent. Michigan R. Co.*, 33 Mich. 25; *Carlisle v. Saginaw Valley, etc., R. Co.*, 27

which are, as a rule, to be judged by the same standards that govern in the case of contracts generally.¹

b. WHAT CONSTITUTES VALID AND SUFFICIENT CONSIDERATION —

(1) *Mutual Promises of Subscribers.* — A good many cases have asserted the view that the mutual promises of all the subscribers form a sufficient consideration to support the promise of each.²

(2) *Mutual Promises of Subscriber and Corporation.* — Similarly, upon the well-established principle that in bilateral contracts the promise of each of the parties is a sufficient consideration for the promise of the other,³ it has been held that a sufficient consideration for the ordinary subscription may be found in the mutual promises of the subscriber and the corporation.⁴

(3) *Advantages of Membership.* — Again, it has been asserted that a sufficient consideration for the subscriber's contract of subscription may be found in advantages which will accrue to him by reason of his membership in the corporation,⁵ such as the interest acquired by the stockholder in the corporation, its franchises, and its property,⁶ and in the right to hold the stock and participate in the pecuniary dividends.⁷

(4) *Concessions to Subscriber.* — Again, it has been held that a valid consideration may be found in concessions made to the subscriber, as, for instance, the selection of a particular route for a plank road.⁸

c. CONSIDERATION IMPLIED. — It has even been held that the existence of a consideration may be implied from the subscription itself.⁹

5. Conditional Subscriptions — a. NATURE. — A conditional subscription is nothing more or less than an offer to subscribe to the stock of the corporation if the corporation will comply with the conditions named by the proposed subscriber, and an acceptance by the corporation is necessary.¹⁰ It has been defined in effect as "a continuing offer which is final and absolute when accepted."¹¹

Mich. 315; *Shurtz v. Schoolcraft, etc.*, R. Co., 9 Mich. 269.

1. For a Full Treatment of the subject of consideration, see the title *CONSIDERATION*, vol. 6, p. 667.

2. *Mutual Promises of Subscribers.* — *Twin Creek, etc.*, Turnpike Road Co. v. Lancaster, 79 Ky. 552, 3 Am. & Eng. Corp. Cas. 58; *Kennebec, etc.*, R. Co. v. Palmer, 34 Me. 366; *Eastern Plank Road Co. v. Vaughan*, 20 Barb. (N. Y.) 155; *Northern R. Co. v. Miller*, 10 Barb. (N. Y.) 260; *Cole v. Ryan*, 52 Barb. (N. Y.) 168; *Spear v. Crawford*, 14 Wend. (N. Y.) 20, 28 Am. Dec. 513; *Galveston Hotel Co. v. Bolton*, 46 Tex. 633. See also *Jeannette Bottle Works v. Schall*, 13 Pa. Super. Ct. 96.

3. See the title *CONSIDERATION*, vol. 6, p. 727.

4. *Mutual Promises of Subscriber and Corporation.* — *Marysville Electric Light, etc.*, Co. v. Johnson, 93 Cal. 538, 27 Am. St. Rep. 215, 36 Am. & Eng. Corp. Cas. 55; *Walter A. Wood Harvester Co. v. Robbins*, 56 Minn. 48.

5. *Advantages of Membership.* — *Ft. Edward, etc.*, Plank Road Co. v. Payne, 17 Barb. (N. Y.) 567.

6. *Interest Acquired.* — *East Tennessee, etc.*, R. Co. v. Gammon, 5 Sneed (Tenn.) 567.

7. *Right to Stock and Dividends — Alabama.* — *Selma, etc.*, R. Co. v. Tipton, 5 Ala. 787, 39 Am. Dec. 344.

Arkansas. — *Smith v. Gillen*, 52 Ark. 442.

Connecticut. — *Danbury, etc.*, R. Co. v. Wilson, 22 Conn. 435.

Indiana. — *Bish v. Bradford*, 17 Ind. 490; *New Albany, etc.*, R. Co. v. Fields, 10 Ind. 187.

Kentucky. — *Fry v. Lexington, etc.*, R. Co., 2 Met. (Ky.) 314.

Minnesota. — *St. Paul, etc.*, R. Co. v. Robbins, 23 Minn. 439.

New York. — *Union Turnpike Road Co. v. Jenkins*, 1 Cai. (N. Y.) 381; *Goshen, etc.*, Turnpike Road Co. v. Hurtin, 9 Johns. (N. Y.) 217, 6 Am. Dec. 273; *Barnes v. Perine*, 12 N. Y. 18; *Lake Ontario, etc.*, R. Co. v. Mason, 16 N. Y. 463; *Hamilton, etc.*, Plank Road Co. v. Rice, 7 Barb. (N. Y.) 157; *Stanton v. Wilson*, 2 Hill (N. Y.) 153; *Barker v. Bucklin*, 2 Den. (N. Y.) 45, 43 Am. Dec. 726; *Schenectady, etc.*, Plank-Road Co. v. Thatcher, 11 N. Y. 102.

Tennessee. — *East Tennessee, etc.*, R. Co. v. Gammon, 5 Sneed (Tenn.) 567.

8. *Selection of Route.* — *Rhey v. Edensburg, etc.*, Plank-Road Co., 27 Pa. St. 261. But compare *Miller v. Wild Cat Gravel Road Co.*, 52 Ind. 64; *Bish v. Bradford*, 17 Ind. 490.

9. *Consideration Implied.* — *East Tennessee, etc.*, R. Co. v. Gammon, 5 Sneed (Tenn.) 567.

10. *Nature of Conditional Subscriptions — Acceptance.* — See *Junction R. Co. v. Reeve*, 15 Ind. 236; *Oldtown, etc.*, R. Co. v. Veazie, 39 Me. 571.

Acceptance by the Company of Five per Cent. on Subscriptions made on other conditions than those named in the articles of association shows concurrence in those new conditions and creates mutuality. *Nichols v. Burlington, etc.*, Plank Road Co., 4 Greene (Iowa) 42.

11. *Taggart v. Western Maryland R. Co.*, 24 Md. 563, 89 Am. Dec. 760; *Ashtabula, etc.*, R. Co. v. Smith, 15 Ohio St. 335. See also *Low v. Edgefield, etc.*, R. Co., 1 Head (Tenn.) 650.

Conditional Subscriptions Cannot Be Withdrawn unless unreasonable delay occurs in performing

b. VALIDITY.—(1) *In General*.—Conditional subscriptions are generally upheld by the courts as valid,¹ unless the charter or statute authorizes only absolute subscription,² or the conditions themselves are contrary to public policy.³

Subscriptions Before Incorporation must, it has been held, be absolute,⁴ but where there is a condition, this and not the subscription is deemed illegal.⁵

(2) *Written Subscriptions Cannot Be Varied by Parol Conditions*.—Where the written subscription is an unqualified promise to pay a specified sum per share at the time and in the manner required by the board of directors, it cannot be varied or changed by a contemporaneous, secret, oral agreement between the subscriber and the corporation into a conditional contract to be enforced only upon the performance of the condition.⁶

the condition. *Cravens v. Eagle Cotton Mills Co.*, 120 Ind. 6, 16 Am. St. Rep. 298.

1. *Conditional Subscriptions Upheld*.—See the following cases:

England.—*In re Richmond Hill Hotel Co.*, L. R. 2 Ch. 527.

Indiana.—*New Albany, etc., R. Co. v. McCormick*, 10 Ind. 499, 71 Am. Dec. 337.

Kentucky.—*McMillan v. Maysville, etc., R. Co.*, 15 B. Mon. (Ky.) 218, 61 Am. Dec. 181.

New York.—*Burrows v. Smith*, 10 N. Y. 550; *Union Hotel Co. v. Hersee*, 79 N. Y. 454, 35 Am. Rep. 536; *Morris Canal, etc., Co. v. Nathan*, 2 Hall (N. Y.) 239.

Ohio.—*Chamberlain v. Painesville, etc., R. Co.*, 15 Ohio St. 225; *Ashtabula, etc., R. Co. v. Smith*, 15 Ohio St. 328; *Dayton, etc., R. Co. v. Hatch*, 1 Disney (Ohio) 84.

Pennsylvania.—*Pittsburgh, etc., R. Co. v. Stewart*, 41 Pa. St. 54; *Caley v. Philadelphia, etc., R. Co.*, 80 Pa. St. 363; *Philadelphia, etc., R. Co. v. Hickman*, 28 Pa. St. 318; *Hanover Junction, etc., R. Co. v. Grubb*, 82 Pa. St. 36; *Jeanette Bottle Works v. Schall*, 13 Pa. Super. Ct. 96.

Wisconsin.—*Racine County Bank v. Ayres*, 12 Wis. 512.

Case Explained.—*In General Electric Co. v. Wightman*, 3 N. Y. App. Div. 118, the court said: "It has been held in this state that conditional subscriptions for the stock of corporations are contrary to public policy and void." *Citing Butternuts, etc., Turnpike Co. v. North*, 1 Hill (N. Y.) 518; and *Ft. Edward, etc., Plank Road Co. v. Payne*, 15 N. Y. 583.

It is to be noted, however, that the cases cited did not unqualifiedly hold the proposition stated, but based their holdings that the conditional subscriptions were void upon the fact that the act under which the corporations were incorporated authorized only absolute subscriptions.

Conditions Must Conform to Charter.—*Thigpen v. Mississippi Cent. R. Co.*, 32 Miss. 347.

An Impossible Condition will be deemed never to have really existed. *Racine County Bank v. Ayres*, 12 Wis. 512.

2. *Butternuts, etc., Turnpike Co. v. North*, 1 Hill (N. Y.) 518; *Ft. Edward, etc., Plank Road Co. v. Payne*, 15 N. Y. 583, reversing 17 Barb. (N. Y.) 567.

3. *Public Policy*.—*New York*.—*Lake Ontario Shore R. Co. v. Curtiss*, 80 N. Y. 219; *Ft. Edward, etc., Plank Road Co. v. Payne*, 15 N. Y. 583; *Macedon, etc., Plank Road Co. v. Snediker*, 18 Barb. (N. Y.) 317; *Dix v. Shaver*, 14 Hun

(N. Y.) 392; *Troy, etc., R. Co. v. Tibbits*, 18 Barb. (N. Y.) 297.

Tennessee.—*Morrow v. Nashville Iron, etc., Co.*, 87 Tenn. 262, 10 Am. St. Rep. 658; *Paducah, etc., R. Co. v. Parks*, 86 Tenn. 560.

Wisconsin.—*Racine County Bank v. Ayres*, Wis. 512.

4. *Subscriptions Before Incorporation*.—*Troy, etc., R. Co. v. Tibbits*, 18 Barb. (N. Y.) 297; *Chamberlain v. Painesville, etc., R. Co.*, 15 Ohio St. 225; *Bedford R. Co. v. Bowser*, 48 Pa. St. 34; *Caley v. Philadelphia, etc., R. Co.*, 80 Pa. St. 363; *Boyd v. Peach Bottom R. Co.*, 90 Pa. St. 169, cited in 1 Am. & Eng. R. Cas. 631.

5. *Pittsburgh, etc., R. Co. v. Biggar*, 34 Pa. St. 455. See also *Matter of St. Marylebone Banking Co.*, 3 De G. & Sm. 21; *In re Imperial Mercantile Credit Assoc.*, L. R. 3 Eq. 361.

6. *Written Subscription Cannot Be Varied by Parol Conditions*.—*Arkansas*.—*Mississippi, etc., R. Co. v. Cross*, 20 Ark. 443.

Connecticut.—*Ridgefield, etc., R. Co. v. Brush*, 43 Conn. 86.

Florida.—*Johnson v. Pensacola, etc., R. Co.*, 9 Fla. 299.

Illinois.—*Dill v. Wabash Valley R. Co.*, 21 Ill. 91; *Corwith v. Culver*, 69 Ill. 502; *Stone v. Vandalia Coal, etc., Co.*, 59 Ill. App. 536.

Indiana.—*Thornburgh v. Newcastle, etc., R. Co.*, 14 Ind. 499; *Brownlee v. Ohio, etc., R. Co.*, 18 Ind. 68; *Cincinnati, etc., R. Co. v. Pearce*, 28 Ind. 502.

Iowa.—*Gelpcke v. Blake*, 15 Iowa 387, 83 Am. Dec. 418; *Jack v. Naber*, 15 Iowa 450.

Maine.—*Kennebec, etc., R. Co. v. Waters*, 34 Me. 369.

Maryland.—*Scarlett v. Academy of Music*, 46 Md. 132.

Minnesota.—*Minneapolis Threshing Mach. Co. v. Davis*, 40 Minn. 110, 26 Am. & Eng. Corp. Cas. 61.

New Hampshire.—*Piscataqua Ferry Co. v. Jones*, 39 N. H. 491.

New York.—*Phoenix Warehousing Co. v. Badger*, 6 Hun (N. Y.) 293, affirmed 67 N. Y. 294; *White Hall, etc., R. Co. v. Myers*, (Supm. Ct. Gen. T.) 16 Abb. Pr. N. S. (N. Y.) 34.

Pennsylvania.—*Philadelphia, etc., R. Co. v. Conway*, 177 Pa. St. 364. See also *Jeanette Bottle Works v. Schall*, 13 Pa. Super. Ct. 96.

Tennessee.—*East Tennessee, etc., R. Co. v. Gammon*, 5 Sneed (Tenn.) 567; *Cunningham v. Edgefield, etc., R. Co.*, 2 Head (Tenn.) 23.

Vermont.—*Connecticut, etc., River R. Co. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181.

c. PERFORMANCE — (1) *Sufficiency in General*. — As a general rule, substantial performance of conditions will be considered sufficient,¹ though there is authority for the view that strict compliance is necessary.²

(2) *When Performance Excused*. — Performance is excused if prevented by the fault of the subscriber,³ but not because unforeseen difficulties, such as floods, interfere.⁴

(3) *Burden of Proof*. — The burden of proving performance is upon the corporation asserting it.⁵

(4) *Question for Jury*. — The fact of performance is usually a question for the jury.⁶

(5) *Decision of Directors*. — But it has been held that when the question of performance is left to the directors, their decision as to the fact of performance cannot be attacked except on the ground of fraud.⁷

d. EVIDENCE. — It has been held that parol evidence is admissible to show that a subscription was not intended to be binding until the performance of a specified condition,⁸ or to show compliance by the corporation with the condition.⁹

6. Subscriber's Right to Stock. — The right of a subscriber to compel the issuance of stock to him by the corporation has been discussed elsewhere.¹⁰

7. Liability of Subscriber — *a. IN GENERAL*. — The general rule is that a subscriber to the stock of a corporation is under a liability to pay therefor, which liability can be extinguished only by payment or release.¹¹

b. NECESSITY FOR PROMISE TO PAY. — But in order that a subscriber may be thus bound to pay the amount due for his stock there must be a promise on his part to pay therefor.¹² In some of the New England states the tendency of the courts has been to require an express promise in order to hold the subscriber.¹³ But the better and more general rule is that where a person

1. **Substantial Performance Sufficient**. — *Hall v. Sims*, 106 Ala. 561; *O'Neal v. King*, 3 Jones L. (48 N. Car.) 517; *Cornell's Appeal*, 114 Pa. St. 153. See also *People v. Holden*, 82 Ill. 93; *Paris, etc., R. Co. v. Henderson*, 89 Ill. 86; *Des Moines Valley R. Co. v. Graff*, 27 Iowa 99, 1 Am. Rep. 256; *Springfield St. R. Co. v. Sleeper*, 121 Mass. 29; *Virginia, etc., R. Co. v. Henry*, 8 Nev. 168.

2. **Strict Compliance Necessary**. — *Martin v. Pensacola, etc., R. Co.*, 8 Fla. 390, 73 Am. Dec. 713; *Brown v. Dibble*, 65 Mich. 520; *Toledo, etc., R. Co. v. Hinsdale*, 45 Ohio St. 556.

3. **When Performance Excused**. — *Upton v. Hansbrough*, 3 Biss. (U. S.) 423.

4. *Jewett v. Lawrenceburgh, etc., R. Co.*, 10 Ind. 539.

5. **Burden of Proof** — *California*. — *Santa Cruz R. Co. v. Schwartz*, 53 Cal. 106.

Connecticut. — *Ridgefield, etc., R. Co. v. Reynolds*, 46 Conn. 375.

Illinois. — *Chase v. Sycamore, etc., R. Co.*, 38 Ill. 215; *People v. Holden*, 82 Ill. 93.

Maine. — *Bucksport, etc., R. Co. v. Buck*, 65 Me. 536.

New Hampshire. — *Monadnock R. Co. v. Felt*, 52 N. H. 379.

New York. — *Union Hotel Co. v. Hersee*, 15 Hun (N. Y.) 371.

Pennsylvania. — *Philadelphia, etc., R. Co. v. Hickman*, 28 Pa. St. 318.

6. **Question for Jury**. — *Jewett v. Lawrenceburgh, etc., R. Co.*, 10 Ind. 539; *St. Louis, etc., R. Co. v. Eakins*, 30 Iowa 279; *Toledo, etc., R. Co. v. Johnson*, 49 Mich. 148. See also *Brand v. Lawrenceville Branch R. Co.*, 77 Ga. 506.

7. **Decision of Directors**. — *Cass v. Pittsburg, etc., R. Co.*, 80 Pa. St. 31.

8. **Parol Evidence**. — *Ottawa, etc., R. Co. v. Hall*, 1 Ill. App. 612; *Tonica, etc., R. Co. v. Stein*, 21 Ill. 96; *Bucher v. Dillsburg, etc., R. Co.*, 76 Pa. St. 306; *Cass v. Pittsburg, etc., R. Co.*, 80 Pa. St. 31. But see *Wight v. Shelby R. Co.*, 16 B. Mon. (Ky.) 4, 63 Am. Dec. 522.

9. *St. Louis, etc., R. Co. v. Eakins*, 30 Iowa 279.

10. See the title **SPECIFIC PERFORMANCE**, *ante*, p. 123.

11. *South Milwaukee Co. v. Murphy*, 112 Wis. 614.

Agreement of Promoters to Give Stock to Subscriber. — An agreement made between promoters of a corporation and a subscriber to its stock that such subscriber is to have the stock for the sake of the influence of his name and that he will not be required to pay his subscription therefor is void, and the corporation may enforce payment of such subscription notwithstanding such agreement. *York Park Bldg. Assoc. v. Barnes*, 39 Neb. 834.

12. **Promise Necessary**. — *Seymour v. Sturgess*, 26 N. Y. 141; *Rochester, etc., Land Co. v. Roe*, 7 N. Y. App. Div. 366.

13. **Express Promise Necessary**. — See the following cases: *Nashua Sav. Bank v. Anglo-American Land, etc., Co.*, 189 U. S. 221, *affirming* 108 Fed. Rep. 764, 48 C. C. A. 15 (stating rule in *New Hampshire*); *Belfast, etc., R. Co. v. Moore*, 60 Me. 561; *Kennebec, etc., R. Co. v. Kendall*, 31 Me. 470; *Penobscot, etc., R. Co. v. Dunn*, 39 Me. 594; *Buckfield Branch R. Co. v. Irish*, 39 Me. 44; *Atlantic Cotton*

subscribes to the stock of a corporation he assumes the liability to pay for the stock even though there is not an express promise to pay in so many words, and this liability is enforceable in the courts.¹

c. STATUTORY LIABILITY MAY BE VARIED BY CONTRACT. — It has been frequently decided in *California* that a subscriber to the capital stock of a corporation may, by the terms of his subscription, vary his liability from that which exists merely by virtue of the statute;² but, as in the case of all other obligations arising from contract, the liability of the subscriber in such cases is measured by the terms of his agreement.³

d. LIABILITY PRIOR TO INCORPORATION AND FOR PRELIMINARY EXPENSES. — A subscriber may be liable to pay calls or assessments levied prior to incorporation,⁴ and subscribers who sign an agreement after the act of incorporation is passed to pay all legal assessments that may be made after the corporation shall be organized are personally liable for an assessment laid to defray preliminary expenses.⁵ But assessments levied before incorporation by a joint-stock association whose members afterwards incorporate cannot be enforced by the corporation.⁶

e. AGREEMENT THAT ONLY PORTION SHALL BE PAID IN. — An agreement between a corporation and its stockholders that only a certain percentage

Mills v. Abbott, 9 Cush. (Mass.) 423; *Katama Land Co. v. Jernegan*, 126 Mass. 155; *Shattuck v. Robbins*, 68 N. H. 565; *New Hampshire Cent. R. Co. v. Johnson*, 30 N. H. 390, 64 Am. Dec. 300; *White Mountains R. Co. v. Eastman*, 34 N. H. 124; *Essex Bridge Co. v. Tuttle*, 2 Vt. 393; *Connecticut, etc., Rivers R. Co. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181. But compare *New England* cases cited in next note *infra*.

An Obligation Created by the Charter is treated as the equivalent of an express promise. *Nashua Sav. Bank v. Anglo-American Land, etc., Co.*, 189 U. S. 221, *affirming* 108 Fed. Rep. 764, 48 C. C. A. 15.

An Agreement to Take and Fill a given number of shares in an incorporated company is equivalent to an agreement to take and pay for such shares. *Penobscot, etc., R. Co. v. Dunn*, 39 Me. 587; *Buckfield Branch R. Co. v. Irish*, 39 Me. 44.

1. Express Promise Not Necessary — *England*. — *Huddersfield Canal Co. v. Buckley*, 7 T. R. 36; *In re Llanharry Hematite Iron Co.*, L. R. 1 Ch. 85, 35 L. J. Ch. 120; *Levick's Case*, 40 L. J. Ch. 180; *Ex p. Tooth*, 19 L. T. N. S. 599; *In re Robinson, etc., Brewery Co.*, L. R. 13 Eq. 228; *In re London, etc., Consol. Coal Co.*, 5 Ch. D. 525; *Ex p. Palmer, Ir. R. 2. Eq.* 573; *Nashua Sav. Bank v. Anglo-American Land, etc., Co.*, 189 U. S. 221, *affirming* 108 Fed. Rep. 764, 48 C. C. A. 15 (stating English rule).

United States. — *Hawley v. Upton*, 102 U. S. 374; *Upton v. Tribilcock*, 91 U. S. 45; *Webster v. Upton*, 91 U. S. 65.

Alabama. — *Beene v. Cahawba, etc., R. Co.*, 3 Ala. 660.

California. — *Mitchell v. Beckman*, 64 Cal. 117.

Connecticut. — *Danbury, etc., R. Co. v. Wilson*, 22 Conn. 435; *Hartford, etc., R. Co. v. Kennedy*, 12 Conn. 500.

Indiana. — *Miller v. Wild Cat Gravel Road Co.*, 52 Ind. 51; *Price v. Grand Rapids, etc., R. Co.*, 18 Ind. 138.

Iowa. — *Nulton v. Clayton*, 54 Iowa 425, 37 Am. Rep. 213; *Waukon, etc., R. Co. v. Dwyer*, 49 Iowa 121.

Kentucky. — *Mt. Sterling Coalroad Co. v. Little*, 14 Bush (Ky.) 429; *Gill v. Kentucky, etc., Gold, etc., Min. Co.*, 7 Bush (Ky.) 635; *Fry v. Lexington, etc., R. Co.*, 2 Met. (Ky.) 314.

Maryland. — *Hughes v. Antietam Mfg. Co.*, 34 Md. 316.

Massachusetts. — See *Anglo-American Land, etc., Co. v. Dyer*, 181 Mass. 593.

Michigan. — *Dexter, etc., Plank-road Co. v. Miller*, 3 Mich. 91.

New York. — *Dayton v. Borst*, 31 N. Y. 435; *Pensselaer, etc., Plank Road Co. v. Barton*, 16 N. Y. 457, note; *Lake Ontario, etc., R. Co. v. Mason*, 16 N. Y. 451; *Buffalo, etc., R. Co. v. Dudley*, 14 N. Y. 336; *Small v. Herkimer Mfg., etc., Co.*, 2 N. Y. 330; *Ogdensburgh, etc., R. Co. v. Frost*, 21 Barb. (N. Y.) 541; *Troy, etc., R. Co. v. Tibbits*, 18 Barb. (N. Y.) 297; *Ft. Edward, etc., Plank Road Co. v. Payne*, 17 Barb. (N. Y.) 567; *Northern R. Co. v. Miller*, 10 Barb. (N. Y.) 268; *Mann v. Currie*, 2 Barb. (N. Y.) 294; *Hartford, etc., R. Co. v. Crosswell*, 5 Hill (N. Y.) 383, 40 Am. Dec. 354; *Spear v. Crawford*, 14 Wend. (N. Y.) 20, 28 Am. Dec. 513.

Pennsylvania. — *Merrimac Min. Co. v. Levy*, 54 Pa. St. 227, 93 Am. Dec. 697.

Tennessee. — *Chase v. East Tennessee, etc., R. Co.*, 5 Lea (Tenn.) 415.

Vermont. — *Windsor Electric Light Co. v. Tandy*, 66 Vt. 248, 44 Am. St. Rep. 838.

Wisconsin. — *Gibbons v. Grinsel*, 79 Wis. 365.

2. Statutory Liability May Be Varied by Contract. — *Ventura, etc., R. Co. v. Hartman*, 116 Cal. 260; *Marysville Electric Light, etc., Co. v. Johnson*, 93 Cal. 538, 27 Am. St. Rep. 215; *West v. Crawford*, 80 Cal. 19.

3. *Ventura, etc., R. Co. v. Hartman*, 116 Cal. 260.

4. *Marseilles Land, etc., Co. v. Aldrich*, 86 Ill. 504.

5. *Salem Mill Dam Corp. v. Ropes*, 6 Pick. (Mass.) 23; *Central Turnpike Corp. v. Valentine*, 10 Pick. (Mass.) 147.

6. *Richmond Factory Assoc. v. Clarke*, 61 Me. 351.

of the stock subscribed by each stockholder shall be paid in is binding on the corporation; but if such corporation becomes insolvent, such unpaid stock subscriptions are subject to be made assets for the benefit of all creditors who gave credit to the corporation on the faith of its capital stock being paid in full without any knowledge of such agreement.¹ Where, however, the creditor deals with the corporation with knowledge of the agreement that only a certain percentage of the par value of each share of stock subscribed is to be paid, he relies only on that amount, and has no equitable right to insist on the collection of any greater sum from the stockholders than the corporation itself could claim as a part of its assets.²

f. SECRET AGREEMENT THAT SUBSCRIBER NOT BOUND VOID. — A secret collateral contract between a corporation and a subscriber to its stock which provides that he shall not be bound by his subscription, or which substantially varies its ostensible terms, is void and leaves the subscription unaffected.³ By secrecy in the agreement is meant that it is kept from the knowledge of the body of subscribers, the reason of the rule which invalidates such collateral contracts being that the action of each in his subscription may be supposed to be influenced by that of the others, and every subscription to be based upon the ground that the others are what upon their face they purport to be.⁴

g. FULL-PAID STOCK NOT LIABLE TO CALLS. — After stock has been issued as full-paid stock for property purchased, the judgment of the directors as to the value of the property becomes conclusive, in the absence of actual fraud in the transaction, and such stock is not liable to any further call.⁵

h. EXTENT OF LIABILITY WHERE CORPORATION INSOLVENT. — Where a corporation is insolvent and its business is ended, the subscribers for or holders of its unpaid stock are assessable for only so much of what is unpaid on the stock as will satisfy the claims of corporate creditors and meet the expenses of winding up its affairs.⁶

i. WHAT LAW GOVERNS LIABILITY. — In case of a subscription to the stock of a foreign corporation, the liability of the subscriber is governed by the law of the domicile of the corporation.⁷

8. Calls — *a. DEFINITIONS AND DISTINCTIONS.* — The terms "calls" and "assessments" are often used indiscriminately to denote the exercise by the corporation of its right to declare due and collect subscriptions or a part thereof.⁸ But the term "assessments" has been said to refer more properly

1. Agreement that Only Portion Shall Be Paid In. — *Bent v. Underdown*, 156 Ind. 516; *Scovill v. Thayer*, 105 U. S. 143.

2. United States. — *Coit v. North Carolina Gold Amalgamating Co.*, 14 Fed. Rep. 12; *Kenton Furnace R., etc., Co. v. McAlpin*, 5 Fed. Rep. 737.

Indiana. — *Bent v. Underdown*, 156 Ind. 516; *Carnahan v. Campbell*, (Ind. 1901) 59 N. E. Rep. 1054.

Iowa. — *Callanan v. Windsor*, 78 Iowa 193; *State Trust Co. v. Turner*, 111 Iowa 664.

Kansas. — *Walburn v. Chenault*, 43 Kan. 352.

Michigan. — *Young v. Erie Iron Co.*, 65 Mich. 111.

Minnesota. — *Deadwood First Nat. Bank v. Gustin Minerva Consol. Min. Co.*, 42 Minn. 327; *Hosper v. Northwestern Mfg., etc., Co.*, 48 Minn. 174.

Missouri. — *Carp v. Chipley*, 73 Mo. App. 22.

Nebraska. — *Enterprise Ditch Co. v. Moffitt*, 58 Neb. 642, 76 Am. St. Rep. 122.

Washington. — *Adamant Mfg. Co. v. Wallace*, 16 Wash. 614.

Where the Stock Is Fictitiously Paid Up, a call does not affect stock subsequently subscribed. *Pike v. Bangor, etc., R. Co.*, 68 Me. 445.

3. Secret Agreement that Subscriber Not Bound Void. — *White Mountains R. Co. v. Eastman*, 34 N. H. 124; *Yonkers Gazette Co. v. Jones*, 30 N. Y. App. Div. 316; *Meyer v. Blair*, 109 N. Y. 600, 4 Am. St. Rep. 500.

4. White Mountains R. Co. v. Eastman, 34 N. H. 124; *Yonkers Gazette Co. v. Jones*, 30 N. Y. App. Div. 316.

5. Full-paid Stock Not Liable to Calls. — *Donald v. American Smelting, etc., Co.*, 62 N. J. Eq. 729. As to issuance of stock for property, etc., see *supra*, this title, *Issue of Stock — Consideration for Issue*.

6. Extent of Liability Where Corporation Insolvent. — *Cumberland Lumber Co. v. Clinton Hill Lumber Mfg. Co.*, 57 N. J. Eq. 627. See generally the title *WINDING UP AND REORGANIZATION*.

7. Law of Corporation's Domicil Governs. — *Crofoot v. Thatcher*, 19 Utah 212, 75 Am. St. Rep. 725.

8. See Spangler v. Indiana, etc., R. Co., 21

to amounts levied upon shareholders after their subscriptions have been fully paid,¹ and adopting the distinction thus indicated the term "call" will be used in this section with reference to the collection of the amounts due in order to make up full payment for the stock.²

b. NECESSITY FOR CALLS — (1) *In General*. — The levy of a call or assessment is usually the first step in the enforcement of the contract of subscription, and is ordinarily a condition precedent to collection.³

(2) *Where Time of Payment Fixed*. — But there is no necessity for any calls where the payments on subscriptions are made due at certain and fixed times by the terms of the charter,⁴ the articles of association or incorporation,⁵ or the contract of subscription.⁶

(3) *Where Corporation Insolvent*. — Where a corporation has become insolvent and abandoned all action under its charter the original mode of making calls upon the stockholders cannot be pursued, and the debt must therefore, from that time, be treated as due without further demand;⁷ consequently it has been held that calls are unnecessary where the corporation has passed into the hands of a receiver⁸ or assignee for the benefit of creditors,⁹ even though the charter requires calls to be made by directors.¹⁰

(4) *Waiver of Calls*. — Denial of membership is a waiver of calls,¹¹ but part payment of a subscription is not.¹²

c. WHO MAY LEVY CALLS — (1) *Directors* — (a) *Power in General*. — The power to make calls is usually vested in the directors of the corporation,¹³ and this power is so clearly within the scope of those usually possessed by directors that it will be implied in the absence of charter provisions to the contrary.¹⁴

Ill. 276; *Braddock v. Philadelphia, etc., R. Co.*, 45 N. J. L. 363.

1. *Assessment Proper*. — See *Price's Appeal*, 106 Pa. St. 421; *Upton v. Tribilcock*, 91 U. S. 45; *Sagory v. Dubois*, 3 Sandf. Ch. (N. Y.) 466.

2. *Meaning of Term "Call"*. — See *Reg. v. Londonderry, etc., R. Co.*, 13 Q. B. 998, 66 E. C. L. 998; *In re Cawley*, 42 Ch. D. 209, 31 Am. & Eng. Corp. Cas. 425; *Hatch v. Dana*, 101 U. S. 205; *Braddock v. Philadelphia, etc., R. Co.*, 45 N. J. L. 363. And see *CALL*, vol. 5, p. 107.

3. *Calls Necessary — England*. — *Bank of South Australia v. Abrahams*, L. R. 6 P. C. 265; *Alexander v. Automatic Telephone Co.*, (1899) 2 Ch. 302, 68 L. J. Ch. 514, 80 L. T. N. S. 753. See also *In re Overend*, L. R. 1 Ch. 535.

United States. — *Scovill v. Thayer*, 105 U. S. 143; *Hawkins v. Glenn*, 131 U. S. 319; *Priest v. Glenn*, 4 U. S. App. 478, 51 Fed. Rep. 400; *Chandler v. Siddle*, 10 Nat. Bankr. Reg. 236; *Wilbur v. Stockholders*, 18 Nat. Bankr. Reg. 178.

Alabama. — *Teague v. Le Grand*, 85 Ala. 493, 7 Am. St. Rep. 64.

Florida. — *Alabama, etc., R. Co. v. Rowley*, 9 Fla. 508.

Georgia. — *North, etc., St. R. Co. v. Spullock*, 88 Ga. 283.

Illinois. — *Banet v. Alton, etc., R. Co.*, 13 Ill. 504; *Spangler v. Indiana, etc., R. Co.*, 21 Ill. 276.

Indiana. — *Ohio, etc., R. Co. v. Cramer*, 23 Ind. 490.

Maryland. — See *Granite Roofing Co. v. Michael*, 54 Md. 65.

Missouri. — *Parks v. Heman*, 7 Mo. App. 14.

New Jersey. — *Grosse Isle Hotel Co. v. l'Anson*, 42 N. J. L. 10, 43 N. J. L. 442; *Brad-*

dock v. Philadelphia, etc., R. Co., 45 N. J. L. 363.

New York. — *Williams v. Taylor*, 120 N. Y. 244.

South Carolina. — *Chesraw, etc., R. Co. v. Garland*, 14 S. Car. 63.

4. *Time of Payment Fixed*. — *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294.

5. *Waukon, etc., R. Co. v. Dwyer*, 49 Iowa 121.

6. *Northwood Union Shoe Co. v. Pray*, 67 N. H. 435.

7. *Where Corporation Insolvent*. — *Henry v. Vermillion, etc., R. Co.*, 17 Ohio 187.

8. *Corporation in Hands of Receiver*. — *Hatch v. Dana*, 101 U. S. 205; *Henry v. Vermillion, etc., R. Co.*, 17 Ohio 187. See also *Scovill v. Thayer*, 105 U. S. 143; *Curry v. Woodward*, 53 Ala. 371; *Glenn v. Semple*, 80 Ala. 159, 60 Am. Rep. 92.

9. *Corporation in Hands of Assignee*. — *McKay v. Elwood*, 12 Wash. 579.

10. *Sagory v. Dubois*, 3 Sandf. Ch. (N. Y.) 466. See also *Glenn v. Saxton*, 68 Cal. 353; *Crawford v. Rohrer*, 59 Md. 599, 1 Am. & Eng. Corp. Cas. 81.

11. *Waiver of Calls*. — *Cass v. Pittsburg, etc., R. Co.*, 80 Pa. St. 31.

12. *Grosse Isle Hotel Co. v. l'Anson*, 43 N. J. L. 442.

13. *Power Vested in Directors*. — See *Bennett v. Great Western Tel. Co.*, 53 Ill. App. 276; *Caze-lais v. Picotte*, 18 Quebec Super. Ct. 538.

A call by directors whom an irregularly called meeting has attempted to discharge is valid. *Swansea Dock Co. v. Levien*, 20 L. J. Exch. 447.

14. *Power Implied*. — *Ambergate, etc., R. Co. v. Mitchell*, 4 Exch. 540; *Gorman v. Guardian Sav. Bank*, 4 Mo. App. 180; *Budd v. Multnomah St. R. Co.*, 15 Oregon 413, 3 Am. St. Rep. 169, 40 Am. & Eng. R. Cas. 551.

(b) **Number of Directors Who Must Concur.** — The unanimous consent of the directors is not necessary to the making of a call.¹ But a quorum of the board must be present to exercise the power,² and a majority of the quorum must concur in making the call.³

A Call Made by Less than a Quorum of directors may become valid if it is subsequently ratified by the proper number.⁴

(c) **Directors Cannot Delegate Power.** — The directors cannot delegate to others their power to make calls,⁵ though it has been held that they may authorize another person to fix the amounts and times of payment,⁶ or may ratify calls made by others without authority.⁷

(d) **Calls by de Facto Directors.** — According to the weight of authority payment of calls made by de facto directors may be enforced, though this has been denied.⁸

(e) **Extent of Power.** — The directors are the judges of the necessity for a call,⁹ and the courts will not inquire as to the wisdom of a call or an assessment, or its necessity at the time, or the motives which prompted it, if it is within the legitimate authority of the directors to levy it, and the objects for which the company was incorporated would justify the expenditure of the money to be raised, and there is no fraud.¹⁰

(2) **Stockholders** — (a) **In General.** — Sometimes the power to make calls is vested in the stockholders as a body,¹¹ and in such case a call cannot be enforced when made by less than a quorum of subscribers.¹²

(b) **Delegation to Directors of Power Vested in Stockholders.** — Where the charter of a

1. **Unanimous Consent Not Necessary.** — *Smith v. Natchez Steamboat Co.*, 1 How. (Miss.) 479.

2. **Quorum Necessary.** — *In re Alma Spinning Co.*, 16 Ch. D. 681; *Price v. Grand Rapids, etc.*, R. Co., 13 Ind. 58; *Hamilton v. Grand Rapids, etc.*, R. Co., 13 Ind. 347.

3. **Majority of Quorum Must Concur.** — *Hamilton v. Grand Rapids, etc.*, R. Co., 13 Ind. 347; *Price v. Grand Rapids, etc.*, R. Co., 13 Ind. 58; *Cowley v. Grand Rapids, etc.*, R. Co., 13 Ind. 61; *Pike v. Bangor, etc.*, R. Co., 68 Me. 445; *Silver Hook Road v. Greene*, 12 R. I. 164.

4. **Ratification.** — *Austin's Case*, 24 L. T. N. S. 932.

5. **Power Cannot Be Delegated by Directors.** — *Rutland, etc.*, R. Co. v. Thrall, 35 Vt. 554. See also *Banet v. Alton, etc.*, R. Co., 13 Ill. 504; *Monmouth Mut. F. Ins. Co. v. Lowell*, 59 Me. 504; *Pike v. Bangor, etc.*, R. Co., 68 Me. 445; *Farmers' Mut. F. Ins. Co. v. Chase*, 56 N. H. 341; *Silver Hook Road v. Greene*, 12 R. I. 164.

6. *Banet v. Alton, etc.*, R. Co., 13 Ill. 504. See also *Hays v. Pittsburgh, etc.*, R. Co., 38 Pa. St. 81.

7. **Ratification.** — *Read v. Memphis Gayoso Gas Co.*, 9 Heisk. (Tenn.) 545; *Rutland, etc.*, R. Co. v. Thrall, 35 Vt. 536.

8. **Calls by de Facto Directors Held Valid.** — *Fairfield County Turnpike Co. v. Thorp*, 13 Conn. 184; *Ohio, etc.*, R. Co. v. McPherson, 35 Mo. 13, 86 Am. Dec. 128; *Hatch v. Lucky Bill Min. Co.*, 25 Utah 405. See also *McCall v. Byram Mfg. Co.*, 6 Conn. 428; *Macon, etc.*, R. Co. v. Vason, 57 Ga. 314; *Banet v. Alton, etc.*, R. Co., 13 Ill. 504; *Johnson v. Crawfordsville, etc.*, R. Co., 11 Ind. 280; *Steinmetz v. Versailles, etc.*, Turnpike Co., 57 Ind. 457; *Vernon Soc. v. Hills*, 6 Cow. (N. Y.) 23, 16 Am. Dec. 429.

Contra. — *Swansea Dock Co. v. Levien*, 20 L. J. Exch. 447; *Garden Gully United Quartz Min. Co. v. McLister*, 1 App. Cas. 39; *Howbeach*

Coal Co. v. Teague, 5 H. & N. 151; *Moses v. Tompkins*, 84 Ala. 613; *People's Mut. Ins. Co. v. Westcott*, 14 Gray (Mass.) 442.

For a Full Treatment of the question of the validity and binding effect of the acts of de facto officers of private corporations, see the title DE FACTO OFFICERS, vol. 8, p. 771.

9. **Extent of Power** — *England.* — *Bailey v. Birkenhead, etc.*, R. Co., 12 Beav. 433; *Yetts v. Norfolk R. Co.*, 3 De G. & Sm. 293; *Ex p. Stanley*, 33 L. J. Ch. 535.

Indiana. — *New Albany, etc.*, R. Co. v. Fields, 10 Ind. 187; *Judah v. American Live Stock Ins. Co.*, 4 Ind. 333.

Missouri. — *Chouteau Ins. Co. v. Floyd*, 74 Mo. 286.

Nebraska. — *Fitzgerald v. Union Sav. Bank*, (Neb. 1902) 90 N. W. Rep. 994.

Oregon. — *Budd v. Multnomah St. R. Co.*, 15 Oregon 413, 3 Am. St. Rep. 169.

Pennsylvania. — *Shober v. Lancaster County Park Assoc.*, 68 Pa. St. 429.

It is sufficient to show a lawful levy that written notice was given of the meeting, and that the latter was regularly held and the assessment made. *Younglove v. Steinman*, 80 Cal. 375.

10. *Oglesby v. Attrill*, 105 U. S. 605; *Nashua Sav. Bank v. Anglo-American Land, etc., Co.*, 189 U. S. 221, affirming 108 Fed. Rep. 764, 48 C. C. A. 15. But compare *Farmer's Co-operative Trust Co. v. Hazen*, 21 Pa. Super. Ct. 130.

11. **Stockholders.** — See *Lykens Valley Cremery Co. v. Bonawitz*, 1 Dauphin Co. Rep. (Pa.) 249.

12. **Quorum Necessary.** — A call cannot be enforced when made by less than a quorum of subscribers, no directors having been duly appointed. *Howbeach Coal Co. v. Teague*, 5 H. & N. 151.

corporation authorized the stockholders to make calls for payment on subscriptions and to appoint a board of directors "to manage the business of the corporation," it was held that the stockholders might delegate to the board of directors the power to make calls.¹ But, under an early *Massachusetts* statute it was held that the power to assess was vested in the corporation, and could not be delegated to the directors.²

(3) *Courts*. — A court of equity may levy a call where the directors or other corporate authorities in whom the power to make calls is vested fail in their duty or cannot act in the premises.³ This power may also be exercised where the corporation is in the hands of a receiver,⁴ or insolvent,⁵ even though the directors have not refused to enforce payment.⁶ The *English* courts have sometimes awarded a mandamus to compel the directors to make the necessary calls,⁷ but the remedy by the direct exercise of the power by the court is more complete and has received more general recognition in the *United States*.⁸

Effect of Call by Court. — A call made by a court of chancery is the same in effect as if it had been made by the president and directors of the corporation, and when made, the contract of the subscriber to pay becomes absolute, and a cause of action against him for the amount of his assessment accrues.⁹

Power of Court No Greater than That of Directors. — A court, in the exercise of its power to levy assessments, can do only what the board of directors in the

A Call Made by One Stockholder Is Invalid though he alone was present at the time and place for the meeting, and there was no rule as to a quorum. *Sharp v. Dawes*, 2 Q. B. D. 26.

1. Delegation to Directors of Power Vested in Stockholders. — *Rives v. Montgomery South Plank-Road Co.*, 30 Ala. 92.

2. Ex p. Winsor, 3 Story (U. S.) 411, decided under the *Massachusetts* Act of 1809.

3. Calls by Court. — *Scovill v. Thayer*, 105 U. S. 155; *Curry v. Woodward*, 53 Ala. 371; *Glenn v. Saxton*, 68 Cal. 358; *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 593; *Robinson v. Darien Bank*, 18 Ga. 65.

4. Corporation in Hands of Receiver. — *Bennett v. Great Western Tel. Co.*, 53 Ill. App. 276; *Efrid v. Piedmont Land Imp., etc. Co.*, 55 S. Car. 78.

5. Corporation Insolvent. — *Efrid v. Piedmont Land Imp., etc. Co.*, 55 S. Car. 78.

An order for an assessment may be made by the Court of Chancery in the suit wherein the corporation was adjudged to be insolvent, and when so made its propriety cannot be questioned in suits brought against the stockholders for its enforcement. Such an order is the result of an exercise of judicial power, and therefore should be made only after a reasonable opportunity has been afforded to the stockholders to be heard on the matter. *Cumberland Lumber Co. v. Clinton Hill Lumber Mfg. Co.*, 57 N. J. Eq. 627.

Filing of Creditor's Bill Equivalent to Call. — *Hatch v. Dana*, 101 U. S. 205, *distinishing* *Wood v. Dummer*, 3 Mason (U. S.) 308; *Pollard v. Bailey*, 20 Wall. (U. S.) 520; *Terry v. Tubman*, 92 U. S. 156. See also *Ogilvie v. Knox Ins. Co.*, 22 How. (U. S.) 380; *Marsh v. Burroughs*, 1 Woods (U. S.) 468; *Dalton, etc., R. Co. v. McDaniel*, 56 Ga. 191; *Bartlett v. Drew*, 57 N. Y. 587; *Henry v. Vermillion, etc., R. Co.*, 17 Ohio 189; *Pierce v. Milwaukee Constr. Co.*, 38 Wis. 253.

6. Efrid v. Piedmont Land Imp., etc., Co., 55 S. Car. 78.

7. Remedy by Mandamus. — See *Reg. v. Victoria Park Co.*, 1 Q. B. 288, 41 E. C. L. 544; *Reg. v. Ledgard*, 1 Q. B. 616, 41 E. C. L. 697; *Rex v. St. Katharine Dock Co.*, 4 B. & Ad. 360, 24 E. C. L. 73.

8. Complete Remedy. — See the following cases: *United States*. — *Hatch v. Dana*, 101 U. S. 205; *Scovill v. Thayer*, 105 U. S. 143; *Myers v. Seeley*, 10 Nat. Bankr. Reg. 411; *Wilbur v. Stockholders*, 18 Nat. Bankr. Reg. 178; *Marsh v. Burroughs*, 1 Woods (U. S.) 463; *Hawkins v. Glenn*, 131 U. S. 319, 26 Am. & Eng. Corp. Cas. 318; *Glenn v. Liggett*, 135 U. S. 533. *Ogilvie v. Knox Ins. Co.*, 22 How. (U. S.) 380.

Alabama. — *Curry v. Woodward*, 53 Ala. 371; *Glenn v. Semple*, 80 Ala. 159, 60 Am. Rep. 92.

California. — *Glenn v. Saxton*, 68 Cal. 353.

Connecticut. — *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 593.

District of Columbia. — *Glenn v. Dodge*, (D. C. 1885) 3 Cent. Rep. 283.

Illinois. — *Great Western Tel. Co. v. Gray*, 122 Ill. 630, 19 Am. & Eng. Corp. Cas. 260.

Iowa. — *Chandler v. Keith*, 42 Iowa 99.

Maryland. — *Glenn v. Williams*, 60 Md. 93.

Missouri. — *Shockley v. Fisher*, 75 Mo. 498; *Boeppler v. Menown*, 17 Mo. App. 447.

Nevada. — *Thompson v. Reno Sav. Bank*, 19 Nev. 103, 3 Am. St. Rep. 797, 10 Am. & Eng. Corp. Cas. 203.

Ohio. — *Henry v. Vermillion, etc., R. Co.*, 17 Ohio 187.

Pennsylvania. — *Franklin Sav. Bank v. Fatzinger*, (Pa. 1886) 4 Atl. Rep. 912; *Citizens', etc., Sav. Bank v. Gillespie*, 115 Pa. St. 564, *cited in* *Bouton v. Dement*, 19 Am. & Eng. Corp. Cas. 316.

Wisconsin. — *Adler v. Milwaukee Patent Brick Mfg. Co.*, 13 Wis. 57.

9. Effect of Call by Court. — *Glenn v. Saxton*, 68 Cal. 358.

exercise of the same corporate power might have done, and a stockholder who is not a party to the proceeding is not concluded by an assessment which the board could not have made.¹

(4) *Receivers, Trustees, or Assignees.* — The power to make and enforce calls may also be exercised by receivers,² trustees,³ or assignees,⁴ as ministers of the courts and representatives of the directors.

d. *HOW FORMULATED.* — In the United States no particular formula is necessary in declaring a call,⁵ and it has been held not to invalidate a call that it did not name the time or place of payment or the person to whom payment was to be made.⁶ But calls must be made by appropriate corporate action on the part of the directors,⁷ and must be evidenced by the minutes of their proceedings as such.⁸

In England a formal resolution appears to be usual, if not necessary,⁹ and such resolution must state the amount required to be paid and the time of payment,¹⁰ though it has been held not to be necessary to state the place of payment or to whom payment must be made.¹¹

An Order Appointing a Receiver and authorizing him to prosecute actions does not amount to a call from which prescription will run.¹²

e. *REQUISITES AND VALIDITY* — (1) *In General.* — Calls must be impartial, must bear equally upon all stockholders,¹³ and must be made as the

1. *Power of Court No Greater than That of Directors.* — *Bennett v. Great Western Tel. Co.*, 53 Ill. App. 276. See also *Great Western Tel. Co. v. Loewenthal*, 154 Ill. 261, *affirming* 51 Ill. App. 447.

2. *Receivers.* — *Maxwell v. Akin*, 89 Fed. Rep. 178; *Great Western Tel. Co. v. Loewenthal*, 154 Ill. 261, *affirming* 51 Ill. App. 447; *Hall v. U. S. Insurance Co.*, 5 Gill (Md.) 484; *Campbell v. Chapman*, (Miss. 1902) 31 So. Rep. 101; *Barkalow v. Totten*, 53 N. J. Eq. 573; *Mann v. Pentz*, 3 N. Y. 415; *Seymour v. Sturges*, 26 N. Y. 134; *Rankine v. Elliott*, 16 N. Y. 377; *Newport Cotton Mill Co. v. Mims*, 103 Tenn. 465.

Necessity for Special Order of Court. — *Simmons v. Taylor*, 106 Tenn. 729.

Assessments by Receiver upon ex Parte Order of Court Not Conclusive. — *Cuykendall v. Corning*, 88 N. Y. 129; *Story v. Furman*, 25 N. Y. 215; *Walker v. Crain*, 17 Barb. (N. Y.) 128.

Requisites to Exercise of Power. — A receiver before making calls must show the amount of corporate indebtedness and liability of each share, where the subscription provides that the unpaid balance shall be subject to the call of the directors, as instructed by the stockholders. *Chandler v. Keith*, 42 Iowa 99.

For a Full Treatment of the power of a receiver to enforce payment by the stockholders of their unpaid subscriptions to the capital stock or of assessments made pursuant to corporate by-laws see the title RECEIVERS, vol. 23, p. 1076.

3. *Trustees.* — *Lewis v. Glenn*, 84 Va. 947.

4. *Assignees.* — *Germantown Pass. R. Co. v. Fidler*, 60 Pa. St. 124, 100 Am. Dec. 546.

5. *No Particular Form Necessary.* — *Citizens' Mut. F. Ins. Co. v. Sortwell*, 10 Allen (Mass.) 112; *Budd v. Multnomah St. R. Co.*, 15 Oregon 418, 3 Am. St. Rep. 169, 40 Am. & Eng. R. Cas. 551.

An Order from the Board of Directors to the president to collect subscriptions is a call. *Braddock v. Philadelphia, etc., R. Co.*, 45 N. J. L. 363.

6. *Western Imp. Co. v. Des Moines Nat. Bank*, 103 Iowa 455.

7. *Corporate Action Necessary.* — *Branch v. Augusta Glass Works*, 95 Ga. 573.

8. *Branch v. Augusta Glass Works*, 95 Ga. 573.

Entry on Minute Book Sufficient. — *Fox v. Allensville, etc., Turnpike Co.*, 46 Ind. 31.

Resolution Need Not Be Recorded. — *Hays v. Pittsburgh, etc., R. Co.*, 38 Pa. St. 81.

9. *Formal Resolution.* — *In re Cawley*, 4 Ch. D. 209, 31 Am. & Eng. Corp. Cas. 425.

Previous Rejection of Resolution. — Such a resolution is valid though a similar one has been rejected at the same meeting. *Matter of British Sugar Refining Co.*, 3 Kay & J. 408; *In re Cawley*, 42 Ch. D. 209, 31 Am. & Eng. Corp. Cas. 425.

10. *Amount and Time of Payment.* — *In re Cawley*, 42 Ch. D. 209, 31 Am. & Eng. Corp. Cas. 425; *Johnson v. Lyttle's Iron Agency*, 5 Ch. D. 687.

11. *Place and Recipient of Payment.* — *Stone v. City, etc., Bank*, 3 C. P. D. 282; *Sheffield, etc., R. Co. v. Woodcock*, 7 M. & W. 574; *American Pastoral Co. v. Gurney*, 61 Fed. Rep. 41. See also *London, etc., R. Co. v. Fairclough*, 3 Scott N. R. 68.

This is true even though the articles of association contain a provision that each member shall be liable to pay the amount of calls to the persons and at the times and places appointed by the directors. *American Pastoral Co. v. Gurney*, 61 Fed. Rep. 41.

12. *Appointment of Receiver.* — *Glenn v. Macon*, 32 Fed. Rep. 7.

13. *Calls Must Be Impartial and Uniform.* — *Preston v. Grand Collier Dock Co.*, 11 Sim. 327; *Cannon v. Trask*, L. R. 20 Eq. 669; *Herbert Kraft Co. Bank v. Orland Bank*, 133 Cal. 64 *Bennett v. Great Western Tel. Co.*, 53 Ill. App. 276; *Pike v. Bangor, etc., R. Co.*, 68 Me. 445; *Great Western Tel. Co. v. Burnham*, 79 Wis. 47, 24 Am. St. Rep. 698; *Germania Iron Min. Co. v. King*, 94 Wis. 439. See also *La Crosse Brown Harvester Co. v. Goddard*, 114 Wis. 610.

purposes of the business require.¹

(2) *Fixing Number of Shares.* — Before a valid call can be made it is necessary that the number of shares of the capital stock to be issued shall be fixed,² and even where it is left to the directors to fix the number of shares within certain limits, they must do this before levying calls.³

(3) *Full Subscription.* — Where the capital stock is fixed at a given sum, divided into shares of a certain amount each, the capital so fixed must be fully subscribed before an action will lie against a subscriber to recover assessments levied on the shares of stock, unless there is a clear provision in the contract to proceed with the accomplishment of the main design with a smaller subscription than the whole amount of capital specified, or there is a waiver of the condition precedent.⁴

(4) *Rule as to Conditional Subscriptions.* — The terms of a conditional subscription must be performed before assessment.⁵ But error in making a call before liability accrues may be corrected by a subsequent call after condition fulfilled and before suit brought.⁶

(5) *Stipulations in Contract Must Be Respected.* — Where the contract of subscription or the charter contains stipulations as to the time of calls, the amount payable at one time, and the like, these must be respected according to their true meaning.⁷

(6) *What Law Governs.* — The validity of calls made by a British corporation is to be determined by the law of Great Britain, for if the calls are invalid and nonenforceable as against stockholders residing in Great Britain, they

Where a Subscriber Does Equity by paying instalments already assessed and costs of action at law, equity will protect him against any assessment not levied on other stockholders. *Yard v. Pacific Mut. Ins. Co.*, 10 N. J. Eq. 480, 64 Am. Dec. 467.

1. *Williams v. Taylor*, 120 N. Y. 244.

2. **Number of Shares Must Be Fixed.** — *Somerset, etc., R. Co. v. Cushing*, 45 Me. 530; *Somerset R. Co. v. Clarke*, 61 Me. 384; *Cabot, etc., Bridge v. Chapin*, 6 Cush. (Mass.) 50; *Worcester, etc., R. Co. v. Hinds*, 8 Cush. (Mass.) 110; *Stoneham Branch R. Co. v. Gould*, 2 Gray (Mass.) 277; *Troy, etc., R. Co. v. Newton*, 8 Gray (Mass.) 596; *Central Turnpike Corp. v. Valentine*, 10 Pick. (Mass.) 142.

3. *Worcester, etc., R. Co. v. Hinds*, 8 Cush. (Mass.) 110, following *Portland, etc., R. Co. v. Graham*, 11 Met. (Mass.) 1; *Lexington, etc., R. Co. v. Chandler*, 13 Met. (Mass.) 312.

4. **Full Subscription — England.** — *Fox v. Clifton*, 6 Bing. 776, 19 E. C. L. 233; *Pitchford v. Davis*, 5 M. & W. 2.

Iowa. — *Peoria, etc., R. Co. v. Preston*, 35 Iowa 118.

Kansas. — *Topeka Bridge Co. v. Cummings*, 3 Kan. 76.

Kentucky. — *Fry v. Lexington, etc., R. Co.*, 2 Met. (Ky.) 323.

Maine. — *Somerset R. Co. v. Clarke*, 61 Me. 384.

Massachusetts. — *Salem Mill Dam Corp. v. Ropes*, 6 Pick. (Mass.) 23, 9 Pick. (Mass.) 195; *Cabot, etc., Bridge v. Chapin*, 6 Cush. (Mass.) 53.

Michigan. — *Shurtz v. Schoolcraft, etc., R. Co.*, 9 Mich. 269.

Nebraska. — *Estabrook v. Omaha Hotel Co.*, 5 Neb. 76; *Boehme v. Omaha Hotel Co.*, 5 Neb. 80; *Hale v. Sanborn*, 16 Neb. 3; *Livesey v. Omaha Hotel Co.*, 5 Neb. 50.

New Hampshire. — *New Hampshire Cent. R.*

Co. v. Johnson, 30 N. H. 404, 64 Am. Dec. 304.

See also *infra*, this section, *Defenses in Actions on Subscriptions.*

Subscriptions Must Be by Persons Apparently Able to Pay. — *Lewey's Island R. Co. v. Bolton*, 48 Me. 451, 77 Am. Dec. 236; *Penobscot R. Co. v. White*, 41 Me. 512, 66 Am. Dec. 257; *Read v. Memphis Gayoso Gas Co.*, 9 Heisk. (Tenn.) 545.

But the fact that some subscriptions turn out to be worthless will not invalidate other subscriptions if obtained in good faith. *Penobscot R. Co. v. Dummer*, 40 Me. 172, 63 Am. Dec. 654.

A Subscription for Preferred Stock to draw ten per cent. interest at once cannot be reckoned as part of the capital stock subscribed. *Lewey's Island R. Co. v. Bolton*, 48 Me. 451, 77 Am. Dec. 236.

5. **Conditional Subscription.** — *Ticonic Water Power, etc., Co. v. Lang*, 63 Me. 480.

6. *Philadelphia, etc., R. Co. v. Hickman*, 28 Pa. St. 318.

7. **Particular Stipulations Construed.** — Where subscriptions were to be called for in instalments it must appear that they were called for periodically; not that assessments were all made at one time, without notice of previous ones. *Spangler v. Indiana, etc., R. Co.*, 21 Ill. 276.

Where the terms of subscription required that no more than five dollars be assessed at one time, it was held that two or more assessments might be voted at the same time if the aggregate amounted to no more than the stipulated amount. *Penobscot R. Co. v. Dummer*, 40 Me. 172, 63 Am. Dec. 654; *Penobscot, etc., R. Co. v. Dunn*, 39 Me. 587.

Calls payable March 1, 1854. December 1, 1854, and March 1, 1855, do not violate a provision forbidding more than two calls in twelve months. *Dinkgrave v. Vicksburg, etc., R. Co.*, 10 La. Ann. 514.

should not be held to be valid and enforceable against stockholders residing in the United States.¹

(7) *Waiver of Irregularities.* — Irregularities in the levy may be waived by implication,² but the acts constituting waiver must be clearly proved.³ Payment of calls is a waiver of irregularities in number and qualifications of the directors issuing them.⁴ But the vote of a city to pay a call does not waive its invalidity.⁵

f. NOTICE AND DEMAND — (1) *Necessity For.* — Notice of a call is a condition precedent to the right to sue for the amount thereof, when such notice is required by the terms of the subscription, by statute, or by the charter or by-laws of the corporation.⁶ And it has been held that notice is necessary even though not expressly required,⁷ but the weight of authority is the other way.⁸

(2) *Time.* — Where notice for a certain time is required it must appear that such requirement was complied with.⁹

(3) *Form and Contents* — (a) *Form Immaterial.* — It has been said that the form of notice is not material, but the only question is whether the notice gives the shareholder to understand that a call has been made and that he is required to pay the amount on a given day.¹⁰

*A Misnomer of the Corporation in a notice to pay instalments is not fatal.*¹¹

(b) *Notice by Mail.* — A notice sent through the mail is ordinarily sufficient, provided it has been received by the person to whom it was sent;¹² and here,

1. *American Pastoral Co. v. Gurney*, 61 Fed. Rep. 41.

2. *Irregularities May Be Waived.* — *Macon, etc., R. Co. v. Vason*, 57 Ga. 314; *York Tramways Co. v. Willows*, 8 Q. B. D. 685.

3. *Acts Constituting Waiver Must Be Clearly Proved.* — *Rutland, etc., R. Co. v. Thrall*, 35 Vt. 536.

4. *Payment.* — *Macon, etc., R. Co. v. Vason*, 57 Ga. 314.

5. *Pike v. Bangor, etc., R. Co.*, 68 Me. 445.

6. *Necessity for Notice.* — *Hughes v. Antietam Mfg. Co.*, 34 Md. 316; *Scarlett v. Academy of Music*, 43 Md. 211; *Granite Roofing Co. v. Michael*, 54 Md. 65; *Dexter, etc., Plankroad Co. v. Millerd*, 3 Mich. 91; *Rutland, etc., R. Co. v. Thrall*, 35 Vt. 536; *Elderkin v. Peterson*, 8 Wash. 674; *South Milwaukee Co. v. Murphy*, 112 Wis. 614. Compare *Illinois River R. Co. v. Zimmer*, 20 Ill. 654.

Requirement of Notice Applicable to Assessments by Court. — *Elderkin v. Peterson*, 8 Wash. 674.

7. *Notice Held Necessary though Not Expressly Required.* — *Miles v. Bough*, 3 Q. B. 845, 43 E. C. L. 1001; *Carlisle v. Cahawba, etc., R. Co.*, 4 Ala. 70; *Alabama, etc., R. Co. v. Rowley*, 9 Fla. 508; *Spangler v. Indiana, etc., R. Co.*, 21 Ill. 276; *Wear v. Jacksonville, etc., R. Co.*, 24 Ill. 593; *Granite Roofing Co. v. Michael*, 54 Md. 65; *Hughes v. Antietam Mfg. Co.*, 34 Md. 316; *Dexter, etc., Plankroad Co. v. Millerd*, 3 Mich. 91; *Braddock v. Philadelphia, etc., R. Co.*, 45 N. J. L. 363; *Essex Bridge Co. v. Tuttle*, 2 Vt. 393.

8. *Notice Not Necessary Unless Expressly Required* — *Alabama.* — *Grubbs v. Vicksburg, etc., R. Co.*, 50 Ala. 398.

Georgia. — *Wilson v. Wills Valley R. Co.*, 33 Ga. 466.

Illinois. — *Tomlin v. Tonica, etc., R. Co.*, 23 Ill. 429.

Indiana. — *Unthank v. Henry County Turn-*

pike Co., 6 Ind. 125; *Fisher v. Evansville, etc., R. Co.*, 7 Ind. 407; *New Albany, etc., R. Co. v. McCormick*, 10 Ind. 499, 71 Am. Dec. 337; *Johnson v. Crawfordsville, etc., R. Co.*, 11 Ind. 280; *Beckner v. Riverside, etc., Turnpike Co.*, 65 Ind. 468; *Smith v. Indiana, etc., R. Co.*, 12 Ind. 61.

Maine. — *Penobscot R. Co. v. Dummer*, 40 Me. 172, 63 Am. Dec. 654.

New York. — *Lake Ontario, etc., R. Co. v. Mason*, 16 N. Y. 451.

Pennsylvania. — *Spellier Electric Time Co. v. Geiger*, 147 Pa. St. 399.

Subscribers Are Chargeable with Notice of all assessments made during their membership. *Spellier Electric Time Co. v. Geiger*, 147 Pa. St. 399.

9. *Time.* — *Mississippi, etc., R. Co. v. Gaster*, 20 Ark. 455; *Macon, etc., R. Co. v. Vason*, 57 Ga. 314; *Cole v. Joliet Opera House Co.*, 79 Ill. 96.

Construction of Requirements. — Notice required to be at least sixty days before call need not be during sixty consecutive days prior thereto; it is sufficient if given once sixty days before the time of payment. *Muskingum Valley Turnpike Co. v. Ward*, 13 Ohio 120, 42 Am. Dec. 191.

10. *Form Immaterial.* — *Shackleford v. Dangerfield*, L. R. 3 C. P. 407.

11. *Misnomer of Corporation.* — *Gray v. Monongahela Nav. Co.*, 2 W. & S. (Pa.) 156, 37 Am. Dec. 500.

12. *Notice by Mail.* — *Jones v. Sisson*, 6 Gray (Mass.) 288; *Braddock v. Philadelphia, etc., R. Co.*, 45 N. J. L. 363. And see generally the title *NOTICE*, vol. 21, p. 580.

Particular Statute Held Not to Authorize Notice by Mail. — In *Hughes v. Antietam Mfg. Co.*, 34 Md. 316, it was held that a statute providing that there should be a "personal demand" or "notice published nearest to the place where

as in other cases, there is a presumption that a communication duly sent by mail was received by the person to whom it was addressed,¹ but the existence of the facts on which this presumption depends is a question for the jury.²

(c) **Notice by Publication.** — When no form of notice is prescribed, notice by newspaper publication is sufficient.³ It has been held that in such case the notice must be shown to have been brought to the stockholder's knowledge.⁴ But it has also been held that notice is sufficient if published at the residence of the subscriber.⁵

Proof of Publication. — The newspaper which contains the notice is clearly the best evidence of its publication and contents, and its production in the first instance is required by the ordinary principles of the law of evidence.⁶ Where there have been several insertions, a copy of the first with the testimony of the publisher as to the others will suffice.⁷ But an affidavit of a newspaper clerk has also been held sufficient,⁸ though a mere certificate of the secretary of the corporation is not.⁹

(d) **Verbal Notice.** — It has also been held that the notice need not be in writing,¹⁰ but personal notice will suffice though publication or letter is prescribed.¹¹

g. MATURITY. — A call dates from the time of the passage of the resolution therefor,¹² and not from the time when notice thereof is given¹³ nor from the time fixed for payment.¹⁴

h. INTEREST. — (1) **Liability for.** — Subscribers may be held liable for interest on the amount of calls which are not paid when due.¹⁵

the business of the corporation shall be carried on" was not complied with by sending a written notice through the mail.

In North Milwaukee Town Site Co. No. 2 v. Bishop, 103 Wis. 492, it was held that notice by mail was not sufficient where the statute required "giving such notice thereof as the by-laws shall prescribe" and no by-law in this regard had ever been adopted. The action of the board of directors in ordering notice by mail was not equivalent to a regular by-law and did not answer all the purposes of the statute.

1. See the title **PRESUMPTIONS**, vol. 22, p. 1252 *et seq.*

2. **Question for Jury.** — Eastern Union R. Co. v. Symonds, 6 R. & Can. Cas. 578; Jones v. Sisson, 6 Gray (Mass.) 288; Braddock v. Philadelphia, etc., R. Co., 45 N. J. L. 363.

3. **Notice by Publication.** — Hall v. U. S. Insurance Co., 5 Gill (Md.) 484. And see generally **DAILY NEWSPAPER**, vol. 8, p. 535, and the titles **NEWSPAPERS**, vol. 21, p. 533; **NOTICE**, vol. 21, p. 580; **PUBLICATION**, vol. 23, p. 307.

4. Alabama, etc., R. Co. v. Rowley, 9 Fla. 508; Tomlin v. Tonica, etc., R. Co., 23 Ill. 429; Unthank v. Henry County Turnpike Co., 6 Ind. 125; Lake Ontario, etc., R. Co. v. Mason, 16 N. Y. 451; Rutland, etc., R. Co. v. Thrall, 35 Vt. 536.

5. Dinkgrave v. Vicksburg, etc., R. Co., 10 La. Ann. 514.

6. **Proof of Publication.** — Rutland, etc., R. Co. v. Thrall, 35 Vt. 546.

7. Unthank v. Henry County Turnpike Co., 6 Ind. 125; Rutland, etc., R. Co. v. Thrall, 35 Vt. 536.

8. Andrews v. Ohio, etc., R. Co., 14 Ind. 169.

9. Tomlin v. Tonica, etc., R. Co., 23 Ill. 429.

10. **Writing Not Necessary.** — Smith v. Tallassee Branch of Cent. Plank-Road Co., 30 Ala. 650.

11. **Personal Notice.** — Mississippi, etc., R. Co. v. Gaster, 20 Ark. 455, in which case the court said: "One of the criterions by which to determine whether the requirements of a statute are imperative or merely directory is that those acts which are of the essence of the thing required to be done are imperative, while those which are not of the essence are directory. * * * The giving of sixty days' notice is imperative and must be strictly complied with, because it is of the essence of the thing required to be done; the mode of doing so is directory, because not of the essence, and may be either by publication in the manner prescribed by the charter or by actual personal notice." See also *Schenectady, etc., Plank-Road Co. v. Thatcher*, 11 N. Y. 102. But compare *Tomlin v. Tonica, etc., R. Co.*, 23 Ill. 429.

12. **Maturity.** — Reg. v. Londonderry, etc., R. Co., 13 Q. B. 998, 66 E. C. L. 998. See also *Beckner v. Riverside, etc., Turnpike Co.*, 65 Ind. 468.

13. Reg. v. Londonderry, etc., R. Co., 13 Q. B. 998, 66 E. C. L. 998.

14. *Ex p. Dawes*, 38 L. J. Ch. 512.

15. **Interest.** — Southampton Dock Co. v. Richards, 1 M. & G. 448, 39 E. C. L. 521; London, etc., R. Co. v. Fairclough, 2 M. & G. 674, 40 E. C. L. 570; *In re Overend*, L. R. 3 Ch. 784; *In re Blakely Ordnance Co.*, L. R. 5 Eq. 6; *Casey v. Galli*, 94 U. S. 673; *Rikhoof v. Brown's Rotary Shuttle Sewing Mach. Co.*, 68 Ind. 388; *Hambleton v. Glenn*, 72 Md. 351, 31 Am. & Eng. Corp. Cas. 505; *Burr v. Wilcox*, 22 N. Y. 551; *Gould v. Oneonta*, 71 N. Y. 298; *Bair v. Wilson*, 15 Pa. Super. Ct. 111; *Acetylene Light, etc., Co. v. Smith*, 10 Pa. Super. Ct. 61, 44 W. N. C. (Pa.) 86. And see generally the title **INTEREST**, vol. 16, p. 984.

Calls by Official Liquidator. — In England a provision as to interest does not apply to calls

(2) *Time from Which Interest Runs.* — Where Calls Are Made by Directors, interest thereon runs from the maturity thereof.¹

Calls Made by the Court have been held to draw interest only from the time of demand or notice and not from the date of the call,² but on the other hand it has been asserted that the decree itself is equivalent to a legal demand, and interest runs from the date thereof.³

i. EVIDENCE. — Where calls are necessary they must be clearly proved.⁴ The best evidence is the official record of the resolution or order,⁵ such as an entry by the secretary in the minute books of the directors.⁶ The corporate books are admissible to prove the mode of payment as well as the call itself.⁷ Proof that a certain call is authorized is competent to show the validity of a previous one.⁸ A mere declaration to that effect in the notice is not sufficient to prove that a call was made by the proper authorities.⁹

j. EFFECT OF TRANSFER OF STOCK ON LIABILITY FOR CALL — (1) *As Between Corporation and Stockholder.* — A subscriber cannot divest himself of his liability to the corporation for the amount of his subscription by merely assigning his stock to another person;¹⁰ even though stock has been sold the corporation may treat the seller and original subscriber as still liable to a call, and recover from him the amount thereof where the corporate requirements as to transfer have not been complied with.¹¹ But the original subscriber is discharged where the corporation had accepted the transferee as a stockholder in his place¹² by duly entering the transfer¹³ or issuing the stock to him.¹⁴

by the official liquidator. *In re Welsh Flannel, etc., Co.*, L. R. 20 Eq. 360.

Forfeited Shares. — Interest is not collectible on forfeited shares where articles provide that all interest in the company is extinguished by forfeiture; though they contain another provision for interest on all overdue calls. *In re Blakely Ordnance Co.*, L. R. 3 Ch. 412.

Fixing of Rate by Directors as a Prerequisite. — *American Pastoral Co. v. Gurney*, 61 Fed. Rep. 41.

1. *Time from Which Interest Computed.* — *In re Blakely Ordnance Co.*, L. R. 5 Eq. 6; *Casey v. Galli*, 94 U. S. 673; *Rikhoff v. Brown's Rotary Shuttle Sewing Mach. Co.*, 68 Ind. 388; *Gould v. Oneonta*, 71 N. Y. 298; *Burr v. Wilcox*, 22 N. Y. 551.

No Interest until Call Made. — *Bair v. Wilson*, 15 Pa. Super. Ct. 131.

2. *Hambleton v. Glenn*, 72 Md. 351, 31 Am. & Eng. Corp. Cas. 505.

3. *Bair v. Wilson*, 15 Pa. Super. Ct. 131.

4. **Evidence.** — *South Georgia, etc., R. Co. v. Ayres*, 56 Ga. 230; *Scarlett v. Academy of Music*, 43 Md. 203.

5. *Guadalupe, etc., Rivers Stock Assoc. v. West*, 70 Tex. 391.

6. *Fox v. Allensville, etc., Turnpike Co.*, 46 Ind. 31.

7. *Bavington v. Pittsburgh, etc., R. Co.*, 34 Pa. St. 358; *Comfort v. Leland*, 3 Whart. (Pa.) 81.

8. *Bavington v. Pittsburgh, etc., R. Co.*, 34 Pa. St. 358.

9. *New Jersey Midland R. Co. v. Strait*, 35 N. J. L. 322.

10. *American Alkali Co. v. Campbell*, 113 Fed. Rep. 398; *Visalia, etc., R. Co. v. Hyde*, 110 Cal. 632, 52 Am. St. Rep. 136.

11. **Original Subscriber Liable.** — *Humble v. Langston*, 7 M. & W. 517; *Sayles v. Blane*, 14 Q. B. 205, 68 E. C. L. 205; *Giesen v. London,*

etc., American Mortg. Co., (C. C. A.) 102 Fed. Rep. 584; *Visalia, etc., R. Co. v. Hyde*, 110 Cal. 632, 52 Am. St. Rep. 136; *Brinkley v. Hambleton*, 67 Md. 169; *Powers v. Knapp*, 71 Hun (N. Y.) 371. See also *Russell v. Easterbrook*, 71 Conn. 50.

12. **Acceptance by Corporation of Transferee.** — *In re Towns' Drainage, etc., Co.*, L. R. 16 Eq. 104; *Hawley v. Upton*, 102 U. S. 314; *Fulgam v. Macon, etc., R. Co.*, 44 Ga. 597; *South Georgia, etc., R. Co. v. Ayres*, 56 Ga. 230; *New Albany, etc., R. Co. v. McCormick*, 10 Ind. 499, 71 Am. Dec. 337; *Vawter v. Ohio, etc., R. Co.*, 14 Ind. 174; *Columbia Electric Co. v. Dixon*, 46 Minn. 463; *Rochester, etc., Land Co. v. Raymond*, 4 N. Y. App. Div. 600, *affirmed* 158 N. Y. 576; *Astoria, etc., R. Co. v. Hill*, 20 Oregon 177; *Paducah, etc., R. Co. v. Parks*, 86 Tenn. 554.

Transferee Liable for Calls Made Before, but Payable After, Transfer. — *Aylesbury R. Co. v. Mount*, 4 M. & G. 651, 43 E. C. L. 336, 5 Scott N. R. 127; *West Philadelphia Canal Co. v. Innes*, 3 Whart. (Pa.) 198. See also *North American Colonial Assoc. v. Bentley*, 15 Jur. 187, 19 L. J. Q. B. 427; *Schenectady, etc., Plank-Road Co. v. Thatcher*, 11 N. Y. 113.

13. **Entry of Transfer.** — *Upton v. Hansbrough*, 3 Biss. (U. S.) 417; *Glenn v. Porter*, 73 Fed. Rep. 275, 38 U. S. App. 422; *Visalia, etc., R. Co. v. Hyde*, 110 Cal. 632, 52 Am. St. Rep. 136; *Hartford, etc., R. Co. v. Boorman*, 12 Conn. 530; *Hall v. U. S. Insurance Co.*, 5 Gill (Md.) 484; *Merrimac Min. Co. v. Bagley*, 14 Mich. 501.

14. **Issuance of Stock.** — *Sigua Iron Co. v. Brown*, 171 N. Y. 488, *affirming* 58 N. Y. App. Div. 436.

Virginia Statute. — Under the Virginia statute an assignor of shares in a corporation remains liable for the unpaid portions of the stock assigned, although the assignee becomes

Reliance upon Information from Corporation that Stock Paid Up. — It has been held, however, that if a transferee inquired of the corporation and was by it informed that the stock was paid up, and he relied upon such information, he ought not to be held liable as having made either an implied or express promise to pay future calls upon the stock.¹

(2) *As Between Parties to Transfer.* — As between the original subscriber and his transferee the former has been held not bound to pay an assessment made after the sale,² but if he does pay calls after the transfer it is well settled that the transferee is under an implied obligation to reimburse him therefor.³ It has been held in *Maryland* that this obligation is confined to those who own the stock when the call is levied,⁴ but there are *English* cases to the effect that the original transferor may hold any one of several successive transferees.⁵

9. Assessments on Paid-up Stock — *a. GENERAL RULE.* — The stockholder becomes such by virtue of a contract with the company, and he has a right to stand upon the terms of that contract, interpreted and limited by the laws under which it was made. Where his contract calls for the payment of a specified sum, and this has been paid, it cannot be violated by requiring him to contribute an additional amount.⁶ Hence the general rule is well established that corporations have no implied power to levy assessments on stock which has been fully paid up, but such power exists only when it is expressly conferred by statute or by the charter of a particular corporation.⁷ When it

also liable. *Hamilton v. Glenn*, 85 Va. 901; *McKim v. Glenn*, 66 Md. 479; *Hambleton v. Glenn*, 72 Md. 331; *Priest v. Glenn*, 41 S. App. 478, 51 Fed. Rep. 400.

1. *Rochester, etc., Land Co. v. Roe*, 7 N. Y. App. Div. 366; *Wintringham v. Rosenthal*, 25 Hun (N. Y.) 580.

2. **Transferrer Not Liable.** — *Brigham v. Mead*, 10 Allen (Mass.) 245.

3. **Implied Obligation of Transferee** — *England.* — *Castellan v. Hobson*, L. R. 10 Eq. 47; *Kellock v. Enthoven*, L. R. 9 Q. B. 241, L. R. 8 Q. B. 458; *Bowring v. Shepherd*, L. R. 6 Q. B. 309; *Davis v. Haycock*, L. R. 4 Exch. 373; *Grissell v. Bristowe*, L. R. 3 C. P. 112; *Chapman v. Shepherd*, L. R. 2 C. P. 228; *Walker v. Bartlett*, 18 C. B. 845, 86 E. C. L. 845; *Humble v. Langston*, 7 M. & W. 517; *Shaw v. Fisher*, 5 De G. M. & G. 596; *Matter of Monmouthshire, etc., Banking Co.*, 2 De G. M. & G. 562. See also *Cruse v. Paine*, L. R. 6 Eq. 641.

United States. — *Tripp v. Apleman*, 35 Fed. Rep. 19, cited in 21 Am. & Eng. Corp. Cas. 544; *Webster v. Upton*, 91 U. S. 68.

Illinois. — *Kellogg v. Stockwell*, 75 Ill. 68.

Iowa. — *Cormac v. Western White Bronze Co.*, 77 Iowa 32.

Maryland. — *Hutzler v. Lord*, 64 Md. 534; *Brinkley v. Hambleton*, 67 Md. 169; *Bend v. Susquehanna Bridge, etc., Co.*, 6 Har. & J. (Md.) 128; *Hall v. U. S. Insurance Co.*, 5 Gill (Md.) 484.

Massachusetts. — *Brigham v. Mead*, 10 Allen (Mass.) 245.

Missouri. — *Treadway v. Johnson*, 33 Mo. App. 122.

New York. — *Johnson v. Underhill*, 52 N. Y. 203.

Pennsylvania. — *Litchen v. Verner*, 8 Pa. Dist. 218.

Liability Does Not Arise until Money Actually Paid. — *Hunt v. Lucas*, 68 Mo. App. 518.

Indemnity for Calls Made Since Agreement for Transfer. — *Hawkins v. Maltby*, L. R. 3 Ch. 188; *Wynne v. Price*, 3 De G. & Sm. 310; *Cruse v. Paine*, L. R. 6 Eq. 641, L. R. 4 Ch. 441; *Peppercorne v. Clench*, 26 L. T. N. S. 656; *Evans v. Wood*, L. R. 5 Eq. 9; *Hodgkinson v. Kelly*, L. R. 6 Eq. 496; *Shepherd v. Gillespie*, L. R. 3 Ch. 764, affirming L. R. 5 Eq. 293; *Castellan v. Hobson*, L. R. 10 Eq. 47; *Pender v. Fox*, 20 W. R. 966; *Brown v. Black*, L. R. 8 Ch. 939; *Sheppard v. Murphy*, Ir. R. 2 Eq. 544; *Paine v. Hutchinson*, L. R. 3 Ch. 388.

The Transferrer Cannot Claim Indemnity from Jobbers who have furnished the names of purchasers to whom transfers have been executed. *Coles v. Bristowe*, L. R. 4 Ch. 3.

4. *Brinkley v. Hambleton*, 67 Md. 169.

5. *Nickalls v. Eaton*, 23 L. T. N. S. 689; *Hawkins v. Maltby*, L. R. 3 Ch. 188.

6. *Ireland v. Palestine, etc., Turnpike Co.*, 19 Ohio St. 369.

7. **General Rule** — *Indiana.* — *Redkey Citizens Natural Gas Co. v. Orr*, 27 Ind. App. 1; *Toner v. Fulkerson*, 125 Ind. 224; *Cincinnati, etc., R. Co. v. Clarkson*, 7 Ind. 595; *Ohio, etc., R. Co. v. Cramer*, 23 Ind. 490.

Iowa. — *Spense v. Iowa Valley Constr. Co.*, 36 Iowa 407.

Maine. — *Mayberry v. Mead*, 80 Me. 27.

Massachusetts. — *Free Schools v. Flint*, 13 Met. (Mass.) 539.

Minnesota. — *Duluth Club v. Macdonald*, 74 Minn. 254.

Nebraska. — *Omaha Law Library Assoc. v. Connell*, 55 Neb. 396; *Enterprise Ditch Co. v. Moffitt*, 58 Neb. 642, 76 Am. St. Rep. 122.

New Hampshire. — *Ossipee Hosiery, etc., Mfg. Co. v. Canney*, 54 N. H. 295; *Great Falls, etc., R. Co. v. Copp*, 38 N. H. 124.

New Jersey. — *State v. Morristown Fire Assoc.*, 23 N. J. L. 195.

New York. — *Sullivan County Club v. Butler*, (Supm. Ct. Tr. T.) 26 Misc. (N. Y.) 306; *Slee*

is not so conferred, it cannot arise out of a mere by-law of the corporation.¹

b. ASSESSMENTS UNDER STATUTES—(1) *Statutory Power to Make Assessments*.—In some jurisdictions authority has been given by statute to levy assessments on paid-up stock for certain specified purposes, and subject to prescribed limitations.²

(2) *Strict Construction of Statutes*.—Even when the power to make assessments is expressly conferred it will receive a strict construction.³ Thus where the charter limits the amount beyond which no assessments can be made, and there is no law controlling the charter in that respect, assessments in excess of the amount fixed by the charter are invalid.⁴ And where the mode of collecting these assessments is prescribed by the statute or by the charter of the corporation, this mode is exclusive. Thus, where it is provided that the assessment shall be enforced by means of the forfeiture and sale of the stock, it cannot be enforced in any other method.⁵

(3) *Restriction of Statutory Power by Corporate By-laws*.—It has been held that even when conferred by statute or charter the power to levy assessments on paid-up stock may be restricted by the corporate by-laws.⁶

(4) *Purposes for Which Assessments Proper*.—The purposes for which an assessment may properly be levied depend entirely upon the terms of the statute governing the corporation or its charter.⁷ Under various provisions it has been held proper to levy an assessment for the purpose of repairing machinery to carry on the corporate business,⁸ or to repay a loan made by the stockholder to the corporation to enable it to purchase adjoining property and transfer its own property to a new corporation, receiving stock therefor.⁹ It has also been held that assessments may properly be levied by the directors of the corporation,¹⁰ but an assessment for the purpose of paying an indebtedness of the company is not authorized by a grant of power to levy assessments

v. Bloon, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273; *Beach v. Smith*, 30 N. Y. 116; *American Silk Works v. Solomon*, 4 Hun (N. Y.) 135.

Pennsylvania.—*Middletown, etc., Turnpike Co. v. Watson*, 1 Rawle (Pa.) 330.

Rhode Island.—*Atlantic De Laine Co. v. Mason*, 5 R. I. 463.

Texas.—*Gresham v. Island City Sav. Bank*, 2 Tex. Civ. App. 52.

Wisconsin.—*Wells v. Green Bay, etc., Canal Co.*, 90 Wis. 442.

Paid-up Nonassessable Stock and Nonassessable Stock Distinguished.—*San Antonio St. R. Co. v. Adams*, 87 Tex. 125.

In England it seems that where directors are empowered to increase the funds, they may do so by assessing the shareholders after their stock is paid up; and the funds so raised may be treated as a loan to the company. *Peninsular Co. v. Fleming*, 27 L. T. N. S. 93.

1. Power Cannot Arise from By-law.—*Free Schools v. Flint*, 13 Met. (Mass.) 539; *Enterprise Ditch Co. v. Moffitt*, 58 Neb. 642, 76 Am. St. Rep. 122; *Sullivan County Club v. Butler*, (Supm. Ct. Tr. T.) 26 Misc. (N. Y.) 306.

2. Assessments Authorized by Statute.—*California*.—*Santa Cruz R. Co. v. Spreckles*, 65 Cal. 193; *Sullivan v. Triunfo Gold, etc., Min. Co.*, 39 Cal. 465; *Sayre v. Citizens Gas-Light, etc., Co.*, 69 Cal. 207; *Taylor v. North Star Gold Min. Co.*, 79 Cal. 285; *Green v. Abietine Medical Co.*, 96 Cal. 323; *Younglove v. Steinman*, 80 Cal. 375.

Idaho.—*Sparks v. Lower Payette Ditch Co.*, 2 Idaho 1030; *Hall v. Eagle Rock, etc., Water Co.*, 5 Idaho 551.

New Hampshire.—*Ossipee Hosiery, etc., Mfg. Co. v. Canney*, 54 N. H. 295; *Lancaster Starch Co. v. Moore*, 62 N. H. 671.

Rhode Island.—*Atlantic De Laine Co. v. Mason*, 5 R. I. 463.

Utah.—*Gary v. York Min. Co.*, 9 Utah 464.

3. Strict Construction of Statutes.—*Lewey's Island R. Co. v. Bolton*, 48 Me. 451, 77 Am. Dec. 236; *Sullivan County Club v. Butler*, (Supm. Ct. Tr. T.) 26 Misc. (N. Y.) 306; *Atlantic De Laine Co. v. Mason*, 5 R. I. 463; *Henderson v. Turngren*, 9 Utah 432. See also *Gary v. York Min. Co.*, 9 Utah 464.

As to the rule of strict construction in general, see the title *STATUTES*, ante, p. 520.

Assessment Cannot Be Made at Special Meeting unless Notice Duly Given.—*Atlantic De Laine Co. v. Mason*, 5 R. I. 463.

4. Great Falls, etc., R. Co. v. Copp, 38 N. H. 124.

5. Belmont Park Assoc. v. Toller, 6 Pa. Co. Ct. 266; *Gary v. York Min. Co.*, 9 Utah 464.

6. Restriction of Statutory Power by Corporate By-laws.—*Price's Appeal*, 106 Pa. St. 421.

7. Under the New Hampshire Statute holders of full-paid stock can only assess themselves for such debts as they are individually liable for under the statute. *Ossipee Hosiery, etc., Mfg. Co. v. Canney*, 54 N. H. 295.

8. Younglove v. Steinman, 80 Cal. 375.

9. Taylor v. North Star Gold Min. Co., 79 Cal. 285.

10. Lancaster Starch Co. v. Moore, 62 N. H. 671; *Gary v. York Min. Co.*, 9 Utah 464.

to keep the capital stock from being impaired.¹

(5) *Power Resides in Stockholders.* — Where the legislature gives power to raise a fund in addition to capital stock, by assessments on stockholders, directors cannot levy such assessments without authority from the stockholders.²

(6) *Retrospective Effect of Statutes.* — The fully paid-up stock of a corporation is the personal property of the owner, and the articles of incorporation and laws of the state are elemental of the contract existing between the corporation and the owner of the stock, and may not be so amended by legislative enactment as to make the paid-up stock subject to an assessment or general or specific assessments, and forfeitable or subject to summary sale by the corporation for the nonpayment of such assessment.³ Nevertheless it has been held that where the legislature has expressly reserved the right to alter, amend, or repeal the charter of a corporation, a stockholder who had purchased his stock at a time when the charter provided that the stockholders should not be liable to any responsibility further than the amount of their respective shares could not object to an assessment made upon him in conformity to a statute passed after his subscription, providing for assessment in certain cases.⁴

c. ASSENT TO ASSESSMENTS. — A stockholder may become liable to an assessment on his fully paid stock by his own act or consent thereto. For this purpose it is not necessary that he should give his express or direct consent; it may be implied or he may be estopped from denying it by his act or by his silence and apparent acquiescence.⁵

Burden of Proof. — The burden of showing the stockholder's assent or acquiescence rests with the company or other parties seeking to hold him liable or to estop him from denying his liability.⁶

Recovery Back of Voluntary Assessment. — A voluntary assessment paid by a stockholder cannot be recovered back even though another stockholder has succeeded in recovering back the amount of such assessment paid by him.⁷

10. Payment — *a. MUST BE IN MONEY OR EQUIVALENT.* — The courts have inflexibly enforced the rule that payment of stock subscriptions is good as against creditors only where the payment has been made in money or what may fairly be considered as money's worth.⁸

b. TIME AND PLACE OF PAYMENT — TO WHOM PAYMENT MADE. — Where a call does not name the time or place of payment, or the person to whom payment is to be made, the call is payable on demand, and the corporation having a place of business and an officer authorized to receive money due, payment is required to be made at that place and to that officer.⁹

c. INTEREST ON ANTICIPATED PAYMENTS. — Where a subscription con-

1. *Dewey v. St. Albans Trust Co.*, 57 Vt. 332.

2. *Power Resides in Stockholders.* — *Marlborough Mfg. Co. v. Smith*, 2 Conn. 579.

3. *Enterprise Ditch Co. v. Moffitt*, 58 Neb. 642, 76 Am. St. Rep. 122; *Ireland v. Palestine, etc.*, *Turnpike Co.*, 19 Ohio St. 369.

4. *Gardner v. Pope Ins. Co.*, 9 R. I. 194, 11 Am. Rep. 238.

5. *Assent.* — *In re Maria Anna, etc.*, *Coal, etc.*, *Co.*, L. R. 20 Eq. 585; *Ossipee Hosiery, etc.*, *Mfg. Co. v. Canney*, 54 N. H. 295; *Sullivan County Club v. Butler*, (Supm. Ct. Tr. T.) 26 Misc. (N. Y.) 306; *Ireland v. Palestine, etc.*, *Turnpike Co.*, 19 Ohio St. 369.

6. *Circumstances Not Showing Assent.* — *Sullivan County Club v. Butler*, (Supm. Ct. Tr. T.) 26 Misc. (N. Y.) 306; *Atlantic De Laine Co. v. Mason*, 5 R. I. 463.

7. *Burden of Proof.* — *Ireland v. Palestine, etc.*, *Turnpike Co.*, 19 Ohio St. 369.

8. *Bidwell v. Pittsburg, etc.*, *Pass. R. Co.*,

114 Pa. St. 535. And see generally the title *PAYMENT*, vol. 22, p. 609 *et seq.*

9. *Payment Must Be in Money or Equivalent.* — *Coleman v. Howe*, 154 Ill. 458, 45 Am. St. Rep. 133; *Dean v. Baldwin*, 99 Ill. App. 582; *Wetherbee v. Baker*, 35 N. J. Eq. 501. See generally the title *PAYMENT*, vol. 22, p. 538 *et seq.* As to the right to issue stock for property, services, and the like, see *supra*, this title, *Issue of Stock*.

Checks. — See *People v. Stockton, etc.*, R. Co., 45 Cal. 306, 13 Am. Rep. 178.

Promissory Notes. — See *Hayne v. Beauchamp, Smed. & M.* (Miss.) 515; *Home Stock Ins. Co. v. Sherwood*, 72 Mo. 461; *Pine River Bank v. Hodsdon*, 46 N. H. 114; *McRae v. Russel*, 12 Ired. L. (34 N. Car.) 224; *Vermont Cent. R. Co. v. Claves*, 21 Vt. 30.

What Amounts to Payment in General. — *Riverton Water Co. v. Hummel*, 175 Pa. St. 575.

9. *Time and Place of Payment — To Whom Payment Made.* — *Western Imp. Co. v. Des Moines Nat. Bank*, 103 Iowa 455.

tract contains a provision that the stock shall be payable in monthly instalments and that "those desiring to do so can pay in full at any time, interest being allowed at four per cent. per annum," a subscriber is entitled according to the contract to receive interest upon anticipated payments.¹

d. PRESUMPTION OF PAYMENT.—Where calls or assessments have been made up to the full amount of the par value of the stock, it will be presumed, in the absence of a showing to the contrary, that they were duly paid as assessed, and that thereby the full amount of the par value of the subscribed stock has been received by the corporation.²

11. Actions and Remedies—*a. ACTION FOR AMOUNT DUE*—(1) *Right of Action.*—Where the subscription for shares contains a promise to pay the calls thereon, and the conditions of the subscription have been performed, there is no doubt that assumpsit or the corresponding action can be maintained in the first instance for all illegal assessments.³

(2) *Prerequisites to Bringing of Action*—(a) *Delivery, Tender, or Issuance of Stock.*—It is not necessary, in order to maintain an action for the amount of a call, that the corporation should show a delivery, tender, or issuance of stock,⁴ at least where the action does not include the final instalment.⁵

(b) *Demand.*—The general rules with relation to demand apply to the collection of a subscription for stock,⁶ but it has been held that one demand for several assessments is sufficient,⁷ and that no demand at all is necessary where the time of payment is specified in the subscription⁸ or where notice of the call has been duly given.⁹

(3) *By Whom Action Brought*—(a) *Corporation.*—The corporation has a right to sue for subscriptions in its corporate name,¹⁰ but must prove its corporate existence¹¹ and right to have capital stock and to receive subscriptions.¹²

A Foreign Corporation may sue in a state court.¹³

(b) *Receivers, Assignees, or Trustees.*—Where the corporation is insolvent the action to collect amounts due on stock may be brought by receivers,¹⁴ assignees

1. *Interest on Anticipated Payments.*—Helfield v. Addicks, 154 Pa. St. 1, 32 W. N. C. (Pa.) 162.

2. *Presumption of Payment.*—Doe v. Northwestern Coal, etc., Co., 78 Fed. Rep. 62.

3. *Right of Action.*—South Bay Meadow Dam Co. v. Gray, 30 Me. 547; Smith v. Natchez Steamboat Co., 1 How. (Miss.) 479; Salem Mill Dam Corp. v. Ropes, 6 Pick. (Mass.) 23; New Hampshire Cent. R. Co. v. Johnson, 30 N. H. 390, 64 Am. Dec. 300; Townsend v. Goewey, 19 Wend. (N. Y.) 424, 32 Am. Dec. 514; Glover v. Tuck, 24 Wend. (N. Y.) 153; Dutchess Cotton Manufactory v. Davis, 14 Johns. (N. Y.) 238, 7 Am. Dec. 459.

Stock May Be Levied on to Satisfy Judgment.—Chase v. East Tennessee, etc., R. Co., 5 Lea (Tenn.) 415, 4 Am. & Eng. R. Cas. 349.

Evidence in Actions on Subscriptions.—See Taussig v. Glenn, 4 U. S. App. 524, 51 Fed. Rep. 409; South Georgia, etc., R. Co. v. Ayres, 56 Ga. 230; Western Maryland R. Co. v. Manro, 32 Md. 280; McCully v. Pittsburgh, etc., R. Co., 32 Pa. St. 25; Philadelphia, etc., R. Co. v. Hickman, 28 Pa. St. 318.

4. *Delivery, Tender, or Issuance of Stock.*—Webb v. Baltimore, etc., R. Co., 77 Md. 92, 39 Am. St. Rep. 396; Walter A. Wood Harvester Co. v. Jefferson, 71 Minn. 367; Walter A. Wood Harvester Co. v. Robbins, 56 Minn. 48; Kohlmetz v. Calkins, 16 N. Y. App. Div. 518.

5. *Minneapolis Harvester Works v. Libby*, 24 Minn. 327. See also South Georgia, etc., R. Co. v. Ayres, 56 Ga. 230.

6. See the title DEMAND, vol. 9, p. 197.

7. *One Demand for Several Assessments Sufficient.*—Spangler v. Indiana, etc., R. Co., 21 Ill. 276.

8. *When No Demand Necessary.*—Swan v. Pittsburg Driving Park, etc., Assoc., 6 Kan. App. 572.

9. *Penobscot R. Co. v. Dummer*, 40 Me. 173, 63 Am. Dec. 654. And see also *Winter v. Muscogee R. Co.*, 11 Ga. 438; *Spangler v. Indiana, etc., R. Co.*, 21 Ill. 276; *Goodrich v. Reynolds*, 31 Ill. 491, 83 Am. Dec. 240.

10. *Suit in Corporate Name.*—Sigua Iron Co. v. Brown, 58 N. Y. App. Div. 436, affirming 33 Misc. (N. Y.) 50, affirmed 171 N. Y. 488.

11. *Plaintiff Must Prove Corporate Existence.*—Hughes v. Antietam Mfg. Co., 34 Md. 316.

12. *Corporation Must Prove Right to Have Capital Stock and Receive Subscriptions.*—Minneapolis Harvester Works v. Libby, 24 Minn. 327.

13. *Foreign Corporation May Sue in State Court.*—Anglo-American Land, etc., Co. v. Dyer, 181 Mass. 593; Howarth v. Lombard, 175 Mass. 570; Sigua Iron Co. v. Brown, 58 N. Y. App. Div. 436, affirming 33 Misc. (N. Y.) 50, affirmed 171 N. Y. 488.

14. *Receivers—Illinois.*—Chandler v. Brown, 77 Ill. 333.

Indiana.—Carnahan v. Campbell, (Ind. 1901) 59 N. E. Rep. 1054.

Iowa.—Stewart v. Lay, 45 Iowa 604.

Louisiana.—Stark v. Burke, 9 La. Ann. 341.

Maryland.—Frank v. Morrison, 58 Md. 423; Stillman v. Dougherty, 44 Md. 380.

Missouri.—Berry v. Rood, 168 Mo. 316.

for the benefit of creditors,¹ or trustees appointed by the courts.² But these officers have no greater power in this respect than the corporation had.³

(4) *Separate Actions Against Subscribers.* — Each subscription to the stock of a corporation is an independent undertaking,⁴ and hence separate actions must be brought against each subscriber for the recovery of the amount due on his subscription.⁵

b. *FORFEITURE* — (1) *Nature, Origin, and Authority* — (a) *In General.* — A very usual remedy given to corporations against delinquent subscribers is the right to forfeit the stock of such subscribers, in which case the stock either reverts to the corporation absolutely or, as is more usual, is sold in order that the proceeds may be applied to the amount due thereon.⁶

(b) *Remedy Purely Statutory.* — The remedy by forfeiture can exist only by virtue of an express statutory grant.⁷ A mere corporate by-law will not authorize a forfeiture,⁸ unless statutory power is given to provide for forfeiture

New York. — Mann v. Pentz, 3 N. Y. 415; Dayton v. Borst, 31 N. Y. 435; Calkins v. Atkinson, 2 Lans. (N. Y.) 12; Dorris v. French, 4 Hun (N. Y.) 292; Van Wagenen v. Clark, 22 Hun (N. Y.) 497; Nathan v. Whitlock, 9 Paige (N. Y.) 152.

Ohio. — Clarke v. Thomas, 34 Ohio St. 46.

Pennsylvania. — Means's Appeal, 85 Pa. St.

75. *Washington.* — Elderkin v. Peterson, 8 Wash. 674.

But see *In re Birmingham, etc.*, R. Co., 18 Ch. D. 155.

A Receiver of a Foreign Corporation, appointed by a court of another state, may maintain an action in *New York* against a stockholder to recover an assessment where it does not appear that any creditor of the corporation within the state of *New York* has made any claim upon the stockholder or that there are creditors in *New York* whose rights will be impaired by the receiver's recovery of such assessment. *Howarth v. Angle*, 39 N. Y. App. Div. 151.

Where an Action Has Been Brought by the Company Before the Appointment of a Receiver, it may be continued in the name of the original party for the benefit of the receiver. The right to collect the unpaid subscriptions was transferred to the receiver. *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 299. See also *Rankine v. Elliott*, 16 N. Y. 377; *Tracy v. Selma First Nat. Bank*, 37 N. Y. 523.

When Receiver Not Proper Party to Enforce Payment. — See *Lea v. Iron Belt Mercantile Co.*, 119 Ala. 271.

1. **Assignees.** — *Hatch v. Dana*, 101 U. S. 205; *Chamberlain v. Bromberg*, 83 Ala. 576; *Tobey v. Russell*, 9 R. I. 58. See also *Athens Car, etc., Co. v. Elsabee*, 19 Pa. Super. Ct. 618.

2. **Trustees.** — *Howard v. Glenn*, 85 Ga. 238, 21 Am. St. Rep. 156; *Lewis v. Glenn*, 84 Va. 947.

3. **Limit of Power.** — *Winters v. Armstrong*, 37 Fed. Rep. 508; *Republic L. Ins. Co. v. Swigert*, 135 Ill. 150, 32 Am. & Eng. Corp. Cas. 555; *Billings v. Robinson*, 94 N. Y. 415; *Cutting v. Damerel*, 88 N. Y. 410; *Cleveland v. Burnham*, 55 Wis. 598.

4. **Each Subscription an Independent Undertaking.** — *Connecticut, etc., Rivers R. Co. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181.

5. **Separate Actions.** — *Tompkins v. Craig*, 93 Fed. Rep. 885; *Baines v. Babcock*, 95 Cal. 581,

29 Am. St. Rep. 158; *Herron v. Vance*, 17 Ind. 595; *Price v. Grand Rapids, etc., R. Co.*, 18 Ind. 137; *Erie, etc., R. Co. v. Patrick*, 2 Abb. App. Dec. (N. Y.) 72, 2 Keyes (N. Y.) 256; *Elderkin v. Peterson*, 8 Wash. 674.

In *Erie, etc., R. Co. v. Patrick*, 2 Abb. App. Dec. (N. Y.) 72, 2 Keyes (N. Y.) 256, two actions were required against a person who had subscribed once as executor and once individually.

6. **Remedy by Forfeiture.** — See *American Alkali Co. v. Campbell*, 113 Fed. Rep. 396; *Carson v. Arctic Min. Co.*, 5 Mich. 295; *Mills v. Stewart*, 62 Barb. (N. Y.) 444.

Second Forfeiture. — The purchaser at a forfeiture sale must pay delinquent instalments in order to prevent a second forfeiture of the shares. *Sturges v. Stetson*, 1 Biss. (U. S.) 251.

Cancellation of Forfeiture. — In *England* the official liquidator, who corresponds in many respects to the American receiver, has no power to cancel a forfeiture. *In re China Steam Ship Co.*, L. R. 6 Eq. 232, 37 L. J. Ch. 901.

7. **Express Statutory Grant Necessary.** — *Dixon v. Evans*, L. R. 5-H. L. 606; *Clarke v. Hart*, 6 H. L. Cas. 633; *In re Hindustan Bank*, L. R. 9 Ch. 1; *In re National Patent Steam Fuel Co.*, 4 De G. & J. 46; *Hill v. Nisbet*, 100 Ind. 341; *Westcott v. Minnesota Min. Co.*, 23 Mich. 163; *Williams v. Lowe*, 4 Neb. 382; *Matter of Long Island R. Co.*, 19 Wend. (N. Y.) 37, 32 Am. Dec. 429; *Budd v. Multnomah St. R. Co.*, 15 Oregon 413, 3 Am. St. Rep. 169, 40 Am. & Eng. R. Cas. 551; *Perrin v. Granger*, 30 Vt. 595.

Retroactive Effect of Statute. — *Tutwiler v. Tuscaloosa Coal, etc., Co.*, 89 Ala. 391, 31 Am. & Eng. Corp. Cas. 445.

Forfeiture Authorized by Charter. — *Matter of Long Island R. Co.*, 19 Wend. (N. Y.) 37, 32 Am. Dec. 429.

Forfeiture Authorized by Articles of Association. — *Westcott v. Minnesota Min. Co.*, 23 Mich. 163.

8. **By-law Will Not Authorize Forfeiture.** — *Kirk v. Nowill*, 1 T. R. 118; *Kennebec, etc., R. Co. v. Kendall*, 31 Me. 470; *Rosenback v. Salt Springs Nat. Bank*, 53 Barb. (N. Y.) 495; *Matter of Long Island R. Co.*, 19 Wend. (N. Y.) 37, 32 Am. Dec. 429.

Stockholders Alone Can Object to a forfeiture as having been made by a mere by-law. *Detweiler v. Breckenkamp*, 83 Mo. 45. And even they cannot where they have assented thereto. *Lesseps v. Architects' Co.*, 4 La. Ann. 316.

in that manner,¹ but where the statute authorizes corporations to "make by-laws" providing for forfeiture, the statute is not operative in favor of any corporation which has not such a by-law.²

(c) **Remedy Cumulative.** — Forfeiture is generally merely a cumulative remedy and does not preclude the corporation from bringing an action to recover the amount due upon the stock.³ There are, however, decisions to the effect that where the subscriber has made no promise or agreement to pay for his stock the sole remedy of the corporation is by sale of the shares.⁴

(d) **Calls Must Be Legal.** — A forfeiture cannot be validly declared for nonpayment of an illegal call,⁵ and it has often been held that a forfeiture for nonpayment of several calls, one of which is illegal, is void.⁶

1. Power to Prescribe Penalties. — *Isbester v. Murphy Mfg. Co.*, 95 Ill. App. 105.

Power Must Be Exercised by General By-law. — Where the directors of a corporation have statutory power to declare by by-law the forfeiture of delinquent stock, this power must be exercised by a by-law which is general and operates upon all delinquent stockholders alike, and a resolution of the board of directors forfeiting the stock of a particular stockholder would not be of any avail. *Isbester v. Murphy Mfg. Co.*, 95 Ill. App. 105.

2. Necessity for By-law. — *Budd v. Multnomah St. R. Co.*, 15 Oregon 413, 3 Am. St. Rep. 169, 40 Am. & Eng. R. Cas. 551. See also *Dearborn v. Washington Sav. Bank*, 18 Wash. 8.

3. Remedy Cumulative — *England*. — *Great Northern R. Co. v. Kennedy*, 4 Exch. 417.

United States. — *American Alkali Co. v. Campbell*, 113 Fed. Rep. 396; *Nashua Sav. Bank v. Anglo-American Land, etc., Co.*, 189 U. S. 221, affirming 108 Fed. Rep. 764, 48 C. C. A. 15.

Alabama. — *Beene v. Cahawba, etc., R. Co.*, 3 Ala. 660; *Selma, etc., R. Co. v. Tipton*, 5 Ala. 787, 39 Am. Dec. 344.

California. — *San Bernardino Invest. Co. v. Merrill*, 108 Cal. 490; *Walter v. Merced Academy Assoc.*, 126 Cal. 582.

Connecticut. — *Hartford, etc., R. Co. v. Kennedy*, 12 Conn. 500; *Danbury, etc., R. Co. v. Wilson*, 22 Conn. 447.

Georgia. — *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412.

Illinois. — *Mandel v. Swan Land, etc., Co.*, 154 Ill. 177, 45 Am. St. Rep. 124, reversing 51 Ill. App. 204; *Banet v. Alton, etc., R. Co.*, 13 Ill. 504; *Klein v. Alton, etc., R. Co.*, 13 Ill. 514; *Ryder v. Alton, etc., R. Co.*, 13 Ill. 516; *Cross v. Pinckneyville Mill Co.*, 13 Ill. 54; *Peoria, etc., R. Co. v. Elting*, 17 Ill. 429; *Spangler v. Indiana, etc., R. Co.*, 21 Ill. 276; *Raymond v. Caton*, 24 Ill. 123.

Kentucky. — *Instone v. Frankfort Bridge Co.*, 2 Bibb (Ky.) 576, 5 Am. Dec. 638.

Louisiana. — *Mexican Gulf R. Co. v. Viavant*, 6 Rob. (La.) 305.

Maryland. — *Hughes v. Antietam Mfg. Co.*, 34 Md. 316.

Massachusetts. — *Boston, etc., R. Co. v. Wellington*, 113 Mass. 79.

Michigan. — *Carson v. Arctic Min. Co.*, 5 Mich. 288; *Atlantic Dynamite Co. v. Andrews*, 97 Mich. 466.

Mississippi. — *Freeman v. Winchester*, 10 Smed. & M. (Miss.) 577; *Payne v. Bullard*, 23 Miss. 88, 55 Am. Dec. 74.

New Hampshire. — *New Hampshire Cent. R. Co. v. Johnson*, 30 N. H. 390, 64 Am. Dec. 300; *White Mountains R. Co. v. Eastman*, 34 N. H. 124.

New York. — *Buffalo, etc., R. Co. v. Dudley*, 14 N. Y. 336; *Rensselaer, etc., Plank Road Co. v. Barton*, 16 N. Y. 457, note; *Lake Ontario, etc., R. Co. v. Mason*, 16 N. Y. 451; *Rensselaer, etc., Plank Road Co. v. Wetsel*, 21 Barb. (N. Y.) 56; *Dayton v. Borst*, 31 N. Y. 435; *Northern R. Co. v. Miller*, 10 Barb. (N. Y.) 260; *Mann v. Currie*, 2 Barb. (N. Y.) 294; *Troy, etc., R. Co. v. Kerr*, 17 Barb. (N. Y.) 581; *Troy, etc., R. Co. v. Tibbits*, 18 Barb. (N. Y.) 297; *Ft. Edward, etc., Plank Road Co. v. Payne*, 17 Barb. (N. Y.) 567; *Ogdensburgh, etc., R. Co. v. Frost*, 21 Barb. (N. Y.) 541; *Eastern Plank Road Co. v. Vaughan*, 20 Barb. (N. Y.) 155; *Goshen, etc., Turnpike Road Co. v. Hurtn*, 9 Johns. (N. Y.) 217, 6 Am. Dec. 273; *Troy Turnpike, etc., Co. v. M'Chesney*, 21 Wend. (N. Y.) 296; *Small v. Herkimer Mfg., etc., Co.*, 2 N. Y. 330.

South Carolina. — *Greenville, etc., R. Co. v. Cathcart*, 4 Rich. L. (S. Car.) 89; *Greenville, etc., R. Co. v. Smith*, 6 Rich. L. (S. Car.) 91; *Charlotte, etc., R. Co. v. Blakely*, 3 Strobb. L. (S. Car.) 245.

Tennessee. — *Stokes v. Lebanon, etc., Turnpike Co.*, 6 Humph. (Tenn.) 241.

Vermont. — *Connecticut, etc., Rivers R. Co. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181; *Rutland, etc., R. Co. v. Thrall*, 35 Vt. 536.

Under the California Statute the directors may on the day specified for declaring the stock delinquent, or at any time subsequent thereto and before the sale of the delinquent stock, waive proceedings for the collection by sale and elect to proceed by action to recover the amount of the assessment. But they must make the election within the time prescribed by the statute. *San Bernardino Invest. Co. v. Merrill*, 108 Cal. 490.

And this statute does not create and was not intended to create any personal liability for assessments, unless from the terms of the stockholders' subscription such liability was incurred. *In re South Mountain Consol. Min. Co.*, 7 Sawy. (U. S.) 30.

4. When Forfeiture the Sole Remedy. — *Rockingham Bldg. Co. v. Burlingame*, 67 N. H. 301; *Seymour v. Sturgess*, 26 N. Y. 141; *Rochester, etc., Land Co. v. Roe*, 7 N. Y. App. Div. 366.

5. Illegal Calls. — *Lewey's Island R. Co. v. Bolton*, 48 Me. 451, 77 Am. Dec. 216.

6. Stoneham Branch R. Co. v. Gould, 2 Gray (Mass.) 277.

(2) *How Power to Forfeit Stock Exercised* — (a) **Compliance with Statutory Requirements.** — The power to declare a forfeiture of shares for nonpayment of the amount due thereon must be exercised in strict compliance with the charter or statutory requirements.¹

(b) **Action of Directors.** — Thus the forfeiture must be declared by duly appointed or elected directors,² and by the number required to conduct corporate business.³ The directors cannot delegate their powers and duties in the premises.⁴ It is also necessary that the resolution should designate the stock to be forfeited,⁵ though a resolution declaring a forfeiture of all delinquent shares has been held sufficient.⁶

The Fact that the Minutes Show No Resolution of forfeiture or notice thereof is not conclusive if the secretary has entered the shares as forfeited.⁷

Mere Notice or Threats of Forfeiture do not constitute an exercise of the power.⁸

(c) **Notice.** — The better view seems to be that provisions as to notice of forfeitures are mandatory⁹ and must be strictly complied with,¹⁰ though it has also been asserted that such provisions are merely directory¹¹ and are satisfied by a substantial compliance.¹² It may be generally stated that the notice must be given a reasonable time before sale of the stock,¹³ must be

1. Statutory Requirements Must Be Complied With — *England.* — Clarke v. Hart, 6 H. L. Cas. 633; Johnson v. Lyttle's Iron Agency, 5 Ch. D. 687, 46 L. J. Ch. 786; *In re North Hallenbeagle Min. Co.*, L. R. 2 Ch. 321; Garden Gully United Quartz Min. Co. v. McLister, 1 App. Cas. 39; London, etc., R. Co. v. Eairclough, 2 M. & G. 674, 40 E. C. L. 570.

California. — Occidental Bldg., etc., Assoc. v. Sullivan, 62 Cal. 394.

Florida. — Alabama, etc., R. Co. v. Rowley, 9 Fla. 508.

Maine. — York, etc., R. Co. v. Ritchie, 40 Me. 425; Lewey's Island R. Co. v. Bolton, 48 Me. 451, 77 Am. Dec. 236.

Massachusetts. — Portland, etc., R. Co. v. Graham, 11 Met. (Mass.) 1; Lexington, etc., R. Co. v. Staples, 5 Gray (Mass.) 522.

Michigan. — Westcott v. Minnesota Min. Co., 23 Mich. 163.

New Jersey. — Downing v. Potts, 23 N. J. L. 66.

New York. — Eastern Plank Road Co. v. Vaughan, 20 Barb. (N. Y.) 155; Mitchell v. Vermont Copper Min. Co., 40 N. Y. Super. Ct. 406; Matter of Long Island R. Co., 19 Wend. (N. Y.) 37, 32 Am. Dec. 429; Johnson v. Albany, etc., R. Co., (Supm. Ct. Spec. T.) 40 How. Pr. (N. Y.) 193.

Pennsylvania. — Germantown Pass. R. Co. v. Fitler, 60 Pa. St. 124, 100 Am. Dec. 546.

Texas. — Nicholson Watson Shoe, etc., Co. v. Urquhart, (Tex. Civ. App. 1903) 75 S. W. Rep. 45.

Utah. — Schwab v. Frisco Min., etc., Co., 21 Utah 258; Raht v. Sevier Min., etc., Co., 18 Utah 290.

Vermont. — Rutland, etc., R. Co. v. Thrall, 35 Vt. 536; Perrin v. Granger, 30 Vt. 595.

Regulated by By-law. — Thus where the statute provides that the sale shall be made as prescribed by the corporate by-laws, there can be no sale in the absence of a by-law providing the manner in which it shall be made. Dearborn v. Washington Sav. Bank, 18 Wash. 8. See also Mitchell v. Vermont Copper Min. Co., 40 N. Y. Super. Ct. 406.

2. Duly Appointed or Elected Directors. — Garden Gully United Quartz Min. Co. v. McLister.

1 App. Cas. 39; Moses v. Tompkins, 84 Ala. 613.

3. Requisite Number. — *In re Alma Spinning Co.*, 16 Ch. D. 681.

4. Power Cannot Be Delegated. — York, etc., R. Co. v. Ritchie, 40 Me. 425.

5. Stock Must Be Designated. — Johnson v. Albany, etc., R. Co., (Supm. Ct. Spec. T.) 40 How. Pr. (N. Y.) 195.

6. Forfeiture of All Delinquent Shares. — Matter of Joint-Stock Co.'s Winding-up Acts, 4 De G. & J. 437; *In re North Hallenbeagle Min. Co.*, L. R. 2 Ch. 321, 15 L. T. N. S. 546; Rutland, etc., R. Co. v. Thrall, 35 Vt. 536.

7. In re North Hallenbeagle Min. Co., L. R. 2 Ch. 321.

8. Notice or Threats Not Equivalent to Forfeiture. — Van Diemen's Land Co. v. Cockerell, 1 C. B. N. S. 732, 87 E. C. L. 732, 26 L. J. C. Pl. 203; *In re East Kingsberg Co.*, L. R. 1 Eq. 309, 13 L. T. N. S. 627; Macon, etc., R. Co. v. Vason, 57 Ga. 314; Water Valley Mfg. Co. v. Seaman, 53 Miss. 655; Puget Sound, etc., R. Co. v. Ouellette, 7 Wash. 265.

9. Provisions as to Notice Mandatory. — *In re North Hallenbeagle Min. Co.*, L. R. 2 Ch. 321; Portland, etc., R. Co. v. Graham, 11 Met. (Mass.) 1; Lexington, etc., R. Co. v. Staples, 5 Gray (Mass.) 522; Lake Ontario, etc., R. Co. v. Mason, 16 N. Y. 451.

10. Van Diemen's Land Co. v. Cockerell, 1 C. B. N. S. 732, 87 E. C. L. 732, 26 L. J. C. Pl. 203, 3 Jur. N. S. 241; Lewey's Island R. Co. v. Bolton, 48 Me. 451, 77 Am. Dec. 236; Hughes v. Antietam Mfg. Co., 34 Md. 316.

11. Requirements Directory. — Mississippi, etc., R. Co. v. Gaster, 20 Ark. 455, where personal notice was held to be sufficient, though newspaper publication was required by charter.

12. Substantial Compliance. — Lexington, etc., R. Co. v. Chandler, 13 Met. (Mass.) 315. See also Schenectady, etc., Plank-Road Co. v. Thatcher, 11 N. Y. 102.

Thirty Days' notice was regarded as sufficient in Rutland, etc., R. Co. v. Thrall, 35 Vt. 536.

13. Three Days' Notice is unreasonably short if the shareholder resides at a distance. Lexington, etc., R. Co. v. Staples, 5 Gray (Mass.) 520.

definite as to the time¹ and place where the forfeiture or sale will take place,² and must clearly show what shares are intended.³

In What Paper Published. — The *California* statute requires only that notice of the sale of delinquent shares be published in the same paper as the notice of assessment unless otherwise ordered by the board of directors, but the board may order the notices to be published in different papers, and if they are regularly so published the requirements of the statute are complied with.⁴

(3) *Effect of Forfeiture and Sale* — (a) **Deficiency.** — The general rule is that the exercise by a corporation of its power to forfeit delinquent stock relieves the subscriber from any further liability thereon,⁵ but on the other hand, there are cases in support of the view that the corporation may recover a deficiency from the subscriber.⁶ Certainly it may recover a deficiency if the right to do so is given by a statute or charter,⁷ but it has been held that such a right cannot be based upon a mere by-law.⁸

Some of the Authorities May Be Reconciled by observing the distinction between strict forfeiture, consisting merely in acquisition by the company, and forfeiture with sale to others.⁹

Where the Right to Recover a Deficiency Does Exist, not only the original subscriber but, after transfer, his assignees may be held liable.¹⁰

Under the California Statute it is the duty of the secretary of a corporation, "unless otherwise ordered by the board of directors," to publish notices of the sale of delinquent stock at least fifteen days prior to the sale. *San Bernardino Invest. Co. v. Merrill*, 108 Cal. 490.

1. *Watson v. Eales*, 23 Beav. 294. See also *Graham v. Van Dieman's Land Co.*, 1 H. & N. 541, 26 L. J. Exch. 73.

2. *Place*. — *Lexington, etc., R. Co. v. Staples*, 5 Gray (Mass.) 522.

3. *York, etc., R. Co. v. Pratt*, 40 Me. 454.

4. **In what Paper Published.** — *Stockton Combined Harvester, etc., Works v. Houser*, 109 Cal. 1.

5. **Forfeiture Relieves Subscriber from Further Liability** — *England*. — *In re Financial Corp.*, L. R. 2 Ch. 714; *In re North Hallenbeagle Min. Co.*, L. R. 2 Ch. 321; *In re Natal Invest Co.*, L. R. 5 Ch. 22; *Inglis v. Great Northern R. Co.*, 16 Jur. 895, 1 Macq. H. L. 112; *Birmingham, etc., R. Co. v. Locke*, 1 Q. B. 256, 41 E. C. L. 527; *Edinburgh, etc., R. Co. v. Hebblewhite*, 6 M. & W. 715; *London, etc., R. Co. v. Fairclough*, 2 M. & G. 674, 40 E. C. L. 570.

United States. — *Ashton v. Burbank*, 2 Dill. (U. S.) 435.

Alabama. — *Allen v. Montgomery R. Co.*, 11 Ala. 437.

Georgia. — *Macon, etc., R. Co. v. Vason*, 57 Ga. 314.

Illinois. — *Mandel v. Swan Land, etc., Co.*, 154 Ill. 177, 45 Am. St. Rep. 124, reversing 51 Ill. App. 204.

Louisiana. — *Macaulay v. Robinson*, 18 La. Ann. 619.

Massachusetts. — *Franklin Glass Co. v. White*, 14 Mass. 286; *Chester Glass Co. v. Dewey*, 16 Mass. 94, 8 Am. Dec. 128; *Ripley v. Sampson*, 10 Pick. (Mass.) 371; *Cutler v. Middlesex Factory Co.*, 14 Pick. (Mass.) 483; *Atlantic Cotton Mills v. Abbott*, 9 Cush. (Mass.) 423; *Lexington, etc., R. Co. v. Chandler*, 13 Met. (Mass.) 311; *Troy, etc., R. Co. v. Newton*, 1 Gray (Mass.) 544; *Low v. Blanchard*, 116 Mass. 272; *Athol, etc., R. Co. v. Prescott*, 110 Mass.

213; *Katama Land Co. v. Jernegan*, 126 Mass. 155; *Andover, etc., Turnpike Corp. v. Gould*, 6 Mass. 40. See also *Mechanics Foundry, etc., Co. v. Hall*, 121 Mass. 273.

New York. — *Northern R. Co. v. Miller*, 10 Barb. (N. Y.) 260; *Ft. Edward, etc., Plank Road Co. v. Payne*, 17 Barb. (N. Y.) 577; *Ogdensburgh, etc., R. Co. v. Frost*, 21 Barb. (N. Y.) 541; *Mills v. Stewart*, 41 N. Y. 384; *Buffalo, etc., R. Co. v. Dudley*, 14 N. Y. 336; *Small v. Herkimer Mfg., etc., Co.*, 2 N. Y. 338.

Vermont. — *Rutland, etc., R. Co. v. Thrall*, 35 Vt. 552.

After a forfeiture the corporation cannot treat the sale as invalid and hold the subscriber for the amount of the call. *Patterson v. Brown, etc.*, Ditch Co., 3 Colo. App. 511.

6. **Subscriber Liable for Deficiency.** — *Great Northern R. Co. v. Kennedy*, 4 Exch. 417; *Hartford, etc., R. Co. v. Kennedy*, 12 Conn. 499; *Danbury, etc., R. Co. v. Wilson*, 22 Conn. 435; *Carson v. Arctic Min. Co.*, 5 Mich. 288; *Iron R. Co. v. Fink*, 41 Ohio St. 321, 52 Am. Rep. 84, 22 Am. & Eng. R. Cas. 20. See also *Sturges v. Stetson*, 1 Biss. (U. S.) 246.

7. *Allen v. Montgomery R. Co.*, 11 Ala. 437; *Mann v. Cooke*, 20 Conn. 178; *Danbury, etc., R. Co. v. Wilson*, 22 Conn. 435; *Mandel v. Swan Land, etc., Co.*, 154 Ill. 177, 45 Am. St. Rep. 124, reversing 51 Ill. App. 204; *Kennebec, etc., R. Co. v. Kendall*, 31 Me. 470; *Athol, etc., R. Co. v. Prescott*, 110 Mass. 213; *Mills v. Stewart*, 41 N. Y. 384; *Stokes v. Lebanon, etc., Turnpike Co.*, 6 Humph. (Tenn.) 241; *Brockenbrough v. James River, etc., Co.*, 1 Patt. & H. (Va.) 94.

8. *Mandel v. Swan Land, etc., Co.*, 154 Ill. 177, 45 Am. St. Rep. 124, reversing 51 Ill. App. 204.

9. See *Carson v. Arctic Min. Co.*, 5 Mich. 295.

10. **Assignees.** — *Hartford, etc., R. Co. v. Kennedy*, 12 Conn. 499; *Merrimac Min. Co. v. Bagley*, 14 Mich. 501; *Mann v. Currie*, 2 Barb. (N. Y.) 294; *Brockenbrough v. James River, etc., Co.*, 1 Patt. & H. (Va.) 94.

(b) **Surplus.** — It has been held that where the sale produces more than the amount due to the corporation upon the stock this surplus belongs to the corporation,¹ but on the other hand, there are cases asserting the more reasonable view that it belongs to the subscriber.²

(4) **Stockholders' Protective Remedies** — (a) **Injunction.** — A threatened forfeiture of paid-up stock may be enjoined,³ but if the assessment is valid, the fact that the corporation is worthless and seeking to acquire the stock is not a sufficient ground for injunction.⁴

(b) **Annulment of Forfeiture.** — Generally, an invalid forfeiture will be annulled at the suit of a stockholder.⁵ But relief from forfeiture will not be granted unless the right to such relief is clearly shown.⁶

Grounds for Annulment. — The forfeiture may be set aside because the stockholder was dead and no administrator had been appointed,⁷ or because notice of calls was not given,⁸ or because the meeting was unlawfully held outside the state.⁹

Loss of Right to Relief. — The right to relief from a forfeiture may be lost by a failure to seek relief within a reasonable time or by acquiescence in the forfeiture.¹⁰

Venue. — The action for relief should be brought in the state where the corporation has its domicile.¹¹

(c) **Action for Damages.** — A stockholder who has been wrongfully deprived of his stock may bring an action for damages for conversion,¹² and the measure of damages for an unauthorized forfeiture is the market value of the stock at the time of the act.¹³

(d) **Tender.** — An impending forfeiture of stock may be prevented by a timely tender of the sum due,¹⁴ and the fact that the tender is accompanied by a protest will not vitiate it.¹⁵

12. Defenses in Actions on Subscriptions — a. IN GENERAL. — In an action

1. **Right to Surplus.** — *Small v. Herkimer Mfg., etc., Co.*, 2 N. Y. 330.

2. *Henkel v. Pioneer Sav., etc., Co.*, 61 Minn. 35. See also *Great Northern R. Co. v. Kennedy*, 4 Exch. 417; *Chicago Title, etc., Co. v. State Bank*, (C. C. A.) 86 Fed. Rep. 863; *Sturges v. Stetson*, 1 Biss. (U. S.) 246.

3. **Injunction.** — *Moore v. New Jersey Light-erage Co.*, 57 N. Y. Super. Ct. 1.

4. *Burham v. San Francisco Fuse Mfg. Co.*, 76 Cal. 24.

5. **Annulment of Forfeiture.** — *Sweny v. Smith*, L. R. 7 Eq. 324; *Stubbs v. Lister*, 1 Y. & C. Ch. 81; *Clarke's Case*, 42 L. J. Ch. 277, 27 L. T. N. S. 843; *In re Agriculturist Cattle Ins. Co.*, L. R. 5 Ch. 79; *Spackman v. Evans*, L. R. 3 H. L. 171; *Herbert Kraft Co. Bank v. Orland Bank*, 133 Cal. 64; *Mitchell v. Vermont Copper Min. Co.*, 67 N. Y. 280.

Stockholder Not Entitled to Decree for Specific Interest in Corporate Property. — *Smith v. Maine Boys Tunnel Co.*, 18 Cal. 111.

6. **Right to Relief Must Be Clearly Shown.** — *Sparks v. Liverpool Waterworks Co.*, 13 Ves. Jr. 428; *Prendergast v. Turton*, 1 Y. & C. Ch. 98; *Clark v. Barnard*, 108 U. S. 436; *Taylor v. North Star Gold Min. Co.*, 79 Cal. 285; *Marshall v. Golden Fleece Gold, etc., Min. Co.*, 16 Nev. 156; *Small v. Herkimer Mfg., etc., Co.*, 2 N. Y. 330; *Vatable v. New York, etc., R. Co.*, 96 N. Y. 49; *Weeks v. Silver Islet Consol. Min. Co.*, 55 N. Y. Super. Ct. 1; *Germantown Pass. R. Co. v. Fidler*, 60 Pa. St. 124, 100 Am. Dec. 546.

7. **Grounds for Annulment.** — *Glass v. Hope*, 16 Grant Ch. (U. C.) 420.

8. *Catchpole v. Ambergate, etc., R. Co.*, 1 El. & Bl. 111, 72 E. C. L. 111, 7 R. & Can. Cas. 221.

9. *Ormsby v. Vermont Copper Min. Co.*, 56 N. Y. 623.

10. **Loss of Right to Relief.** — *Rule v. Jewell*, 18 Ch. D. 660; *In re Financial Corp.*, L. R. 2 Ch. 714; *Matter of Joint-Stock Co.'s Winding-up Acts*, 4 De G. & J. 437; *Ex p. Webster*, 32 L. J. Ch. 135; *In re North Hallenbeagle Min. Co.*, L. R. 2 Ch. 321; *In re Cobre Copper Mine Co.*, L. R. 9 Eq. 107; *Austin's Case*, 24 L. T. N. S. 932; *In re Tavistock Ironworks Co.*, L. R. 4 Eq. 233; *In re County Palatine Loan, etc., Co.*, L. R. 9 Ch. 54; *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43; *Lesseps v. Architects' Co.*, 4 La. Ann. 316; *Raht v. Sevier Min., etc., Co.*, 18 Utah 290. *Compare* *Garden Gully United Quartz Min. Co. v. McLister*, 1 App. Cas. 39; *Hunter v. Stewart*, 4 De G. F. & J. 168.

11. **Venue.** — *North State Copper, etc., Min. Co. v. Field*, 64 Md. 151.

12. **Action for Damages.** — *Herbert Kraft Co. Bank v. Orland Bank*, 133 Cal. 64.

13. **Measure of Damages.** — *Stubbs v. Lister*, 1 Y. & C. Ch. 81; *Ormsby v. Vermont Copper Min. Co.*, 56 N. Y. 623; *Budd v. Multnomah St. R. Co.*, 15 Oregon 413, 3 Am. St. Rep. 169, 40 Am. & Eng. R. Cas. 551.

14. **Tender.** — *Walker v. Ogden*, 1 Biss. (U. S.) 287; *Mitchell v. Vermont Copper Min. Co.*, 67 N. Y. 280.

Tender of Check. — *Mitchell v. Vermont Copper Min. Co.*, 67 N. Y. 280.

15. *Sweny v. Smith*, L. R. 7 Eq. 324.

against a subscriber to recover the amount of his subscription he may set up any defense going to show that he is not liable upon his alleged contract of subscription.¹

b. PARTICULAR DEFENSES CONSIDERED — (1) Change in Corporate Name.

— Where the business of the corporation has not been changed, and the subscriber is not shown to be prejudiced, and no fraud intervenes, there exists no sound basis for relieving the subscriber from a contract whose substance is fully performed merely because of a change in the name of the corporation.² But the corporation may recover the amount of his subscription, suing in its new name,³ though it must, of course, prove its identity as the corporation to whose stock the defendant subscribed.⁴

(2) *Alterations in Charter.* — A subscriber to the stock of a corporation cannot successfully defend against a suit to enforce his subscription on the ground of changes in the charter⁵ which merely enlarge the original powers of the corporation,⁶ are auxiliary to the corporate objects,⁷ merely grant to the corporation additional privileges,⁸ or effect changes in matters collateral to the contract of subscription;⁹ but material changes which affect the contract of subscription are a good defense.¹⁰

Unaccepted Amendment. — When an amendment of the charter of the corporation was not mandatory but merely permissive, and the corporation never accepted the amendment or acted under it, such amendment never became a part of the charter and hence cannot release a subscriber from his subscription.¹¹

(3) *Failure of Corporate Enterprise.* — The fact that a corporate enterprise has failed and the corporation become insolvent is not generally a good defense to an action to enforce a subscription.¹²

(4) *Abandonment or Delay in Enterprise.* — A mere abandonment of the corporate enterprise is not necessarily a good defense to an action upon a subscription,¹³ especially where the abandonment is only partial¹⁴ or tem-

1. **Right to Set up Defenses.** — *Great Western Tel. Co. v. Purdy*, 162 U. S. 329; *Garrigue v. Arnott*, 80 Ill. App. 24.

2. **Change of Name Does Not Preclude Recovery.** — *Scarborough v. Butler*, 3 Lev. 238; *Colchester v. Seaber*, 3 Burr. 1866; *Mellor v. Spateman*, 1 Saund. 344, note 1; *Priest v. Glenn*, 4 U. S. App. 478, 51 Fed. Rep. 400; *Mahan v. Wood*, 44 Cal. 462; *Howard v. Glenn*, 85 Ga. 238, 21 Am. St. Rep. 156; *Bucksport, etc., R. Co. v. Buck*, 68 Me. 81; *Yonkers Gazette Co. v. Taylor*, 30 N. Y. App. Div. 324; *Buffalo, etc., R. Co. v. Dudley*, 14 N. Y. 336; *Schenectady, etc., Plank-Road Co. v. Thatcher*, 11 N. Y. 102; *North Whitehall Tp. v. South Whitehall Tp.*, 3 S. & R. (Pa.) 117.

3. **Corporation May Sue in New Name.** — *Bucksport, etc., R. Co. v. Buck*, 68 Me. 81; *Greenville, etc., Narrow Gauge R. Co. v. Johnson*, 8 Baxt. (Tenn.) 332.

4. **Proof of Identity.** — *Semple v. Glenn*, 91 Ala. 245, 24 Am. St. Rep. 894.

The Minutes of the Stockholders' Meeting are admissible to prove such identity. *Semple v. Glenn*, 91 Ala. 245, 24 Am. St. Rep. 894.

5. **Alterations of Charter.** — *Burlington, etc., R. Co. v. White*, 5 Iowa 409.

Where the Charter Is Subject to Alteration or repeal by the legislature, a subscriber is not discharged by amendment. *Union Hotel Co. v. Hersee*, 79 N. Y. 454, 35 Am. Rep. 536.

Ratification. — *Hammond v. Straus*, 53 Md. 1.

6. **Enlarging Original Powers.** — *Peoria, etc., R. Co. v. Elting*, 17 Ill. 429; *Peoria, etc., R. Co. v. Preston*, 35 Iowa 115; *Pacific R. Co. v.*

Hughes, 22 Mo. 303; *Pacific R. Co. v. Renshaw*, 18 Mo. 210.

7. **Amendments Auxiliary to Corporate Objects.** — *Banet v. Alton, etc., R. Co.*, 13 Ill. 504; *Sprague v. Illinois River R. Co.*, 19 Ill. 174; *Illinois River R. Co. v. Zimmer*, 20 Ill. 654.

8. **Grant of Additional Privileges.** — *Chattanooga, etc., R. Co. v. Warthen*, 98 Ga. 599; *Gray v. Monongahela Nav. Co.*, 2 W. & S. (Pa.) 156, 37 Am. Dec. 500. See also *Cross v. Peach Bottom R. Co.*, 90 Pa. St. 392, 1 Am. & Eng. R. Cas. 366.

9. **Matters Collateral to Contract of Subscription** — *Cravens v. Eagle Cotton Mills Co.*, 120 Ind. 6, 16 Am. St. Rep. 298.

10. **Material Changes.** — *Norwich Lock Mfg. Co. v. Hockaday*, 89 Va. 557.

11. **Unaccepted Amendment.** — *Chattanooga, etc., R. Co. v. Warthen*, 98 Ga. 599.

12. **Failure No Defense.** — *Morgan County v. Thomas*, 76 Ill. 140; *Hardy v. Merriweather*, 14 Ind. 205; *Henry v. Vermillion, etc., R. Co.*, 17 Ohio 187; *Miers v. Zanesville, etc., Turnpike Co.*, 11 Ohio 273.

13. **Abandonment of Corporate Enterprise.** — *Four Mile Valley R. Co. v. Bailey*, 18 Ohio St. 208. See also *Bish v. Bradford*, 17 Ind. 490; *Smith v. Gower*, 2 Duv. (Ky.) 17; *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294.

14. **Partial Abandonment.** — *Dorman v. Jacksonville, etc., Plank-Road Co.*, 7 Fla. 265; *Buffalo, etc., R. Co. v. Gifford*, 87 N. Y. 294.

Abandonment of Part of Railway No Defense. — *In re Jennings*, 1 Ch. Rep. 236.

Failure to Acquire Property. — A stockholder

porary.¹ But such abandonment may be a good defense where no effort to collect has been made within the period of limitation,² or other subscriptions have been refunded and all prosecution of the corporate design has ceased,³ or where its charter has lapsed because of noncompliance with its terms,⁴ or even, it has been held, where otherwise confirmed subscribers have changed their circumstances in reliance upon the fact of abandonment.⁵

Delay. — Similarly, delay in the progress of the corporate enterprise is rarely available as a defense,⁶ though it has been said, *obiter*, that an unreasonable delay would authorize one to withdraw his subscription.⁷

(5) *Change in Corporate Design.* — Whether or not a change in the corporate design will release a subscriber depends upon its materiality. A material and radical change will undoubtedly release him if made without his knowledge, consent, or confirmation, express or implied.⁸ But immaterial changes will not have this effect,⁹ for he must be presumed to have made his subscription in contemplation of possible changes.¹⁰

As to the **Materiality of Changes** the decisions are not uniform,¹¹ but a reference to the cases cited in the note will enable the reader to form an idea of the trend of judicial opinion in the various jurisdictions.¹²

in a corporation formed for the purpose of developing wild oil land cannot maintain an action to recover back his subscription on the ground of the failure of the company to acquire all of the land mentioned in its prospectus; he must show fraud or misrepresentations, or such an entire failure in the business of the company as amounts to virtual dissolution. *Kelsey v. Northern Light Oil Co.*, 54 Barb. (N. Y.) 111.

1. **Temporary Abandonment.** — *McMillan v. Maysville, etc.*, R. Co., 15 B. Mon. (Ky.) 218, 61 Am. Dec. 181; *Red Wing Hotel Co. v. Friedrich*, 26 Minn. 112.

2. **No Effort to Collect Within Period of Limitation.** — *Pittsburgh, etc.*, R. Co. *v. Byers*, 32 Pa. St. 22, 72 Am. Dec. 770.

3. *McCully v. Pittsburgh, etc.*, R. Co., 32 Pa. St. 25. See also *Delaware River, etc.*, R. Co. *v. Rowland*, (Pa. 1887) 9 Atl. Rep. 929, 30 Am. & Eng. R. Cas. 524.

4. **Lapse of Charter.** — *Sodus Bay, etc.*, R. Co. *v. Lapham*, 43 Hun (N. Y.) 314.

5. *Fountain Ferry Turnpike Road Co. v. Jewell*, 8 B. Mon. (Ky.) 147.

6. **Delay.** — *Cedar Rapids First Nat. Bank v. Hurford*, 29 Iowa 579; *Pickering v. Templeton*, 2 Mo. App. 424; *Union Hotel Co. v. Hersee*, 79 N. Y. 454, 35 Am. Rep. 536; *Miller v. Pittsburgh, etc.*, R. Co., 40 Pa. St. 237, 80 Am. Dec. 570.

7. *In re Boyle*, 54 L. J. Ch. 550.

8. **Material Changes Release Subscriber.** — *Marysville Electric Light, etc. Co. v. Johnson*, 109 Cal. 192, 50 Am. St. Rep. 34; *Union Agricultural, etc., Assoc. v. Neill*, 31 Iowa 95; *Union Locks, etc., v. Towne*, 1 N. H. 44, 8 Am. Dec. 32; *Hartford, etc., R. Co. v. Crosswell*, 5 Hill (N. Y.) 388, 40 Am. Dec. 354; *Stern v. McKee*, 70 N. Y. App. Div. 142; *Greenbrier Industrial Exposition v. Rodes*, 37 W. Va. 738; *West End Real Estate Co. v. Nash*, 51 W. Va. 341.

Change After Forfeiture of Stock. — A material alteration in the charter, made without the consent of a subscriber after his stock was forfeited, will not release him from payment of a note given for the subscription. *Mitchell v. Rome R. Co.*, 17 Ga. 574.

9. **Subscriber Not Released by Immaterial Changes.** — *Union Agricultural, etc., Assoc. v. Neill*, 31 Iowa 95; *Hartford, etc., R. Co. v. Crosswell*, 5 Hill (N. Y.) 388, 40 Am. Dec. 354; *Pennsylvania, etc., Canal Co. v. Webb*, 9 Ohio 136. See also *London, etc., R. Co. v. Wilson*, 6 Bing. N. Cas. 135, 37 E. C. L. 316; *Midland Great Western R. Co. v. Gordon*, 16 M. & W. 804; *Banet v. Alton, etc., R. Co.*, 13 Ill. 513.

10. *Mowrey v. Indianapolis, etc., R. Co.*, 4 Biss. (U. S.) 78.

11. See *Banet v. Alton, etc., R. Co.*, 13 Ill. 504.

12. **Changes Held to Release Subscriber.** — See the following cases:

California. — *Marysville Electric Light, etc., Co. v. Johnson*, 109 Cal. 192, 50 Am. St. Rep. 34.

Georgia. — *South Georgia, etc., R. Co. v. Ayres*, 56 Ga. 230.

Illinois. — *Fulton County v. Mississippi, etc., R. Co.*, 21 Ill. 338.

Massachusetts. — *Middlesex Turnpike Corp. v. Locke*, 8 Mass. 268; *Middlesex Turnpike Corp. v. Swan*, 10 Mass. 384, 6 Am. Dec. 139.

New Hampshire. — *Union Locks, etc., v. Towne*, 1 N. H. 44, 8 Am. Dec. 32.

New York. — *Hartford, etc., R. Co. v. Crosswell*, 5 Hill (N. Y.) 383, 40 Am. Dec. 354.

North Carolina. — *Thompson v. Guion*, 5 Jones Eq. (58 N. Car.) 113.

Ohio. — *Marietta, etc., R. Co. v. Elliott*, 10 Ohio St. 57.

Pennsylvania. — *Auburn Bolt, etc., Works v. Schultz*, 143 Pa. St. 256; *Manheim, etc., Turnpike Co. v. Arndt*, 31 Pa. St. 317; *Cross v. Peach Bottom R. Co.*, 90 Pa. St. 392, 1 Am. & Eng. R. Cas. 366.

Virginia. — *Norwich Lock Mfg. Co. v. Hockaday*, 89 Va. 557.

Changes Held Not to Release Subscriber. — See the following cases:

Georgia. — *Wilson v. Wills Valley R. Co.*, 33 Ga. 466; *Russell v. Alabama Midland R. Co.*, 94 Ga. 510.

Illinois. — *Banet v. Alton, etc., R. Co.*, 13 Ill. 504; *Peoria, etc., R. Co. v. Elting*, 17 Ill. 429; *Sprague v. Illinois River R. Co.*, 19 Ill. 174;

(6) *Nonperformance of Conditions.* — Where a subscription is made subject to valid conditions, the nonperformance of these conditions will constitute a complete defense in an action to recover upon the subscription.¹

(7) *Capital Stock Not Fully Subscribed* — (a) *General Rule.* — It is a general rule that all subscriptions are made upon the implied if not express condition that they shall become binding and enforceable only upon the entire capital stock of the corporation being subscribed for; hence, in an action against a subscriber it is usually a complete defense that the capital stock has not been fully subscribed.²

Illinois River R. Co. v. Zimmer, 20 Ill. 654.

Iowa. — *Peoria, etc., R. Co. v. Preston*, 35 Iowa 125.

Kentucky. — *Fry v. Lexington, etc., R. Co.*, 2 Met. (Ky.) 314; *Owenton, etc., Turnpike Road Co. v. Smith*, (Ky. 1890) 31 Am. & Eng. Corp. Cas. 312, note.

Massachusetts. — *Boston, etc., R. Co. v. Wellington*, 113 Mass. 79.

Missouri. — *Central Plankroad Co. v. Clemens*, 16 Mo. 359.

New York. — *Buffalo, etc., R. Co. v. Dudley*, 14 N. Y. 336.

Pennsylvania. — *Clark v. Monongahela Nav. Co.*, 10 Watts (Pa.) 364; *Gray v. Monongahela Nav. Co.*, 2 W. & S. (Pa.) 156, 37 Am. Dec. 500; *Cross v. Peach Bottom R. Co.*, 90 Pa. St. 392, 1 Am. & Eng. R. Cas. 366.

South Carolina. — *Greenville, etc., R. Co. v. Coleman*, 5 Rich. L. (S. Car.) 118.

Vermont. — *Rutland, etc., R. Co. v. Thrall*, 35 Vt. 536.

Wisconsin. — *Gibbons v. Grinsel*, 79 Wis. 365.

1. *Nonperformance of Conditions Defense* — *England.* — *Edwards v. Grand Junction R. Co.*, 7 Sim. 337, 1 Myl. & C. 650; *Matter of Eastern Counties Junction, etc., R. Co.*, 2 De G. M. & G. 66; *Preston's Case*, 15 W. R. 299; *In re Richmond Hill Hotel Co., L. R.* 2 Ch. 527; *Ex p. Bartlett*, 19 L. T. N. S. 628; *In re Aldborough Hotel Co., L. R.* 4 Ch. 184; *Ex p. Harwood*, 20 L. T. N. S. 736; *Rankin v. Hop, etc., Exch. Co.*, 20 L. T. N. S. 207; *Simpson v. Heaton's Steel, etc., Co.*, 19 W. R. 614. See also *In re Essex Brewery Co., L. R.* 18 Eq. 507, 22 W. R. 891.

Illinois. — *Banet v. Alton, etc., R. Co.*, 13 Ill. 504.

Indiana. — *Evansville, etc., Straight Line R. Co. v. Shearer*, 10 Ind. 244; *New Albany, etc., R. Co. v. McCormick*, 10 Ind. 499, 71 Am. Dec. 337.

Iowa. — See *Des Moines Valley R. Co. v. Graff*, 27 Iowa 99, 1 Am. Rep. 256.

Kentucky. — *Frankfort, etc., Turnpike Co. v. Churchill*, 6 T. B. Mon. (Ky.) 427, 17 Am. Dec. 159; *McMillan v. Maysville, etc., R. Co.*, 15 B. Mon. (Ky.) 218, 61 Am. Dec. 181.

Massachusetts. — *Central Turnpike Corp. v. Valentine*, 10 Pick. (Mass.) 142.

New Hampshire. — *Porter v. Raymond*, 53 N. H. 519; *Monadnock R. Co. v. Felt*, 52 N. H. 379.

New York. — *Burrows v. Smith*, 10 N. Y. 550; *Union Hotel Co. v. Hersee*, 79 N. Y. 454, 35 Am. Rep. 536; *Morris Canal, etc., Co. v. Nathan*, 2 Hall (N. Y.) 239.

Ohio. — *Chamberlain v. Painesville, etc., R. Co.*, 15 Ohio St. 225; *Ashtabula, etc., R. Co. v. Smith*, 15 Ohio St. 328; *Dayton, etc., R. Co. v. Hatch*, 1 Disney (Ohio) 84.

Pennsylvania. — *Pittsburgh, etc., R. Co. v. Stewart*, 41 Pa. St. 54; *Philadelphia, etc., R. Co. v. Hickman*, 28 Pa. St. 318; *Hanover Junction, etc., R. Co. v. Grubb*, 82 Pa. St. 36; *Quaker City Apartment House Co. v. Matthews*, 21 Pa. Super. Ct. 519; *Manheim, etc., Turnpike Co. v. Arndt*, 31 Pa. St. 317; *Caley v. Philadelphia, etc., R. Co.*, 80 Pa. St. 363; *Auburn Bolt, etc., Works v. Schultz*, 143 Pa. St. 256; *Spellier Electric Time Co. v. Leedom*, 149 Pa. St. 185.

As to conditions in general, see *supra*, this section, *Conditional Subscriptions*.

Subscriber Not Released by Failure in Matters Collateral to Contract. — *Cravens v. Eagle Cotton Mills Co.*, 120 Ind. 6, 16 Am. St. Rep. 298; *American Bldg., etc., Assoc. v. Rainbolt*, 48 Neb. 434.

2. *Full Capital Stock Must Be Subscribed* — *England.* — *Fox v. Clifton*, 6 Bing. 776, 19 E. C. L. 233; *Pitchford v. Davis*, 5 M. & W. 2; *Galvanized Iron Co. v. Westoby*, 8 Exch. 17; *Wontner v. Shairp*, 4 C. B. 404, 56 E. C. L. 404; *Norwich, etc., Nav. Co. v. Theobald*, M. & M. 151, 22 E. C. L. 272; *Howbeach Coal Co. v. Teague*, 5 H. & N. 151.

United States. — *Winters v. Armstrong*, 37 Fed. Rep. 508.

California. — *Santa Cruz R. Co. v. Schwartz*, 53 Cal. 106; *San Bernardino Invest. Co. v. Merrill*, 108 Cal. 490.

Colorado. — *Stearns v. Sopris*, 4 Colo. App. 191.

Connecticut. — *Ridgefield, etc., R. Co. v. Brush*, 43 Conn. 86.

Georgia. — *South Georgia, etc., R. Co. v. Ayres*, 56 Ga. 230; *Memphis Branch R. Co. v. Sullivan*, 57 Ga. 240.

Illinois. — *Allman v. Havana, etc., R. Co.*, 88 Ill. 521; *Temple v. Lemon*, 112 Ill. 51; *McCoy v. World's Columbia Exposition*, 186 Ill. 356, 78 Am. St. Rep. 288, affirming 87 Ill. App. 605.

Indiana. — *Banty v. Buckles*, 68 Ind. 49; *Hoagland v. Cincinnati, etc., R. Co.*, 18 Ind. 452.

Iowa. — *Peoria, etc., R. Co. v. Preston*, 35 Iowa 115.

Kansas. — *Topeka Bridge Co. v. Cummings*, 3 Kan. 55.

Kentucky. — *Wight v. Shelby R. Co.*, 16 B. Mon. (Ky.) 4, 63 Am. Dec. 522; *Lail v. Mt. Sterling Coal Road Co.*, 13 Bush (Ky.) 32.

Louisiana. — *Exposition R., etc., Co. v. Canal St. Exposition R. Co.*, 42 La. Ann. 370.

Maine. — *Somerset R. Co. v. Clarke*, 61 Me. 379; *Rockland, etc., Steamboat Co. v. Sewall*, 78 Me. 167, 12 Am. & Eng. Corp. Cas. 85; *Oldtown, etc., R. Co. v. Veazie*, 39 Me. 571; *Penobscot R. Co. v. Dummer*, 40 Me. 172, 63 Am. Dec. 654; *Belfast, etc., R. Co. v. Cottrell*,

(b) **Modification or Abrogation of Rule.** — In some jurisdictions, however, this rule has been to a considerable extent modified or abrogated, or may be inapplicable by reason of the terms of a particular subscription.¹ Thus, the total stock need not be subscribed when the terms of the subscription or of the articles of association or incorporation show an intention to commence business before a full subscription is obtained.² Similarly, where the statute or charter fixes less than the full capital stock as the amount which must be subscribed, a subscription to that amount is sufficient,³ though in such case it is a prerequisite to the subscriber's liability that the specified amount shall be subscribed.⁴

66 Me. 185; *Lewey's Island R. Co. v. Bolton*, 48 Me. 451, 77 Am. Dec. 236.

Maryland. — *Hughes v. Antietam Mfg. Co.*, 34 Md. 318.

Massachusetts. — *Salem Mill Dam Corp. v. Ropes*, 6 Pick. (Mass.) 23, 9 Pick. (Mass.) 187, 19 Am. Dec. 363; *Cabot, etc., Bridge v. Chapin*, 6 Cush. (Mass.) 50; *Newburyport Bridge v. Story*, 6 Pick. (Mass.) 45, note; *Eaton v. Pacific Nat. Bank*, 144 Mass. 260; *Penobscot, etc., R. Co. v. Bartlett*, 12 Gray (Mass.) 244, 71 Am. Dec. 753; *Boston, etc., R. Co. v. Wellington*, 113 Mass. 79; *Central Turnpike Corp. v. Valentine*, 10 Pick. (Mass.) 142; *Worcester, etc., R. Co. v. Hinds*, 8 Cush. (Mass.) 110; *Stoneham Branch R. Co. v. Gould*, 2 Gray (Mass.) 277.

Michigan. — *Shurtz v. Schoolcraft, etc., R. Co.*, 9 Mich. 269; *Swartwout v. Michigan Air Line R. Co.*, 24 Mich. 390; *Monroe v. Ft. Wayne, etc., R. Co.*, 28 Mich. 272; *International Fair, etc., Assoc. v. Walker*, 88 Mich. 62, 36 Am. & Eng. Corp. Cas. 233; *Curry Hotel Co. v. Mullins*, 93 Mich. 318.

Mississippi. — *Selma, etc., R. Co. v. Anderson*, 51 Miss. 829.

Missouri. — *Haskell v. Worthington*, 94 Mo. 560.

Nebraska. — *Livesey v. Omaha Hotel Co.*, 5 Neb. 50; *Hale v. Sanborn*, 16 Neb. 1; *Hards v. Platte Valley Imp. Co.*, 35 Neb. 263. See also *Macfarland v. West Side Imp. Assoc.*, 56 Neb. 277.

New Hampshire. — *New Hampshire Cent. R. Co. v. Johnson*, 30 N. H. 390, 64 Am. Dec. 300; *Contoocook Valley R. Co. v. Barker*, 32 N. H. 363; *Littleton Mfg. Co. v. Parker*, 14 N. H. 543.

New York. — *Bray v. Farwell*, 81 N. Y. 600; *Erie, etc., R. Co. v. Owen*, 32 Barb. (N. Y.) 616; *Sullivan County Club v. Butler*, (Supm. Ct. Tr. T.) 26 Misc. (N. Y.) 306.

Ohio. — *Jewett v. Valley R. Co.*, 34 Ohio St. 601.

Pennsylvania. — *Garrett v. Dillsbury, etc., R. Co.*, 78 Pa. St. 465.

Rhode Island. — *Warwick R. Co. v. Cady*, 11 R. I. 131.

Tennessee. — *Anderson v. Middle, etc., Tennessee Cent. R. Co.*, 91 Tenn. 44.

Texas. — *Orynski v. Loustaunau*, (Tex. 1890) 15 S. W. Rep. 674.

Vermont. — *Rutland, etc., R. Co. v. Thrall*, 35 Vt. 536.

Washington. — *Denny Hotel Co. v. Schram*, 6 Wash. 134, 36 Am. St. Rep. 130; *Birge v. Browning*, 11 Wash. 249.

Wisconsin. — *Anvil Min. Co. v. Snerman*, 74 Wis. 226.

Rule Not Available Against Claims of Corporate Creditors. — See *Farnsworth v. Robbins*, 36 Minn. 369.

Presumption that Required Amount Subscribed. — *Milwaukee Brick, etc., Co. v. Schoknecht*, 108 Wis. 457.

1. **Modification or Abrogation of Rule.** — *Ornamental Pyrographic Woodwork Co. v. Brown*, 2 H. & C. 63; *Macdougall v. Jersey Imperial Hotel Co.*, 2 Hem. & M. 528, 34 L. J. Ch. 28; *Re English, etc., Rolling-Stock Co.*, 12 Jur. N. S. 738; *Chubb v. Upton*, 95 U. S. 665; *Auburn Opera-House, etc., Assoc. v. Hill*, (Cal. 1893) 32 Pac. Rep. 587; *Newcastle, etc., Turnpike Co. v. Bell*, 8 Blackf. (Ind.) 584; *York, etc., R. Co. v. Pratt*, 40 Me. 447; *Skowhegan, etc., R. Co. v. Kinsman*, 77 Me. 370, 22 Am. & Eng. R. Cas. 13; *Oregon Cent. R. Co. v. Scoggin*, 3 Oregon 161; *Willamette Freighting Co. v. Stannus*, 4 Oregon 261; *Astoria, etc., R. Co. v. Hill*, 20 Oregon 177; *Cheraw, etc., R. Co. v. White*, 14 S. Car. 51. See also *Belton Compress Co. v. Saunders*, 70 Tex. 699.

2. **Intention to Commence Business Before Full Subscription.** — *Arkadelphia Cotton Mills v. Trimble*, (Ark. 1891) 36 Am. & Eng. Corp. Cas. 253; *Mandel v. Swan Land, etc., Co.*, 154 Ill. 177, 45 Am. St. Rep. 124, reversing 51 Ill. App. 204; *Ornamental Pyrographic Woodwork Co. v. Brown*, 2 H. & C. 63, 32 L. J. Exch. 190.

Formal Resolution. — Where the directors are authorized to continue by formal resolution the organization of registered members, even though the full stock is not subscribed, such resolution or the full subscription is a condition precedent to the power to make calls. *North Stafford Steel, etc., Co. v. Ward*, L. R. 3 Exch. 172. See also *Watts v. Salter*, 10 C. B. 477, 70 E. C. L. 477; *Re English, etc., Rolling Stock*, 35 Beav. 646; *Johnson v. Goslett*, 3 C. B. N. S. 569, 91 E. C. L. 569; *London, etc., Assur. Soc. v. Redgrave*, 4 C. B. N. S. 524, 93 E. C. L. 524; *McDougall v. Jersey Imperial Hotel Co.*, 10 Jur. N. S. 1043; *Elder v. New Zealand Land Imp. Co.*, 30 L. T. N. S. 285; *Howbeach Coal Co. v. Teague*, 5 H. & N. 151.

3. **Subscriptions to Limit Fixed Sufficient.** — *San Bernardino Invest. Co. v. Merrill*, 108 Cal. 490; *Anglo-American Land, etc., Co. v. Dyer*, 181 Mass. 593; *Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Neb. 279; *Hanover Junction, etc., R. Co. v. Grubb*, 82 Pa. St. 36.

4. **Subscription to Limit Fixed Necessary** — *England.* — *Pearce v. Jersey Waterworks Co.*, L. R. 5 Exch. 200; *North Stafford Steel, etc., Co. v. Ward*, L. R. 3 Exch. 172.

United States. — *Minor v. Mechanics' Bank*, 1 Pet. (U. S.) 46.

Subscriptions to Increase of Capital. — A subscriber for increased stock cannot defeat an action to enforce his subscription by setting up the failure of the corporation to obtain subscriptions for the whole of the authorized increase.¹

(c) **What Subscriptions May Be Counted.** — In order to ascertain whether the entire capital stock or the amount necessary to fix the subscribers, liability has been subscribed, it has been asserted that all subscriptions made in good faith may be counted,² even though they were taken merely to make up the necessary amount,³ or some of them afterwards proved to be worthless.⁴ Conditional subscriptions, it has been held, cannot be counted,⁵ nor can invalid subscriptions,⁶ unless perhaps where it was honestly supposed at the time that they were valid.⁷ Similarly, no account can be taken of subscriptions by insolvents⁸ or persons *non compos mentis*,⁹ or subscriptions payable in depreciated stock at par,¹⁰ or in work or labor,¹¹ unless, perhaps, when the law authorizes payment in such manner.¹² Similarly, it has been held that *ultra vires* subscriptions by other corporations cannot be counted.¹³

California. — *Herbert Kraft Co. Bank v. Orland Bank*, 133 Cal. 64; *San Bernardino Invest. Co. v. Merrill*, 108 Cal. 490; *Ventura, etc., Valley R. Co. v. Hartman*, 116 Cal. 262.

Connecticut. — *New Haven, etc., R. Co. v. Chapman*, 38 Conn. 65.

Illinois. — *Illinois River R. Co. v. Zimmer*, 20 Ill. 654.

Indiana. — *Hoagland v. Cincinnati, etc., R. Co.*, 18 Ind. 452.

Kansas. — *Hunt v. Kansas, etc., Bridge Co.*, 11 Kan. 412.

Massachusetts. — *Boston, etc., R. Co. v. Wellington*, 113 Mass. 79; *Lexington, etc., R. Co. v. Chandler*, 13 Met. (Mass.) 311; *Penobscot, etc., R. Co. v. Bartlett*, 12 Gray (Mass.) 244, 71 Am. Dec. 753.

Mississippi. — *Perkins v. Sanders*, 56 Miss. 733.

Missouri. — *Sedalia, etc., R. Co. v. Abell*, 17 Mo. App. 645.

New York. — *Schenectady, etc., Plank Road Co. v. Thatcher*, 11 N. Y. 102; *Rensselaer, etc., Plank Road Co. v. Wetsel*, 21 Barb. (N. Y.) 56; *Hamilton, etc., Plank Road Co. v. Rice*, 7 Barb. (N. Y.) 166.

Ohio. — *Jewett v. Valley R. Co.*, 34 Ohio St. 601.

Oregon. — *Fairview R. Co. v. Spillman*, 23 Oregon 587.

Pennsylvania. — *Hanover Junction, etc., R. Co. v. Grubb*, 82 Pa. St. 36.

Virginia. — *Norwich Lock Mfg. Co. v. Hockaday*, 89 Va. 557. But see *Galveston Hotel Co. v. Bolton*, 46 Tex. 633.

1. *Delano v. Butler*, 118 U. S. 634; *Greenbrier Industrial Exposition v. Ocheltree*, 44 W. Va. 626.

2. All Subscriptions Made in Good Faith. — *Penobscot R. Co. v. Dummer*, 40 Me. 172, 63 Am. Dec. 654; *Penobscot R. Co. v. White*, 41 Me. 512, 66 Am. Dec. 259.

3. Subscriptions Taken to Complete Amount Required. — *Mangles v. Grand Collier Dock Co.*, 2 R. & Can. Cas. 359.

Where a Subscriber Verbally Guaranteed the subscription to have reached the amount required by the original contract of subscription, without subscribing for or agreeing in writing to take and pay for the additional stock necessary to make up such amount, this was held not to be such a compliance with the terms of the

original contract as to make it binding upon the other subscribers. *Branch v. Augusta Glass Works*, 95 Ga. 573.

4. Subscriptions Which Prove Worthless. — *Penobscot R. Co. v. Dummer*, 40 Me. 172, 63 Am. Dec. 654; *Salem Mill Dam Corp. v. Ropes*, 9 Pick. (Mass.) 187, 19 Am. Dec. 363.

5. Conditional Subscriptions. — *California Southern Hotel Co. v. Russell*, 88 Cal. 277; *New York, etc., R. Co. v. Hunt*, 39 Conn. 75; *Brand v. Lawrenceville Branch R. Co.*, 77 Ga. 506; *Oskaloosa Agricultural Works v. Parkhurst*, 54 Iowa 357; *Troy, etc., R. Co. v. Newton*, 8 Gray (Mass.) 596. See also *Fairview R. Co. v. Spillman*, 23 Oregon 587.

But a subscription conditioned upon the payment of interest has been included. *Rutland, etc., R. Co. v. Thrall*, 35 Vt. 536.

And in Philadelphia, etc., *R. Co. v. Hickman*, 28 Pa. St. 318, subscriptions conditioned on a certain amount of stock being taken were held valid.

6. Invalid Subscriptions. — *Belfast, etc., R. Co. v. Cottrell*, 66 Me. 185; *Swartwout v. Michigan Air Line R. Co.*, 24 Mich. 389; *Chicago Bldg., etc., Co. v. Browning*, 19 Pa. Super. Ct. 355.

7. See *Gibbons v. Ellis*, 83 Wis. 434.

8. Subscriptions by Insolvents. — *Lewey's Island R. Co. v. Bolton*, 48 Me. 451, 77 Am. Dec. 237; *Belfast, etc., R. Co. v. Brooks*, 60 Me. 568.

9. Subscriptions by Persons Non Compos Mentis. — *Phillips v. Covington, etc., Bridge Co.*, 2 Met. (Ky.) 219; *Hahn's Appeal*, (Pa. 1886) 7 Atl. Rep. 482.

10. Subscription Payable in Depreciated Stock at Par. — *Ticonic Water Power, etc., Co. v. Lang*, 63 Me. 480.

11. Subscription Payable in Work or Labor, Etc. — *New York, etc., R. Co. v. Hunt*, 39 Conn. 75; *Troy, etc., R. Co. v. Newton*, 8 Gray (Mass.) 596.

12. See *Phillips v. Covington, etc., Bridge Co.*, 2 Met. (Ky.) 219. See generally as to such subscriptions *supra*, this title, *Issue of Stock — Consideration for Issue*.

13. Subscriptions by Other Corporations Ultra Vires. — *Berry v. Yates*, 24 Barb. (N. Y.) 199.

Waiver of Defense by Failure to Make Objection. — *McCoy v. World's Columbian Exposition*, 186 Ill. 356, 78 Am. St. Rep. 288, affirming 87 Ill. App. 605.

(8) *Nonpayment of Percentage Required to Be Paid in Cash.*—By an application of the principle of law that a person cannot be allowed to profit by his own wrong, it is held by the weight of authority that a subscriber to the stock of a corporation cannot escape liability on his subscription by setting up the fact that he did not pay down at the time of his subscription a percentage or proportion of the amount thereof which was required to be paid in cash.¹ It has also been held that a requirement that a certain percentage be paid does not require that such percentage be paid on each subscription, but it is sufficient if all cash payments amount to such proportion of the total amount subscribed.²

In New York it was held in an early case that a failure to pay the percentage required rendered the subscription void,³ but this doctrine was subsequently questioned and held not to apply to a subscription to the capital stock of a corporation made before incorporation,⁴ the construction of the statute being that if the aggregate payment amounted to the required ten per cent., it was sufficient.⁵ But with respect to subscriptions made subsequent to incorporation the decisions have been uniform that payment must follow subscription and that until both acts occur no valid contract exists.⁶

(9) *Fraud in Procuring Subscription.*—In an action on a subscription to stock it is, as a general rule, a good defense that the subscription was induced

1. Failure to Make Required Cash Payment No Defense—Alabama.—Smith v. Tallassee Branch of Cent. Plank-Road Co., 30 Ala. 650; Selma, etc., R. Co. v. Rountree, 7 Ala. 670.

Florida.—Southern L. Ins., etc., Co. v. Lanier, 5 Fla. 110, 58 Am. Dec. 448.

Georgia.—Napier v. Poe, 12 Ga. 170; Mitchell v. Rome R. Co., 17 Ga. 574.

Illinois.—Ryder v. Alton, etc., R. Co., 13 Ill. 516; Klein v. Alton, etc., R. Co., 13 Ill. 514; Illinois River R. Co. v. Zimmer, 20 Ill. 657.

Kentucky.—Wight v. Shelby R. Co., 16 B. Mon. (Ky.) 5, 63 Am. Dec. 522.

Louisiana.—Vicksburg, etc., R. Co. v. McKeen, 12 La. Ann. 638.

Maine.—Penobscot R. Co. v. White, 41 Me. 512, 66 Am. Dec. 257.

Maryland.—Oler v. Baltimore, etc., R. Co., 41 Md. 583; Webb v. Baltimore, etc., R. Co., 77 Md. 92, 39 Am. St. Rep. 396.

Minnesota.—Minneapolis, etc., R. Co. v. Bassett, 20 Minn. 535.

Mississippi.—Water Valley Mfg. Co. v. Seaman, 53 Miss. 655; Barrington v. Mississippi Cent. R. Co., 32 Miss. 372; Fiser v. Mississippi, etc., R. Co., 32 Miss. 359.

New Hampshire.—Piscataqua Ferry Co. v. Jones, 39 N. H. 491.

North Carolina.—Haywood, etc., Plank Road Co. v. Bryan, 6 Jones L. (51 N. Car.) 82; McRae v. Russel, 12 Ired. L. (34 N. Car.) 224.

Ohio.—Henry v. Vermillion, etc., R. Co., 17 Ohio 191; Ashtabula, etc., R. Co. v. Smith, 15 Ohio St. 328; Chamberlain v. Painesville, etc., R. Co., 15 Ohio St. 225.

Pennsylvania.—Garrett v. Dillsburg, etc., R. Co., 78 Pa. St. 465.

South Carolina.—Spartanburg, etc., R. Co. v. Ezell, 14 S. Car. 281; Greenville, etc., R. Co. v. Woodsides, 5 Rich. Eq. (S. Car.) 145.

Vermont.—Vermont Cent. R. Co. v. Claves, 21 Vt. 30.

Virginia.—Stuart v. Valley R. Co., 32 Gratt. (Va.) 146.

West Virginia.—Pittsburgh, etc., R. Co. v. Applegate, 21 W. Va. 172. See also Greenbrier

Industrial Exposition v. Ocheltree, 44 W. Va. 626.

2. United States.—State Ins. Co. v. Redmond, 1 McCrary (U. S.) 308.

California.—People v. Chambers, 42 Cal. 201.

Georgia.—Wood v. Coosa, etc., R. Co., 32 Ga. 273.

Maryland.—Farmers, etc., Bank v. Nelson, 12 Md. 35; Taggart v. Western Maryland R. Co., 24 Md. 588, 89 Am. Dec. 760.

New York.—Lake Ontario, etc., R. Co. v. Mason, 16 N. Y. 451. See also the third note *infra*.

Pennsylvania.—Hibernia Turnpike Co. v. Henderson, 8 S. & R. (Pa.) 219, 11 Am. Dec. 593; Leighty v. Susquehanna, etc., Turnpike Co., 14 S. & R. (Pa.) 434; Bucher v. Dillsburg, etc., R. Co., 76 Pa. St. 306; Boyd v. Peach Bottom R. Co., 90 Pa. St. 169, cited in 1 Am. & Eng. R. Cas. 631.

3. New York Doctrine.—Union Turnpike Road Co. v. Jenkins, 1 Cai. (N. Y.) 381.

4. Lake Ontario, etc., R. Co. v. Mason, 16 N. Y. 457; Beattys v. Solon, 64 Hun (N. Y.) 120; Yonkers Gazette Co. v. Taylor, 30 N. Y. App. Div. 334; South Buffalo Natural Gas Co. v. Bain, (Buffalo Super. Ct. Gen. T.) 9 Misc. (N. Y.) 425; United Growers Co. v. Eisner, 22 N. Y. App. Div. 1.

5. See South Buffalo Natural Gas Co. v. Bain, (Buffalo Super. Ct. Gen. T.) 9 Misc. (N. Y.) 425. See also the third note *supra*.

6. South Buffalo Natural Gas Co. v. Bain, (Buffalo Super. Ct. Gen. T.) 9 Misc. (N. Y.) 425; New York, etc., R. Co. v. Van Horn, 57 N. Y. 473; Beach v. Smith, 30 N. Y. 122; Black River, etc., R. Co. v. Clarke, 25 N. Y. 210; Ogdensburgh, etc., R. Co. v. Wolley, 1 Keyes (N. Y.) 118; Excelsior Grain Binder Co. v. Stayner, (Supm. Ct.) 58 How. (N. Y.) 275, 25 Hun (N. Y.) 91; Perry v. Hoadley, (N. Y. City Ct. Spec. T.) 19 Abb. N. Cas. (N. Y.) 79; Yonkers Gazette Co. v. Taylor, 30 N. Y. App. Div. 334; United Growers Co. v. Eisner, 22 N. Y. App. Div. 1. See also Knickerbocker Trust Co. v. Hard, 67 N. Y. App. Div. 463.

by fraud or false representations on the part of the corporation.¹

Subscriber Must Act Promptly. — While it is not necessary that the subscriber should disaffirm the contract immediately upon his discovery of the fraud,² he must do so within a reasonable time,³ and whether the time is reasonable is a question for the jury.⁴

Where Deception Due to Subscriber's Negligence. — A false representation has been held not to constitute a defense where the contract between the subscriber and the corporation was clear, and if he was deceived it was due to his own negligent omission to inform himself, by reading the contract signed by him, as to the truth of the representations or their binding force.⁵

Where the Stock Is Worth as Much as it would have been had the representations been true, it has been held that the false representations are not a defense.⁶

(10) **Increase of Capital Stock.** — It has been held that the subscriber may successfully defend upon the ground that the corporation was incorporated with a larger capital stock than was set forth in the prospectus or the contract of subscription,⁷ but the mere issue of more shares than was at first contemplated is not a good defense.⁸

(11) **Irregular Organization.** — A subscriber to the capital stock of a proposed corporation can be compelled to pay his subscription only upon a showing that a *de jure* organization of the proposed corporation has been perfected. It is not enough to show facts constituting a mere *de facto* corporation.⁹

(12) **Mismanagement.** — The mere mismanagement of the affairs of a corporation will not release a stockholder from his obligation to pay for the stock subscribed by him, nor avail him as a defense in an action for the enforcement of his contract.¹⁰

1. Fraud or False Representations Good Defense. — Alabama Foundry, etc., Works v. Dallas, 127 Ala. 513; Beal v. Dillon, 5 Kan. App. 27; Savage v. Bartlett, 78 Md. 561; Fear v. Bartlett, 81 Md. 435; Queen City Printing, etc., Co. v. McAden, 131 N. Car. 178; Quaker City Apartment House Co. v. Matthews, 21 Pa. Super. Ct. 519; Byers v. Maxwell, (Tex. Civ. App. 1903) 73 S. W. Rep. 437; West End Real Estate Co. v. Claiborne, 97 Va. 734.

Fraud of Promoters Not Sufficient Defense. — Shick v. Citizens Enterprise Co., 15 Ind. App. 329, 57 Am. St. Rep. 230; Oldham v. Mt. Sterling Imp. Co., 103 Ky. 529; Regener v. Hubbard, (Supm. Ct. Tr. T.) 56 N. Y. Supp. 173, But compare Anderson v. Scott, 70 N. H. 350, wherein it was held that fraud of the person who procured the subscription was a defense even though such person had no authority to take subscriptions.

Representations Must Be Fitted to Deceive. — Russell v. Alabama Midland R. Co., 94 Ga. 510.

Fraud Cannot Be Set up in an Action by a Trustee appointed by the court to enforce liability for unpaid subscriptions. Howard v. Glenn, 85 Ga. 238, 21 Am. St. Rep. 156.

2. Disaffirmance Need Not Be Immediately upon Discovery of Fraud. — Aaron's Reefs v. Twiss, (1896) A. C. 273.

3. Subscriber Must Disaffirm in Reasonable Time. — Urner v. Sollenberger, 89 Md. 316; Savage v. Bartlett, 78 Md. 561; Fear v. Bartlett, 81 Md. 435.

4. Question for Jury. — Urner v. Sollenberger, 89 Md. 316.

5. Deception Due to Subscriber's Negligence. — Chicago Bldg., etc., Co. v. Summerour, 101 Ga. 820; Smith v. Southern Bldg., etc., Assoc., 111 Ga. 811.

6. Walter A. Wood Harvester Co. v. Jefferson, 71 Minn. 367.

7. Increase of Capital Stock. — Newport Cotton Mill Co. v. Mims, 103 Tenn. 465; Baker v. Ft. Worth Board of Trade, 8 Tex. Civ. App. 560; Stevens v. London Steel Works Co., 15 Ont. 75, 19 Am. & Eng. Corp. Cas. 255.

8. Gibbons v. Grinsell, 79 Wis. 365.

9. Irregular Organization. — Williams v. Citizens' Enterprise Co., 25 Ind. App. 351, 153 Ind. 496; Indianapolis Furnace, etc., Co. v. Herkimer, 46 Ind. 142; Rikhoff v. Brown's Rotary Shuttle Sewing Mach. Co., 68 Ind. 388; Clark v. Barnes, 58 Mo. App. 667; Capps v. Hastings Prospecting Co., 40 Neb. 470, 42 Am. St. Rep. 677; Ogden Clay Co. v. Harvey, 9 Utah 497. *Contra*, Fairview R. Co. v. Spillman, 23 Oregon 587.

A Subscription to Preliminary Articles of Association, not purporting to be a contract with an existing corporation, does not estop the subscriber to afterward deny the existence of the corporation in a suit upon the subscription. Rikhoff v. Brown's Rotary Shuttle Sewing Mach. Co., 68 Ind. 388; Capps v. Hastings Prospecting Co., 40 Neb. 470, 42 Am. St. Rep. 677.

10. Mismanagement — Illinois. — Chetlain v. Republic L. Ins. Co., 86 Ill. 220; People v. Barnett, 91 Ill. 422.

Iowa. — Merrill v. Reaver, 50 Iowa 404.

Kansas. — Ginrich v. Patron's Mill Co., 21 Kan. 61.

Kentucky. — Cook v. Hopkinsville, etc., Turnpike Road Co., (Ky. 1895) 32 S. W. Rep. 748; Oldham v. Mt. Sterling Imp. Co., 103 Ky. 529.

Nebraska. — Hards v. Platte Valley Imp. Co., 46 Neb. 709.

South Carolina. — Glenn v. Rosborough, 48 S. Car. 272.

(13) *Release* — (a) *In General*. — The defendant in an action on a stock subscription has the right to plead a release.¹

(b) *What Amounts to Release — Validity*. — When the contract is once formed the subscriber cannot release himself from liability to pay, unless he has the consent of the corporation,² and even then he cannot be released if the rights of creditors would be prejudiced.³ Nor can he be released by the directors without the consent of all the subscribers.⁴

The President of a Corporation Acting Alone cannot release a subscriber from liability upon his subscription without any action by the corporation upon the matter.⁵

The Cancellation of a Percentage upon each subscription may be valid as between company and subscriber.⁶

A Private Agreement with a Third Person that the latter shall pay for the stock does not release the subscriber.⁷

A Resolution to Drop Delinquent Subscribers from the rolls, never enforced, will not release from liability on his subscription one who has since claimed the benefits of membership.⁸

Consideration. — An alleged release which is without consideration is void.⁹

Collusive Agreements between the corporation and a subscriber to the effect that the latter shall not be bound, or shall be allowed any undue advantage over his fellows, are invalid.¹⁰

Purchase of Property at Exorbitant Price Not a Defense. — *Chetlain v. Republic L. Ins. Co.*, 86 Ill. 220; *Hornaday v. Indiana, etc.*, R. Co., 9 Ind. 263; *Dorris v. French*, 4 Hun (N. Y.) 292.

1. **Defendant May Plead Release.** — *Great Western Tel. Co. v. Purdy*, 162 U. S. 329; *Garrigue v. Arnott*, 80 Ill. App. 24. See generally the title *RELEASE AND DISCHARGE*, vol. 24, p. 282.

Evidence. — The cancellation or rescission of a subscription for corporate stock may be proved by circumstantial evidence. *Pacific Fruit Co. v. Coon*, 107 Cal. 447.

2. **Subscriber Cannot Release Himself After Contract Completed.** — *Upton v. Tribilcock*, 91 U. S. 48; *Gaff v. Flesher*, 33 Ohio St. 107; *Muskingum Valley Turnpike Co. v. Ward*, 13 Ohio 120, 42 Am. Dec. 191; *Graff v. Pittsburgh, etc.*, R. Co., 31 Pa. St. 489. See also *supra*, this section, *Creation of Contract — Withdrawal of Subscription*.

3. **Prejudice to Rights of Creditors.** — *Putnam v. New Albany*, 4 Biss. (U. S.) 365; *Carter v. Union Printing Co.*, (Ark. 1891) 36 Am. & Eng. Corp. Cas. 257; *Farnsworth v. Robbins*, 36 Minn. 369. Compare *Glenn v. Hatchett*, 91 Ala. 316; *Bates v. Great Western Tel. Co.*, 134 Ill. 536.

4. **Consent of Subscribers.** — *Burke v. Smith*, 16 Wall. (U. S.) 390; *Pacific Fruit Co. v. Coon*, 107 Cal. 447; *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203, *affirming* 63 Ill. App. 593; *Melvin v. Lamar Ins. Co.*, 80 Ill. 446, 22 Am. Rep. 199; *Osgood v. King*, 42 Iowa 478; *Hughes v. Antietam Mfg. Co.*, 34 Md. 316; *Bedford R. Co. v. Bowser*, 48 Pa. St. 29. See also *Tulare Sav. Bank v. Talbot*, 131 Cal. 45.

If the Company Has No Debts and does no business, and the directors hold all the stock among themselves, it is competent for them to make any agreement among themselves which releases each from any obligation to the others or to the company. *Non-Electric Fibre Mfg. Co. v. Peabody*, 21 N. Y. App. Div. 247.

5. *United Growers Co. v. Eisner*, 22 N. Y. App. Div. 1.

6. **Cancellation of Percentage.** — *Glenn v. Hatchett*, 91 Ala. 316.

7. *Williams v. Benet*, 34 S. Car. 112.

8. *Hays v. Franklin County Lumber Co.*, 35 Neb. 511.

9. **Consideration Necessary.** — *United Growers Co. v. Eisner*, 22 N. Y. App. Div. 1; *Braddock Electric R. Co. v. Bily*, 11 Pa. Super. Ct. 144.

Without a new consideration to support the agreement, a payment of a part of a subscription is not a satisfaction of the whole, even though the corporation agree to receive it in full payment and satisfaction for the stock. *World's Fair Excursion, etc., Boat Co. v. Gasch*, 162 Ill. 402, *reversing* 59 Ill. App. 391.

10. **Collusive Agreements Void — England.** — *In re Agriculturist Cattle Ins. Co.*, L. R. 1 Ch. 161; *Mangles v. Grand Collier Dock Co.*, 10 Sim. 519; *Preston v. Grand Collier Dock Co.*, 11 Sim. 327. See also *In re North Shields Quay, etc., Co.*, 4 Kay & J. 688.

Georgia. — See *Memphis Branch R. Co. v. Sullivan*, 57 Ga. 240.

Illinois. — *Melvin v. Lamar Ins. Co.*, 80 Ill. 446, 22 Am. Rep. 199; *Vance, etc., Co. v. Bentley*, 92 Ill. App. 287, *affirmed* 196 Ill. 236.

New Hampshire. — *White Mountains R. Co. v. Eastman*, 34 N. H. 124.

New Jersey. — *Boney v. Williams*, 55 N. J. Eq. 691; *Eisenlord v. Oriental Ins. Co.*, 29 N. J. Eq. 437.

New York. — *Meyer v. Blair*, 109 N. Y. 605, 4 Am. St. Rep. 500; *White v. Kuntz*, 107 N. Y. 518, 1 Am. St. Rep. 886. See also *Phoenix Warehousing Co. v. Badger*, 6 Hun (N. Y.) 293, *affirmed* 67 N. Y. 294.

Pennsylvania. — *Graff v. Pittsburgh, etc.*, R. Co., 31 Pa. St. 489; *Miller v. Hanover Junction, etc.*, R. Co., 87 Pa. St. 95, 30 Am. Rep. 349; *Robinson v. Pittsburgh, etc.*, R. Co., 32 Pa. St. 334, 72 Am. Dec. 792; *Jeanette Bottle Works v. Schall*, 13 Pa. Super. Ct. 96. See also *Crawford County v. Pittsburgh, etc.*, R. Co., 32 Pa. St. 141.

(14) *Set-off and Counterclaim.* — Where the corporation is a "going concern" and seeks to collect unpaid subscriptions for its own benefit exclusively, the subscriber may set off debts due from it to him,¹ and such a set-off allowed by the company cannot afterwards be questioned except for fraud.² But a stockholder cannot, by purchasing claims against the corporation, extinguish his liability to an amount greater than that actually paid by him.³ Nor can he successfully claim a set-off on account of money paid voluntarily pursuant to an illegal contract.⁴

(15) *Illegal Object of Corporation.* — Though it is a good defense to an action on a stock subscription that the corporation was organized for illegal purposes, expressed in the certificate of incorporation, such defense is not made out by proof that the illegal purpose was indicated by the prospectus issued by the promoters, blank form of contract to be used, and other acts before the corporation was created, where the illegal purpose does not necessarily appear on the face of the organization, and even if the company should afterward enter into illegal projects, such misconduct would have to be corrected in some other way than in a suit against a subscriber to recover his subscription.⁵

(16) *Payment.* — The defendant in an action on a stock subscription has, of course, the right to plead payment.⁶

(17) *Defendant Not Subscriber.* — It is also competent for the defendant to show that he is not and never has been a subscriber.⁷

(18) *Inability of Corporation to Issue Stock.* — That a corporation has not issued, and has divested itself of the power to issue, stock certificates in accordance with the contract of subscription, is a good defense to a suit on a stock subscription.⁸

(19) *Call for Unwarranted Purpose.* — It is also a good defense that the call was made for a purpose not warranted in the constitution of the company.⁹

(20) *Exercise of Option to Pay Otherwise than in Cash.* — It is a good defense to an action on a subscription that the subscriber had the option of paying in cash or giving a right of way, and that he had chosen the latter.¹⁰

(21) *Failure to Incorporate.* — Failure to incorporate has been held not sufficient to relieve a subscriber; the equitable right in the capital of the proposed company being sufficient.¹¹

(22) *Improper Issue of Stock to Others.* — One who has received what he subscribed for cannot complain of an issue of stock to those who could not

Vermont. — *Blodgett v. Morrill*, 20 Vt. 509.

Wisconsin. — See *Downie v. White*, 12 Wis. 176, 78 Am. Dec. 731.

1. **General Rule.** — *In re Stranton Iron, etc., Co.*, L. R. 19 Eq. 449. See also *Paine v. Central Vermont R. Co.*, 118 U. S. 152, 25 Am. & Eng. R. Cas. 37.

As to *Set-off and Counterclaim in Actions by Creditors*, see *infra*, this title, *Liability of Stockholders for Corporate Debts*.

2. *Goodwin v. McGehee*, 15 Ala. 232; *Thompson v. Meisser*, 108 Ill. 359.

3. **Setting Off Purchased Claims.** — *United States.* — *Sawyer v. Hoag*, 17 Wall. (U. S.) 610; *Manville v. Karst*, 16 Fed. Rep. 173.

Alabama. — *Goodwin v. McGehee*, 15 Ala. 232.

Illinois. — *Thompson v. Meisser*, 108 Ill. 359; *Gauch v. Harrison*, 12 Ill. App. 457.

Iowa. — *Peters v. Ft. Madison Constr. Co.*, 72 Iowa 405.

New York. — *Bulkley v. Whitcomb*, 49 Hun (N. Y.) 290; *Briggs v. Cornwell*, 9 Daly (N. Y.) 436.

Virginia. — *Hardy v. Norfolk Mfg. Co.*, 80 Va. 404.

4. *Scovill v. Thayer*, 105 U. S. 145.

5. *U. S. Vinegar Co. v. Foehrenbach*, 148 N. Y. 58, *affirming* 74 Hun (N. Y.) 435; *U. S. Vinegar Co. v. Schlegel*, 143 N. Y. 537, *affirming* 67 Hun (N. Y.) 356.

6. **Payment.** — *Great Western Tel. Co. v. Purdy*, 162 U. S. 329; *Garrigue v. Arnott*, 80 Ill. App. 24.

7. **Defendant Not a Subscriber.** — *Garrigue v. Arnott*, 80 Ill. App. 24.

8. **Inability of Corporation to Issue Stock.** — *Knoxville, etc., R. Co. v. Knoxville*, 98 Tenn. 1.

9. **Call for Unwarranted Purpose.** — *East Anglian R. Co. v. Eastern Counties R. Co.*, 11 C. B. 811, 73 E. C. L. 811; *Hartford, etc., R. Co. v. Croswell*, 5 Hill (N. Y.) 383, 40 Am. Dec. 354; *Bank of China, etc., v. Morse*, 44 N. Y. App. Div. 435, *affirmed* 168 N. Y. 458.

10. **Exercise of Option to Pay Otherwise than in Cash.** — *Evansville, etc., R. Co. v. Wright*, 38 Ind. 64.

11. **Failure to Incorporate.** — *Smith v. Gillen*, 52 Ark. 442.

have compelled it, whose names were not on the books, or who had not actually paid in the amount required down.¹

(23) *Receipt of Depreciated Currency in Payment of Subscriptions.* — *Ultra vires* acts of the directors in allowing certain stockholders to pay up their subscriptions in depreciated Confederate currency have been held to be no defense to an action against other stockholders for amounts due on proper calls.²

(24) *Secret Agreement to Release Other Subscribers.* — A subscriber cannot successfully defend on the ground that the corporation has secretly agreed with other subscribers to release them, for such an agreement is void.³

(25) *Making of Premature Contract.* — The making of a premature contract by the company before the full capital stock is paid in will not release a subscriber.⁴

(26) *Taking of Invalid Subscriptions.* — In an action against a subscriber for the amount due on his subscription he cannot, as a defense, avail himself of the fact that part of the capital stock was subscribed for by corporations and that such subscriptions were invalid under the law.⁵

(27) *Violations of Charter.* — Acts done in violation of the charter, such as issuing preferred stock, or changing a terminus of the railway line or the principal office of the company, will not defeat the collection of subscriptions to the capital stock.⁶

(28) *Impeachment of Corporate Existence.* — In the absence of fraud or demonstrable error, a party recognizing the assistance of a corporation by subscribing for its stock cannot defend an action on his subscription by impeaching the existence and capacity of the corporation.⁷

(29) *Nonpayment of Other Subscriptions.* — The subscriber cannot successfully defend on the ground that other subscriptions have not been paid.⁸

(30) *Statute of Limitations* — (a) *May Be Set Up.* — The defendant in an action on a stock subscription may plead the statute of limitations.⁹

(b) *Time from Which Statute Runs.* — In the case of a call by directors, the statute of limitations begins to run from the time the call was made or when payment becomes due.¹⁰

On calls by the court, the statute, according to the weight of authority, runs only from the date of the decree,¹¹ but there are decisions which hold that the

1. *Improper Issue of Stock to Others.* — *Swartwout v. Michigan Air Line R. Co.*, 24 Mich. 389.

2. *Receipt of Depreciated Currency in Payment of Subscriptions.* — *Macon, etc., R. Co. v. Vason*, 57 Ga. 314.

3. *Secret Agreement to Release Other Subscribers.* — *Armstrong v. Danahy*, 75 Hun (N. Y.) 405; *Wilson v. Hundley*, 96 Va. 96, 70 Am. St. Rep. 837.

4. *Making of Premature Contract.* — *Naugatuck Water Co. v. Nichols*, 58 Conn. 403, 31 Am. & Eng. Corp. Cas. 306.

5. *Taking of Invalid Subscriptions.* — *U. S. Vinegar Co. v. Foehrenbach*, 148 N. Y. 58. In this case the court said: "That is a question for the people to raise through their proper officers and in appropriate proceedings. The defendants cannot raise it."

6. *Violations of Charter.* — *Russell v. Alabama Midland R. Co.*, 94 Ga. 510.

7. *Impeachment of Corporate Existence.* — *American Homestead Co. v. Linigan*, 46 La. Ann. 1118.

8. *Nonpayment of Other Subscriptions.* — *Cook v. Hopkinsville, etc., Turnpike Road Co.*, (Ky. 1895) 32 S. W. Rep. 748,

9. *Subscriber May Plead Statute of Limitations.* — *Great Western Tel. Co. v. Purdy*, 162 U. S. 329; *Garrigue v. Arnott*, 80 Ill. App. 24.

10. *Time When Payment Due.* — *Taylor v. Glenn*, 4 U. S. App. 509, 51 Fed. Rep. 405; *Dorsheimer v. Glenn*, 4 U. S. App. 500, 51 Fed. Rep. 404; *Priest v. Glenn*, (C. C. A.) 51 Fed. Rep. 400; *Curry v. Woodward*, 53 Ala. 371; *West v. Topeka Sav. Bank*, (Kan. 1903) 72 Pac. Rep. 252; *Otter View Land Co. v. Bolling*, (Ky. 1902) 70 S. W. Rep. 834, 24 Ky. L. Rep. 1157; *Williams v. Taylor*, 120 N. Y. 244; *Athens Car, etc., Co. v. Elsbree*, 19 Pa. Super. Ct. 618; *Gold v. Paynter*, (Va. 1903) 44 S. E. Rep. 920.

Where Shares Have Been Assigned the statute runs from the date of the call and not the date of the assignment. *Priest v. Glenn*, (C. C. A.) 51 Fed. Rep. 400.

11. *Calls by the Court.* — *Hawkins v. Glenn*, 131 U. S. 319, 26 Am. & Eng. Corp. Cas. 318; *Morgan County v. Allen*, 103 U. S. 498; *Glenn v. Liggett*, 135 U. S. 533; *Glenn v. Semple*, 80 Ala. 150, 60 Am. Rep. 92; *Lehman v. Glenn*, 87 Ala. 618; *Glenn v. Howard*, 81 Ga. 383, 12 Am. St. Rep. 318; *Glenn v. Williams*, 60 Md. 95; *Vanderwerken v. Glenn*, 85 Va. 9.

liability accrues when the corporation ceases to do business, and that the statute begins to run from that time.¹

Where the Time for Payment Is Prescribed by Law, the statute of limitations runs, it has been held, from the time a default is made.²

Refusal to Pay the First of a Series of Calls is not such denial of liability upon the remainder as to set the statute running against them.³

(c) Effect of One Call Becoming Barred on Other Calls. — The statute runs only against the right to enforce calls made, not against the right to make calls for the unpaid portions of the stock when need therefor may arise. Hence the fact that the right to enforce a certain call has become barred by the statute of limitations does not prevent an action upon another call subsequently made.⁴

(d) What Law Governs. — The statute of the state where the corporation is organized governs.⁵

c. WAIVER AND ESTOPPEL — (1) *In General*. — A subscriber to the stock of a corporation may, by his acts or acquiescence, waive defenses which he might otherwise have set up in an action upon his subscription, or become estopped to deny his liability.⁶

(2) *Circumstances Showing Waiver* — (a) *Participation in Corporate Affairs*. — The active participation of a subscriber in the affairs of the corporation may operate as a waiver of defenses to an action on his subscription,⁷ particularly where he acts as an officer of the corporation.⁸ But mere election to corporate office, without serving, will not have this effect.⁹

1. *West v. Topeka Sav. Bank*, (Kan. 1903) 72 Pac. Rep. 252. See also *Glenn v. Dorsheimer*, 23 Fed. Rep. 695.

2. *Statute Running from Default*. — *West v. Topeka Sav. Bank*, (Kan. 1903) 72 Pac. Rep. 252.

3. *Dorsheimer v. Glenn*, (C. C. A.) 51 Fed. Rep. 404.

4. *Effect of One Call Becoming Barred*. — *Taylor v. Glenn*, 4 U. S. App. 509, 51 Fed. Rep. 405; *Dorsheimer v. Glenn*, 4 U. S. App. 500, 51 Fed. Rep. 404.

5. *Law of Corporation's Domicile Governs*. — *Glenn v. Liggett*, 135 U. S. 548. See also *Andrews v. Bacon*, 38 Fed. Rep. 777; *Butler v. Poole*, 44 Fed. Rep. 586.

6. *Waiver and Estoppel*. — *Auburn Opera-House, etc., Assoc. v. Hill*, (Cal. 1893) 32 Pac. Rep. 587; *Macfarland v. West Side Imp. Assoc.*, 56 Neb. 277; *Hards v. Platte Valley Imp. Co.*, 35 Neb. 263; *Perkiomen Brick Co. v. Dyer*, 13 Montg. Co. Rep. (Pa.) 111; *Ogden Clay Co. v. Harvey*, 9 Utah 497.

Waiver May Be Implied. — *Hanover Junction, etc., R. Co. v. Grubb*, 82 Pa. St. 36.

Subscription to Void Increase. — *Union R. Co. v. Sneed*, 99 Tenn. 1.

7. *Participation in Corporate Affairs* — *England*. — *Assur. Co. v. Ayscough*, 188 E. C. L. 761; *Tredwen v. Boulton*, 6 M. & W. 461; *Cromford v. Lacey*, 3 Y. & J. 30.

Connecticut. — *Barrows v. Natchaug Silk Co.*, 72 Conn. 658.

Georgia. — *Cole v. Dyer*, 29 Ga. 434.

Maryland. — *Stillman v. Dougherty*, 44 Md. 380; *Garling v. Baechtel*, 41 Md. 305; *Hager v. Cleveland*, 36 Md. 476.

Minnesota. — *Masonic Temple Assoc. v. Channell*, 43 Minn. 353.

Missouri. — *Central Plankroad Co. v. Clemens*, 16 Mo. 359; *Kirkwood Gymnasium, etc., Assoc. v. Van Ness*, 61 Mo. App. 361, 1 Mo. App. Rep. 625; *Newland Hotel Co. v. Wright*, 73 Mo. App. 240.

Nebraska. — *Macfarland v. West Side Imp. Assoc.*, 53 Neb. 417.

New York. — *United Growers Co. v. Eisner*, 22 N. Y. App. Div. 1.

Oregon. — *Willamette Freighting Co. v. Stannus*, 4 Oregon 261; *Nickum v. Burckhardt*, 30 Oregon 464, 60 Am. St. Rep. 822; *Fairview R. Co. v. Spillman*, 23 Oregon 587.

Pennsylvania. — *Erie, etc., Plank-Road Co. v. Brown*, 25 Pa. St. 156. See also *Shields v. Casey*, 155 Pa. St. 253, 35 Am. St. Rep. 879.

Utah. — *Ogden Clay Co. v. Harvey*, 9 Utah 497.

Virginia. — *West End Real Estate Co. v. Claiborne*, 97 Va. 734.

West Virginia. — *Greenbrier Industrial Exposition v. Squires*, 40 W. Va. 307, 52 Am. St. Rep. 884.

8. *Acting as Officer* — *England*. — *West Cornwall R. Co. v. Mowatt*, 15 Q. B. 521, 69 E. C. L. 521; *Dover, etc., R. Co.*, 1 Drew 247; *Sharp-ley v. Louth, etc., R. Co.*, 2 Ch. D. 665.

Connecticut. — *Lane v. Brainerd*, 30 Conn. 565; *Danbury, etc., R. Co. v. Wilson*, 22 Conn. 435.

Minnesota. — *Masonic Temple Assoc. v. Channell*, 43 Minn. 353.

Missouri. — *Kirkwood Gymnasium, etc., Assoc. v. Van Ness*, 61 Mo. App. 361, 1 Mo. App. Rep. 625.

Nebraska. — *Macfarland v. West Side Imp. Assoc.*, 53 Neb. 417; *American Bldg., etc., Assoc. v. Rainbolt*, 48 Neb. 434.

New York. — *United Growers Co. v. Eisner*, 22 N. Y. App. Div. 1; *Ruggles v. Brock*, 6 Hun (N. Y.) 164.

Ohio. — *Dayton, etc., R. Co. v. Hatch*, 1 Disney (Ohio) 84.

Pennsylvania. — *Pittsburgh, etc., R. Co. v. Proudfit*, 2 Pittsb. (Pa.) 85.

Tennessee. — *Lear v. S. K. Paige Lumber, etc., Co.*, (Tenn. Ch. 1897) 42 S. W. Rep. 808.

9. *Election Without Serving*. — *Ridgefield, etc., R. Co. v. Reynolds*, 46 Conn. 375.

(b) **Acquiescence.** — While mere silence is not necessarily a waiver,¹ a waiver may result from the subscriber's failure to refuse to take the stock,² or his holding himself out as a stockholder,³ or accepting dividends⁴ or other benefits of membership.⁵

(c) **Payment.** — Again, the stockholder may become estopped to deny his liability by making payment of his subscription in whole⁶ or in part,⁷ unless such payment was induced by fraud, misrepresentation, or the like,⁸ or was made under a mistaken belief that conditions had been complied with.⁹

(d) **Knowledge Necessary.** — In order that a subscriber's acts shall constitute a waiver of defenses, they must have been done with knowledge of the facts constituting the defense; he will not be estopped by his acts done before such knowledge was acquired, if he promptly disaffirms his subscription upon learning of the facts.¹⁰

13. Rescission of Contract — *a.* **FOR FRAUD OR FALSE REPRESENTATIONS.** — As a general rule a person who has been induced to subscribe to the stock of a corporation by fraud or false representations has a right to rescind his subscription and to recover back from the corporation the amount he has paid on his stock.¹¹

1. **Mere Silence Not a Waiver.** — *Burlington, etc., R. Co. v. Boestler*, 15 Iowa 555; *Bucksport, etc., R. Co. v. Brewer*, 67 Me. 295; *Hanover Junction, etc., R. Co. v. Grubb*, 82 Pa. St. 36.

2. **Failure to Refuse to Take Stock.** — *In re Joint Stock Co.'s Winding-up Acts*, 2 Kay & J. 253.

3. *Cheltenham, etc., R. Co. v. Daniel*, 2 Q. B. 281, 42 E. C. L. 675; *Birmingham, etc., R. Co. v. Locke*, 1 Q. B. 256, 41 E. C. L. 527.

4. **Acceptance of Dividends.** — *Barrows v. Natchaug Silk Co.*, 72 Conn. 658.

5. *Wadesboro Cotton Mills Co. v. Burns*, 114 N. Car. 353.

6. **Payment of Subscription in Full.** — *Parks v. Evansville, etc., Straight Line R. Co.*, 23 Ind. 567; *Kirkwood Gymnasium, etc., Assoc. v. Van Ness*, 61 Mo. App. 361, 1 Mo. App. Rep. 625; *Ossipee Hosiery, etc., Mfg. Co. v. Canney*, 54 N. H. 295; *Littleton Mfg. Co. v. Parker*, 14 N. H. 543; *New Hampshire Cent. R. Co. v. Johnson*, 30 N. H. 390, 64 Am. Dec. 300; *Contoocook Valley R. Co. v. Barker*, 32 N. H. 363.

7. **Part Payment of Subscription.** — *Hall v. Selma, etc., R. Co.*, 6 Ala. 741; *Klein v. Alton, etc., R. Co.*, 13 Ill. 514; *Kirkwood Gymnasium, etc., Assoc. v. Van Ness*, 61 Mo. App. 361, 1 Mo. App. Rep. 625; *Ogden Clay Co. v. Harvey*, 9 Utah 499; *West End Real Estate Co. v. Claiborne*, 97 Va. 734; *Greenbrier Industrial Exposition v. Squires*, 40 W. Va. 307, 52 Am. St. Rep. 884. See also *Hamilton v. Grangers' L., etc., Ins. Co.*, 67 Ga. 145; *Inter Mountain Pub. Co. v. Jack*, 5 Mont. 568, 6 Am. & Eng. Corp. Cas. 478; *Mississippi, etc., R. Co. v. Harris*, 36 Miss. 17.

Giving Promissory Note. — *Keller v. Johnson*, 11 Ind. 337, 71 Am. Dec. 355; *O'Donald v. Evansville, etc., Straight Line R. Co.*, 14 Ind. 259; *Evansville, etc., Straight-Line R. Co. v. Dunn*, 17 Ind. 603; *Slipher v. Earhart*, 83 Ind. 173; *Chamberlain v. Painesville, etc., R. Co.*, 15 Ohio St. 225.

8. **Fraud, etc.** — *Ridgefield, etc., R. Co. v. Brush*, 43 Conn. 86; *Jewett v. Lawrenceburgh, etc., R. Co.*, 10 Ind. 539; *Somerset, etc., R. Co. v. Cushing*, 45 Me. 524; *Oldtown, etc., R. Co. v. Veazie*, 39 Me. 571; *Grosse Isle Hotel Co. v.*

I'Anson, 43 N. J. L. 442; *Morris Canal, etc., Co. v. Nathan*, 2 Hall (N. Y.) 239; *Pittsburgh, etc., R. Co. v. Stewart*, 41 Pa. St. 54.

9. **Mistake.** — *Hawkins v. Citizens' Real Estate, etc., Co.*, 38 Oregon 544; *Birge v. Brown*, 11 Wash. 249.

10. **Knowledge Necessary.** — *Fairview R. Co. v. Spillman*, 23 Oregon 587; *Johnson v. Schar*, 9 S. Dak. 536; *Newport Cotton Mill Co. v. Mims*, 103 Tenn. 465; *West End Real Estate Co. v. Nash*, 51 W. Va. 341.

Delay in Repudiating a subscription on the ground of false representations as to the stock do not amount to a waiver where it was caused by proposed arrangements to make the actual issue of stock as represented. *West End Real Estate Co. v. Claiborne*, 97 Va. 734.

11. **Right to Rescind** — *United States*. — *Barcus v. Gates*, 89 Fed. Rep. 783, 32 C. C. A. 337; *Upton v. Englehart*, 3 Dill. (U. S.) 496, 28 Fed. Cas. No. 16,800; *Newton Nat. Bank v. Newbegin*, 74 Fed. Rep. 135, 40 U. S. App. 1; *Wallace v. Bacon*, 86 Fed. Rep. 553.

Colorado. — *Zang v. Adams*, 23 Colo. 408, 58 Am. St. Rep. 249.

Maryland. — *Wenstrom Consol. Dynamo, etc., Co. v. Purnell*, 75 Md. 113.

Missouri. — *Ramsey v. Thompson Mfg. Co.*, 116 Mo. 313.

New York. — *Mack v. Latta*, 83 N. Y. App. Div. 242; *Buker v. Leighton Lea Assoc.*, 63 N. Y. App. Div. 507; *Talmadge v. Sanitary Security Co.*, 31 N. Y. App. Div. 498.

Virginia. — *McClanahan v. Ivanhoe Land, etc., Co.*, 96 Va. 124.

Wisconsin. — *Franev v. Warner*, 96 Wis. 222. See generally the title RESCISSION, CANCELLATION, AND REFORMATION, vol. 24, p. 604.

False Representations Made by an Agent who procured subscriptions are sufficient to authorize a rescission, even though made without authority. *Talmadge v. Sanitary Security Co.*, 31 N. Y. App. Div. 498. See generally the title FRAUD AND DECEIT, vol. 14, p. 29. Compare *Lynde v. Anglo-Italian Hemp Spinning Co.*, (1896) 1 Ch. 178. in which case the fraud of a promoter not authorized to act for the corporation was held not a ground for rescission.

b. FRAUDULENT INTENT. — It has been held that in order to warrant the rescission of a stock subscription on account of misrepresentation there must be a false statement of fact made with fraudulent intent, which being believed and acted upon caused the damage.¹ But it has also been asserted that such an intent is not necessary, but it is sufficient if the representations are in fact false and calculated to induce the subscriber to take the stock.²

c. STATEMENTS AS TO FUTURE EVENT. — The rule is well settled that statements concerning the happening of a future event cannot be relied upon to avoid subscriptions obtained by an agent of a corporation. Relating, as they do, to the probability or improbability of the happening of a future event, they must necessarily be matters of opinion merely.³

d. DAMAGE. — It has been asserted that damage must have resulted to the stockholder in order to entitle him to rescind.⁴ But, on the other hand, it has been held that where a stockholder sues to rescind his subscription on the ground that it was induced by false representations, it is immaterial whether or not the stock was worth the amount that he subscribed for it.⁵

e. SUBSCRIBER MUST ACT PROMPTLY. — The right to rescind must be exercised promptly upon a discovery of the fraud or false representations, otherwise it may be lost.⁶ Thus, where a stockholder after discovery of the fraud has elected to retain his membership and to seek to obtain an adjustment of his rights as a member of the association, he cannot, after several years have elapsed, secure a cancellation of his subscription and recover back the money paid in.⁷

f. RATIFICATION. — A stockholder will not be permitted to disaffirm on the grounds of fraud after having, with full knowledge of the fraud, dealt with the subject-matter thereof under circumstances and to an extent that amount to a ratification.⁸

g. SURRENDER OF STOCK. — In the absence of evidence to the contrary, the stock is presumed to be of some value, and its surrender is a condition precedent to the right to rescind,⁹ but it has been held that the stock need not be tendered back where it had become absolutely worthless before the discovery of the fraud.¹⁰

h. INSOLVENCY OF CORPORATION. — There are obvious reasons why a shareholder of a corporation should not be released from his subscription to its capital stock after the insolvency of the company, and particularly after a proceeding has been inaugurated to liquidate its affairs, unless the case is one in which the stockholder has exercised due diligence, and in which no facts exist upon which corporate creditors can reasonably predicate an estoppel. When a corporation becomes bankrupt, the temptation to lay aside the garb of a stockholder, on one pretense or another, and to assume the rôle of a creditor, is very strong, and all attempts of that kind should be viewed with

1. *Fraudulent Intent.* — *Bartol v. Walton, etc.*, Co., 92 Fed. Rep. 13.

Knowledge of Falsity Necessary. — *Bartol v. Walton, etc.*, Co., 92 Fed. Rep. 13.

2. *Talmadge v. Sanitary Security Co.*, 31 N. Y. App. Div. 498.

3. *Statements as to Future Event.* — *Jefferson v. Hewitt*, 95 Cal. 535. And see generally the title *FRAUD AND DECEIT*, vol. 14, p. 39.

4. *Damage.* — *Bartol v. Walton, etc.*, Co., 92 Fed. Rep. 13; *American Bldg., etc., Assoc. v. Bear*, 48 Neb. 455.

5. *Mack v. Latta*, 83 N. Y. App. Div. 242.

6. *Subscriber Must Act Promptly.* — *Upton v. Englehart*, 3 Dill. (U. S.) 496, 28 Fed. Cas. No. 16,800; *Newton Nat. Bank v. Newbegin*, 74 Fed. Rep. 135, 40 U. S. App. 1; *Wallace v. Bacon*, 86 Fed. Rep. 553; *Barcus v. Gates*, 89 Fed. Rep. 783, 32 C. C. A. 337; *Bartol v. Wal-*

ton, etc., Co., 92 Fed. Rep. 13; *Wenstrom Consol. Dynamo, etc., Co. v. Purnell*, 75 Md. 113; *Acetylene Light, etc., Co. v. Smith*, 10 Pa. Super. Ct. 61, 44 W. N. C. (Pa.) 86; *Martin v. South Salem Land Co.*, 94 Va. 28. See also *Painesville Nat. Bank v. King Varnish Co.*, 4 Ohio Cir. Dec. 511, 8 Ohio Cir. Ct. 563.

7. *Buker v. Leighton Lea Assoc.*, 63 N. Y. App. Div. 507. See also *Weisiger v. Richmond Ice Mach. Co.*, 90 Va. 795.

8. *Ratification.* — *Marten v. Paul O'Burns Wine Co.*, 99 Cal. 355; *Wilson v. Hundley*, 96 Va. 96, 70 Am. St. Rep. 837. See also *Franey v. Wauwatosa Park Co.*, 99 Wis. 46.

9. *Surrender of Stock.* — *Building, etc., Assoc. v. Cameron*, 48 Neb. 124.

10. *Zang v. Adams*, 2 Colo. 408, 58 Am. St. Rep. 249.

suspicion. If a considerable period of time has elapsed since the subscription was made; if the subscriber has actively participated in the management of the affairs of the corporation; if there has been any want of diligence on the part of the stockholder, either in discovering the alleged fraud, or in taking steps to rescind when the fraud was discovered; and, above all, if any considerable amount of corporate indebtedness has been created since the subscription was made, which is outstanding and unpaid — in all of these cases the right to rescind should be denied, where the attempt is not made until the corporation becomes insolvent. But if none of these conditions exist, and the proof of the alleged fraud is clear, a stockholder should be permitted to rescind his subscription as well after as before the company ceases to be a going concern.¹

XII. RIGHTS, POWERS, AND PREROGATIVES OF STOCKHOLDERS IN GENERAL —

1. General Rights. — The principal rights of stockholders in ordinary business or trading corporations are to attend and vote at corporate meetings, to take part in the election of officers,² to participate in dividends and profits, and to receive their proportionate shares of the corporate property or its proceeds upon dissolution or winding up of the corporation, and after payment of its debts.³ Other rights which they may possess are, for the most part, merely incidental and auxiliary to the foregoing.⁴

1. Insolvency of Corporation. — *Newton Nat. Bank v. Newbegin*, 74 Fed. Rep. 135, 40 U. S. App. 1; *Wallace v. Bacon*, 86 Fed. Rep. 553. See also *Upton v. Englehart*, 3 Dill. (U. S.) 496, 28 Fed. Cas. No. 16,800; *Ramsey v. Thompson Mfg. Co.*, 116 Mo. 313; *Farrar v. Walker*, 3 Dill. (U. S.) 506, note, 8 Fed. Cas. No. 4,679; *Upton v. Tribilcock*, 91 U. S. 45; *Ogilvie v. Knox Ins. Co.*, 22 How. (U. S.) 380; *Michener v. Payson*, 17 Fed. Cas. No. 9,525; *Duffield v. E. T. Barnum Wire, etc., Works*, 64 Mich. 293; *Turner v. Grangers L., etc., Ins. Co.*, 65 Ga. 649, 38 Am. Rep. 801; *Ruggles v. Brock*, 6 Hun (N. Y.) 164; *Hurd v. Kelly*, 78 N. Y. 588, 34 Am. Rep. 567; *Howard v. Turner*, 155 Pa. St. 349, 35 Am. St. Rep. 883. In all of these cases the evidence showed that there had been either some lack of diligence on the part of the stockholder in discovering the fraud of which he complained, or unreasonable delay in asserting his rights after the discovery of the fraud, or active participation in the management of the corporation, or that debts had been contracted by the corporation, subsequent to the subscription, which either gave to corporate creditors superior equitable rights, or estopped the shareholder, as against a corporate creditor, from asserting that he was not a shareholder. *Newton Nat. Bank v. Newbegin*, (C. C. A.) 74 Fed. Rep. 135.

Contrary Rule in England. — It has become the settled rule in England that a suit to rescind a stock subscription on the ground of fraud cannot be maintained by a stockholder, no matter what diligence he may have shown, after proceedings have been taken to liquidate the affairs of the corporation on the ground of its insolvency, inasmuch as the rights of creditors of the corporation, both as against the corporation and those who are registered shareholders, then become superior to the rights of the defrauded shareholder. *Oakes v. Turquand*, L. R. 2 H. L. 325; *Stone v. City, etc., Bank*, 3 C. P. D. 282; *In re London, etc., Bank*, L. R. 7 Ch. 60; *Kent v. Freehold Land, etc., Co.*, L. R. 3 Ch. 493.

2. Participation in Corporate Meetings and Elections. — *Storrow v. Texas Consol. Compress, etc., Assoc.*, (C. C. A.) 87 Fed. Rep. 615; *Fisher v. Essex Bank*, 5 Gray (Mass.) 377. And see *infra*, this title, *Stockholders' Meetings*.

3. Participation in Dividends and in Final Division of Property. — *Storrow v. Texas Consol. Compress, etc., Assoc.* (C. C. A.) 87 Fed. Rep. 612; *Commercial F. Ins. Co. v. Board of Revenue*, 99 Ala. 4; *Fisher v. Essex Bank*, 5 Gray (Mass.) 377; *Smith v. Hurd*, 12 Met. (Mass.) 371, 46 Am. Dec. 690; *Jones v. Concord, etc., R. Co.*, 67 N. H. 119; *Plimpton v. Bigelow*, 93 N. Y. 592; *Jermain v. Lake Shore, etc., R. Co.*, 91 N. Y. 483; *Budd v. Multnomah St. R. Co.*, 12 Oregon 274, 53 Am. Rep. 355; *Neiler v. Kelley*, 69 Pa. St. 403; *Brightwell v. Mallory*, 10 Yerg. (Tenn.) 196.

Further as Regards the Right to Dividends, see the title *DIVIDENDS*, vol. 9, p. 679.

Members of Corporations Which Have No Capital Stock, such as volunteer fire companies and incorporated military companies, have no right to share in the corporate property or its proceeds upon dissolution of the corporation. *Cummings v. Hillis*, 108 Ga. 402; *Mason v. Atlanta F. Co. No. 1*, 70 Ga. 604, 48 Am. Rep. 585.

A Person Who Owns an Equitable Interest in the Stock of a corporation, arising from the failure of the corporation to issue stock to him in accordance with an agreement whereby he was to receive stock in exchange for property which he had conveyed to the company, is entitled, upon a sale of such property and the practical dissolution of the corporation, to his proportionate share of the proceeds. *Pendery v. Carleton*, (C. C. A.) 87 Fed. Rep. 41.

4. Other Rights Merely Incidental or Auxiliary. — In *Forbes v. Memphis, etc., R. Co.*, 2 Woods (U. S.) 331, the court said: "The rights of a stockholder are, to meet at stockholders' meetings, to participate in the profits of the business, and to require that the corporate property and funds shall not be diverted from their original purpose. If the company become insolvent, it is the right of the stockholders to

Members of Corporations Formed for Special Purposes, such as building and loan associations,¹ irrigation companies,² press associations,³ volunteer fire companies,⁴ and incorporated military companies, may, of course, have other rights peculiar to membership in such organizations.⁵

Rights of Preferred Stockholders. — Aside from priority of dividends the rights of preferred stockholders are in general, and in the absence of stipulations to the contrary, the same as those of holders of common stock.⁶

2. Rights as Regards Corporate Property. — A stockholder has no legal title to the corporate property, or to any separate part thereof, until a division is made on the winding up or dissolution of the corporation;⁷ and prior to that time he has no right to take any of the corporate property for his own purposes.⁸ Nor can he compel the corporation to accept a surrender of his shares and pay him their value from its general assets.⁹

have the property applied to the payment of its debts. I do not know of any other rights, except incidental ones, subsidiary or auxiliary to these. Of course, a stockholder has ordinarily a right to a certificate for his stock, to transfer it on the company's books, and to inspect these books. For the invasion of these rights by the officers of the company he may sue at law, or in equity, according to the nature of the case."

Rights as Regards Formation of By-laws. — In *Storrow v. Texas Consol. Compress, etc., Assoc.*, (C. C. A.) 87 Fed. Rep. 615, it is said that the shareholders of a corporation are entitled to participate in the formation of by-laws. But see *Com. v. Cullen*, 13 Pa. St. 133, in which case there is a dictum to the effect that the right of enacting by-laws belongs to the officers or managers of the corporation.

Right of Majority Stockholder to Have Receiver Appointed. — See *Chafee v. Quidnick Co.*, 14 R. I. 75.

Stockholder May Sue in Equity to Establish Rights. — *Gowdy Gas Well, etc., Co. v. Patterson*, 29 Ind. App. 261. And see *infra*, this title, *Rights and Remedies of Minority Stockholders*.

1. Rights of Members in Building and Loan Associations. — See the title BUILDING AND LOAN ASSOCIATIONS, vol. 4, p. 999, and also *Miller v. Eastern Bldg., etc., Assoc.*, (Tenn. Ch. 1899) 53 S. W. Rep. 231.

2. Rights of Members in Irrigation Companies. — Each stockholder in an irrigation company is entitled to water in proportion to the amount of his stock. *Rocky Ford Canal, etc., Co. v. Simpson*, 5 Colo. App. 30. And see *Knowles v. Clear Creek, etc., Mill, etc., Co.*, 18 Colo. 209. And consult the title IRRIGATION, vol. 17, p. 522 *et seq.*

3. Rights of Members in Press Associations. — See *Matthews v. Associated Press*, 136 N. Y. 333, 32 Am. St. Rep. 741.

4. Rights of Members of Volunteer Fire Company. — See *Mason v. Atlanta F. Co.* No. 1, 70 Ga. 604, 48 Am. Rep. 585. And consult the title FIRE DEPARTMENT, vol. 13, p. 73.

5. Rights of Members of Incorporated Military Company. — See *Cummings v. Hollis*, 108 Ga. 402.

6. Rights of Preferred Stockholders. — *Jones v. Concord, etc., R. Co.*, 67 N. H. 119, 234, 68 Am. St. Rep. 650. See also *Elkins v. Camden, etc., R. Co.*, 36 N. J. Eq. 233; *St. John v. Erie R. Co.*, 22 Wall. (U. S.) 136. And see *supra*, this title, *Kinds of Stock — Preferred or Guaranteed Stock*.

Rights Dependent upon Terms of Contract. — *Storrow v. Texas Consol. Compress, etc., Assoc.*, (C. C. A.) 87 Fed. Rep. 612.

Right to Share in Property upon Dissolution. — Upon the dissolution of a corporation and the distribution of its assets, preferred stockholders have no priority over common stockholders unless such priority has been expressly contracted for. *Jones v. Concord, etc., R. Co.*, 67 N. H. 119.

Relative Rights of Preferred and Common Stockholders as Regard Dividends. — See the title DIVIDENDS, vol. 9, p. 73.

Right of Preferred Stockholders to Vote. — See *infra*, this title, *Stockholders' Meetings*.

7. Corporate Property Not the Property of Stockholders. — *Forbes v. Memphis, etc., R. Co.*, 2 Woods (U. S.) 331; *Storrow v. Texas Consol. Compress, etc., Assoc.*, (C. C. A.) 87 Fed. Rep. 615; *Smith v. Hurd*, 12 Met. (Mass.) 371, 46 Am. Dec. 690; *Elkins v. Camden, etc., R. Co.*, 36 N. Y. Eq. 233; *Plimpton v. Bigelow*, 93 N. Y. 592; *Jermain v. Lake Shore, etc., R. Co.*, 91 N. Y. 483; *Jones v. Terre Haute, etc., R. Co.*, 57 N. Y. 196; *Grobe v. Erie County Mut. Ins. Co.*, 39 N. Y. App. Div. 183; *Mickles v. Rochester City Bank*, 11 Paige (N. Y.) 118, 42 Am. Dec. 103.

No Interest Subject to Mortgage. — A stockholder has no interest in the corporate property which he can mortgage. *Humphreys v. McKissock*, 140 U. S. 312.

Land Granted to Corporation. — A grant of land to a corporation, with power to make contracts in reference thereto for the purpose of accomplishing corporate purposes, is not a grant to the original corporators in the proportion in which they have subscribed for stock in the company organized. The title vests in the company for the purpose of accomplishing the end and object of its creation, and not in the individual stockholder, in the proportion that his shares bear to the whole stock, for his private benefit and disposal. *Brown v. Florida Southern R. Co.*, 19 Fla. 472.

Interest Closely Akin to Ownership. — *State v. Whited*, 104 La. 125.

8. No Right to Take Corporate Property for Private Purposes. — *Boynton v. Roe*, 114 Mich. 401.

9. No Right to Compel Corporation to Accept Surrender of Shares. — *Mayfield v. Alton R. etc., Co.*, 100 Ill. App. 614, affirmed 198 Ill. 528.

A By-law of a College Corporation providing that the stock of any teacher leaving the college

3. Participation in Management of Corporation. — Direct participation in the management of corporate affairs is not a right which stockholders, as such, can claim;¹ that right belongs to the ministerial officers of the corporation, and during their terms their plans will not be interfered with, even by the courts, merely to suit different views of the stockholders as to corporate policy.²

4. Rights as Creditors of Corporation. — Stockholders, as such, are not creditors of their corporation;³ but there is no principle of law which prohibits them from becoming creditors by virtue of independent dealings with the company.⁴ Thus a stockholder who has advanced money to his corporation has the same right as an outsider to demand and enforce repayment,⁵ unless it is shown that the money advanced was in the nature of a voluntary contribution or assessment, and not a loan.⁶

5. Sharing in Distribution of New Stock — *a. IN GENERAL.* — Those who are shareholders when an increase of capital stock is effected enjoy the right to subscribe to the new stock in proportion to their original holdings, and before subscriptions may be received from outsiders.⁷ This right may be

shall be purchased and held for the use of his successor, before the vacant chair shall be occupied by any teacher, provided the retiring teacher is willing to sell, does not render it obligatory upon the corporation to purchase stock held by a third person for the use of a retiring teacher. *St. John v. College of Physicians, etc.*, 54 Ill. App. 663.

1. No Right to Direct Participation in Corporate Management. — *Smith v. Hurd*, 12 Met. (Mass.) 371, 46 Am. Dec. 690; *Monroe Dairy Assoc. v. Webb*, 40 N. Y. App. Div. 49.

In *Com. v. Cullen*, 13 Pa. St. 133, 53 Am. Dec. 450, it is said: "Corporate powers are usually distinguished into legislative, electoral, and administrative; in private corporations aggregate, though sometimes all the members act immediately in the administration of its affairs, usually, for the sake of convenience, the direct management is intrusted by the charter to certain officers, or board of managers, elected by the members at large, though deriving their ordinary powers from the act of incorporation. These officers exercise the legislative and administrative functions; the former in the institution of by-laws for the general government of the company, the latter in the superintendence and execution of its general business."

Stockholders Authorized by Statute to Make Lease of Corporate Property. — *Jones v. Concord, etc.*, R. Co., 67 N. H. 234, 68 Am. St. Rep. 650.

2. Officers and Directors Entitled to Manage Corporate Business. — *Union Mut. F. Ins. Co. v. Keyser*, 32 N. H. 313, 64 Am. Dec. 375; *Conro v. Port Henry Iron Co.*, 12 Barb. (N. Y.) 27; *McCullough v. Moss*, 5 Den. (N. Y.) 567; *Com. v. Roman Catholic Soc.*, 6 S. & R. (Pa.) 508; *Dana v. U. S. Bank*, 5 W. & S. (Pa.) 223.

And see *infra*, this title, *Rights and Remedies of Minority Stockholders* — *In General*.

No Right to Control Subscriptions to Stock. — *Brown v. Florida Southern R. Co.*, 19 Fla. 472.

3. Stockholders, as Such, Not Creditors of Corporation. — *St. John v. Erie R. Co.*, 22 Wall. (U. S.) 136; *State v. Whited*, 104 La. 125; *Elkins v. Camden, etc., R. Co.*, 36 N. J. Eq. 233. And see the title *DIVIDENDS*, vol. 9, p. 73.

It seems that the acceptance of certificates of

stock by the stockholders of a corporation, in lieu of any interest or shares in land conveyed to the corporation, precludes them from claiming the proceeds of a sale of such land, as against the creditors of the company. *McClintock v. Bourbon County Agricultural Soc.*, (Ky. 1899) 49 S. W. Rep. 23.

4. Stockholders May Become Creditors of Corporation. — *Merrick v. Peru Coal Co.*, 61 Ill. 472; *Legendre v. New Orleans Brewing Assoc.*, 45 La. Ann. 669, 40 Am. St. Rep. 243; *Kingman v. Cornell-Tebbetts Mach., etc.*, Ca. 150 Mo. 282.

5. Stockholder Entitled to Recover Back Money Loaned to Corporation. — *Merrick v. Peru Coal Co.*, 61 Ill. 472; *Burke v. Sidra Bay Co.*, 116 Wis. 137.

Right to Sell Corporate Property for Payment of Claims. — For circumstances under which it was held that the owner of a half interest in a corporation had the right to sell all the corporate property and apply a part of the proceeds to payment of his own claims against the corporation, see *Doyle v. Leitelt*, 97 Mich. 298.

6. No Right to Recover Back Voluntary Contribution or Assessment. — *Farrar v. Pneumatic Gate Co.*, 88 Ill. App. 498; *Bidwell v. Pittsburgh, etc., Pass. R. Co.*, 114 Pa. St. 535.

7. Pre-emptive Right to Proportionate Share of New Stock. — *Colorado.* — *Crosby v. Stratton*, (Colo. App. 1902) 68 Pac. Rep. 130.

Illinois. — *Eidman v. Bowman*, 58 Ill. 444, 11 Am. Rep. 90.

Maryland. — *Real Estate Trust Co. v. Bird*, 90 Md. 229.

Massachusetts. — *Gray v. Portland Bank*, 3 Mass. 364, 3 Am. Dec. 156; *Atkins v. Albree*, 12 Allen (Mass.) 359. And see *Mason v. Davol Mills*, 132 Mass. 76.

Michigan. — *Hammond v. Edison Illuminating Co.*, (Mich. 1902) 90 N. W. Rep. 1040.

Minnesota. — *Jones v. Morrison*, 31 Minn. 140.

Nebraska. — *Humboldt Driving Park Assoc. v. Stevens*, 34 Neb. 528, 33 Am. St. Rep. 654.

New Hampshire. — *Jones v. Concord, etc., R. Co.*, 67 N. H. 119, 234, 68 Am. St. Rep. 650.

New Jersey. — *Way v. American Grease Co.*, 60 N. J. Eq. 263.

Pennsylvania. — *Electric Co. v. Edison Elec-*

curtailed by charter provisions,¹ or limited as to the time within which it is to be exercised;² but the directors cannot deprive a stockholder of such right,³ or burden it with conditions unauthorized by the charter,⁴ as by confining it to stockholders who are not in arrears on the shares already taken by them;⁵ nor can a bonus or premium be exacted as a condition of its exercise.⁶ But a mere vote to increase the stock of a corporation does not give a stockholder any vested right to new shares so as to prevent the corporation from subsequently rescinding the same.⁷

b. RULE AS TO STOCK UNTAKEN, REISSUED, OR ISSUED FOR PROPERTY PURCHASED. — The stockholder also has a pre-emptive right to subscribe for his proportionate share of a subsequent issue of stock which was untaken, and therefore unissued, at the time of the incorporation;⁸ but he has no such right as regards reissued stock,⁹ or as regards new stock issued for the purchase of property which will become a part of the common property of the corporation and from which each shareholder will receive the same benefit as his associates.¹⁰

c. WHO MAY EXERCISE RIGHT. — The right here considered belongs

tric Illuminating Co., 200 Pa. St. 516; *Morris v. Stevens*, 178 Pa. St. 563.

Texas. — *Bonnet v. Eagle Pass. First Nat. Bank*, 24 Tex. Civ. App. 613.

Vermont. — *State v. Smith*, 48 Vt. 266, 33 Am. Rep. 811.

Wisconsin. — *Dousman v. Wisconsin, etc., Min., etc., R. Co.*, 40 Wis. 418.

Reasons for Rule. — See *Gray v. Portland Bank*, 3 Mass. 364, 3 Am. Dec. 156; *Humboldt Driving Park Assoc. v. Stevens*, 34 Neb. 528, 33 Am. St. Rep. 654; *Jones v. Concord, etc., R. Co.*, 67 N. H. 119; *Meredith v. New Jersey Zinc, etc., Co.*, 55 N. J. Eq. 211.

Evidence Held Insufficient to Show Increase of Stock. — *Einstein v. Rochester Gas, etc., Co.*, 146 N. Y. 46.

Common and Preferred Stockholders Have an Equal Right to share in the distribution of new stock, unless otherwise stipulated. *Jones v. Concord, etc., R. Co.*, 67 N. H. 119.

Stockholders Unable to Take New Shares Cannot Object. — *Grobe v. Erie County Mut. Ins. Co.*, 39 N. Y. App. Div. 183. And see *Jones v. Concord, etc., R. Co.*, 67 N. H. 234, 68 Am. St. Rep. 650.

1. Right May Be Qualified by Charter. — *Real Estate Trust Co. v. Bird*, 90 Md. 229.

Directors Authorized by Charter to Determine Method of Distribution. — A charter provision that the directors shall have power to increase the stock on such terms and conditions and in such manner as to them shall seem best, deprives a stockholder of his pre-emptive right to a *pro rata* share in the increased stock where the directors decide upon another method of distribution. *Ohio Ins. Co. v. Nunnemacher*, 15 Ind. 294.

2. Right May Be Limited as to Time of Exercise. — *Hart v. St. Charles St. R. Co.* 30 La. Ann. 758; *Sewall v. Eastern R. Co.*, 9 Cush. (Mass.) 5; *Grobe v. Erie County Mut. Ins. Co.*, 39 N. Y. App. Div. 183; *Pearson v. London, etc., R. Co.*, 14 Sim. 541.

3. Directors Cannot Deprive Stockholders of Right. — *Electric Co. v. Edison Electric Illuminating Co.*, 200 Pa. St. 516.

4. Directors Cannot Burden Right with Unauthorized Conditions — *Hammond v. Edison Illuminating Co.*, (Mich. 1902) 90 N. W. Rep. 1040.

5. Right Cannot Be Confined to Stockholders Not in Arrears — *Rees v. Montgomery County Bank*, 31 Pa. St. 78, 72 Am. Dec. 726.

Set-off Debts of Stockholder. — Where a corporation is reorganized, and new stock is issued, a provision in the resolutions for reorganization that stockholders who are indebted to the corporation and who fail to pay their debts within a certain time shall only be entitled to receive new stock equal in amount to the balance of their original holdings, over and above their unpaid debts to the company, is valid and enforceable. *Reading Trust Co. v. Reading Iron Works*, 137 Pa. St. 282.

6. No Power to Exact Bonus or Premium. — *Hammond v. Edison Illuminating Co.*, (Mich. 1902) 90 N. W. Rep. 1040; *Cunningham's Appeal*, 108 Pa. St. 546.

7. Vote to Increase Stock Not an Increase Per Se. — *Terry v. Eagle Lock Co.*, 47 Conn. 141.

8. Rule Applicable to Untaken Stock. — *Crosby v. Stratton*, (Colo. App. 1902) 68 Pac. Rep. 130; *Eidman v. Bowman*, 58 Ill. 444, 11 Am. Rep. 90; *Morris v. Stevens*, 17 Pa. Co. Ct. 209, *distinguishing* *Curry v. Scott*, 54 Pa. St. 270, and *following* *Reese v. Montgomery County Bank*, 31 Pa. St. 78, 72 Am. Dec. 726. And see *Montgomery Bank v. Reese*, 26 Pa. St. 143.

No Rule of Equality as Between Original Incorporators. — There is no rule of law which entitles all of the original incorporators of a corporation to the same number of shares. *Brown v. Florida Southern R. Co.*, 19 Fla. 472.

9. No Pre-emptive Right as Regards Reissued Stock. — *Crosby v. Stratton*, (Colo. App. 1902) 68 Pac. Rep. 130; *Hartridge v. Rockwell, R. M. Charl.* (Ga.) 260; *Bonnet v. Eagle Pass First Nat. Bank*, 24 Tex. Civ. App. 613; *State v. Smith*, 48 Vt. 266, 33 Am. Rep. 811.

Real Nature of Stock Decisive. — The fact that the corporate officers report certain stock as unissued does not give the shareholder any pre-emptive right where it is, in fact, reissued stock. *Crosby v. Stratton*, (Colo. App. 1902) 68 Pac. Rep. 130.

10. Stock Issued for Purchase of Property. — *Meredith v. New Jersey Zinc, etc., Co.*, 55 N. J. Eq. 211 (*affirmed* without opinion 56 N. J. Eq. 454); *Bonnet v. Eagle Pass First Nat. Bank*, 24 Tex. Civ. App. 613.

only to actual shareholders, and does not extend to executory purchasers of stock,¹ or to holders of notes convertible into shares at a date subsequent to the increase of stock,² or to subscribers who have transferred their stock before the increase.³ But a *bona fide* holder of stock, who is entitled to a transfer on the books of the company, cannot be deprived of his right to share in an increase of stock by the wrongful refusal of the company to make the transfer.⁴

Right as Between Life-tenant and Remainderman.—As between the life-tenant and remainderman of a trust fund in stock, the proceeds of a sale of the right to share in the distribution of new stock are to be treated as capital.⁵

d. WAIVER OF RIGHT.—The stockholder may, of course, waive his right to share in the distribution of new stock.⁶ And such a waiver will be implied where the right is not asserted within a fixed or reasonable time.⁷ But an agreement signed by a stockholder, before any increase of stock has been voted, by which he waives his right to share in a contemplated increase, is not binding upon a person who afterwards purchases his stock without notice thereof.⁸

Effect of Waiver upon Right to Premiums.—A stockholder who does not avail himself of the right to take his proportionate share of new stock is not entitled to receive premiums realized upon the sale of such stock to other parties, unless this right is given to him by statute or by vote of the stockholders.⁹

e. SALE OF RIGHT.—The right here considered may be sold by the stockholder;¹⁰ and hence a resolution which requires him to buy the new stock at par or sell his right to buy it at that price does not constitute an infringement of his rights.¹¹

f. REMEDIES FOR VIOLATION OF RIGHT—(1) *Suit in Equity or Action for Damages.*—An attempt to deprive the stockholder of his right to a proportionate share of new stock may be enjoined in equity;¹² or, if the wrong

1. **Executory Purchaser Not Entitled to Right.**—*Miller v. Illinois Cent. R. Co.*, 24 Barb. (N. Y.) 312.

Vendor Not Required to Advance Money to Preserve Right to Vendee.—*Currie v. White*, 45 N. Y. 822.

2. **Holders of Note Convertible into Shares Not Within Rule.**—*Pratt v. American Bell Telephone Co.*, 141 Mass. 225, 55 Am. Rep. 465.

3. **Subscriber Who Has Transferred Stock Before Increase.**—*Real Estate Trust Co. v. Bird*, 90 Md. 229.

4. **Corporation Cannot Defeat Right by Wrongful Refusal to Transfer.**—*Real Estate Trust Co. v. Bird*, 90 Md. 229.

5. **Proceeds of Sale of Right Treated as Capital.**—*Atkins v. Albree*, 12 Allen (Mass.) 359; *Biddle's Appeal*, 99 Pa. St. 278.

Privilege Appurtenant to Capital.—As between the life-tenant and remainderman of an estate in stock, a privilege given by the corporation to subscribe to additional stock at par belongs to the latter, as appurtenant to the capital. *Hite v. Hite*, 93 Ky. 257, 40 Am. St. Rep. 189.

6. **Stockholder May Waive Right.**—*Eidman v. Bowman*, 58 Ill. 444, 11 Am. Rep. 90; *Hammond v. Edison Illuminating Co.*, (Mich. 1902) 90 N. W. Rep. 1040.

While in general the present holders of stock have a primary right to subscribe in proportion to their holdings for any new issue, the stockholders themselves may determine otherwise and order a sale to the public and payment of the proceeds into the treasury. But this is exceptional and the exercise of a reserve power

which should not be permitted unless there is a clear intent of the stockholders to do so. *Morris v. Stevens*, 178 Pa. St. 578.

7. **Right Waived by Delay.**—*Crosby v. Stratton*, (Colo. App. 1902) 68 Pac. Rep. 130; *Terry v. Eagle Lock Co.*, 47 Conn. 141; *Hammond v. Edison Illuminating Co.*, (Mich. 1902) 90 N. W. Rep. 1040; *Bonnet v. Eagle Pass First Nat. Bank*, 24 Tex. Civ. App. 613; *Pearson v. London, etc., R. Co.*, 14 Sim. 541.

8. **When Vendee Is Not Bound by Waiver of Vendor.**—*Real Estate Trust Co. v. Bird*, 90 Md. 229.

9. **Right to Premiums Lost by Waiver.**—*Mason v. Davol Mills*, 132 Mass. 76.

10. **Right May Be Sold by Stockholder.**—*Hammond v. Edison Illuminating Co.*, (Mich. 1902) 90 N. W. Rep. 1040; *Jones v. Concord, etc., R. Co.*, 67 N. H. 234, 68 Am. St. Rep. 650.

11. **Resolution Requiring Stockholder to Buy at Par, or Sell Right, Valid.**—*Jones v. Concord, etc., R. Co.*, 67 N. H. 234, 68 Am. St. Rep. 650; *Grobe v. Erie County Mut. Ins. Co.*, 39 N. Y. App. Div. 183.

12. **Suit in Equity.**—*Hammond v. Edison Illuminating Co.*, (Mich. 1902) 90 N. W. Rep. 1040; *Electric Co. v. Edison Electric Illuminating Co.*, 200 Pa. St. 516; *Bonnet v. Eagle Pass First Nat. Bank*, 24 Tex. Civ. App. 613; *Dousman v. Wisconsin, etc., Min., etc., Co.*, 40 Wis. 418.

The Remedy at Law Is Inadequate and Partially Inequitable, as plaintiffs would in effect be taking out of their own pockets part of the damages recovered because their own stock would be

has been accomplished, he may recover damages by an action at law.¹

Suit to Enjoin Voting of Stock Wrongfully Acquired. — Stockholders who have wrongfully obtained more than their proportionate share of the increased stock may be enjoined from voting the same, at the suit of a stockholder who has not been afforded an opportunity to subscribe,² but the stock will not be canceled where the corporation has received the benefit of the payment therefor.³

(2) *Mandamus to Compel Issuance of Shares.* — It has been held that the issuance of shares of new stock to which a stockholder is entitled may be compelled by mandamus.⁴

(3) *Demand for Shares and Offer to Subscribe as Conditions Precedent.* — A stockholder who brings his action against the corporation for damages for refusal to allow him to subscribe for new shares, or for depriving him of them in any other way, must allege and prove that he demanded the shares and offered to subscribe and pay for them in the regular way within the time fixed for such subscriptions.⁵

(4) *Measure of Damages.* — The measure of damages is the excess of the market value of the stock above the par value, with legal interest on such excess.⁶

diminished in value by reason of the amount paid out of the corporation treasury in the form of damages. *Morris v. Stevens*, 17 Pa. Co. Ct. 209.

Each Stockholder Required to Sue in His Own Right. — *Dousman v. Wisconsin, etc., Min., etc., Co.*, 40 Wis. 418.

A Suit in Equity Cannot Be Maintained where it is not shown that the corporation is not of sufficient responsibility to answer an action at law for damages. *Meredith v. New Jersey Zinc, etc., Co.*, 55 N. J. Eq. 211, 56 N. J. Eq. 454. And see *Sewall v. Eastern R. Co.*, 9 Cush. (Mass.) 5, holding that a court of equity has no jurisdiction to compel a conveyance of the stock to which the stockholder is entitled.

A Stockholder Cannot Have an Issue of New Stock Enjoined upon the ground that the proposed method of distribution is not the most advantageous which might have been adopted as regards his own interests, where it appears that such distribution will be advantageous to the stockholders generally. *Jones v. Concord, etc., R. Co.*, 67 N. H. 234, 68 Am. St. Rep. 650.

1. Action at Law for Damages. — *Eidman v. Bowman*, 58 Ill. 444, 11 Am. Rep. 90; *Gray v. Portland Bank*, 3 Mass. 364, 3 Am. Dec. 156; *Meredith v. New Jersey Zinc, etc., Co.*, 55 N. J. Eq. 211, 56 N. J. Eq. 454; *Reading Trust Co. v. Reading Iron Works*, 137 Pa. St. 282; *Reese v. Montgomery County Bank*, 31 Pa. St. 78, 72 Am. Dec. 726; *Dousman v. Wisconsin, etc., Min., etc., Co.*, 40 Wis. 418.

Stock Sold to Bona Fide Purchaser Without Notice. — Where the share of new stock rightfully belonging to a stockholder is sold by the corporation to a bona fide purchaser without notice, the only remedy of the stockholder is by an action for damages against the corporation. *Eidman v. Bowman*, 58 Ill. 444, 11 Am. Rep. 90.

Trover — Proof of Demand and Injury. — In *Crosby v. Stratton*, (Colo. App. 1902) 68 Pac. Rep. 130, an action in the nature of trover, brought by one stockholder against another, on the ground that the latter had wrongfully procured more than his share of an issue of new

stock, was dismissed for failure of proof that the plaintiff had ever demanded his share of the new stock, and upon proof that the amount of such stock still remaining in the treasury was in excess of the amount to which the plaintiff was entitled.

2. Suit to Enjoin Voting of Stock Wrongfully Acquired. — *Way v. American Grease Co.*, 60 N. J. Eq. 263; *Morris v. Stevens*, 178 Pa. St. 563, 17 Pa. Co. Ct. 209.

3. Stock Not Canceled Where Consideration Has Been Paid. — *Morris v. Stevens*, 178 Pa. St. 563, 17 Pa. Co. Ct. 209.

4. Issuance of Shares Compelled by Mandamus. — *Hammond v. Edison Illuminating Co.*, (Mich. 1902) 90 N. W. Rep. 1040.

5. Demand and Offer to Subscribe Conditions Precedent. — *Crosby v. Stratton*, (Colo. App. 1902) 68 Pac. Rep. 130; *Curry v. Scott*, 54 Pa. St. 270; *Wilson v. Montgomery County Bank*, 29 Pa. St. 537; *Morris v. Stevens*, 17 Pa. Co. Ct. 209; *Bonnet v. Eagle Pass First Nat. Bank*, 24 Tex. Civ. App. 613.

Demand Also Essential Where Relief Is Sought in Equity. — See *Brown v. Florida Southern R. Co.*, 19 Fla. 472.

6. Measure of Damages. — *Eidman v. Bowman*, 58 Ill. 444, 11 Am. Rep. 90; *Gray v. Portland Bank*, 3 Mass. 364, 3 Am. Dec. 156; *Bonnet v. Eagle Pass First Nat. Bank*, 24 Tex. Civ. App. 613.

Other Statements of Rule. — The stockholder is entitled to all the advantages he could have derived from the stock if it had been delivered at the specified time. Those advantages are the highest market value between the breach and the trial, together with the bonus and dividends which have been received in the mean time. This is the rule where the consideration has been paid. Where it has not been paid the plaintiff should be allowed the difference between it and the value of the stock, together with the difference between the interest on the consideration and the dividends on the stock. *Montgomery Bank v. Reese*, 26 Pa. St. 143.

The measure of damages is the highest market price the stock afterwards attains, not-

6. Right to Exchange Common for Preferred Stock. — When preferred stock is issued with an option to the common shareholders of exchanging their stock therefor, the option must be exercised within the time prescribed, or, if no time is fixed, then within a reasonable time.¹

7. Right to Alienate Stock. — Shares of stock being personal property it necessarily follows that the right of alienation is an inseparable incident of their ownership as between the parties to a transfer.²

8. Right to Inspect Corporate Books and Records — *a.* **INSPECTION COMMON-LAW AND STATUTORY RIGHT.** — A stockholder has the right at common law to inspect and examine the books and records of his corporation at a proper time and place and for a proper purpose;³ and in many jurisdictions this right is further secured by statutory⁴ or constitutional provisions.⁵ The statutes of the various states upon this subject are not intended to abridge the stockholder's common law rights,⁶ but rather to enlarge and extend them.⁷

b. **NATURE OF RIGHT — WHETHER QUALIFIED OR ABSOLUTE.** — At common law the right of inspection is not absolute, but can only be exercised for a definite purpose; and the allowance of a writ of mandamus for its enforcement rests in the sound discretion of the court.⁸ On the

withstanding that, pending the suit, the corporation becomes insolvent. *Reading Trust Co. v. Reading Iron Works*, 137 Pa. St. 282.

1. Exchange of Common for Preferred Stock. — *Holland v. Cheshire R. Co.*, 151 Mass. 231. And see *Muhlenburg v. Philadelphia, etc., R. Co.*, 47 Pa. St. 16; *Campbell v. London, etc., R. Co.*, 5 Hare 519; *Pearson v. London, etc., R. Co.*, 14 Sim. 541.

2. Right of Alienation an Irreparable Incident of Ownership. — *O'Brien v. Cummings*, 13 Mo. App. 197; *Brown v. Britton*, 41 N. Y. App. Div. 57. And see *supra*, this title, *Sales and Conveyances*.

3. Inspection a Common-law Right — *England*. — *Gery v. Hopkins*, 7 Mod. 129; *Rex v. Fraternity of Hostmen*, 2 Str. 1223.

United States. — *Ranger v. Champion Cotton-Press Co.*, 51 Fed. Rep. 61.

Illinois. — *Stone v. Kellogg*, 165 Ill. 192, 56 Am. St. Rep. 240.

Michigan. — *People v. Walker*, 9 Mich. 328.

Missouri. — *Union Nat. Bank v. Hunt*, 76 Mo. 439; *State v. Laughlin*, 53 Mo. App. 542.

New Jersey. — *Stettauer v. New York, etc., Constr. Co.*, 42 N. J. Eq. 46, note; *Huyler v. Cragin Cattle Co.*, 40 N. J. Eq. 392.

New York. — *Matter of Steinway*, 159 N. Y. 250.

Ohio. — *Goebel v. Herancourt Brewing Co.*, 2 Ohio Dec. 377.

Pennsylvania. — *Com. v. Philadelphia, etc., R. Co.*, 3 Pa. Dist. 115.

Tennessee. — *Deaderick v. Wilson*, 8 Baxt. (Tenn.) 108.

Vermont. — *Lewis v. Brainerd*, 53 Vt. 519.

Washington. — *State v. Pacific Brewing, etc., Co.*, 21 Wash. 451.

Stockholder in Fire Insurance Company Entitled to Inspection. — *Matter of Coats*, 73 N. Y. App. Div. 178.

Where the Corporation Is Insolvent and in the Hands of a Receiver the question whether or not an inspection of its books shall be accorded to its stockholders is one resting in the discretion of the court, unhampered by any decisions touching such right of inspection while the corporation was still a going concern in the hands

of its officers and directors. Ordinarily it would seem that such discretion should be exercised by the court most liberally towards every individual stockholder who shows some reason other than mere idle curiosity which induces him to ask for the inspection; but the receiver may properly refuse to permit an inspection until ordered to do so by the court. *Chable v. Nicaragua Canal Constr. Co.*, 59 Fed. Rep. 846.

4. Right Further Secured by Statute. — *Mutter v. Eastern, etc., R. Co.*, 38 Ch. D. 92; *Johnson v. Langdon*, 135 Cal. 624; *Coquard v. National Linseed Oil Co.*, 171 Ill. 480; *Stone v. Kellogg*, 165 Ill. 192, 56 Am. St. Rep. 240; *Mathews v. McClaughry*, 83 Ill. App. 224; *Stone v. Kellogg*, 62 Ill. App. 444; *Crown Coal, etc., Co. v. Thomas*, 60 Ill. App. 234; *Boardman v. Marshalltown Grocery Co.*, 105 Iowa 445; *State v. Sportsman's Park, etc., Assoc.*, 29 Mo. App. 326; *Lewis v. Brainerd*, 53 Vt. 519; *State v. Bergenthal*, 72 Wis. 314. And see the statutes of the several states.

Stockholder in National Bank Within Terms of Statute Giving Right of Inspection. — *Winter v. Baldwin*, 89 Ala. 483.

5. Right Guaranteed by Constitution. — *State v. Whited*, 104 La. 125; *State v. Citizens' Bank*, 51 La. Ann. 426; *State v. New Orleans Gas-light Co.*, 49 La. Ann. 1556; *Legendre v. New Orleans Brewing Assoc.*, 45 La. Ann. 669, 40 Am. St. Rep. 243. And see the constitutions of the several states.

6. Statutes Not Intended to Abridge Common-law Right. — *State v. Laughlin*, 53 Mo. App. 542; *Matter of Steinway*, 159 N. Y. 250.

Statutes Not Innovations upon, but Declaratory of, Common Law. — *State v. Pacific Brewing, etc., Co.*, 21 Wash. 451.

7. Statutes Intended to Enlarge and Extend Common-law Right. — *Cobb v. Lagarde*, 129 Ala. 488; *Foster v. White*, 86 Ala. 467; *Stone v. Kellogg*, 165 Ill. 192, 56 Am. St. Rep. 240. But see *O'Hara v. National Biscuit Co.*, (N. J. 1903) 54 Atl. Rep. 241.

8. Right Not Absolute at Common Law — *England*. — *Rex v. Merchant Tailors' Co.*, 2 B. & A. 115, 22 E. C. L. 40. And see *Rex v. Clear*, 4 B. & C. 890, 10 E. C. L. 466.

other hand, the statutory right of inspection is, as a general rule, practically absolute,¹ the only limitations being that it shall be exercised at reasonable and proper times, and not from curiosity or for improper or unlawful purposes.² Thus, the right cannot be denied upon the ground that the stockholder seeking the inspection is a business rival of the corporation,³ or that he is a stockholder in a rival concern,⁴ or that he is on unfriendly terms with the officers of the company,⁵ or that he is suspicious that the corporate affairs are not being properly managed,⁶ or that he desires an inspection for the purpose of obtaining information that will enable him to defeat a plan of reorganization proposed by the receiver of the company,⁷ or that an inspection would cause inconvenience to the corporation,⁸ or that the list of stockholders sought to be inspected is subject to change.⁹ Nor can a

Illinois.—*Stone v. Kellogg*, 165 Ill. 192, 56 Am. St. Rep. 240.

New Jersey.—*Bruning v. Hoboken Printing, etc., Co.*, 67 N. J. L. 119; *O'Hara v. National Biscuit Co.*, (N. J. 1903) 54 Atl. Rep. 241.

New York.—*Matter of Steinway*, 159 N. Y. 250; *Matter of Coats*, 73 N. Y. App. Div. 178; *People v. Produce Exch. Trust Co.*, 53 N. Y. App. Div. 93; *Matter of Pierson*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 726, affirmed 44 N. Y. App. Div. 215; *People v. Lake Shore, etc., R. Co.*, 11 Hun (N. Y.) 1, 70 N. Y. 220.

Pennsylvania.—*Com. v. Philadelphia, etc., R. Co.*, 3 Pa. Dist. 115.

Rhode Island.—*Lyon v. American Screw Co.*, 16 R. I. 472.

Washington.—*State v. Pacific Brewing, etc., Co.*, 21 Wash. 451.

Allowance of Mandamus in Discretion of Court.—See *infra*, this subsection, *Remedies for Denial of Right*—*Mandamus*—*In General*.

The Right Is Not to Be Exercised to Gratify Curiosity or for speculative purposes, but in good faith and for a specific, honest purpose, and where there is a particular matter in dispute involving and affecting seriously the rights of the relator as a stockholder. *Phoenix Iron Co. v. Com.*, 113 Pa. St. 563. And to the same effect are most of the cases cited in the preceding note.

What Reasons Sufficient.—According to some decisions the mere benefit of knowledge to be derived from the books as to the proper conduct of the corporate business is not a sufficient cause for the issuance of the writ of mandamus to enforce the right, but something more must be shown, as that a controversy is depending or that some question or interest is involved with reference to which the contents of the books may be applicable. Of this class are the following cases: *People v. Lake Shore, etc., R. Co.*, 11 Hun (N. Y.) 1; *People v. Walker*, 9 Mich. 328; *Lyon v. American Screw Co.*, 16 R. I. 472; *Rex v. Merchant Tailor's Co.*, 2 B. & A. 115, 22 E. C. L. 40. But the tendency of the modern decisions is towards holding that a stockholder, as such, has a right to inspect the books and records of the corporation, where his sole object is to inform himself as to the manner in which the corporate business is being conducted. *State v. Laughlin*, 53 Mo. App. 542; *Huyler v. Cragin Cattle Co.*, 40 N. J. Eq. 392; *State v. Pacific Brewing, etc., Co.*, 21 Wash. 451.

President Entitled to Inspection As of Right.—*People v. Goldstein*, 37 N. Y. App. Div. 550.

1. Statutory Right Generally Absolute—*Alabama*.—*Cobb v. Lagarde*, 129 Ala. 488; *Foster v. White*, 86 Ala. 467.

California.—*Johnson v. Langdon*, 135 Cal. 624.

Iowa.—*Ellsworth v. Dorwart*, 95 Iowa 108, 58 Am. St. Rep. 427.

Maryland.—*Weihenmayer v. Bitner*, 88 Md. 325.

Missouri.—*State v. Laughlin*, 53 Mo. App. 542; *State v. St. Louis, etc., R. Co.*, 29 Mo. App. 301; *State v. Sportsman's Park, etc., Assoc.*, 29 Mo. App. 326.

New York.—*Matter of Steinway*, 159 N. Y. 250; *Matter of Reiss*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 234.

Ohio.—*Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 78 Am. St. Rep. 707.

Washington.—*State v. Pacific Brewing, etc., Co.*, 21 Wash. 451.

Motive Immaterial under Statute.—*Johnson v. Langdon*, 135 Cal. 624.

Statutory Right Not Unqualified in New Jersey.—*O'Hara v. National Biscuit Co.*, (N. J. 1903) 54 Atl. Rep. 241.

Constitutional Right of Inspection Not Absolute in Louisiana.—*Legendre v. New Orleans Brewing Assoc.*, 45 La. Ann. 669, 40 Am. St. Rep. 243.

2. Limitation upon Statutory Right.—*Stone v. Kellogg*, 165 Ill. 192, 56 Am. St. Rep. 240; *Meysenburg v. People*, 88 Ill. App. 328.

3. Stockholder a Business Rival of Corporation.—*Weihenmayer v. Bitner*, 88 Md. 325. But see *Matter of Kennedy*, 75 N. Y. App. Div. 188.

4. Stockholder in Rival Concern.—*Cobb v. Lagarde*, 129 Ala. 488; *Johnson v. Langdon*, 135 Cal. 624.

5. Stockholder on Unfriendly Terms with Officers.—*Cobb v. Lagarde*, 129 Ala. 488; *Meysenburg v. People*, 88 Ill. App. 328; *Ellsworth v. Dorwart*, 95 Iowa 108, 58 Am. St. Rep. 427.

6. Stockholder Unduly Suspicious.—*Stone v. Kellogg*, 62 Ill. App. 444.

7. Inspection Desired for Purpose of Defeating Reorganization.—*Chable v. Nicaragua Canal Constr. Co.*, 59 Fed. Rep. 846.

8. Inspection Inconvenient to Corporation.—*State v. St. Louis, etc., R. Co.*, 29 Mo. App. 301; *Matter of Reiss*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 234. Compare *People v. Lake Shore, etc., R. Co.*, 11 Hun (N. Y.) 1, 70 N. Y. 220; *Phoenix Iron Co. v. Com.*, 113 Pa. St. 563.

9. List of Stockholders Subject to Change.—*Com. v. Philadelphia, etc., R. Co.*, 3 Pa. Dist.

refusal to permit an inspection of any of the books of the corporation be justified upon the ground that the stockholder asked to see some books which he had no right to examine.¹

c. **BY-LAWS AFFECTING RIGHT OF INSPECTION.**—While the manner in which the right of inspection is to be exercised may be regulated in a reasonable manner, the right itself cannot be annulled, or regulated out of existence, by the by-laws of the corporation.²

d. **DUTY OF FOREIGN CORPORATION TO KEEP BOOKS WITHIN STATE.**—In order to facilitate the inspection of their books and records by stockholders, foreign corporations are generally required by statute to keep certain books within the state.³ Compliance with such a statute may be enforced by mandamus;⁴ but in *Illinois* it has been held that a technical failure to comply with the exact letter of the statute does not expose a corporation to the forfeiture of its franchises.⁵

e. **WHO ENTITLED TO INSPECTION.**—The right of inspection is confined to stockholders⁶ and the personal representatives of deceased stockholders.⁷ An executed sale of stock deprives the vendor of his right of inspection even though the stock sold is placed in escrow pending the further performance of the contract by the parties.⁸ Nor does the right extend to a person who has purchased stock in an insolvent corporation, for mere speculative purposes, after the appointment of a receiver.⁹ It seems, however, that a member of a building association does not lose his rights in this regard by failure to pay his dues.¹⁰ In *New York* the right is limited to those who are stockholders of record upon the books of the company,¹¹ and accordingly does not extend to pledgees of stock;¹² although it has been held that a stockholder to whom no certificate of stock has been issued may recover the statutory penalty imposed

115. Compare *People v. Lake Shore, etc.*, R. Co., 11 Hun (N. Y.) 1, 70 N. Y. 220.

1. **Demand for Inspection Too Broad.**—*Ellsworth v. Dorwart*, 95 Iowa 108, 58 Am. St. Rep. 427.

2. **Right May Be Regulated but Not Denied by By-laws.**—*State v. Citizens' Bank*, 51 La. Ann. 426; *State v. Laughlin*, 53 Mo. App. 542; *State v. St. Louis, etc.*, R. Co., 29 Mo. App. 301.

By-law Construed in Favor of Right.—A corporate by-law providing that the transfer books of the company shall be closed for a certain number of days prior to each annual stockholders' meeting will not be construed as closing such books against inspection by stockholders. *State v. St. Louis, etc.*, R. Co., 29 Mo. App. 301.

Common-law Right Denied by By-laws.—In *Ranger v. Champion Cotton-Press Co.*, 51 Fed. Rep. 61, there is a dictum to the effect that the common-law right may be modified or even denied by the corporate by-laws.

3. **Foreign Corporations Required by Statute to Keep Books Within State.**—North, etc., *Rolling Stock Co. v. People*, 147 Ill. 234; *People v. Knickerbocker Trust Co.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 446; *Recknagel v. Empire Self-Lighting Oil Lamp Co.*, (Supm. Ct. App. T.) 24 Misc. (N. Y.) 193; *Clason v. Nassau Ferry Co.*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 315. And see the statutes of the several states.

Statutes to Be Construed Liberally.—*People v. Knickerbocker Trust Co.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 446.

4. **Statutory Duty Enforceable by Mandamus.**—*Crown Coal, etc., Co. v. Thomas*, 60 Ill. App. 234.

5. **Franchises Not Forfeited for Technical Violation of Law.**—North, etc., *Rolling Stock Co. v. People*, 147 Ill. 234.

6. **Right of Inspection Confined to Stockholders.**—*State v. New Orleans Gaslight Co.*, 49 La. Ann. 1556.

7. **Personal Representative of Deceased Stockholder Entitled to Inspection.**—*State v. Citizens' Bank*, 51 La. Ann. 426.

When Executor Cannot Inspect.—In *Matter of Kennedy*, 75 N. Y. App. Div. 188, a mandamus to enforce the right of inspection was refused to the executor of a deceased stockholder, upon proof that his motives in seeking an inspection were improper, and upon the ground, also, that an inspection by the executor was unnecessary, the public treasurer being empowered to ascertain the value of the defendant's stock, for the purposes of assessing the transfer tax, by an examination of the officers of the corporation.

8. **Vendor Not Entitled to Inspection After Executed Sale of Stock.**—*State v. Whited*, 104 La. 125.

9. **Purchaser of Stock in Insolvent Corporation After Appointment of Receiver.**—*Chable v. Nicaragua Canal Constr. Co.*, 59 Fed. Rep. 846.

10. **Right Not Lost by Failure to Pay Dues.**—*Buker v. Steele*, (County Ct.) 43 N. Y. Supp. 346.

11. **Right Limited to Stockholders of Record.**—*Matter of Reiss*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 234.

12. **Pledgees of Stock Not Entitled to Inspection.**—*Matter of Brooklyn First Nat. Bank*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 662, affirmed without opinion 44 N. Y. App. Div. 635.

upon the officers of a corporation for their refusal to permit an inspection of its books.¹

f. **WHAT BOOKS AND RECORDS MAY BE INSPECTED.** — At common law the right of inspection covers all the books and records of the corporation,² including contracts made by the company;³ and in some jurisdictions the statutory right is equally inclusive,⁴ while in others it is more limited.⁵ Where the right to inspect the "stock book" is given by statute, the corporation cannot nullify such right by its failure to keep a stock book, and in case it attempts to do so the stockholder will be entitled to inspect any other books or papers of the corporation which contain information similar to that required to be stated in the stock book.⁶

g. **EXAMINATION BY AGENT, ATTORNEY, OR EXPERT ACCOUNTANT.** — The stockholder is entitled to make his examination of the books by or with his agent or attorney⁷ or an expert accountant.⁸

Expense of Examination by Expert. — In *Louisiana* it has been held that a corporation is not liable for the compensation of an expert appointed by the court to examine its books in mandamus proceedings.⁹

h. **RIGHT TO TAKE COPIES.** — The right to inspect the books includes the right to take extracts or copies therefrom,¹⁰ for which purpose the stockholder is entitled to be accompanied by a stenographer.¹¹

i. **RIGHT TO BE EXERCISED AT REASONABLE TIMES ONLY.** — The right of inspection, whether claimed under the common law or by virtue of a statute, can only be exercised at reasonable times.¹²

j. **INTERESTS OF CORPORATION AND OF THIRD PERSONS TO BE SAFEGUARDED.** — Where an application for inspection is granted by the court, care

1. Stockholder Without Certificate May Recover Statutory Penalty. — *Buker v. Steele*, (County Ct.) 43 N. Y. Supp. 346.

2. All Books and Records Open to Stockholders at Common Law. — *Lewis v. Brainerd*, 53 Vt. 519; *State v. Pacific Brewing, etc., Co.*, 21 Wash. 451.

Stockholder in Bank Entitled to Examine Discount Book. — *Cockburn v. Union Bank*, 13 La. Ann. 289.

Entitled to Inspect Books of General Account as Well as Stock Books. — *State v. Bergenthal*, 72 Wis. 314.

In *Lyon v. American Screw Co.*, 16 R. I. 472, it was held that at common law a stockholder was not entitled to inspect the stock ledger of his corporation.

3. Corporate Contract Open to Inspection. — *Stone v. Kellogg*, 165 Ill. 192, 56 Am. St. Rep. 240.

Right to Inspect Original Papers and Vouchers Not Absolute. — *Ellsworth v. Dorwart*, 95 Iowa 108, 58 Am. St. Rep. 427.

4. Statutory Right Held to Cover All Books and Papers. — *Weihenmayer v. Bitner*, 88 Md. 325. And see *Stone v. Kellogg*, 62 Ill. App. 444.

5. Statutory Right Limited to Stock or Transfer Books. — *Bruning v. Hoboken Printing, etc., Co.*, 67 N. J. L. 119; *Matter of Steinway*, 31 N. Y. App. Div. 70. And see the statutes of the several states.

6. Right Not Defeated by Failure to Keep Stock-Book. — *People v. Knickerbocker Trust Co.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 446; *Buker v. Steele*, (County Ct.) 43 N. Y. Supp. 346.

7. May Examine by Agent or Attorney. — *Foster v. White*, 86 Ala. 467; *Coquard v. National Linseed Oil Co.*, 171 Ill. 480; *Ellsworth*

v. Dorwart, 95 Iowa 108, 58 Am. St. Rep. 427; *State v. Bienville Oil Works Co.*, 28 La. Ann. 204; *People v. Nassau Ferry Co.*, 86 Hun (N. Y.) 128; *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 78 Am. St. Rep. 707; *Blymyer v. Blymyer Iron Works Co.*, 8 Ohio Dec. 463, 5 Ohio N. P. 71.

No Right to Examine by Attorney or Agent in England. — See *In re West Devon Great Consols Mine*, 27 Ch. D. 106.

8. May Examine with Expert Accountant. — *State v. Sportsman's Park, etc., Assoc.*, 29 Mo. App. 326; *Blymyer v. Blymyer Iron Works Co.*, 8 Ohio Dec. 463, 5 Ohio N. P. 71; *Phoenix Iron Co. v. Com.*, 113 Pa. St. 563; *Deaderick v. Wilson*, 8 Baxt. (Tenn.) 108.

9. Corporation Not Liable for Compensation of Expert. — *State v. Citizens' Bank*, 51 La. Ann. 426.

10. Entitled to Take Copies of Books and Records Examined. — *Mutter v. Eastern, etc., R. Co.*, 38 Ch. D. 92; *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 78 Am. St. Rep. 707; *Phoenix Iron Co. v. Com.*, 113 Pa. St. 563; *Com. v. Philadelphia, etc., R. Co.*, 3 Pa. Dist. 115; *Deadrack v. Wilson*, 8 Baxt. (Tenn.) 108.

No Right to Copy List of Stockholders under Constitutional Provision in Pennsylvania. — *Com. v. Empire Pass. R. Co.*, 134 Pa. St. 237.

11. Stockholder May Be Accompanied by Stenographer. — *Ellsworth v. Dorwart*, 95 Iowa 108, 58 Am. St. Rep. 427.

12. Right Must Be Exercised at Reasonable Times. — *Weihenmayer v. Bitner*, 88 Md. 325; *People v. Walker*, 9 Mich. 328; *State v. Sportsman's Park, etc., Assoc.*, 29 Mo. App. 326; *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 78 Am. St. Rep. 707.

should be taken that the interests of the corporation and of third persons are properly safeguarded.¹ An order granting an inspection without restriction as to the place or duration thereof, and without adequate provision against interference with the business of the corporation, is too broad.²

k. REMEDIES FOR DENIAL OF RIGHT — (1) *Mandamus* — (a) *In General*. — In the *United States* it is well settled that where the stockholders' right of inspection is denied by the corporation it may, in a proper case, be enforced by mandamus.³ A mandamus will not issue, however, where it is shown that the petitioner's purpose in seeking an inspection is evil, improper, or unlawful.⁴ And, according to some decisions, the writ may also be refused where it appears that the petitioner's only object is to obtain a list of the other stockholders in order that he may induce them to join him in litigation against the company,⁵ or where his purpose is to ascertain whether facts exist which would authorize an application to the attorney-general to dissolve the corporation or appoint a receiver, or which would enable him to begin criminal proceedings against the officers,⁶ or where he fails to show any specific purpose to be subserved by an inspection.⁷ But it is observed that some of these latter decisions, and particularly those holding that the petitioner must show a specific purpose to be subserved by an inspection, cannot be regarded as controlling authorities in cases where an absolute right of inspection is given by statute.⁸

Improper Motives Not Presumed — Burden of Proof. — It cannot be presumed that the purpose of a stockholder in seeking an inspection of the corporate books and records is improper;⁹ and where the defendant in mandamus proceedings

1. Interests of Corporation and of Third Persons to Be Safeguarded. — *State v. Citizens' Bank*, 51 La. Ann. 426; *Matter of Steinway*, 159 N. Y. 250.

Depositors' Accounts in Bank Not Open to Examination. — *State v. Citizens' Bank*, 51 La. Ann. 426.

Exclusive Appropriation of Books Not Permitted. — Individual shareholders should not be permitted to appropriate the books of the corporation, for purposes of inspection, to an unreasonable extent, and to the detriment of the interests of the corporation and the rights of other shareholders. *State v. St. Louis, etc., R. Co.*, 29 Mo. App. 301.

2. Order Without Restrictions Too Broad. — *Matter of Coats*, 73 N. Y. App. Div. 178.

3. Right of Inspection Enforceable by Mandamus — *Alabama*. — *Cobb v. Lagarde*, 129 Ala. 488; *Winter v. Baldwin*, 89 Ala. 483; *Foster v. White*, 86 Ala. 467.

Delaware. — *Richardson v. Swift*, 7 Houst. (Del.) 137.

Illinois. — *Coquard v. National Linseed Oil Co.*, 171 Ill. 480; *Stone v. Kellogg*, 165 Ill. 192, 56 Am. St. Rep. 240; *Crown Coal, etc., Co. v. Thomas*, 60 Ill. App. 234.

Iowa. — *Boardman v. Marshalltown Grocery Co.*, 105 Iowa 445.

Louisiana. — *State v. Citizens' Bank*, 51 La. Ann. 426; *State v. Riedy*, 50 La. Ann. 258; *State v. New Orleans Gaslight Co.*, 49 La. Ann. 1556; *Legendre v. New Orleans Brewing Assoc.*, 45 La. Ann. 669, 40 Am. St. Rep. 243; *State v. Bienville Oil Works Co.*, 28 La. Ann. 204; *Cockburn v. Union Bank*, 13 La. Ann. 289.

Maryland. — *Weißenmayer v. Bitner*, 88 Md. 325.

Michigan. — *People v. Walker*, 9 Mich. 328.

Missouri. — *State v. St. Louis, etc., R. Co.*, 29 Mo. App. 301.

New Jersey. — *Bruning v. Hoboken Printing, etc., Co.*, 67 N. J. L. 119; *Trimble v. American Sugar Refining Co.*, 61 N. J. Eq. 340; *Fuller v. Hollander*, 61 N. J. Eq. 648.

New York. — *Matter of Steinway*, 159 N. Y. 250, 31 N. Y. App. Div. 70; *Matter of Rappleye*, 43 N. Y. App. Div. 84.

Ohio. — *Goebel v. Herancourt Brewing Co.*, 2 Ohio Dec. 377.

Pennsylvania. — *Phoenix Iron Co. v. Com.*, 113 Pa. St. 563; *Com. v. Phoenix Iron Co.*, 105 Pa. 111, 51 Am. Rep. 184; *Com. v. Pennsylvania R. Co.*, 6 Pa. Dist. 266; *Com. v. Philadelphia, etc., R. Co.*, 3 Pa. Dist. 115.

Wisconsin. — *State v. Bergenthal*, 72 Wis. 314.

Right Not Enforceable by Mandamus in England. — See *Holland v. Dickinson*, 37 Ch. D. 669.

4. Mandamus Refused upon Proof of Evil, Improper, or Unlawful Purpose. — *Weißenmayer v. Bitner*, 88 Md. 325; *Matter of Kennedy*, 75 N. Y. App. Div. 188; *Matter of Coats*, 73 N. Y. App. Div. 178; *Philadelphia Invest. Co. v. Eldridge*, 2 Pa. Dist. 394.

5. Inspection to Aid Litigation Against Corporation Refused. — *Com. v. Empire Pass. R. Co.*, 134 Pa. St. 237.

6. Inspection to Procure Dissolution or Aid in Criminal Proceedings Against Officers Refused. — *People v. Produce Exch. Trust Co.*, 53 N. Y. App. Div. 93; *Matter of Pierson*, 44 N. Y. App. Div. 215, affirming 28 Misc. (N. Y.) 726.

7. Mandamus Refused Where Specific Purpose Is Not Shown. — *Rex v. Merchant Tailors' Co.*, 2 B. & Ad. 115, 22 E. C. L. 40; *In re Burton, etc., Co.*, 31 L. J. Q. B. 62; *Lyon v. American Screw Co.*, 16 R. I. 472.

8. Proof of Specific Purpose Unnecessary under Statutes. — See *supra*, this section, 8. b. *Nature of Right — Whether Absolute or Qualified.*

9. Improper Purpose Not Presumed. — *John-*

alleges that the petitioner is actuated by improper motives, he has the burden of proving this defense.¹

(b) **Foreign Corporations.** — According to the *New York* decisions the remedy by mandamus is not available as against foreign corporations;² but the contrary has been held in *Delaware*.³

(c) **Conditions Precedent.** — Before the court will be justified in issuing a writ of mandamus to enforce the right of inspection there must have been some refusal or obstruction interposed to the enjoyment thereof by the party against whom the writ is sought.⁴ And in *New York* it has been held that a stockholder who desires to inspect the books of account of a corporation, other than those which he is entitled to inspect by statute, must exhaust his statutory remedy by written demand upon the treasurer for a verified statement of the corporate affairs, before resorting to the remedy by mandamus.⁵

(2) **Action at Law for Damages.** — A stockholder who is injured by a denial of the right of inspection may recover damages therefor in an action at law⁶ against the officers of the company.⁷

(3) **Remedies in Equity.** — In *England* the statutory right of inspection may be enforced by injunction,⁸ and the same rule obtains in *Ohio*;⁹ while in *New Jersey*, by statute, the court of chancery has power, in a proper case, to order the books of a corporation to be brought within the state and opened to the inspection of stockholders.¹⁰ But in other jurisdictions it has been said that the inherent jurisdiction of courts of chancery to compel the production of

son v. Langdon, 135 Cal. 624; State v. Pacific Brewing, etc., Co., 21 Wash. 451.

1. **Burden of Proving Improper Purpose upon Defendant.** — Cobb v. Lagarde, 129 Ala. 488; Meysenburg v. People, 88 Ill. App. 328; State v. Pacific Brewing, etc., Co., 21 Wash. 451.

2. **Mandamus Not Issued Against Foreign Corporations.** — Matter of Rappleye, 43 N. Y. App. Div. 84. And to the same effect, see Matter of Crosby, 43 N. Y. App. Div. 618; People v. Knickerbocker Trust Co., (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 446.

3. **Contra — Foreign Corporation Subject to Mandamus.** — Richardson v. Swift, 7 Houst. (Del.) 137.

4. **Denial of Right a Condition Precedent.** — Mathews v. McClaughry, 83 Ill. App. 224.

Indefinite Delay Equivalent to Denial. — Cobb v. Lagarde, 129 Ala. 488.

What Constitutes a Sufficient Demand. — Where the evidence in mandamus proceedings showed that the relator made personal application at the office of the corporation for examination of the books, and was told by the officials in charge that the president of the company had given instructions that no inspection of the books by shareholders was to be allowed, and that afterwards a formal demand in writing was made by counsel representing the relator, upon the secretary of the company, for permission to examine the books, which demand was refused, it was held that the defendant could not urge that no proper demand had been made or that the suit was premature. State v. New Orleans Gaslight Co., 49 La. Ann. 1556.

5. **Demand for Statement of Corporate Affairs a Condition Precedent.** — People v. Nassau Ferry Co., 86 Hun (N. Y.) 128.

6. **Action at Law for Damages Maintainable.** — Boardman v. Marshalltown Grocery Co., 105 Iowa 445.

Mandamus Preferable to Suit for Damages. — Legendre v. New Orleans Brewing Assoc., 45

La. Ann. 669, 40 Am. St. Rep. 243; Weihe-mayer v. Bitner, 88 Md. 325.

The Costs and Counsel Fees of mandamus proceedings to compel the corporation and its officers to permit an inspection of the books have been held to be not recoverable. Clason v. Nassau Ferry Co., (Supm. Ct. App. T.) 20 Misc. (N. Y.) 315.

7. **Officers Liable to Action for Damages.** — Bourdette v. Sieward, 52 La. Ann. 1333; Legendre v. New Orleans Brewing Assoc., 45 La. Ann. 669, 40 Am. St. Rep. 243.

Damages Must Be Legal Proximate Result of Refusal. — Bourdette v. Sieward, 107 La. 258.

An Error of an Officer in a Subordinate Position in refusing to permit books to be examined is not, per se, such an error as will expose the company to the payment of damages. Legendre v. New Orleans Brewing Assoc., 45 La. Ann. 669, 40 Am. St. Rep. 243.

8. **Injunction the Remedy in England.** — Holland v. Dickson, 37 Ch. D. 669. And see Mutter v. Eastern, etc., R. Co., 38 Ch. D. 92; *In re* West Devon Great Consols Mine, 27 Ch. D. 106.

9. **Injunction the Remedy in Ohio.** — Cincinnati Volksblatt Co. v. Hoffmeister, 62 Ohio St. 189, 78 Am. St. Rep. 707.

10. **Statutory Jurisdiction of Court of Chancery in New Jersey.** — Huyler v. Cragin Cattle Co., 40 N. J. Eq. 392.

The power conferred by the General Corporation Act (P. L. 1896, p. 292, § 44) summarily to order books of a corporation to be forthwith brought within this state is exercisable by a justice of the Supreme Court, or by the Court of Chancery, only when a situation exists in which the judicial authority whose action is invoked can exercise control over the books after compliance with the order. That situation constitutes the "proper cause" contemplated by the act. Fuller v. Hollander, 61 N. J. Eq. 648. And see Stettauer v. New York, etc., Constr. Co., 42 N. J. Eq. 66.

corporate books and papers for inspection is confined to cases where such books and paper are evidential in a pending cause, or where the bill is filed for relief as well as discovery, and relief has been refused on the ground that the remedy at law is adequate.¹

(4) *Action to Recover Statutory Penalty.*—Corporations and their officers are, in some jurisdictions, made liable to statutory penalties for refusing to permit an inspection of the corporate books by stockholders.²

Evidence in Action to Recover Penalty.—In an action to recover the statutory penalty, evidence as to the plaintiff's discharge from the employ of the corporation, being calculated to prejudice the jury in his favor, is not admissible.³

9. *General Right to Information Regarding Corporate Affairs.*—In addition to the right of inspection above considered, the stockholders of a corporation have, at common law, a general right to be informed as to the business and affairs of the company;⁴ and in some jurisdictions this right has been extended by statutes requiring the directors or officers to make and post monthly balance sheets,⁵ or to furnish written statements of the affairs of the corporation upon demand.⁶

Bill of Discovery.—A stockholder cannot sue in equity for a discovery of matters which might be ascertained by an examination of the books and records of the corporation, in the absence of proof that he has been refused permission to examine such books and records, or that the remedy by mandamus is inadequate.⁷

10. *Right to Contract with Corporation.*—A stockholder may contract with his corporation and acquire the same rights thereby as any individual.⁸

1. *Ranger v. Champion Cotton-Press Co.*, 51 Fed. Rep. 61; *Boardman v. Marshalltown Grocery Co.*, 105 Iowa 445.

2. *Officers Liable to Statutory Penalty for Refusal to Permit Examination.*—*Lewis v. Brainerd*, 53 Vt. 519; *Buker v. Steele*, (County Ct.) 43 N. Y. Supp. 346.

Foreign Corporations and Their Officers are liable to penalties for refusing to exhibit the stock book of the corporation to a stockholder upon proper demand made. *People v. Knickerbocker-Trust Co.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 446; *Cox v. Island Min. Co.*, 65 N. Y. App. Div. 508, 175 N. Y. 328.

Statute Strictly Construed.—*Greene v. Shain*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 720.

No Penalty in Absence of Wilful Neglect or Refusal.—*Kirkman v. Carlstadt Chemical Co.*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 822; *Lozier v. Saratoga Gas, etc., Co.*, 59 N. Y. App. Div. 390; *Kelsey v. Pfadler Process Fermentation Co.*, 41 Hun (N. Y.) 20; *Recknaye v. Empire Self-Lighting Oil Lamp Co.*, (Supm. Ct. App. T.) 24 Misc. (N. Y.) 193.

Proper Demand a Condition Precedent.—*Buker v. Steele*, (County Ct.) 43 N. Y. Supp. 346; *Cox v. Island Min. Co.*, 65 N. Y. App. Div. 508.

Penalties Not Cumulative from Day to Day.—*Cox v. Paul*, 175 N. Y. 328, modifying judgment 65 N. Y. App. Div. 508.

Interest upon Penalty Not Recoverable.—*Cox v. Island Min. Co.*, 65 N. Y. App. Div. 508.

Officer Not Liable Where Compliance with Demand Impossible.—*Lewis v. Brainerd*, 53 Vt. 519.

3. *Evidence of Plaintiff's Discharge Not Admissible.*—*Kirkman v. Carlstadt Chemical Co.*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 822.

4. *Right to General Information Regarding Corporate Officers.*—*Weir v. Bay State Gas Co.*,

91 Fed. Rep. 940. And see *infra*, this title, *Rights and Remedies of Minority Stockholders*—13. *Right to Information Regarding Corporate Affairs.*

5. *California Statute Requiring Monthly Balance Sheets Construed.*—*Anderson v. Burnes*, 122 Cal. 272; *Miles v. Woodward*, 115 Cal. 310; *Loveland v. Garner*, 71 Cal. 541.

6. *Statutory Right to Written Statement Regarding Corporate Affairs.*—In *New York*, by statute, a stockholder owning a prescribed amount of stock is entitled to a verified statement of the corporate affairs, upon written application to the treasurer of the corporation. *People v. Nassau Ferry Co.*, 86 Hun (N. Y.) 128. And where the application is refused, the applicant is entitled to recover a penalty of fifty dollars for failure to furnish the statement, and a further penalty for every day's neglect to comply with his demand, up to the time of the commencement of the action. *St. John v. Eberlin*, (Supm. Ct. Tr. T.) 23 Misc. (N. Y.) 585.

7. *Bill of Discovery Not Maintainable Where Remedy at Law Is Adequate.*—*Wolfe v. Underwood*, 96 Ala. 329; *Coquard v. National Linsed Oil Co.*, 171 Ill. 480; *Trimble v. American Sugar Refining Co.*, 61 N. J. Eq. 340.

8. *Stockholder May Contract with Corporation.*—*Merrick v. Peru Coal Co.*, 61 Ill. 472; *Church v. Church Cement Co.*, 75 Minn. 85. And see *Union Mut. L. Ins. Co. v. Frear Stone Mfg. Co.*, 97 Ill. 537, 37 Am. Rep. 129.

A Stockholder May Purchase Corporate Property at a sheriff's sale, and in the absence of fraud he is not accountable to other stockholders though he bids it in much below its value. *Mickles v. Rochester City Bank*, 11 Paige (N. Y.) 118, 42 Am. Dec. 103.

As Regards Dealings of Majority Stockholders with Corporation, see *infra*, this title, *Rights and Remedies of Minority Stockholders*.

11. Right to Enter into Business Competition with Corporation. — There is no rule of law which prohibits an individual stockholder from entering into business on his own account in competition with the corporation, or from joining in the formation of a new corporation which, by its rivalry, will destroy the business prospects of the first.¹

12. Right to Sue Corporation. — A stockholder may sue his corporation or be sued by it.² Thus he may bring an action of trover against the company for conversion of his stock.³

13. No Right to Deny Existence of Corporation. — Stockholders in a *de facto* corporation who have dealt with it as a legal entity, and participated in the benefits of the corporate business, and incurred liabilities as stockholders, cannot be permitted to deny the existence of the corporation, even though there were irregularities in its organization.⁴

14. Rights on Consolidation or Reorganization. — Where a valid consolidation of corporations is effected, the stockholders in the constituent corporations become stockholders in the new company,⁵ with equal rights, in proportion to the number of their shares, unless otherwise stipulated.⁶ If the consolidation is effected without authority, or wrongfully, and without the consent of the stockholder, he may recover the value of his stock from the consolidated corporation;⁷ but a stockholder who has, either expressly or by implication, consented to a consolidation which is authorized by statute, cannot compel his corporation to accept a surrender of his stock and pay him its value from the corporate assets.⁸ Upon reorganization of a corporation the rights of the

1. Right to Compete with Corporation. — *Monroe Dairy Assoc. v. Webb*, 40 N. Y. App. Div. 49. But as to the rule which prohibits majority stockholders from entering into agreements prejudicial to the corporation and to the minority stockholders, see *infra*, this title, *Rights and Remedies of Minority Stockholders*.

2. Stockholder May Sue Corporation. — *Merrick v. Peru Coal Co.*, 61 Ill. 472.

3. Stockholder May Sue Corporation for Conversion of Stock. — *Budd v. Multnomah St. R. Co.*, 12 Oregon 274, 53 Am. Rep. 355, citing *Payne v. Elliot*, 54 Cal. 339, 35 Am. Rep. 80; *McAllister v. Kuhn*, 96 U. S. 87, and *distinguishing Neiler v. Kelley*, 69 Pa. St. 407.

Stock Illegally Sold and Bought In by Corporation. — Where a corporation has practically deprived a stockholder of his stock, and the advantages accruing from its ownership, by bidding it in for itself at a sale which it pretends to make under its by-laws, and on account of the failure of the stockholder to meet and pay certain prescribed monthly dues an action for conversion of the stock will lie against the corporation, although such sale was irregular and illegal, having been conducted in total disregard of the requirements of the by-law authorizing the same. *Allen v. American Bldg., etc., Assoc.*, 49 Minn. 544, 32 Am. St. Rep. 574; *Carpenter v. American Bldg., etc., Assoc.*, 54 Minn. 403, 40 Am. St. Rep. 345.

Upon a Reissue of Stock which has been transferred to the corporation to be used as general assets, a former owner of such stock cannot maintain an action of trover against another stockholder upon the ground that the latter has obtained more than his proportionate share of the reissued stock. *Crosby v. Stratton*, (Colo. App. 1902) 68 Pac. Rep. 130. And see *supra*, this section, 5. *Right to Share in Distribution of New Stock*.

4. No Right to Deny Existence of Corporation. — *Joliet v. Frances*, 85 Ill. App. 243; *Forest*

Glen Brick, etc., Co. v. Gade, 55 Ill. App. 181; *Seaton v. Grimm*, 110 Iowa 145.

5. Stockholders in Constituent Corporations Become Stockholders in Consolidated Company. — See the title *CONSOLIDATION OF CORPORATIONS*, vol. 6, p. 821.

Where the Consolidation Is Accompanied by an Increase of Stock the stockholders are entitled to subscribe to the new stock in proportion to their original holdings, and before subscriptions are received from outsiders. *Jones v. Concord, etc., R. Co.*, 67 N. H. 119. And see *supra*, this section, *Sharing in Distribution of New Stock*.

6. Rights Equal unless Otherwise Stipulated. — *Jones v. Concord, etc., R. Co.*, 67 N. H. 119.

Right to Shares Not Affected by Consolidation. — Stockholders of one of the constituent corporations have no right to new shares of stock brought into the consolidated corporation by another one of the constituent companies. *Bonnet v. Eagle Pass First Nat. Bank*, 24 Tex. Civ. App. 613.

7. When Dissenting Stockholder May Recover Value of His Stock. — *Mayfield v. Alton R., etc., Co.*, 100 Ill. App. 614, affirmed 198 Ill. 528. And see *infra*, this title, *Rights and Remedies of Minority Stockholders* — 7. *Rights as Regards Consolidation with Other Corporations*.

Statute Authorizing Condemnation of Stock of Dissenting Stockholder. — Under the *Ohio* statute it is the duty of a corporation which desires to consolidate with another to ascertain who, if any, of its stockholders refuse to convert their stock into the stock of the proposed consolidated company, and to have the value of the stock of one who refuses ascertained and paid him in the manner provided, before the proceeding can be regularly perfected. *Pittsburgh, etc., R. Co. v. Garrett*, 50 Ohio St. 405.

8. Consenting Shareholder Not Entitled to Recover Value of Shares. — *Mayfield v. Alton R., etc., Co.*, 100 Ill. 614, affirmed 198 Ill. 528.

stockholders will depend largely upon the terms of the reorganization scheme, and upon the particular circumstances of the case.¹ Where a new corporation is created upon the practical dissolution of other corporations, with the consent of the latter's stockholders, but without any further surrender of their rights, such new company may be called upon to respond directly to the stockholders of the old companies.²

XIII. RIGHTS AND REMEDIES OF MINORITY STOCKHOLDERS — 1. In General —

a. NO GROUND FOR COMPLAINT WHERE ACT NOT ULTRA VIRES, ILLEGAL, OR FRAUDULENT. — It is well settled that minority stockholders cannot question, in judicial proceedings, the acts of directors or majority stockholders, unless such acts are *ultra vires*, illegal, or fraudulent.³ As regards all matters *intra vires* the policy of the law is to leave the affairs of corporate bodies to the management and control of their own chosen agencies, and minority stockholders will not be permitted to displace corporate authority and control by substituting therefor the policy, management, and control of the courts, except in plain cases of such fraud or maladministration as works manifest oppression or wrong to them.⁴ Courts of equity will not undertake to control the policy or business method of a corporation, although it may be seen that a wiser policy might be adopted, and the business be more successful if other methods were pursued.⁵

1. Right to Stock in New Corporation upon Reorganization. — *Dow v. Iowa Cent. R. Co.*, 144 N. Y. 426, 70 Hun (N. Y.) 186.

Waiver of Claims Against Corporation. — A stockholder in a reorganized corporation who has waived his right, if any, to insist upon payment in cash for his interest in the old corporation, and has received in the new company the exact amount of what he had in the old, cannot afterwards, when the reorganized corporation has mortgaged its property and become insolvent, assert a claim against it upon the ground that upon liquidation, at the time of the reorganization, his stock might have entitled him to participate in the then existing surplus. *Boynton v. Roe*, 114 Mich. 401.

Right to Withdraw Application for Stock in New Corporation Before Acceptance. — *In re Metropolitan F. Ins. Co.*, (1900) 2 Ch. 671.

2. New Corporation Directly Liable to Stockholders of Old Companies. — *Anthony v. American Glucose Co.*, (Supm. Ct. Gen. T.) 21 N. Y. Supp. 667.

Further as Regards Rights of Stockholders upon Reorganization, see *infra*, this title, *Rights and Remedies of Minority Stockholders* — 8. *Rights as Regards Reorganization of Corporation*, and also the title *WINDING UP AND REORGANIZATION OF CORPORATIONS*.

3. No Grounds of Complaint in Absence of Ultra Vires, Illegality, or Fraud. — *Metcalf v. American School Furniture Co.*, 122 Fed. Rep. 115; *Lowe v. Pioneer Threshing Co.*, 70 Fed. Rep. 646; *Shaw v. Davis*, 78 Md. 308; *Hodge v. U. S. Steel Corp.*, (N. J. 1903) 54 Atl. Rep. 1; *Berger v. U. S. Steel Corp.*, 63 N. J. Eq. 809; *Sewell v. East Cape May Beach Co.*, 50 N. J. Eq. 717; *Ellerman v. Chicago Junction R., etc.*, Co., 49 N. J. Eq. 217; *Goebel v. Herancourt Brewing Co.*, 2 Ohio Dec. 377; *Hatch v. Lucky Bill Min. Co.*, 25 Utah 405. See generally the title *OFFICERS AND AGENTS OF PRIVATE CORPORATIONS*, vol. 21, p. 873 *et seq.*

4. Courts Not Inclined to Interfere at Suit of Minority. — *Roman v. Woolfolk*, 98 Ala. 219; *Wolfe v. Underwood*, 96 Ala. 329; *Gamble v.*

Queens County Water Co., 123 N. Y. 91; *Burden v. Burden*, 159 N. Y. 287; *Hart v. Ogdensburg, etc.*, R. Co., 89 Hun (N. Y.) 316; *Earle v. Burland*, 27 Ont. App. 540.

5. Courts Will Not Interfere with Business Policy of Corporation. — *Rogers v. Nashville, etc.*, R. Co., (C. C. A.) 91 Fed. Rep. 299; *Wolfe v. Underwood*, 96 Ala. 329; *Wheeler v. Pullman Iron, etc.*, Co., 143 Ill. 197; *Donald v. American Smelting, etc.*, Co., 61 N. J. Eq. 458; *Trimble v. American Sugar Refining Co.*, 61 N. J. Eq. 340; *Flynn v. Brooklyn City R. Co.*, 158 N. Y. 493; *Jacobus v. American Mineral Water Mach. Co.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 371; *Rafferty v. Buffalo City Gas Co.*, 37 N. Y. App. Div. 618; *Wolf v. Pennsylvania R. Co.*, 195 Pa. St. 91; *Farwell v. Babcock*, 27 Tex. Civ. App. 162.

Corporate Management Not Vested in Stockholders. — The management and control of a corporation is not vested directly in its stockholders, as such, but in the trustees or directors. *Monroe Dairy Assoc. v. Webb*, 40 N. Y. App. Div. 49. And see *supra*, this title, *Rights, Powers, and Prerogatives of Stockholders in General* — 3. *Participation in Management of Corporation*.

Minority Not Entitled to Enjoin Sale of Corporate Products Below Cost. — *Trimble v. American Sugar Refining Co.*, 61 N. J. Eq. 340; *Kuhn v. Woolson Spice Co.*, 10 Ohio Dec. 292. And see *infra*, this section, *Rights as Regards Ultra Vires or Illegal Acts — Acts in Violation of Laws Against Monopoly*.

No Right to Enjoin Purchase of Stock in Rival Corporation. — *Rafferty v. Buffalo City Gas Co.*, 37 N. Y. App. Div. 618. And see *infra*, this section, *Rights as Regards Purchase or Sale of Property by Corporation*.

The Payment of a Bonus to Persons Who Indorse the Paper of a Corporation will not be enjoined at the suit of minority stockholders where there is no evidence of fraud. *Coquard v. National Linseed Oil Co.*, 171 Ill. 480.

Manner of Retiring Preferred Stock and Issuing Bonds. — The manner in which a duly author-

No Interference with Internal Management of Foreign Corporations. — A court of equity will not interfere with the internal management of a foreign corporation at the suit of a resident stockholder.¹

b. MAJORITY ENTITLED TO CONTROL AS AGAINST MINORITY. — As a general rule the majority stockholders of a corporation have the right to control it as against the minority,² and the latter cannot be allowed to dictate the corporate policy.³ The individual stockholder takes or acquires his stock subject to the implied condition and understanding that what the charter or general law in existence when the corporation is organized permits and authorizes may take place, without or against his assent, if sanctioned by the prescribed majority of his associates.⁴

c. DUTY OF MAJORITY TOWARDS MINORITY. — There is no rule of law which prevents one or more persons from purchasing a majority of the shares of a corporation for the purpose of acquiring control thereof.⁵ But when a

ized plan for the retirement of preferred stock and the issue of bonds is to be carried through is part of the business of the corporation, and, in the absence of fraud or bad faith, is not the subject of judicial control to any greater extent than other business of the corporation. The court cannot substitute its judgment for that of the directors and majority stockholders and say that a less expensive plan could be successfully adopted. *Berger v. U. S. Steel Corp.*, 63 N. J. Eq. 809; *Hodge v. U. S. Steel Corp.*, (N. J. 1903) 54 Atl. Rep. 1.

1. Internal Management of Foreign Corporations Not Interfered With. — *North State Copper, etc., Co. v. Field*, 64 Md. 151, holding that all acts which affect the complainant solely in his capacity as a member of the corporation, whether it be as stockholder, director, president, or other officer, and which are the acts of the corporation, whether acting in stockholders' meeting or through its agents, the board of directors, relate to the internal management of the corporation within this rule. To the same effect, see *Matter of Rappleye*, 43 N. Y. App. Div. 84; *Lewisohn v. Anaconda Copper Min. Co.*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 613; *Madden v. Penn. Electric Light Co.*, 181 Pa. St. 617, 7 Pa. Dist. 304; *American Grease Co. v. Vozellus*, 9 Pa. Dist. 217.

2. Majority Entitled to Control as Against Minority. — *Rogers v. Nashville, etc., R. Co.*, (C. C. A.) 91 Fed. Rep. 299; *Ervin v. Oregon R., etc., Co.*, 27 Fed. Rep. 625; *Coquard v. National Linseed Oil Co.*, 171 Ill. 480; *Wheeler v. Pullman Iron, etc., Co.*, 143 Ill. 197; *Emerson v. South Fork Irrigation, etc., Co.*, 59 Kan. 778, 53 Pac. Rep. 756; *Brown v. Britton*, 41 N. Y. App. Div. 57; *Lewisohn v. Anaconda Copper Min. Co.*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 613; *Abbot v. American Hard Rubber Co.*, 33 Barb. (N. Y.) 578.

An Election of Directors May Be Set Aside at the suit of majority stockholders where it appears that the complainants were prevented from participating in such election by the use of a temporary injunction which has since been dissolved. *Matter of Townsend*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 80.

By-laws Providing for Control by Majority. — When the by-laws of a corporation, adopted by the stockholders in pursuance of authority given by the act of incorporation, provide that a majority vote at a stockholders' meeting shall be

binding on the corporation, every shareholder will be bound by all acts and proceedings within the scope of the power and authority conferred by the charter which shall be approved or sanctioned by the vote of a majority of such shareholders, duly taken and ascertained according to law. *Hodge v. U. S. Steel Corp.*, (N. J. 1903) 54 Atl. Rep. 1. And see *Burden v. Burden*, 159 N. Y. 287.

3. Minority Not Entitled to Dictate Policy of Corporation. — *Wallace v. Pierce-Wallace Pub. Co.*, 101 Iowa 313, 63 Am. St. Rep. 389; *Peatman v. Centerville Light, etc., Co.*, 100 Iowa 245; *Fluker v. Emporia City R. Co.*, 48 Kan. 577. And see *Ranger v. Champion Cotton-Press Co.*, 52 Fed. Rep. 611.

4. Implied Contract to Submit to Will of Majority. — *Farmers' L. & T. Co. v. Toledo, etc., R. Co.*, 54 Fed. Rep. 759, *per* Jackson, J. And to the same effect, see *Metcalfe v. American School Furniture Co.*, 122 Fed. Rep. 115; *Dickinson v. Consolidated Traction Co.*, 114 Fed. Rep. 232; *Mayfield v. Alton R., etc., Co.*, 198 Ill. 528; *Wheeler v. Pullman Iron, etc., Co.*, 143 Ill. 197; *Durfee v. Old Colony, etc., R. Co.*, 5 Allen (Mass.) 230; *Hodge v. U. S. Steel Corp.*, (N. J. 1903) 54 Atl. Rep. 1; *Abbot v. American Hard Rubber Co.*, 33 Barb. (N. Y.) 578; *Grobe v. Erie County Mut. Ins. Co.*, 39 N. Y. App. Div. 183.

5. Purchase of Majority Shares for Purpose of Acquiring Control Legal. — *Hart v. Ogdensburg, etc., R. Co.*, 89 Hun (N. Y.) 316.

A stockholder of a newly organized corporation who acquires control thereof by purchasing the stock of other stockholders and debts due from the corporation does not thereby violate an agreement made between the stockholders, on the organization of the corporation, that all certificates of stock issued to stockholders shall be deposited with a trust company, and shall not be withdrawn for a period of six months unless a certain amount of treasury stock is sold, and a minority stockholder cannot sue to restrain such acts as a breach of the agreement. *Williams v. Montgomery*, 68 Hun (N. Y.) 416.

One Corporation Purchasing Majority Stock of Another. — One corporation will not be enjoined from purchasing a majority of the shares of another, at the suit of a minority stockholder of the latter, where such purchase is *intra vires*, unless it is clearly shown that the purchase is made with the intent of mismanaging.

number of stockholders combine to constitute themselves a majority, in order to control the corporation as they see fit, they become for all practical purposes the corporation itself, and assume the trust relation occupied by the corporation towards its stockholders.¹ Under such circumstances they owe a duty to the minority of good faith and diligence to carry out the purpose for which the corporation was organized, and they may not manage and conduct the business in their own interests, or to their own advantage, and to the injury of the other shareholders.² In other words, where the inherent right of each stockholder to vote his shares in his own interest³ is exercised by majority stockholders, their action resulting from such votes must not be so detrimental to the interests of the corporation itself as to lead to the necessary inference that the interests of the majority of the shareholders lie wholly outside of and in opposition to the interests of the corporation and of the minority of the shareholders, and that their action is a wanton or fraudulent destruction of the rights of such minority.⁴ The legal rights of individual shareholders cannot be taken from them by the majority, however large.⁵

2. Rights as Regards Ultra Vires or Illegal Acts — *a. IN GENERAL.* — As a general rule, single or minority stockholders may restrain their associates or the corporation from the doing of *ultra vires* acts,⁶ even though they are not

or wrecking the corporation whose shares are purchased, or of conducting its business in such a way as to defraud the minority shareholders. *Phelan v. Edison Electric Illuminating Co.*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 109; *Hart v. Ogdensburg, etc., R. Co.*, 89 Hun (N. Y.) 316. Nor does the fact that the complaining minority have placed their stock beyond their control, so as to disable themselves from selling the same, enable them to enjoin the majority holders from selling their stock to another corporation. *Ingraham v. National Salt Co.*, 72 N. Y. App. Div. 582, affirming 36 Misc. (N. Y.) 646. And see *infra*, this section, *Right to Relief Against Fraud—One Corporation Wrecked in Interests of Another.*

1. When Majority Stockholders Become Trustees for Minority. — *Ervin v. Oregon R., etc., Co.*, 27 Fed. Rep. 625.

Majority Stockholders Not Trustees or Agents of Minority. — *Price v. Holcomb*, 89 Iowa 123.

The mere fact that the majority stockholder wishes or hopes that the corporation will fail or be unable to pay its debts is no reason why a court of equity should enjoin creditors of the corporation from collecting their debts, even though the majority stockholder is also a creditor. Nor is there any principle which entitles a minority stockholder to compel the majority stockholder to pay the debts of a corporation when the corporation itself is insolvent and unable to pay its debts. *Oelbermann v. New York, etc., R. Co.*, (Supm. Ct. Spec. T.) 7 Misc. (N. Y.) 352.

2. Majority Owe Duty of Good Faith to Minority. — *Price v. Holcomb*, 89 Iowa 123; *Miner v. Belle Isle Ice Co.*, 93 Mich. 97; *Farmers L. & T. Co. v. New York, etc., R. Co.*, 150 N. Y. 410, 55 Am. St. Rep. 689; *Jacobus v. American Mineral Water Mach. Co.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 371; *Lewisohn v. Anaconda Copper Min. Co.*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 613.

Payment of Private Counsel Fees Out of Corporate Funds. — Where the charter of a corporation has expired, the majority stockholders,

officers, and directors have no right to use the corporate assets or credit in employing counsel to obtain judicial sanction of a plan for the disposal of the corporate assets, favored by the majority, as against a plan favored by the minority. *Mason v. Pewabic Min. Co.*, (C. C. A.) 66 Fed. Rep. 391.

3. Each Stockholder Entitled to Vote in His Own Interest. — *Lewisohn v. Anaconda Copper Min. Co.*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 613.

4. Gamble v. Queens County Water Co., 123 N. Y. 91. And to the same effect, see *Rogers v. Nashville, etc., R. Co.*, (C. C. A.) 91 Fed. Rep. 299; *McLeary v. Erie Tel., etc., Co.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 3.

When Minority May Enjoin Majority from Voting Their Stock. — See *McLeary v. Erie Tel., etc., Co.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 3.

5. Majority Cannot Take Away Legal Rights of Minority. — *Gresham v. Island City Sav. Bank*, 2 Tex. Civ. App. 52.

6. Minority Entitled to Restrain Ultra Vires Acts in General. — *Ryan v. Williams*, 100 Fed. Rep. 172; *Farmers' L. & T. Co. v. Toledo, etc., R. Co.*, (C. C. A.) 54 Fed. Rep. 759; *Willoughby v. Chicago Junction R., etc., Co.*, 50 N. J. Eq. 656; *Kuhn v. Woolson Spice Co.*, 10 Ohio Dec. 292; *Marshall v. American Caramel Co.*, 9 Pa. Dist. 152; *Earle v. Burland*, 27 Ont. App. 540. See *infra*, this section, *Right to Sue or Defend on Behalf of Corporation—When Stockholder May Sue.* And see generally the title *ULTRA VIRES.*

Enjoining Application of Property to Ultra Vires Objects. — *Pratt v. Pratt*, 33 Conn. 446. See also *Baldwin v. Hillsborough, etc., R. Co.*, 1 Ohio Dec. (Reprint) 532, 10 West. L. J. 337.

Right of Corporation to Purchase Its Own Shares. — Under the *New Jersey Corporation Act of 1896*, corporations formed thereunder have the power to purchase and hold their own shares, and such purchase cannot be restrained by minority stockholders in the absence of fraud. *Berger v. U. S. Steel Corp.*, 63 N. J. Eq. 809.

injured thereby.¹ This right, however, may be waived by laches² or by acquiescence in the acts complained of.³

b. ACTS IMPAIRING OBLIGATION OF CONTRACT. — Minority holders of stock, whether common or preferred, will be protected in equity against any acts by the corporation or by majority stockholders which tend to impair the obligation of their contract with the corporation or affect injuriously their vested rights.⁴ Thus, a suit in equity may be maintained by a holder of common stock to enjoin an unlawful or unauthorized issue of preferred stock.⁵

c. ATTEMPTS TO CHANGE NATURE OF CORPORATE ENTERPRISE. — It is of the essence of the contract between the corporation and its stockholders that the corporate powers shall only be exercised to accomplish the objects for which they were called into existence, and neither directors nor majority stockholders will be permitted to control those powers to pervert or destroy the original purposes of the incorporators.⁶ Nor can any amendment of the corporate charter which changes fundamentally the nature or purpose of the enterprise be forced upon the corporation by majority stockholders against the wishes of the minority.⁷

d. ACTS IN VIOLATION OF LAWS AGAINST MONOPOLY. — In a number of instances where minority stockholders have sued for relief against corporate acts alleged to be in violation of laws against monopoly or in restraint of trade, the courts have refused to interfere, on the ground that no violation of law was shown;⁸ and indeed, whatever right the minority may have to

1. Immaterial that Complainant Is Not Injured. — *Byrne v. Schuyler Electric Mfg. Co.*, 65 Conn. 336. And see *infra*, this section, *Necessity of Showing Injury from Acts Complained Of*.

2. Right to Object Waived by Laches. — *Terry v. Eagle Lock Co.*, 47 Conn. 141; *Rabe v. Dunlap*, 51 N. J. Eq. 40.

3. Right Waived by Acquiescence. — *Burden v. Burden*, 159 N. Y. 287. See also *Kent v. Quicksilver Min. Co.*, 78 N. Y. 185; *Skinner v. Smith*, 134 N. Y. 240. And see *infra*, this section, *Waiver of Rights by Laches, Acquiescence, or Participation*.

4. Preferred Stockholders Entitled to Protection Against Acts Impairing Obligation of Contract. — See *Wilcox v. Trenton Potteries Co.*, (N. J. 1902) 53 Atl. Rep. 474; *Pronick v. Spirits Distributing Co.*, 58 N. J. Eq. 97; *Marshall v. American Caramel Co.*, 9 Pa. Dist. 152. See also the title *IMPAIRMENT OF OBLIGATION OF CONTRACTS*, vol. 15, p. 1036.

Repeal of By-law as Impairment of Vested Rights. — *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159. See the title *BY-LAWS*, vol. 5, p. 90.

Right to Payment of Interest in Money. — Where a certificate of stock provides for the payment of interest in money, neither the corporation nor its majority stockholders have any power to compel the holder of the certificate to accept anything other than money for such interest. *McLaughlin v. Detroit, etc., R. Co.*, 8 Mich. 99.

Issue of Bonds to Retire Preferred Stock. — The *New Jersey Corporation Act*, as revised in 1896, authorizes corporations formed thereunder to retire shares of their preferred stock purchased with bonds, or the proceeds of bonds, issued for that purpose, the provisions of the statute being complied with; and, in the absence of fraud, a preferred stockholder cannot enjoin the issue of bonds for the purpose of retiring preferred stock on the ground that such action tends to impair his contract or vested rights. *Berger v. U. S. Steel Corp.*, 63

N. J. Eq. 809; *Hodge v. U. S. Steel Corp.*, (N. J. 1903) 54 Atl. Rep. 1.

5. Unlawful Issue of Preferred Stock. — *Ernst v. Elmira Municipal Imp. Co.*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 583. And see *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159.

6. Minority May Prevent Changes in Nature of Corporate Enterprise. — *Ervin v. Oregon R., etc., Co.*, 27 Fed. Rep. 625; *Kean v. Johnson*, 9 N. J. Eq. 401.

Unauthorized Diversion of Corporate Funds Enjoined. — *Burden v. Burden*, 8 N. Y. App. Div. 160, affirmed 159 N. Y. 287.

Removal of Business Beyond Limits of State. — Under the *New Jersey* statutes a manufacturing corporation which, in its certificate, states that its manufacturing plant and business shall be located in that state, and that the only business carried on outside of the state shall be the sale of manufactured articles, may be restrained by preliminary injunction, at the suit of a minority stockholder, from removing its manufacturing plant and business beyond the limits of the state until the right is determined on final hearing. *Stickle v. Liberty Cycle Co.*, (N. J. 1895) 32 Atl. Rep. 708. But see *Meredith v. New Jersey Zinc, etc., Co.*, 59 N. J. Eq. 257, 56 N. J. Eq. 454, 55 N. J. Eq. 211.

7. Minority May Prevent Radical Amendment of Charter. — *Alexander v. Atlanta, etc., R. Co.*, 108 Ga. 151. See also *Baldwin v. Hillsborough, etc., R. Co.*, 1 Ohio Dec. (Reprint) 532, 10 West. L. J. 337. And consult the title *CORPORATIONS (PRIVATE)*, vol. 7, p. 681.

Extension of Railroad Enjoined. — In *Alexander v. Atlanta, etc., R. Co.*, 108 Ga. 151, a railroad company was restrained, at the suit of minority stockholders, from extending its road, on the ground that the charter amendment authorizing such extension had been adopted without the consent and against the protest of the minority.

8. Facts Held Insufficient to Show Unlawful Monopoly or Restraint of Trade. — *Trimble v.*

complain of such acts as injurious to themselves as stockholders or to the corporation, they have no right to complain of them as injurious to the public.¹

c. **ASSESSMENT OF FULLY PAID STOCK.** — In the absence of statutory authority neither directors nor majority stockholders have any power to authorize the further assessment of fully paid stock.²

3. Right to Relief Against Fraud — *a.* **IN GENERAL.** — As regards acts *intra vires* the most important exception to the general rule that the courts will not interfere with the corporate management at the suit of minority stockholders exists in the case of fraud. On sufficient proof that the directors,³ officers,⁴ or majority stockholders of a corporation are conducting its affairs in their own interests exclusively, and defrauding the minority out of their legal rights, courts of equity will always interpose for the protection of the minority,⁵ unless the latter have forfeited their right to relief by laches or acquiescence in the acts complained of.⁶

b. **FUNDS CONVERTED BY OFFICERS.** — Minority stockholders may sue to compel the officers of the corporation to return corporate funds which they have wrongfully converted to their own use.⁷

c. **EXCESSIVE SALARIES VOTED OR PAID.** — The voting or payment of excessive salaries by directors or majority stockholders, to themselves or to the officers of the corporation, constitutes a fraud which may be redressed at the suit of minority stockholders.⁸

d. **ONE CORPORATION WRECKED IN INTERESTS OF ANOTHER.** — A corporation which has acquired a majority of the stock of a competing company will not be allowed to mismanage or wreck the latter, in its own interests, to

American Sugar Refining Co., 61 N. J. Eq. 340; *Meredith v. New Jersey Zinc, etc., Co.*, 55 N. J. Eq. 211; *Kuhn v. Woolson Spice Co.*, 10 Ohio Dec. 292. See the title **MONOPOLIES AND CORPORATE TRUSTS**, vol. 20, p. 844.

1. No Right to Complain on Ground of Injury to Public. — *Metcalf v. American School Furniture Co.*, 122 Fed. Rep. 115; *Coquard v. National Linseed Oil Co.*, 171 Ill. 480.

2. Assessment of Fully Paid Stock Unlawful. — *Redkey Citizens Natural Gas, etc., Co. v. Orr*, 27 Ind. App. 1; *Gresham v. Island City Sav. Bank*, 2 Tex. Civ. App. 52. See generally *supra*, this title, *Subscription to Stock — Assessments on Paid-up Stock*.

3. Fraud by Directors. — *Kimball v. New England Roller Grate Co.*, 69 N. H. 485; *Flynn v. Brooklyn City R. Co.*, 158 N. Y. 493; *Watkins v. Watkins, etc., Lumber Co.*, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 227; *Taylor v. Miami Exporting Co.*, 5 Ohio 162, 22 Am. Dec. 785. And see *United Electric Securities Co. v. Louisiana Electric Light Co.*, 68 Fed. Rep. 673.

4. Fraud by Officers. — *Forbes v. Memphis, etc., R. Co.*, 2 Woods. (U. S.) 323; *Peabody v. Flint*, 6 Allen (Mass.) 52; *Cross v. Johnson*, 20 Wash. 124.

5. Fraud by Majority Stockholders. — *Ryan v. Williams*, 100 Fed. Rep. 172; *Farmers' L. & T. Co. v. Toledo, etc., R. Co.*, (C. C. A.) 54 Fed. Rep. 759; *Bixler v. Summerfield*, 195 Ill. 147; *Flynn v. Brooklyn City R. Co.*, 158 N. Y. 493; *Gamble v. Queens County Water Co.*, 123 N. Y. 91; *Earle v. Burland*, 27 Ont. App. 540. And see *infra*, this section, *Right to Sue or Defend on Behalf of Corporation — When Stockholder May Sue*.

Majority Enjoined from Voting Stock in Pursuance of Fraudulent Scheme. — *McLeary v. Erie*

Tel., etc., Co., (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 3.

Right to Restrain Majority from Fraudulently Discontinuing Suit Brought by Corporation. — See *Hazard v. Credit Mobilier of America*, 38 Fed. Rep. 195.

6. Rights Forfeited by Long Delay. — *Hazard v. Credit Mobilier of America*, 38 Fed. Rep. 195. And see *infra*, this section, *Waiver of Rights by Laches, Acquiescence, or Participation*.

7. Funds Converted by Officers. — *Ranger v. Champion Cotton-Press Co.*, 52 Fed. Rep. 611.

Rule as to Foreign Corporations under Missouri Statutes. — The *Missouri* statutes authorizing suits by stockholders against the directors and officers of corporations do not authorize the resident stockholders of a foreign corporation to bring a suit *in personam* directly against the local manager of such a corporation to recover from him individually for conversion or misappropriation of the corporate assets. In the case of foreign corporations, the proper remedy in such cases is by the appointment of a receiver. *Sidway v. Missouri Land, etc., Co.*, 116 Fed. Rep. 381.

8. Excessive Salaries. — *Bixler v. Summerfield*, 195 Ill. 147; *Brown v. De Young*, 167 Ill. 549; *Blair v. Telegram Newspaper Co.*, 172 Mass. 201; *Earle v. Burland*, 27 Ont. App. 540.

Director Voting in His Own Interest. — That the person receiving the salary alleged to be excessive was a director of the corporation, and, as a director, voted for such salary, is not sufficient to entitle minority stockholders to an accounting, especially where the vote of the defendant was not essential to the carrying of the resolution. *Clark v. American Coal Co.*, 86 Iowa 436,

the injury of the minority stockholders.¹ Where such wrong is threatened, the company holding the majority stock may be enjoined from voting the same at the suit of the minority;² or, if the wrong has been accomplished, and the company guilty of the fraud has bought in all the property of the wrecked corporation at a foreclosure sale, it will hold such property in trust for the minority.³

4. Right to Disaffirm Voidable Contracts — Contracts with Directors. — In the absence of fraud minority stockholders have no right to enjoin the execution of corporate contracts which are *intra vires*, even though such contracts may be voidable at the option of the corporation or its majority stockholders. Such is the rule as to contracts between the corporation and its directors⁴ and contracts between corporations having common directors.⁵

Contracts with Majority Stockholders. — Although the majority stockholders of a corporation may lawfully make a contract with the company, such contract will be scrutinized with much greater care than if made with a third party, and unless it appears that it was made honestly and for an adequate consideration, a court of equity will interpose to prevent it from being used oppressively and in violation of the rights of the minority.⁶

5. Rights as Regards Purchase or Sale of Property by Corporation — a. PURCHASE OF PROPERTY IN GENERAL. — Minority stockholders may enjoin their corporation from purchasing property, or the stock of other corporations, even though such purchase is *intra vires*, if it appears that the price to be paid is so grossly exorbitant as to show fraud;⁷ but a wide discretion in the matter of valuation, as in other matters, is confided to the directors, and as long as they act in good faith their discretion will not be interfered with.⁸

Ultra Vires Purchase. — The fact that a corporation has purchased certain

1. Corporation Wrecked by Majority Stockholder. — *Farmers' L. & T. Co. v. New York, etc.*, R. Co., 150 N. Y. 410, 55 Am. St. Rep. 689. See also *Jacobus' v. American Mineral Water Mach. Co.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 371; *Wolf v. Shortridge*, 22 Pa. Co. Ct. 81; *Devine v. Frankford Steel, etc., Co.*, 205 Pa. St. 114. And see *infra*, this section, *Right to Sue or Defend on Behalf of Corporation — When Stockholder May Sue*.

Duty of Majority Stockholder to Pay Interest on Corporate Obligations. — A corporation which owns the majority stock of another corporation, and has guaranteed its mortgage bonds, owes no duty to the minority stockholders to pay the interest on such bonds in its capacity as guarantor. Its only duty in this regard is as majority stockholder, and such duty is conditioned upon the possession of the requisite funds from the assets of the corporation. *Cutting v. Baltimore, etc., R. Co.*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 616.

A Minority Stockholder Cannot Sue at Law in his own behalf to recover damages resulting from the mismanagement of his corporation by another corporation which holds the majority stock. Such a wrong can be redressed only by a suit in equity on behalf of all stockholders similarly situated. *Niles v. New York Cent., etc., R. Co.*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 69. And see *infra*, this section, *No Right to Sue in Own Behalf on Corporate Cause of Action*.

2. One Corporation Enjoined from Voting Majority Stock in Another. — *George v. Central R., etc., Co.*, 101 Ala. 607; *Memphis, etc., R. Co. v. Woods*, 88 Ala. 630, 16 Am. St. Rep. 81.

3. Property Fraudulently Acquired Held in Trust for Minority. — *Cutting v. Baltimore, etc., R. Co.*, 65 N. Y. App. Div. 414, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 616, in which case, however, it was also held that the complaining stockholders must do equity by paying their *pro rata* share of the mortgage debt.

4. Majority Stockholders May Ratify Voidable Contracts with Directors. — *Hodge v. U. S. Steel Corp.*, (N. J. 1903) 54 Atl. Rep. 1. And see *Grant v. United Kingdom Switchback R. Co.*, 40 Ch. D. 135.

5. Contracts Between Corporations Having Common Directors. — *Burden v. Burden*, 159 N. Y. 287, affirming 8 N. Y. App. Div. 160; *Hart v. Ogdensburg, etc., R. Co.*, 89 Hun (N. Y.) 316; *Wallace v. Long Island R. Co.*, 12 Hun (N. Y.) 460. And see *Smith v. Ferries, etc., R. Co.*, (Cal. 1897) 51 Pac. Rep. 710; *North-West Transp. Co. v. Beatty*, 12 App. Cas. 589.

6. Contracts Between Majority Stockholders and Corporation Closely Scrutinized. — *Mumford v. Ecuador Development Co.*, 111 Fed. Rep. 639; *Rogers v. Nashville, etc., R. Co.*, (C. C. A.) 91 Fed. Rep. 299.

7. Purchase of Property Enjoined When Fraudulent. — *Donald v. American Smelting, etc., Co.*, 61 N. J. Eq. 458.

8. For Facts Held Insufficient to Warrant Injunction, see Greer v. Amalgamated Copper Co., 61 N. J. Eq. 364; *Donald v. American Smelting, etc., Co.*, 61 N. J. Eq. 458; *Rafferty v. Buffalo City Gas Co.*, 37 N. Y. App. Div. 618.

Purchase Not Set Aside When Complainant Has Not Been Injured. — *Smith v. Ferries, etc., R. Co.*, (Cal. 1897) 51 Pac. Rep. 710. And see *infra*, this section, *Necessity of Showing Injury from Acts Complainant Of*.

property which it is not authorized to acquire or hold does not empower a court of equity, at the instance of a stockholder, to take such property from the corporate assets and divide it among the stockholders.¹

Rights Where Vendee Corporation Assumes Bonds of Vendor. — Where one corporation, on the purchase of property from another, agrees to assume bonds issued by the latter, a stockholder of the purchasing company cannot attack the validity of the bonds.²

b. PURCHASE FROM STOCKHOLDERS OR DIRECTORS. — As a general rule a stockholder has the same right to deal with the corporation as a stranger, and while sales of property to the corporation by majority stockholders will be subjected to close scrutiny by the courts,³ and enjoined if fraudulent,⁴ they will not be set aside at the suit of the minority where no fraud is shown.⁵ So a purchase of property from directors, though voidable at the option of the corporation, may be ratified by the majority stockholders, and will not be enjoined or set aside at the instance of the minority, in the absence of fraud.⁶

c. SALE OF PART OF CORPORATE PROPERTY. — Minority stockholders cannot prevent the sale of a part of the corporate property which is not essential to the business of the corporation, where there is no evidence of fraud or bad faith.⁷

d. SALE OF ALL CORPORATE PROPERTY AND ASSETS. — In the absence of charter or statutory provisions authorizing such a sale, neither the directors nor the majority stockholders of a solvent and prosperous corporation can sell all the corporate property and assets, thus effecting a practical dissolution of the corporation. Such a sale is *ultra vires* and may be enjoined by minority stockholders.⁸ Where, however, the corporation is insolvent or in failing circumstances, and the business can no longer be carried on advantageously, such a sale may be made, and minority stockholders cannot object thereto in the absence of fraud.⁹ Nor does the rule forbidding a sale of all the corporate

1. **Ultra Vires Purchase — Property Not Distributed Among Stockholders.** — *Burden v. Burden*, 8 N. Y. App. Div. 160, affirmed 159 N. Y. 287.

2. **No Right to Attach Bonds of Vendor Corporation.** — *Smith v. Ferries, etc.*, R. Co. (Cal. 1897) 51 Pac. Rep. 710.

3. **Right of Majority to Deal with Corporation — Dealings Closely Scrutinized.** — *Russell v. Rock Run Fuel Gas Co.*, 184 Pa. St. 102.

4. **Sale Enjoined if Fraudulent.** — *Lowe v. Pioneer Threshing Co.*, 70 Fed. Rep. 646.

5. **Sale Not Set Aside in Absence of Fraud.** — *Barr v. Pittsburgh Plate-Glass Co.*, (C. C. A.) 57 Fed. Rep. 86.

6. **Purchase of Property from Directors.** — *North-West Transp. Co. v. Beatty*, 12 App. Cas. 589.

What Insufficient to Show Fraud. — In *Gamble v. Queens County Water Co.*, 123 N. Y. 91, it was held that a discrepancy between the real value of the property purchased and the price paid, as large as that between eighty or eighty-five thousand dollars and one hundred and ten thousand dollars, was not conclusive of fraud.

7. **No Right to Enjoin Sale of Part of Property in Absence of Fraud.** — *Hall v. Syracuse*, 71 Hun (N. Y.) 465; *Lewisohn v. Anaconda Copper Min. Co.*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 613. See also *Lewisohn v. Anaconda Copper Min. Co.*, 29 N. Y. App. Div. 552, reversing (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 31.

8. **Minority Entitled to Prevent Ultra Vires Sale of All Corporate Property.** — *Hunt v. American Grocery Co.*, 81 Fed. Rep. 532; *Byrne v.*

Schuyler Electric Mfg. Co., 65 Conn. 336; *Price v. Holcomb*, 89 Iowa 123; *St. Louis v. St. Louis Gaslight Co.*, 70 Mo. 69; *Forrester v. Boston, etc., Consol. Copper, etc.*, Min. Co., 21 Mont. 544; *Kean v. Johnson*, 9 N. J. Eq. 401; *Abbot v. American Hard Rubber Co.*, 33 Barb. (N. Y.) 578; *Smith v. New York Consol. Stage Co.*, (C. Pl.) 18 Abb. Pr. (N. Y.) 419; *Boston, etc., R. Corp. v. New York, etc., R. Co.*, 13 R. I. 260. And see *People v. Ballard*, 134 N. Y. 269; *Devine v. Frankford Steel, etc., Co.*, 205 Pa. St. 114; *Metcalf v. American School Furniture Co.*, 122 Fed. Rep. 115.

9. **Corporation Insolvent or in Failing Circumstances.** — *Hayden v. Official Hotel Red-Book, etc., Co.*, 42 Fed. Rep. 875; *Price v. Holcomb*, 89 Iowa 123; *Rothwell v. Robinson*, 44 Minn. 538; *Sewell v. East Cape May Beach Co.*, 50 N. J. Eq. 717; *Skinner v. Smith*, 134 N. Y. 240; *Phillips v. Providence Steam Engine Co.*, 21 R. I. 302.

When Sale by Insolvent Corporation May Be Enjoined. — A dissenting stockholder may interfere and prevent a sale of all the corporate property, even though the corporation is actually insolvent, if the purpose of the sale is not the *bona fide* winding up of its business, but is the continuance of the business in another corporation. *Byrne v. Schuyler Electric Mfg. Co.*, 65 Conn. 336.

Assignment for Benefit of Creditors. — Directors of an insolvent corporation have no power to make an assignment of all its property to trustees for the benefit of creditors, without the consent of the stockholders, where the statute

property without the consent of minority stockholders apply where power to make such sale is conferred by the charter of the corporation or by statute.¹

Rule Where Sale Has Been Consummated. — Where title to the property and its possession have passed to the grantee, and the rights of third parties have intervened, the sale will not be set aside at the suit of a minority stockholder,² especially where the complainant has been guilty of laches.³

Assignment of Corporate Rights Without Consideration. — Majority stockholders cannot give away the rights of the corporation, without consideration, to the injury of the minority.⁴

e. SALE TO MAJORITY STOCKHOLDERS OR DIRECTORS — A sale of corporate property to the majority stockholders for an inadequate consideration will be set aside at the suit of the minority.⁵ And the same is true of fraudulent sales of corporate property made by directors to themselves⁶ or to their relatives.⁷

6. Rights as Regards Leases by or to Corporation. — A lease of all the property of a corporation made by the directors with the assent of the majority stockholders will not be set aside at the suit of a dissenting minority if *intra vires* and free from fraud.⁸ Nor can minority stockholders object to the

prescribes a different mode of winding up the affairs of the corporation. *Kyle v. Wagner*, 45 W. Va. 349.

1. Sale Authorized by Charter or Statutes. — *St. Louis v. St. Louis Gaslight Co.*, 70 Mo. 69; *Peabody v. Westerly Water Works*, 20 R. I. 176. And see *Metcalf v. American School Furniture Co.*, 122 Fed. Rep. 115.

Fraudulent Sales to Majority Stockholders Not Authorized by Statute. — Even though majority stockholders are authorized by statute to dissolve the corporation, dispose of its property, and divide the proceeds, despite the opposition of minority stockholders, they have no right to exercise their control over the corporate management for the purpose of appropriating the property or its avails to themselves to the exclusion of a minority, or without rendering them a fair return. *Ervin v. Oregon R., etc.*, Co., 27 Fed. Rep. 625, 20 Fed. Rep. 577. And see *infra*, this subsection, *Sale to Majority Stockholders or Directors*.

2. No Right to Rescission of Executed Sale. — *Farmers' L. & T. Co. v. Toledo, etc.*, R. Co., (C. C. A.) 54 Fed. Rep. 759; *Metcalf v. American School Furniture Co.*, 122 Fed. Rep. 115; *Spokane v. Amsterdamsch Trustees Kantoor*, 22 Wash. 172.

Where There Is Evidence that the Sale Was Fraudulent, the purchaser may be restrained, by temporary injunction, from disposing of the property before the validity of the sale is determined on a final hearing. *Eldred v. American Palace-Car Co.*, 96 Fed. Rep. 59.

3. Right to Rescind Lost by Laches. — *Boston, etc.*, R. Corp. v. *New York, etc.*, R. Co., 13 R. I. 260. And see *infra*, this section, *Waiver of Rights by Laches, Acquiescence, or Participation*.

4. Majority Cannot Assign Corporate Rights Without Consideration. — Majority stockholders of a corporation which has sold its plant, machinery, stock, and other tangible property cannot, without consideration and against the protest of minority stockholders, authorize the vendee to use the name of the corporation. *Armington v. Palmer*, 21 R. I. 109.

5. Fraudulent Sale to Majority Set Aside. — *Mumford v. Ecuador Development Co.*, 111 Fed. Rep. 639; *Hayden v. Official Hotel Red-Book, etc.*, Co., 42 Fed. Rep. 875; *Ervin v. Oregon R., etc.*, Co., 27 Fed. Rep. 625. And see *Mason v. Pewabic Min. Co.*, 133 U. S. 50.

Purchase by Majority at Public Sale. — A sale of corporate property to majority stockholders at public auction will not be set aside at the suit of the minority where there is no evidence of fraud or bad faith, *Hayden v. Official Hotel Red-Book, etc.*, Co., 42 Fed. Rep. 875, even though the majority stockholders voted their stock, at a stockholders' meeting, in favor of the sale. *Price v. Holcomb*, 89 Iowa 23.

6. Fraudulent Sale to Director. — See *Skinner v. Smith*, 134 N. Y. 240.

When Sale Will Not Be Set Aside. — A sale of corporate property to the directors of a corporation will not be set aside at the suit of a minority stockholder where there is no evidence of actual fraud, and where the complainant has been guilty of laches. *Snow v. Boston Blank Book Mfg. Co.*, 158 Mass. 325.

7. Fraudulent Sale to Relatives of Directors. — *Whitman v. Holmes Pub. Co.*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 47.

Evidence as to Price Offered by Other Persons Admissible to Show Fraud in Sale. — *Jones v. Western Mfg. Co.*, 27 Wash. 136.

8. Intra Vires Lease Not Set Aside in Absence of Fraud. — *Dickinson v. Consolidated Traction Co.*, 114 Fed. Rep. 232; *Bartholomew v. Derby Rubber Co.*, 69 Conn. 521, 61 Am. St. Rep. 57; *Flynn v. Brooklyn City R. Co.*, 9 N. Y. App. Div. 269, affirmed 158 N. Y. 493.

Leases Between Corporations Having Common Directors. — The mere fact that the same persons were directors of the corporation which made the lease and of the corporation which took such lease is not of itself sufficient to avoid the contract at the instance of one or more stockholders, against the will of the corporation. That fact alone might entitle either corporation to avoid the lease, but it does not give such right to a stockholder, in the absence of fraud. *Wallace v. Long Island R. Co.*, 12

action of their corporation in taking a lease of the property of another company, unless such action is fraudulent, *ultra vires*, or illegal.¹

7. Rights as Regards Consolidation with Other Corporations. — In the absence of statutory authority a consolidation of corporations cannot be lawfully effected against the wishes of minority stockholders.² But statutes authorizing consolidation are binding upon all persons who subscribe for or acquire stock after their enactment, and minority stockholders thus bound cannot prevent consolidation unless they are able to show fraud³ or illegality in the method to be pursued.⁴ Nor will a consolidation which has been fully consummated be set aside at the suit of a dissenting stockholder who has been guilty of laches.⁵

8. Rights as Regards Reorganization of Corporation. — As a general rule, majority stockholders have no power to involve the minority in a reorganization of the corporation without their consent, express or implied.⁶ But where the reorganization has been carried into effect, and an annulment of the proceedings would result in loss to the majority shareholders, equity will not interfere unless the complainant shows that he has suffered substantial injury and has not been guilty of laches or acquiescence.⁷

Rights After Reorganization. — Upon reorganization each shareholder in the old corporation is entitled either to recognition as a stockholder in the new company⁸ or to money compensation for the value of his shares.⁹

9. Rights as Regards Issue and Sale of Stock. — A minority stockholder may sue to enjoin an illegal issue or sale of stock¹⁰ or to procure the cancellation

Hun (N. Y.) 460; Hart v. Ogdensburg, etc., R. Co., 89 Hun (N. Y.) 316. And see Shaw v. Davis, 78 Md. 308.

1. Lease of Property of Another Corporation Sustained Unless Fraudulent, Ultra Vires, or Illegal. — Shaw v. Davis, 78 Md. 308.

That the Managing Officers of a Corporation Have Made a Bad Bargain through misjudgment as to the value of a lease is wholly insufficient of itself to justify a court of equity in setting the contract aside at the instance of a dissenting minority. Rogers v. Nashville, etc., R. Co., (C. C. A.) 91 Fed. Rep. 299.

2. Minority May Prevent Unauthorized Consolidation. — Ervin v. Oregon R., etc., Co., 27 Fed. Rep. 625; Rabe v. Dunlap, 51 N. J. Eq. 40.

As Regards the Rights of Stockholders in General upon Consolidation, see *supra*, this title, *Rights, Powers, and Prerogatives of Stockholders in General* — *Rights on Consolidation or Reorganization.*

Right of Dissenting Stockholder to Recover Value of Stock Where Consolidation Is Unauthorized. — See Mayfield v. Alton R., etc., Co., 198 Ill. 528.

3. Facts Held Insufficient to Warrant Injunction Against Consolidation. — Hart v. Ogdensburg, etc., R. Co., 89 Hun (N. Y.) 316, 69 Hun (N. Y.) 378.

Right to Recover Value of Stock in Old Company. — The lawful consolidation of corporations organized subsequently to the enactment of statutes authorizing consolidation gives to dissenting stockholders no right to demand of the consolidated company payment in cash for their shares of stock, in the absence of collusion, fraud, or illegality. But statutes enacted after subscriptions have been made cannot be invoked to compel dissenting stockholders to transfer their subscriptions to the consolidated company, since this would be an impairment of contract. Mayfield v. Alton R., etc., Co., 198 Ill. 528. See

also Jones v. Concord, etc., R. Co., 67 N. H. 119.

4. Illegality in Method. — Langan v. Francklyn, (Brooklyn City Ct. Spec. T.) 29 Abb. N. Cas. (N. Y.) 102.

When Minority Cannot Question Validity of Consolidation. — Where the forms prescribed by statute for the consolidation of corporations have been duly observed, and the consolidated corporation has been permitted to exercise its functions as such for a number of years, the consolidation will not be declared invalid at the suit of a minority stockholder of one of the constituent companies, in the absence of proof that the state, through its proper officers, has refused to act. Atchison, etc., R. Co. v. Sumner County, 51 Kan. 617.

5. Right to Set Aside Consolidation Waived by Laches. — Rabe v. Dunlap, 51 N. J. Eq. 40.

6. Minority Entitled to Prevent Reorganization. — Post v. Beacon Vacuum Pump, etc., Co., (C. C. A.) 84 Fed. Rep. 371, (C. C. A.) 89 Fed. Rep. 1; People v. Ballard, 134 N. Y. 269.

As Regards the Rights of Stockholders in General upon Reorganization, see *supra*, this title, *Rights, Powers, and Prerogatives of Stockholders in General* — *Rights on Consolidation or Reorganization.*

7. When Reorganization Will Not Be Set Aside. — Post v. Beacon Vacuum Pump, etc., Co., (C. C. A.) 84 Fed. Rep. 371, (C. C. A.) 89 Fed. Rep. 1.

8. Right to Recognition as Stockholder in New Corporation. — Fletcher v. Newark Telephone Co., 55 N. J. Eq. 47.

9. When Confined to Money Compensation. — Gresham v. Island City Sav. Bank, 2 Tex. Civ. App. 52.

10. Right to Enjoin Illegal Issue or Sale of Stock. — McDermott v. Anaheim Union Water Co., 124 Cal. 112.

of stock issued in violation of law¹ or without consideration.² But a court of equity will not interfere to enforce the rights of minority shareholders as regards the distribution of new stock where the remedy at law is adequate,³ or where the proposed distribution, although not the most advantageous that might have been adopted with reference to the interests of the complaining shareholder, will be beneficial to the shareholders generally.⁴ Nor will stock issued to other shareholders be canceled at the suit of a minority holder on the ground that it was issued for an inadequate consideration, where the complainant fails to show that he has been injured thereby.⁵

10. Right to Compel or Restrain Declaration of Dividends. — So long as the directors of a corporation are acting honestly and within their discretionary powers, the court will not interfere, at the suit of minority stockholders, either to compel⁶ or to restrain⁷ the declaration of dividends. But it will interfere where it is clearly shown that the directors are guilty of fraud or bad faith in accumulating a large surplus and refusing to pay dividends,⁸ or upon proof that it is proposed to pay a dividend out of the capital of the corporation, contrary to law.⁹

11. Rights as Regards Election of Directors. — A stockholder may obtain an injunction to restrain persons claiming to have been elected directors from acting as such when the election was illegal and void.¹⁰ But the election of

Right of Common Stockholder to Enjoin Unlawful Issue of Preferred Stock. — See *supra*, this section, *Rights as Regards Ultra Vires or Illegal Acts — Acts Impairing Obligation of Contract.*

1. Right to Cancellation of Stock Unlawfully Issued. — *Stebbins v. Perry County*, 167 Ill. 567.

Offer to Return Consideration Paid for Illegal Stock Unnecessary. — *McDermont v. Anaheim Union Water Co.*, 124 Cal. 112; *Stebbins v. Perry County*, 167 Ill. 567.

No Right as Against Foreign Corporation. — A court of equity will not take jurisdiction of a bill to procure the cancellation of stock of a foreign corporation and to prevent certain stock from being voted, since these matters pertain to the internal management of the corporation. *American Grease Co. v. Vogellus*, 9 Pa. Dist. 217.

2. Cancellation of Stock Issued Without Consideration. — *Kimball v. New England Roller Grate Co.*, 69 N. H. 485.

3. No Relief in Equity Where Remedy at Law Is Adequate. — *Meredith v. New Jersey Zinc, etc.*, Co., 55 N. J. Eq. 211, *affirmed* 56 N. J. Eq. 454.

4. Minority Not Entitled to Enjoin Distribution Beneficial to Shareholders Generally. — *Jones v. Concord, etc.*, R. Co., 67 N. H. 234, 68 Am. St. Rep. 650. And see *supra*, this title, *Rights, Powers, and Prerogatives of Stockholders in General — Sharing in Distribution of New Stock.*

5. Stock Issued for Inadequate Consideration — When Minority Cannot Object. — *Bibb v. Montgomery Iron Works*, 101 Ala. 301; *Potter v. Necedah Lumber Co.*, 105 Wis. 25.

6. When Declaration of Dividend Will Not Be Ordered — United States. — *New York, etc.*, R. Co. v. *Nickals*, 119 U. S. 296.

Alabama. — *Wolfe v. Underwood*, 96 Ala. 329.

Connecticut. — *Pratt v. Pratt*, 33 Conn. 446.

Louisiana. — *State v. State Bank*, 6 La. 747.

Maine. — *Belfast, etc.*, R. Co. v. *Belfast*, 77 Me. 445.

Michigan. — *Hunter v. Roberts*, 83 Mich. 63.

New Jersey. — *Trimble v. American Sugar Refining Co.*, 61 N. J. Eq. 340.

New York. — *Burden v. Burden*, 159 N. Y. 287; *McNab v. McNab, etc.*, Mfg. Co., 62 Hun (N. Y.) 18; *Karnes v. Rochester, etc.*, R. Co., (Supm. Ct. Spec. T.) 4 Abb. Pr. N. S. (N. Y.) 107; *Scott v. Eagle Fire Co.*, 7 Paige (N. Y.) 198.

Pennsylvania. — *McLean v. Pittsburgh Plate Glass Co.*, 159 Pa. St. 112.

Wisconsin. — *Morey v. Fish Bros. Wagon Co.*, 108 Wis. 520.

And see generally the title *DIVIDENDS*, vol. 9, p. 686 *et seq.*

7. Injunction to Restrain Declaration of Dividend Refused. — *McKean v. Philadelphia Contributionship, etc.*, 6 Pa. Dist. 40.

8. When Declaration of Dividend Will Be Ordered. — *Storrow v. Texas Consol. Compress, etc., Assoc.*, (C. C. A.) 87 Fed. Rep. 612; *Hazeltine v. Belfast, etc.*, R. Co., 79 Me. 411, 1 Am. St. Rep. 330; *Belfast, etc.*, R. Co. v. *Belfast*, 77 Me. 445; *Griffing v. A. A. Griffing Iron Co.*, 61 N. J. Eq. 269; *Fougeray v. Cord*, 50 N. J. Eq. 185; *Burden v. Burden*, 159 N. Y. 287; *Boardman v. Lake Shore, etc.*, R. Co., 84 N. Y. 157; *Hiscock v. Lacy*, (Supm. Ct. Spec. T.) 9 Misc. (N. Y.) 578; *Brown v. Buffalo, etc.*, R. Co., 27 Hun (N. Y.) 342; *Morey v. Fish Bros. Wagon Co.*, 108 Wis. 520; *Earle v. Burland*, 27 Ont. App. 540. And see *Marcuse v. Gullett Gin Mfg. Co.*, 52 La. Ann. 1383.

9. Right to Restrain Payment of Dividend Out of Capital. — *Coquard v. National Linseed Oil Co.*, 171 Ill. 480.

10. Right to Restrain Directors Illegally Elected from Acting. — *Reynolds v. Bridenthal*, 57 Neb. 280; *Humbolt Driving Park Assoc. v. Stevens*, 34 Neb. 528, 33 Am. St. Rep. 654. But see *Mickles v. Rochester City Bank*, 11 Paige (N. Y.) 118, 42 Am. Dec. 103.

When Irregular Election Will Not Be Disturbed. — See *Matter of Griffing Iron Co.*, 63 N. J. L. 168; *Hall v. West Chester Pub. Co.*, 180 Pa. St. 561.

directors by majority shareholders will not be enjoined at the suit of a person who holds, and that merely as trustee, a very small portion of the entire stock of the corporation.¹

12. Right to Compel Officers to Perform Duties. — A stockholder in a corporation may sue to compel the officers thereof to perform the duties imposed upon them by the articles of incorporation.²

13. Right to Information Regarding Corporate Affairs. — Minority stockholders have the right to be informed as to the management of the corporation and the condition of its affairs.³

14. Right to Accounting. — Minority stockholders are entitled, upon proper allegations and proof, to an accounting from the officers⁴ or directors⁵ of their corporation.

15. Right to Have Receiver Appointed. — As a general rule, a court of equity will not take the management of a corporation out of the hands of its directors and majority stockholders and place it in the hands of a receiver, at the suit of the minority;⁶ but it may do so in exceptional cases.⁷

1. Trustee of Small Portion of Stock Not Entitled to Enjoin Election. — *Greenough v. Alabama G. S. R. Co.*, 64 Fed. Rep. 22.

2. Right to Compel Officers to Perform Duties. — *Finley v. Hill*, (Ky. 1897) 42 S. W. Rep. 735.

Mandamus Refused. — In *Com. v. Roman Catholic Soc.*, 6 S. & R. (Pa.) 508, a motion for a rule to show cause why a mandamus should not be issued against the trustees of a church, commanding them to affix the common seal of the corporation to certain alterations and amendments of the charter of the corporation, was refused.

3. Minority Entitled to Information Regarding Corporate Affairs. — *Weir v. Bay State Gas Co.*, 91 Fed. Rep. 940; *Sage v. Culver*, 71 Hun (N. Y.) 42, 147 N. Y. 241. And see *supra*, this title, *Rights, Powers, and Prerogatives of Stockholders in General — Right to Inspect Corporate Books and Records; General Right to Information Regarding Corporate Affairs.*

4. Right to Accounting from Officers. — *Sage v. Culver*, 71 Hun (N. Y.) 42, affirmed 147 N. Y. 241.

5. Right to Accounting from Directors. — *Davis v. Hofer*, 38 Oregon 150.

Right to Accounting from Another Corporation Holding Position of Majority Stockholder. — See *Wolf v. Pennsylvania R. Co.*, 195 Pa. St. 91; *Wolf v. Shortridge*, 22 Pa. Co. Ct. 81.

6. Minority Stockholders Not Entitled to Appointment of Receiver. — *Edwards v. Bay State Gas Co.*, 91 Fed. Rep. 942; *United Electric Securities Co. v. Louisiana Electric Light Co.*, 68 Fed. Rep. 673; *Ranger v. Champion Cotton-Press Co.*, 52 Fed. Rep. 609; *Hyde Park Gas Co. v. Kerber*, 5 Ill. App. 132; *Fluker v. Emporia City R. Co.*, 48 Kan. 577; *Port Huron, etc., R. Co. v. St. Clair Circuit Judge*, 31 Mich. 456; *Rothwell v. Robinson*, 44 Minn. 538; *Watkins v. Watkins, etc., Lumber Co.*, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 227; *Goebel v. Herancourt Brewing Co.*, 2 Ohio Dec. 377; *Robison v. Cleveland City R. Co.*, 7 Ohio Dec. 312; *Devine v. Frankford Steel, etc., Co.*, 205 Pa. St. 114.

Receiver Not Appointed to Bring Suit for Corporation. — A receiver will not be appointed, at the suit of minority stockholders, for the purpose of bringing suit on behalf of the corporation, where the complaining stockholders have an adequate remedy by a suit in their own

names on behalf of the corporation. *Edwards v. Bay State Gas Co.*, 91 Fed. Rep. 942; *Burnes v. Atchison*, 48 Kan. 507; *Marcuse v. Gullett Gin Mfg. Co.*, 52 La. Ann. 1383.

7. When Receiver Will Be Appointed at Suit of Minority Stockholder. — *Becker v. Gulf City St. R., etc., Co.*, 80 Tex. 475. And see *Forbes v. Memphis, etc., R. Co.*, 2 Woods (U. S.) 323; *United Electric Securities Co. v. Louisiana Electric Light Co.*, 68 Fed. Rep. 673.

In *Miner v. Belle Isle Ice Co.*, 93 Mich. 97, a receiver was appointed at the suit of a minority stockholder upon proof that the corporation had not paid a dividend for seven years; that the complainant had invested and tied up a large sum of money; and that the failure of the corporation to pay dividends was due to the fraudulent action of the majority stockholder in controlling the company for his own interest and profit.

In *Davis v. U. S. Electric Power, etc., Co.*, 77 Md. 35, although the court refused to appoint a receiver because the proof failed to sustain the averments of the bill, it was said *obiter* that a receiver would be appointed upon clear proof that the directors of the corporation had adopted a fraudulent policy at the instance and for the benefit of another corporation and that if this policy were carried out ruin would overtake the company.

Receiver Pendente Lite Appointed. — *State v. Second Judicial Dist. Ct.*, 22 Mont. 220. And see *Stevens v. Davison*, 18 Gratt. (Va.) 819, 98 Am. Dec. 692.

Stockholders Empowered by Statute to Apply for Receiver. — *Osgood v. Maguire*, 61 N. Y. 524. And see *Matter of Atty.-Gen.*, 28 Hun (N. Y.) 360, affirmed without opinion 93 N. Y. 630.

Statute Authorizing Appointment of Receiver Construed. — A statute authorizing courts of equity to dissolve corporations and appoint receivers thereof for the purpose of closing up the corporate affairs does not authorize the court to appoint a receiver, at the suit of a stockholder, for the purpose of continuing and carrying on the business of the corporation. *Standley v. Hendrie, etc., Mfg. Co.*, 27 Colo. 331.

Further as Regards the Appointment of Receivers for Corporations see the title *RECEIVERS*, vol. 23, p. 1021 *et seq.*

16. Right to Have Corporation Dissolved and Business Wound Up. — Ordinarily, minority stockholders cannot have the corporation dissolved and its business wound up against the wishes of the majority;¹ but under special circumstances they may be entitled to such relief.²

17. No Right to Enforcement of Unlawful Agreement. — The courts will not lend their aid to minority stockholders for the enforcement of agreements which are unlawful as against public policy.³

18. No Right to Sue in Own Behalf on Corporate Cause of Action. — A stockholder, merely as such, cannot have an action in his own behalf against one who has injured the corporation, however much the wrongful acts have depreciated the value of his shares.⁴ Thus, he cannot sue at law to recover for goods sold by the corporation,⁵ or in equity to enforce specific performance of its contracts;⁶ nor can he maintain an action of replevin in his own name to recover corporate property.⁷ The rule applies to wrongful acts committed by directors, officers,⁸ or majority stockholders of the corporation, as well as to those committed by strangers.⁹ And the fact that the complaining stockholder has become the owner of all the capital stock,¹⁰ or that the corporation has done no business for a number of years, and has no property excepting the claim sued upon, does not enlarge his rights in this respect.¹¹ But the general rule has no application where the wrongful acts are not only wrongs against the corporation, but are also violations by the wrongdoers of a duty arising from contract or otherwise, and owing directly by him to the stockholders.¹²

19. Right to Sue or Defend on Behalf of Corporation — *a*. IN GENERAL. — As a general rule of law, suits to protect corporate interests or redress cor-

1. Minority Not Entitled to Have Corporation Dissolved. — *Watkins v. Watkins*, etc., *Lumber Co.*, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 227; *Robison v. Cleveland City R. Co.*, 7 Ohio Dec. 312; *Goebel v. Herancourt Brewing Co.*, 2 Ohio Dec. 377. And see the cases cited *supra*, this section, *Right to Have Receiver Appointed*.

Corporation Not Dissolved for Fraud of Directors. — *Tutwiler v. Tuskaloosa Coal, etc., Co.*, 89 Ala. 391.

2. When Corporation May Be Dissolved at Suit of Stockholder. — *Bixler v. Summerfield*, 195 Ill. 147; *Miner v. Belle Isle Ice Co.*, 93 Mich. 97; *Falls v. Anglo-Teutonia Bldg., etc., Assoc.*, 105 Tenn. 18.

Dissolution at Suit of Stockholder Authorized by Statute. — *Mickles v. Rochester City Bank*, 11 Paige (N. Y.) 118, 42 Am. Dec. 103. And see *Osgood v. Maguire*, 61 N. Y. 524.

Right to Have Business Wound up Where Charter Has Expired. — See *Mason v. Pewabic Min. Co.*, 133 U. S. 50.

Application for Investigation by State Treasurer as Condition Precedent. — See *Falls v. Anglo-Teutonia Bldg., etc., Assoc.*, 105 Tenn. 18.

3. No Right to Enforcement of Unlawful Agreement. — *Williams v. Montgomery*, 68 Hun (N. Y.) 416.

4. Not Entitled to Sue in Own Behalf on Corporate Cause of Action. — *Forbes v. Memphis, etc., Co.*, 2 Woods (U. S.) 323; *Ritchie v. McMullen*, (C. C. A.) 79 Fed. Rep. 522; *Eldred v. Ripley*, 97 Ill. App. 503; *Cutshaw v. Fargo*, 8 Ind. App. 691; *Legendre v. New Orleans Brewing Assoc.*, 45 La. Ann. 669, 40 Am. St. Rep. 243; *Niles v. New York Cent., etc., R. Co.*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 69; *Lewisohn v. Anaconda Copper Min. Co.* (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 613; *Smith v.*

Hurd, 12 Met. (Mass.) 371, 46 Am. Dec. 690; *Peabody v. Flint*, 6 Allen (Mass.) 52.

5. No Right to Recover for Goods Sold by Corporation. — *Cutshaw v. Fargo*, 8 Ind. App. 691.

6. Not Entitled to Enforce Specific Performance of Corporate Contracts. — *Collier v. Deering Camp Ground Assoc.*, (Ky. 1902) 66 S. W. Rep. 183.

7. No Right to Maintain Replevin for Corporate Property. — *Button v. Hoffman*, 61 Wis. 20, 50 Am. Rep. 131.

8. Wrongful Acts by Directors or Officers. — *McAfee v. Zettler*, 103 Ga. 579; *Bethune v. Wells*, 94 Ga. 486; *Eldred v. Ripley*, 97 Ill. App. 503; *Legendre v. New Orleans Brewing Assoc.*, 45 La. Ann. 669, 40 Am. St. Rep. 243; *Smith v. Hurd*, 12 Met. (Mass.) 371, 46 Am. Dec. 690; *Peabody v. Flint*, 6 Allen (Mass.) 52; *Craig v. Gregg*, 83 Pa. St. 19.

Money Illegally Taken from Corporate Treasury. — A stockholder cannot, as an individual, sue the officers of the corporation to recover from them directly his proportionate share of moneys which he claims that they have illegally taken as salaries from the treasury of the corporation. *Rafferty v. Donnelly*, 197 Pa. St. 423.

9. Wrongful Acts by Majority Stockholders. — *Lewisohn v. Anaconda Copper-Min. Co.*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 613.

10. Stockholder Owning All Stock of Corporation Not Entitled to Sue. — *Randall v. Dudley*, 111 Mich. 437; *Button v. Hoffman*, 61 Wis. 20, 50 Am. Rep. 131.

11. Fact that Corporation Has Ceased to Do Business Immaterial. — *Thompson v. Stanley*, (Supm. Ct. Spec. T.) 20 N. Y. Supp. 317.

12. When General Rule Does Not Apply. — *Ritchie v. McMullen*, (C. C. A.) 79 Fed. Rep. 522; *Eldred v. Ripley*, 97 Ill. App. 503. And

porate wrongs must be brought by the corporation, and in its name.¹ A stockholder cannot sue or defend in the corporate name without the consent of the corporation,² nor can he ordinarily sue in his own name on behalf of the corporation. There are, however, exceptional cases where, upon the actual or virtual refusal of the corporation to bring suit, a stockholder may sue on behalf of himself and other stockholders, and for the benefit of the corporation.³ And such a suit may also be maintained where the corporation has been dissolved.⁴ In order, however, to justify a departure from the

see *Brewster v. Hatch*, (Supm. Ct. Spec. T.) 10 Abb. N. Cas. (N. Y.) 400.

1. General Rule — Suits to Be Brought by Corporation. — See the title CORPORATIONS (PRIVATE), vol. 7, p. 850.

2. Stockholder Not Allowed to Sue or Defend in Corporate Name. — *Cornell v. Sims*, 111 Ga. 828; *Silk Mfg. Co. v. Campbell*, 27 N. J. L. 539.

Officer Not Entitled to Sue in Corporate Name Without Consent. — *Weir Furnace Co. v. Aushutz-Bradberry Co.*, 10 Pa. Dist. 81.

No Right to Sue Out Writ of Error in Corporate Name Without Consent. — *Chicago, etc., Rapid Transit R. Co. v. Northern Trust Co.*, 90 Ill. App. 460.

3. Stockholder Entitled to Sue in Exceptional Cases When Corporation Has Refused — England. — *Alexander v. Automatic Telephone Co.*, (1900) 2 Ch. 56.

United States. — *Greenwood v. Union Freight R. Co.*, 105 U. S. 13; *Heath v. Erie R. Co.*, 8 Blatchf. (U. S.) 347; *Davenport v. Dows*, 18 Wall. (U. S.) 626; *Metcalf v. American School Furniture Co.*, 122 Fed. Rep. 115; *Dickinson v. Consolidated Traction Co.*, 114 Fed. Rep. 232; *Edwards v. Bay State Gas Co.*, 91 Fed. Rep. 942; *Streight v. Junk*, (C. C. A.) 59 Fed. Rep. 321; *McGeorge v. Big Stone Gap Imp. Co.*, 57 Fed. Rep. 262; *Samuel v. Holladay, Woolw.* (U. S.) 400, 21 Fed. Cas. No. 12,288; *Pond v. Vermont Valley R. Co.*, 12 Blatchf. (U. S.) 280, 19 Fed. Cas. No. 11,265.

Alabama. — *Steiner v. Parsons*, (Ala. 1894) 16 So. Rep. 6.

California. — *Waymire v. San Francisco, etc., R. Co.*, 112 Cal. 646; *Wickersham v. Crittenden*, 93 Cal. 17; *Cogswell v. Bull*, 39 Cal. 320; *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508.

Colorado. — *Peoples Sav. Bank v. Colorado Min. Exch. Bldg. Co.*, 8 Colo. App. 354.

Connecticut. — *Byrne v. Schuyler Electric Mfg. Co.*, 65 Conn. 336.

Georgia. — *Alexander v. Atlanta, etc., R. Co.*, 113 Ga. 193; *Colquitt v. Howard*, 11 Ga. 556.

Illinois. — *Higgins v. Lansingh*, 154 Ill. 301; *Farwell v. Great Western Tel. Co.*, 161 Ill. 522; *Bruschke v. Nord Chicago Schuetzen Verein*, 145 Ill. 433; *Chicago v. Cameron*, 120 Ill. 447; *Eldred v. Ripley*, 97 Ill. App. 503; *Chicago, etc., Rapid Transit R. Co. v. Northern Trust Co.*, 90 Ill. App. 460, affirmed 195 Ill. 288; *Hyde Park Gas Co. v. Kerber*, 5 Ill. App. 132.

Indiana. — *Carter v. Ford Plate Glass Co.*, 85 Ind. 180.

Kansas. — *Burnes v. Atchison*, 48 Kan. 507.

Kentucky. — *Pittsburg, etc., R. Co. v. Dodd*, (Ky. 1903) 72 S. W. Rep. 822; *Collier v. Deering Camp Ground Assoc.*, (Ky. 1902) 66 S. W. Rep. 183.

Louisiana. — *Watkins v. North American Land, etc., Co.*, 107 La. 107.

Maryland. — *Mottu v. Primrose*, 23 Md. 482.

Massachusetts. — *Brewer v. Boston Theatre*, 104 Mass. 378; *Peabody v. Flint*, 6 Allen (Mass.) 52.

Missouri. — *Exter v. Sawyer*, 146 Mo. 302; *Albers v. Merchants' Exch.*, 45 Mo. App. 206.

New Hampshire. — *March v. Eastern R. Co.*, 40 N. H. 548, 77 Am. Dec. 732.

New York. — *Flynn v. Brooklyn City R. Co.*, 158 N. Y. 493; *Sage v. Culver*, 147 N. Y. 241; *Bar v. New York, etc., R. Co.*, 125 N. Y. 263; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Brewster v. Hatch*, (Supm. Ct. Spec. T.) 10 Abb. N. Cas. (N. Y.) 400; *Carpenter v. Roberts*, (Supm. Ct. Spec. T.) 56 How. Pr. (N. Y.) 216; *Bloom v. National United Ben. Sav., etc., Co.*, 81 Hun (N. Y.) 120; *Leslie v. Lorillard*, 40 Hun (N. Y.) 392; *Sheridan v. Sheridan Electric Light Co.*, 38 Hun (N. Y.) 396; *Ithaca Gas-Light Co. v. Treman*, 30 Hun (N. Y.) 212; *Robinson v. Smith*, 3 Paige (N. Y.) 222, 24 Am. Dec. 212.

Ohio. — *Robison v. Cleveland City R. Co.*, 7 Ohio Dec. 312; *Larwill v. Burke*, 10 Ohio Cir. Dec. 605.

Pennsylvania. — *Langolf v. Seiberlitch*, 2 Pars. Eq. Cas. (Pa.) 64.

Rhode Island. — *Hodges v. New England Screw Co.*, 1 R. I. 312, 53 Am. Dec. 624.

South Carolina. — *Matthews v. Allendale Bank*, 60 S. Car. 183.

South Dakota. — *Loftus v. Farmers' Shipping Assoc.*, 8 S. Dak. 201.

Tennessee. — *Grant v. Lookout Mountain Co.*, 93 Tenn. 691; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625.

Texas. — *People's Invest. Co. v. Crawford*, (Tex. Civ. App. 1898) 45 S. W. Rep. 738.

West Virginia. — *Crumlish v. Shenandoah Valley R. Co.*, 28 W. Va. 623.

Wisconsin. — *Northern Trust Co. v. Snyder*, 113 Wis. 516.

Relief Not Confined to Prevention of Future Acts.

— Where a court of equity would have interfered, at the instance of a stockholder, to prevent an unlawful or fraudulent transaction, it will equally interpose to undo such transaction after its consummation. There is an equity of rescission as well as of prevention. *Morris v. Elyton Land Co.*, 125 Ala. 263; *Chicago v. Cameron*, 120 Ill. 447. But compare *Metcalf v. American School Furniture Co.*, 122 Fed. Rep. 115, and see *infra*, this subsection, *Waiver of Right to Sue or Defend*.

4. Where Corporation Has Been Dissolved. — *Putnam v. Ruch*, 54 Fed. Rep. 216, 56 Fed. Rep. 416; *Musson v. Richardson*, 11 Rob. (La.) 37. And see *McGeorge v. Big Stone Gap Imp. Co.*, 57 Fed. Rep. 262.

general rule requiring the corporation itself to sue, reasons of a most urgent character must be shown; ¹ and a stockholder who sues on behalf of his corporation in a court of equity must, in order to excite the favorable action of the court, show to its satisfaction that the result of the suit will be to promote justice, and not to produce any inequitable results.²

Where Corporation Itself Has No Cause of Action. — Where the corporation itself has no valid cause of action, it necessarily follows that a stockholder cannot sue in its behalf.³

b. NATURE OF STOCKHOLDERS' SUITS. — Suits by a stockholder on behalf of the corporation to procure relief against transactions which have been fully consummated should be carefully distinguished from suits for preventive relief against threatened acts injurious to the stockholder individually.⁴ In a suit by a stockholder on behalf of the corporation the real controversy is between the corporation and the person whose acts are complained of; the corporation is the beneficial plaintiff, even though it is joined as a party defendant,⁵ and is therefore entitled to the benefit of any relief that may be granted.⁶ In such suit causes of complaint in favor of the stockholder individually cannot be joined with those in favor of the corporation;⁷ nor can complaints made

Charter Repealed. — A repeal of the charter of a corporation by the legislature does not of itself enable a stockholder to defend an action against such corporation, where the statutes provide that corporations whose charters have expired or been annulled shall continue in existence for a certain period for the purpose of winding up their affairs. *General Electric Co. v. West Asheville Imp. Co.*, 73 Fed. Rep. 386.

1. Urgent Reasons Required to Justify Departure from General Rule. — *Rogers v. Nashville, etc., R. Co.* (C. C. A.) 91 Fed. Rep. 299.

2. Siegman v. Maloney, 63 N. J. Eq. 422, holding that if a statute making directors liable to the corporation for dividends paid out of the capital stock could be considered as establishing such liability regardless of the financial needs of the corporation, still, being highly penal, and liable to produce inequitable results, it could not be enforced in a court of equity by a stockholder suing on behalf of the corporation, even though it was shown that the complainant had no remedy in any other court.

3. Where Corporation Itself Has No Cause of Action. — *Waymire v. San Francisco, etc., R. Co.*, 112 Cal. 646; *Miller v. University Magazine Co.*, (Supm. Ct. Spec. T.) 10 Misc. (N. Y.) 311. And see *Hart v. Ogdensburg, etc., R. Co.*, 89 Hun (N. Y.) 316.

Rule Where Cause of Action Against Directors Has Been Released by Receiver. — *Craig v. James*, 71 N. Y. App. Div. 238, 80 N. Y. App. Div. 16.

4. Distinction Between Suits on Behalf of Corporation and Other Suits by Stockholders. — *Dickinson v. Consolidated Traction Co.*, 114 Fed. Rep. 232; *Alexander v. Atlanta, etc., R. Co.*, 113 Ga. 193; *Willoughby v. Chicago Junction R., etc., Co.*, 50 N. J. Eq. 656.

5. Corporation Beneficial Plaintiff though Joined as Defendant — *United States*. — *Dickinson v. Consolidated Traction Co.*, 114 Fed. Rep. 232; *Edwards v. Bay State Gas Co.*, 91 Fed. Rep. 942; *De Neufville v. New York, etc., R. Co.* (C. C. A.) 81 Fed. Rep. 10.

Alabama. — *Morris v. Elyton Land Co.*, 125 Ala. 263; *Tutwiler v. Tuskaloosa Coal, etc., Co.*, 89 Ala. 391.

California. — *Smith v. Ferries, etc., R. Co.*, (Cal. 1897) 51 Pac. Rep. 710.

Georgia. — *Alexander v. Atlanta, etc., R. Co.*, 113 Ga. 193.

Illinois. — *Bruschke v. Nord Chicago Schuetzen Verein*, 145 Ill. 433; *Chicago Macaroni Mfg. Co. v. Boggiano*, 202 Ill. 312; *Hyde Park Gas Co. v. Kerber*, 5 Ill. App. 132.

Indiana. — *Carter v. Ford Plate Glass Co.*, 85 Ind. 180.

Maryland. — *Davis v. Gemmell*, 73 Md. 530.

New Jersey. — *Appleton v. American Malting Co.*, (N. J. 1903) 54 Atl. Rep. 454; *Wilson v. American Palace Car Co.*, (N. J. 1903) 54 Atl. Rep. 415; *Willoughby v. Chicago Junction R., etc., Co.*, 50 N. J. Eq. 656.

New York. — *Flynn v. Brooklyn City R. Co.*, 158 N. Y. 493, 9 N. Y. App. Div. 269; *Thompson v. Stanley*, (Supm. Ct. Spec. T.) 20 N. Y. Supp. 317.

Ohio. — *Larwill v. Burke*, 10 Ohio Cir. Dec. 579, 605, 19 Ohio Cir. Ct. 449.

Tennessee. — *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625.

Virginia. — *Mount v. Radford Trust Co.*, 93 Va. 427.

Necessity to Join Corporation as Party Plaintiff or Defendant. — See the title *STOCK AND STOCKHOLDERS*, 20 ENCYC. OF PL. AND PR. 771.

Moneyed Compensation to Stockholder No Bar to Suit. — *Morris v. Elyton Land Co.*, 125 Ala. 263.

Corporation Not Entitled to Plead as Defendant. — Where a stockholder of a foreign corporation sued in its behalf, a plea to the jurisdiction filed by the corporation, which had been made a party defendant, was overruled on the ground that such corporation, although a nominal defendant, was in reality the beneficial plaintiff. *Wilson v. American Palace Car Co.*, (N. J. 1903) 54 Atl. Rep. 415.

6. Decree Granting Relief to Stockholder Directly Erroneous. — *Chicago Macaroni Mfg. Co. v. Boggiano*, 202 Ill. 312. But see *Brown v. De Young*, 167 Ill. 549.

7. Joinder of Corporate and Individual Causes of Action Not Permissible. — *Metcalf v. American*

against the corporation be joined with complaints made on its behalf.¹

Necessity to Sue on Behalf of All Stockholders. — Where the suit is for the benefit of the corporation it must be brought on behalf of the complaining stockholder and of all other stockholders who may choose to come in and be made parties.² Where, on the other hand, it is based on a cause of action in favor of the stockholder individually, the latter may, at his election, either stand alone or sue on behalf of himself and other stockholders similarly situated.³

c. EQUITY JURISDICTION. — By the weight of authority a suit by a stockholder on behalf of the corporation must be brought in a court of equity.⁴

d. WHEN STOCKHOLDER MAY SUE — (1) *General Grounds of Action.* — According to the leading English and American cases,⁵ a stockholder may sue on behalf of his corporation where, and only where, there exists as the foundation of the suit some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization;⁶ or such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party or among themselves or with other shareholders, as will result in serious injury to the corporation or to the interests of the other shareholders;⁷ or where the board of directors, or a majority of

School-Furniture Co., 108 Fed. Rep. 909; Whitney v. Fairbanks, 54 Fed. Rep. 985; Jenkins v. Bradley, 104 Wis. 540.

1. Causes of Action For and Against Corporation Cannot Be Joined. — Morse v. Bay State Gas Co., 91 Fed. Rep. 944; Edwards v. Bay State Gas Co., 91 Fed. Rep. 942.

2. When Necessary to Sue on Behalf of All Stockholders. — Flynn v. Brooklyn City R. Co., 158 N. Y. 493, affirming 9 N. Y. App. Div. 269.

3. When Stockholder May Stand Alone. — Alexander v. Atlanta, etc., R. Co., 113 Ga. 193; Fletcher v. Newark Telephone Co., 55 N. J. Eq. 47. And see Dousman v. Wisconsin, etc., Min., etc., Co., 40 Wis. 418, holding that a stockholder who sues on the ground that he has been deprived of his proportionate share of new stock must sue for his own benefit alone, and cannot sue on behalf of himself and others.

4. Suit Must Be in Equity. — Eldred v. Ripley, 97 Ill. App. 503; Crumlish v. Shenandoah Valley R. Co., 28 W. Va. 623; Jenkins v. Bradley, 104 Wis. 540. But see Hanley v. Balch, 94 Mich. 315; Morrill v. Little Falls Mfg. Co., 46 Minn. 260.

5. Leading Cases. — Foss v. Harbottle, 2 Hare 461; Mozley v. Alston, 1 Phil. 790; Gray v. Lewis, L. R. 8 Ch. 1035; Macdougall v. Gardiner, 1 Ch. D. 13; Hawes v. Oakland, 104 U. S. 450; Brewer v. Boston Theatre, 104 Mass. 378.

6. Ultra Vires Acts — *United States.* — Hawes v. Oakland, 104 U. S. 450; Corbus v. Alaska Treadwell Gold Min. Co., 187 U. S. 455; Heath v. Erie R. Co., 8 Blatchf. (U. S.) 347; Dickinson v. Consolidated Traction Co., 114 Fed. Rep. 232.

Colorado. — Majors v. Taussig, 20 Colo. 44. *Connecticut.* — Byrne v. Schuyler Electric Mfg. Co., 65 Conn. 336.

Georgia. — Steel Lumber Co. v. Laurens Lumber Co., 98 Ga. 329; Central R. Co. v. Collins. 40 Ga. 582.

Illinois. — Ottawa, etc., R. Co. v. Black, 79 Ill. 262; McCrory v. Chambers, 48 Ill. App. 445.

Kentucky. — Pittsburg, etc., R. Co. v. Dodd, (Ky. 1903) 72 S. W. Rep. 822.

Maryland. — Shaw v. Davis, 78 Md. 308; Davis v. Gemmell, 73 Md. 530.

Minnesota. — Stewart v. Erie, etc., Transp. Co., 17 Minn. 372.

Missouri. — Fisher v. Patton, 134 Mo. 32.

New Hampshire. — March v. Eastern R. Co., 40 N. H. 548, 77 Am. Dec. 732.

New Jersey. — Trimble v. American Sugar Refining Co., 61 N. J. Eq. 340.

New York. — Davis v. Congregation Beth Tephila Israel, 40 N. Y. App. Div. 424; Lewishohn v. Anaconda Copper Min. Co., (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 613.

Ohio. — Larwill v. Burke, 10 Ohio Cir. Dec. 605.

Rhode Island. — Hodges v. New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624.

South Carolina. — Wenzel v. Palmetto Brewing Co., 48 S. Car. 80; Latimer v. Richmond, etc., R. Co., 39 S. Car. 44.

Texas. — Joy v. Ft. Worth Compress Co., 24 Tex. Civ. App. 94.

Ultra Vires Purchase of Stock in Another Corporation Enjoined. — Central R. Co. v. Collins, 40 Ga. 582.

Ultra Vires Transfer of Property to Another Corporation Set Aside. — Morris v. Elyton Land Co., 125 Ala. 263. And see Metcalf v. American School Furniture Co., 122 Fed. Rep. 115.

Ultra Vires Act Resulting from Mistake No Ground for Suit. — Hodges v. New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624.

7. Fraud of Directors Injurious to Corporation and Shareholders — *United States.* — Hawes v. Oakland, 104 U. S. 450; Corbus v. Alaska Treadwell Gold Min. Co., 187 U. S. 455; Heath v. Erie R. Co., 8 Blatchf. (U. S.) 347; Elkins v. Chicago, 119 Fed. Rep. 957; De Neufville v. New York, etc., R. Co., (C. C. A.) 81 Fed. Rep. 10; Streight v. Junk, (C. C. A.) 59 Fed. Rep. 321; Weidenfeld v. Sugar Run R. Co., 48 Fed. Rep. 615.

Alabama. — Van Kirk v. Adler, 111 Ala. 104; Steiner v. Parsons, (Ala. 1894) 16 So. Rep. 6.

Colorado. — Majors v. Taussig, 20 Colo. 44; Arkansas River Land, etc., Co. v. Farmers' L. & T. Co., 13 Colo. 587.

them, are acting for their own interest, in a manner destructive of the corporation itself or of the right of the other shareholders;¹ or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation which is in violation of the rights of the other shareholders, and which can be restrained only by the aid of a court of equity;² or where, for some other reason, intervention by the court is necessary to prevent irremediable injury or a total failure of justice.³

Injury to Corporation or Stockholders. — Where the acts complained of are *intra vires* the complaining stockholder must also show that the corporation or its stockholders have been or will be injured thereby;⁴ but this rule does not apply where the acts in question are *ultra vires*.⁵

(2) *Specific Grounds of Action.* — The specific injuries which may be

Georgia. — Steel Lumber Co. v. Laurens Lumber Co., 98 Ga. 329.

Illinois. — Wheeler v. Pullman Iron, etc., Co., 143 Ill. 197.

Kentucky. — Pittsburg, etc., R. Co. v. Dodd, (Ky. 1903) 72 S. W. Rep. 822.

Maryland. — Shaw v. Davis, 78 Md. 308; Davis v. Gemmell, 73 Md. 530.

Massachusetts. — Gay v. Fair, 175 Mass. 521; Ward v. Salem St. R. Co., 108 Mass. 332.

Michigan. — Hanley v. Balch, 94 Mich. 315; Miner v. Belle Isle Ice Co., 93 Mich. 97.

Minnesota. — Pencille v. State Farmers' Mut. Hair Ins. Co., 74 Minn. 67, 73 Am. St. Rep. 326.

New Hampshire. — March v. Eastern R. Co., 40 N. H. 548, 77 Am. Dec. 732.

New York. — Flynn v. Brooklyn City R. Co., 158 N. Y. 493; Greaves v. Gouge, 69 N. Y. 154; Carpenter v. Roberts, (Supm. Ct. Spec. T.) 56 How. Pr. (N. Y.) 216; Pondir v. New York, etc., R. Co., 72 Hun (N. Y.) 384, 31 Abb. N. Cas. (N. Y.) 29; Lewisohn v. Anaconda Copper Min Co., (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 613.

Ohio. — Larwill v. Burke, 10 Ohio Cir. Dec. 605.

Rhode Island. — Hodges v. New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624.

South Carolina. — Stahn v. Catawba Mills, 53 S. Car. 519; Wenzel v. Palmetto Brewing Co., 48 S. Car. 80; Latimer v. Richmond, etc., R. Co., 39 S. Car. 44.

Mere Errors of Judgment Not Sufficient. — Roberts v. New York, etc., R. Co., (Supm. Ct. Gen. T.) 31 N. Y. Supp. 577; Wallace v. Long Island R. Co., 12 Hun (N. Y.) 460.

Real Defendant Innocent of Fraud. — Where the directors of one corporation, through a fraudulent purpose, refuse to bring suit against another corporation to enforce a contract, minority stockholders of the former corporation may sue in its behalf even though the latter corporation is not a party to the fraud. Pittsburg, etc., R. Co. v. Dodd, (Ky. 1903) 72 S. W. Rep. 822.

1. Directors Acting in Own Interests to Prejudice of Corporation. — Hawes v. Oakland, 104 U. S. 450; Corbus v. Alaska Treadwell Gold Min. Co., 187 U. S. 455; Decatur Mineral Land Co. v. Palm, 113 Ala. 531, 59 Am. St. Rep. 140, citing Merchants, etc., Line v. Waganer, 71 Ala. 581; Majors v. Taussig, 20 Colo. 44; Wickersham v. Crittenden, 106 Cal. 329; Steel Lumber Co. v. Laurens Lumber Co., 98 Ga. 329; Tipton Fire Co. v. Barnheisel, 92 Ind. 88; Gerry

v. Bismark Bank, 19 Mont. 191; Hallenborg v. Greene, 66 N. Y. App. Div. 590; Gray v. New York, etc., Steamship Co., 3 Hun (N. Y.) 383; Lewisohn v. Anaconda Copper Min. Co., (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 613; Watkins v. Watkins, etc., Lumber Co., 11 N. Y. App. Div. 517; Latimer v. Richmond, etc., R. Co., 39 S. Car. 44. And see Alexander v. Automatic Telephone Co., (1900) 2 Ch. 56.

2. Majority Stockholders Oppressing Minority. — Hawes v. Oakland, 104 U. S. 450; Corbus v. Alaska Treadwell Gold Min. Co., 187 U. S. 455; Mumford v. Ecuador Development Co., 111 Fed. Rep. 639; Majors v. Taussig, 20 Colo. 44; Steel Lumber Co. v. Laurens Lumber Co., 98 Ga. 329; Knabe v. Ternot, 16 La. Ann. 13; Polar Star Lodge No. 1 v. Polar Star Lodge No. 1, 16 La. Ann. 53; Brewer v. Boston Theatre, 104 Mass. 378; Latimer v. Richmond, etc., R. Co., 39 S. Car. 44; Joy v. Ft. Worth Compress Co., 24 Tex. Civ. App. 94.

What Constitutes Oppression by Majority. — Gamble v. Queens County Water Co., 123 N. Y. 91.

Burden of Proof upon Minority to Show Fraud. — Lewisohn v. Anaconda Copper Min. Co., (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 613.

3. Necessity of Interference in General. — Hawes v. Oakland, 104 U. S. 450.

A Stockholder Cannot Sue to Restrain Slander of the Title of Property belonging to the corporation. Langdon v. Hillside Coal, etc., Co., 41 Fed. Rep. 609.

Acts Exposing Corporation to Litigation. — A stockholder cannot sue to restrain other stockholders from voting for, and the corporation from carrying on, a business authorized by its charter, on the ground that by so doing it will infringe the rights of another corporation and expose itself to litigation therefor. Converse v. Hood, 149 Mass. 471.

4. Injury to Corporation or Stockholders Must Be Shown. — Elkins v. Chicago, 119 Fed. Rep. 957; Jefferson County Sav. Bank v. Francis, 115 Ala. 317; Smith v. Ferries, etc., R. Co., (Cal. 1897) 51 Pac. Rep. 710; Reynolds v. Mt. Vernon Bank, 158 N. Y. 740; Larwill v. Burke, 10 Ohio Cir. Dec. 605, 19 Ohio Cir. Ct. 511. See also Atkins v. Steacy, 5 Dill. (U. S.) 381, note, 2 Fed. Cas. No. 605. And see *infra*, this section, *Necessity of Showing Injury from Acts Complained Of*.

5. Injury Not Necessary Where Acts Are Ultra Vires. — Byrne v. Schuyler Electric Mfg. Co., 65 Conn. 336; Davis v. Congregation Beth Tephila Israel, 40 N. Y. App. Div. 424.

redressed by a stockholder's suit, within the general rules above stated, are so numerous and so varied in their character that it is impossible to set forth all the conceivable circumstances under which such a suit may be maintained; nor would an attempt to do so serve any useful purpose, since it is generally agreed that each case must be judged upon its own merits as it arises. The cases, however, in which this jurisdiction is most frequently invoked are where the directors of a corporation have suffered its funds or property to be lost or wasted through gross negligence;¹ or have fraudulently misappropriated corporate property;² or have wasted the funds of the corporation by voting excessive salaries to themselves or to the corporate officers;³ or have neglected or refused to resist the collection of illegal taxes assessed against the corporation⁴ or to oppose the enforcement of other unconstitutional legislation prejudicial to its interests;⁵ or where officers or directors controlling two or more corporations are mismanaging or wrecking one company in the interests of another.⁶

1. Corporate Property Lost through Gross Negligence of Directors.—*Landis v. Sea Isle City Hotel Co.*, (N. J. 1895) 31 Atl. Rep. 755; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Bloom v. National United Ben. Sav., etc., Co.*, 81 Hun (N. Y.) 120; *Robinson v. Smith*, 3 Paige (N. Y.) 222, 24 Am. Dec. 212; *Sayles v. White*, 18 N. Y. App. Div. 590; *Larwill v. Burke*, 10 Ohio Cir. Dec. 605; *Robison v. Cleveland City R. Co.*, 7 Ohio Dec. 312. And see *Watkins v. North American Land, etc., Co.*, 107 La. 107.

2. Corporate Property Misappropriated by Directors.—*Tipton Fire Co. v. Barnheisel*, 92 Ind. 88; *Schoening v. Schwenk*, 112 Iowa 733; *Robinson v. Smith*, 3 Paige (N. Y.) 222, 24 Am. Dec. 212; *Sage v. Culver*, 71 Hun (N. Y.) 42.

3. Directors Voting Excessive Salaries to Themselves or to Officers.—*Sellers v. Phoenix Iron Co.*, 13 Fed. Rep. 20; *Decatur Mineral Land Co. v. Palm*, 113 Ala. 531, 59 Am. St. Rep. 140; *Marcuse v. Gullett Gin Mfg. Co.*, 52 La. Ann. 1383; *Blair v. Telegram Newspaper Co.*, 172 Mass. 201; *Fitchett v. Murphy*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 544 [reversed on another point 46 N. Y. App. Div. 181]; *Butts v. Wood*, 37 N. Y. 317; *Eaton v. Robinson*, 19 R. I. 146, 18 R. I. 396; *Earle v. Burland*, 27 Ont. App. 540.

Burden of Proving Rendition of Services upon Defendants Where Bad Faith Is Proved.—*Harrison v. Thomas*, (C. C. A.) 112 Fed. Rep. 22.

4. Refusal to Resist Collection of Illegal Tax.—*Pollock v. Farmers' L. & T. Co.*, 157 U. S. 429; *Dodge v. Woolsey*, 18 How. (U. S.) 331; *Barnes v. Kornegay*, 62 Fed. Rep. 671; *Forbes v. Gracey*, 9 Fed. Cas. No. 4,924; *Foot v. Linck*, 5 McLean (U. S.) 616, 9 Fed. Cas. No. 4,913. And see *Huntington v. Palmer*, 104 U. S. 482.

When Stockholder Cannot Enjoin Payment of Tax.—A court of equity will not, at the suit of a stockholder, restrain a corporation from applying for a license and paying the tax or fee imposed by law for conducting a business upon which Congress has imposed such tax, in the absence of proof that irreparable injury will result or that there is no adequate remedy at law. *Corbus v. Alaska Treadwell Gold Min. Co.*, 187 U. S. 455, affirming 99 Fed. Rep. 334.

5. A Stockholder May Sue to Test the Constitutionality of a State Statute repealing the charter

of the corporation and transferring its property and franchises to another company, where the corporation itself declines to take steps to assert its rights. *Greenwood v. Union Freight R. Co.*, 105 U. S. 13.

Where stock belonging to loyal stockholders was seized and sold by order of the Confederate government, during the civil war, and the corporation refused to bring suit to have the sale declared invalid, it was held that a stockholder might sue for that purpose. *Perdicaris v. Charleston Gaslight Co.*, *Chase* (U. S.) 435, 19 Fed. Cas. No. 10,974.

Stockholder Not Entitled to Injunction Against State.—*Ball v. Rutland R. Co.*, 93 Fed. Rep. 513. But if the state officers are committing, or about to commit, some specific wrong or trespass to the injury of the complainant's rights, the suit will lie. *Smyth v. Ames*, 169 U. S. 466.

6. One Corporation Wrecked in Interest of Another.—*De Neufville v. New York, etc., R. Co.*, (C. C. A.) 81 Fed. Rep. 10; *Earle v. Seattle, etc., R. Co.*, 56 Fed. Rep. 909; *Weidenfeld v. Sugar Run R. Co.*, 48 Fed. Rep. 615; *Wheeler v. Pullman Iron, etc., Co.*, 143 Ill. 197; *Pittsburg, etc., R. Co. v. Dodd*, 72 S. W. Rep. 822, 24 Ky. L. Rep. 2057; *Fitzgerald v. Fitzgerald, etc., Constr. Co.*, 41 Neb. 374; *March v. Eastern R. Co.*, 40 N. H. 548, 77 Am. Dec. 732; *Barr v. New York, etc., R. Co.*, 96 N. Y. 444; *Hallenborg v. Greene*, 66 N. Y. App. Div. 590; *Boaz v. Sterlingworth R. Supply Co.*, 68 N. Y. App. Div. 1.

Right to Set Aside Lease of Corporate Property.—Where one railroad company, owning a majority of the stock of another, and controlling the directors of the latter, fraudulently procures them to make a lease of their road, without consideration, a minority stockholder in the leased road may sue in his own name to annul the lease and for an accounting. *Pondir v. New York, etc., R. Co.*, 72 Hun (N. Y.) 384, 31 Abb. N. Cas. (N. Y.) 29. But see *Wallace v. Long Island R. Co.*, 12 Hun (N. Y.) 460.

Effect of Agreement for Arbitration.—Where a contract of lease between two railroad companies provides for the arbitration by referees of any difficulties that may arise between the parties, a stockholder of the lessor company cannot sue in behalf of the corporation to have the lease set aside, without first seeking relief

e. WHEN ALLOWED TO DEFEND. — A stockholder can intervene for the purpose of defending an action against the corporation where, and only where, there has been such a neglect or refusal on the part of the corporation or its officers to protect its interests that the court can clearly see that such action on the part of the stockholder is necessary to his protection.¹ This general rule is not affected by statutes authorizing persons interested in actions to be brought in as parties, on their application;² nor does a statute authorizing stockholders to intervene in actions against corporations for the purpose of showing that they are not individually liable authorize a stockholder to defend on behalf of the corporation.³ Under the *New York* statutes, however, a stockholder is entitled to a stay of proceedings in an action brought against the corporation by procurement or default of its directors, and to be admitted to defend on its behalf, upon proof that the corporation has a good defense which the directors wrongfully refuse to interpose.⁴

f. DEMAND AND REFUSAL OF CORPORATE ACTION AS CONDITION PRECEDENT—(1) *In General.* — As a general rule, before a stockholder can be permitted to sue or defend on behalf of the corporation he must show that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes,⁵ and

under the arbitration clause of the agreement. *Wolf v. Pennsylvania R. Co.*, 195 Pa. St. 91.

1. When Allowed to Defend.—*United States.* — *Bronson v. La Crosse*, etc., R. Co., 2 Wall. (U. S.) 283; *General Electric Co. v. West Asheville Imp. Co.*, 73 Fed. Rep. 386; *Farmers' L. & T. Co. v. Toledo*, etc., R. Co., 67 Fed. Rep. 49; *Pittsburgh Fifth Nat. Bank v. Pittsburgh*, etc., R. Co., 1 Fed. Rep. 190.

California. — *Shively v. Eureka Tellurium Gold Min. Co.*, 129 Cal. 293; *Waymire v. San Francisco*, etc., R. Co., 112 Cal. 646.

Colorado. — *Majors v. Taussig*, 20 Colo. 44; *Henry v. Travelers' Ins. Co.*, 16 Colo. 179.

Illinois. — *Gunderson v. Illinois Trust*, etc., Bank, 199 Ill. 422.

Kansas. — *Fitzwater v. National Bank*, 62 Kan. 163, 84 Am. St. Rep. 377.

Michigan. — *Stradley v. Pailthorpe*, 96 Mich. 287.

Minnesota. — *Morrill v. Little Falls Mfg. Co.*, 46 Minn. 260.

Missouri. — *Meyer v. Bristol Hotel Co.*, 163 Mo. 59; *Chouteau v. Allen*, 70 Mo. 290.

Nebraska. — *State v. Holmes*, 60 Neb. 40.

New York. — *Farmers L. & T. Co. v. New York*, etc., R. Co., 150 N. Y. 410, 55 Am. St. Rep. 689; *Wilkinson v. Chemical F. Ins. Co.*, (N. Y. City Ct. Spec. T.) 2 City Ct. (N. Y.) 43; *Farmers' L. & T. Co. v. New York*, etc., R. Co., 78 Hun (N. Y.) 213.

Tennessee. — *Kirtland v. Purdy University*, 7 Lea (Tenn.) 243.

Texas. — *Gresham v. Island City Sav. Bank*, 2 Tex. Civ. App. 52.

Washington. — *Bissell v. Taylor*, 7 Wash. 324.

West Virginia. — *Park v. New York*, etc., Oil Co., 26 W. Va. 486; *Park v. Ulster*, etc., Petroleum Co., 25 W. Va. 108.

Stockholder Not Permitted to Plead Statute of Limitations in Action Against Corporation. — *Davis v. Gemmell*, 73 Md. 530; *Meyer v. Bristol Hotel Co.*, 163 Mo. 59.

In Georgia stockholders can plead or defend

for the corporation only in the cases expressly provided for in the code. *Blackman v. Central R., etc., Co.*, 58 Ga. 189.

The Defense Interposed by the Stockholder Is Independent of the Company and of its directors, and the stockholder becomes a real and substantial party to the extent of his own interests and of those who may join him, and against whom any proceeding, order, or decree of the court in the cause is binding and may be enforced. *Bronson v. La Crosse*, etc., R. Co., 2 Wall. (U. S.) 283; *Morrill v. Little Falls Mfg. Co.*, 46 Minn. 260.

2. **Effect of Statutes Permitting Intervention by Parties Interested.** — *Matter of Fontana*, 85 Hun (N. Y.) 219.

3. **Statute Authorizing Defense Against Individual Liability.** — *Byers v. Franklin Coal Co.*, 14 Allen (Mass.) 470; *Robbins v. Justices*, 12 Gray (Mass.) 225; *Farnum v. Ballard Vale Mach. Shop*, 12 Cush. (Mass.) 507; *Hobbs v. Dane Mfg. Co.*, 5 Allen (Mass.) 581.

4. **Stay of Proceedings in Action Collusively Brought.** — *Matter of Virgil*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 320.

The Statute Does Not Apply unless the action is brought against the corporation in the interest of a director or for his benefit. *Matter of Gardner*, 86 Hun (N. Y.) 30.

5. **Demand for Corporate Action Condition Precedent.** — *United States.* — *Hawes v. Oakland*, 104 U. S. 450; *Corbus v. Alaska Treadwell Gold Min. Co.*, 187 U. S. 455; *Dimpfell v. Ohio*, etc., R. Co., 110 U. S. 209; *Savings*, etc., Co. v. Bear Valley Irrigation Co., 112 Fed. Rep. 693; *Rogers v. Nashville*, etc., R. Co., (C. C. A.) 91 Fed. Rep. 299; *Hutton v. Joseph Bancroft*, etc., Co., 83 Fed. Rep. 17; *Holton v. Wallace*, (C. C. A.) 77 Fed. Rep. 61; *Ziegler v. Lake St. El. R. Co.*, (C. C. A.) 76 Fed. Rep. 662; *Farmers' L. & T. Co. v. Toledo*, etc., R. Co., 67 Fed. Rep. 49; *Swope v. Villard*, 61 Fed. Rep. 417.

Alabama. — *Louisville*, etc., R. Co. v. *Neal*, 128 Ala. 149; *Johnson v. National Bldg., etc., Assoc.*, 125 Ala. 465; *Montgomery Light Co. v.*

that the managing body of the corporation has refused to sue or defend, as the case may be.¹ Where the corporation has brought suit, and prosecuted

Lahey, 121 Ala. 131; Jefferson County Sav. Bank v. Francis, 115 Ala. 317; Decatur Mineral Land Co. v. Palm, 113 Ala. 531, 59 Am. St. Rep. 140; Roman v. Woolfolk, 98 Ala. 219; Steiner v. Parsons, 103 Ala. 215; Tutwiler v. Tuskaloosa Coal, etc., Co., 89 Ala. 391.

Colorado.—Ide v. Bascomb, (Colo. App. 1903) 72 Pac. Rep. 62; Smith v. Bulkley, (Colo. App. 1902) 70 Pac. Rep. 958; Majors v. Tausig, 20 Colo. 44; Beshoar v. Chappell, 6 Colo. App. 323.

Georgia.—Steel Lumber Co. v. Laurens Lumber Co., 98 Ga. 329; Cornell v. Sims, 111 Ga. 828; Alexander v. Searcy, 81 Ga. 536, 12 Am. St. Rep. 337.

Indiana.—Tevis v. Hammersmith, (Ind. App. 1903) 66 N. E. Rep. 79.

Iowa.—Dillon v. Lee, 110 Iowa 156.

Kansas.—Fry v. Rush, 63 Kan. 429; Atchison, etc., R. Co. v. Sumner County, 51 Kan. 617.

Massachusetts.—Blair v. Telegram Newspaper Co., 172 Mass. 201; Brewer v. Boston Theatre, 104 Mass. 378.

Missouri.—Loomis v. Missouri Pac. R. Co., 165 Mo. 469; Albers v. Merchants' Exch., 45 Mo. App. 206.

New Jersey.—Siegmán v. Maloney, (N. J. 1903) 54 Atl. Rep. 405.

New York.—Flynn v. Brooklyn City R. Co., 158 N. Y. 493; Greaves v. Gouge, 69 N. Y. 154; Leslie v. Lorillard, 31 Hun (N. Y.) 305; Craig v. James, 71 N. Y. App. Div. 238; Fitchett v. Murphy, 46 N. Y. App. Div. 181; Flynn v. Brooklyn City R. Co., 9 N. Y. App. Div. 269.

North Carolina.—Coble v. Beall, 130 N. Car. 533.

Ohio.—Kuhn v. Woolson Spice Co., 10 Ohio Dec. 292.

Pennsylvania.—Wolf v. Pennsylvania R. Co., 195 Pa. St. 91.

South Carolina.—Wenzel v. Palmetto Brewing Co., 48 S. Car. 80; Latimer v. Richmond, etc., R. Co., 39 S. Car. 44.

Tennessee.—Wallace v. Lincoln Sav. Bank, 89 Tenn. 630, 24 Am. St. Rep. 625; Boyd v. Sims, 87 Tenn. 771.

Texas.—Becker v. Gulf City St. R., etc., Co., 80 Tex. 475.

Virginia.—Mount v. Radford Trust Co., 93 Va. 427.

Wisconsin.—Northern Trust Co. v. Snyder, 113 Wis. 516; Cunningham v. Wechselberg, 105 Wis. 359.

1. Refusal of Corporate Action Condition Precedent.—*United States.*—Detroit v. Dean, 106 U. S. 537; Dodge v. Woolsey, 18 How. (U. S.) 331; Davenport v. Dows, 18 Wall. (U. S.) 626; Memphis v. Dean, 8 Wall. (U. S.) 64; Savings, etc., Co. v. Bear Valley Irrigation Co., 112 Fed. Rep. 693; Swope v. Villard, 61 Fed. Rep. 417; Whitney v. Fairbanks, 54 Fed. Rep. 985; Putnam v. Ruch, 54 Fed. Rep. 216, affirmed 56 Fed. Rep. 416; Taylor v. Holmes, 14 Fed. Rep. 498; Danmeyer v. Coleman, 11 Fed. Rep. 97; Pittsburgh Fifth Nat. Bank v. Pittsburgh, etc., R. Co., 1 Fed. Rep. 190; Morgan v. New Orleans,

etc., R. Co., 1 Woods (U. S.) 15, 17 Fed. Cas. No. 9, 806.

Alabama.—Jefferson County Sav. Bank v. Francis, 115 Ala. 317.

Colorado.—Miller v. Murray, 17 Colo. 408.

Georgia.—Cornell v. Sims, 111 Ga. 828; Alexander v. Searcy, 81 Ga. 536, 12 Am. St. Rep. 337; Henry v. Elder, 63 Ga. 347.

Illinois.—Perry County v. Stebbins, 66 Ill. App. 427.

Indiana.—Tevis v. Hammersmith, (Ind. App. 1903) 66 N. E. Rep. 79.

Iowa.—Dillon v. Lee, 110 Iowa 156.

Kansas.—Home Min. Co. v. McKibben, 60 Kan. 387.

Kentucky.—Shawhan v. Zinn, 79 Ky. 300.

Maine.—Kennebec, etc., R. Co. v. Portland, etc., R. Co., 54 Me. 173.

Massachusetts.—Smith v. Hurd, 12 Met. (Mass.) 371, 46 Am. Dec. 690.

Michigan.—Talbot v. Scripps, 31 Mich. 268; La Grange Tp. v. State Treasurer, 24 Mich. 468.

Missouri.—Albers v. Merchants' Exch., 45 Mo. App. 206.

New Jersey.—Willoughby v. Chicago Junction R., etc., Co., 59 N. J. Eq. 656.

New York.—Flynn v. Brooklyn City R. Co., 158 N. Y. 493; Greaves v. Gouge, 69 N. Y. 154; House v. Cooper, 30 Barb. (N. Y.) 157; Vanderbilt v. Garrison, (N. Y. Super. Ct. Spec. T.) 3 Abb. Pr. (N. Y.) 361; Wilkie v. Rochester, etc., R. Co., 12 Hun (N. Y.) 242; Gray v. New York, etc., Steamship Co., 3 Hun (N. Y.) 383, 5 Thomp. & C. (N. Y.) 224; Robinson v. Smith, 3 Paige (N. Y.) 222, 24 Am. Dec. 212; Beveridge v. New York El. R. Co., (Supm. Ct. Gen. T.) 5 N. Y. St. Rep. 59; Corning v. Barrett, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 241; Craig v. James, 71 N. Y. App. Div. 238; Fitchett v. Murphy, 46 N. Y. App. Div. 181; Flynn v. Brooklyn City R. Co., 9 N. Y. App. Div. 269.

Ohio.—Larwill v. Burke, 10 Ohio Cir. Dec. 579; Egbert v. Third Ward Bldg. Assoc. Co., 9 Ohio Dec. 646.

Pennsylvania.—Wolf v. Pennsylvania R. Co., 195 Pa. St. 91; Holton v. New Castle R. Co., 138 Pa. St. 111, affirming Holton v. New Castle Northern R. Co., 8 Pa. Co. Ct. 430.

Tennessee.—Wallace v. Lincoln Sav. Bank, 89 Tenn. 630, 24 Am. St. Rep. 625.

Virginia.—Mount v. Radford Trust Co., 93 Va. 427.

West Virginia.—Crumlish v. Shenandoah Valley R. Co., 28 W. Va. 623; Park v. New York, etc., Oil Co., 26 W. Va. 486; Park v. Ulster, etc., Petroleum Co., 25 W. Va. 108.

Wisconsin.—Northern Trust Co. v. Snyder, 113 Wis. 516; Cunningham v. Wechselberg, 105 Wis. 359; Dousman v. Wisconsin, etc., Min., etc., Co., 40 Wis. 418.

Refusal Necessary—Neglect Not Sufficient.—Leslie v. Lorillard, 31 Hun (N. Y.) 305.

Where a Corporation Itself Repudiates a Contract, a stockholder will not be allowed to sue to prevent its performance. Stewart v. Erie, etc., Transp. Co., 17 Minn. 372.

the same diligently and in good faith, a stockholder will not be allowed to sue in its behalf on the same cause of action, whatever the result of the corporate suit may have been.¹

(2) *When Demand Is Not Essential.* — Where a stockholder sues to enforce his individual rights the suit is not on behalf of the corporation, and consequently no demand for corporate action is required as a condition precedent.² This rule applies to suits for preventive relief against threatened *ultra vires* acts,³ suits where the corporation is the real and not merely the nominal defendant,⁴ suits to procure the cancellation of stock illegally issued,⁵ and suits to procure the appointment of receivers.⁶ Nor need any effort to procure corporate action be shown in a case where the corporation has abandoned its corporate business and ceased to elect directors.⁷

(3) *Excuses for Failure to Make Demand.* — In the state courts it is generally held that a stockholder may excuse a failure to demand corporate action by showing that the persons charged with the wrongdoing, and who would be parties defendant to the action, are still in control of the corporation as directors,⁸ or that the wrongdoers control a majority of the board of directors.⁹

1. *Where Corporation Has Brought Suit.* — *Smith v. Bulkley*, (Colo. App. 1902) 70 Pac. Rep. 958; *Steele Lumber Co. v. Laurens Lumber Co.*, 98 Ga. 329; *Alexander v. Donohoe*, 68 Hun (N. Y.) 131.

Where Directors Bring Suit Against Themselves. — In *Ithaca Gas-Light Co. v. Treman*, 30 Hun (N. Y.) 212, where the officers of a corporation complied with the stockholder's request by bringing suit against themselves, the complaining stockholder was allowed to intervene as a party to the action, in order to insure its prosecution in good faith.

2. *Where Stockholder Sues in His Own Right.* — *Alexander v. Atlanta, etc., R. Co.*, 113 Ga. 193.

3. *No Demand Necessary Where Relief Sought Is Prevention of Ultra Vires Acts.* — *Davis v. Gemmell*, 70 Md. 356; *Davis v. Congregation Beth Tephila Israel*, 40 N. Y. App. Div. 424; *Northern Trust Co. v. Snyder*, 113 Wis. 516.

4. *Where Corporation Is Real Defendant.* — *Dousman v. Wisconsin, etc., Min., etc., Co.*, 40 Wis. 418.

5. *Suit for Cancellation of Stock Illegally Issued.* — *Stebbins v. Perry County*, 167 Ill. 567.

6. *Suits to Procure Appointment of Receiver.* — *Walter v. F. E. McAlister Co.*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 747.

7. *Where Corporation Has Abandoned Business and Has No Directors.* — *Thompson v. Stanley*, (Supm. Ct. Spec. T.) 20 N. Y. Supp. 317; *Tennessee Mountain Petroleum, etc., Co. v. Ayers*, (Tenn. Ch. 1897) 43 S. W. Rep. 744; *Crumlish v. Shenandoah Valley R. Co.*, 28 W. Va. 623. And see *Sheridan Brick Works v. Marion Trust Co.*, 157 Ind. 292; *Kuhn v. Woolson Spice Co.*, 10 Ohio Dec. 292.

The Fact that the Corporation Is Not a Going Concern does not relieve the stockholder from the necessity of demanding corporate action, as long as it has not been dissolved. *Dillon v. Lee*, 110 Iowa 156.

8. *Demand Excused Where Wrongdoers Are Still in Control of Corporation* — *Alabama*. — *Montgomery Light Co. v. Lahey*, 121 Ala. 131; *Bell v. Montgomery Light Co.*, 103 Ala. 275.

California. — *Moyle v. Landers*, (Cal. 1889) 21 Pac. Rep. 1133.

Colorado. — *Miller v. Murray*, 17 Colo. 408.

Georgia. — *Cornell v. Sims*, 111 Ga. 828; *Colquitt v. Howard*, 11 Ga. 556.

Illinois. — *Wheeler v. Pullman Iron, etc., Co.*, 143 Ill. 197.

Massachusetts. — *Brewer v. Boston Theatre*, 104 Mass. 378.

Missouri. — *Hannerty v. Standard Theater Co.*, 109 Mo. 297; *Albers v. Merchants' Exch.*, 45 Mo. App. 206.

New Jersey. — *Appleton v. American Malting Co.*, (N. J. 1903) 54 Atl. Rep. 454.

New York. — *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Brewster v. Hatch*, (Supm. Ct. Spec. T.) 10 Abb. N. Cas. (N. Y.) 400; *Corning v. Barrett*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 241; *Robinson v. Smith*, 3 Paige (N. Y.) 222, 24 Am. Dec. 212; *Walter v. F. E. McAlister Co.*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 747; *Davis v. Congregation Beth Tephila Israel*, 40 N. Y. App. Div. 424; *Sage v. Culver*, 71 Hun (N. Y.) 42.

Ohio. — *Robison v. Cleveland City R. Co.*, 7 Ohio Dec. 312.

Rhode Island. — *Eaton v. Robinson*, 18 R. I. 396; *Hodges v. New England Screw Co.*, 1 R. I. 312, 53 Am. Dec. 624.

South Carolina. — *Matthews v. Allendale Bank*, 60 S. Car. 183.

South Dakota. — *Loftus v. Farmers' Shipping Assoc.*, 8 S. Dak. 201.

Virginia. — *Mount v. Radford Trust Co.*, 93 Va. 427.

West Virginia. — *Crumlish v. Shenandoah Valley R. Co.*, 28 W. Va. 623.

Rule Same in England. — *Alexander v. Automatic Telephone Co.*, (1900) 2 Ch. 56.

One Defendant Member of Board of Directors. — It is not sufficient to show that one of the wrongdoers is a member of the board of directors. *Dillon v. Lee*, 110 Iowa 156.

Majority of Stock Controlled by Relatives and Friends of Wrongdoers. — Proof that the president of a corporation whose acts are complained of and his relatives and friends own or control a majority of the stock is not sufficient to show that a demand for corporate action would have been useless. *Wenzel v. Palmetto Brewing Co.*, 48 S. Car. 80.

9. *Directors under Control of Wrongdoers.* — *Miner v. Belle Isle Co.*, 93 Mich. 97; *Knoop*

or by proof of any other facts which clearly show that a demand for corporate action would have been useless.¹

(4) *Suits in Federal Courts under Ninety-fourth Equity Rule* — (a) **Origin and Application of Rule.** — In the leading case upon the subject of stockholders' suits, the United States Supreme Court condemned the practice of bringing such suits for the sole purpose of conferring jurisdiction upon the federal courts, on the ground of diverse citizenship, in cases where they would not otherwise have jurisdiction, and, in order to prevent such collusive suits, laid down the rule that in every suit by a stockholder on behalf of the corporation the bill must set forth with particularity the efforts made by the plaintiff to secure corporate action, and the cause of his failure to obtain the same, and allege that the suit is not brought collusively for the purpose of conferring jurisdiction upon the federal court.² Soon after the decision of this case the principle announced therein was embodied in the ninety-fourth equity rule. This rule, in so far as it deals with the subject of collusive jurisdiction, introduces a more stringent rule in the federal courts than the rule which is applied in the state courts; and by virtue of its provisions, excuses for failure to procure corporate action which would be held sufficient in the state tribunals are frequently rejected by the United States courts on the ground that they do not sufficiently negative the idea of collusion.³ But where the complainant's bill, in all of

v. Bohmrich, 49 N. J. Eq. 82; *Bohmrich v. Knoop*, 50 N. J. Eq. 485; *Currier v. New York, etc., R. Co.*, 35 Hun (N. Y.) 355; *Loftus v. Farmers' Shipping Assoc.*, 8 S. Dak. 201; *Mount v. Radford Trust Co.*, 93 Va. 427. And see *Atwood v. Merryweather*, L. R. 5 Eq. 464, note; *Mason v. Harris*, 11 Ch. D. 97; *Menier v. Hooper's Tel. Works*, L. R. 9 Ch. 350.

What Insufficient to Show Wrongful Control. — That the directors of a corporation were elected by the holder of a majority of the stock does not make them agents of that interest, nor raise any legal presumption that they are or will be unfaithful to the true and general interests of the corporation whose powers they exercise. *Rogers v. Nashville, etc., R. Co.*, (C. C. A.) 91 Fed. Rep. 299; *Decatur Mineral Land Co. v. Palm*, 113 Ala. 531, 59 Am. St. Rep. 140.

1. Useless Demand Not Required — *Alabama*. — *Jasper Land Co. v. Wallis*, 123 Ala. 652; *Steiner v. Parsons*, (Ala. 1894) 16 So. Rep. 6; *Jefferson County Sav. Bank v. Francis*, 115 Ala. 317; *George v. Central R., etc., Co.*, 101 Ala. 607.

California. — *Shively v. Eureka Tellurium Gold Min. Co.*, 129 Cal. 293; *Wickersham v. Crittenden*, 106 Cal. 329; *Smith v. Dorn*, 96 Cal. 73; *Parrott v. Byers*, 40 Cal. 614.

Illinois. — *Higgins v. Lansingh*, 154 Ill. 301; *Chicago v. Cameron*, 120 Ill. 447.

Indiana. — *Tevis v. Hammersmith*, (Ind. App. 1903) 66 N. E. Rep. 79; *Sheridan Brick Works v. Marion Trust Co.*, 157 Ind. 292.

Iowa. — *Schoening v. Schwenk*, 112 Iowa 733.

Kentucky. — *Pittsburg, etc., R. Co. v. Dodd*, (Ky. 1903) 72 S. W. Rep. 822.

Massachusetts. — *Brewer v. Boston Theatre*, 104 Mass. 378.

Minnesota. — *Björngaard v. Goodhue County Bank*, 49 Minn. 483.

Montana. — *Forrester v. Boston, etc., Consol. Copper, etc., Min. Co.*, 21 Mont. 544; *Gerry v. Bismarck Bank*, 19 Mont. 191.

Nebraska. — *Fitzgerald v. Fitzgerald, etc., Constr. Co.*, 41 Neb. 374.

New Jersey. — *Willoughby v. Chicago Junction R., etc., Co.*, 50 N. J. Eq. 656; *Landis v. Sea Isle City Hotel Co.*, (N. J. 1895) 31 Atl. Rep. 755.

New York. — *Lewisohn v. Anaconda Copper Min. Co.*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 613; *Lewisohn v. Anaconda Copper Min. Co.*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 31; *Miller v. Barlow*, 78 N. Y. App. Div. 331; *Boaz v. Sterlingworth R. Supply Co.*, 68 N. Y. App. Div. 1.

Ohio. — *Kuhn v. Woolson Spice Co.*, 10 Ohio Dec. 292.

Pennsylvania. — *Wolf v. Pennsylvania R. Co.*, 195 Pa. St. 91.

South Carolina. — *Stahn v. Catawba Mills*, 53 S. Car. 519.

Texas. — *Becker v. Gulf City St. R., etc., Co.*, 80 Tex. 475; *Cowles v. Glass*, (Tex. Civ. App. 1895) 30 S. W. Rep. 293; *Joy v. Ft. Worth Compress Co.*, 24 Tex. Civ. App. 94; *Houston Cemetery Co. v. Drew*, 13 Tex. Civ. App. 536.

Virginia. — *Mount v. Radford Trust Co.*, 93 Va. 427.

West Virginia. — *Crumlish v. Shenandoah Valley R. Co.*, 28 W. Va. 623.

Wisconsin. — *Northern Trust Co. v. Snyder*, 113 Wis. 516; *Cunningham v. Wechselberg*, 105 Wis. 359; *Dousman v. Wisconsin, etc., Min., etc., Co.*, 40 Wis. 418.

There Is No Presumption that the officers of a corporation will commit a breach of trust by refusing to take action for the redress of its wrongs. The charge should rest on some act, affirmative or permissive, manifestly in violation of duty, and manifestly the result of fraud, and not of erroneous judgment. *Wolf v. Pennsylvania R. Co.*, 195 Pa. St. 91.

2. Collusive Suits by Stockholders Condemned. — *Hawes v. Oakland*, 104 U. S. 450. And see *Detroit v. Dean*, 106 U. S. 537; *Morgan v. New Orleans, etc., R. Co.*, 1 Woods (U. S.) 15.

3. Ninety-fourth Equity Rule Applied. — *Corbus v. Alaska Treadwell Gold Min. Co.*, 187 U. S. 455; *Stewart v. Washington, etc., Steam-*

its averments, shows that the controversy is substantially between citizens of different states, and that there is no collusion, the ends of the rule are met, and if it further appears that a demand upon the directors to bring suit would have been futile, the suit will not be dismissed because of the complainant's failure to comply with a useless formality.¹

(b) **When Rule Does Not Apply.** — That part of the ninety-fourth equity rule which requires an averment in the bill that the suit is not brought collusively does not apply where the suit has been commenced in a state court and afterwards removed to a federal court,² or where the question involved is one of federal cognizance irrespective of diverse citizenship of the parties.³ Nor does the rule apply in cases where there is a real contest between the stockholder and the corporation,⁴ or where the cause of action is one that the corporation itself could not enforce.⁵

(c) **Stockholder Required to Show Merits in Addition to Compliance with Rule.** — A stockholder cannot by mere technical compliance with equity rule ninety-four preclude all inquiry as to his right to sue on behalf of the corporation. The court will examine the bill in its entirety and determine whether, under all the circumstances, the plaintiff has made such a showing as will entitle him to relief.⁶

(5) *What Demand Sufficient* — (a) **In General.** — The effort on the part of the stockholder to procure corporate action must be earnest and *bona fide*,

ship Co., 187 U. S. 466; *Elkins v. Chicago*, 119 Fed. Rep. 957; *Worth Mfg. Co. v. Bingham*, (C. C. A.) 116 Fed. Rep. 785; *Dickinson v. Consolidated Traction Co.*, 114 Fed. Rep. 232; *Bimber v. Calivada Colonization Co.*, 110 Fed. Rep. 58; *Robinson v. West Virginia Loan Co.*, 90 Fed. Rep. 770; *Clarke v. Eastern Bldg., etc., Assoc.*, 89 Fed. Rep. 779; *Church v. Citizens' St. R. Co.*, 78 Fed. Rep. 526; *Ziegler v. Lake St. El. R. Co.*, (C. C. A.) 76 Fed. Rep. 662; *Weidenfeld v. Allegheny, etc., R. Co.*, 47 Fed. Rep. 11; *McHenry v. New York, etc., R. Co.*, 22 Fed. Rep. 130; *Footte v. Cunard Min. Co.*, 17 Fed. Rep. 46; *Bill v. Western Union Tel. Co.*, 16 Fed. Rep. 14.

What Demand and Refusal Sufficient under Rule. — *Ball v. Rutland R. Co.*, 93 Fed. Rep. 513.

1. **When Failure to Demand Corporate Action Not Fatal under Rule.** — *Harrison v. Thomas*, (C. C. A.) 112 Fed. Rep. 22; *Eldred v. American Palace-Car Co.*, 99 Fed. Rep. 168; *Berwind v. Canadian Pac. R. Co.*, 98 Fed. Rep. 158; *Rogers v. Nashville, etc., R. Co.*, (C. C. A.) 91 Fed. Rep. 299; *Weir v. Bay State Gas Co.*, 91 Fed. Rep. 940; *De Neufville v. New York, etc., R. Co.*, (C. C. A.) 81 Fed. Rep. 10; *Excelsior Pebble Phosphate Co. v. Brown*, (C. C. A.) 74 Fed. Rep. 321; *Young v. Alhambra Min. Co.*, 71 Fed. Rep. 810; *Barnes v. Kornegay*, 62 Fed. Rep. 675. And see *Pond v. Vermont Valley R. Co.*, 12 Blatchf. (U. S.) 280, 19 Fed. Cas. No. 11,265.

No General Rule Can Be Laid Down as to when a demand for corporate action may be dispensed with under this rule. Each case must stand upon its own facts and circumstances. The rule is a peremptory one, that the fact that such application, if made, would be futile, must absolutely and clearly appear, and so, if the question comes up at final hearing, the evidence in the case must be resorted to to show that the allegations of the bill relied upon for this purpose are true in point of fact. *Dickinson v. Consolidated Traction Co.*, 114 Fed. Rep. 232.

2. **Rule Not Applicable to Suit Removed to Federal Court.** — *Earle v. Seattle, etc., R. Co.*, 56 Fed. Rep. 909.

3. **Question of Federal Cognizance Irrespective of Diverse Citizenship.** — *Ball v. Rutland R. Co.*, 93 Fed. Rep. 513.

A Suit by Stockholders to Test the Constitutionality of a Statute will not be held collusive on proof merely that the officers of the corporation agree with the complainants as to its unconstitutionality. *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79. And see *Elkins v. Chicago*, 119 Fed. Rep. 957.

4. *Ranger v. Champion Cotton-Press Co.*, 52 Fed. Rep. 611, holding that the ninety-fourth equity rule applied only to suits brought by stockholders against the corporation and "an outsider," and not to suits against the corporation alone.

Equity Rule Ninety-four Is Applicable in a case where the bill states a cause of action which properly belongs to the corporation, even though there are additional averments setting up a cause of action by the stockholder against the corporation, and asking for the appointment of a receiver. *Clarke v. Eastern Bldg., etc., Assoc.*, 89 Fed. Rep. 779.

5. **Where Rights Asserted Could Not Be Enforced by Corporation.** — *Barcus v. Gates*, (C. C. A.) 89 Fed. Rep. 783; *Excelsior Pebble Phosphate Co. v. Brown*, (C. C. A.) 74 Fed. Rep. 321.

Rescission of Contract Made with Stockholders Personally. — Equity rule ninety-four does not apply to a petition filed by a stockholder for leave to intervene in a pending suit, of which the court has jurisdiction, for the purpose of rescinding a contract made with the stockholders personally. *Old Colony Trust Co. v. Dubuque Light, etc., Co.*, 89 Fed. Rep. 794.

6. **Stockholder Required to Show Merits.** — *Corbus v. Alaska Treadwell Gold Min. Co.*, 187 U. S. 455.

and not merely simulated.¹ He must request the directors of the corporation to bring suit.² Any demand short of this, as, for instance, a mere demand for a money payment, is insufficient.³

(b) **To Whom Addressed.** — As a general rule the demand must be addressed to the board of directors in the first instance,⁴ and it is only in exceptional cases that a demand upon the president of the corporation alone is sufficient.⁵

If the Corporation Is in the Hands of a Receiver or assignee, the demand should be made upon that officer, and his refusal to act will justify a suit by the stockholder.⁶

(c) **Necessity of Appeal to Other Stockholders.** — According to the weight of authority a stockholder cannot rest upon a refusal of the directors to sue, but, if time permits, he must also appeal to the other stockholders to take action by corporate meetings or otherwise; or, if he has not made such an appeal, he must show that the effort would have been useless.⁷

(6) **What Refusal Sufficient.** — The refusal of the corporate authorities to take action must be real and not collusive.⁸ And, furthermore, it must be a wrongful refusal amounting to a breach of trust.⁹ Where the right of the corporation to bring suit is doubtful, or where it is clear that it has no such right, a refusal by the directors to sue confers no right upon the stockholders.¹⁰

1. **Earnest and Bona Fide Effort Required.** — *Hawes v. Oakland*, 104 U. S. 450; *Elkins v. Chicago*, 119 Fed. Rep. 957; *Louisville, etc., R. Co. v. Neal*, 128 Ala. 149; *Montgomery Light Co. v. Lahey*, 121 Ala. 131; *Albers v. Merchants' Exch.*, 45 Mo. App. 206. And see *Pondir v. New York, etc., R. Co.*, 72 Hun (N. Y.) 384.

Repeated Protests merely, by the complaining stockholder, unaccompanied by any specific efforts to obtain redress from the parties authorized to afford it, are not sufficient. *Boyd v. Sims*, 87 Tenn. 771.

2. **Request to Bring Suit Essential.** — *Johns v. McLester*, (Ala. 1903) 34 So. Rep. 174; *Flynn v. Brooklyn City R. Co.*, 158 N. Y. 493, 9 N. Y. App. Div. 269.

3. **Mere Demand for Money Payment Insufficient.** — *Flynn v. Brooklyn City R. Co.*, 158 N. Y. 493, 9 N. Y. App. Div. 269.

4. **Demand to Be Addressed to Directors.** — *Decatur Mineral Land Co. v. Palm*, 113 Ala. 531, 59 Am. St. Rep. 140; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625.

Demand upon Directors Individually Not Sufficient. — It seems that the demand must be made upon the directors as a board, and not upon the members individually. *Latimer v. Richmond, etc., R. Co.*, 39 S. Car. 44; *Boyd v. Sims*, 87 Tenn. 771.

5. **Demand upon President — When Sufficient.** — *Chicago v. Cameron*, 120 Ill. 447. And see *Ball v. Rutland R. Co.*, 93 Fed. Rep. 513.

Demand upon President Not Sufficient. — *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625.

6. **Corporation in Hands of Receiver or Assignee.** — *Holton v. Wallace*, (C. C. A.) 77 Fed. Rep. 61; *Streight v. Junk*, (C. C. A.) 59 Fed. Rep. 321; *Craig v. James*, 71 N. Y. App. Div. 238; *Coble v. Beall*, 130 N. Car. 533; *Egbert v. Third Ward Bldg. Assoc. Co.*, 9 Ohio Dec. 646; *Cunningham v. Wechselberg*, 105 Wis. 359. Compare *Walter v. F. E. McAlister Co.*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 747.

When the Receiver's Interest Is Hostile to That of the Stockholders, and there are circumstances indicative of fraud on his part, a minority

stockholder may sue without requesting him to bring suit. *Farwell v. Great Western Tel. Co.*, 161 Ill. 522; *Brinckerhoff v. Bostwick*, 88 N. Y. 52.

7. **Necessity of Appeal to Other Stockholders — England.** — *Foss v. Harbottle*, 2 Hare 461.

United States. — *Hawes v. Oakland*, 104 U. S. 450; *Corbus v. Alaska Treadwell Gold Min. Co.*, 187 U. S. 455; *Kessler v. Ensley Land Co.*, 123 Fed. Rep. 546; *Church v. Citizens' St. R. Co.*, 78 Fed. Rep. 526; *McGeorge v. Big Stone Gap Imp. Co.*, 57 Fed. Rep. 262; *Foot v. Cunard Min. Co.*, 17 Fed. Rep. 46; *Bill v. Western Union Tel. Co.*, 16 Fed. Rep. 14.

Alabama. — *Louisville, etc., R. Co. v. Neal*, 128 Ala. 149; *Montgomery Light Co. v. Lahey*, 121 Ala. 131.

Colorado. — *Miller v. Murray*, 17 Colo. 408.

Illinois. — *Chicago v. Cameron*, 22 Ill. App.

91.

Massachusetts. — *Brewer v. Boston Theatre*, 104 Mass. 378.

Missouri. — *Albers v. Merchants' Exch.*, 45 Mo. App. 206.

Pennsylvania. — *Wolf v. Pennsylvania R. Co.*, 195 Pa. St. 91.

When Not Essential. — *Schoening v. Schwenk*,

112 Iowa 733. And see *Brewer v. Boston Theatre*, 104 Mass. 378.

8. **Refusal Must Be Real.** — *Detroit v. Dean*,

106 U. S. 537; *Elkins v. Chicago*, 119 Fed. Rep.

957.

9. **Refusal Must Be Wrongful.** — *Detroit v. Dean*, 106 U. S. 537; *Samuel v. Holladay*, *Woolw. (U. S.)* 400, 21 Fed. Cas. No. 12,288; *Willoughby v. Chicago Junction R., etc., Co.*, 50 N. J. Eq. 656; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625.

10. **Where Right to Sue Is Not Clear.** — *Hendrickson v. Bradley*, (C. C. A.) 85 Fed. Rep. 508; *La Grange Tp. v. State Treasurer*, 24 Mich. 468; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625.

Refusal to Sue in Equity Where Proper Remedy Is at Law. — Where the proper remedy of the corporation is by an action at law, a refusal of the directors to bring a suit in equity, or to

g. WHO MAY SUE OR DEFEND — (1) *In General.* — The right to sue or defend on behalf of the corporation is confined to persons who are stockholders at the time when the action is brought.¹ An assignee of stock who has not yet registered the same, or obtained recognition by the corporation as a stockholder, cannot sue on its behalf;² nor can a former stockholder who has parted with his stock.³

(2) *Ownership of Stock at Time of Transaction Complained of.* — In the state courts the complainant in a stockholder's suit must show that he was a stockholder at the time of the transaction complained of,⁴ or that he has since become a stockholder.⁵ In the federal courts, under the ninety-fourth rule in equity, the rule is somewhat more stringent, such complainant being required to show that he was a stockholder at the time of the transaction complained of, or that his shares have devolved on him since by operation of law.⁶

h. WAIVER OF RIGHT TO SUE OR DEFEND. — A stockholder may waive his right to sue or defend on behalf of the corporation by laches, or by acquiescence or participation in the acts complained of.⁷

i. POWER OF MAJORITY STOCKHOLDERS TO RATIFY WRONGFUL ACTS. — As regards *ultra vires* acts by the managing authorities of corporations, it is clear that no attempted ratification thereof by majority stockholders can deprive the minority of their right to sue on behalf of the corporation.⁸ Where the acts complained of are *intra vires*, they may be ratified by the

continue the prosecution of a suit which they have instituted, does not entitle a stockholder to sue in his own name, even though he offers to assume the expense and conduct the litigation in a court of equity. *Warfen v. Para Rubber Shoe Co.*, 166 Mass. 97.

1. *Complainant Must Be a Stockholder.* — *Heath v. Erie R. Co.*, 8 Blatchf. (U. S.) 347; *Da Ponte v. Louisiana State Lottery Co.*, 6 Fed. Cas. No. 3,569; *Jefferson County Sav. Bank v. Francis*, 115 Ala. 317; *Tutwiler v. Tuskaloosa Coal, etc., Co.*, 89 Ala. 391; *Fry v. Rush*, 63 Kan. 429; *Meyer v. Bristol Hotel Co.*, 163 Mo. 59; *Thompson v. Stanley*, 73 Hun (N. Y.) 248; *Fitchett v. Murphy*, 46 N. Y. App. Div. 181. And see *infra*, this section, 20. *Who May Sue to Enforce Rights.*

Right of Member of Non-moneyed Corporation to Sue. — In *Louisiana* it has been held that a member of a corporation who has rights to vindicate which relate to property or to any intellectual gratification, the violation of which may be made the basis of a demand for money, may bring a stockholder's suit, even though the corporation is not a moneyed corporation. *Knabe v. Ternot*, 16 La. Ann. 13.

Equitable Owner of Speculative Interest. — A lease of railroad property made by the bondholders of the corporation will not be annulled at the suit of persons who claim to be shareholders, where it is shown that the complainants are merely the equitable owners of the stock claimed by them, and that their interest in the corporate property is subordinate to the bondholders, and, at best, is merely speculative, the claim of the bondholders being in excess of the value of the corporate property. *McHenry v. New York, etc., R. Co.*, 22 Fed. Rep. 130.

Small Stockholder Required to Make Out Clear Case. — *Albers v. Merchants' Exch.*, 45 Mo. App. 206.

2. *Assignee of Stock Not Yet Registered Cannot Sue.* — *Brown v. Duluth, etc., R. Co.*, 53 Fed.

Rep. 889. But to the contrary see *Parrott v. Byers*, 40 Cal. 614.

Objection Cured by Intervention of Former Owner. — *Houston Cemetery Co. v. Drew*, 13 Tex. Civ. App. 536.

3. *Former Stockholder Not Entitled to Sue.* — *Rafferty v. Donnelly*, 197 Pa. St. 423.

4. *Ownership of Stock at Time of Transaction Complained of Essential.* — *Alexander v. Searcy*, 81 Ga. 536, 12 Am. St. Rep. 337; *Tevis v. Hammersmith*, (Ind. App. 1903) 66 N. E. Rep. 912; *Clark v. American Coal Co.*, 86 Iowa 436; *Wolf v. Shortridge*, 22 Pa. Co. Ct. 81, reversed on another point 195 Pa. St. 91.

5. *Subsequent Stockholders Allowed to Sue or Defend.* — *Majors v. Taussig*, 20 Colo. 44; *Chicago v. Cameron*, 22 Ill. App. 91, 120 Ill. 447; *Forrester v. Boston, etc., Consol. Copper, etc., Min. Co.*, 21 Mont. 544; *Sayles v. Central Nat. Bank*, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 155.

Federal Equity Rule Ninety-four, requiring proof that the shares of stock have since devolved upon the complainant by operation of law, is not applicable in the state courts. *Montgomery Light Co. v. Lahey*, 121 Ala. 131; *Forrester v. Boston, etc., Consol. Copper, etc., Min. Co.*, 21 Mont. 544.

6. *Rule in Federal Courts.* — *Hawes v. Oakland*, 104 U. S. 450; *Dimpfell v. Ohio, etc., R. Co.*, 110 U. S. 209; *Bimber v. Calivada Colonization Co.*, 110 Fed. Rep. 58; *Robinson v. West Virginia Loan Co.*, 99 Fed. Rep. 770; *Church v. Citizens' St. R. Co.*, 78 Fed. Rep. 526; *Footo v. Cunard Min. Co.*, 17 Fed. Rep. 46.

7. *Waiver of Right to Sue or Defend.* — See *infra*, this section, 24. *Waiver of Rights by Laches, Acquiescence, or Participation.*

8. *No Power in Majority to Ratify Ultra Vires Acts.* — *Heath v. Erie R. Co.*, 8 Blatchf. (U. S.) 347; *Byrne v. Schuyler Electric Mfg. Co.*, 65 Conn. 336; *Albers v. Merchants' Exch.*, 45 Mo. App. 206; *Spokane v. Amsterdamsch Trustees Kantoor*, 22 Wash. 172.

majority stockholders, if free from actual fraud;¹ but, notwithstanding a recent decision to the contrary in a federal Circuit Court,² it seems, by the weight of authority, that majority stockholders have no power to ratify *intra vires* acts which are actually fraudulent, so as to preclude minority stockholders from bringing suit upon the refusal of the corporation to do so.³

j. **SUIT DISMISSED WHEN NOT BROUGHT IN GOOD FAITH.** — A court of equity will not entertain a bill purported to be filed by a stockholder on behalf of the corporation, where it is shown that the suit is, in reality, instigated by a rival corporation for its own benefit.⁴

k. **SUCCESSIVE SUITS BY DIFFERENT STOCKHOLDERS.** — Questions which have been litigated and decided in a suit by one stockholder on behalf of a corporation are *res judicata*, and, in the absence of fraud or collusion, cannot be relitigated in a similar suit by another stockholder.⁵

20. Who May Sue to Enforce Rights. — The complainant in a suit to enforce the rights of minority stockholders must be a stockholder at the time when the bill is filed,⁶ or the personal representative of a deceased stockholder.⁷ And, as a general rule, his ownership must be an ownership of record upon the books of the company.⁸ Such a suit cannot be brought by a holder of fictitious stock for which nothing has been paid or agreed to be paid,⁹ or by a mere subscriber to stock who has failed to comply with the conditions and terms of his subscription.¹⁰

Person Whose Stock Has Been Pledged. — The fact that the complainant's stock

1. Intra Vires Acts May Be Ratified if Free from Actual Fraud. — *Metcalf v. American School Furniture Co.*, 122 Fed. Rep. 115. See also *Bill v. Western Union Tel. Co.*, 16 Fed. Rep. 14; *Wallace v. Long Island R. Co.*, 12 Hun (N. Y.) 460; *Wolf v. Pennsylvania R. Co.*, 195 Pa. St. 91. And see *supra*, this section, 4. **Right to Disaffirm Voidable Contracts.**

2. Kessler v. Ensley Land Co., 123 Fed. Rep. 546, holding that majority stockholders may, where acting in good faith, ratify *intra vires* acts which are actually fraudulent, and so preclude the minority from bringing suit.

3. Fraudulent Acts Not Capable of Ratification. — *Brewer v. Boston Theatre*, 104 Mass. 394; *Hazard v. Durant*, 11 R. I. 196. And see *Atwood v. Merryweather*, L. R. 5 Eq. 464, note; *Heath v. Erie R. Co.*, 8 Blatchf. (U. S.) 347; *Dickinson v. Consolidated Traction Co.*, 114 Fed. Rep. 232; *McGeorge v. Big Stone Gap Imp. Co.*, 57 Fed. Rep. 262; *Cumberland Coal, etc., Co. v. Sherman*, 30 Barb. (N. Y.) 577.

4. Suit Dismissed When Not Brought in Good Faith. — *Forrest v. Manchester, etc., R. Co.*, 4 De G. F. & J. 126. And see *infra*, this section, 22. **Motive in Bringing Suit.**

5. Successive Suits — Res Judicata. — *Wilmington v. Chicago Junction R., etc., Co.*, 50 N. J. Eq. 656. And see *Hodge v. U. S. Steel Corp.*, (N. J. 1902) 53 Atl. Rep. 601, *reversed* on another point (N. J. 1903) 54 Atl. Rep. 1.

6. A Former Stockholder Who Has Transferred All His Equitable Interest in the stock of the corporation cannot sue. *Scanlan v. Snow*, 2 App. Cas. (D. C.) 137.

Preferred Stockholder Entitled to Sue Notwithstanding Default in Payment of Dividends. — *Marshall v. American Caramel Co.*, 9 Pa. Dist. 152.

Purchaser of Stock Not Allowed to Attack Prior Management of Corporation. — As a general proposition, the purchaser of stock in a corporation is not allowed to attack the acts

and management of the company prior to the acquisition of his stock. *United Electric Securities Co. v. Louisiana Electric Light Co.*, 68 Fed. Rep. 673.

Relief Refused to Holder in Trust of Small Portion of Stock. — *Greenough v. Alabama G. S. R. Co.*, 64 Fed. Rep. 22.

As to Who May Sue or Defend on Behalf of Corporation, see *supra*, this section, 19. **Right to Sue or Defend on Behalf of Corporation — g. Who May Sue or Defend.**

7. Personal Representative of Deceased Stockholder May Sue. — *Scanlan v. Snow*, 2 App. Cas. (D. C.) 137.

8. Ownership of Record Essential. — *Brown v. Duluth, etc., R. Co.*, 53 Fed. Rep. 889; *Hodge v. U. S. Steel Corp.*, (N. J. 1902) 53 Atl. Rep. 601, *reversed* on another point, (N. J. 1903) 54 Atl. Rep. 1.

Rule Where Transfer Is Wrongfully Refused. — Where a transfer of stock upon the books of the corporation is wrongfully refused, the holder of the stock may sue to redress other wrongs without first bringing an action to compel a transfer. *Real Estate Trust Co. v. Bird*, 90 Md. 229; *Ernst v. Elmira Municipal Imp. Co.*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 583.

9. Holder of Fictitious Stock Not Allowed to Sue. — *Arkansas River Land, etc., Co. v. Farmers' T. & T. Co.*, 13 Colo. 587.

Any Legal Stockholder Entitled to Sue. — In *Stewart v. Erie, etc., Transp. Co.*, 17 Minn. 372, it was held that any person who was a legal stockholder might sue to enforce his rights without regard to the manner in which he acquired his stock; and an objection that the complainant was not entitled to relief because he was not a stockholder upon a *bona fide* cash subscription was overruled.

10. Mere Subscriber Not Allowed to Sue. — *Bussey v. Hooper*, 35 Md. 15, 6 Am. Rep. 350. And see *Heath v. Erie R. Co.*, 8 Blatchf. (U. S.) 347.

has been pledged as collateral security for a loan does not affect his right of action.¹

21. Necessity of Showing Injury from Acts Complained Of. — A court of equity will not interfere, at the suit of a minority stockholder, to enjoin or set aside transactions which are voidable only, unless it clearly appears that the complainant has sustained or may sustain some damage therefrom.² Nor will an injunction be granted where it does not appear that the complainant's apprehension of injury is well founded.³ Where, however, the acts complained of are *ultra vires*, the complainant is not required to prove injury.⁴

22. Motive in Bringing Suit. — Where a suit by a minority stockholder concerns or is based on the complainant's own property rights, either legal or equitable, and is not a suit on behalf of the corporation, the bad motives of the litigant in insisting upon his rights cannot be considered as a basis for refusing to recognize the same.⁵ But whenever it is made to appear that a stockholder's suit, although nominally on behalf of the corporation, is not brought in good faith for the protection of the corporate rights, but is in reality originated and prosecuted by another corporation for its own benefit, the court will refuse to entertain the bill.⁶

23. Rights of Majority and of Strangers Entitled to Consideration. — While the holder of a single share of stock is entitled to redress for any real grievance that he may have suffered, still, care must be taken that the majority are not deprived of their rights by a small number of dissentients, and where the complainant owns but a small proportion of the entire stock of the corporation, he will be required to make out a very clear case in order to entitle himself to relief.⁷ A preliminary injunction will not be granted at the suit of a minority stockholder where it is apparent that its issuance would result in greater injury to the majority stockholders than its refusal would occasion to the complainant.⁸ Nor will transactions which have been fully consummated be set aside where it appears that the granting of such relief would cause great injury to the majority or to strangers.⁹ So, minority stockholders who

1. Pledgor of Stock Allowed to Sue. — *Fisher v. Patton*, 134 Mo. 32. And see *Higgins v. Lansingh*, 154 Ill. 301.

When Purchaser from Pledgor Cannot Sue. — See *Da Ponte v. Louisiana State Lottery Co.*, 6 Fed. Cas. No. 3,569.

2. Injury Must Be Shown. — *Dickinson v. Consolidated Traction Co.*, 114 Fed. Rep. 232; *Smith v. Ferries, etc.*, R. Co., (Cal. 1897) 51 Pac. Rep. 710; *Clark v. American Coal Co.*, 86 Iowa 436; *Emerson v. South Fork Irrigation, etc.*, Co., 59 Kan. 778, 53 Pac. Rep. 756; *Kendall v. Klapperthal Co.*, 202 Pa. St. 596.

Technical Injury Not Sufficient. — *Hutchinson v. American Palace-Car Co.*, 104 Fed. Rep. 182.

Proof of Injury Essential Where Action Is at Law. — *Corning v. Barrett*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 241.

3. Injunction Refused in Absence of Proof that Complainant's Fears Are Well Founded. — *Coquard v. National Linseed Oil Co.*, 171 Ill. 480.

An injunction will not be granted in anticipation of possible injury to arise under a statute that may never be passed. *Ryan v. Williams*, 100 Fed. Rep. 172.

4. Proof of Injury Unnecessary When Acts Are Ultra Vires. — *Byrne v. Schuyler Electric Mfg. Co.*, 65 Conn. 336.

5. Materiality of Motive in Bringing Suit. — *Hodge v. U. S. Steel Corp.*, (N. J. 1902) 53 Atl. Rep. 553, *distinguishing* *Forrest v. Manchester, etc.*, R. Co., 4 De G. F. & J. 126, and *following*

Seaton v. Grant, L. R. 2 Ch. 459; *Mutter v. Eastern, etc.*, R. Co., 38 Ch. D. 92.

Motive Immaterial Unless Defendants Would Be Injured. — *Lewisohn v. Anaconda Copper Min. Co.*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 613.

6. Suit Dismissed When Brought in Interest of Rival Corporation. — *Forrest v. Manchester, etc.*, R. Co., 4 De G. F. & J. 126; *Filder v. London, etc.*, R. Co., 1 Hem. & M. 489; *Beshoar v. Chappell*, 6 Colo. App. 323; *Jenkins v. Auburn City R. Co.*, 27 N. Y. App. Div. 553; *Moore v. Silver Valley Min. Co.*, 104 N. Car. 534; *Kuhn v. Woolson Spice Co.*, 7 Ohio Cir. Dec. 289, 13 Ohio Cir. Ct. 547, 10 Ohio Dec. 292.

Complainant Not Disqualified by Individual Interest. — *Henry v. Pittsburg, etc.*, R. Co., 5 Ohio Dec. 41.

7. Small Stockholder Required to Make Out Very Clear Case. — *Dickinson v. Consolidated Traction Co.*, 114 Fed. Rep. 232; *Berger v. U. S. Steel Corp.*, 63 N. J. Eq. 809; *Trimble v. American Sugar-Refining Co.*, 61 N. J. Eq. 340; *Benedict v. Western Union Tel. Co.*, (Supm. Ct. Spec. T.) 9 Abb. N. Cas. (N. Y.) 214. And see *Albers v. Merchants Exch.*, 45 Mo. App. 206.

8. Preliminary Injunction Refused When Injurious to Majority Without Corresponding Benefit to Minority. — *Ryan v. Williams*, 100 Fed. Rep. 172.

9. Interest of Innocent Third Persons Protected. — *Snow v. Boston Blank Book Mfg. Co.*, 158 Mass. 325; *Baldwin v. Hillsborough, etc.*, R.

claim all the benefits of a corporate contract cannot, at the same time, sue to be relieved of its burdens.¹

24. Waiver of Rights by Laches, Acquiescence, or Participation. — Whatever rights minority stockholders may have, including the right to sue or defend on behalf of the corporation, may be waived by laches,² or by acquiescence,³ or by participation in the acts complained of.⁴ What period of delay will be held sufficient to bar the complainant's right to relief depends upon the circumstances of the particular case.⁵ A court of equity may deny relief on the

Co., 1 Ohio Dec. (Reprint) 532, 10 West. L. J. 337.

A Foreclosure Sale of Corporate Property Will Not Be Set Aside at the suit of a small stockholder, against the protest of a great number of bondholders, where it appears that the property is not worth the amount of the mortgage. *Drake v. New York Suburban Water Co.*, 36 N. Y. App. Div. 275.

1. No Right to Disaffirm Contract in Part Only. — *Smith v. Ferries, etc.*, R. Co., (Cal. 1897) 51 Pac. Rep. 710. And see *Bonnet v. Eagle Pass First Nat. Bank*, 24 Tex. Civ. App. 613.

Complainant Not Permitted to Speculate upon Chances. — *Rabe v. Dunlap*, 51 N. J. Eq. 40.

2. Waiver of Rights by Laches — United States. — *Taylor v. South, etc.*, Alabama R. Co., 13 Fed. Rep. 152; *Pacific R. Co. v. Missouri Pac. R. Co.*, 12 Fed. Rep. 641.

California. — *Wills v. Porter*, (Cal. 1900) 61 Pac. Rep. 1109.

Connecticut. — *Terry v. Eagle Lock Co.*, 47 Conn. 141.

Illinois. — *Levin v. Chicago Gas Light, etc.*, Co., 64 Ill. App. 393; *Coquard v. National Linseed Oil Co.*, 171 Ill. 480.

Massachusetts. — *Snow v. Boston Blank Book Mfg. Co.*, 158 Mass. 325; *Peabody v. Flint*, 6 Allen (Mass.) 52.

New Jersey. — *Brady v. Atlantic City*, 53 N. J. Eq. 440; *Rabe v. Dunlap*, 51 N. J. Eq. 40.

New York. — *Metropolitan El. R. Co. v. Manhattan R. Co.*, (C. Pl. Spec. T.) 14 Abb. N. Cas. (N. Y.) 103; *Jones v. U. S. State Co.*, (Supm. Ct. Spec. T.) 16 How. Pr. (N. Y.) 129; *Hart v. Ogdensburg, etc.*, R. Co., 89 Hun (N. Y.) 316; *Roberts v. New York, etc.*, R. Co., (Supm. Ct. Gen. T.) 31 N. Y. Supp. 577; *Marbury v. Stone*, 17 N. Y. App. Div. 352, affirmed without opinion, 160 N. Y. 701.

Pennsylvania. — *Wolf v. Pennsylvania R. Co.*, 195 Pa. St. 91; *Watts's Appeal*, 78 Pa. St. 370; *Chester Pipe, etc.*, Co. v. *Saltsburg Gas Co.*, 8 Pa. Dist. 427.

South Carolina. — *Latimer v. Richmond, etc.*, R. Co., 39 S. Car. 44.

Utah. — *Hatch v. Lucky Bill Min. Co.*, 25 Utah 405.

Pledge of Stock Bound by Laches of Owner. — *Spokane v. Amsterdamsch Trustees Kantoor*, 22 Wesh. 172.

Facts Held Insufficient to Show Laches. — *Ex-Mission Land, etc.*, Co. v. *Flash*, 97 Cal. 610; *Forrester v. Boston, etc.*, Consol. Copper, etc., Min. Co., 21 Mont. 544.

3. Estoppel by Acquiescence in Acts Complained Of. — *Da Ponte v. Louisiana State Lottery Co.*, 6 Fed. Cas. No. 3,569; *Coquard v. National Linseed Oil Co.*, 171 Ill. 480; *Stewart v. Erie, etc.*, Transp. Co., 17 Minn. 372; *Reynolds v. Mt. Vernon Bank*, 6 N. Y. App. Div. 62; *Hoyt v.*

Quicksilver Min. Co., 17 Hun (N. Y.) 169; *Miller v. University Magazine Co.*, (Supm. Ct. Spec. T.) 10 Misc. (N. Y.) 311; *Baldwin v. Hillsborough, etc.*, R. Co., 1 Ohio Dec. (Reprint) 532, 10 West. L. J. 337; *Coleman v. Columbia Oil Co.*, 51 Pa. St. 74; *Hatch v. Lucky Bill Min. Co.*, 25 Utah 405.

Acquiescence by Predecessor in Interest Fatal. — *Da Ponte v. Louisiana State Lottery Co.*, 6 Fed. Cas. No. 3,569; *Hodge v. U. S. Steel Corp.*, (N. J. 1902) 53 Atl. Rep. 601, reversed on another point, (N. J. 1903) 54 Atl. Rep. 1; *Trimble v. American Sugar Refining Co.*, 61 N. J. Eq. 340; *Farwell v. Babcock*, 27 Tex. Civ. App. 162; *Hatch v. Lucky Bill Min. Co.*, 25 Utah 405.

Facts Held Insufficient to Show Acquiescence. — See *George v. Central R., etc.*, Co., 101 Ala. 607; *Landis v. Sea Isle City Hotel Co.*, (N. J. 1895) 31 Atl. Rep. 755; *Gresham v. Island City Sav. Bank*, 2 Tex. Civ. App. 52.

Stockholder Not Estopped by Acquiescence. — As the real controversy in a stockholder's suit on behalf of the corporation is between the corporation and the alleged wrongdoers, the acquiescence of the nominal plaintiff, the complaining stockholder, in the acts complained of cannot be set up as an estoppel. *Fitzgerald v. Fitzgerald, etc.*, Constr. Co., 41 Neb. 374.

4. Estoppel by Participation in Acts Complained Of. — *Ziegler v. Lake St. El. R. Co.*, 69 Fed. Rep. 176; *McGeorge v. Big Stone Gap Imp. Co.*, 57 Fed. Rep. 262; *Arkansas River Land, etc.*, Co. v. *Farmers' L. & T. Co.*, 13 Colo. 587; *Coquard v. National Linseed Oil Co.*, 171 Ill. 480; *Hyde Park Gas Co. v. Kerber*, 5 Ill. App. 132; *Thompson v. Lambert*, 44 Iowa 239; *Cutting v. Baltimore, etc.*, R. Co., (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 616, 65 N. Y. App. Div. 414; *Burden v. Burden*, 8 N. Y. App. Div. 160, affirmed 159 N. Y. 287; *Clark v. Pittsburg Natural Gas Co.*, 184 Pa. St. 188; *Hall v. West Chester Pub. Co.*, 180 Pa. St. 561; *Hartman v. Pennsylvania Range Boiler Co.*, 9 Pa. Dist. 560; *Jackson v. Crown Point Min. Co.*, 21 Utah 1; *Spokane v. Amsterdamsch Trustees Kantoor*, 22 Wash. 172. And see *Johnson v. La Variété Assoc.*, 28 La. Ann. 421.

Participation by Predecessor in Title Fatal. — *Brown v. Duluth, etc.*, R. Co., 53 Fed. Rep. 889; *Parsons v. Hayes*, (N. Y. Super. Ct. Gen. T.) 14 Abb. N. Cas. (N. Y.) 419.

Merely Retention of Bonds Not Estoppel. — *Morris v. Elyton Land Co.*, 125 Ala. 263.

Stockholder Not Estopped by Participation. — *Appleton v. American Malting Co.*, (N. J. 1903) 54 Atl. Rep. 454.

5. Relief Has Been Refused after a delay of nine years. *Cullen v. Coal Creek Min., etc.*, Co., (Tenn. Ch. 1897) 42 S. W. Rep. 693; seven

ground of laches even though the suit is brought within the period of the statute of limitations.¹

Wrongs by Directors. — A director of a corporation is not such a technical trustee as to be outside the protection of the statute of limitations;² but he cannot cover his *mala fides* with the plea of laches because of mere delay in calling him to account.³

Ultra Vires Acts. — The fact that the acts complained of are *ultra vires* does not relieve the complaining stockholder from the necessity of moving promptly.⁴ He cannot be permitted to await results and then affirm or disaffirm the acts in question accordingly as they prove profitable or otherwise.⁵

XIV. STOCKHOLDERS' MEETINGS — 1. **Purpose and Necessity.** — As a corporation is a separate entity, distinct from the members composing it, so is the will of the corporation separate and distinct from that of the individual stockholders, the will or assent of the stockholders being the will or assent of the corporation only where the former is expressed at a lawful meeting of stockholders and in the manner provided by law. Stockholders' meetings, therefore, are held for the purpose of giving expression to the corporate will, and are absolutely essential to the accomplishment of this purpose.⁶ *A fortiori* is a meeting of stockholders necessary to the accomplishment of an act which the state constitution requires to be done, if at all, at such a meeting. In such case even the legislature cannot give the individual assents of the stockholders the force of a corporate assent duly expressed at a stockholders' meeting.⁷

2. **Legality** — *a.* **TIME AND PLACE** — (1) *Time.* — Stockholders' meetings must be held at such times as are fixed by law; or, where no time is thus fixed, at such times as are fixed by the stockholders themselves or by those authorized to call the meetings.⁸ But the mere fact that a by-law requires a meeting to be held in a certain month will not preclude the holding thereof at a later time fixed by competent authority.⁹

years, *Alexander v. Searcy*, 81 Ga. 536, 12 Am. St. Rep. 337; six years, *Gregory v. Patchett*, 33 Beav. 595; four years, *Kessler v. Ensley Land Co.*, 123 Fed. Rep. 546; and three years, *Dimpfell v. Ohio, etc., R. Co.*, 110 U. S. 209.

Delay of One Month After Discovery of Fraud Not Fatal. — *Farwell v. Great Western Tel. Co.*, 161 Ill. 522.

The Complainant Is Not Chargeable with Laches where the proof shows that he protested against the acts complained of as soon as they came to his knowledge, and appealed both to the directors and to the other shareholders to bring suit, and brought suit himself immediately upon their refusal to act. *Byrne v. Schuyler Electric Mfg. Co.*, 65 Conn. 336.

1. **Statute of Limitations Not Controlling in Equity.** — *Kessler v. Ensley Land Co.*, 123 Fed. Rep. 546.

Where an Action by the Corporation Itself Would Not Be Barred by the statute of limitations, it is immaterial that the complaining stockholder is barred by such statute; especially where the bill sets forth other causes of action which are not barred. *Joy v. Ft. Worth Compress Co.*, 24 Tex. Civ. App. 94.

2. **Directors Protected by Statute of Limitations.** — *Cullen v. Coal Creek Min., etc., Co. (Tenn. Ch. 1897)* 42 S. W. Rep. 693.

3. *Montgomery Light Co. v. Lahey*, 121 Ala. 131, holding that where the acts complained of had continued for a long time, the complainant was entitled to an accounting as to such acts as had occurred within six years of the time when the suit was brought, although other acts complained of were protected by the statute

of limitations. But see *Kessler v. Ensley Land Co.*, 123 Fed. Rep. 546.

4. **Ultra Vires Acts.** — *Cullen v. Coal Creek Min., etc., Co. (Tenn. Ch. 1897)* 42 S. W. Rep. 693.

5. **Stockholder Not Permitted to Lie by and Await Results.** — *Levin v. Chicago Gas Light, etc., Co.*, 64 Ill. App. 393; *Rabe v. Dunlap*, 51 N. J. Eq. 40.

6. **Meetings Essential to Expression of Corporate Will.** — *Marlborough Mfg. Co. v. Smith*, 2 Conn. 579; *Peirce v. New Orleans Bldg. Co.*, 9 La. 397; *State University v. Williams*, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72; *Clarke v. Omaha, etc., R. Co.*, 5 Neb. 314; *Duke v. Markham*, 105 N. Car. 131, 18 Am. St. Rep. 889; *Langolf v. Seiberlitch*, 2 Pars. Eq. Cas. (Pa.) 64.

7. **Statute Dispensing with Stockholders' Meeting Held Unconstitutional.** — *Ewing v. Oroville Min. Co.*, 56 Cal. 649, wherein it was held that Civ. Code Cal. (1880), § 359, authorizing an increase of capital stock upon the written consent of the stockholders, was unconstitutional as being in violation of Const. Cal., art. 12, § 11, prohibiting such increase except at a duly constituted meeting of stockholders.

8. **Time of Annual Meeting Fixed by By-laws.** — *Pond v. Vermont Valley R. Co.*, 19 Fed. Cas. No. 11,264; *Gold Bluff Min., etc., Corp. v. Whitlock*, 75 Conn. 669.

Time Fixed by Party Calling Meeting. — *Com. v. Smith*, 45 Pa. St. 59. See *infra*, this subsection, *Call; Notice*.

9. **Time Fixed by By-law Not Exclusive.** — *Scanlan v. Snow*, 2 App. Cas. (D. C.) 137.

Estoppel. — All who participate in a meeting of stockholders are estopped to assert that it was not held at the time specified by the by-laws.¹

(2) **Place.** — The State in which stockholders' meetings must be held is, in the absence of a statutory authority to the contrary, the state under whose laws the corporation was created.² Indeed, it seems doubtful whether such meetings can be held in any other state even where they are expressly authorized so to be held, the reason being that the corporation exists solely under the laws and within the bounds of the state which created it, and hence cannot do a strictly corporate act in any other state;³ and this doctrine and reason thereof is peculiarly applicable to a meeting for the organization of the corporation.⁴ But where the corporation is chartered in several states, a meeting in any one of the states is legal, and also sufficient without any further meetings in the other states, at least so far as the disposition of property made at such meeting is concerned.⁵

The Locality or Specific Point at which the meeting must be held may, in the absence of statutory restriction, be fixed by by-laws,⁶ or, in the absence of such by-laws, by the persons authorized to call the meeting.⁷ In either case the meeting, in order to be a lawful one, must be held at the place fixed.

The Presumption, in the absence of evidence to the contrary, is that the place of meeting indicated by the records thereof was the proper place.⁸

Estoppel. — While the doctrine, as above stated, that meetings must be held within the incorporating state is well settled, the operation of this doctrine is considerably curtailed by the doctrine of estoppel, according to which all who participate in a meeting outside of the home state are precluded from asserting the invalidity thereof.⁹

In Collateral Proceedings, as in an action between a corporation and one who has contracted with it, the fact that the directors of the corporation were elected at a meeting outside of the home state cannot be taken advantage of either by the corporation itself or by the other party to the contract, unless there be some express statutory or charter inhibition against meetings outside of the state.¹⁰

b. CALL — (1) *Necessity.* — Where the time and place of meetings are not fixed by statute, charter or by-laws, meetings must be called by some duly constituted authority.¹¹ But the call may be waived, and is waived

1. **Persons Participating in Meeting Estopped to Question Time Thereof.** — *Hussey v. Gallagher*, 61 Ga. 86.

2. **Meetings Must Be Held in State of Residence of Corporation.** — *Duke v. Taylor*, 37 Fla. 64, 53 Am. St. Rep. 232; *Harding v. American Glucose Co.*, 182 Ill. 551, 74 Am. St. Rep. 189; *Miller v. Ewer*, 27 Me. 509, 46 Am. Dec. 619; *Smith v. Silver Valley Min. Co.*, 64 Md. 85, 54 Am. Rep. 760; *Thompson v. Natchez Water, etc., Co.*, 68 Miss. 423; *Missouri Lead Min., etc., Co. v. Reinhard*, 114 Mo. 219, 35 Am. St. Rep. 746; *Camp v. Byrne*, 41 Mo. 525; *Webb v. Midway Lumber Co.*, 68 Mo. App. 546; *Hilles v. Parrish*, 14 N. J. Eq. 380; *Ormsby v. Vermont Copper Min. Co.*, 56 N. Y. 623; *Mitchell v. Vermont Copper Min. Co.*, 40 N. Y. Super. Ct. 406; *Franco-Texan Land Co. v. Laigle*, 59 Tex. 339.

3. **Meeting in Foreign State Invalid.** — See *Hilles v. Parrish*, 14 N. J. Eq. 380; *Franco-Texan Land Co. v. Laigle*, 59 Tex. 339.

4. **Meetings for Organization Must Be Held in State Creating Corporation.** — *Duke v. Taylor*, 37 Fla. 64, 53 Am. St. Rep. 232; *Miller v. Ewer*, 27 Me. 509, 46 Am. Dec. 619; *Smith v. Silver Valley Min. Co.*, 64 Md. 85, 54 Am. Rep. 760;

Camp v. Byrne, 41 Mo. 25. See also the title CORPORATIONS (PRIVATE), vol. 7, p. 658.

5. **Where Corporation Chartered in Several States Meeting in One Held Legal.** — *Graham v. Boston, etc., R. Co.*, 118 U. S. 161. See also *Pittsburg, etc., R. Co. v. Columbus, etc., R. Co.*, 8 Bliss. (U. S.) 456, 19 Fed. Cas. No. 11,197.

6. **Place Fixed by By-laws.** — *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274.

7. **Place Fixed by Notice of Meeting.** — See *infra*, this subsection, *Call; Notice*.

8. **Place of Meeting Presumed to Be Right One.** — *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274.

9. **Estoppel as to Validity of Meeting Outside of Home State.** — *Handley v. Stutz*, 139 U. S. 417, reversing 41 Fed. Rep. 531; *Heath v. Silverthorn Lead Min., etc., Co.*, 39 Wis. 146. See also *Webb v. Midway Lumber Co.*, 68 Mo. App. 546; *Humphrey v. Mooney*, 5 Colo. 282.

10. *Humphrey v. Mooney*, 5 Colo. 282.

11. **Necessity of Call.** — *England.* — *In re Haycraft Gold Reduction, etc., Co.*, (1900) 2 Ch. 230, 69 L. J. Ch. 497, 83 L. T. N. S. 166, 7 Manson 243.

United States. — *Matthews v. Columbia Nat. Bank*, 79 Fed. Rep. 558.

where all the stockholders attend the meeting and participate therein.¹

(2) *Sufficiency* — (a) *Authority to Call* — Where There Is No Statute or By-law specifying who may call a meeting of stockholders, it may always be called by the directors,² and it has even been held that in such case a general agent of a business corporation may make the call;³ but the secretary of the corporation has no such authority.⁴

Statutory and Charter Provisions specifying who may call meetings are usually mandatory, and must be strictly complied with, a call by any one else than the designated authority being insufficient;⁵ but it has been held that a statutory provision that meetings might be called by three stockholders did not preclude the adoption of a reasonable by-law providing some other method of calling meetings.⁶

By-laws designating who may call meetings may be either mandatory or directory. In the former case no one except the designated authority can call a meeting,⁷ while in the latter case the directors may make the call though not authorized by the by-laws so to do.⁸ And when a statute designates who may call a meeting for a certain purpose in the event that such meeting is not held on the day specified by the by-laws, the failure to adopt by-laws regarding such meeting will not preclude the calling of the meeting, and the call may be made by the persons designated by the statute.⁹

Where the Majority of Original Stockholders Refuse to Call a Meeting for Organization, it has been held that the call may be made by the minority.¹⁰

(b) *Manner of Making Call*. — In the absence of mandatory statutory provisions as to how the call shall be made, the manner of making it may be prescribed by by-laws, subject only to the restriction that the by-laws must be reasonable.¹¹ Where there is neither statute nor by-law on the subject, a call by the directors must be made by formal order, their individual consent not expressed at a board meeting being insufficient;¹² but it has been held that an injunction against a call for instalments on stock would not be granted on the ground that the officers making the call were elected at a meeting called by the commissioners appointed to call it, though the call was not made by a formal order of the commissioners, it appearing that the call was signed by

Connecticut. — *Congregational Soc. v. Sperry*, 10 Conn. 200.

Indiana. — *Southern Plank-Road Co. v. Hixon*, 5 Ind. 165.

Maine. — *Evans v. Osgood*, 18 Me. 213.

Maryland. — *Heller v. National Marine Bank*, 89 Md. 602, 73 Am. St. Rep. 212.

Massachusetts. — *Citizens' Mut. F. Ins. Co. v. Sortwell*, 8 Allen (Mass.) 217; *Stebbins v. Merritt*, 10 Cush. (Mass.) 27.

Nevada. — *State v. Pettineli*, 10 Nev. 141.

New Hampshire. — *Goulding v. Clark*, 34 N. H. 148.

New Jersey. — *Johnston v. Jones*, 23 N. J. Eq. 216.

New York. — *Matter of David Jones Co.*, 67 Hun (N. Y.) 360.

Pennsylvania. — *Com. v. Cullen*, 13 Pa. St. 133, 53 Am. Dec. 450.

Vermont. — *Stevens v. Eden Meeting-House Soc.*, 12 Vt. 688.

West Virginia. — *Reilly v. Oglebay*, 25 W. Va. 36.

1. *Waiver of Call*. — *Braintree Water Supply Co. v. Braintree*, 146 Mass. 482.

2. *Directors May Make Call*. — *Cassell v. Lexington, etc., Turnpike Road Co.*, (Ky.) 1888) 9 S. W. Rep. 502. See also *In re Haycraft Gold Reduction, etc., Co.*, (1900) 2 Ch. 230, 69 L. J. Ch. 497.

3. *General Agent of Business Corporation May Make Call*. — *Stebbins v. Merritt*, 10 Cush. (Mass.) 27.

4. *Secretary Cannot Make Call*. — *In re Haycraft Gold Reduction, etc., Co.*, (1900) 2 Ch. 230, 83 L. T. N. S. 166, 7 Manson 243; *Cassell v. Lexington, etc., Turnpike Road Co.*, (Ky. 1888) 9 S. W. Rep. 502, rehearing 9 S. W. Rep. 701.

5. *Statutes*. — *Matthews v. Columbia Nat. Bank*, 79 Fed. Rep. 558; *Evans v. Osgood*, 18 Me. 213; *Goulding v. Clark*, 34 N. H. 148; *Hardenburgh v. Farmers' etc., Bank*, 3 N. J. Eq. 68; *Reilly v. Oglebay*, 25 W. Va. 36.

Charter Provision. — *Southern Plank-Road Co. v. Hixon*, 5 Ind. 165.

6. *Taylor v. Griswold*, 14 N. J. L. 222, 27 Am. Dec. 33.

7. *By-laws*. — *State v. Pettineli*, 10 Nev. 141.

8. *Citizens' Mut. F. Ins. Co. v. Sortwell*, 8 Allen (Mass.) 217.

9. *Matter of David Jones Co.*, 67 Hun (N. Y.) 360.

10. *Bussey v. Hooper*, 35 Md. 15, 6 Am. Rep. 350.

11. *Manner of Call*. — *Taylor v. Griswold*, 14 N. J. L. 222, 27 Am. Dec. 33.

12. *In re Haycraft Gold Reduction, etc., Co.*, (1900) 2 Ch. 230, 69 L. J. Ch. 497, 83 L. T. N. S. 166, 7 Manson 243.

the commissioners individually and was thereafter acquiesced in by them.¹ The call must, furthermore, be made in good faith, any fraud on the part of those making it calculated to redound to their personal benefit being fatal to the legality of the meeting convened thereunder.² The call is usually enforced by notice to the stockholders, and the notice is generally the only evidence of the call,³ the two acts being so closely allied that they are sometimes treated as identical.⁴

General and Special Statutory Provisions are sometimes in conflict, in which case the object of the meeting will determine which provision must control.⁵

(3) *Remedy Where Constituted Authorities Refuse to Make Call.* — Where the persons authorized to call meetings refuse or neglect to perform their duty in this regard, performance may be compelled by mandamus;⁶ and, in the absence of statutory provisions on the subject, this is the only judicial remedy available to compel the calling of a meeting, the courts having no other authority in the premises.⁷ Any stockholder who will be injured by the failure of the meeting to convene has a standing to apply for the writ;⁸ and the proper parties defendant are the officers whose duty it was to make the call.⁹

(4) *Presumption and Burden of Proof.* — All reasonable presumptions will be indulged in favor of the regularity of the call,¹⁰ and the burden of proving any irregularity therein is upon the party asserting it.¹¹

(5) *Waiver.* — All irregularities in the call are waived where all the stockholders attend and participate in the meeting,¹² and it has even been held that mere acquiescence in an irregular call, without any participation whatever in the meeting, will operate as a waiver.¹³

c. **NOTICE** — (i) *Necessity — When Not Necessary.* — Where the time and place of meeting are specified by statute, charter, or by-law, no further notice to the stockholders is necessary.¹⁴

1. *Hardenburgh v. Farmers', etc., Bank*, 3 N. J. Eq. 68.

2. *Cannon v. Trask*, L. R. 20 Eq. 669; *Jackson v. Munster Bank*, 13 L. R. Ir. 118; *Nathan v. Tompkins*, 82 Ala. 437. See also *infra*, this section, *Judicial Control of Meetings*.

3. See *infra*, this subsection, *Notice*.

4. *Forest Glen Brick, etc., Co. v. Gade*, 55 Ill. App. 181; *Taylor v. Griswold*, 14 N. J. L. 222, 27 Am. Dec. 33.

5. *Heller v. National Marine Bank*, 89 Md. 602, 73 Am. St. Rep. 212. Here a general statute providing for a call by stockholders was held to yield to a special section providing for a call by directors when the object of the meeting brought it within the latter section.

6. **Mandamus Lies to Compel Call.** — *Reg. v. Bannatyne*, 17 Q. B. 524, 79 E. C. L. 524, 6 Eng. L. & Eq. 365; *Foss v. Harbottle*, 2 Hare 461; *Isle of Wight R. Co. v. Tahourdin*, 25 Ch. D. 320; *Bassett v. Atwater*, 65 Conn. 355; *State v. Wright*, 10 Nev. 167; *M'Neely v. Woodruff*, 13 N. J. L. 352; *People v. Cummings*, 72 N. Y. 433; *People v. Board of Governors*, 61 Barb. (N. Y.) 397. As to mandamus to compel elections, see the titles **MANDAMUS**, vol. 19, p. 869; **OFFICERS AND AGENTS OF PRIVATE CORPORATIONS**, vol. 21, p. 837.

7. *Taylor v. Philadelphia, etc., R. Co.*, 7 Fed. Rep. 381.

In **New Hampshire** by statute (now Pub. Stat. 1901, c. 148, §§ 16, 17), a meeting may be called, where the regularly constituted authorities fail to make a call, by a warrant issued by

a justice of the peace upon the petition of a designated number of the stockholders. *Goulding v. Clark*, 34 N. H. 148.

And it has been held that the fact that the justice is a stockholder does not affect the validity of such warrant, the issuance thereof being a ministerial act. *Ashuelot R. Co. v. Elliot*, 57 N. H. 397.

8. See the cases cited in the preceding note.

9. *Dusenbury v. Looker*, 110 Mich. 58.

10. **Presumption.** — *Wallace v. First Parish*, 109 Mass. 263. See also *infra*, this subsection, *Notice*.

11. *Dunn v. New Orleans Bldg. Co.*, 8 La. 483.

12. **Irregularity in Call Waived.** — *Judah v. American Live Stock Ins. Co.*, 4 Ind. 333; *Newcomb v. Reed*, 12 Allen (Mass.) 362; *Manhattan Brass Co. v. Webster Glass, etc., Co.*, 37 Mo. App. 145; *Weinburgh v. Union St. R. Advertising Co.*, 55 N. J. Eq. 640; *Benbow v. Cook*, 115 N. Car. 324, 44 Am. St. Rep. 454; *Chamberlain v. Painesville, etc., R. Co.*, 15 Ohio St. 225.

13. *Walworth v. Brackett*, 98 Mass. 98.

14. **Notice of Stated Meetings Not Necessary.** — *Morrill v. Little Falls Mfg. Co.*, 53 Minn. 371; *Jones v. Concord, etc., R. Co.*, 67 N. H. 119; *Atlantic Mut. F. Ins. Co. v. Sanders*, 36 N. H. 252; *People v. Batchelor*, 22 N. Y. 128; *State v. Bonnell*, 35 Ohio St. 10; *Warner v. Mower*, 11 Vt. 385.

Notice of Adjourned Session of Stated Meeting Not Necessary. — *Western Imp. Co. v. Des Moines Nat. Bank*, 103 Iowa 455.

When Necessary. — When the time and place of meetings are not fixed in such a manner as to charge the stockholders with notice, as by statute, charter, or by-law, notice must be given;¹ and the fact that a special meeting is called at a regular meeting will not dispense with the necessity of notice to all who are not present at the regular meeting.²

A Fortiori must notice be given where it is required by constitution,³ statute,⁴ charter,⁵ or by-law.⁶

Where a Stockholder Is Non Compos Mentis, and thus incapable of receiving a notice of a meeting, the regularity of the meeting will not be affected thereby.⁷

Effect of Failure to Give Notice. — Whenever a notice of a meeting is required by law, any attempt to hold a meeting without notice will usually be abortive, and the acts of the stockholders at such meeting will not be the acts of the corporation.⁸ The effect of this principle, however, is considerably curtailed by the principles that no one can take advantage of the lack of notice unless he has been injured thereby,⁹ and that the requirement of notice is usually for the sole benefit of the stockholders and hence advantage thereof cannot ordinarily be taken by any one but a stockholder.¹⁰ Where, moreover, all the stockholders attend the meeting, the notice is waived and the meeting is valid,¹¹ unless the requirement of notice be for the benefit of the public as well as of the stockholders, in which case the notice cannot be waived.¹² The effect of failure to give notice is still further curtailed by the principles of estoppel, whereby one who participates in the meeting is estopped to question its validity on account of lack of notice.¹³ Furthermore, the lack of notice may be cured by ratification by the absent members,¹⁴ or by the action of a majority of the stockholders at a meeting subsequently called.¹⁵

Usage will not excuse the failure to give notice of a meeting of which the law requires a notice.¹⁶

(2) **Sufficiency**—(a) **By Whom Given**—**In General.** — The notice of meeting is only a method of enforcing the call, and hence the question who may give the notice is identical with the question who may make the call, which has already been discussed.¹⁷

1. Notice Necessary Where Time and Place of Meeting Not Otherwise Fixed.—*San Buenaventura Commercial Min., etc., Co. v. Vassault*, 50 Cal. 534; *Stow v. Wyse*, 7 Conn. 214, 18 Am. Dec. 99; *Wiggin v. Lowell First Freewill Baptist Church*, 8 Met. (Mass.) 301; *State v. Bonnell*, 35 Ohio St. 10; *Com. v. Cullen*, 13 Pa. St. 133, 53 Am. Dec. 450.

2. People v. Batchelor, 22 N. Y. 128.

3. Shepp v. Norristown Pass. R. Co., 13 Pa. Co. Ct. 254.

4. Charter Gas Engine Co. v. Charter, 47 Ill. App. 36; *Lincoln v. New Orleans Express Co.*, 45 La. Ann. 729; *State v. McGrath*, 86 Mo. 239.

5. Cleveland City Forge Iron Co. v. Taylor Bros. Iron-Works, 54 Fed. Rep. 82; *U. S. v. McKelden*, 4 McArthur & M. (D. C.) 162; *Davies v. Monroe Water-Works, etc., Co.*, 107 La. 145.

6. San Buenaventura Commercial Min., etc., Co. v. Vassault, 50 Cal. 534; *Brown v. Electric Min. Mach. Co.*, 22 Pittsb. L. J. N. S. 343.

7. Stockholder's Mental Incapacity.—*Stebbins v. Merritt*, 10 Cush. (Mass.) 27.

8. Meeting Without Notice When Notice Required.—*In re St. Helen Mill Co.*, 3 Sawy. (U. S.) 88, 21 Fed. Cas. No. 12,222; *U. S. v. McKelden*, *MacArthur & M. (D. C.)* 162; *Davies v. Monroe Water-Works, etc., Co.*, 107 La. 145; *Lincoln v. New Orleans Express Co.*, 45 La. Ann. 729; *State v. McGrath*, 86 Mo. 239; *Shepp v. Norristown Pass. R. Co.*, 13 Pa. Co. Ct. 254; *Brown v. Electric Min. Mach.*

Co., 22 Pittsb. L. J. N. S. 343; *Com. v. Cullen*, 13 Pa. St. 133, 53 Am. Dec. 450; *Stevens v. Eden Meeting House Soc.*, 12 Vt. 688.

9. Columbia Nat. Bank's Appeal, 16 W. N. C. (Pa.) 357.

10. Central Trust Co. v. Condon, (C. C. A.) 67 Fed. Rep. 84. But see *Cleveland City Forge Iron Co. v. Taylor Bros. Iron-Works Co.*, 54 Fed. Rep. 82, wherein it was held that attaching creditors might attack the validity of a dissolution resolved upon at a meeting which was not advertised as required by the charter.

11. Waiver of Notice.—*Gold Bluff Min., etc., Corp. v. Whitlock*, 75 Conn. 669; *Tompkins v. Sperry*, 96 Md. 560; *Manhattan Brass Co. v. Webster Glass, etc., Co.*, 37 Mo. App. 145. See also *McClinch v. Sturgis*, 72 Me. 288; *Benbow v. Cook*, 115 N. Car. 324, 44 Am. St. Rep. 454.

12. State v. McGrath, 86 Mo. 239.

13. Kenton Furnace R., etc., Co. v. McAlpin, 5 Fed. Rep. 737; *Gold Bluff Min., etc., Corp. v. Whitlock*, 75 Conn. 669; *Jones v. Milton, etc., Turnpike Co.*, 7 Ind. 547.

14. Benbow v. Cook, 115 N. Car. 324, 44 Am. St. Rep. 454.

15. Richardson v. Vermont, etc., R. Co., 44 Vt. 613; *Jones v. Milton, etc., Turnpike Co.*, 7 Ind. 547.

16. Rex v. Hill, 4 B. & C. 426, 10 E. C. L. 376; *Wiggin v. Lowell First Freewill Baptist Church*, 8 Met. (Mass.) 301.

17. See supra, this subsection, *Call—Sufficiency—Authority to Call*.

Statutes Specifying Who Must Give the Notice must be complied with, and a notice by any one other than the authority specified by the statute will be insufficient.¹ But it has been held that where a statute authorizes the incorporation of a religious congregation after due public notice at a stated meeting, the notice need not be given by any particular person.²

Attendance Is Waiver. — A statutory requirement that the notice be given by any particular person or persons may be waived, and is waived by attendance at and participation in the meeting.³

Collateral Attack. — Such a provision cannot ordinarily be made the basis of a collateral attack upon the validity of the meeting.⁴

(b) **To Whom Given.** — It may be stated as a general rule that all stockholders are entitled to notice of meetings whenever it is necessary to give such notice at all.⁵ As to who are stockholders, the rule is the same as that by which the right to vote is determined,⁶ the notice being given in order that the stockholder may attend the meeting and protect his interests by his vote. But that it has been held that the validity of a meeting will not be affected by the failure to give notice to trustees who hold the bare legal title to stock, without any beneficial interest therein, where notice is given to the *cestuis que trustent* or where the latter are present at the meeting.⁷ In some cases, however, a stockholder may be entitled to notice though not entitled to vote upon the particular business to be transacted at a meeting.⁸ Generally the registration books of the corporation determine who are entitled to notice, and the validity of a meeting will not be affected by failure to give notice to persons not registered as stockholders.⁹

(c) **How Given.** — Where There Are No Statutory, Charter, or By-law Provisions as to how notice shall be given, personal notice is necessary,¹⁰ but it need not be given in any particular manner, provided that it is sufficient to apprise the persons to whom it is given of the time, place, and object of the meeting.¹¹

Statutory, Charter, and By-law Requirements are usually held to be mandatory, and must be complied with.¹² Thus, a published notice is insufficient where a

1. *Kulinski v. Dambrowski*, 29 Wis. 109.

2. *West Koshkonong Congregation v. Ottesen*, 80 Wis. 62. See also *St. Jacob's Lutheran Church v. Bly*, 73 N. Y. 323. And see generally the title RELIGIOUS SOCIETIES, vol. 24, p. 323.

3. *Benbow v. Cook*, 115 N. Car. 324, 44 Am. St. Rep. 454.

4. *Chamberlain v. Painesville, etc.*, R. Co., 15 Ohio St. 225.

5. **Persons Entitled to Notice** — *United States*. — *Cleveland City Forge Iron Co. v. Taylor Bros. Iron Works Co.*, 54 Fed. Rep. 82.

California. — *San Buenaventura Commercial Min., etc., Co. v. Vassault*, 50 Cal. 534.

Connecticut. — *Stow v. Wyse*, 7 Conn. 214, 18 Am. Dec. 99.

District of Columbia. — *U. S. v. McKelden, MacArthur & M.* (D. C.) 162.

Illinois. — *Charter Gas Engine Co. v. Charter*, 47 Ill. App. 36.

Louisiana. — *Davies v. Monroe Water-Works, etc.; Co.*, 107 La. 149; *Lincoln v. New Orleans Express Co.*, 45 La. Ann. 729.

Massachusetts. — *Evans v. Boston Heating Co.*, 157 Mass. 37; *People's Mut. Ins. Co. v. Westcott*, 14 Gray (Mass.) 440; *Stebbins v. Merritt*, 10 Cush. (Mass.) 27; *Wiggin v. Lowell First Freewill Baptist Church*, 8 Met. (Mass.) 301.

Missouri. — *State v. McGrath*, 86 Mo. 239.

Pennsylvania. — *Shepp v. Norristown Pass. R. Co.*, 13 Pa. Co. Ct. 254.

Rhode Island. — *Atlantic De Laine Co. v. Mason*, 5 R. I. 463.

Vermont. — *Stevens v. Eden Meeting-House Soc.*, 12 Vt. 688; *Warner v. Mower*, 11 Vt. 385.

6. *Rex v. Free Fishermen Co.*, 8 T. R. 356; *Angell & Ames on Corp.*, § 492; *Dillon on Munic. Corp.*, § 200. See also *infra*, this section, *Proceedings at Meetings — Voting — Who May Vote*.

7. *American Nat. Bank v. Oriental Mills*, 17 R. I. 551.

8. *Medical, etc., Soc. v. Weatherly*, 75 Ala. 248, in which case expulsion at a meeting of which the stockholder expelled had no notice was held to be invalid.

9. **Unregistered Executors.** — *Allen v. Gold Reefs of West Africa*, (1900) 1 Ch. 656, 69 L. J. Ch. 266, 82 L. T. N. S. 210, 48 W. R. 452, 7 Manson 417.

Unregistered Pledgee. — *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274.

10. **Manner of Notice.** — *Stow v. Wyse*, 7 Conn. 214, 18 Am. Dec. 99; *Stevens v. Eden Meeting-House Soc.*, 12 Vt. 688.

11. *West Koshkonong Congregation v. Ottesen*, 80 Wis. 62.

12. **Provisions in Charter.** — *Stow v. Wyse*, 7 Conn. 214, 18 Am. Dec. 99; *Shelby R. Co. v. Louisville, etc., R. Co.*, 12 Bush (Ky.) 62.

Provisions in By-laws. — *Stow v. Wyse*, 7 Conn. 214, 18 Am. Dec. 99. See also *Cogswell v. Bullock*, 13 Allen (Mass.) 90.

statute requires a notice in person or by mail.¹ Likewise, a verbal notice is insufficient where a printed or written notice is required by the charter² or by a by-law.³ But where a statute merely requires that due notice be given, the notice need not be given in any particular manner;⁴ and where the statute requires meetings to be convened and conducted pursuant to the by-laws, but the by-laws do not prescribe how notice shall be given, the notice must be given according to general statutory provisions upon the subject, if there be any such provisions.⁵

(d) **Time of Notice — In General.** — In the absence of statutory or charter restrictions, the length of the notice may be prescribed by by-laws, subject only to the restriction that the time must be reasonable,⁶ and the mere fact that the notice is insufficient to allow to any particular stockholder time to attend, he being away from his residence, will not, in the absence of fraud, render the time unreasonable.⁷ Where charter provisions as to the length of the notice conflict with constitutional provisions, the latter control;⁸ so where by-laws conflict with statutory provisions, the statute controls;⁹ but where a general statutory provision conflicts with a special provision, the latter controls whenever the meeting comes within the purview of the special provision.¹⁰

Computation of Time is made according to the general law applicable to legal notices, according to which either the first or the last day of any specified period is usually excluded.¹¹

Where the Meetings Are Required to Be Advertised a certain time, as, for example, two weeks, prior to the date on which they are to be held, it has been held that the advertisement need not be continued during the entire period, a single advertisement the prescribed time prior to the meeting being sufficient.¹²

Waiver. — Statutory provisions as to the length of notice may be waived by the stockholders, at least where such provisions are for the benefit of the stockholders, and such a waiver will be implied where all the shares of a corporation are represented and voted at a meeting held upon a notice shorter than that required by the statute.¹³

(e) **Form and Contents — In General.** — No particular form of notice is required, except that the notice must generally show the authority of the person issuing it¹⁴ and the time, place,¹⁵ and objects of the meeting.¹⁶ In stating the time not only the day must be given, but the hour also;¹⁷ and the objects of the meeting, that is, the business to be transacted, must be stated with sufficient particularity to enable the stockholder to determine for himself whether it is

1. Charter Gas Engine Co. v. Charter, 47 Ill. App. 36.

2. Wescott v. Minnesota Min. Co., 23 Mich. 145.

3. Stevens v. Eden Meeting-House Soc., 12 Vt. 688.

4. West Koshkonong Congregation v. Ottesen, 80 Wis. 62.

5. Matter of Long Island R. Co., 19 Wend. (N. Y.) 37, 32 Am. Dec. 429.

When General and Special Statutory Provisions are conflicting the special controls for matters covered by it. Heller v. National Marine Bank, 89 Md. 602, 73 Am. St. Rep. 212.

6. Jones v. Morrison, 31 Minn. 140; Taylor v. Griswold, 14 N. J. L. 222, 27 Am. Dec. 33.

7. Jones v. Morrison, 31 Minn. 140.

8. Shepp v. Norristown Pass. R. Co., 13 Pa. Co. Ct. 254.

9. Brown v. Republican Mountain Silver Mines, 55 Fed. Rep. 7, (C. C. A.) 58 Fed. Rep. 644.

10. Jones v. Morrison, 31 Minn. 140.

11. The Vigilancia, 68 Fed. Rep. 781. See the title TIME, COMPUTATION OF.

12. Weckerly v. Fell, etc., R. Co., 8 Pa. Dist. 89.

13. Matter of A. A. Griffing Iron Co., 63 N. J. L. 168.

14. **What Notice Must Show.** — Johnston v. Jones, 23 N. J. Eq. 216.

15. **Time and Place.** — Charter Gas Engine Co. v. Charter, 47 Ill. App. 36; Coe v. East, etc., R. Co., 52 Fed. Rep. 531.

16. **Objects.** — Tiessen v. Henderson, (1899) 1 Ch. 861, 68 L. J. Ch. 353, 80 L. T. N. S. 483, 47 W. R. 459, 6 Manson 340; Coe v. East, etc., R. Co., 52 Fed. Rep. 531; Evans v. Osgood, 18 Me. 213; Evans v. Boston Heating Co., 157 Mass. 37; American Tube Works v. Boston Mach. Co., 139 Mass. 5; People's Mut. Ins. Co. v. Westcott, 14 Gray (Mass.) 440; Beecher v. Marquette, etc., Rolling Mill Co., 45 Mich. 103; Jones v. Concord, etc., R. Co., 67 N. H. 234, 68 Am. St. Rep. 650; Atlantic De Laine Co. v. Mason, 5 R. I. 463; Warner v. Mower, 11 Vt. 385.

17. San Buenaventura Commercial Min., etc., Co. v. Vassault, 50 Cal. 534; Charter Gas Engine Co. v. Charter, 47 Ill. App. 36.

necessary for him to attend in order to protect his interests.¹ Technical objections to the notice, however, will not be sustained where it is substantially sufficient to enable the stockholders to determine whether their interests are involved and to attend the meeting if they wish to do so, and no one has been misled by the defects complained of.² As hereinbefore shown, notice of a general or stated meeting is usually unnecessary;³ but when such a notice is required the objects of the meeting need not be stated, it being manifest from the very nature of the meeting that it is for the transaction of all business that may come up.⁴

A Conditional Notice is not sufficient if it leaves the stockholder in doubt as to whether the meeting will be held;⁵ but a notice declaring that the meeting therein referred to will not be held if certain things occur at a certain other meeting previously to be held is not subject to objection as being conditional,⁶ especially if the notice states that the stockholders will be notified in the event that the result of the first meeting renders the second unnecessary.⁷

Waiver. — The requirement that the notice must state the objects of the meeting, being for the benefit of the stockholders, may be waived by them even in the face of a statute specifically requiring that such objects be so stated, and all stockholders who attend a meeting and participate without objection in the transaction of business not mentioned in the notice will be deemed to have waived the defect.⁸

(3) *Presumption and Burden of Proof.* — Every reasonable presumption will be indulged in favor of the regularity of a meeting so far as regularity is dependent upon the giving of notice, and the burden of proving lack or insufficiency of notice is upon the person asserting such irregularity.⁹

d. QUORUM — Necessity. — An assembly of stockholders pursuant to a proper call and notice is not necessarily a stockholders' meeting. There must be a quorum, otherwise the meeting will not be a legal one except for the purpose of adjournment.¹⁰

What Is Quorum. — In the absence of statutory, charter, or by-law provisions on the subject, a majority of the whole number of stockholders or shares is essential to a quorum where the number of such stockholders or shares is definite and ascertained; but where the number is indefinite any number who assemble constitute a quorum,¹¹ and even one stockholder may, in

1. *Tiessen v. Henderson*, (1899) 1 Ch. 861, 68 L. J. Ch. 353, 80 L. T. N. S. 483, 47 W. R. 459, 6 *Manson* 340; *Evans v. Osgood*, 18 Me. 213; *American Tube Works v. Boston Mach. Co.*, 139 Mass. 5.

2. **Technical Objections Not Favored.** — *Henderson v. Australasia Bank*, 62 L. T. N. S. 869; *South School Dist. v. Blakeslee*, 13 Conn. 227; *Evans v. Boston Heating Co.*, 157 Mass. 37; *Jones v. Concord, etc., R. Co.*, 67 N. H. 234, 68 Am. St. Rep. 650; *Langan v. Franklyn*, (Brooklyn City Ct. Spec. T.) 29 Abb. N. Cas. (N. Y.) 102.

3. See *supra*, this subsection, *Necessity*.

4. *Warner v. Mower*, 11 Vt. 385.

5. *Alexander v. Simpson*, 43 Ch. D. 139.

6. *Tiessen v. Henderson*, (1899) 1 Ch. 861, 68 L. J. Ch. 353, 80 L. T. N. S. 483, 47 W. R. 459, 6 *Manson* 340, *distinguishing* *Alexander v. Simpson*, 43 Ch. D. 139, 59 L. J. Ch. 137.

7. *In re Espuela Land, etc., Co.*, 48 W. R. 684.

8. **Waiver.** — *Synnott v. Cumberland Bldg. Loan Assoc., (C. C. A.)* 117 Fed. Rep. 379; *Gold Bluff Min., etc., Corp. v. Whitlock*, 75 Conn. 650; *Tomkins v. Sperry*, 96 Md. 560.

9. **Sufficient Notice Prima Facie Presumed.** — *Ashley Wire Co. v. Illinois Steel Co.*, 60 Ill.

App. 179; *Wallace v. First Parish*, 109 Mass. 263; *Sargent v. Webster*, 13 Met. (Mass.) 497, 46 Am. Dec. 743. See also *Forest Glen Brick, etc., Co. v. Gade*, 55 Ill. App. 181; *Cushman v. Illinois Starch Co.*, 79 Ill. 281. Compare *Cassell v. Lexington, etc., Turnpike Road Co.*, (Ky. 1888) 9 S. W. Rep. 701.

10. **Necessity of Quorum.** — *Morrill v. Little Falls Mfg. Co.*, 53 Minn. 371; *Madison Ave. Baptist Church v. Baptist Church*, 5 Robt. (N. Y.) 649; *Ex p. Rogers*, 7 Cow. (N. Y.) 526; *Craig v. Pittsburgh First Presb. Church*, 88 Pa. St. 42, 32 Am. Rep. 417; *Matter of Granger*, 7 Phila. (Pa.) 350; *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308, 11 Am. Rep. 253.

11. **What Is Quorum.** — *Rex v. Varlo*, 1 Cowp. 248; *Morrill v. Little Falls Mfg. Co.*, 53 Minn. 371; *Columbia Bottom Levee Co. v. Meier*, 39 Mo. 53; *Madison Ave. Baptist Church v. Baptist Church*, 5 Robt. (N. Y.) 649; *Field v. Field*, 9 Wend. (N. Y.) 395; *Ex p. Willcocks*, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525; *Matter of Rapid Transit Ferry Co.*, 15 N. Y. App. Div. 530; *Craig v. Pittsburgh First Presb. Church*, 88 Pa. St. 42, 32 Am. Rep. 417; *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308, 11 Am. Rep. 253.

the latter case, constitute a quorum.¹ Whether the quorum must be of stockholders or of shares depends upon whether the voting is by heads or by shares.² Statutory, charter, and by-law provisions as to how many shall constitute a quorum are mandatory;³ but the number may be fixed by by-laws only in the absence of statutory restrictions,⁴ and the intention of thus fixing the number must clearly appear.⁵ In computing the number of stockholders or shares required by statute, charter, or by-law to constitute a quorum, the special provisions must of course be looked to. It has been held that a provision requiring the holders of a certain proportion of the stock to be represented meant two-thirds of the outstanding stock, and did not include the stock owned by the corporation itself,⁶ and that under a similar provision it was not necessary that the stock represented should be authorized stock, it being held sufficient if the proper proportion of the stock actually issued be represented;⁷ likewise it has been held that a by-law provision requiring a majority of the stockholders to be represented meant a majority of the outstanding shares, there being a statute requiring the voting to be by shares instead of by the head.⁸ On the other hand, it has been held that a provision requiring a majority of the stock to be represented meant a majority of all the stock, whether issued or not.⁹

Presumption and Evidence. — Where it appears from the records that the meeting was otherwise regular, but it does not appear that a quorum was present, the presence of a quorum will be presumed.¹⁰ The presence of a quorum may, moreover, be proved by evidence *dehors* the record.¹¹

e. DIVIDED MEETINGS. — Where a meeting is divided by disorder, and each faction holds a meeting, the meeting held by the faction not in fault will generally be the corporate meeting,¹² and the disorder or improper conduct which justifies the faction not in fault in withdrawing must be such that such faction is without remedy save by withdrawing.¹³ A call to withdraw to escape disorder must be made in good faith, and not to carry out preconceived schemes in the interest of the withdrawing faction.¹⁴ Such call must, furthermore, be made to all who wish to escape the disorder, and where it is not so made, being confined to the members of the withdrawing faction, a subsequent invitation to the members of the other faction to come over and vote will not validate the meeting held by the seceders.¹⁵

f. WAIVER, ESTOPPEL, AND RATIFICATION — **Waiver.** — Where all the stockholders attend and participate in a meeting all irregularities therein are

1. *Morrill v. Little Falls Mfg. Co.*, 53 Minn. 371. Compare *Sharp v. Dawes*, 46 L. J. Q. B. 104.

2. See *infra*, this section, *Voting* — *Manner of Voting* — *By Heads or by Shares*.

3. **Statutory Requirement as to Quorum.** — *Castner v. Twitchell-Champlin Co.*, 91 Me. 524; *Matter of Rapid Transit Ferry Co.*, 15 N. Y. App. Div. 530; *Ex p. Rogers*, 7 Cow. (N. Y.) 526.

Charter Requirements. — *Hemans v. Hotchkiss Ordnance Co.*, (1899) 1 Ch. 115, 68 L. J. Ch. 99, 79 L. T. N. S. 681, 47 W. R. 276, 6 Mason 52; *Ex p. Rogers*, 7 Cow. (N. Y.) 526; *Green v. Seymour*, 3 Sandf. Ch. (N. Y.) 285; *Com. v. Woelper*, 3 S. & R. (Pa.) 29, 8 Am. Dec. 628.

By-law Requirements. — *Castner v. Twitchell-Champlin Co.*, 91 Me. 524; *Ellsworth Woolen Mfg. Co. v. Faunce*, 79 Me. 440; *Franklin Trust Co. v. Rutherford, etc., Electric Co.*, 57 N. J. Eq. 42, *affirmed* 43 Atl. Rep. 1008.

4. *Matter of Rapid Transit Ferry Co.*, 15 N. Y. App. Div. 530.

5. *Castner v. Twitchell-Champlin Co.*, 91 Me. 524.

6. *Green v. Seymour*, 3 Sandf. Ch. (N. Y.) 285.

7. *Castner v. Twitchell-Champlin Co.*, 91 Me. 524.

8. *Weinburgh v. Union St. R. Advertising Co.*, 55 N. J. Eq. 640.

9. *Ellsworth Woolen Mfg. Co. v. Faunce*, 79 Me. 440.

10. *Citizens' Mut. F. Ins. Co. v. Sortwell*, 8 Allen (Mass.) 217; *Com. v. Woelper*, 3 S. & R. (Pa.) 29, 8 Am. Dec. 628.

11. *Franklin Trust Co. v. Rutherford, etc., Electric Co.*, 57 N. J. Eq. 42, *affirmed* 43 Atl. Rep. 1008.

12. **Divided Meetings.** — *Proctor Coal Co. v. Finley*, 98 Ky. 405; *Com. v. Patterson*, 158 Pa. St. 476.

13. *Proctor Coal Co. v. Finley*, 98 Ky. 405; *Matter of Argus Printing Co.*, 1 N. Dak. 434, 26 Am. St. Rep. 630.

Votes Cast at Both Factional Meetings Counted. — *In re Election of Directors*, 61 N. J. L. 422.

14. *Com. v. Patterson*, 158 Pa. St. 476.

15. *Com. v. Patterson*, 158 Pa. St. 476.

thereby waived,¹ unless the irregularity consists of the failure to comply with some statutory formality intended for the benefit of the public at large or some particular portion thereof, in which case the stockholders cannot waive it.²

Estoppel. — All who participate in a meeting are estopped to question its regularity,³ and the corporation itself may, as to third persons, be estopped to deny the legality of a meeting.⁴

Ratification. — The proceedings of irregular meetings may be ratified either by a majority of the stockholders at a subsequent meeting regularly called⁵ or, where the irregularity consists of lack of notice to a portion of the stockholders, by the absent stockholders.⁶

3. Proceedings at Meetings — *a.* **SCOPE OF TOPIC.** — Many of the special proceedings of stockholders' meetings having been made the subjects of other titles in this work,⁷ this subsection of the present title is confined mainly to the general principles applicable to the organization and conduct of stockholders' meetings, the special matters treated of elsewhere being touched upon only so far as is essential to an orderly treatment of the subject.

b. **ORGANIZATION AND MODERATION.** — A stockholders' meeting must be called to order by a duly authorized officer, who is usually designated by the charter or some general statute; but it is not necessary that such officer should act in person.⁸ After the meeting has been called to order the next step, where there is no permanent moderator designated by law, is to elect as moderator either one of the stockholders or, in the case of manufacturing corporations, some outside party.⁹ The moderator has formal control over the meeting, and may, when so authorized by the majority vote, place a reasonable time limit upon the debates on the business presented.¹⁰ He has not, however, any control over the business presented, and cannot prevent the transaction of business by refusing to preside over the meeting. If he refuses to preside, the stockholders may act without him.¹¹ Where a by-law provides that debates shall be governed by the rules laid down in a certain manual, and makes no further provision in this regard, the debates will be governed exclusively by such rules.¹²

c. **WHAT BUSINESS MAY BE TRANSACTED.** — At a General or Stated Meeting of which no notice is required, the time and place of meeting being fixed by general statute, charter, or by-law, any and all legitimate corporate business may be transacted.¹³

1. Waiver of Irregularities. — *Synnott v. Cumberland Bldg. Loan Assoc.*, (C. C. A.) 117 Fed. Rep. 379; *Kenton Furnace R., etc., Co. v. McAlpin*, 5 Fed. Rep. 737; *Gold Bluff Min., etc., Corp. v. Whitlock*, 75 Conn. 669; *Jones v. Milton, etc., Turnpike Co.*, 7 Ind. 547; *Tompkins v. Sperry*, 96 Md. 560; *Braintree Water Supply Co. v. Braintree*, 146 Mass. 482; *Manhattan Brass Co. v. Webster Glass, etc., Co.*, 37 Mo. App. 145; *Matter of A. A. Griffing Iron Co.*, 63 N. J. L. 168; *Benbow v. Cook*, 115 N. Car. 324, 44 Am. St. Rep. 454. See also *supra*, this subsection, *Time and Place*; *Call*; *Notice*.

2. Formalities Required for Benefit of Public Not Subject to Waiver. — *State v. McGrath*, 86 Mo. 239.

3. Estoppel. — *Kenton Furnace R., etc., Co. v. McAlpin*, 5 Fed. Rep. 737; *Gold Bluff Min., etc., Corp. v. Whitlock*, 75 Conn. 669; *Jones v. Milton, etc., Turnpike Co.*, 7 Ind. 547. See also *supra*, this subsection, *Notice*.

4. *Bates v. Androscoggin, etc., R. Co.*, 49 Me. 491.

5. Ratification — *Jones v. Milton, etc., Turnpike Co.*, 7 Ind. 547; *Richardson v. Vermont, etc., R. Co.*, 44 Vt. 613.

6. *Benbow v. Cook*, 115 N. Car. 324, 44 Am.

St. Rep. 454. See also *supra*, this subsection, *Notice*.

7. See such titles as *BY-LAWS*, vol. 5, p. 86; *CUMULATIVE VOTING*, vol. 8, p. 494; *OFFICERS AND AGENTS OF PRIVATE CORPORATIONS*, vol. 21, p. 833; *PROXIES*, vol. 23, p. 294; *VOTING TRUSTS*.

8. Organization. — *People v. Albany, etc., R. Co.*, 55 Barb. (N. Y.) 344.

9. *Stebbins v. Merritt*, 10 Cush. (Mass.) 27.

10. *Wall v. London, etc., Assets Corp.*, (1898) 2 Ch. 469, 67 L. J. Ch. 596, 79 L. T. N. S. 249.

11. *State v. Cronan*, 23 Nev. 437.

The Mere Fact that the Moderator Refuses to Put a Question to the House in a certain manner does not authorize the person presenting such question to usurp the office of chairman or moderator and put the question to the house in the manner desired, the remedy of such party being an appeal to the house at large. *Proctor Coal Co. v. Finley*, 98 Ky. 405.

12. *People v. American Institute*, (Supm. Ct. Spec. T.) 34 How. Pr. (N. Y.) 468.

13. Business at General or Stated Meeting. — *Chicago, etc., R. Co. v. Union Pac. R. Co.*, 47 Fed. Rep. 15; *Sampson v. Bowdoinham Steam Mill Corp.*, 36 Me. 78; *Mutual F. Ins. Co. v.*

At a Special or Extraordinary Meeting, or any other meeting the time and place of which are not definitely fixed, no business can be transacted except that which is specified in the notice of the meeting.¹ It has been held, however, that a special yearly meeting required by statute and convened by call and notice for certain purposes, as, for example, for the election of directors, might, by usage, be converted into a general meeting for the transaction of general business.²

Waiver of Restrictions. — The restrictions upon the business which may be transacted at special meetings being, moreover, for the benefit of the stockholders, may be waived by them, and are so waived where they attend the meeting and participate without objection in the business actually transacted.³

The Transaction at a Special Meeting of Business Not Specified in the notice does not vitiate the other proceedings of the meeting which are within the notice.⁴

At an Adjourned Meeting any business may be transacted which might have been transacted at the original meeting.⁵

d. VOTING — (1) *Who May Vote* — (a) **In General.** — In the absence of statutory, charter, and by-law restrictions, the right to vote at a stockholders' meeting is an incident of ownership of stock.⁶ Beneficial ownership, however, is not essential to the right to vote,⁷ and it has been held that under a statute giving all "owners" of stock the right to vote, one who merely holds stock may vote;⁸ but it has also been held that where the charter provides that each stockholder shall have a vote for each share "owned" by him, one who has assigned his stock cannot vote it, even with the consent of the assignee, and notwithstanding that the stock is still registered in the name of the assignor.⁹ The general rule is that where the legal title and the beneficial ownership are divided, the right to vote depends upon the terms of the agreement under which such division was effected.¹⁰ It is not essential that an

Farquhar, 86 Md. 668; *Warner v. Mower*, 11 Vt. 385. See also *supra*, this section, *Legality — Notice*.

By-Law May Restrict Business Transactions at Meeting. — *Weatherly v. Medical, etc., Soc.*, 76 Ala. 567.

1. Business at Special Meetings — England. — *Tiessen v. Henderson*, (1899) 1 Ch. 861; *Wall v. London, etc., Assets Corp.*, (1898) 2 Ch. 469; *In re London, etc., Land Co.*, 31 Ch. D. 223; *In re Bridport Old Brewery Co.*, L. R. 2 Ch. 191; *In re Silkstone Fall Colliery Co.*, 1 Ch. D. 38; *Imperial Bank v. Hindustan Bank*, L. R. 6 Eq. 91; *Anglo-Californian Gold Min. Co. v. Lewis*, 6 H. & N. 174; *In re Stearic Acid Co.*, 9 Jur. N. S. 1066.

Connecticut. — *Gold Bluff Min., etc., Corp. v. Whitlock*, 75 Conn. 669.

Kentucky. — *Shelby R. Co. v. Louisville, etc., R. Co.*, 12 Bush (Ky.) 62.

Maine. — *Evans v. Osgood*, 18 Me. 213.

Maryland. — *Mutual F. Ins. Co. v. Farquhar*, 86 Md. 668.

Massachusetts. — *Evans v. Boston Heating Co.*, 157 Mass. 37; *American Tube Works v. Boston Mach. Co.*, 139 Mass. 5; *People's Mut. Ins. Co. v. Westcott*, 14 Gray (Mass.) 440.

Michigan. — *Tuttle v. Michigan Air Line R. Co.*, 35 Mich. 247.

New Hampshire. — *Jones v. Concord, etc., R. Co.*, 67 N. H. 234, 68 Am. St. Rep. 650; *St. Mary's Benev. Assoc. v. Lynch*, 64 N. H. 213.

Rhode Island. — *Atlantic De Laine Co. v. Mason*, 5 R. I. 463.

See also *supra*, this section, *Legality — Notice*.

2. Mutual F. Ins. Co. v. Farquhar, 86 Md. 668.

3. Waiver of Restrictions. — *Synnott v. Cumberland Bldg. Loan Assoc.*, (C. C. A.) 117 Fed. Rep. 379; *Rex v. Theodorick*, 8 East 543.

4. Matter of British Sugar Refining Co., 3 Kay & J. 408; *In re Irrigation Co.*, L. R. 6 Ch. 176.

5. Adjourned Meeting. — *Scadding v. Lorant*, 3 H. L. Cas. 418; *State v. Cronan*, 23 Nev. 437; *Smith v. Law*, 21 N. Y. 296; *Farrar v. Perley*, 7 Me. 404; *Matter of Granger*, 7 Phila. (Pa.) 350; *Warner v. Mower*, 11 Vt. 385.

6. Right to Vote. — *Taylor v. Southern Pac. Co.*, 122 Fed. Rep. 147; *State v. New Orleans, etc., R. Co.*, 20 La. Ann. 489; *Johnston v. Jones*, 23 N. J. Eq. 216; *Miller v. Ratterman*, 47 Ohio St. 141; *Com. v. Patterson*, 158 Pa. St. 476; *Com. v. Dalzell*, 152 Pa. St. 217, 34 Am. St. Rep. 640; *Tunis v. Hestonville, etc., R. Co.*, 149 Pa. St. 70; *Com. v. Fisher*, 2 Brews. (Pa.) 394; *Shelmerdine v. Welsh*, 20 Phila. (Pa.) 199, 47 Leg. Int. (Pa.) 26; *Lafferty's Estate*, 2 Pa. Dist. 215.

7. Pender v. Lushington, 6 Ch. D. 70; *In re Stranton Iron, etc., Co.*, L. R. 16 Eq. 559.

8. State v. Leete, 16 Nev. 242. See also *infra*, this subdivision of this subsection, *Executors and Administrators; Trustees; Pledged Stock*.

9. Com. v. Woodward, 4 Phila. (Pa.) 121, 17 Leg. Int. (Pa.) 141. See *infra*, this subdivision of this subsection, *Necessity and Effect of Registration of Stock*.

10. Where Legal Title and Beneficial Ownership Divided. — *Com. v. Patterson*, 158 Pa. St. 476; *Com. v. Dalzell*, 152 Pa. St. 217, 34 Am. St. Rep. 640; *Tunis v. Hestonville, etc., R. Co.*, 149 Pa. St. 70. See *infra*, this subdivision of this subsection, *Trustees; Pledged Stock*.

owner of stock should have a certificate of stock in order to entitle him to vote.¹ Nor is a certificate conclusive evidence of the right to vote, as, for example, where the corporation pledges its stock and issues certificates to the pledgee.²

(b) **Necessity and Effect of Registration of Stock.** — As Between the Corporation and a Stockholder any transfer of stock which passes the title thereof to the transferee is sufficient to entitle him to vote;³ but as the legal title is usually held to continue in the former owner until the stock has been transferred upon the books of the corporation, it follows that, as between the corporation and any one offering to vote, the books of the corporation are conclusive as to who is entitled to vote, the rule being that all and only registered stockholders have the right to vote.⁴

A Fortiori does this rule obtain where it is so provided by statute⁵ or by the charter.⁶ A mere allotment, however, entered upon the books of the corporation, setting aside certain shares thereafter to be issued to a certain person upon the performance by him of certain conditions, does not entitle such person to vote, at least until he has performed the conditions or the corporation has waived them.⁷

As Between Stockholders Inter Se the records of the corporation are not conclusive as to the right to vote. A transferee of stock may, as against the transferor, have the right to vote, though he cannot exercise his franchise because he is not a registered stockholder.⁸ The courts, therefore, are not bound by the records of the corporation, and may go behind them in order to ascertain who, as between two or more claimants, is entitled to vote, and may enjoin the registered stockholder from voting, either at the instance of the party really owning the franchise⁹ or at the instance of the stockholders at large.¹⁰

In Election Controversies the court may likewise go behind the corporation

1. *Beckett v. Houston*, 32 Ind. 393.

2. *Griswold v. Seligman*, 72 Mo. 110.

3. *People v. Devin*, 17 Ill. 84.

4. **Corporation Records Conclusive** — *England*. — *Pender v. Lushington*, 6 Ch. D. 70.

United States. — *Burgess v. Seligman*, 107 U. S. 20; *Vowell v. Thompson*, 3 Cranch (C. C.) 428; *Poole v. West Point Butter, etc., Assoc.*, 30 Fed. Rep. 513.

California. — *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237; *People v. Robinson*, 64 Cal. 373.

Connecticut. — *State v. Ferris*, 42 Conn. 568; *Vansands v. Middlesex County Bank*, 26 Conn. 144; *Northrop v. Newton, etc., Turnpike Co.*, 3 Conn. 544; *Marlborough Mfg. Co. v. Smith*, 2 Conn. 579.

Louisiana. — *Monsseaux v. Urquhart*, 19 La. Ann. 482.

Minnesota. — *Morrill v. Little Falls Mfg. Co.*, 53 Minn. 371.

Nebraska. — *Haskell v. Read*, (Neb. 1903) 93 N. W. Rep. 999; *Reynolds v. Bridenthal*, 57 Neb. 280.

Nevada. — *State v. Pettineli*, 10 Nev. 141.

New Jersey. — *Matter of Election of Directors*, 44 N. J. L. 529; *Downing v. Potts*, 23 N. J. L. 66.

New York. — *Ex p. Willcocks*, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525; *Ex p. Holmes*, 5 Cow. (N. Y.) 426; *Matter of Barker*, 6 Wend. (N. Y.) 509; *McHenry v. Jewett*, 26 Hun (N. Y.) 453; *Matter of Long Island R. Co.*, 19 Wend. (N. Y.) 37, 32 Am. Dec. 429; *Matter of Mohawk, etc., R. Co.*, 19 Wend. (N. Y.) 135.

North Dakota. — *Matter of Argus Printing*

Co., 1 N. Dak. 434, 26 Am. St. Rep. 639.

Ohio. — *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350, 38 Am. Rep. 594; *Harper v. Ampt*, 32 Ohio St. 291.

Oregon. — *State v. Smith*, 15 Oregon 98, on rehearing 15 Oregon 100.

Pennsylvania. — *Com. v. Dalzell*, 152 Pa. St. 217, 34 Am. St. Rep. 640; *Oerther v. Bank*, 1 Leg. Rec. (Pa.) 69.

Rhode Island. — *Hoppin v. Buffum*, 9 R. I. 513, 11 Am. Rep. 291.

5. **Statutes Making Records Conclusive.** — *Price v. Holcomb*, 89 Iowa 123; *State v. McGann*, 64 Mo. App. 225; *In re Election of Directors*, (N. J. 1899) 43 Atl. Rep. 433; *In re Election of Directors*, 61 N. J. L. 422; *Matter of Lestie*, 58 N. J. L. 609; *Matter of Glen Salt Co.*, 17 N. Y. App. Div. 234; *Com. v. Dalzell*, 1 Pa. Dist. 657.

See also *infra*, this subdivision of this subsection, *Statutory, Charter, and By-law Restrictions upon Voting*.

6. *Pender v. Lushington*, 6 Ch. D. 70; *In re Stranton Iron, etc., Co.*, L. R. 16 Eq. 559.

7. *Spitzel v. Chinese Corp.*, 80 L. T. N. S. 347, 6 Manson 355.

8. **Right to Vote as Between Stockholders Inter Se.** — *Witham v. Cohen*, 100 Ga. 670; *Haskell v. Read*, (Neb. 1903) 93 N. W. Rep. 997. See also *Allen v. Hill*, 16 Cal. 113. And see *infra*, this subdivision of this subsection, *Pledged Stock*.

9. *Haskell v. Read*, (Neb. 1903) 93 N. W. Rep. 997. See also *infra*, this section, *Judicial Control of Meetings*.

10. *Campbell v. Poultney*, 6 Gill & J. (Md.) 94.

records in order to determine who was entitled to vote, and thus to determine who was elected,¹ especially where there is a statute providing that no one shall vote at elections except *bona fide* stockholders.²

(c) **Statutory, Charter, and By-law Restrictions on Voting — Statutory Provisions.** — One of the most frequent statutory provisions relative to the right to vote is that the registration and transfer books of the corporation shall be *prima facie* evidence of the right to vote, the effect of this provision being to render such books conclusive as between the corporation and any one offering to vote, but not as between the stockholders *inter se* or as to the validity of the votes cast when questioned by any one competent to question it.³ Another frequent provision is that no one shall vote upon certain matters, as, for example, at elections of officers, except stockholders who have been registered as such for a certain period prior to the voting.⁴ It seems, however, that where the failure to register within the required time is due to the negligence of the corporation through its duly authorized officers, it will be estopped to deny the stockholder's right to vote.⁵ Still another class of statutory provisions very important in their effect are those which operate to restrict, more or less, the evidentiary force of the transfer and registration books of the corporation, as where it is provided that the votes of each stockholder shall equal the number of shares "owned" by him,⁶ or that no one shall vote except *bona fide* stockholders;⁷ and within the same category may be placed statutes requiring corporate election at or within a certain time, such provisions being held to exclude from voting at elections held after the specified time not only all stockholders who acquire their stock after such time,⁸ but also all stockholders who, though holding stock at the time the election should be held, thereafter transfer the same.⁹ Even the right of a real, registered owner of stock to vote may be cut off by statute, as when it is provided that no one except resident stockholders in certain corporations can vote; and such a provision cannot be evaded by a gratuitous transfer of their stock by nonresidents to residents.¹⁰ Likewise it may be provided that stockholders whose liability to the corporation is past due cannot vote, such a provision being held to refer solely to liability for stock subscriptions.¹¹

Charter Provisions may restrict the right to vote to the same extent as such right may be restricted by statute, the charter being only a species of statute. Thus, a charter may restrict the right to vote to stockholders who

1. In Election Contests the Court May Go Behind the Corporation Records. — Mack v. De Bardeleben Coal, etc., Co., 90 Ala. 396; Witham v. Cohen, 100 Ga. 670; Campbell v. Poultney, 6 Gill & J. (Md.) 94, 26 Am. Dec. 559; Strong v. Smith, 15 Hun (N. Y.) 222; Com. v. Patterson, 158 Pa. St. 476; State v. Hunton, 28 Vt. 594. See also the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 21, p. 838.

2. Smith v. San Francisco, etc., R. Co., 115 Cal. 584, 56 Am. St. Rep. 119; Stewart v. Mahoney Min. Co., 54 Cal. 149.

3. Statutes Rendering Corporation Records Prima Facie Evidence of Right to Vote. — People v. Robinson, 64 Cal. 373; *In re* Election of Directors, (N. J. 1899) 43 Atl. Rep. 433; *In re* Election of Directors, 61 N. J. L. 422; Johnston v. Jones, 23 N. J. Eq. 216; Matter of Glen Salt Co., 17 N. Y. App. Div. 234, affirmed mem. 153 N. Y. 688; Com. v. Dalzell, 1 Pa. Dist. 657. See also *supra*, this subdivision of this subsection, *Necessity and Effect of Registration*.

4. Matter of Vernon, 1 Penn. (Del.) 195; Matter of Leslie, 58 N. J. L. 609; Matter of Glen Salt Co., 17 N. Y. App. Div. 234, affirmed

mem. 153 N. Y. 688; People v. Tibbets, 4 Cow. (N. Y.) 358.

Under such a provision it has been held that where the stock of one stockholder was, pursuant to an award of arbitration, transferred to another stockholder, which transfer was entered on the books of the corporation, but was thereafter set aside, the transferee was not a qualified voter during the interim between the date of the transfer and that of the vacation of the award and the issue of new stock to the transferee. Matter of Leslie, 58 N. J. L. 609.

5. Matter of Glen Salt Co., 17 N. Y. App. Div. 234, affirmed mem. 153 N. Y. 688.

6. State v. Leete, 16 Nev. 242; Com. v. Woodward, 4 Phila. (Pa.) 124, 17 Leg. Int. (Pa.) 141. See also *supra*, this subdivision of this subsection, *In General*.

7. Smith v. San Francisco, etc., R. Co., 115 Cal. 584, 56 Am. St. Rep. 119; Stewart v. Mahoney Min. Co., 54 Cal. 149.

8. Vandenburg v. Broadway Underground Connecting R. Co., 29 Hun (N. Y.) 348.

9. Johnston v. Jones, 23 N. J. Eq. 216.

10. State v. Hunton, 28 Vt. 594.

11. U. S. v. Barry, 36 Fed. Rep. 246.

have held their shares for a certain period,¹ or may provide that no one stockholder shall cast over a certain number of votes, no matter how many shares he may hold, and this provision cannot be evaded by a gratuitous transfer made solely for the purpose of securing the voting of the transferrer's shares in excess of the charter limits.²

By-laws may restrict the right to vote to certain classes of stockholders,³ as, for example, to stockholders who have been registered as such for a certain length of time;⁴ or they may limit the number of votes which may be cast by each stockholder.⁵ Indeed, the right to vote may be denied entirely,⁶ or, possibly, may be given to one who is not a stockholder;⁷ but a by-law cannot supersede a statutory⁸ or charter provision as to who may vote.⁹

(a) **Determination of Right to Vote.** — In the absence of special provisions to the contrary, the determination of the right to vote lies, for the time being, solely with the meeting at large.¹⁰ The final determination of the question is for the courts;¹¹ but the state attorney-general has no standing to maintain proceedings to determine who may vote at a meeting of stockholders of a strictly private corporation.¹² Even where a by-law provides that the decision of certain persons shall be conclusive as to the right to vote, their decision is open to attack for fraud.¹³

(e) **As to Particular Classes of Persons and Stock** — *aa. PREFERRED STOCKHOLDERS.* — Unless the right to vote is withheld or limited by the contract under which preferred stock is issued, a preferred stockholder stands upon the same footing as regards voting as any other stockholder.¹⁴

bb. DIRECTORS. — Directors may vote the same as other stockholders.¹⁵

cc. CORPORATE STOCKHOLDERS. — It has been held, on grounds of public policy, that a corporation holding stock in another corporation cannot vote at the stockholders' meetings of the latter,¹⁶ especially where the stockholding corporation owns a majority of the stock in the other corporation and attempts to control the latter for the benefit of the former, the remedy of the minority stockholders being by way of injunction against the voting of the majority stock so held.¹⁷ It seems fairly settled, however, that where one corporation

1. **Right to Vote Restricted by Charter.** — *Van Dyke v. Stout*, 8 N. J. Eq. 333.

2. **Charter Restrictions as to Number of Votes.** — *Mack v. De Bardeleben Coal, etc., Co.*, 90 Ala. 396; *Campbell v. Poultny*, 6 Gill & J. (Md.) 94, 26 Am. Dec. 559; *Webb v. Ridgely*, 38 Md. 364. *Contra*, *Pender v. Lushington*, 6 Ch. D. 70; *In re Stranton Iron, etc., Co.*, L. R. 16 Eq. 559; both cases holding that the corporate registers were conclusive, notwithstanding that some of the registered stockholders may have been mere gratuitous transferees to whom stock had been transferred in order to evade a charter restriction upon the number of votes which each stockholder might cast.

3. **By-law Provisions as to Voting.** — *Com. v. Dalzell*, 152 Pa. St. 217, 34 Am. St. Rep. 640. See also *infra*, this subsection, *Manner of Voting* — *By Heads or by Shares*.

4. *Gilbert v. Manchester Iron Mfg. Co.*, 11 Wend. (N. Y.) 628.

5. *Com. v. Detwiller*, 131 Pa. St. 614.

6. *In re Barrow Hæmatite Steel Co.*, 39 Ch. D. 582, 59 L. T. N. S. 500; *Miller v. Ratterman*, 47 Ohio St. 141. See also *Mackintosh v. Flint, etc., R. Co.*, 34 Fed. Rep. 582.

7. *Com. v. Park*, 14 Pa. Co. Ct. 481. See also *infra*, this subdivision of this subsection, *Bondholders*.

8. *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237.

9. *People v. Phillips*, 1 Den. (N. Y.) 388; *People v. Tibbets*, 4 Cow. (N. Y.) 358.

10. **Determining Who May Vote.** — *State v. Chute*, 34 Minn. 135; *State v. Cronan*, 23 Nev. 437.

11. *Matter of Pioneer Paper Co.*, (Supm. Ct. Spec. T.) 36 How. Pr. (N. Y.) 111. See also *infra*, this section, *Judicial Control of Meetings*.

12. *Atty.-Gen. v. Albion Academy*, 52 Wis. 469.

13. *Triesler v. Wilson*, 89 Md. 169.

14. **Preferred Stockholders May Vote.** — *In re Barrow Hæmatite Steel Co.*, 39 Ch. D. 582, 59 L. T. N. S. 500; *Miller v. Ratterman*, 47 Ohio St. 141. See also *St. John v. Erie R. Co.*, 10 Blatchf. (U. S.) 271; *Storror v. Texas Consol. Compress, etc., Assoc.*, (C. C. A.) 87 Fed. Rep. 612.

15. **Directors May Vote.** — *Jones v. Concord, etc., R. Co.*, 67 N. H. 119; *Hodge v. U. S. Steel Corp.*, (N. J. 1903) 54 Atl. Rep. 1.

16. **Corporate Stockholders.** — *State v. Newman*, 51 La. Ann. 833, 72 Am. St. Rep. 476; *Milbank v. New York, etc., R. Co.*, (Supm. Ct. Spec. T.) 64 How. Pr. (N. Y.) 20.

17. **Injunction Against Corporation Holding Majority of Stock in Another Corporation.** — *Memphis, etc., R. Co. v. Woods*, 88 Ala. 630, 16 Am. St. Rep. 81; *American Refrigerating, etc., Co. v. Linn*, 93 Ala. 610; *Mack v. De Bardeleben Coal, etc., Co.*, 90 Ala. 396; *Davis v. U. S.*

is expressly authorized to hold stock in other corporations, it may vote such stock as it may hold at stockholders' meetings of the corporation which issued the stock;¹ but the courts, upon an application for an injunction against the voting of such stock, will carefully scrutinize the purposes for which the holder thereof proposes to vote it.² Even where a corporation is expressly authorized to hold stock in other corporations, it will not be allowed to vote such stock if it appears that the ownership of the stock and the voting thereof will result in an unlawful combination.³

A Municipal Corporation stands upon the same footing as, if not a better than, any other corporation in the matter of voting stock of a private corporation owned by it. At all events, it may vote stock held by it.⁴

dd. EXECUTORS AND ADMINISTRATORS.—The executor or administrator of a deceased stockholder may vote the stock belonging to the estate of the deceased, without any formal transfer thereof on the books of the corporation;⁵ and by comity a foreign executor stands upon the same footing as regards voting as an executor duly qualified in the state in which the meeting is held.⁶ Where there are two or more personal representatives, no one or more can vote against the protest of the other or others;⁷ but where one only is present at the meeting, and it does not appear that there is any objection on the part of the other or others, he may vote the stock belonging to the estate.⁸

ee. TRUSTEES.—Trustees holding the legal title to stock may vote it, though they have no beneficiary interest therein;⁹ but they must vote as directed by the *cestuis que trustent*.¹⁰ Where, however, the stock is held in trust for the corporation itself, the trustees cannot vote it, not because of any disability on the part of the trustees but because stock owned by the corporation cannot be voted directly or indirectly.¹¹ Neither will a trustee not qualified to hold the stock in trust be allowed to vote it where one competent to object petitions for an injunction to prevent such voting.¹²

Electric Power, etc., Co., 77 Md. 35; Buckeye Marble, etc., Co. v. Harvey, 92 Tenn. 115; State v. McDaniel, 22 Ohio St. 354.

1. Corporation Expressly Authorized to Hold Stock May Vote it.—Clarke v. Richmond, etc., R., etc., Co., (C. C. A.) 62 Fed. Rep. 328; Clarke v. Central R., etc., Co., 50 Fed. Rep. 338; Davis v. U. S. Electric Power, etc., Co., 77 Md. 35; Camden, etc., R. Co. v. Elkins, 37 N. J. Eq. 273; Oelbermann v. New York, etc., R. Co., 77 Hun (N. Y.) 332. *Contra*, Parsons v. Tacoma Smelting, etc., Co., 25 Wash. 492.

2. Clarke v. Central R., etc., Co., 50 Fed. Rep. 338.

3. Clarke v. Central R., etc., Co., 50 Fed. Rep. 338. See also Clarke v. Richmond, etc., R., etc., Co., (C. C. A.) 62 Fed. Rep. 328.

4. Municipal Stockholders May Vote.—Hancock v. Louisville, etc., R. Co., 145 U. S. 409.

5. Executors and Administrators May Vote Without Formal Transfer of Stock.—Wolfe v. Underwood, 97 Ala. 375; Market St. R. Co. v. Hellman, 109 Cal. 571; Schmidt v. Mitchell, 101 Ky. 570; Matter of North Shore Staten Island Ferry Co., 63 Barb. (N. Y.) 556; Matter of Cape May, etc., Nav. Co., 51 N. J. L. 78; Tunis v. Hestonville, etc., R. Co., 149 Pa. St. 70.

6. Matter of Cape May, etc., Nav. Co., 51 N. J. L. 78.

7. Joint Personal Representatives.—Tunis v. Hestonville, etc., R. Co., 149 Pa. St. 70.

8. Schmidt v. Mitchell, 101 Ky. 570, *distinguishing* Tunis v. Hestonville, etc., R. Co., 149 Pa. St. 70. See also Scanlan v. Snow, 2 App. Cas. (D. C.) 137.

9. Trustees of Stock May Vote It.—Pender v. Lushington, 6 Ch. D. 70; Wanneker v. Hitchcock, 38 Fed. Rep. 383; Market St. R. Co. v. Hellman, 109 Cal. 571; Conant v. Millaudon, 5 La. Ann. 542; State v. Cronan, 23 Nev. 437; Matter of Mohawk, etc., R. Co., 19 Wend. (N. Y.) 135; Matter of Barker, 6 Wend. (N. Y.) 509; Matter of North Shore Staten Island Ferry Co., 63 Barb. (N. Y.) 556; Com. v. Dalzell, 152 Pa. St. 217, 34 Am. St. Rep. 640; Wilson v. Central Bridge, 9 R. I. 590; Hoppin v. Buffum, 9 R. I. 513, 11 Am. Rep. 291.

Where the Right Is Restricted by Statute to "Bona Fide Stockholders," stock issued to a trustee without the knowledge of the purported beneficiaries cannot be voted by the trustee. Stewart v. Mahoney Min. Co., 54 Cal. 149.

10. Trustees' Votes Subject to Control of Beneficiaries.—Market St. R. Co. v. Hellman, 109 Cal. 571; McHenry v. Jewett, 26 Hun (N. Y.) 453; *Ex p.* Holmes, 5 Cow. (N. Y.) 426; American Nat. Bank v. Oriental Mills, 17 R. I. 551; Wilson v. Central Bridge, 9 R. I. 590.

11. Stock Held in Trust for the Corporation Itself Cannot Be Voted.—U. S. v. Columbian Ins. Co., 2 Cranch (C. C.) 266; Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237; American Railway-Frog Co. v. Haven, 101 Mass. 398, 3 Am. Rep. 377; *Ex p.* Holmes, 5 Cow. (N. Y.) 426; Com. v. Fisher, 2 Brews. (Pa.) 394, 7 Phila. (Pa.) 264. See *infra*, this subdivision of this subsection, *Stock Owned by Corporation Itself*.

12. Clarke v. Central R., etc., Co., 50 Fed. Rep. 338.

ff. JOINT OWNERS. — Where stock is owned by and registered in the name of a partnership, it may be voted by any of the partners.¹ Likewise, it has been held that a surviving partner may vote partnership stock registered in the name of the deceased partner.² So also may one of several joint executors vote stock belonging to the estate.³ But it seems that one of several joint owners cannot vote in disregard of the wishes of his co-owners.⁴

gg. NONRESIDENT STOCKHOLDERS. — Nonresident stockholders may vote the same as resident stockholders,⁵ unless such right is denied by some special provision.⁶

hh. STOCKHOLDERS INTERESTED IN MATTER TO BE VOTED ON. — Personal interest separate from that of the other stockholders in the matter to be voted on does not disqualify a stockholder from voting, there being no trust relation between the stockholders *inter se*.⁷

ii. STOCK OWNED BY CORPORATION ITSELF. — Stock which has never been issued or which has been bought in by the corporation itself cannot be voted, either directly or indirectly through the medium of a trustee.⁸ It seems, however, that if all the stockholders consent to the voting of such stock, no one else can object.⁹

jj. PLEDGED STOCK. — Where the stock has been pledged, the right to vote, so far as the corporation is concerned, follows the legal title to the stock, the franchise being exercisable by the pledgor when such title remains in him, and by the pledgee when the title has been transferred to him.¹⁰ As between

1. Partner May Vote Partnership Stock. — *Kenton Furnace R., etc., Co. v. McAlpin*, 5 Fed. Rep. 737.

2. *Allen v. Hill*, 16 Cal. 113.

3. See *supra*, this subdivision of this subsection, *Executors and Administrators*.

4. Joint Owners. — *Wiggins v. European, etc., R. Co.*, 1 Hask. (U. S.) 122, 29 Fed. Cas. No. 17,626; *Scanlan v. Snow*, 2 App. Cas. (D. C.) 137. See also *supra*, this subdivision of this subsection, *Executors and Administrators*.

5. Nonresident Stockholders May Vote. — *Com. v. Detwiller*, 131 Pa. St. 614; *Com. v. Woelper*, 3 S. & R. (Pa.) 29, 8 Am. Dec. 628.

6. *State v. Hunton*, 28 Vt. 594.

Charter Restrictions. — *Matter of Barker*, 6 Wend. (N. Y.) 509; *Com. v. Woelper*, 3 S. & R. (Pa.) 29, 8 Am. Dec. 628.

7. Stockholders Not Disqualified by Interest in Matter to Be Voted On. — *North-West Transp. Co. v. Beatty*, 12 App. Cas. 589; *Windmuller v. Standard Distilling, etc., Co.*, 115 Fed. Rep. 748, 114 Fed. Rep. 491; *Bjorngaard v. Goodhue County Bank*, 49 Minn. 483; *Gamble v. Queens County Water Co.*, 123 N. Y. 91; *Socorro Mountain Min. Co. v. Preston*, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 220; *Weckerly v. Fell, etc., R. Co.*, 8 Pa. Dist. 89.

8. Stock Owned by the Corporation Itself Cannot Be Voted. — *Farrington v. Tennessee*, 95 U. S. 687; *U. S. v. Columbian Ins. Co.*, 2 Cranch (C. C.) 266; *Farwell v. Houghton Copper Works*, 8 Fed. Rep. 66; *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237; *Monseaux v. Urquhart*, 19 La. Ann. 482; *Castner v. Twitchell-Champlin Co.*, 91 Me. 524; *American Railway-Frog Co. v. Haven*, 101 Mass. 398, 3 Am. Rep. 377; *Ex p. Holmes*, 5 Cow. (N. Y.) 426; *Matter of Argus Printing Co.*, 1 N. Dak. 434, 26 Am. St. Rep. 639; *Allen v. De Largerberger*, 10 Ohio Dec. (Reprint) 341, 20 Cinc. L. Bul. 368; *Com. v. Fisher*, 2 Brews. (Pa.) 374; *State v. Smith*, 48 Vt. 266.

9. *Farwell v. Houghton Copper Works*, 8 Fed. Rep. 66.

10. Right to Vote Pledged Stock Follows Legal Title — *United States*. — *National Bank of Commerce v. Allen*, (C. C. A.) 90 Fed. Rep. 545; *Poole v. West Point Butter, etc., Assoc.*, 30 Fed. Rep. 513; *Scholfield v. Union Bank*, 2 Cranch (C. C.) 115, 21 Fed. Cas. No. 12,475.

California. — *People v. Robinson*, 64 Cal. 373.

Colorado. — *Miller v. Murray*, 17 Colo. 408.

Connecticut. — *State v. Ferris*, 42 Conn. 568; *Vansands v. Middlesex County Bank*, 26 Conn. 144; *Northrop v. Newton, etc., Turnpike Co.*, 3 Conn. 544; *Marlborough Mfg. Co. v. Smith*, 2 Conn. 579.

Massachusetts. — *J. H. Wentworth Co. v. French*, 176 Mass. 442.

Nebraska. — *Haskell v. Read*, (Neb. 1903) 93 N. W. Rep. 997.

Nevada. — *State v. Pettineli*, 10 Nev. 141.

New York. — *Vail v. Hamilton*, 85 N. Y. 453; *Elyea v. Lehigh Salt Min. Co.*, 45 N. Y. App. Div. 231; *McHenry v. Jewett*, 26 Hun (N. Y.) 453; *Strong v. Smith*, 15 Hun (N. Y.) 222; *Ex p. Willcocks*, 7 Cow. (N. Y.) 410, 17 Am. Dec. 525; *Matter of Barker*, 6 Wend. (N. Y.) 509.

North Dakota. — *Matter of Argus Printing Co.*, 1 N. Dak. 434, 26 Am. St. Rep. 639.

Ohio. — *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350; 38 Am. Rep. 594.

Pennsylvania. — *Com. v. Dalzell*, 152 Pa. St. 217, 34 St. Rep. 640; *Shelmerdine v. Walsh*, 20 Phila. (Pa.) 199, 47 Leg. Int. (Pa.) 26; *Allen v. De Largerberger*, 10 Ohio Dec. (Reprint) 341, 20 Cinc. L. Bul. 368.

Vermont. — *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274.

Compare State v. Smith, 15 Oregon 98, on rehearing 15 Oregon 100. In this case it appeared that the pledgee had, without authority

the pledgor and pledgee, however, the right to vote the pledged stock belongs, in the absence of an agreement to the contrary, to the pledgor, who may, even where the legal title has been transferred, enforce his right by an injunction, either restraining the pledgee from voting¹ or compelling him to give a proxy.²

kk. STOCK COVERED BY CONTRACTS OF SALE OR OPTIONS. — As between a stockholder and one to whom he has executed an executory contract for the sale of stock, the former has the right to vote the stock in the absence of a contrary agreement;³ and the same rule applies where an option to purchase is given.⁴ It may be stipulated, however, in the contract of sale, that the purchaser shall have the right to vote.⁵

ll. STOCK NOT PAID FOR. — The fact that one to whom stock has been issued has not paid the corporation for it does not prevent him from being a stockholder, and hence, in the absence of special provisions to the contrary, he may vote.⁶ A mere conditional subscription, however, will not entitle the subscriber to vote.⁷

mm. STOCK ILLEGALLY ISSUED. — Where stock is illegally or fraudulently issued to persons participating in such improper issue or having knowledge of the wrongful character thereof, such persons do not become stockholders and hence cannot vote.⁸

nn. BONDHOLDERS. — The holders of corporation bonds have no inherent right to vote at stockholders' meetings. They may, however, in the absence of statutory or charter provisions to the contrary, be given such right by the consent of all the stockholders;⁹ but where the right to vote is, by statute or constitution, expressly restricted to stockholders, a by-law authorizing bondholders to vote is void.¹⁰

(f) Effect of Errors in Receiving or Rejecting Votes. — Where Illegal Votes Are Received unchallenged, their reception will not affect the validity of the resolution or measure being voted on.¹¹

Where Proper Votes Are Rejected, the stockholder who offered them will not be heard to complain unless it appears that he made a proper offer to vote.¹²

Harmless Error. — The mere reception of improper votes or rejection of proper ones will not render the resolution or measure invalid. It must affirmatively

be transferred from the pledgor, caused the pledged stock to be transferred on the corporation registers to the pledgee. It was held that the pledgor's votes should have been received instead of the pledgee's.

Shares Pledged by Corporation. — In *Griswold v. Seligman*, 72 Mo. 110, it was held that where a corporation deposited with a pledgee a majority of its capital stock, to be held by him for a certain period in trust to secure the payment of certain advances made by him, he was not entitled to vote the stock, though certificates of stock were issued to the pledgee.

1. *Haskell v. Read*, (Neb. 1903) 93 N. W. Rep. 998. See also *infra*, this section, *Judicial Control of Meetings*.

2. *Vowell v. Thompson*, 3 Cranch (C. C.) 428; *Scholfield v. Union Bank*, 2 Cranch (C. C.) 115; *McHenry v. Jewett*, 90 N. Y. 58; *Matter of Argus Printing Co.*, 1 N. Dak. 434, 26 Am. St. Rep. 639; *Hoppin v. Buffum*, 9 R. I. 513, 11 Am. Rep. 291.

3. *Stock Covered by Contract of Sale.* — *Matter of Argus Co.*, 138 N. Y. 557; *State v. McDaniel*, 22 Ohio St. 354.

4. *In re Newcomb*, (Supm. Ct. Spec. T.) 18 N. Y. Supp. 16.

5. *Com. v. Patterson*, 158 Pa. St. 476.

6. *Shares Not Paid for May Be Voted.* — *Lincoln v. State*, 36 Ind. 161; *Haskell v. Read*, (Neb. 1903) 93 N. W. Rep. 997; *Downing v. Potts*, 23 N. J. L. 66; *Savage v. Ball*, 17 N. J. Eq. 142; *Henderson v. Hogan*, 7 Ohio Dec. (Reprint) 173, 1 Cinc. L. Bul. 227; *Curry v. Scott*, 54 Pa. St. 270. See also *Price v. Holcomb*, 89 Iowa 123.

Charter Disqualification for Nonpayment of Calls. — *Randt Gold Min. Co. v. Wainwright*, (1901) 1 Ch. 184, 70 L. J. Ch. 90, 84 L. T. N. S. 348, 8 Manson 61.

7. *California Southern Hotel Co. v. Russell*, 88 Cal. 277.

8. *Stock Illegally Issued Cannot Be Voted.* — *Humboldt Driving Park Assoc. v. Stevens*, 34 Neb. 528, 33 Am. St. Rep. 654; *Kimball v. New England Roller Grate Co.*, 69 N. H. 485; *Morris v. Stevens*, 17 Pa. Co. Ct. 209.

9. *Bondholders.* — *State v. McDaniel*, 22 Ohio St. 354.

10. *Durkee v. People*, 155 Ill. 354, 46 Am. St. Rep. 340, *affirming* 53 Ill. App. 396.

11. *Effect of Reception of Illegal Votes.* — *Matter of Chenango County Mut. Ins. Co.*, 19 Wend. (N. Y.) 635; *Matter of Long Island R. Co.*, 19 Wend. (N. Y.) 37, 32 Am. Dec. 429.

12. *State v. Chute*, 34 Minn. 135.

appear that the final result of the voting would have been different if the errors had not been made.¹

(2) *Manner of Voting*—(a) *In General*.—The manner of voting is usually regulated by statute, charter, or by-law.² These, of course, must be complied with; but otherwise the form and manner of casting votes are under the control of the meeting. The votes must, however, be by some formal act at a meeting; a verbal agreement by stockholders, not made at a meeting, not being equivalent to their votes;³ and a vote, though actually cast, does not become final until the result of the voting has been announced, and until then any vote may be changed at the will of the voter.⁴ Where it appears from the corporate records that any matter has been voted on, every reasonable presumption will be indulged in favor of the legality of the manner of voting upon such matter.⁵

(b) *In Person or by Proxy*.—At common law votes could not be cast by proxies;⁶ but now, in the case of nearly all corporations except municipal corporations, the right to vote by proxy is expressly conferred by statute, charter, or by-law.⁷

(c) *By Heads or by Shares*.—At common law each stockholder had only one vote, regardless of the number of shares held by him;⁸ but now the right to one vote for each share owned is generally given to stockholders in private corporations either by statute, charter, or by-law.⁹ It has been questioned whether, in the absence of special statutory or charter authority, the right to one vote for each share can be conferred by a by-law;¹⁰ but the better rule is

1. *Harmless Errors*.—*Christ Church v. Pope*, 8 Gray (Mass.) 140; *Trustees v. Gibbs*, 2 Cush. (Mass.) 45; *First Parish v. Stearns*, 21 Pick. (Mass.) 148; *Matter of Argus Co.*, 138 N. Y. 557; *Ex p. Murphy*, 7 Cow. (N. Y.) 153; *Matter of Chenango County Mut. Ins. Co.*, 19 Wend. (N. Y.) 635.

2. See *supra*, this subdivision of this subsection, and the subdivisions immediately hereafter following.

3. *Dulin v. Pacific Wood, etc., Co.*, 103 Cal. 357.

4. *State v. McGann*, 64 Mo. App. 225, 2 Mo. App. Rep. 1087.

5. *Brackett v. Persons Unknown*, 53 Me. 228.

6. *Voting by Proxy Not Allowable at Common Law*.—*Howard v. Hull*, 5 R. & Corp. L. J. 255; *Atty.-Gen. v. Scott*, 1 Ves. 413; *Harben v. Phillips*, 23 Ch. D. 14; *Perry v. Tuscaloosa Cotton Seed Oil Mill Co.*, 93 Ala. 364; *Walker v. Johnson*, 17 App. Cas. (D. C.) 144; *Taylor v. Griswold*, 14 N. J. L. 223, 27 Am. Dec. 33; *People v. Twaddle*, 18 Hun (N. Y.) 427; *Philips v. Wickham*, 1 Paige (N. Y.) 590; *Com. v. Bringham*, 103 Pa. St. 134, 49 Am. Rep. 119; *Craig v. Pittsburgh First Presb. Church*, 88 Pa. St. 42, 32 Am. Rep. 417; *Brown v. Com.*, 3 Grant Cas. (Pa.) 209; *Wilson v. American Academy of Music*, 2 Pa. Co. Ct. 280.

7. *Right to Vote by Proxy Expressly Conferred*.—*United States*.—*Synnott v. Cumberland Bldg. Loan Assoc.*, (C. C. A.) 117 Fed. Rep. 379; *Columbia Nat. Bank v. Matthews*, (C. C. A.) 85 Fed. Rep. 934; *Matthews v. Columbia Nat. Bank*, 79 Fed. Rep. 558.

Alabama.—*Steiner v. Steiner Land, etc., Co.*, 120 Ala. 128.

California.—*Market St. R. Co. v. Hillman*, 109 Cal. 571.

District of Columbia.—*Walker v. Johnson*, 17 App. Cas. (D. C.) 144.

Kentucky.—*Schmidt v. Mitchell*, 101 Ky. 570.

New Jersey.—*Chapman v. Bates*, 61 N. J. Eq. 658; *Clowes v. Miller*, 60 N. J. Eq. 179.

New York.—*Sullivan v. Parkes*, 69 N. Y. App. Div. 221; *Matter of Glen Salt Co.*, 17 N. Y. App. Div. 234; *Matter of Pioneer Paper Co.*, (Supm. Ct. Spec. T.) 36 How. Pr. (N. Y.) 111; *Hey v. Dolphin*, 92 Hun (N. Y.) 230; *Langan v. Francklyn*, (Brooklyn City Ct. Spec. T.) 29 Abb. N. Cas. (N. Y.) 102; *Grobe v. Erie County Mut. Ins. Co.*, 39 N. Y. App. Div. 183.

Pennsylvania.—*Pennsylvania R. Co. v. Pennsylvania Ins. Co.*, 205 Pa. St. 219.

See generally the title PROXIES, vol. 23, p. 294. See also the title VOTING TRUSTS.

8. *At Common Law Each Stockholder Had Only One Vote*.—*In re Horbury Bridge Coal, etc., Co.*, 11 Ch. D. 109; *Taylor v. Griswold*, 14 N. J. L. 222, 27 Am. Dec. 33; *Com. v. Conover*, 10 Phila. (Pa.) 55, 30 Leg. Int. (Pa.) 200.

9. *Right to One Vote for Each Share Specifically Conferred*.—*Beckett v. Houston*, 32 Ind. 393; *Proctor Coal Co. v. Finley*, 98 Ky. 405; *Ran-kin v. Newark Library Assoc.*, 64 N. J. L. 265; *Van Dyke v. Stout*, 8 N. J. Eq. 333; *Matter of Rochester Dist. Tel. Co.*, 40 Hun (N. Y.) 172; *Com. v. Detwiller*, 131 Pa. St. 614; *Hays v. Com.*, 82 Pa. St. 518; *Wilson v. American Academy of Music*, 2 Pa. Co. Ct. 280.

10. *Taylor v. Griswold*, 14 N. J. L. 222, 27 Am. Dec. 33, wherein it was held that a charter provision that certain acts might be done by a majority of stockholders gave to each stockholder only one vote, and hence that a by-law giving one vote for each share was invalid. But see *Fredericks v. Pennsylvania Canal Co.*, 109 Pa. St. 50, wherein it was held that a statute authorizing a certain thing to be done upon a vote of a certain proportion of the "stockholders" meant a certain proportion of

that such right can be so conferred, and it has been so held.¹ It has also been contended that a statute changing the method of voting as specified by a charter from one vote to each stockholder to one vote for each share is in violation of the provision in the Federal Constitution against the impairment of contracts; but it was held that where, at least, the charter is, according to a general statute, subject to change by the legislature, such a statutory change of the manner of voting is not a violation of the Federal Constitution.²

(a) *Cumulative Voting.* — This subject has been treated elsewhere.³

(3) *Voting Agreements — Not Intrinsically Invalid.* — Agreements between stockholders looking to the control of the acts of the corporation by means of the concerted voting of the parties to the agreement are not intrinsically invalid. They are or are not invalid accordingly as they are or are not fraudulent or conducive to fraud upon the rights of the other stockholders.⁴

Effect of Improper Combination. — Where the stockholders have by a combination agreement secured the control of the corporation for an improper purpose, they will be held to occupy a trust relation to all the other stockholders, and will not only be held to a strict account but will be enjoined from carrying out their illegal schemes;⁵ but the mere fact that an act, not illegal in itself, has been accomplished by means of an illegal voting agreement will not necessarily render the act invalid.⁶

(4) *Number of Votes Essential to Corporate Action.* — Where there is a legally constituted meeting, the acts of a majority of those present are the acts of the corporation, though such majority is less than a majority of the total number of stockholders or shares.⁷ Even where a resolution has been unanimously adopted, it may be revoked by a mere majority of those present

the stock. See also *Weinburgh v. Union St. R. Advertising Co.*, 55 N. J. Eq. 640, *distinguishing and explaining Taylor v. Griswold*, 14 N. J. L. 222, 27 Am. Dec. 33.

1. *By-law Giving One Vote for Each Share Held Valid.* — *Com. v. Detwiller*, 131 Pa. St. 614; *Proctor Coal Co. v. Finley*, 98 Ky. 405.

2. *Gregg v. Granby Min., etc., Co.*, 164 Mo. 616.

3. *Cumulative Voting.* — See the title CUMULATIVE VOTING, vol. 8, p. 494.

4. *Voting Agreements Are Not Intrinsically Invalid.* — *Smith v. San Francisco, etc., R. Co.*, 115 Cal. 584, 56 Am. St. Rep. 119; *Scruggs v. Cotterill*, 67 N. Y. App. Div. 583; *Tonawanda Valley, etc., R. Co. v. New York, etc., R. Co.*, 42 Hun (N. Y.) 496; *Hartley v. Welsh*, 8 Pa. Dist. 546. See also the title VOTING TRUSTS.

Illustrations of Agreements Held Valid. — Thus, it has been held that an agreement to combine stock for the purpose of terminating mismanagement by a change in the direction through the instrumentality of a majority of votes, at a regular election, was not invalid. *Havemeyer v. Havemeyer*, 43 N. Y. Super. Ct. 506, *affirmed* 86 N. Y. 618. An agreement between two subscribers to a charity to combine their votes in favor of two objects of charity, one of such objects to be designated by one of the parties and the other object to be designated by the other party, has been held valid. *Bolton v. Madden*, L. R. 9 Q. B. 55.

Voting Agreement Between Majority Stockholders for Control of Corporation Held Valid. — *Faulds v. Yates*, 57 Ill. 416, 11 Am. Rep. 24.

Instances of Agreements Held Invalid. — The following agreements have been held invalid:

Voting Agreement to Keep Corporation Indefinitely in Statu Quo. — *Harris v. Scott*, 67 N. H. 437.

Agreement Intended to Secure Lucrative Office to Certain Parties. — *Cone v. Russell*, 48 N. J. Eq. 208; *Gage v. Fisher*, 5 N. Dak. 297; *Jones v. Scudder*, 2 Cinc. Super. Ct. 178; *Withers v. Edmonds*, 26 Tex. Civ. App. 189. See also *Guernsey v. Cook*, 120 Mass. 501.

Agreement Not to Grant Proxies. — *Tomlin v. Farmers', etc., Bank*, 52 Mo. App. 430; *Fisher v. Bush*, 35 Hun (N. Y.) 641.

Agreement to Vote Certain Way in Consideration of Pecuniary Arrangement. — *Woodruff v. Wentworth*, 133 Mass. 309; *Guernsey v. Cook*, 120 Mass. 501. See also *Elliott v. Richardson*, L. R. 5 C. P. 744.

Agreement to Give Parties Who Are Not Stockholders Right to Vote. — *Hafer v. New York, etc., R. Co.*, 9 Ohio Dec. (Reprint) 470, 14 Cinc. L. Bul. 68.

Agreement by Director to Keep Person in Office. — *West v. Camden*, 135 U. S. 507.

Voting Agreement Between Directors to Keep Themselves and Nominees in Office. — *Snow v. Church*, 13 N. Y. App. Div. 108.

5. *Weckerly v. Fell, etc., R. Co.*, 8 Pa. Dist. 89. See also *supra*, this title, *Rights and Remedies of Minority Stockholders.*

6. *Tomlin v. Farmers', etc., Bank*, 52 Mo. App. 430.

7. *Acts of Majority of Quorum Binding on Corporation.* — *Price v. Holcomb*, 89 Iowa 123; *Peirce v. New Orleans Bldg. Co.*, 9 La. 397; *State v. Chute*, 34 Minn. 135; *Black v. Delaware, etc., Canal Co.*, 22 N. J. Eq. 130; *Madison Ave. Baptist Church v. Baptist Church*, 5 Robt. (N. Y.) 649; *Craig v. Pittsburgh First Presb. Church*, 88 Pa. St. 42, 32 Am. Rep. 417; *Matter of Granger*, 7 Phila. (Pa.) 350; *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 208, 11 Am. Rep. 253.

or of the stock represented at any legally constituted meeting.¹ Whether an act must be done by a majority of the stockholders present or by a majority of the stock represented depends upon whether the voting is by heads or by shares.²

e. MINUTES — Necessity. — The minutes of a stockholders' meeting constitute the best evidence of the action of the meeting, and it is therefore manifest that the better practice is to keep complete minutes of all proceedings at such meetings.³ But in the absence of statutory or charter requirements the keeping of minutes is not essential to the validity of the acts of the meeting, and such acts may be proved by parol when it appears that no minutes were kept,⁴ or that minutes which were made have been lost.⁵

Conclusiveness. — The minutes of a stockholders' meeting are not conclusive. Errors therein may be explained and omissions may be supplied by extraneous evidence.⁶

Proof of Minutes. — The minutes are not self-proving, but must be shown to be authentic by competent witnesses, usually the officers having legal custody of the corporate records.⁷

f. ADJOURNMENT. — Stockholders' meetings can be adjourned only by the action of the meeting itself, the presiding officer having no authority in this regard,⁸ unless such authority is specially conferred upon some particular person.⁹

4. Judicial Control of Meetings — In General. — Courts of equity have a general supervisory control over stockholders' meetings, not only upon the ground that it is always the province of equity to prevent fraud, but also upon the ground that a corporation is a *quasi* trustee for its stockholders in corporate matters, and as such may be compelled by a court of equity to exercise its functions in a legal manner;¹⁰ and in many cases the jurisdiction of equity over stockholders' meetings may be maintained on the ground that there is no adequate legal remedy, as where the legal remedies will not prevent a repetition of the frauds or impositions complained of.¹¹ The jurisdiction of equity in the premises is generally limited, however, to the prevention of fraud or unfairness, the legal remedies being usually fully adequate to redress injuries flowing from wrongs already perpetrated;¹² but where jurisdiction has been acquired on other grounds, equity may review the proceedings of

¹ *McKean v. Philadelphia Contributionship*, etc., 6 Pa. Dist. 40.

² See *supra*, this subsection, *Voting — Manner of Voting — By Heads or by Shares.*

³ *Minutes Best Evidence of Action of Meeting.* — *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655, 25 Am. St. Rep. 401; *Waters v. Gilbert*, 2 Cush. (Mass.) 27; *Latourette v. Clark*, 51 N. Y. 639; *National Bank of Republic v. Navassa Phosphate Co.*, 56 Hun (N. Y.) 136; *Bowick v. Miller*, 21 Oregon 25; *Dial v. Valley Mut. L. Assoc.*, 29 S. Car. 560.

Minutes Prima Facie Evidence of Proceedings. — *Simple v. Glenn*, 91 Ala. 245, 24 Am. St. Rep. 894.

⁴ *Minutes Not Essential to Validity of Acts of Meeting.* — *McMichael v. Brennan*, 31 N. J. Eq. 496. See also *Benbow v. Cook*, 115 N. Car. 324, 44 Am. St. Rep. 454; *Kentucky Bank v. Schuylkill Bank*, 1 Pars. Eq. Cas. (Pa.) 180.

⁵ *Minutes Lost.* — *Handley v. Stutz*, 139 U. S. 417; *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655, 25 Am. St. Rep. 401; *Wallace v. First Parish*, 109 Mass. 263; *Bowick v. Miller*, 21 Oregon 25.

⁶ *Minutes Not Conclusive.* — *Forest Glen*

Brick, etc., Co. v. Gade, 55 Ill. App. 181; *Van Hook v. Somerville Mfg. Co.*, 5 N. J. Eq. 137.

⁷ *Minutes Must Be Proved Authentic.* — *Simple v. Glenn*, 91 Ala. 245, 24 Am. St. Rep. 894; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 565; *Whitman v. Granite Church*, 24 Me. 236; *Stebbins v. Merritt*, 10 Cush. (Mass.) 27; *Smith v. Natchez Steamboat Co.*, 1 How. (Miss.) 479; *Highland Turnpike Co. v. McKean*, 10 Johns. (N. Y.) 154, 6 Am. Dec. 324.

⁸ *Adjournment.* — *State v. Cronan*, 23 Nev. 437; *Chicago Macaroni Mfg. Co. v. Boggiano*, 202 Ill. 312, *modifying* 99 Ill. App. 509.

⁹ *Salisbury Gold Min. Co. v. Hathorn*, (1897) A. C. 268.

¹⁰ *Jurisdiction in Equity over Meetings.* — *Pennsylvania Co. v. Franklin F. Ins. Co.*, 181 Pa. St. 40.

¹¹ *Bartlett v. Gates*, 118 Fed. Rep. 71; *Walker v. Johnson*, 17 App. Cas. (D. C.) 168.

¹² *Adequate Legal Remedies.* — *Walker v. Johnson*, 17 App. Cas. (D. C.) 144. See also the titles *MANDAMUS*, vol. 19, p. 867; *OFFICERS AND AGENTS OF PRIVATE CORPORATIONS*, vol. 21, p. 843; *QUO WARRANTO*, vol. 23, p. 641.

corporate meetings, notwithstanding the existence of adequate legal remedies.¹

Instances. — From the foregoing general principles it would seem that the instances in which equity may intervene to control or supervise a stockholders' meeting are limited only by the number of methods by which stockholders may attempt to take advantage of other stockholders. Instances are given in the note.² But the most common instances of equitable interference in the conduct of stockholders' meetings are by way of injunctions against voting and by the appointment of a master to conduct corporate elections.³ Injunctions against voting are not, however, greatly favored by the courts, and the right thereto must be clearly established;⁴ especially where the bill is filed only a few days before the meeting,⁵ or where the restraining order is not served until after the meeting has been convened.⁶ A court of equity will never enjoin the voting of stock in a foreign corporation,⁷ nor will it enjoin the voting of stock in a corporation over which it has full jurisdiction where the party who owns the stock is not a party to the suit;⁸ nor has a

1. Incidental Equitable Jurisdiction. — *Nathan v. Tompkins*, 82 Ala. 437; *Walker v. Johnson*, 17 App. Cas. (D. C.) 144; *Haskell v. Read*, (Neb. 1903) 93 N. W. Rep. 997. See also the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 21, p. 843.

2. Instances of Equitable Interference:

An Injunction Has Been Granted Against a Meeting on the ground that the call was misleading, *Jackson v. Munster Bank*, 13 L. R. Ir. 118; on the ground that the date fixed for the meeting is unreasonable in that many stockholders will be unable to vote, *Cannon v. Trask*, L. R. 20 Eq. 669; and on the ground that some of the stockholders have obtained an unfair control by fraudulently obtaining an injunction restraining the complainant from voting, *Brown v. Pacific Mail Steamship Co.*, 5 Blatchf. (U. S.) 525, 4 Fed. Cas. No. 2,025.

Injunction Against Carrying Out Resolution of Meeting. — The execution of judgment notes in favor of certain stockholders has been enjoined on the ground that the resolution authorizing the execution of the notes was passed by means of the votes of such stockholders, and that there was nothing due to them from the corporation. *Weckerly v. Fell*, etc., R. Co., 8 Pa. Dist. 89.

3. Injunctions Against Voting. — Equity has jurisdiction to restrain stockholders from voting and to restrain the voting of particular stock whenever it will be inequitable or illegal to allow such stockholders to vote or such stock to be voted; and in order to ascertain who has the right to vote the court is not bound by the corporate registers, but may go behind them and decide the question from extraneous evidence. *Vowell v. Thompson*, 3 Cranch (C. C.) 428, 28 Fed. Cas. No. 17,023; *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237; *McHenry v. Jewett*, 26 Hun (N. Y.) 453; *State v. Smith*, 15 Oregon 98. See also *Strong v. Smith*, 15 Hun (N. Y.) 222.

Instances in Which Injunctions Against Voting Have Been Granted Are as Follows: — *Against Pledge Holding Legal Title.* — *Vowell v. Thompson*, 3 Cranch (C. C.) 428; *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 227; *Haskell v. Read*, (Neb. 1903) 93 N. W. Rep. 997; *McHenry v. Jewett*, 26 Hun (N. Y.) 453; *State v. Smith*, 15 Oregon 98, on rehearing 15 Oregon 100. See also *supra*, this section, *Vot-*

ing—Who May Vote—As to Particular Classes of Persons and Stock.

Against Stockholder Voting More Stock than He Owns. — *Stewart v. Pierce*, 116 Iowa 733.

Against Voting Shares Illegally Issued. — *Haskell v. Read*, (Neb. 1903) 93 N. W. Rep. 997; *Morris v. Stevens*, 17 Pa. Co. Ct. 209.

Against Stockholders Who Have Procured Majority of Stock by Fraud. — *Brown v. Pacific Mail Steamship Co.*, 5 Blatchf. (U. S.) 525, 4 Fed. Cas. No. 2,025.

When One Corporation Unlawfully Held Stock in Another Corporation, or lawfully held such stock but attempted to vote it to its own advantage and to the detriment of the other corporation, an injunction was granted. *Clarke v. Central R.*, etc., Co., 50 Fed. Rep. 338; *George v. Central R.*, etc., Co., 101 Ala. 607; *American Refrigerating, etc., Co. v. Linn*, 93 Ala. 610; *Mack v. De Bardeleben Coal, etc., Co.*, 90 Ala. 396; *Memphis, etc., R. Co. v. Woods*, 88 Ala. 630, 16 Am. St. Rep. 81; *State v. Newman*, 51 La. Ann. 833, 72 Am. St. Rep. 476; *Webb v. Ridgely*, 38 Md. 364; *Clowes v. Miller*, 60 N. J. Eq. 179; *Milbank v. New York, etc., R. Co.*, (Supm. Ct. Spec. T.) 64 How. Pr. (N. Y.) 20; *Oelbermann v. New York, etc., R. Co.*, 77 Hun (N. Y.) 332; *Parsons v. Tacoma Smelting, etc., Co.*, 25 Wash. 492; *Wood v. Union Gospel Church Bldg. Assoc.*, 63 Wis. 9. See also *Greenough v. Alabama G. S. R. Co.*, 64 Fed. Rep. 22.

Where one stockholder had, by an agreement with another, the right to direct the voting of the stock of both in the hands of a trustee, but had lost such right by transferring his stock, he was enjoined from directing the voting of the stock. *Clowes v. Miller*, 60 N. J. Eq. 179.

4. Injunctions Against Voting Not Favored. — *American Refrigerating, etc., Co. v. Linn*, 93 Ala. 610; *Hilles v. Parrish*, 14 N. J. Eq. 380; *Matter of Rochester Dist. Tel. Co.*, 40 Hun (N. Y.) 172; *Reed v. Jones*, 6 Wis. 680. See also *Com. v. Stevens*, 168 Pa. St. 582.

5. Hilles v. Parrish, 14 N. J. Eq. 380.

6. Matter of Rochester Dist. Tel. Co., 40 Hun (N. Y.) 172.

7. American Grease Co. v. Vogellus, 23 Pa. Co. Ct. 664.

8. Taylor v. Southern Pac. Co., 122 Fed. Rep. 147. But see *Brown v. Pacific Mail Steamship Co.*, 5 Blatchf. (U. S.) 525.

single stockholder any standing to enjoin another stockholder from voting in favor of a certain measure on the ground that such measure, if carried out, will constitute a violation of the corporate rights of the corporation or the collective rights of all the stockholders.¹

Appointment of Master to Conduct Elections. — A court of equity, under its general jurisdiction over corporate elections,² has jurisdiction to appoint a master to conduct a corporate election, which will be exercised whenever it appears that a fair and honest election cannot be had on account of fraud or other unlawful conduct on the part of a portion of the stockholders;³ and in the proceedings to obtain such an appointment it seems that the corporation is the only necessary party defendant.⁴ The master so appointed is not bound by the corporate registers in determining who has the right to vote, especially where the power to go behind such registers is expressly conferred by the order appointing him.⁵

XV. LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS — 1. Nature and Extent — a. EQUITABLE LIABILITY — (1) Trust-fund Doctrine. — In the *United States* the courts of equity have evolved the doctrine that the capital stock and other property of a corporation constitute a trust fund for the payment of corporate obligations, and that no part of this fund can be lawfully withheld or withdrawn by the stockholders if there are outstanding corporate obligations to the payment of which such assets should be applied.⁶

(2) *Application of Doctrine* — (a) **Liability of Stockholders for Unpaid Subscription** — *aa. IN GENERAL.* — Hence, if any part of the capital stock for which a stockholder has subscribed be unpaid, the amount of such unpaid subscription remains in

1. *Converse v. Hood*, 149 Mass. 471.

2. **General Jurisdiction of Equity over Corporate Elections.** — *Republican Mountain Silver Mines v. Brown*, (C. C. A.) 58 Fed. Rep. 647; *Brown v. Pacific Mail Steamship Co.*, 5 Blatchf. (U. S.) 525; *Orr v. Bracken County*, 81 Ky. 593; *Jenkins v. Baxter*, 160 Pa. St. 199; *Central Iron Works v. Pennsylvania R. Co.*, 5 Pa. Dist. 248; *Titusville Oil Exch. v. Witherop*, 2 Pa. Super. Ct. 508.

3. **Appointment of Master to Conduct Election.** *Bartlett v. Gates*, 118 Fed. Rep. 66; *Walker v. Johnson*, 17 App. Cas. (D. C.) 169; *People v. Hart*, (C. Pl. Gen. T.) 36 N. Y. St. Rep. 974; *Kniskern v. St. John*, etc., *Lutheran Church*, 1 Sandf. Ch. (N. Y.) 567; *Jenkins v. Baxter*, 160 Pa. St. 199; *Tunis v. Hestonville*, etc., *Pass. R. Co.*, 149 Pa. St. 70; *Gowen's Appeal*, 10 W. N. C. (Pa.) 85; *Anderson v. Eltonhead*, 26 W. N. C. (Pa.) 95; *Dick v. Lehigh Valley R. Co.*, 4 Pa. Dist. 560; *Com. v. Philadelphia*, etc., *R. Co.*, 3 Pa. Dist. 115.

4. *Bartlett v. Gates*, 118 Fed. Rep. 66.

5. **Master Not Bound by Corporate Register in Determining Right to Vote.** — *Bartlett v. Gates*, 118 Fed. Rep. 72; *Tunis v. Hestonville*, etc., *Pass. R. Co.*, 149 Pa. St. 71; *Anderson v. Eltonhead*, 26 W. N. C. (Pa.) 95.

6. **Trust-fund Doctrine — United States.** — *Sanger v. Upton*, 91 U. S. 56; *Scammon v. Kimball*, 92 U. S. 362; *Hatch v. Dana*, 101 U. S. 205; *Handley v. Stutz*, 139 U. S. 427; *Coit v. North Carolina Gold Amalgamating Co.*, 14 Fed. Rep. 12; *Marsh v. Burroughs*, 1 Woods (U. S.) 463; *Union Nat. Bank v. Douglass*, 1 McCrary (U. S.) 86; *Holmes v. Sherwood*, 3 McCrary (U. S.) 405, 16 Fed. Rep. 725; *Wood v. Dummer*, 3 Mason (U. S.) 308; *Chicago*, etc., *R. Co. v. Howard*, 7 Wall. (U. S.) 392; *Sawyer v. Hoag*, 17 Wall. (U. S.) 610;

Winans v. McKean R., etc., Co., 6 Blatchf. (U. S.) 216.

Alabama. — *Allen v. Montgomery R. Co.*, 11 Ala. 437; *Smith v. Huckabee*, 53 Ala. 191; *Glenn v. Semple*, 80 Ala. 159, 60 Am. Rep. 92; *Commercial F. Ins. Co. v. Board of Revenue*, 99 Ala. 5. But see *Henderson v. Hall*, 134 Ala. 455.

Arkansas. — *Jones v. Arkansas Agricultural, etc., Co.*, 38 Ark. 17.

Connecticut. — *Crandall v. Lincoln*, 52 Conn. 73, 52 Am. Rep. 560.

Illinois. — *Clapp v. Peterson*, 104 Ill. 26; *Melvin v. Lamar Ins. Co.*, 80 Ill. 446, 22 Am. Rep. 199; *Union Mut. L. Ins. Co. v. Frear Stone Mfg. Co.*, 97 Ill. 537, 37 Am. Rep. 129.

Iowa. — *Osgood v. King*, 42 Iowa 478.

Kansas. — *Ryan v. Leavenworth, etc., R. Co.*, 21 Kan. 365.

Louisiana. — *Robertson v. Conrey*, 5 La. Ann. 297; *Cochran v. Ocean Dry Dock Co.*, 30 La. Ann. 1365.

Minnesota. — *Farnsworth v. Robbins*, 36 Minn. 369.

New Jersey. — *National Trust Co. v. Miller*, 33 N. J. Eq. 155; *Wetherbee v. Baker*, 35 N. J. Eq. 501.

New York. — *Bartlett v. Drew*, 57 N. Y. 587; *Hastings v. Drew*, 76 N. Y. 9; *Nathan v. Whitlock*, 3 Edw. (N. Y.) 215; *Slee v. Bloom*, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273.

Ohio. — *Gilmore v. Cincinnati Bank*, 8 Ohio 62.

Wisconsin. — *Adler v. Milwaukee Patent Brick Mfg. Co.*, 13 Wis. 57.

See also the title **DISSOLUTION OF CORPORATIONS**, vol. 9, p. 608.

Origin of Doctrine. — This doctrine appears to date from 1824, when it was formulated by Judge Story in *Wood v. Dummer*, 3 Mason (U. S.) 308.

his hands impressed with a trust in favor of corporate creditors, and if the assets of the corporation are insufficient to discharge its debts, a court of equity may, at the instance of creditors, subject the unpaid subscription to their payment.¹

1. Liability for Unpaid Subscriptions — United States. — Sanger v. Upton, 91 U. S. 56; Hatch v. Dana, 101 U. S. 205; Hawley v. Upton, 102 U. S. 314; Scovill v. Thayer, 105 U. S. 143; Glenn v. Liggett, 135 U. S. 533; Flinn v. Bagley, 7 Fed. Rep. 785; *In re* Glen Iron Works, 17 Fed. Rep. 324; Rickerson Roller-Mill Co. v. Farrell Foundry, etc., Co., (C. C. A.) 75 Fed. Rep. 554; Addison v. Pacific Coast Milling Co., 79 Fed. Rep. 459; Wilbur v. Stockholders, 18 Nat. Bankr. Reg. 178, 29 Fed. Rep. Cas. No. 17,636; Upton v. Hansbrough, 3 Biss. (U. S.) 417; Holmes v. Sherwood, 3 McCrary (U. S.) 405; Winans v. McKean R., etc., Co., 6 Blatchf. (U. S.) 216.

Alabama. — Allen v. Montgomery R. Co., 11 Ala. 437; Curry v. Woodward, 53 Ala. 371; Glenn v. Semple, 80 Ala. 159, 60 Am. Rep. 92; Joseph v. Davis, (Ala. 1892) 10 So. Rep. 830.

California. — Harmon v. Page, 62 Cal. 448; Baines v. Babcock, 95 Cal. 581, 29 Am. St. Rep. 158; Vermont Marble Co. v. Declez Granite Co., 135 Cal. 579.

Connecticut. — Ward v. Griswoldville Mfg. Co., 16 Conn. 593; Fish v. Smith, 73 Conn. 377.

Georgia. — Hightower v. Thornton, 8 Ga. 486.

Illinois. — Alling v. Wenzel, 46 Ill. App. 562; Bates v. Great Western Tel. Co., 134 Ill. 536; Thayer v. El Plomo Min. Co., 40 Ill. App. 344. But see Turner v. Alabama Min., etc., Co., 25 Ill. App. 144.

Indiana. — Coffin v. Ransdell, 110 Ind. 417, 16 Am. & Eng. Corp. Cas. 432; Bent v. Underdown, 156 Ind. 516.

Iowa. — Tuthill Spring Co. v. Smith, 90 Iowa 331.

Kansas. — See Putnam v. Hutchison, 4 Kan. App. 273.

Kentucky. — Haldeman v. Ainslie, 82 Ky. 396; Clark v. Richardson, (Ky. 1895) 3 S. W. Rep. 878.

Louisiana. — Millaudon v. New Orleans, etc., R. Co., 3 Rob. (La.) 489; Brode v. Firemen's Ins. Co., 8 Rob. (La.) 244.

Maine. — Libby v. Tobey, 82 Me. 397; McAvity v. Lincoln Pulp, etc., Co., 82 Me. 504; Appleton v. Turnbull, 84 Me. 72.

Maryland. — Rider v. Morrison, 54 Md. 429.

Massachusetts. — Barre First Nat. Bank v. Hingham Mfg. Co., 127 Mass. 563.

Michigan. — Peninsular Sav. Bank v. Black Flag Stove Polish Co., 105 Mich. 535.

Mississippi. — Lewis v. Robertson, 13 Smed. & M. (Miss.) 558; Payne v. Bullard, 23 Miss. 88.

Missouri. — Skrainka v. Allen, 7 Mo. App. 434; Kehl v. Lademann, 11 Mo. App. 550; Haskell v. Sells, 14 Mo. App. 91; Farmers Bank v. Gallagher, 43 Mo. App. 482; Ford v. Kansas City, etc., R. Co., 52 Mo. App. 439; Shields v. Hobart, 172 Mo. 491.

New Jersey. — Wetherbee v. Baker, 35 N. J. Eq. 501.

New York. — Mann v. Pentz, 3 N. Y. 415; Dayton v. Borst, 31 N. Y. 435; Briggs v. Penniman, 8 Cow. (N. Y.) 387, 18 Am. Dec. 454; Briggs v. Cornwell, 9 Daly (N. Y.) 436.

North Carolina. — Bain v. Clinton Loan Assoc., 112 N. Car. 248.

Ohio. — Wood v. Pearce, 2 Disney (Ohio) 411.

Oregon. — Ladd v. Cartwright, 7 Oregon 329; Lee v. Imbrie, 13 Oregon 510; Hawkins v. Citizens' Real-Estate, etc., Co., 38 Oregon 544. See also Hodges v. Silver Hill Min. Co., 9 Oregon 200.

Pennsylvania. — Allibone v. Hager, 46 Pa. St. 48; Bunn's Appeal, 105 Pa. St., 49, 51 Am. Rep. 166; Miller's Appeal, 1 Penny. (Pa.) 120; Virginia Bank v. Adams, 1 Pars. Eq. Cas. (Pa.) 534.

Tennessee. — Shields v. Clifton Hill Land Co., 94 Tenn. 123; 45 Am. St. Rep. 700; Jones v. Whitworth, 94 Tenn. 602.

Texas. — Walker v. Lewis, 49 Tex. 123; Mathis v. Pridham, 1 Tex. Civ. App. 58.

Vermont. — Bassett v. St. Albans Hotel Co., 47 Vt. 313.

Wisconsin. — Adler v. Milwaukee Patent Brick Mfg. Co., 13 Wis. 57; Shaw v. Gilbert, 111 Wis. 165.

Canada. — Thorold v. Neelon, 18 Ont. App. 658.

Unpaid Instalments on Stock in the ordinary case are assets; they are claims which a company could enforce, and therefore they are claims of which the creditors can compel the enforcement through the instrumentality of a court of equity. Coit v. North Carolina Gold Amalgamating Co., 14 Fed. Rep. 12.

The Fact that No Assessment Has Been Made will not protect a stockholder from liability in equity upon his subscription. National Park Bank v. Peavey, 64 Fed. Rep. 912; Samainego v. Stiles, (Ariz. 1889) 20 Pac. Rep. 607; Scott v. Winham, 73 Miss. 76; Thompson v. Reno Sav. Bank, 19 Nev. 171, 3 Am. St. Rep. 881.

Call or Assessment upon Stockholders Necessary. — Glenn v. Soule, 22 Fed. Rep. 417; Parks v. Heman, 7 Mo. App. 14.

A Provision of a Charter that no assessment shall be levied for more than fifty per cent. of the subscription does not affect the right of corporate creditors to recover the full amount of the unpaid subscription. Wilbur v. Stockholders, 18 Nat. Bankr. Reg. 178, 29 Fed. Cas. No. 17,636.

A Stipulation in the Contract of Subscription that it shall be payable only on the call of the corporation, while valid between stockholders and the corporation, is void as to creditors. Hatch v. Dana, 101 U. S. 205; Allen v. Montgomery R. Co., 11 Ala. 437.

The Corporation's Breach of a Condition upon which a subscription is made frees the subscriber from liability. Jessamine County v. Swigert (Ky. 1887) 3 S. W. Rep. 13.

Issue of Stock Once Fully Paid. — In *Illinois* it has been held that if stock which has once

To constitute one a subscriber no formal agreement in writing or otherwise is necessary.¹ The acceptance of the shares themselves is equivalent to a subscription or an agreement to take them.²

bb. POWER OF CORPORATION TO EXEMPT — (aa) *In General.* — This liability of stockholders for unpaid subscriptions is founded upon the soundest principles of equity,³ and cannot be avoided by the acquiescence of the corporation in any mere nominal or colorable payment⁴ or by making an untrue recital in the stock certificate that the shares are fully paid.⁵

(bb) *Agreements in Sale of Stock.* — The same equity avoids as to creditors any agreement between the corporation and subscribers for its stock by which their liability for the payment of the full amount due thereon is qualified.⁶

been fully paid for to the corporation subsequently passes to the corporation by purchase and is reissued by it, no subscription liability attaches to the stock in the hands of the purchaser. *Pullman v. Railway Equipment Co.*, 73 Ill. App. 313.

But in *Louisiana* it has been held that the purchase of its own stock by a corporation cancels it, and that if it be thereafter reissued, it is subject to the same liability which attaches to other stock. *Belknap v. Adams*, 49 La. Ann. 1350.

Liability for Unsubscribed Stock. — Where a corporation is entitled by its articles of incorporation to commence business with a less amount than the whole sum of its authorized capital stock subscribed and paid in, and the provisions of such articles are complied with, its stockholders cannot be held liable to the creditors of the corporation for the amount of the authorized capital stock not subscribed to, as for unpaid subscriptions. *Sweney v. Talcott*, 85 Iowa 103.

Liability for Interest. — Where the contract of subscription provides that payments thereon shall be made in monthly instalments, without demand, creditors may recover not only such unpaid instalments, but interest thereon from the time each became due. *Jackson F. & M. Ins. Co. v. Walle*, 105 La. 89; *Hawkins v. Citizens' Real Estate, etc., Co.*, 38 Oregon 544. See also *Shaw v. Gilbert*, 111 Wis. 165.

Effect of Statute. — The rights of existing creditors cannot be impaired by a statute providing that the capital stock of a certain corporation shall not be liable for further assessments after fifty per cent. of the par value has been paid in. *Williams v. Watters*, (Md. 1903) 54 Atl. Rep. 767.

The Stock of Mining Corporations constitutes in some jurisdictions an exception to the principle of the text, because of the universally known custom of such corporations to have a very large nominal capital and to issue such capital to its full amount as paid up, but to dispose of it at what it will bring in the market. The capital of such corporations, from the nature of the venture, is of an extremely fluctuating and uncertain character, and is invested in property acquired for the sole purpose of being exhausted and distributed among shareholders in the form of dividends, and not kept as a permanent fund with which to carry on business. *In re South Mountain Consol. Min. Co.*, 7 Sawy. (U. S.) 30, 5 Fed. Rep. 403, 8 Sawy. (U. S.) 366, 14 Fed. Rep. 347.

1. *Vermont Marble Co. v. Declez Granite Co.*,

135 Cal. 579. But see *In re South Mountain Consol. Min. Co.*, 5 Fed. Rep. 403.

The Word "Subscriber" as used in a statute defining the liability of stockholders has been construed to include stockholders of every description. *Gay v. Keys*, 30 Ill. 413.

2. *Jackson v. Traer*, 64 Iowa 469, 52 Am. Rep. 449; *Barron v. Burrill*, 86 Me. 72.

A Certificate for the Stock is not necessary to make one a subscriber. All that is necessary, so far as creditors are concerned, is that the subscriber shall have bound himself to become a contributor to the fund which the stock of the corporation represents. *Hawley v. Upton*, 102 U. S. 316.

Liability upon Stock Note. — A note given by the directors of a bank jointly in payment of stock really subscribed for by the bank, but issued to such directors to evade the National Banking Act, may be enforced by the creditors of the corporation. *Penn Safe Deposit, etc., Co. v. Thomas*, 4 Pa. Dist. 421; *Penn Safe Deposit, etc., Co. v. Kennedy*, 175 Pa. St. 160.

3. **Good Faith in Making Payment Required.** — *Peninsular Sav. Bank v. Black Flag Stove Polish Co.*, 105 Mich. 535; *Marshall Foundry Co. v. Killian*, 99 N. Car. 501, 6 Am. St. Rep. 539.

4. **Nominal or Colorable Payment.** — *Sawyer v. Hoag*, 17 Wall. (U. S.) 610; *Crawford v. Rohrer*, 59 Md. 599; *Wetherbee v. Baker*, 35 N. J. Eq. 508. See also *Union Nat. Bank v. Douglass*, 1 McCrary (U. S.) 86; *Bouton v. Dement*, 123 Ill. 142.

5. **Stock Falsely Issued as Fully Paid** — *United States*. — *Stutz v. Handley*, 41 Fed. Rep. 544; *Foreman v. Bigelow*, 4 Cliff. (U. S.) 508. *Illinois*. — *Howe v. Illinois Agricultural Works*, 46 Ill. App. 85.

Minnesota. — *Deadwood First Nat. Bank v. Gustin Minerva Consol. Min. Co.*, 42 Minn. 327.

Missouri. — *Pickering v. Templeton*, 2 Mo. App. 424; *A. Wight Co. v. Steinkemeyer*, 6 Mo. App. 574; *Eyerma v. Kriekhaus*, 7 Mo. App. 455.

Texas. — *Nenny v. Waddill*, 6 Tex. Civ. App. 244.

6. **Agreements in Sale of Stock.** — *Jewell v. Rock River Paper Co.*, 101 Ill. 57; *Kern v. Chicago Co-operative Brewing Assoc.*, 40 Ill. App. 356; *Beals v. Buffalo Expanded Metal Constr. Co.*, 49 N. Y. App. Div. 589; *Henry v. Vermillion, etc., R. Co.*, 17 Ohio 187; *Painesville Nat. Bank v. King Varnish Co.*, 4 Ohio Cir. Dec. 511, 8 Ohio Cir. Ct. 563; *Lexow v. Pennsylvania Diamond Drill Co.*, 5 Pa. Dist. 499.

Hence, while as between the parties to the transaction the sale by a corporation of its stock at a discount from its face value, or an agreement embodied in the contract of subscription, or made collateral thereto, that only a certain part of the capital will be called for, is valid,¹ it is void as to the creditors of the corporation, and does not affect their right to recover in equity the unpaid balance due upon such stock.²

(cc) *Release of Unpaid Balance.*—So, as against creditors, stockholders have no power to exempt themselves from liability, when only a portion of their subscription has been paid in, by a resolution declaring the remaining portion to be nonassessable.³

(dd) *Rescission of Subscription and Surrender of Stock.*—Until a corporation begins business and contracts liabilities it seems that a subscription to its capital stock is revocable at the pleasure of the parties,⁴ but after liabilities have been contracted it has been held that a rescission is a fraud upon its creditors and void as to them.⁵ It has been held, however, that a rescission of the

1. **Valid Between Parties.**—*Harrison v. Arkansas Valley R. Co.*, 4 McCrary (U. S.) 264; *Christensen v. Eno*, 106 N. Y. 99, 60 Am. Rep. 429.

Hence, the directors of a corporation cannot, without the assent of a stockholder, declare shares which have been issued to him as fully paid to be partly unpaid and liable for the debts of the corporation. *Peck v. Coalfield Coal Co.*, 11 Ill. App. 88, affirmed 105 Ill. 529.

2. **When Void as to Corporate Creditors.**—*United States.*—*Scovill v. Thayer*, 105 U. S. 143; *Upton v. Hansbrough*, 3 Biss. (U. S.) 417; *Upton v. Jackson*, 1 Flipp. (U. S.) 413; *In re Glen Iron Works*, 17 Fed. Rep. 324, 20 Fed. Rep. 674; *Wilbur v. Stockholders*, 18 Nat. Bankr. Reg. 178, 29 Fed. Cas. No. 17,636.

Connecticut.—*Mann v. Cooke*, 20 Conn. 178; *Northrop v. Bushnell*, 38 Conn. 498.

Illinois.—*Union Mut. L. Ins. Co. v. Frear Stone Mfg. Co.*, 97 Ill. 537, 37 Am. Rep. 129; *Jewell v. Rock River Paper Co.*, 101 Ill. 57; *Hickling v. Wilson*, 104 Ill. 54; *Great Western Tel. Co. v. Cray*, 122 Ill. 630, 19 Am. & Eng. Corp. Cas. 260; *Turner v. Alabama Min., etc., Co.*, 25 Ill. App. 144; *Alling v. Wenzell*, 35 Ill. App. 246.

Indiana.—*Bruner v. Brown*, 139 Ind. 600. *Maryland.*—*Crawford v. Rohrer*, 59 Md. 599, 1 Am. & Eng. Corp. Cas. 81.

Missouri.—*Guerney v. Moore*, 131 Mo. 650; *Pickering v. Templeton*, 2 Mo. App. 424.

New York.—*Slee v. Bloom*, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273.

Virginia.—*Martin v. South Salem Land Co.*, 94 Va. 28.

Word "Nonassessable" on Certificate of Stock.—*Upton v. Tribilcock*, 91 U. S. 45, stated under NONASSESSABLE, vol. 21, p. 544.

It Is No Defense to an Action upon a Note Given for a Subscription to the stock of an insurance company that such note was delivered under the condition that it should not be binding unless accepted by the state insurance commissioner as part of the assets of the company. *Smith v. Hopkins*, 10 Wash. 77.

Purchasing Stock of Embarrassed Corporation.—Where the directors and managing officers of a corporation which is deeply in debt, without intending to secure personal advantage, but with a view to aid the corporation, purchase some of its unissued stock at a discount price,

at which they had made diligent but unsuccessful effort to sell it to others, the difference between the discount price and the par value of the stock thus purchased cannot, in case of insolvency, be regarded as assets of the corporation. *Peter v. Union Mfg. Co.*, 56 Ohio St. 181. But see *contra*, *Flinn v. Bagley*, 7 Fed. Rep. 785.

3. **Release of Unpaid Balance.**—*United States.*—*Upton v. Tribilcock*, 91 U. S. 45; *In re Bachman*, 12 Nat. Bankr. Reg. 223, 2 Fed. Cas. No. 707; *Burke v. Smith*, 16 Wall. (U. S.) 390; *Upton v. Hansbrough*, 3 Biss. (U. S.) 417; *Upton v. Jackson*, 1 Flipp. (U. S.) 413.

Arkansas.—*Carter v. Union Printing Co.*, 54 Ark. 576.

Illinois.—*Zirkel v. Joliet Opera House Co.*, 79 Ill. 334.

Indiana.—*Bruner v. Brown*, 139 Ind. 600. *Iowa.*—*Singer v. Given*, 61 Iowa 93.

Louisiana.—*Brode v. Firemen's Ins. Co.*, 10 Rob. (La.) 440; *Psychaud v. Hood*, 23 La. Ann. 732.

Maryland.—*Rider v. Morrison*, 54 Md. 429.

Minnesota.—*Farnsworth v. Robbins*, 36 Minn. 369.

Mississippi.—*Vick v. La Rochelle*, 57 Miss. 602; *Payne v. Bullard*, 23 Miss. 88.

Missouri.—*Gill v. Balis*, 72 Mo. 424; *Chouteau Ins. Co. v. Floyd*, 74 Mo. 286; *Nickols v. Stevens*, 123 Mo. 96, 45 Am. St. Rep. 514; *Haskell v. Sells*, 14 Mo. App. 91.

New York.—*Sagory v. Dubois*, 3 Sandf. Ch. (N. Y.) 466.

Pennsylvania.—*Miller's Appeal*, 1 Penny. (Pa.) 120; *American Tube, etc., Co. v. Baden Gas Co.*, 24 Pittsb. Leg. J. N. S. (Pa.) 25.

4. **Rescission of Subscription Before Liabilities Are Incurred.**—*Alling v. Wenzell*, 35 Ill. App. 246.

5. **After Liabilities Have Been Incurred.**—*United States.*—*Morgan County v. Allen*, 103 U. S. 498; *Putnam v. New Albany*, 4 Biss. (U. S.) 365; *Glenn v. Scott*, 28 Fed. Rep. 804.

Alabama.—*Lehman v. Warner*, 61 Ala. 455. *Maryland.*—*Rider v. Morrison*, 54 Md. 429.

Minnesota.—*Farnsworth v. Robbins*, 36 Minn. 369.

Mississippi.—*Payne v. Bullard*, 23 Miss. 88. *New York.*—*Matter of Reciprocity Bank*, 22 N. Y. 9; *Slee v. Bloom*, 19 Johns. (N. Y.) 478,

10 Am. Dec. 273.

subscription is valid as to liabilities subsequently incurred,¹ but this has been denied in two later cases which hold that a rescission is invalid as to subsequent as well as to existing creditors.²

(*ee*) *Reduction of Capital Stock.* — While, as against existing creditors, a corporation cannot by an amendment of its charter, or a resolution of the stockholders reducing the capital stock of the corporation, relieve stockholders of their liability upon their original subscriptions;³ yet creditors who become such subsequent to the reduction, and with knowledge of the fact, are not injured by it, and cannot be heard to complain.⁴

(*ff*) *Forfeiture of Stock.* — It has been held that a stockholder whose shares have been forfeited by the corporation for failure to pay a subscription to the capital stock is released thereby from any liability upon such shares,⁵ though the contrary has also been held.⁶

cc. DEFENSES. — It is no defense to a suit by a creditor to recover his debt out of an unpaid subscription, that the defendant was induced to subscribe to the stock by the fraudulent misrepresentations of the agent of the corporation,⁷ or by an agreement which the corporation had failed to carry out,⁸ or that the corporation was irregularly organized⁹ or organized for an illegal purpose,¹⁰ or has been dissolved;¹¹ nor can a stockholder set up informalities

North Carolina. — Heggie *v.* People's Bldg., etc., Assoc., 107 N. Car. 581; Blalock *v.* Kernersville Mfg. Co., 110 N. Car. 99.

Ohio. — Royce *v.* Tyler, 1 Ohio Cir. Dec. 428, 2 Ohio Cir. Ct. 175. Compare Taylor *v.* Miami Exporting Co., 6 Ohio 176; Morgan *v.* Lewis, 46 Ohio St. 1.

Oregon. — Balfour *v.* Baker City Gas, etc., Co., 27 Oregon 300.

1. *Validity as to Subsequent Creditors.* — Alling *v.* Wenzel, 133 Ill. 264; Johnson *v.* Lullman, 15 Mo. App. 55.

In Erskine *v.* Peck, 13 Mo. App. 280, affirmed 83 Mo. 465, the defendant received certain shares of stock for which he paid nothing. He afterwards surrendered this stock to the corporation, and the shares thus surrendered were re-issued for value to *bona fide* purchasers. It was held that the defendant was not liable upon his unpaid subscription to creditors who became such subsequent to the surrender and re-issue.

2. *Chrisman-Sawyer Banking Co. v. Independence Wool Mfg. Co.*, 168 Mo. 634; Ollesheimer *v.* Thompson Mfg. Co., 44 Mo. App. 172.

3. *Reduction of Capital Stock.* — *In re State Ins. Co.*, 11 Biss., (U. S.) 301.

4. Gade *v.* Forest Glen Brick, etc., Co., 165 Ill. 367; Hepburn *v.* Exchange, etc., Co., 4 La. Ann. 87. See also Cooper *v.* Frederick, 9 Ala. 738; Woodhouse *v.* Com. Ins. Co., 54 Pa. St. 307.

5. *Forfeiture of Shares — Operation as a Release.* — Crissey *v.* Cook, (Kan. 1903) 72 Pac. Rep. 541; Lexington, etc., R. Co. *v.* Bridges, 7 B. Mon. (Ky.) 556, 46 Am. Dec. 528; Macaulay *v.* Robinson, 18 La. Ann. 619; Mills *v.* Stewart, 62 Barb. (N. Y.) 444.

6. *Not a Release.* — Cucullu *v.* Union Ins. Co., 2 Rob. (La.) 573; Dixon *v.* Firemen's Ins. Co., 11 Rob. (La.) 252; Albright *v.* Texas, etc., R. Co., 8 N. Mex. 110.

7. *Defenses — Fraudulent Representations* — *United States.* — Ogilvie *v.* Knox Ins. Co., 22 How. (U. S.) 380; Ross-Meehan Brake Shoe Foundry Co. *v.* Southern Malleable Iron Co., 72 Fed. Rep. 957; Upton *v.* Hansbrough, 3 Biss. (U. S.) 417.

Connecticut. — Litchfield Bank *v.* Church, 29 Conn. 137.

Georgia. — Howard *v.* Glenn, 85 Ga. 238.

Indiana. — Reeder *v.* Maranda, 66 Ind. 485.

Michigan. — Duffield *v.* E. T. Barnum Wire, etc., Works, 64 Mich. 293.

Mississippi. — Safford *v.* Barnes, 39 Miss. 399.

New York. — Briggs *v.* Cornwell, 9 Daly (N. Y.) 436; McDowall *v.* Sheehan, 59 Hun (N. Y.) 618, 13 N. Y. Supp. 386; Moosbrugger *v.* Walsh, 89 Hun (N. Y.) 564.

Ohio. — Painesville Nat. Bank *v.* King Varnish Co., 4 Ohio Cir. Dec. 511, 8 Ohio Cir. Ct. 563.

Texas. — Mathis *v.* Pridham, 1 Tex. Civ. App. 58.

But a stockholder who repudiates his contract of subscription within a reasonable time after the discovery of the fraud practiced upon him cannot be held liable upon the stock subscribed for. Savage *v.* Bartlett, 78 Md. 561.

8. *Failure to Carry Out Agreement.* — Mathis *v.* Pridham, 1 Tex. Civ. App. 68.

9. *Irregular Organization.* — Upton *v.* Hansbrough, 3 Biss. (U. S.) 417; Beck *v.* Henderson, 76 Ga. 360; Torras *v.* Raeburn, 108 Ga. 345; McCarthy *v.* Lavasche, 89 Ill. 270, 31 Am. Rep. 83; Atherton *v.* Sugar Creek, etc., Turnpike Co., 67 Ind. 334; Methodist Episcopal Union Church *v.* Pickett, 19 N. Y. 482. See also Marshall Foundry Co. *v.* Killian, 99 N. Car. 501, 6 Am. St. Rep. 539; Cole *v.* Satsop R. Co., 9 Wash. 487.

A Shareholder of a Manufacturing Corporation cannot plead as a defense the failure of the corporators to pay in one-half of the capital stock as required by section-2768, Revised Statutes of Missouri. Wells *v.* Thompson Mfg. Co., 54 Mo. App. 41.

10. Augir *v.* Ryan, 63 Minn. 373; Cardwell *v.* Kelly, 95 Va. 570.

11. *Dissolution of Corporation.* — Morgan County *v.* Thomas, 76 Ill. 120; Bish *v.* Bradford, 17 Ind. 490; Cucullu *v.* Union Ins. Co., 2 Rob. (La.) 573; Lewis *v.* Robertson, 13 Smed. & M. (Miss.) 558.

in the issue of the stock if the corporation had the power to create it,¹ though he may show that the stock is void as having been issued in excess of the limit imposed by the charter.²

(b) **Liability on Bonus Stock.** — A stockholder who accepts bonus stock issued by a corporation without assets to support it³ is liable to creditors who become such after such increase of the capital stock in like manner as if he had subscribed for it;⁴ but not, it seems, to creditors who become such before the issue of the stock, and who did not deal with the corporation on the faith of any capital represented by such shares.⁵

(c) **Liability of Stock Issued for Overvalued Consideration** — *aa.* **STOCK ISSUED IN PAYMENT OF PROPERTY.** — While, in the absence of statutory or charter restrictions, any property which a corporation is authorized to purchase, or which is necessary for the purpose of its legitimate business, may be received in payment for its stock,⁶ yet when a subscription for stock in a corporation is paid for in prop-

The fact that a corporation has been ousted from the enjoyment of its franchise is no defense to a suit by a creditor against stockholders to enforce payment of their stock subscriptions. *Rowland v. Meader Furniture Co.*, 38 Ohio St. 269.

1. **Informalities in Issue of Stock.** — *Upton v. Tribilcock*, 91 U. S. 45; *Chubb v. Upton*, 95 U. S. 665; *Pullman v. Upton*, 96 U. S. 328; *Upton v. Jackson*, 1 Flipp. (U. S.) 413; *Eaton v. Aspinwall*, 19 N. Y. 119; *Buffalo, etc., R. Co. v. Cary*, 26 N. Y. 75; *Aspinwall v. Sacchi*, 57 N. Y. 551; *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159; *Sheldon Hat Blocking Co. v. Eickemeyer Hat Blocking Mach. Co.*, 90 N. Y. 613; *Veeder v. Mudgett*, 95 N. Y. 295; *Clarke v. Thomas*, 34 Ohio St. 46. See also *Palmer v. Zumbrot Bank*, 72 Minn. 266.

2. **Void Issue.** — *Scovill v. Thayer*, 105 U. S. 149; *Clark v. Turner*, 73 Ga. 1; *Kampman v. Tarver*, 87 Tex. 491. See also *Page v. Austin*, 10 Can. Sup. Ct. 132.

But the fact that a corporation makes an unlawful issue of its stock, with which it intends to replace a previous valid issue, will not relieve a subscriber to the first issue from his liability thereon. *Kampmann v. Traver*, (Tex. Civ. App. 1895) 29 S. W. Rep. 1144.

Refusal of Corporation to Accept Previous Offer of Payment No Defense. — *Potts v. Wallace*, 146 U. S. 689.

Compromise of Liability of Other Stockholders. — Where the entire subscription liability of every stockholder must be exhausted to satisfy the corporate indebtedness, it is no defense to an action against one stockholder that the liability of other stockholders had been compromised for less than the full amount due by them. *Bennett v. Glenn*, (C. C. A.) 55 Fed. Rep. 956. See also *Bristol Iron, etc., Co. v. Selliez*, 175 Pa. St. 18.

Existence of Statutory Remedy. — The fact that the statute gives a corporate creditor the right to recover from a stockholder a proportionate part of his claim, does not exclude the creditor's right to subject an unpaid subscription to the payment of his claim. *Potter v. Dear*, 95 Cal. 578.

3. **Overvaluation of Assets.** — It has been held that mere overvaluation of the increased corporate property upon which the bonus stock was issued to stockholders will not render them liable to the corporate creditors. *Berwind-*

White Coal Min. Co. v. Ewart, (Supm. Ct. Spec. T.) 11 Misc. (N. Y.) 490.

4. **Liability upon Bonus Stock.** — *Richardson v. Green*, 133 U. S. 30; *Handley v. Stutz*, 139 U. S. 417; *Butler v. Aspinwall*, 33 Fed. Rep. 217; *Preston v. Cincinnati, etc., R. Co.*, 36 Fed. Rep. 54, *affirmed* 146 U. S. 630; *Wallace v. Carpenter Electric Heating Mfg. Co.*, 70 Minn. 321, 68 Am. St. Rep. 530; *Hebberd v. Southwestern Land, etc., Co.*, 55 N. J. Eq. 18; *Veeder v. Mudgett*, 95 N. Y. 295. But see *Seaboard Nat. Bank v. Slater*, 117 Fed. Rep. 1002; *Fogg v. Blair*, 139 U. S. 118; *Christensen v. Eno*, 106 N. Y. 99, 60 Am. Rep. 429.

The Right of Creditors to Compel the Owners of Bonus Stock to Pay for It, contrary to the actual agreement with the corporation, rests upon the ground of fraud, which consists in the misrepresentation as to the actual amount of capital upon the faith of which persons have dealt with the corporation and given it credit. *Hospes v. Northwestern Mfg., etc., Co.*, 48 Minn. 174.

5. **Deadwood First Nat. Bank v. Gustin Minerva Consol. Min. Co.**, 42 Minn. 327; *Hospes v. Northwestern Mfg., etc., Co.*, 48 Minn. 174, 31 Am. St. Rep. 637, 36 Am. & Eng. Corp. Cas. 206.

Liability for the Proceeds of Bonus Stock has been enforced against directors. *Hickling v. Wilson*, 104 Ill. 54; *Eyremann v. Kriekhaus*, 7 Mo. App. 455.

Upon Shares Illegally Issued and Subsequently Withdrawn and Canceled, a person to whom they were issued cannot be held liable by a creditor who became such after the stock was canceled. *Hollingshead v. Woodward*, 35 Hun (N. Y.) 410, *reversed* on other points 107 N. Y. 96.

No Liability upon Bonds. — The acceptance of bonds issued by a corporation to its stockholders gratis imposes no liability to pay for them which a corporate creditor may enforce. *Roman v. Dimmick*, 115 Ala. 233.

6. **Right to Receive Property in Payment for Stock.** — *Phelan v. Hazard*, 5 Dill. (U. S.) 45; *Coffin v. Ransdell*, 110 Ind. 417; *Bruner v. Brown*, 139 Ind. 600; *Brant v. Ehlen*, 59 Md. 1; *Kraft-Holmes Grocery Co. v. Crow*, 36 Mo. App. 288; *Shields v. Clifton Hill Land Co.*, 94 Tenn. 123, 45 Am. St. Rep. 700.

Inventions for Which Patents Have Been Applied for, and the prospective patents, are property, in consideration of which stock may be issued. *Whitehill v. Jacobs*, 75 Wis. 474.

erty, the property must be taken at its reasonable monetary value; and although a margin will be allowed for an honest difference of opinion as to its value,¹ a valuation grossly excessive, knowingly made, while its acceptance may bind the corporation, is a fraud on its creditors, and they may proceed against the stockholder individually as for an unpaid subscription.² In some jurisdictions, the cases go so far as to hold that a stockholder who pays for

A Contractual License to Take Minerals from Land, revocable only by consent or by condition broken, may serve as a consideration for the issue of corporate stock. *Shepard v. Drake*, 61 Mo. App. 134.

Payment in Stock of Another Corporation. — Unless the corporation accepting stock in payment of a subscription has received a direct pecuniary advantage from the acceptance of such stock, the subscriber who delivered it is liable for the full amount of his subscription. *Lester v. Bemis Lumber Co.*, (Ark. 1903) 74 S. W. Rep. 518. See generally as to the power of one corporation to hold stock in another, the title *CORPORATIONS (PRIVATE)*, vol. 7, p. 810.

1. Valuation Made in Good Faith—*United States*. — *Coit v. North Carolina Gold Amalgamating Co.*, 119 U. S. 343, 15 Am. & Eng. Corp. Cas. 610; *Ft. Madison Bank v. Alden*, 129 U. S. 372; *Du Pont v. Tilden*, 42 Fed. Rep. 87, 30 Am. & Eng. Corp. Cas. 129; *Northwestern Mut. L. Ins. Co. v. Cotton Exch. Real Estate Co.*, 46 Fed. Rep. 22; *Grant v. East, etc., R. Co.*, (C. C. A.) 54 Fed. Rep. 569.

Kentucky. — *Mercer v. Park City Mineral Water Co.*, (Ky. 1897) 38 S. W. Rep. 841; *John R. Proctor Land Co. v. Cooke*, 103 Ky. 96.

Michigan. — *Graves v. Brooks*, 117 Mich. 424; *Young v. Erie Iron Co.*, 65 Mich. 111.

Nebraska. — *Troup v. Horbach*, 53 Neb. 795; *Penfield v. Dawson Town, etc., Co.*, 57 Neb. 231.

New Jersey. — *Bickley v. Schlag*, 46 N. J. Eq. 533.

New Mexico. — *Medler v. Albuquerque Hotel, etc., Co.*, 6 N. Mex. 331.

Pennsylvania. — *Carr v. Le Fevre*, 27 Pa. St. 413; *American Tube, etc., Co. v. Hays*, 165 Pa. St. 489, 35 W. N. C. (Pa.) 530.

Tennessee. — *Jones v. Whitworth*, 94 Tenn. 602.

Washington. — *Kroenert v. Johnston*, 19 Wash. 96.

Wisconsin. — *National Bank v. Illinois, etc., Lumber Co.*, 101 Wis. 247.

Property of Speculative Value. — Where the value of the property taken in payment is largely speculative, as, for example, coal lands, a greater scope to the discretion of the corporation will be allowed. *Peck v. Coalfield Coal Co.*, 11 Ill. App. 88.

2. Property Knowingly Overvalued—*United States*. — *Lloyd v. Preston*, 146 U. S. 630.

Alabama. — *Elyton Land Co. v. Birmingham Warehouse, etc., Co.*, 92 Ala. 407, 25 Am. St. Rep. 65, 35 Am. & Eng. Corp. Cas. 597; *Roman v. Dimmick*, 115 Ala. 233; *Joseph v. Davis*, (Ala. 1892) 10 So. Rep. 830.

Illinois. — *National Bank v. Pacific R. Co.*, 66 Ill. App. 320; *Sprague v. National Bank*, 172 Ill. 149, 64 Am. St. Rep. 17; *Coleman v. Howe*, 154 Ill. 458, 45 Am. St. Rep. 133; *Alling v. Wenzell*, 27 Ill. App. 511.

Iowa. — *Osgood v. King*, 42 Iowa 478; *State*

Trust Co. v. Turner, 111 Iowa 664; *Jackson v. Traer*, 64 Iowa, 469, 52 Am. Rep. 449.

Maryland. — *Crawford v. Rohrer*, 59 Md. 599, 1 Am. & Eng. Corp. Cas. 81.

Minnesota. — *Hastings Malting Co. v. Iron Range Brewing Co.*, 65 Minn. 28.

Nebraska. — *Gillkie, etc., Co. v. Dawson Town, etc., Co.*, 46 Neb. 333.

New Jersey. — *Wetherbee v. Baker*, 32 N. J. Eq. 537.

Ohio. — *Gates v. Tippecanoe Stone Co.*, 6 Ohio Cir. Dec. 23, 9 Ohio Cir. Ct. 99, 57 Ohio St. 60, 63 Am. St. Rep. 705; *Ford v. Lamson*, 9 Ohio Cir. Dec. 374, 17 Ohio Cir. Ct. 539.

Pennsylvania. — *Bailey v. Pittsburg, etc., Gas Coal, etc., Co.*, 69 Pa. St. 334.

Rhode Island. — *Crowley v. Walton*, 23 R. I. 331.

Utah. — *Salt Lake Hardware Co. v. Tintic Milling Co.*, 13 Utah 423.

Wisconsin. — *Gogebic Investment Co. v. Iron Chief Min. Co.*, 78 Wis. 427, 23 Am. St. Rep. 417.

Canada. — *Matter of Hess Mfg. Co.*, 23 Can. Sup. Ct. 644.

Where the Overvaluation Is Gross, a strong presumption is raised that it was knowingly and intentionally done. *Lloyd v. Preston*, 146 U. S. 630; *Taylor v. Walker*, 117 Fed. Rep. 737; *Heberd v. Southwestern Land, etc., Co.*, 55 N. J. Eq. 18; *Boynton v. Hatch*, 47 N. Y. 225; *Van Cott v. Van Brunt*, 82 N. Y. 535; *Carr v. Le Fevre*, 27 Pa. St. 413. See also *Jackson v. Traer*, 64 Iowa 469.

Gross Overvaluation Is Evidence of Fraud. — *Coleman v. Howe*, 154 Ill. 458, 45 Am. St. Rep. 133; *Kelly v. Clark*, 21 Mont. 291.

If Stock Be Fraudulently Issued in Pretended Payment of a Quitclaim Deed to land in which the grantor had no interest, he becomes liable as for an unpaid subscription. *Henderson v. Turngren*, 9 Utah 432.

Worthless Patents and Inventions. — *Chisholm v. Forny*, 65 Iowa 333; *Van Cleve v. Berkey*, 143 Mo. 109; *Salt Lake City Hardware Co. v. Tintic Milling Co.*, 13 Utah 423.

Upon the Incorporation of a Partnership each partner becomes liable to subsequent creditors for any difference between the net value of his interest in the partnership and the face value of the stock issued in payment therefor. *Camden v. Stuart*, 144 U. S. 104.

If the firm was insolvent, the partners are liable for the full face value of the stock issued to them. *Ford v. Lamson*, 9 Ohio Cir. Dec. 374, 17 Ohio Cir. Ct. 539.

Transaction Must Be Impeached for Fraud. — In some jurisdictions it has been held that the fact that property received by a corporation in full payment for a stock subscription is taken at an overvaluation, will not support an action against the shareholder as for an unpaid subscription until the transaction has first been impeached for fraud. *Peck v. Coalfield Coal Co.*,

his shares in property is chargeable by the corporation's creditors with the difference between the face value of the stock and the actual value of the property, regardless of the question of fraud.¹

bb. STOCK ISSUED IN PAYMENT OF SERVICES. — A corporation may lawfully issue stock in payment of services rendered to it, and where the good faith of the transaction is not impeached nor a failure of consideration shown, the holder is not liable personally on the ground that such stock is unpaid.² But if the amount of stock issued for such services be grossly in excess of the fair value thereof, the holder may be held to account to creditors for such excess.³

cc. STOCK ISSUED IN PAYMENT OF ANTECEDENT DEBT. — A corporation may lawfully issue stock in payment of a debt due by it, but if the amount of the debt be less than the par value of the stock, a corporate creditor may recover the difference.⁴

dd. PAYMENT IN DEPRECIATED STOCK. — Whether a person who accepts the depreciated stock of a corporation in payment of an antecedent debt, or for property conveyed to it, is liable to other creditors for the difference between the par value of the stock and the price at which he accepted it, is a disputed question. In some jurisdictions, it is held that if the stock be taken at its present market value no subscription liability attaches to it;⁵ but in other jurisdictions it has been held that the holder is liable to the creditors for its full value.⁶

(d) **Liability for Corporate Assets Withdrawn by Stockholders** — *aa. IN GENERAL.* — If the assets of a corporation come by any means into the hands of its stockholders, before its debts are paid, the established rule in equity is that such holders take the assets charged with a trust in favor of creditors, which a court of equity will enforce.⁷

11 Ill. App. 88; Sangamon Coal Min. Co. v. Richardson, 33 Ill. App. 277; Mallinckrodt Chemical Works v. Belleville Glass Co., 34 Ill. App. 404; Coffin v. Ransdell, 110 Ind. 417; Clow v. Brown, (Ind. 1892) 31 N. E. Rep. 361; Merchants', etc., Sav. Bank v. Belington Coal, etc., Co., 51 W. Va. 60. See also Whitehill v. Jacobs, 75 Wis. 474; National Bank v. Illinois, etc., Lumber Co., 101 Wis. 247.

While a Contract Stands Unimpeached the courts, even where the rights of the creditors are involved, will treat that as payment which the parties have agreed should be payment. Phelan v. Hazard, 5 Dill. (U. S.) 45; Brant v. Ehlen, 59 Md. 1.

1. **Actual Value of Property the Test** — *United States.* — Flinn v. Bagley, 7 Fed. Rep. 785.

Maine. — Libby v. Tobey, 82 Me. 397; Gillin v. Sawyer, 93 Me. 151.

Missouri. — Shickle v. Watts, 94 Mo. 410; Chouteau v. Dean, 7 Mo. App. 210; Kehlor v. Lademann, 11 Mo. App. 550; Farmer's Bank v. Gallaher, 43 Mo. App. 482; Leucke v. Tredway, 45 Mo. App. 507; Berry v. Rood, 168 Mo. 316; Hill v. Atoka Coal, etc., Co., 124 Mo. 153; McClure v. Paducah Iron Co., 90 Mo. App. 567.

Texas. — Mathis v. Pridham, 1 Tex. Civ. App. 58; Cole v. Adams, 19 Tex. Civ. App. 507.

Washington. — Manhattan Trust Co. v. Seattl Coal, etc., Co., 16 Wash. 499; Dunlap v. Rauch, 24 Wash. 620.

But see under the *Minnesota* statute Ross v. Kelly, 36 Minn. 38; Wallace v. Carpenter Electric Heating Mfg. Co., 70 Minn. 321, 68 Am. St. Rep. 530.

2. **Right to Issue Stock in Payment of Services.** — Holly Mfg. Co. v. New Chester Water Co.,

48 Fed. Rep. 879, *affirmed* (C. C. A.) 53 Fed. Rep. 19.

3. **Overvaluation of Services Rendered.** — Shickle v. Watts, 94 Mo. 410.

Services of Promoter. — The *bona fides* of the issue of excessive proportion of stock to a promoter must be submitted to a jury. Herbert v. Uhl, (Supm. Ct. Gen. T.) 20 N. Y. Supp. 743.

Services in Recommending Goods Manufactured by Corporation, paid for by an issue of stock of large amount, render the recipient liable on the stock to creditors. Peninsular Sav. Bank v. Black Flag Stove Polish Co., 105 Mich. 535.

4. Kehlor v. Lademann, 11 Mo. App. 550; Shepard v. Drake, 61 Mo. App. 134.

5. **Payment in Depreciated Stock.** — Van Cott v. Van Brunt, 82 N. Y. 535. See also Handley v. Stutz, 139 U. S. 417; Fogg v. Blair, 139 U. S. 118.

Where a Creditor Takes the Worthless Stock of an Insolvent Corporation at twenty cents on the dollar, with the purpose merely of assisting the corporation through its difficulties, such stockholder is not liable to other creditors for the unpaid balance upon such stock. Clark v. Bever, 31 Fed. Rep. 670, *affirmed* in 139 U. S. 101.

6. Jackson v. Traer, 64 Iowa 469, 52 Am. Rep. 449; Martin v. South Salem Land Co., 94 Va. 28; Adamant Mfg. Co. v. Wallace, 16 Wash. 614.

7. **Liability for Assets Withdrawn from Corporation** — *United States.* — Scammon v. Kimball, 92 U. S. 362; McKay v. Hill, 1 Hask. (U. S.) 276; Chicago, etc., R. Co. v. Howard, 7 Wall. (U. S.) 392; Union Nat. Bank v. Douglass, 1 McCrary (U. S.) 86.

Return of Subscription. — Thus, if a corporation returns to its stockholders money received from them in payment of their subscriptions, leaving corporate debts unpaid, such assets may be followed by corporate creditors and subjected to the payment of their debts.¹

bb. **DIVISION OF PROPERTY AMONG STOCKHOLDERS.** — So if the officers of a corporation divide its capital or property among the stockholders, leaving any debts unpaid, any stockholder receiving such dividend is liable for such debt out of the funds so received.²

cc. **PAYMENT OF DIVIDEND OUT OF CAPITAL STOCK.** — For like reasons, if a corporation pays a cash dividend to its stockholders, not out of the profits which it has earned, but out of its capital stock, corporate creditors who suffer thereby may follow the fund into the hands of such stockholders.³

(e) Extent of Liability. — The subscription liability of stockholders for corporate debts extends only to the par value of the shares subscribed for by each of them respectively.⁴ This liability is several and not joint.⁵ Hence, in many of the states, a corporate creditor may sue any stockholder or number of stockholders for a corporate debt not exceeding the liability of such stockholder or stockholders,⁶ leaving the latter to adjust the equities between him or them and the other solvent stockholders⁷ by an equitable suit for contribution.⁸

Georgia. — *Ellis v. Pullman*, 95 Ga. 445.

Illinois. — *Clapp v. Peterson*, 104 Ill. 26;

Peterson v. Illinois Land, etc., Co., 6 Ill. App. 257; *Henry v. Jewett*, 94 Ill. App. 667.

Kansas. — *Ryan v. Leavenworth, etc., R. Co.*, 21 Kan. 365.

Louisiana. — *Robertson v. Comey*, 5 La. Ann. 297.

Massachusetts. — *Thompson v. Bemis Paper Co.*, 127 Mass. 595.

Missouri. — *Alexander v. Relfe*, 74 Mo. 495.

New Jersey. — *National Trust Co. v. Miller*, 33 N. J. Eq. 155.

Pennsylvania. — *Chambersburg Mfg., etc., Assoc.'s Appeal*, 2 Walk. (Pa.) 488.

Tennessee. — *Albitztigui v. Guadalupe Caloe Min. Co.*, 92 Tenn. 598.

The Stockholders of a Corporation Have No Right to Appropriate Any Part of Its Assets to Pay Salaries Due Them as Officers of the company, or due them on any other account, until all creditors who are not stockholders have been paid. *Cochran v. Ocean Dry-Dock Co.*, 30 La. Ann. 1365.

Stockholders to Whom Corporate Bonds Are Issued as a Bonus May Be Compelled to Account to creditors of the corporation for the proceeds of the sale of such bonds. *Shrainka v. Allen*, 7 Mo. App. 434, 76 Mo. 384.

1. Return of Subscription. — *Schmidt v. Chester Shoe Mfg. Co.*, 25 Pa. Co. Ct. 49; *South Bend Toy Mfg. Co. v. Pierre F. & M. Ins. Co.*, 4 S. Dak. 173.

Return of Stock Notes. — *Smith v. Hopkins*, 10 Wash. 77.

2. Division of Property Among Stockholders. — *Chicago, etc., R. Co. v. Howard*, 7 Wall. (U. S.) 392; *Union Nat. Bank v. Douglass*, 1 McCrary (U. S.) 86; *Hill v. Gruell*, 42 Ill. App. 411; *American Steel, etc., Co. v. Eddy*, (Mich. 1902) 89 N. W. Rep. 952; *Osgood v. Laytin*, 3 Keyes (N. Y.) 521; *Bartlett v. Drew*, 57 N. Y. 587; *Hastings v. Drew* (Supm. Ct. Spec. T.) 50 How. Pr. (N. Y.) 254, 76 N. Y. 9.

3. Payment of Cash Dividends Out of Capital. — *Gratz v. Redd*, 4 B. Mon. (Ky.) 178; *Lexington*,

L., etc., Ins. Co. v. Page, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165; *Williams v. Boice*, 38 N. J. Eq. 364. See also *Shields v. Hobart*, 172 Mo. 491.

But a creditor has no right after the corporation has become insolvent to call upon stockholders to account for dividends paid in good faith out of the profits of the business at a time when the corporation was prosperous and its assets were amply sufficient for the payment of all its indebtedness. *Reid v. Eatonton Mfg. Co.*, 40 Ga. 98; *Miller v. Bradish*, 69 Iowa 278.

4. Liability Measured by Unpaid Subscriptions. — *Carnahan v. Campbell*, (Ind. 1901) 59 N. E. Rep. 1054; *Morgan v. Howland*, 89 Me. 484; *Scott v. Windham*, 73 Miss. 76; *Washington Sav. Bank v. Butchers' etc., Bank*, 130 Mo. 155; *Gorder v. Connor*, 56 Neb. 781; *Wilson Cotton Mills v. C. C. Randleman Cotton Mills*, 115 N. Car. 475.

5. Liability Several. — *Hatch v. Dana*, 101 U. S. 205.

A Stockholder Cannot Escape Liability on the ground that he has already paid a greater percentage of his subscription than the other stockholders. *Brode v. Firemen's Ins. Co.*, 8 Rob. (La.) 244.

6. Recovery of Debt from Single Stockholder. — *Hatch v. Dana*, 101 U. S. 205; *Holmes v. Sherwood*, 3 McCrary (U. S.) 405; *Addison v. Pacific Coast Milling Co.*, 79 Fed. Rep. 459; *Larrabee v. Baldwin*, 35 Cal. 155; *Walter v. Merced Academy Assoc.*, 126 Cal. 582; *Stewart v. Lay*, 45 Iowa 604; *Wehrman v. Reakirt*, 1 Cinc. Super. Ct. 230. But see *Patterson v. Lynde*, 112 Ill. 196; *Robertson v. Noeninger*, 20 Ill. App. 227.

7. Apportionment Among Solvent Stockholders. — *Mallinckrodt Chemical Works v. Belleville Glass Co.*, 34 Ill. App. 404; *Hodges v. Silver Hill Min. Co.*, 9 Oregon 200.

8. See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 363.

Liability Extends to Antecedent Debts. — *Shields v. Clifton Hill Land Co.*, 94 Tenn. 123, 45 Am. St. Rep. 700.

(f) **Waiver of Liability by Creditor** — *aa.* BY EXPRESS AGREEMENT. — A creditor may waive his right of recourse on the stockholders of the corporation for their unpaid subscription by an agreement when the debt was contracted to look only to the corporation and its property for payment.¹

bb. BY KNOWLEDGE OF FACTS. — So if a person with knowledge that the stock of a corporation has been issued for less than its par value² or has been paid by the transfer of certain property at an excessive valuation³ sees fit with that knowledge to give credit to the corporation, he has no right after it has become insolvent to call the stockholders to account for his debts on the ground that their subscriptions have not been paid in full.⁴

(3) **Rule in England.** — The trust-fund doctrine, being purely the creature of the American courts of equity, does not obtain in England. There, aside from the statutory provisions, creditors have in general no greater rights against subscribers than the company itself has,⁵ and release of subscribers is largely discretionary with the directors.⁶

1. **Waiver by Express Agreement.** — *Robinson v. Bidwell*, 22 Cal. 379; *Carnohan v. Campbell*, 158 Ind. 226; *Callanan v. Windsor*, 78 Iowa 193; *Bush v. Robinson*, 95 Ky. 492.

The Mere Expectation that the Debt Would Be Paid out of the proceeds of certain bonds which the corporation hoped to sell will not operate as a release of the stockholders. *Albright v. Texas*, etc., R. Co., 8 N. Mex. 110.

A Creditor Who Formerly, as Director of the Corporation, Assented to the release of certain stockholders, cannot maintain an action against such stockholders upon their unpaid subscription. *Walton v. Hake*, 9 Mo. App. 596. See also *Slee v. Bloom*, 5 Johns. Ch. (N. Y.) 366, 9 Am. Dec. 306.

Insertion in a Bond of a Provision Limiting Liability does not release a stockholder from his subscription liability. *Preston v. Cincinnati*, etc., R. Co., 36 Fed. Rep. 54.

2. **Knowledge that Stock Is Not Issued for Par Value.** — *Rickerson Roller-Mill Co. v. Farrell Foundry*, etc., Co., (C. C. A.) 75 Fed. Rep. 554. See also *Bent v. Underdown*, 156 Ind. 516.

Especially when the creditor is also a stockholder and a party to the agreement that a part only of the subscription should be paid in. *Richardson v. Chicago Packing*, etc., Co., 131 Cal. xviii.

Illinois Statute Rendering Knowledge Possessed by Creditor Immaterial. — *Sprague v. National Bank*, 172 Ill. 149, 64 Am. St. Rep. 17.

3. **Knowledge that Stock Is Paid for in Property** — *United States*. — *Ft. Madison Bank v. Alden*, 129 U. S. 372; *Northwestern Mut. L. Ins. Co. v. Cotton Exch. Real Estate Co.*, 70 Fed. Rep. 155.

Indiana. — *Bruner v. Brown*, 139 Ind. 600.

Kansas. — *Walburn v. Chenault*, 43 Kan. 352.

Missouri. — *Woolfolk v. January*, 131 Mo. 620; *Berry v. Rood*, 168 Mo. 316; *Carp v. Chipley*, 73 Mo. App. 22.

Washington. — *Turner v. Bailey*, 12 Wash. 634; *Adamant Mfg. Co. v. Wallace*, 16 Wash. 614.

Wisconsin. — *Whitehill v. Jacobs*, 75 Wis. 474.

4. *Coit v. North Carolina Gold Amalgamating Co.*, 14 Fed. Rep. 12; *Robinson v. Bidwell*, 22 Cal. 379; *Hill v. Silvey*, 81 Ga. 500; *Young v. Erie Iron Co.*, 65 Mich. 111.

Creditor Not Chargeable with Facts Ascertainable from Corporation Books. — *Gilkie*, etc., Co. v. *Dawson*, Town, etc., Co., 46 Neb. 333.

A Recital in a Deed of a Certain Number of Paid-up Shares as the consideration for the property conveyed to the corporation does not constitute constructive notice to creditors. *Osgood v. King*, 42 Iowa 478.

The Record of Incorporation showing that stock subscriptions were paid by the conveyance of property does not operate as constructive notice to subsequent creditors of the corporation of the real value of the property received in payment of the subscriptions. *Lea v. Iron Belt Mercantile Co.*, 119 Ala. 271.

5. **Rule in England.** — *In re Dronfield Silkestone Coal Co.*, 17 Ch. D. 76; *In re Ambrose Lake Tin*, etc., Min. Co., 14 Ch. D. 390; *In re Ince Hall Rolling Mills Co.*, 23 Ch. D. 545, note, 30 W. R. 945; *Waterhouse v. Jamieson*, L. R., 2 H. L. Sc. 29.

6. **Release of Subscriptions Valid.** — *In re Norwich Provident Ins. Soc.*, 8 Ch. D. 334; *In re Essex Brewery Co.*, L. R. 18 Eq. 507; *In re Agriculturist Cattle Ins. Co.*, L. R., 1 Ch. 161; *Spackman v. Evans*, L. R. 3 H. L. 171.

Surrender and cancellation are proper, when expressly authorized. *Cockburn's Case*, 4 De G. & Sm. 177; *In re Natal Invest. Co.*, L. R. 5 Ch. 22; *Ex p. Fenn*, 22 L. J. Ch. 692; *In re Bodmin United Mines Co.*, 23 Beav. 370; *Ex p. Wright*, 37 L. J. Ch. 529; *Matter of Agriculturist Cattle Ins. Co.*, 3 De G. J. & S. 41; *Dixon v. Evans*, L. R. 5 H. L. 606; *In re Nantoes Consols Co.*, L. R. 13 Eq. 437; *Colville's Case*, 48 L. J. Ch. 633.

And a release cannot be set aside after undue delay, even when not authorized. *Matter of Royal Bank*, 2 De G. M. & G. 522.

The company may confer the power upon itself by special resolution. *In re County Palatine Loan*, etc., Co., L. R. 9 Ch. 54; *Taylor v. Pilsen Joel*, etc., Electric Light Co., 27 Ch. D. 268.

But where the power is not conferred, a surrender and cancellation of shares is void. *Matter of Vale of Neath*, etc., Brewery Co., 3 De G. & Sm. 244; *Munt's Case*, 22 Beav. 55; *Jones's Case*, 27 L. J. Ch. 666; *Ex p. Daniell*, 1 De G. & J. 372, 26 L. J. Ch. 563; *Ex p. Preece*, 15 Jur. 528; *Matter of Joint Stock Co.'s Winding-up Acts*, 4 Kay & J. 305.

b. ADDITIONAL STATUTORY LIABILITY — (1) In General. — In the absence of statute, when a stockholder has paid in the amount of stock subscribed by him, he becomes discharged of all liability to the corporation and to its creditors.¹ Any further liability which attaches to his subscription arises solely from express legislative enactment, either in the charter of the corporation or by some general law to which it and all similar corporations and their individual members are made subject.²

The By-laws of a Corporation cannot impose an obligation upon stockholders to pay the corporate debts where the charter or general statute under which the corporation is organized does not do so.³

(2) Validity and Effect of Constitutional and Statutory Provisions — (a) Constitutional Provisions. — The power of a constitutional convention to incorporate into the constitution of a state such provisions making stockholders liable for

And lapse of time will not render surrender and cancellation binding on the remaining stockholders unless they are shown to have had actual knowledge. *In re Agriculturist Cattle Ins. Co.*, L. R. 1 Ch. 161; *Spackman v. Evans*, 34 L. J. Ch. 321, affirmed L. R. 3 H. L. 171. But see *Evans v. Smallcombe*, L. R. 3 H. L. 249.

Listing Contributors. — Cases in which owners of fully paid-up stock were not held as contributors: *Re British*, etc., Cork Co., 11 Jur. N. S. 941, 14 W. R. 22, 13 L. T. N. S. 267; *In re Marlborough Club Co.*, L. R. 5 Eq. 365; *Ex p. Thomas*, L. R. 18 Eq. 17, note, 42 L. J. Ch. 781, 21 W. R. 782; *In re Heyford Co.*, L. R. 5 Ch. 11; *Kirby's Case*, 46 L. T. N. S. 682.

Cases in which owners of fully paid-up stock were held as contributors: *In re Anglesea Colliery Co.*, L. R. 1 Ch. 555; *Re Hollyford Min. Co.*, Ir. R. 1 Eq. 39; *In re South Blackpool Hotel Co.*, L. R., 4 Eq. 238; *In re Anglo-Moravian Hungarian Junction R. Co.*, L. R. 15 Eq. 407; *Fraser's Case*, 42 L. J. Ch. 358; *In re Caribbean Co.*, L. R. 10 Ch. 614; *Aspinall's Case*, 36 L. T. N. S. 362.

1. No Liability at Common Law — United States. — *Pollard v. Bailey*, 20 Wall. (U. S.) 520; *U. S. v. Knox*, 102 U. S. 422.

Arkansas. — *Jones v. Jarman*, 34 Ark. 323.

Illinois. — *Parkhurst v. Mexican Southeastern R. Co.*, 102 Ill. App. 507.

Indiana. — *Toner v. Fulkerson*, 125 Ind. 224.

Maine. — *Coffin v. Rich*, 45 Me. 507, 71 Am. Dec. 559.

Massachusetts. — *Gray v. Coffin*, 9 Cush. (Mass.) 192; *Erickson v. Nesmith*, 4 Allen (Mass.) 233; *Essex Co. v. Lawrence Mach. Shop.*, 10 Allen (Mass.) 352.

Missouri. — *Schricker v. Ridings*, 65 Mo. 208; *Miley v. Parker*, 7 Mo. App. 561; *Donnelly v. Hodgson*, 13 Mo. App. 15; *Lewis v. St. Charles County*, 13 Mo. App. 48; *Railroad Gazette v. Wherry*, 58 Mo. App. 423.

New Jersey. — *Salt Lake City Nat. Bank v. Hendrickson*, 40 N. J. L. 52; *Thomson-Houston Electric Co. v. Murray*, 60 N. J. L. 20.

New York. — *Freeland v. McCullough*, 1 Den. (N. Y.) 414, 43 Am. Dec. 685.

Rhode Island. — *Atwood v. Rhode Island Agricultural Bank*, 1 R. I. 376.

Tennessee. — *Woods v. Wicks*, 7 Lea (Tenn.) 40.

Vermont. — *Dauchy v. Brown*, 24 Vt. 197.

2. Statutory Liability — United States. —

Terry v. Little, 101 U. S. 216; *Knower v. Haines*, 31 Fed. Rep. 513; *U. S. v. Stanford*, 69 Fed. Rep. 25.

Alabama. — *Smith v. Huckabee*, 53 Ala. 191.

California. — *French v. Teschemaker*, 24 Cal.

518.

Indiana. — *Shaw v. Boylan*, 16 Ind. 384.

Massachusetts. — *Norton v. Hodges*, 100 Mass. 241; *Free Schools v. Flint*, 13 Met. (Mass.) 539.

New York. — *Harger v. McCullough*, 2 Den. (N. Y.) 119; *Thomas v. Dakin*, 22 Wend. (N. Y.) 9; *Slee v. Bloom*, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273.

Pennsylvania. — *Myers v. Irwin*, 2 S. & R. (Pa.) 368.

Liability of Sole Owner. — Under the *Kentucky* statute, the ownership of all the stock of a corporation by a single individual suspends the corporate franchise until the stock is transferred to others, and renders the corporate property liable for the individual debts of the sole owner. It does not make the individual property of the sole owner liable for debts created by him on behalf of and in the name of the corporation. *Louisville Banking Co. v. Eisenman*, 94 Ky. 83, 42 Am. St. Rep. 335.

A Collateral Promise Made by a Stockholder to be answerable for the debts of the corporation, not exceeding a certain amount, does not release the promisor's liability as a stockholder, but he may be held liable both as a stockholder and as a guarantor. *London, etc., Bank v. Parrott*, 125 Cal. 472, 73 Am. St. Rep. 64.

It has been held, however, that such a collateral promise cannot be enforced in his own name by an assignee of the creditor to whom the promise was made. *Gamwell v. Pomeroy*, 121 Mass. 207.

3. Reid v. Eatonton Mfg. Co., 40 Ga. 98; *Free Schools v. Flint*, 13 Met. (Mass.) 539. See also *Kinnan v. Sullivan County Club*, 26 N. Y. App. Div. 213.

The Office of a By-law is to regulate the conduct and define the duties of the members towards the corporation and between themselves; and the right of any creditor to establish a legal claim through such a by-law must depend upon the general principles applicable to express contracts. *Flint v. Pierce*, 99 Mass. 68, 96 Am. Dec. 691; *Mellen v. Whipple*, 1 Gray (Mass.) 317; *Field v. Crawford*, 6 Gray (Mass.) 116; *Dow v. Clark*, 7 Gray (Mass.) 198.

corporate debts as it may deem wise is not disputed; the only question that arises is whether the provision so incorporated is self-executing, or whether it requires subsequent remedial legislation to put it into effect.¹ It has been held that a provision that each stockholder in any corporation shall be liable to the amount of stock held or owned by him is self-executing,² but that a provision that each stockholder of a corporation shall be individually liable for his proportion of its debts,³ or that dues from corporations shall be secured by the individual liability of the stockholders to an additional amount equal to the stock owned by such stockholders, and such other means as shall be provided by law,⁴ requires legislation to complete it.

(b) **Statutory Provisions.** — In the absence of constitutional restriction, a legislature may, it seems, impose such liability upon stockholders of corporations, or grant such release from or modification of this liability, as it sees fit.⁵ But if the state constitution prescribes that stockholders shall, to a specified extent, be liable for corporate debts, the legislature has no power to exempt the stockholders of a particular corporation⁶ or class of corporations⁷ from such liability.

(c) **Effect on Existing Relations** — *aa. IN GENERAL.* — This statutory liability of stockholders to corporate creditors, being contractual in its nature,⁸ is protected by the clause of the Federal Constitution forbidding the impairment of the obligation of contracts,⁹ and cannot be varied without the consent of the parties¹⁰ after it has once attached by the establishment of the relation of stockholder and creditor between them.¹¹

1. **Constitutional Provisions.** — *Jerman v. Benton*, 79 Mo. 148; *Blakeman v. Benton*, 9 Mo. App. 107.

2. **Self-executing Provisions.** — *Willis v. Mabon*, 48 Minn. 140; *McKusick v. Seymour*, 48 Minn. 158.

3. **Provisions Requiring Legislation.** — *French v. Teschemaker*, 24 Cal. 518.

A constitutional provision declaring that corporate debts "shall be secured by such individual liability of the corporators, or other means, as may be prescribed by law" is not self-executing. *Williams v. Citizens Enterprise Co.*, 153 Ind. 496.

4. *Morley v. Thayer*, 3 Fed. Rep. 737; *Fowler v. Lamson*, 146 Ill. 472, 37 Am. St. Rep. 163; *Woodworth v. Bowles*, 61 Kan. 569; *Crippen v. Laighton*, 69 N. H. 540, 76 Am. St. Rep. 192; *Hancock Nat. Bank v. Farnum*, 20 R. I. 466. But see *Schertz v. Chester First Nat. Bank*, 47 Ill. App. 124; *National Bank v. Zinser*, 55 Ill. App. 510.

Validity of Statute Enacted to Execute Constitutional Provision. — An act providing that each stockholder shall be "individually liable to the creditors of such company for his proportion; that is to say, in proportion to the amount of stock by him held," is too indefinite to carry the constitutional provision into effect. *U. S. v. Stanford*, 69 Fed. Rep. 25.

5. **Statutory Provisions.** — *Wincock v. Turpin*, 96 Ill. 135; *Hampson v. Weare*, 4 Iowa 13, 66 Am. Dec. 116; *Merchants' Ins. Co. v. Hill*, 12 Mo. App. 148.

If a Corporation Organized under a Special Charter Increases Its Capital Stock under the provisions of the general law, the holders of such stock take it subject to the liabilities imposed by the general law. *Tibballs v. Libby*, 87 Ill. 142.

6. *Central Agricultural, etc., Assoc. v. Alabama Gold L. Ins. Co.*, 70 Ala. 120; *St. Louis R.*

Supplies Mfg. Co. v. Harbine, 2 Mo. App. 134; *State v. Sherman*, 22 Ohio St. 411.

7. *McGowan v. McDonald*, 111 Cal. 57, 52 Am. St. Rep. 149; *Anderson v. Anderson Iron Co.*, 65 Minn. 281.

8. See *infra*, this section, *Nature of Statutory Liability* — *Contractual or Penal*.

9. See the title *IMPAIRMENT OF OBLIGATION OF CONTRACTS*, vol. 15, p. 1037.

10. **If a Stockholder Makes No Objection to an Amendment** of the corporate charter, but participates in the benefits derived from the conduct of the business under the amended charter, he will be held to have acquiesced in the amendment, and will be estopped from denying his liability under it. *Dows v. Naper*, 91 Ill. 44.

11. **Subscription Subsequent to Constitutional Amendment.** — A change in the state constitution relieving stockholders from double liability is effective as to the holders of stock subsequently issued, although the issue of the stock was under an authority and to cover debts incurred before the change. *Ochiltree v. Iowa R. Contracting Co.*, 21 Wall. (U. S.) 249, *affirming* 54 Mo. 113.

A Bond Acquired After the Repeal of a Constitution Imposing a Double Liability upon Stockholders, may be enforced against such stockholders if they were liable thereon at the time the bond was issued. *Blakeman v. Benton*, 9 Mo. App. 107.

Effect of Particular Statutory Enactments. — Under a statute making stockholders liable for the corporate debts unless it is otherwise specified in the charter, the fact that the charter is silent as to the liability of the stockholders does not exempt them from liability. *Came v. Brigham*, 39 Me. 35.

For interpretation of the effect of particular acts amending or repealing former enactments imposing liability upon stockholders, see *Kisse-*

When Void as to Stockholders. — Hence the liability of stockholders of existing corporations cannot be increased by the subsequent adoption of a new state constitution,¹ or the amendment of the general corporation law.²

When Void as to Corporate Creditors. — Nor, on the other hand, can the rights of corporate creditors be impaired by the adoption of a new state constitution³ or the repeal of a statute imposing a liability upon stockholders,⁴ although the liability of the stockholder was conditional only,⁵ and even though he became such subsequent to the passage of the repealing statute.⁶

bb. **RESERVATION OF RIGHT TO AMEND.** — Of course, where a state constitution⁷ or general corporation act⁸ reserves the right to appeal or amend the law regulating corporations and their members, or where the power to amend or repeal a charter is expressly reserved therein,⁹ the liability of stockholders may be increased or diminished by subsequent legislation.

cc. **STATUTES AFFECTING REMEDY MERELY.** — A retrospective enactment which affects merely the creditor's remedy against corporate stockholders is not unconstitutional.¹⁰

(3) **Construction.** — Statutes imposing an additional liability upon stockholders being in derogation of the common law, it is usually held that they are to be strictly construed, and not extended beyond the limits to which they are plainly carried by their provisions.¹¹ In a few cases, however, these

berth v. Prescott, 95 Fed. Rep. 357; *Wood v. Harrison*, 50 Ind. 480; *Burkam v. Fitch*, 51 Ind. 375; *Whitney v. Hammond*, 44 Me. 305; *Milliken v. Whitehouse*, 49 Me. 527; *Strauss v. Heiss*, 48 Md. 292; *Musselman v. Wright*, 107 Mich. 639; *Fairchild v. Masonic Hall Assoc.*, 71 Mo. 526; *Kleckner v. Turk*, 45 Neb. 176; *Close v. Potter*, (Buffalo Super. Ct. Gen. T.) 2 Misc. (N. Y.) 1; *Rochester v. Barnes*, 26 Barb. (N. Y.) 657; *Busby v. Riley*, 6 S. Dak. 401.

1. **When Void as to Stockholders.** — *Stacy v. Little Rock, etc.*, R. Co., 5 Dill. (U. S.) 348; *Robertson v. Sibley*, 10 Minn. 323; *Fairchild v. Masonic Hall Assoc.*, 71 Mo. 526.

2. *U. S. v. Stanford*, 69 Fed. Rep. 25; *Ireland v. Palestine, etc.*, Turnpike Co., 19 Ohio St. 369; *Megargee v. Wakefield Mfg. Co.*, 48 Pa. St. 442.

Future-contracted Debts. — It has been held in *Massachusetts* and *Maine* that the legislature has power to pass an act making stockholders liable for the debts of the corporation, providing the statute is prospective in its operation; and such a statute binds stockholders to the payment of future-contracted debts. *Wheeler v. Frontier Bank*, 23 Me. 308; *Stanley v. Stanley*, 26 Me. 191; *Coffin v. Rich*, 45 Me. 507, 71 Am. Dec. 559; *Hathorn v. Calef*, 53 Me. 471; *Gray v. Coffin*, 9 Cush. (Mass.) 200; *Peele v. Phillips*, 8 Allen (Mass.) 86.

3. **When Void as to Creditors.** — *St. Louis R. Supplies Mfg. Co. v. Harbine*, 2 Mo. App. 134; *Provident Sav. Inst. v. Jackson Place Skating, etc.*, Rink, 52 Mo. 552.

4. *Blakeman v. Benton*, 9 Mo. App. 107.
5. *Hawthorne v. Calef*, 2 Wall. (U. S.) 10; *Donworth v. Coolbaugh*, 5 Iowa 300; *Whitney v. Hammond*, 44 Me. 305.

6. *National Commercial Bank v. McDonnell*, 92 Ala. 387.

When Liability Has Become Fixed. — For stronger reasons, the amendment or repeal of a statute cannot release stockholders whose liability to creditors has become fixed by the

insolvency of the corporation. *Matter of Warren*, 52 Mich. 557.

7. **Reservation of Right to Amend — In Constitution.** — *McGowan v. McDonald*, 111 Cal. 57, 52 Am. St. Rep. 149; *Weidenger v. Spruance*, 101 Ill. 278; *Shufeldt v. Carver*, 8 Ill. App. 545; *Fogg v. Sidwell*, 8 Ill. App. 551; *Hirshfeld v. Bobb*, 27 N. Y. App. Div. 180; *Barnes v. Arnold*, (Supm. Ct. Eq. T.) 23 Misc. (N. Y.) 197; *Hagmayer v. Alten*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 59; *Sleeper v. Goodwin*, 67 Wis. 577.

8. **In General Corporation Act.** — *Sherman v. Smith*, 1 Black (U. S.) 587; *U. S. Trust Co. v. U. S. Fire Ins. Co.*, 18 N. Y. 199; *Matter of Lee's, etc., Bank*, 21 N. Y. 9.

9. **In Corporate Charter.** — *Bailey v. Hollister*, 26 N. Y. 112; *Gardner v. Hope Ins. Co.*, 9 R. I. 194, 11 Am. Rep. 238.

10. **Statutes Affecting Remedy — United States.** — *Hill v. Merchants' Mut. Ins. Co.*, 134 U. S. 515. See also *Borland v. Haven*, 37 Fed. Rep. 394.

Maine. — *Cummings v. Maxwell*, 45 Me. 190; *Coffin v. Rich*, 45 Me. 507, 71 Am. Dec. 559; *Hathorn v. Calef*, 53 Me. 471.

Missouri. — *Merchants' Ins. Co. v. Hill*, 86 Mo. 466, affirming 12 Mo. App. 148.

New York. — *Story v. Furman*, 25 N. Y. 214.
Rhode Island. — *Penniman's Petition*, 11 R. I. 333.

See also generally the titles CONSTITUTIONAL LAW, vol. 6, p. 946 *et seq.*; STATUTES, *ante*, p. 692 *et seq.*

11. **Construction — Strict — Connecticut.** — *Marlborough Mfg. Co. v. Smith*, 2 Conn. 579. *Illinois.* — *Steel v. Dunne*, 65 Ill. 298.

Maine. — *Grose v. Hilt*, 36 Me. 22; *Coffin v. Rich*, 45 Me. 511, 71 Am. Dec. 559; *Libby v. Tobey*, 82 Me. 397, 31 Am. & Eng. Corp. Cas. 526.

Massachusetts. — *Chamberlin v. Huguenot Mfg. Co.*, 118 Mass. 532; *Potter v. Stevens*, 127 Mass. 592, 34 Am. Rep. 428; *Gray v. Coffin*, 9 Cush. (Mass.) 192; *Dane v.*

statutes have been viewed as remedial legislation, and have been so construed as to abate the mischief they were intended to remedy.¹

(4) *Nature of Statutory Liability*—(a) *Contractual or Penal*.—The liability of stockholders for corporate debts, though imposed by statute, is contractual and not penal. It is a part of the contract which stockholders enter into when they subscribe to or purchase the stock of the corporation, and which third parties rely upon when they enter into contracts with the corporation.²

(b) *Joint or Several*.—Where the statute makes each stockholder liable for the debts of the corporation to an amount measured by the shares held by him, the liability so imposed is several and not joint.³ But where the statute or the charter of the corporation makes stockholders liable absolutely, without any limitation upon the liability of each, the liability so imposed is joint.⁴

Dane Mfg. Co., 14 Gray (Mass.) 488; Priest v. Essex Hat Mfg. Co., 115 Mass. 380.

New York.—Diven v. Lee, 36 N. Y. 302; Lowry v. Inman, 46 N. Y. 119; Chase v. Lord, 77 N. Y. 1.

Pennsylvania.—Moyer v. Pennsylvania Slate Co., 71 Pa. St. 293; Younghieny Shaft Co. v. Evans, 72 Pa. St. 331; O'Reilly v. Bard, 105 Pa. St. 569.

Vermont.—Dauchy v. Brown, 24 Vt. 197; Windham Provident Sav. Inst. v. Sprague, 43 Vt. 502.

Wisconsin.—Harrod v. Hamer, 32 Wis. 162. See generally the title *STATUTES*, ante, p. 662.

1. *Liberal Construction—California*.—Mokelumne Hill Canal, etc., Co. v. Woodbury, 14 Cal. 265; Davidson v. Rankin, 34 Cal. 503.

Illinois.—Gauch v. Harrison, 12 Ill. App. 457.

Indiana.—Marion Tp. Union Draining Co. v. Norris, 37 Ind. 424.

Michigan.—Bohn v. Brown, 33 Mich. 257.

New York.—Freeland v. McCullough, 1 Den. (N. Y.) 414, 43 Am. Dec. 685; Herries v. Platt, 21 Hun (N. Y.) 132.

See generally the title *STATUTES*, ante, p. 676.

2. *Statutory Liability Contractual in Its Nature—United States*.—Whitman v. Oxford Nat. Bank, 176 U. S. 559.

Arkansas.—Lanigan v. North, 69 Ark. 62.

Connecticut.—Davis v. Essex First Baptist Soc., 44 Conn. 582.

Illinois.—Schrader v. Heinzelman, 51 Ill. App. 31; Morse v. Pacific R. Co., 93 Ill. App. 33.

Kansas.—Pacific Elevator Co. v. Whitbeck, 63 Kan. 102, 88 Am. St. Rep. 229.

Maine.—Pulsifer v. Greene, 96 Me. 438.

Minnesota.—Hanson v. Davison, 73 Minn. 454.

Missouri.—Hodgson v. Cheever, 8 Mo. App. 318; Blakeman v. Benton, 9 Mo. App. 107; Pfaff v. Gruen, (Mo. 1902) 69 S. W. Rep. 405.

New York.—Marshall v. Sherman, 84 Hun (N. Y.) 186.

Ohio.—Kulp v. Fleming, 65 Ohio St. 321; Cleveland Gas Co. v. Collins, 10 Ohio Cir. Dec. 475, 19 Ohio Cir. Ct. 247.

South Carolina.—Sullivan v. Sullivan Mfg. Co., 14 S. Car. 494; Hall v. Klinck, 25 S. Car. 348, 60 Am. Rep. 505.

West Virginia.—Nimick v. Mingo Iron Works Co., 25 W. Va. 184.

Liability Concurrent with Equitable Liability.—The additional liability of stockholders cre-

ated by statute is not exclusive of, but concurrent with, the equitable liability upon their subscriptions, and a creditor may enforce either as he chooses. Harmon v. Page, 62 Cal. 448; Potter v. Dear, 95 Cal. 578; Bunn's Appeal, 105 Pa. St. 49, 51 Am. Rep. 166. Compare Haskins v. Harding, 2 Dill. (U. S.) 99, 11 Fed. Cas. No. 6,196.

Liability to Creditors, Not to Corporation.—The statutory liability of stockholders is to the creditors of the corporation, and not to the corporation itself. Liberty Female College Assoc. v. Watkins, 70 Mo. 13.

3. *Nature of Liability—Liability Held to Be Several—United States*.—Godfrey v. Terry, 97 U. S. 171.

Illinois.—McCarthy v. Lavasche, 89 Ill. 270, 31 Am. Rep. 83; Thompson v. Meisser, 108 Ill. 359; Siegel v. Andrews, 78 Ill. App. 611.

Massachusetts.—Burnap v. Haskins Steam-Engine Co., 127 Mass. 586; Crease v. Babcock, 10 Met. (Mass.) 525.

Michigan.—Pettibone v. McGraw, 6 Mich. 441.

Minnesota.—Hanson v. Davison, 73 Minn. 454.

Missouri.—Perry v. Turner, 55 Mo. 418.

New York.—Matter of Hollister Bank, 27 N. Y. 393, 84 Am. Dec. 292; Poughkeepsie Bank v. Ibbotson, 24 Wend. (N. Y.) 473; Marshall v. Sherman, 84 Hun (N. Y.) 186.

Ohio.—Umsted v. Buskirk, 17 Ohio St. 113; Brown v. Hitchcock, 36 Ohio St. 667; Mason v. Alexander, 44 Ohio St. 318; Newberry v. Alexander, 44 Ohio St. 346; Wehrman v. Reakirt, 1 Cinc. Super. Ct. 230; Smith v. Newark, etc., R. Co., 4 Ohio Cir. Dec. 356, 8 Ohio Cir. Ct. 583.

Tennessee.—Ohio L. Ins., etc., Co. v. Merchants' Ins., etc., Co., 11 Humph. (Tenn.) 1, 53 Am. Dec. 742.

West Virginia.—Nimick v. Mingo Iron Works Co., 25 W. Va. 184.

4. *Liability Held to Be Joint*.—Deming v. Bull, 10 Conn. 409; Shafer v. Moriarty, 46 Ind. 9; New England Commercial Bank v. Newport Steam Factory, 6 R. I. 154, 75 Am. Dec. 688.

Until the Issue of Certificates of Stock to the members of a manufacturing corporation they own the stock in common, and therefore under Stat. Mass. 1862, c. 218, were all jointly and severally liable for a debt of the corporation contracted before the capital was paid in, although the corporation had voted to divide the capital stock into shares, and one at least of the members had agreed to take a certain

(c) **Primary or Secondary.** — The character of the statutory liability of stockholders, whether primary or secondary, depends upon the provisions of the several statutes and the mode in which the liability created by them is to be enforced. Under some of them the liability created is held to be principal and primary,¹ while under others it has been construed to be secondary and collateral to the principal obligation which rests upon the corporation.²

(a) **In Personam or in Rem.** — The liability created by the statutes imposing liability upon stockholders for corporate debts is ordinarily personal,³ but a provision in the charter that the property of each stockholder shall be liable for the corporate debts creates no right of personal action against the stockholder, but merely gives a right to a proceeding *in rem* against his property.⁴

(5) **Extent of Liability** — (a) **Proportional Liability.** — In a few states the statutes make each stockholder liable for such proportion of the corporate debts and liabilities as the amount of stock or shares owned by him bears to the whole stock of the corporation.⁵ Under these statutes a creditor may recover his entire debt from any one stockholder, provided the amount of such recovery does not exceed the defendant's proportion of the entire corporate indebtedness.⁶ In estimating this proportion insolvent as well as solvent stockholders must be included in the calculation,⁷ and the estimate must be based on the par value of the shares.⁸

(b) **Liability for Amount Equal to Subscription.** — The most usual statutory provision

number of shares. *Hawes v. Anglo-Saxon Petroleum Co.*, 111 Mass. 200.

Where a Certain Number of Shares of Stock Was Held by Two Persons, and it did not appear that they were partners, or held the stock as such, they were held to be tenants in common, each of an undivided half interest in the stock, and neither could be held for more than one-half of the stockholders' superadded liability. *Markell v. Ray*, 75 Minn. 138.

1. **Liability Primary and Principal** — *California*. — *Mokelumne Hill Canal, etc., Co. v. Woodbury*, 14 Cal. 265; *Young v. Rosenbaum*, 39 Cal. 646; *Knowles v. Sandercock*, 107 Cal. 629; *McGowan v. McDonald*, 111 Cal. 57, 52 Am. St. Rep. 149.

Georgia. — *Andrews v. Gwinnett Mfg. Co.*, 50 Ga. 637.

Illinois. — *Buchanan v. Meisser*, 105 Ill. 638; *Schalucky v. Field*, 124 Ill. 617, 7 Am. St. Rep. 399.

New York. — *Corning v. McCullough*, 1 N. Y. 47, 49 Am. Dec. 287; *Moss v. Averell*, 10 N. Y. 449; *Moss v. McCullough*, 7 Barb. (N. Y.) 279; *Clark v. Myers*, 11 Hun (N. Y.) 608.

Wisconsin. — *Flour City Nat. Bank v. Wechselsberg*, 45 Fed. Rep. 547 (construing the Wisconsin statute); *Coleman v. White*, 14 Wis. 700.

Where a Corporation Has Been Dissolved the liability of its stockholders is primary. *Sterne v. Atherton*, 7 Kan. App. 20; *McHale v. Moore*, (Kan. 1903) 71 Pac. Rep. 522; *Dawson v. Sholley*, 4 Kan. App. 367.

Pendency of Suit Against Corporation No Defense to Stockholder. — *Herman v. Hecht*, 116 Cal. 553.

2. **Liability Secondary and Collateral** — *United States*. — *Jacobson v. Allen*, 12 Fed. Rep. 454.

Connecticut. — *Ball Electric Light Co. v. Child*, 68 Conn. 522.

Kansas. — *Pacific Elevator Co. v. Whitbeck*, 63 Kan. 102, 88 Am. St. Rep. 229.

New Hampshire. — *Hicks v. Burns*, 38 N. H. 141.

Ohio. — *Wright v. McCormack*, 17 Ohio St. 86; *Umsted v. Buskirk*, 17 Ohio St. 113; *Cowles v. Bartell*, 2 Ohio Dec. (Reprint) 424, 3 West. L. Month. 41.

Pennsylvania. — *Patterson v. Wyomissing Mfg. Co.*, 40 Pa. St. 117; *Means's Appeal*, 85 Pa. St. 75.

Utah. — *Henderson v. Turngren*, 9 Utah 432. *West Virginia*. — *Nimick v. Mingo Iron-Works Co.*, 25 W. Va. 184.

3. **Liability in Personam.** — *Walter v. Merced Academy Assoc.*, 126 Cal. 582.

4. **Liability in Rem.** — *Lowry v. Inman*, 2 Sweeny (N. Y.) 117.

5. **Proportional Liability.** — *In re South Mountain Consol. Min. Co.*, 5 Fed. Rep. 403; *Lanigan v. North*, 69 Ark. 62; *Lane v. Morris*, 10 Ga. 162.

Under Provision in Charter. — *Atwood v. Rhode Island Agricultural Bank*, 1 R. I. 376.

6. *Lane v. Harris*, 16 Ga. 217; *Boyd v. Hall*, 56 Ga. 563.

7. *Adkins v. Thornton*, 19 Ga. 325; *Maine Trust, etc., Co. v. Southern Loan, etc., Co.*, 92 Me. 444.

When Part of the Stock Is Owned by the Corporation, the individual stockholders are not, for that reason, liable to any further extent than they would have been if none of the stock had been so owned. *Crease v. Babcock*, 10 Met. (Mass.) 525.

Liability of Person Holding More than Five Hundred Dollars' Worth of Stock. — *Moon Bros. Carriage Co. v. Waxahachie Grain, etc., Co.*, 13 Tex. Civ. App. 103.

Stockholders Liable for Ten per Cent. of Debts in Addition to Subscription Liability. — *Fleniken v. Marshall*, 43 S. Car. 80.

Stockholders Liable to Creditors as General Partners. — *Planters' Bank v. Bivingsville Cotton Mfg. Co.*, 10 Rich. L. (S. Car.) 95.

8. *Lane v. Morris*, 10 Ga. 162.

is that stockholders shall be liable for corporate debts to a sum equal in amount to the stock held by them respectively. The statutes themselves differ somewhat in phraseology, but the liability imposed is practically identical.¹ Their effect is to double the liability of the stockholder, making him liable, not only upon his subscription for the par value of the stock subscribed by him, but also for a further sum equal to its face value.²

(c) **Liability for Double Amount of Subscription.** — The liability imposed by the *Colorado* statute upon stockholders for the corporate debts "in double the amount of the par value of the stock owned by them respectively," has been construed to mean double the par value of such stock in addition to their liability upon their original subscriptions.³

(d) **Debts and Demands to Which Liability Extends** — *aa. CLAIMS EX CONTRACTU* — (*aa*) *In General.* — The liability of stockholders for the debts of the corporation extends to demands arising out of contracts, whether liquidated⁴ or unliquidated.⁵ It does not, however, extend to debts incurred through fraud and collusion between the directors of the corporation and the creditors,⁶ or to claims arising out of contracts made by the officers of the corporation without authority.⁷

(*bb*) *Wages Due Laborers, Servants, etc.* — *aaa. In General.* — A common form of statutory liability is that for wages due to servants, laborers, apprentices, and the like. These statutes apply to services performed without the state as well as

1. **Liable for Amount Equal to Subscription** — *Alabama.* — *McDonnell v. Alabama Gold L. Ins. Co.*, 85 Ala. 401.

Arkansas. — *Jones v. Jerman*, 34 Ark. 323.

Illinois. — *Root v. Sinnock*, 24 Ill. App. 537, affirmed 120 Ill. 350, 60 Am. Rep. 558.

Michigan. — *Pettibone v. McGraw*, 6 Mich. 441; *Peck v. Miller*, 39 Mich. 594.

Minnesota. — *Willis v. Mabon*, 48 Minn. 140.

Missouri. — *St. Louis R. Supplies Mfg. Co. v. Harbine*, 2 Mo. App. 134; *State Sav. Assoc. v. Kellogg*, 63 Mo. 540.

Ohio. — *Taylor v. West Liberty Wheel Co.*, 6 Ohio Dec. (Reprint) 947, 9 Am. L. Rec. 28.

New York. — *Empire City Bank's Case*, (Ct. App.) 8 Abb. Pr. (N. Y.) 192.

In Utah the statute applies to corporate banking institutions only. *Richardson v. Treasure Hill Min. Co.*, 23 Utah 366.

2. *Norris v. Johnson*, 34 Md. 485; *Guerney v. Moore*, 131 Mo. 650; *Pickering v. Templeton*, 2 Mo. App. 424; *Lewis v. St. Charles County*, 5 Mo. App. 225; *Perkins v. Hatch*, 4 Hun (N. Y.) 137.

The fact that a stockholder has not paid for the stock subscribed for by him does not affect his statutory liability as a stockholder. *Mitchell v. Beckman*, 64 Cal. 117.

Liability has been held to attach only to shares actually subscribed and paid for, although the company offered to issue five shares for each share paid for. *Rogers v. Gross*, 67 Minn. 224.

No agreement entered into between the incorporators can release stockholders from their statutory liability. *Oswald v. Minneapolis Times Co.*, 65 Minn. 249.

3. *Zang v. Wyant*, 25 Colo. 551, 71 Am. St. Rep. 145.

4. **Liability for Money Borrowed by Corporation.** — *Borland v. Haven*, 37 Fed. Rep. 394.

"Debts" mean such as are existing or contracted, and not liabilities which may ultimately

ripen into debts. *Oviatt v. Hughes*, 41 Barb. (N. Y.) 541.

Liability for Debts Contracted in Foreign State. — *Hutchins v. New England Coal Min. Co.*, 4 Allen (Mass.) 580.

— **For Funds Deposited as Savings.** — *Bromley v. Goodwin*, 95 Ill. 118.

— **For Judgment Debts, Whether Ex contractu or Ex delicto.** — *Powell v. Oregonian R. Co.*, 38 Fed. Rep. 187.

— **For Joint Debts of Corporation and Another.** — *Frost v. St. Paul Banking, etc., Co.*, 57 Minn. 325.

— **For Mortgaged Debt of Corporation** — *Barron v. Paine*, 83 Me. 312; *Barron v. Burrill*, 86 Me. 72.

— **For Negotiable Bond Though Secured by Mortgage on All Corporate Property.** — *Garrett v. Sayles*, 1 Fed. Rep. 371.

— **For Taxes.** — *Mercantile Trust, etc., Co. v. Mellon*, 28 Pittsb. L. J. N. S. (Pa.) 85; *Anderson v. Com.*, 18 Gratt (Va.) 295.

The liability of stockholders upon mortgage bonds issued by the corporation is measured by the face value of the bonds. *Keystone Bridge Co. v. Barstow*, 8 Mo. App. 494.

No liability for claims barred by statute of limitations. — *Van Hook v. Whitlock*, 3 Paige (N. Y.) 409.

Execution on judgment for part only of which stockholder liable. — *Stedman v. Eveleth*, 6 Met. (Mass.) 114.

5. **An Unliquidated Claim** growing out of a contract for work and labor done is a debt within the meaning of the statute. *Haynes v. Brown*, 36 N. H. 545.

So is an unliquidated claim for damages for breach of contract. *Mill Dam Foundry v. Hovey*, 21 Pick. (Mass.) 417; *Dryden v. Kellogg*, 2 Mo. App. 87. Compare *Cable v. McCune*, 26 Mo. 371, 72 Am. Dec. 214.

6. *National Carriage Mfg. Co. v. Story, etc., Co.*, 111 Cal. 531.

7. *Ward v. Joslin*, 100 Fed. Rep. 676, (C. C. A.) 105 Fed. Rep. 224, 186 U. S. 142.

to those performed within the state in which the company is incorporated.¹ It may be enforced not only by the laborer or servant himself, but by the payee of a bill of exchange accepted by the corporation for the amount of such wages,² or by one who furnishes goods to the laborer on the order of the company in payment of wages.³

bbb. Who Are Laborers, Servants, etc. — Who are to be deemed laborers or servants within the meaning of these terms as used in the statutes depends largely upon the particular statute, although the decisions are fairly harmonious. The term "laborer" is usually confined to persons doing manual labor, but "servant" is a word of much larger signification. Thus, a traveling salesman has been held not to be a laborer,⁴ but has been held to be a servant or clerk.⁵ A person employed as an assistant editor or reporter of a newspaper,⁶ or as a bookkeeper,⁷ or as a civil engineer and traveling agent,⁸ has been held to be a servant.

The General Officers of a Corporation, who exercise a general supervision over its business, or some integral part of it, such as the general manager,⁹ or the secretary of the corporation,¹⁰ or the assistant chief engineer of a railroad,¹¹ are ordinarily held not to be included; nor is the superintendent of a mine,¹² especially where it is situated in another country and the superintendent has full power to control the property and to manage the financial affairs of the corporation in such country.¹³

But Foremen and Gang Bosses, who exercise merely a limited supervision over the work upon which they are employed by the corporation, are usually held to be within the statute.¹⁴ Thus, the foreman of a factory¹⁵ and the engineer and foreman of a mine¹⁶ have been held to be servants; while the boss of a gang of miners has been held to be included within the meaning of the terms "miners, quarrymen, and other laborers."¹⁷

Professional Men. — An attorney at law¹⁸ or a consulting engineer¹⁹ who renders professional services to the corporation is not to be regarded as an employee within the purview of the statute.

Independent Contractors. — Nor is an independent contractor,²⁰ or laborers hired by him,²¹ although employed upon the works of the corporation.

(cc) Materials Furnished to Manufacturing Corporations. — Under the *Pennsylvania Act of 1854*, the stockholders of a manufacturing corporation are made liable

1. *Clokus v. Hollister Min. Co.*, 92 Wis. 325.

2. *Pilcher v. Brayton*, 17 Hun (N. Y.) 429.

3. *Reading Industrial Mfg. Co. v. Graeff*, 64 Pa. St. 395.

4. *Jones v. Avery*, 50 Mich. 326.

5. *Hand v. Cole*, 88 Tenn. 400.

6. *Harris v. Norvell*, (Supm. Ct. Spec. T.) 1 Abb. N. Cas. (N. Y.) 127.

7. *Chapman v. Chumar*, 54 Hun (N. Y.) 636, 7 N. Y. Supp. 230. *Compare Sherman v. Herbert*, (City Ct. Tr. T.) 2 City Ct. (N. Y.) 314.

8. *Williamson v. Wadsworth*, 49 Barb. (N. Y.) 294.

9. *Wakefield v. Fargo*, 90 N. Y. 213.

10. *Coffin v. Reynolds*, 37 N. Y. 640. But see *Richardson v. Abendroth*, 43 Barb. (N. Y.) 162.

11. *Brockway v. Innes*, 39 Mich. 47, 33 Am. Rep. 348.

12. *Kraueser v. Ruckel*, 17 Hun (N. Y.) 463; *Cocking v. Ward*, (Tenn. Ch. 1898) 48 S. W. Rep. 287. See also *Dean v. DeWolf*, 16 Hun (N. Y.) 186.

13. *Hill v. Spencer*, 61 N. Y. 274.

14. *Hovey v. Ten Broeck*, 3 Robt. (N. Y.) 316.

15. *Sleeper v. Goodwin*, 67 Wis. 577.

One employed as foreman of a factory, but who keeps the time of the hands, solicits orders, and does whatever else he is told to do by the superintendent, is a servant. *Short v. Medberry*, 29 Hun (N. Y.) 39.

So one who acts as superintendent in the absence of the regular officer, but who works with the men when such officer is present, is a laborer or servant. *Vincent v. Bamford*, (N. Y. Super. Ct. Gen. T.) 42 How. Pr. (N. Y.) 109.

16. *Vincent v. Bamford*, (N. Y. Super. Ct. Gen. T.) 42 How. Pr. (N. Y.) 109.

17. *Thomas v. Bevans*, 2 Luz. Leg. Obs. (Pa.) 99.

18. *Bristor v. Smith*, 158 N. Y. 157; *Bristor v. Kretz*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 55; but see under a subsequent statute *Hallett v. Metropolitan Messenger Co.*, 69 N. Y. App. Div. 258.

19. *Ericsson v. Brown*, 38 Barb. (N. Y.) 390.

20. **Independent Contractor.** — *Peck v. Miller*, 39 Mich. 594; *Taylor v. Manwaring*, 48 Mich. 171; *Aikin v. Wasson*, 24 N. Y. 482; *Moyer v. Pennsylvania Slate Co.*, 71 Pa. St. 293.

21. *Gallagher v. Ashby*, 26 Barb. (N. Y.) 143.

for the price of materials furnished to it. The term "materials" has been construed to mean substances which are actually used by the corporation in the manufacture of articles in which it deals,¹ and sold and delivered to it in the usual course of business.² This liability can only be enforced by the person supplying the materials, and does not extend to a promissory note which a third person seeks to enforce against the corporation, although such note was given for the price of materials furnished.³

(dd) *Liability for Antecedent Debts.* — Under a statute making the stockholders of corporations liable only for corporate debts incurred after the acquisition of their stock, it has been held in *California* that a defendant is not liable upon a note given by the corporation after he became a stockholder, but for a debt incurred prior thereto.⁴ The contrary, however, has been held in *Kentucky*, where each renewal of a note is regarded as a new contract.⁵

(ee) *Liability on Renewal Note.* — The same diversity appears in cases where attempts have been made to charge stockholders upon notes executed after they ceased to be stockholders, but for debts contracted while they were such. In some cases it has been held that a stockholder was liable on the ground that, in the absence of any agreement to the contrary, the note did not create a new debt or satisfy the old one.⁶ In other cases the opposite view has been taken.⁷ Of course, where the parties expressly agree that the note shall be taken in payment of the debt,⁸ or where the note is actually discounted and the proceeds applied to the payment of the debt,⁹ the stockholder is released from liability therefor.

(ff) *Maturity of Debt.* — Under the *New York* statute (Act of 1848, c. 40, § 24), a stockholder is not personally liable for the payment of any debt contracted by the corporation unless such debt is payable within one year from the time it was contracted.¹⁰ The Limited Liability Company Act of 1875 contains a like provision, except that the period is increased to two years.¹¹ These statutes were construed in one case to mean that the entire debt must, by the terms of the contract, be payable within the period;¹² but the weight of authority does not support this view, for it has been repeatedly decided that a stockholder may be held liable upon a contract for services, or upon a lease of property to the corporation, though made for a term beyond the statutory period, if the wages due under such contract,¹³ or the rent accruing under the lease,¹⁴ are payable in instalments falling within the period.

bb. CLAIMS EX DELICTO. — Unliquidated damages arising from the commission

1. *Materials Supplied Manufacturing Corporations.* — *Moyer v. Pennsylvania Slate Co.*, 71 Pa. St. 293; *Featherman v. Wölle*, 3 Leg. Gaz. (Pa.) 86.

2. *Weiss v. Mauch Chunk Iron Co.*, 58 Pa. St. 295.

3. *Weigley v. Coal Oil Co.*, 5 Phila. (Pa.) 67, 19 Leg. Int. (Pa.) 292.

4. *Liability for Antecedent Debts.* — *Winona Wagon Co. v. Bull*, 108 Cal. 1. See also *Danielson v. Yoakum*, 116 Cal. 382.

5. *Castleman v. Holmes*, 4 J. J. Marsh. (Ky.) 1. But see *Hyatt v. Anderson*, (Ky. 1903) 74 S. W. Rep. 1094.

6. *Liability upon Renewal Note.* — *Hauenschild v. Standard Coffin Co.*, 10 Ohio Dec. 536, 8 Ohio N. P. 124.

But the liability of a stockholder cannot be renewed or extended beyond the period of one year by the acceptance by a creditor of a note for an antecedent indebtedness. *Parrott v. Colby*, 6 Hun (N. Y.) 55, affirmed 71 N. Y. 597; *Jagger Iron Co. v. Walker*, 43 N. Y. Super. Ct. 275. See also *Union Bank v. Wando Min., etc., Co.*, 17 S. Car. 339.

7. *Milliken v. Whitehouse*, 49 Me. 527. See also *Taylor v. West Liberty Wheel Co.*, 6 Ohio Dec. (Reprint) 947, 9 Am. L. Rec. 28.

8. *Wheeler v. Faurot*, 37 Ohio St. 26.

9. *Fisher v. Marvin*, 47 Barb. (N. Y.) 159.

Reinstatement of Debt. — Where the debts of a corporation are extinguished by agreement, a revival of the debts, placing the corporation *in statu quo*, revives its stockholders' liability. *Borland v. Haven*, 37 Fed. Rep. 394.

10. *Maturity of Debt.* — *Cox v. Gould*, 4 Blatchf. (U. S.) 341, construing the *New York* statute.

11. *McIntyre v. Strong*, 48 N. Y. Super. Ct. 127; *Barnes v. Arnold*, (Supm. Ct. Eq. T.) 23 Misc. (N. Y.) 197.

12. *Goff v. Whitney*, (City Ct. Tr. T.) 2 City Ct. (N. Y.) 256.

13. *Contract for Services.* — *Hale v. Conkling*, 7 Daly (N. Y.) 397; *Dean v. Mace*, 19 Hun (N. Y.) 391; *Hovey v. Ten Broeck*, 3 Robt. (N. Y.) 316.

14. *Lease to Corporation.* — *McIntyre v. Strong*, 48 N. Y. Super. Ct. 127, affirmed 94 N. Y. 648.

of a tort by the corporation or its agents are usually held not to be "debts" within the meaning of that term as used in the statutes imposing liability upon stockholders.¹ But in *Ohio* and *South Carolina* they have been held to be "dues" within the purview of their statutes.²

cc. INTEREST AND COSTS. When the statutory liability of stockholders is unlimited, their liability for the corporate debts is commensurate with the liability of the corporation itself. If the debt of the corporation carries interest it is enforceable also against the stockholders.³ And if judgment has been recovered against the corporation, the stockholders are liable for interest thereon, and the costs of enforcing it against them.⁴ When the statutory liability of stockholders is limited to an amount equal to the par value of the stock held by them, a judgment against a stockholder may include interest from the time of the commencement of the action, and the costs of the suit, in addition to the amount of his statutory liability.⁵

(6) *Defenses* — (a) *Defects in Organization.* — A stockholder who is sued upon his statutory liability cannot plead as a defense irregularities in the organization of the corporation,⁶ or that it commenced business before one-half of its capital stock had been subscribed for in cash as required by its charter.⁷

(b) *Extension of Time of Payment to Corporation.* — An extension by a creditor of the time for paying a corporate debt does not release the statutory liability of stockholders,⁸ except in jurisdictions where stockholders are regarded as sureties for the debts of the corporation.⁹

(c) *Discharge of Corporation in Bankruptcy.* — In *Minnesota* it was formerly held that the discharge of a corporation in bankruptcy extinguished its debts and released its stockholders from their constitutional liability therefor.¹⁰ But the effect of this decision was nullified by an amendment to the bankruptcy act providing that the release of any debtor should not operate to discharge any other party liable for the same debt, the act being construed to include stockholders.¹¹ A similar provision in the national Bankruptcy Act of 1898 has

1. *Unliquidated Damages for Torts Not "Debts"* — *United States.* — *Brown v. Trail*, 89 Fed. Rep. 641.

Illinois. — *Peck v. Cooper*, 8 Ill. App. 403.

Kansas. — *Atchison, etc., R. Co. v. Cochran*, 43 Kan. 225, 19 Am. St. Rep. 129.

Michigan. — *Bohn v. Brown*, 33 Mich. 257.

Missouri. — *Cable v. McCune*, 26 Mo. 371, 72 Am. Dec. 214.

Nebraska. — *Doolittle v. Marsh*, 11 Neb. 243.

New York. — *Heacock v. Sherman*, 14 Wend. (N. Y.) 58; *Merrick v. Van Santvoord*, 34 N. Y. 208.

Oregon. — *Poley v. Lacert*, 35 Oregon 166.

Texas. — *Belo v. Fuller*, 84 Tex. 450, 31 Am. St. Rep. 75.

2. *Damages for Torts Held to Be "Dues."* — *Rider v. Fritchey*, 49 Ohio St. 285; *Flenniken v. Marshall*, 43 S. Car. 80.

3. *Interest and Costs.* — *Knowles v. Sandercock*, 107 Cal. 629; *Zang v. Wyant*, 25 Colo. 551, 71 Am. St. Rep. 145.

4. *Matter of Warren*, 52 Mich. 557; *Fleeson v. Savage Silver Min. Co.*, 3 Nev. 157. See also *Cutright v. Stanford*, 81 Ill. 240.

5. *Grose v. Hilt*, 36 Me. 22; *Burr v. Wilcox*, 22 N. Y. 551; *Handy v. Draper*, 89 N. Y. 334; *Wehrman v. Reakirt*, 1 Cinc. Super. Ct. 230; *Mason v. Alexander*, 44 Ohio St. 318; *Taylor v. West Liberty Wheel Co.*, 6 Ohio Dec. (Reprint) 947, 9 Am. L. Rec. 28; *Wehrman v. Reakirt*, 1 Cinc. Super. Ct. 231. But see *Richmond v. Irons*, 121 U. S. 27; *Munger v. Jacobson*, 99

Ill. 349; *Sackett's Harbor Bank v. Blake*, 3 Rich. Eq. (S. Car.) 225.

6. *Defects in Organization.* — *McDougald v. Lane*, 18 Ga. 445; *Booth v. Campbell*, 37 Md. 522; *Abbott v. Aspinwall*, 26 Barb. (N. Y.) 202; *Ryan v. Miami Valley R. Co.*, 6 Ohio Dec. (Reprint) 1071, 10 Am. L. Rec. 263; *McHose v. Wheeler*, 45 Pa. St. 32.

7. *Maine Trust, etc., Co. v. Southern Loan, etc., Co.*, 92 Me. 444.

Change of Corporate Purpose. — *Walker v. Merced Academy Assoc.*, 126 Cal. 582.

Fraud in Procuring Subscription. — *Briggs v. Cornwell*, 9 Daly (N. Y.) 436.

8. *Extension of Time to Corporation* — *New York.* — *Harger v. McCullough*, 2 Den. (N. Y.) 119; *Parrott v. Colby*, 6 Hun (N. Y.) 55; *Berwind-White Coal Min. Co. v. Ewart*, (Supm. Ct. Spec. T.) 11 Misc. (N. Y.) 490.

Ohio. — *Boice v. Hodge*, 51 Ohio St. 236, 46 Am. St. Rep. 569; *Taylor v. West Liberty Wheel Co.*, 6 Ohio Dec. (Reprint) 947, 9 Am. L. Rec. 28; *Painesville Nat. Bank v. King Varnish Co.*, 4 Ohio Cir. Dec. 511, 8 Ohio Cir. Ct. 563.

Pennsylvania. — *Aultman's Appeal*, 98 Pa. St. 505.

Tennessee. — *Jackson v. Meek*, 87 Tenn. 69, 10 Am. St. Rep. 620.

9. *Hanson v. Donkersley*, 37 Mich. 184; *Powell v. Eldred*, 39 Mich. 552.

10. *Discharge of Corporation in Bankruptcy.* — *Mohr v. Minnesota Elevator Co.*, 40 Minn. 343.

11. *Willis v. Mabon*, 48 Minn. 140.

been given a like effect.¹

(d) **Dissolution of Corporation.** — It has been held in *North Carolina* that upon the dissolution of a corporation by the expiration of the time for which it was chartered, its debts become extinct, and that the liability of its stockholders, prescribed by statute, being a secondary one, becomes extinct also.² A contrary doctrine has been asserted in *Wisconsin* in the case of a voluntary dissolution.³

(e) **Payment of Corporate Debts.** — It is a good defense to an action against a stockholder that he has already paid corporate debts to an amount equal to that for which he is liable under the statute,⁴ or has given his note therefor,⁵ or has had judgment rendered against him, although such judgment has not been paid.⁶ A discharge of any portion of his liability in this way is a good defense *pro tanto*.⁷ But it has been held that after a stockholder has notice of suit against him, he cannot defeat the action by paying other creditors.⁸

Purchasing Debts at a Discount. — A stockholder who pays at a discount debts owing by the corporation can only claim a discharge for the sum actually expended.⁹

(f) **Waiver by Creditor** — *aa. EXPRESS WAIVER.* — Constitutional and statutory provisions imposing liability upon the stockholders of corporations, being enacted for the benefit of creditors, may be waived by them by inserting a stipulation to that effect in their contracts with the corporation,¹⁰ or even, it

1. *In re Marshall Paper Co.*, 95 Fed. Rep. 419.

Purchase of Corporate Debt at Discount. — It is no objection to the enforcement of a corporate debt against a stockholder that the creditor purchased it at a discount. *Coquard v. Pendergast*, 35 Mo. App. 237.

2. **Dissolution of Corporation.** — *Malloy v. Mallett*, 6 Jones Eq. (59 N. Car.) 346. See also *Robison v. Beall*, 26 Ga. 17.

3. *Sleeper v. Goodwin*, 67 Wis. 577.

4. **Payment of Corporate Debts** — *United States*. — *In re South Mountain Consol. Min. Co.*, 5 Fed. Rep. 403.

Florida. — *Hood v. French*, 37 Fla. 117.

Georgia. — *Lane v. Harris*, 16 Ga. 217.

Illinois. — *Buchanan v. Meisser*, 105 Ill. 638; *Thebus v. Smiley*, 110 Ill. 316; *Schrader v. Heinzelman*, 51 Ill. App. 31.

Kansas. — *Sedgwick City Bank v. Sedgwick Milling, etc., Co.*, 59 Kan. 654; *Kendall v. Underhill*, 8 Kan. App. 521; *Musgrave v. Glen Elder Assoc.*, 5 Kan. App. 393; *Crocker v. Ball*, 10 Kan. App. 364.

Massachusetts. — *Sargent v. Stetson*, 181 Mass. 371.

Missouri. — *Washington Sav. Bank v. Butchers', etc., Bank*, 130 Mo. 155; *Manville v. Roeber*, 11 Mo. App. 317.

New York. — *Garrison v. Howe*, 17 N. Y. 458; *Woodruff, etc., Co. v. Chittenden*, 4 Bosw. (N. Y.) 406; *Young v. Brice*, (N. Y. City Ct. Spec. T.) 19 Abb. N. Cas. (N. Y.) 79, note.

But see *Grose v. Hilt*, 36 Me. 22.

Payment in Real Property Available. — *Kendall v. Underhill*, 8 Kan. App. 521.

A Payment to the Receiver of the Corporation discharges the stockholder from liability, even though the receiver had no power to enforce such liability by suit. *Strauss v. Denny*, 95 Md. 690.

Payment to Firm of Which Stockholder Is Member No Release. — *Buchanan v. Meisser*, 105 Ill.

638. Nor to his wife. *Broadway Nat. Bank v. Baker*, 176 Mass. 294.

Payment Enures to Benefit of Transferee. — If a stockholder discharges the liability against his stock by paying a judgment equal in amount to its par value, a transferee of such stock takes it free from future liability. *Thebus v. Smiley*, 110 Ill. 316.

5. **Giving Note for Corporate Debt.** — *Munson v. Warren*, 63 Kan. 162. See also *Burwell v. Hazard Home Co.*, 4 Ohio Dec. (Reprint) 355, 2 Cleve. L. Rep. 9.

6. **Judgment for Corporate Debt.** — *Buchanan v. Meisser*, 105 Ill. 638; *Bittner v. Lee*, 25 Mo. App. 559; *Cushing v. Perot*, 175 Pa. St. 66, 52 Am. St. Rep. 835.

7. **Partial Discharge.** — *Manville v. Karst*, 16 Fed. Rep. 173; *Campbell v. Reese*, 8 Kan. App. 518; *Morr v. West Tennessee Bank*, 4 Lea (Tenn.) 578.

8. **Payment After Notice of Suit.** — *Manville v. Karst*, 16 Fed. Rep. 173; *Thebus v. Smiley*, 110 Ill. 316; *Grose v. Hilt*, 36 Me. 22; *Cole v. Butler*, 43 Me. 401.

The contrary, however, has been held in *New York*. *Young v. Brice*, (N. Y. City Ct. Gen. T.) 3 N. Y. Supp. 124; *Richards v. Brice*, 15 Daly (N. Y.) 144.

9. **Effect of Buying Up Corporate Debts at a Discount.** — *Brown v. Trail*, 89 Fed. Rep. 641; *Thompson v. Meisser*, 108 Ill. 359; *Gauch v. Harrison*, 12 Ill. App. 457; *Abbey v. Long*, 44 Kan. 688; *Lingle v. National Ins. Co.*, 45 Mo. 109; *Bulkley v. Whitcomb*, 121 N. Y. 107, 49 Hun (N. Y.) 290; *Conde v. Hall*, 92 Hun (N. Y.) 335; *Briggs v. Cornwell*, 19 Cal. (N. Y.) 436.

10. **Waiver by Stipulation in Contract.** — *Robinson v. Bidwell*, 22 Cal. 379; *French v. Teschemaker*, 24 Cal. 518.

A Stipulation in a Corporate Bond Valid. — *Hull v. Standard Coal, etc., Co.*, 20 Ohio Cir. Ct. 533, 11 Ohio Cir. Dec. 331. But see

has been held, by parol agreements collateral thereto.¹

bb. IMPLIED WAIVER. — So a creditor may waive his right to hold stockholders personally liable for corporate debts by acts which operate as a release of such liability.²

(g) *Release of Stockholder.* — In jurisdictions where the statutory liability of stockholders is several, it has been held that the release of one stockholder by a corporate creditor will not affect the liability of the others.³ But it has been held in *California*, where, under the statute, stockholders are jointly liable, that if a creditor by an instrument under seal releases a single stockholder from personal liability for his debt, he thereby discharges the corporation and other stockholders to the same extent as to the one to whom the release was executed.⁴

c. INDIVIDUAL OR PARTNERSHIP LIABILITY — (1) *For Ante-corporate Debts.* — Promoters are personally liable for debts contracted by them before the corporation was created, notwithstanding the subsequent assumption of such debts by the corporation,⁵ unless the creditor agreed to look only to the prospective corporation for payment.⁶

(2) *When Incorporation Is Fraudulent* — *Incorporation in Foreign State.* — It has been held that if, under the laws of a state, persons organize themselves into a corporation without intending to do business there, but for the purpose of evading the statutes of another state in which it is proposed that the business shall be conducted, they are guilty of fraud, and will be treated as partners and held to a corresponding responsibility.⁷

Obtaining Charter by Fraudulent Misrepresentations. — It has been held in *Pennsylvania* that if a corporation created under a general law acquires its charter by fraudulent misrepresentation of facts necessary to secure it, all stockholders who were voluntary parties to the wrong, or who become subsequent purchasers of the stock with knowledge of the facts, are personally liable for the corporate debts.⁸

(3) *When Incorporation Is Defective.* — Persons assuming to do business as a corporation without completing the organization thereof are partners, and are liable as such.⁹ But if they establish a *de facto* corporation the general

Kreisser v. Ashtabula Gaslight Co., 24 Ohio Cir. Ct. 313.

1. *Waiver by Collateral Agreement.* — *Basshor v. Forbes*, 36 Md. 154.

An Agreement to Accept Property in payment of a debt, if not executed before the dissolution of the corporation, does not relieve stockholders. *Grew v. Breed*, 10 Met. (Mass.) 569.

2. *Implied Waiver.* — *Van Hook v. Whitlock*, 26 Wend. (N. Y.) 43, 37 Am. Dec. 246; *New England Commercial Bank v. Newport Steam Factory*, 6 R. I. 154, 75 Am. Dec. 688.

A Laborer Does Not Waive His Claim for Wages against the stockholders personally by presenting it in such a manner as to entitle him to receive a dividend from the assignee of the insolvent corporation. *Sleeper v. Goodwin*, 67 Wis. 577.

3. *Release of Single Stockholder.* — *Poughkeepsie Bank v. Ibbotson*, 5 Hill (N. Y.) 461; *Herries v. Platt*, 21 Hun (N. Y.) 132.

4. *Prince v. Lynch*, 38 Cal. 528, 99 Am. Dec. 427.

5. *Personal Liability for Antecorporate Debts.* — *Haslett v. Wotherspoon*, 2 Rich. Eq. (S. Car.) 395; *Broyles v. McCoy*, 5 Sneed (Tenn.) 602. See also *Forbes v. Whittemore*, 62 Ark. 229; *Hepner v. Mavbury*, (N. Y. City Ct. Gen. T.) 23 Misc. (N. Y.) 262, and see the title *PROMOTERS*, vol. 23, p. 237.

6. *Agreement to Look to Future Corporation for Payment.* — But where the contract sued upon is in writing, the promoters cannot show by parol evidence that the creditor agreed to look to the future corporation for payment. *Weir Furnace Co. v. Bodwell*, 73 Mo. App. 389.

7. *Incorporation in Foreign State.* — *Hill v. Beach*, 12 N. J. Eq. 31; *Kruse v. Dusenbury*, 1 City Ct. Supp. (N. Y.) 87; *Empire Mills v. Alston Grocery Co.*, 4 Tex. App. Civ. Cas., § 221. See for further treatment the title *FOREIGN CORPORATIONS*, vol. 13, p. 847.

8. *Laterson v. Arnold*, 45 Pa. St. 410.

Fraudulent Assumption of Corporate Powers under an Old Charter Never Accepted. — *Leffman v. Flanigen*, 4 Phila. (Pa.) 316, 18 Leg. Int. (Pa.) 220.

A Pretended Incorporation without assets to cover a real partnership is abortive, and is open to collateral attack as a mere fraudulent device, and is nonexistent except as to persons who have contracted with it as a corporation in such a way as to estop themselves to show the fraud. *Christian, etc., Grocery Co. v. Fruitdale Lumber Co.*, 121 Ala. 340. See also *Detroit Electrical Works v. Riverside St. R. Co.*, (Tex. Civ. App. 1895) 29 S. W. Rep. 412.

9. *Defective Incorporation.* — *Liebold v. Green*, 69 Ill. App. 527; *Teitig v. Boesman*, 12 Mont. 404. Especially when the creditor dealt with the

rule is that persons who deal with it as such are afterwards estopped to deny the liability of its incorporation, and to hold its stockholders personally liable as partners.¹

(4) *Failure to Comply with Statutory Requirements* — (a) *In General.* — This rule is subject to qualification, however, when the defective organization proceeds from a failure to comply with some statutory requirement. Here the rule is that if the statute does not make the performance of certain acts a condition precedent to the assumption of corporate powers, the nonperformance of these acts, while it may be a sufficient ground to sustain a writ of *quo warranto* to oust the corporation from the exercise of its franchise, does not destroy its charter as a corporation nor make its stockholders individually liable for its debts;² but if the incorporation is imperfect for failure to comply with some provision of the statute which is made a prerequisite to corporate existence, the creditors are not estopped to show the fact, but may hold the supposed stockholders liable as partners.³

(b) *When Statutes Impose Liability for Failure* — *aa. NATURE OF LIABILITY CREATED.* — Many of these statutes expressly provide that the incorporators shall be personally liable for the corporate debts until the prescribed acts are performed. These statutes being generally penal in their nature are strictly construed,⁴ and may be repealed as to existing as well as to subsequent creditors,⁵ even

defendants as with a partnership and without knowledge of the attempted incorporation. *New York Nat. Exch. Bank v. Crowell*, 177 Pa. St. 313.

1. See the title *DE FACTO CORPORATIONS*, vol. 8, p. 754. See also *Crawfordsville First Nat. Bank v. Dovetail Body, etc., Co.*, 143 Ind. 534; *Shoun v. Armstrong*, (Tenn. 1900) 59 S. W. Rep. 790.

Stockholders in a De Facto Corporation, where the attempt to organize was in good faith and the body has stood unchallenged by the state for a considerable time, cannot be held liable individually, or as partners, merely because of a technical omission in the organization. *Globe Pub. Co. v. State Bank*, 41 Neb. 175; *Kleckner v. Turk*, 45 Neb. 176; *Hogue v. Capital Nat. Bank*, 47 Neb. 929.

Incorporation of a Partnership does not release the partners from their liability as partners to a creditor who continues to sell goods to them without notice of the change. *Perkins v. Rouss*, 78 Miss. 343.

2. **When the Required Act Is Not a Prerequisite of Corporate Existence** — *Colorado.* — *Humphrey v. Mooney*, 5 Colo. 282.

Iowa. — *Langan v. Iowa, etc., Constr. Co.*, 49 Iowa 317.

Massachusetts. — *Salem First Nat. Bank v. Almy*, 117 Mass. 476.

Michigan. — *American Mirror, etc., Co. v. Bulkley*, 107 Mich. 447.

Nebraska. — *Kleckner v. Turk*, 45 Neb. 176.

Pennsylvania. — *Rendall v. Jackson*, 1 Pa. Dist. 726, 11 Pa. Co. Ct. 183.

3. **When Act Is Prerequisite** — *California.* — *Mokelumne Hill Canal, etc., Co. v. Woodbury*, 14 Cal. 427 (stated under the title *DE FACTO CORPORATIONS*, vol. 8, p. 753, note 1).

Illinois. — *Bigelow v. Gregory*, 73 Ill. 197.

Indiana. — *Heaston v. Cincinnati, etc., R. Co.*, 16 Ind. 275, 79 Am. Dec. 430.

Iowa. — *Kaiser v. Lawrence Sav. Bank*, 56 Iowa 104, 41 Am. Rep. 85.

Kentucky. — *Bamberger v. White*, 6 Ky. L. Rep. 292,

Minnesota. — *Johnson v. Corser*, 34 Minn. 355.

Missouri. — *Hurt v. Salisbury*, 55 Mo. 310; *Richardson v. Pitts*, 71 Mo. 128; *Ferris v. Thaw*, 72 Mo. 446.

Nebraska. — *Abbott v. Omaha Smelting, etc., Co.*, 4 Neb. 423.

New York. — *Abbott v. Aspinwall*, 26 Barb. (N. Y.) 202; *Jessup v. Carnegie*, 44 N. Y. Super. Ct. 260; *Wells v. Gates*, 18 Barb. (N. Y.) 554.

Texas. — *Empire Mills v. Alston Grocery Co.*, 4 Tex. App. Civ. Cas., § 221.

It has been held, however, that to charge a stockholder with a debt on the ground that he is a partner, it must be shown that he expressly or impliedly authorized such indebtedness. *Railroad Gazette v. Wherry*, 58 Mo. App. 423; *Fuller v. Rowe*, 57 N. Y. 23.

Incorporation under an Unconstitutional Act does not render the stockholders liable as partners. *State v. How*, 1 Mich. 512. See also the title *DE FACTO CORPORATIONS*, vol. 8, p. 751.

Foreign Corporation Failing to Become Domesticated in State Where Business Done. — *Taylor v. Branham*, 35 Fla. 297. See also the title *FOREIGN CORPORATIONS*, vol. 13, p. 847.

Louisiana — Limited Corporations. — Under the Louisiana Act (Acts La. 1888, No. 36) the omission of the word "limited" from the title of corporations formed under that act renders the stockholders liable as partners. *Lehman v. Knapp*, 48 La. Ann. 1148.

4. **Penal Statutes Strictly Construed.** — *Cable v. McCune*, 26 Mo. 371, 72 Am. Dec. 214; *Globe Pub. Co. v. State Bank*, 41 Neb. 175; *Hogue v. Capital Nat. Bank*, 47 Neb. 929; *Chase v. Lord*, (Ct. App.) 6 Abb. N. Cas. (N. Y.) 258; *Lawler v. Burt*, 7 Ohio St. 340; *Wing v. Slater*, 19 R. I. 597. See generally the title *STATUTES, ante*, p. 659.

5. **Constitutionality of Repealing Statutes.** — *Union Iron Co. v. Pierce*, 4 Biss. (U. S.) 327; *Gregory v. German Bank*, 3 Colo. 332, 25

after action brought thereunder, if before judgment is rendered.¹

bb. PROVISIONS ENFORCING PUBLICITY. — Under the *Iowa* and *Minnesota* statutes making the individual property of stockholders liable for the corporation debts if the corporation fails to fulfil certain requirements in respect to the publicity of its organization, it has been held that stockholders are liable where there is a failure to publish a notice of incorporation,² or where the published articles fail to state when the corporation is to begin and end and the location of its principal place of business,³ or fail to fix the highest amount of indebtedness or liability to which the corporation may be subjected;⁴ but they are not liable for failure to post up a notice of the by-laws of the corporation,⁵ or for failure to file a copy of the articles of incorporation in the office of the secretary of state.⁶

cc. PUBLISHING STATEMENT OF LIABILITIES. — In some of the states there are statutes requiring the officers of corporations to publish annually a statement of corporate liabilities, and providing that a default in the publication of such statement shall subject the stockholders to personal liability for the corporate debts.⁷ Under the *Massachusetts* statute the statement may be published at any time within the year from the filing of the certificate of payment of the capital stock.⁸ In *Nebraska* it has been held that to subject stockholders to liability under the statutes it must affirmatively appear that the credit was given to the corporation while it was in default of the required notice.⁹ In *Rhode Island* the filing of a false certificate subjects the stockholders to liability.¹⁰

dd. PAYMENT OF CAPITAL STOCK — (*aa*) *In General.* — In the absence of a provision in the articles of incorporation or general corporation law fixing the amount of capital stock which must be subscribed and paid in before the corporation may commence business, the fact that the corporation commenced business before the full amount of its capital stock had been paid in will not render the individual property of its stockholders liable for the corporate debts;¹¹ but in some states the statutes expressly provide that stockholders shall be liable until all,¹² or a certain percentage,¹³ of the capital stock shall be paid in.

The Effect of These Statutes is to make each stockholder liable as a partner¹⁴ for

Am. Rep. 760; *Breitung v. Lindauer*, 37 Mich. 217; *Hogue v. Capital Nat. Bank*, 47 Neb. 929; *Lawler v. Burt*, 7 Ohio St. 340.

1. *Globe Pub. Co. v. State Bank*, 41 Neb. 175.

2. *Provisions Enforcing Publicity.* — *Eisfeld v. Kenworth*, 50 Iowa 389. See also *National New Haven Bank v. Northwestern Guaranty Loan Co.*, 61 Minn. 375.

The Exception Made in the Iowa Statute in favor of railroad corporations applies to a corporation organized for the purpose of furnishing materials for building and equipping railroads. *Jessup v. Carnegie*, 80 N. Y. 441, 36 Am. Rep. 643, following *Davenport First Nat. Bank v. Davies*, 43 Iowa 424.

3. *Clegg v. Hamilton, etc., County*, 61 Iowa 121.

4. *Heuer v. Carmichael*, 82 Iowa 288.

5. *McKellar v. Stout*, 14 Iowa 359.

6. *Davenport First Nat. Bank v. Davies*, 43 Iowa 424.

7. *Failure to Publish Statement of Liabilities.* — *Cable v. McCune*, 26 Mo. 371, 72 Am. Dec. 214; *Porter v. Sherman County Banking Co.*, 36 Neb. 271; *Wing v. Slater*, 19 R. I. 597; *Elsbree v. Burt*, 24 R. I. 322.

8. *Howe v. Boston Carpet Co.*, 16 Gray (Mass.) 493.

9. *Gorder v. Plattsburgh Canning Co.*, 36 Neb. 548.

10. *Congdon v. Winsor*, 17 R. I. 236.

11. *Payment of Capital Stock.* — *Thornton v. Balcom*, 85 Iowa 198.

12. *Powers v. Knapp*, 158 N. Y. 733; *White, etc., Co. v. Jones*, 86 Hun (N. Y.) 57.

13. *Heinze v. South Green Bay Land, etc., Co.*, 109 Wis. 99.

Bankruptcy of Corporation. — The rights of creditors under these statutes are not taken away by the bankruptcy of the corporation. *Tibbals v. Libby*, 87 Ill. 142.

Nature of Liability. — The statutory liability of a stockholder for the debts of the company, until the full amount of the capital stock is paid in, is contractual and not penal. *Norris v. Wrenschall*, 34 Md. 492; *Corning v. McCullough*, 1 N. Y. 47, 49 Am. Dec. 287; *Conant v. Van Schaick*, 24 Barb. (N. Y.) 87; *Thompson v. Nicolai*, (Supm. Ct. Spec. T.) 49 N. Y. Supp. 422, 21 Misc. (N. Y.) 700; *Cochran v. Wiechers*, 119 N. Y. 399; *Closet v. Potter*, 155 N. Y. 145.

It is also primary and not secondary to the liability of the corporation. *Thompson v. Nicolai*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 700.

14. *Perkins v. Sanders*, 56 Miss. 733.

Volume XXVI.

all corporate debts created before the full capital stock was paid in,¹ either unlimitedly or to an amount equal to the stock held by him,² according to the terms of the particular statute, which amount is to be measured by the par value of the stock at the time the debts were contracted, without regard to the amount actually paid in by each subscriber.³ The fact that any one of them has paid in the full amount of his subscription does not release him,⁴ but he continues liable until the full amount subscribed by all has been paid in.⁵

(bb) *Payment in Property.* — These statutes do not prohibit the payment of the capital stock in property, but in *New York* the right of the corporation to accept payment in this manner is expressly recognized and provided for in the statute,⁶ subject, however, to the limitation that the property shall be such as is necessary for the business for which the corporation is organized,⁷ and that it shall be taken at its fair and reasonable value.⁸ While a mere mistake or error of judgment, either as to the necessity of the purchase or the value of the property, if made in good faith, will not subject stockholders to liability,⁹ if the property is intentionally overvalued the pretended payment will not protect them.¹⁰ Whether the purchase at the price was made in good faith or was simply a scheme to evade the statute is a question of fact for the jury.¹¹

cc. *FILING CERTIFICATE OF PAYMENT.* — Under a statute making the stockholders of a corporation individually liable to its creditors to the amount of stock held by them respectively for all its debts and contracts, until the amount of its capital has been paid in and a certificate thereof has been made and recorded,¹² it has been held that a failure to make the certificate renders stockholders liable, although the full amount of the stock has actually been paid in.¹³ Where a corporation organized under such a statute increases its capital stock,

1. *National Park Bank v. Remsen*, 55 N. Y. Super. Ct. 144.

Liability for Corporate Torts Held Not to Attach to Stockholders — *Doyle v. Kimball*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 431. *Contra*, *Kelly v. Clark*, 21 Mont. 291.

2. *Woodruff, etc., Iron Works v. Chittenden*, 4 Bosw. (N. Y.) 406.

3. *Norris v. Johnson*, 34 Md. 485.

4. *Butler v. Walker*, 80 Ill. 345; *Tibballs v. Libby*, 87 Ill. 142; *Matthews v. Albert*, 24 Md. 527.

5. *Chase v. Lord*, 77 N. Y. 1.

Liability Terminates When Capital Stock Paid In. — *Booth v. Campbell*, 37 Md. 522.

These Statutes Apply to additional stock subscribed as well as to the original stock of the corporation. *Booth v. Campbell*, 37 Md. 522.

6. **Right to Accept Payment in Property.** — *Powers v. Knapp*, 85 Hun (N. Y.) 38, 158 N. Y. 733; *Herbert v. Duryea*, 87 Hun (N. Y.) 288.

7. **What Is Necessary Property.** — *Powell v. Murray*, 3 N. Y. App. Div. 273, 157 N. Y. 717; *Montgomery v. Brush Electric Illuminating Co.*, 48 N. Y. App. Div. 12, 168 N. Y. 657.

8. **Value of Property.** — *White, etc., Co. v. Jones*, 86 Hun (N. Y.) 57.

9. **Valuation Made in Good Faith.** — *Schenck v. Andrews*, 57 N. Y. 133; *Douglass v. Ireland*, 73 N. Y. 100; *Lake Superior Iron Co. v. Drexel*, 90 N. Y. 87.

10. **Intentional Overvaluation.** — *Boynton v. Hatch*, 47 N. Y. 225; *Blake v. Griswold*, 103 N. Y. 429; *National Tube Works Co. v. Gillfillan*, 124 N. Y. 302.

11. **Bona Fides Question of Fact.** — *White, etc., Co. v. Jones*, 86 Hun (N. Y.) 57; *Lake Superior Iron Co. v. Drexel*, 90 N. Y. 87.

Good-will of Business — Where a corporation succeeds to the business of a partnership the good-will of the business may be considered as an asset in determining the value of the firm property. *White, etc., Co. v. Jones*, 79 N. Y. App. Div. 373.

12. **Failure to File Certificate of Payment of Capital Stock.** — *Eaton v. Aspinwall*, 6 Duer (N. Y.) 176.

The necessity for filing the certificate is not dispensed with by the provision of Laws N. Y. 1853, c. 333, § 2, allowing trustees of manufacturing corporations to acquire property for the use of the company, and to issue paid-up shares therefor. *Brown v. Torrey*, 42 N. Y. Super. Ct. 1.

13. *Eaton v. Aspinwall*, 6 Duer (N. Y.) 176; *Chase v. Lord*, (Ct. App.) 6 Abb. N. Cas. (N. Y.) 258; *Plass v. Housman*, 49 Hun (N. Y.) 610, 2 N. Y. Supp. 235; *Veeder v. Mudgett*, 95 N. Y. 295.

Under the New York Laws of 1875, c. 611, § 37, a certificate must be filed both with the secretary of state and the clerk of the county in which the principal business office of the corporation is situated. *Jones v. Mail, etc., Pub. Co.*, 80 Hun (N. Y.) 368; *Christie v. Bowne*, 83 Hun (N. Y.) 107. Compare *Jones v. Butler*, 146 N. Y. 55.

Under the New York General Manufacturing Act of 1848, the clerk's failure to record does not make the stockholder liable. *Veeder v. Mudgett*, 95 N. Y. 295.

The Mere Filing and Recording of the Certificate
Volume XXVI.

a failure to file the requisite certificate in respect to such new stock will not render the holders of the original stock liable.¹

(5) *Engaging in Illegal Business.* — If a corporation is organized for the prosecution of an unlawful undertaking, its stockholders are personally liable for debts so contracted.² But if a corporation organized for a lawful purpose transcends its powers, and engages in a business in violation of law, only those stockholders who participate in the management of the corporation, or who authorize or sanction its acts, are personally liable for liabilities incurred through its unlawful undertakings.³

(6) *Debts Incurred in Excess of Statutory Liability.* — The fact that officers of a corporation incurred debts or issued bonds on its behalf in excess of the statutory limitation does not render the stockholders liable for such excess,⁴ except where they are expressly made so by statute.⁵

(7) *Debts Incurred Ultra Vires.* — Stockholders are not rendered liable for the debts of the corporation merely by the fact that such debts are beyond the power of the corporation to create;⁶ only those stockholders are bound who authorize or assent to the unauthorized acts.⁷

(8) *Fraud of Corporation.* — A stockholder is not personally liable for a fraud committed by the officers of the corporation, unless he was a party to the transaction.⁸

(9) *Dissolution of Corporation.* — In the absence of statute, the dissolution of a corporation does not convert its stockholders into partners, nor make them liable as such.⁹ But in some of the states, the statutes make stockholders in all or in certain classes of corporations liable in proportion to the stock they may respectively hold at the time of the dissolution.¹⁰ The term "dissolution" is used in the statutes, not in a technical, but in a practical sense. It is held to occur so far as the rights and remedies of the creditors are concerned whenever the corporation becomes insolvent and ceases to perform its corporate functions, even though it may have the capacity to reorganize and reinvestigate itself.¹¹

cate will not avail if the whole capital stock has not actually been paid in. *White, etc., Co. v. Jones*, 45 N. Y. App. Div. 241.

1. *Griffeth v. Green*, 129 N. Y. 517, affirming 59 Hun (N. Y.) 619. See also under the *Rhode Island* statute, *Sayles v. Brown*, 40 Fed. Rep. 8.

2. *Corporation Organized for Unlawful Business.* — *McGrew v. City Produce Exch.*, 85 Tenn. 572, 4 Am. St. Rep. 771. See also *St. Louis Stamping Co. v. Quinby*, 5 B. & A. Pat. Cas. 275, 21 Fed. Cas. No. 12,240a.

3. *Medill v. Collier*, 16 Ohio St. 599.

4. *Incurring Debts in Excess of Statutory Limitation.* — *Langan v. Iowa, etc., Constr. Co.*, 49 Iowa 317; *Raymond v. Spring Grove, etc., R. Co.*, 10 Ohio Dec. (Reprint) 416, 21 Cinc. L. Bul. 103.

5. *Lovegrove v. Hunt*, 58 Me. 9.

6. *Debts Incurred Ultra Vires.* — *Trowbridge v. Scudder*, 11 Cush. (Mass.) 83.

If a Corporation Purchases Goods for a purpose within the scope of its charter, its stockholders are not rendered liable as partners for the price of such goods by the fact that they are subsequently diverted to a purpose beyond the scope of the corporate powers. *Searight v. Payne*, 2 Tenn. Ch. 175; *Tennessee Automatic Lighting Co. v. Massey*, (Tenn. Ch. 1899) 56 S. W. Rep. 35.

7. *Kearny v. Buttle*, 1 Ohio St. 362.

8. *Liability for Fraud of Corporation.* — *Ben-ton v. Minneapolis Tailoring, etc., Co.*, 73 Minn. 498.

Misrepresentations Made by Incorporators before incorporation cannot be made the ground of an action by creditors of the corporation against the stockholders thereof. *Matthewes v. Stanford*, 17 Ga. 543.

To Render a Stockholder Personally Liab'le on the Ground of Fraud, the creditor must show that he became a creditor of the corporation, induced by something said or done by the stockholder amounting to the perpetration of a deceit on the plaintiff. *Sisson v. Matthews*, 20 Ga. 848.

A mere statement of a *bona fide* opinion is not fraud. *Searight v. Payne*, 2 Tenn. Ch. 175.

Availing Himself of His Superior Advantage by obtaining security for a debt due him by the corporation is not fraud in a stockholder. *Whitwell v. Warner*, 20 Vt. 425.

Fraud in Obtaining Charter. — An action for fraud will lie against those who certify falsely for the purpose of obtaining a charter. *Cochran v. Arnold*, 58 Pa. St. 405.

9. *Dissolution of Corporation.* — *Tarbell v. Page*, 24 Ill. 46; *Central Sav. Inst. v. Walker*, 5 Hun (N. Y.) 34, affirmed 66 N. Y. 424. See also the title DISSOLUTION OF CORPORATIONS, vol. 9, p. 605.

10. *Statutory Liability upon Dissolution.* — *Gibbs v. Davis*, 27 Fla. 531; *Grew v. Breed*, 10 Met. (Mass.) 569; *Briggs v. Penniman*, 8 Cow. (N. Y.) 387, 18 Am. Dec. 454; *Poughkeepsie Bank v. Ibbotson*, 24 Wend. (N. Y.) 473; *Slee v. Bloom*, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273.

11. *What Constitutes Dissolution.* — *Central*

2. Who Are Liable — a. IN GENERAL. — The question as to who can be held liable as a stockholder is one depending largely upon statutory provisions. It is held that these statutes must be strictly construed and cannot be extended by implication to include persons not clearly within their terms.¹ The liability has been held to extend to preferred stockholders,² married women,³ cities,⁴ and counties.⁵

b. ESTATE OF DECEASED STOCKHOLDER. — In the event of the death of a stockholder his liability, if of a contractual nature, may generally be enforced against his estate,⁶ provided the claim is made against the estate before it is finally settled and distributed.⁷ But the contrary is true where the liability imposed by statute is in the nature of a penalty.⁸ And where the only remedy prescribed by the statute is of a nature not to survive the death of the stockholder, it is held that such remedy is exclusive and that the liability cannot be enforced against the decedent's estate.⁹

c. PLEDGEE HOLDING STOCK AS COLLATERAL. — As a general rule, one who takes stock in pledge as collateral security and has it transferred to himself on the books of the company becomes subject to the same liability as other persons who hold the legal title to the stock.¹⁰ But by statute in vari-

Agricultural, etc., Assoc. v. Alabama Gold L. Ins. Co., 70 Ala. 120; Poughkeepsie Bank v. Ibbotson, 24 Wend. (N. Y.) 473; Penniman v. Briggs, Hopk. (N. Y.) 300; Briggs v. Penniman, 8 Cow. (N. Y.) 387, 18 Am. Dec. 454; Slee v. Bloom, 19 Johns. (N. Y.) 477, 10 Am. Dec. 273.

Dissolution, in the sense in which the term is used in the statute, occurs when the corporation comes into the condition of having debts and no assets, and has ceased to exercise its corporate functions, or has suffered acts to be done which end the object for which it was created. Gibbs v. Davis, 27 Fla. 531.

1. Statute Strictly Construed. — Gray v. Coffin, 9 Cush. (Mass.) 192.

2. Railroad Co. v. Smith, 48 Ohio St. 219. And see American Steel, etc., Co. v. Eddy, (Mich. 1902) 89 N. W. Rep. 952.

3. Matter of Reciprocity Bank, 22 N. Y. 9.

4. Shipley v. Terre Haute, 74 Ind. 297. And see Putnam v. New Albany, 4 Biss. (U. S.) 365.

5. Morgan County v. Allen, 103 U. S. 498.

6. Estate of Deceased Shareholder Liable — United States. — Richmond v. Irons, 121 U. S. 27; Mechanics' Sav. Bank v. Fidelity Ins., etc., Co., 87 Fed. Rep. 113; Tourtelot v. Finke, 87 Fed. Rep. 840.

Michigan. — Matter of Warren, 52 Mich. 557.

Minnesota. — Nolan v. Hazen, 44 Minn. 478. And see Markell v. Ray, 75 Minn. 138.

Missouri. — Marks v. Hardy, 86 Mo. 232; Manville v. Edgar, 8 Mo. App. 324.

New York. — Bailey v. Hollister, 26 N. Y. 112; Chase v. Lord, 77 N. Y. 1, 6 Abb. N. Cas. (N. Y.) 258; Cochran v. Wiechers, 119 N. Y. 399; Diven v. Duncan, 41 Barb. (N. Y.) 520.

Rhode Island. — New England Commercial Bank v. Newport Steam Factory, 6 R. I. 154, 75 Am. Dec. 688.

Vermont. — Barton Nat. Bank v. Atkins, 72 Vt. 33.

Wisconsin. — Gianella v. Bigelow, 96 Wis. 185.

Such Liability Does Not Constitute a Trust Fund in the estate. It stands on the same footing as any other debt of the decedent. Morse v.

Gillette, 93 Ill. App. 23; *In re Beard*, 7 Wyo. 104, 75 Am. St. Rep. 882.

Debts Created After Death of Stockholder. — In *New York* it has been held that the estate is liable even for debts contracted by the corporation after the death of the stockholder. Bailey v. Hollister, 26 N. Y. 112. But the contrary is held in *Massachusetts*. Bacon v. Pomeroy, 104 Mass. 577.

A Transfer by the Estate before the insolvency of the corporation releases its liability. Ricaud v. Wilmington Sav., etc., Co., (C. C. A.) 70 Fed. Rep. 424.

7. Claim Must Be Made Before Final Settlement. — Larkin v. Willi, 12 Mo. App. 135. But see Roeder v. Knoebel, 12 Mo. App. 587.

8. Liability in Nature of Penalty. — *Diversey v. Smith*, 103 Ill. 378, 42 Am. Rep. 14. And see Moies v. Sprague, 9 R. I. 541.

9. Statute Giving No Remedy Against Estate. — Dane v. Dane Mfg. Co., 14 Gray (Mass.) 488; Cummings v. Wright, 11 Mo. App. 348; Donnelly v. Hodgson, 14 Mo. App. 548; Moies v. Sprague, 9 R. I. 541.

10. Pledgee Liable — England. — Price's Case, 3 De G. & Sm. 146; *In re Asiatic Banking Corp.*, L. R. 7 Eq. 91, L. R. 4 Ch. 252; *In re Land Credit Co.*, L. R. 8 Ch. 831.

United States. — Pullman v. Upton, 96 U. S. 328; Germania Nat. Bank v. Case, 99 U. S. 628; Moore v. Jones, 3 Woods (U. S.) 53; National Foundry, etc., Works v. Oconto Water Co., 68 Fed. Rep. 1006.

Alabama. — National Commercial Bank v. McDonnell, 92 Ala. 387.

Connecticut. — Ball Electric Light Co. v. Child, 68 Conn. 522.

Illinois. — Wheelock v. Kost, 77 Ill. 296; Melvin v. Lamar Ins. Co., 80 Ill. 446, 22 Am. Rep. 199.

Indiana. — Koons v. Jeffersonville First Nat. Bank, 89 Ind. 178, 3 Am. & Eng. Corp. Cas. 176.

Iowa. — Hale v. Walker, 31 Iowa 344, 7 Am. Rep. 137; Calumet Paper Co. v. Stotts Invest. Co., 96 Iowa 147, 59 Am. St. Rep. 362.

Louisiana. — Haynes v. Palmer, 13 La. Ann. 240.

Maryland. — Magruder v. Colston, 44 Md.

ous jurisdictions pledgees are exempted from liability.¹ And in some cases they have been held liable only where their character as pledgees did not appear on the books of the company.²

d. STOCK HELD IN FIDUCIARY CAPACITY — Holder of Legal Title Liable. — Under some statutes the person in whose name the stock stands on the books of the company is liable to creditors although he is not the real owner.³ But it has been held that he is not liable where the books of the company show that the stock is held in a fiduciary capacity,⁴ or where judgment has already been recovered against the person admitted to be the true owner.⁵ And one holding stock in a fiduciary capacity will not be held responsible as a stockholder where not within the contemplation of the statute creating the liability.⁶ Where the holder of the legal title is held liable he may recover over against the real owner.⁷

Equitable Owner Held Liable. — Under some statutes the equitable owner of stock standing in another's name can be held liable to creditors of the corporation.⁸

349, 22 Am. Rep. 47. But compare *Matthews v. Albert*, 24 Md. 527.

Massachusetts. — *Barre First Nat. Bank v. Hingham Mfg. Co.*, 127 Mass. 563; *Dickinson v. Central Nat. Bank*, 129 Mass. 279, 37 Am. Rep. 351; *Crease v. Babcock*, 10 Met. (Mass.) 525; *Holyoke Bank v. Burnham*, 11 Cush. (Mass.) 183; *Johnson v. Somerville Dyeing, etc., Co.*, 15 Gray (Mass.) 216; *Grew v. Breed*, 10 Met. (Mass.) 569.

Missouri. — *Bagley v. Tyler*, 43 Mo. App. 195. *New York.* — *Rosevelt v. Brown*, 11 N. Y. 148; *U. S. Trust Co. v. U. S. Fire Ins. Co.*, 18 N. Y. 199; *Richardson v. Abendroth*, 43 Barb. (N. Y.) 162; *Adderly v. Storm*, 6 Hill (N. Y.) 624.

Pennsylvania. — *Aultman's Appeal*, 98 Pa. St. 505.

Wisconsin. — *Sleeper v. Goodwin*, 67 Wis. 579.

As Between the Parties to the transaction the pledgee is not liable for calls on the stock. *Biggio v. Sandheger*, 10 Ohio Dec. 316.

Where the Pledgee Retained the Stock After the Payment of the Loan for the purpose of selling it, he was held to be the legal holder and liable as such. *Ersine v. Lowenstein*, 11 Mo. App. 595.

Where Stock Was Pledged to a Corporation and was transferred on the books to the president of such corporation, it was held that the corporation could not be held liable as a stockholder unless the transfer to the president had been authorized or ratified by the directors as a transfer to the corporation, which was a question for the jury. *Anderson v. Philadelphia Warehouse Co.*, 4 Fed. Rep. 130.

A Transfer by the Pledgee Terminates His Liability, though made for that very purpose. *Holyoke Bank v. Burnham*, 11 Cush. (Mass.) 183.

1. Pledgee Exempted by Statute. — *Burgess v. Seligman*, 107 U. S. 20; *Beal v. Essex Sav. Bank*, (C. C. A.) 67 Fed. Rep. 816; *Borland v. Nevada Bank*, 99 Cal. 89, 37 Am. St. Rep. 32; *Matthews v. Albert*, 24 Md. 527; *Union Sav. Assoc. v. Seligman*, 92 Mo. 635, 1 Am. St. Rep. 776; *McMahon v. Macy*, 51 N. Y. 155.

Holders of Stock Issued Directly as Collateral are not liable thereon as stockholders unless they have permitted themselves to be held out in that character and thus have induced creditors

to extend credit to the corporation. *Andrews v. National Foundry, etc., Works*, (C. C. A.) 76 Fed. Rep. 166. See also *Sturtevant v. National Foundry, etc., Works*, (C. C. A.) 88 Fed. Rep. 613. But see *Griswold v. Seligman*, 72 Mo. 110; *Fisher v. Seligman*, 75 Mo. 13.

2. Not Liable if Character Shown by Books. — *Pauly v. State L. & T. Co.*, 58 Fed. Rep. 666; *Davis v. Essex First Baptist Soc.*, 44 Conn. 582; *Barre First Nat. Bank v. Hingham Mfg. Co.*, 127 Mass. 563.

3. Holder of Legal Title Liable. — *Richmond v. Irons*, 121 U. S. 27; *Hawkins v. Glenn*, 131 U. S. 319; *Baines v. Babcock*, 95 Cal. 581; *Baines v. Story*, (Cal. 1891) 27 Pac. Rep. 676, affirmed (Cal. 1892) 30 Pac. Rep. 777; *Morse v. Pacific R. Co.*, 93 Ill. App. 33; *Biggio v. Sandheger*, 10 Ohio Dec. 316; *Allibone v. Hager*, 46 Pa. St. 48.

The Trustee, and Not the Beneficiary of stock transferred in trust, is liable after transfer. *In re Humber Ironworks, etc., Co.*, 1 Ch. D. 576.

The Oregon Statute is held to apply only to holders of the legal title, and under it equitable owners cannot be held liable by creditors of the corporation. *Branson v. Oregonian R. Co.*, 10 Oregon 278.

4. Biggio v. Sandheger, 10 Ohio Dec. 316. And see *In re West Hartlepool Iron Co.*, 1 Ch. D. 664.

5. Yardley v. Wilgus, 56 Fed. Rep. 965.

6. An Assignee in Bankruptcy cannot be held liable where he has never accepted the stock nor consented to become a stockholder. *American File Co. v. Garrett*, 110 U. S. 288.

So of an Assignee in Insolvency under the Massachusetts statute. *Gray v. Coffin*, 9 Cush. (Mass.) 192.

So of an Executor who takes stock in his own name, as executor, in accordance with the directions of the will, under Stat. Minn. (1894), § 3410. *Markell v. Ray*, 75 Minn. 138.

7. Morse v. Pacific R. Co., 93 Ill. App. 33; *Stover v. Flack*, 30 N. Y. 64.

A Trustee may compel his beneficiary to indemnify him against calls. *Hemming v. Maddick*, L. R. 7 Ch. 395.

8. Lloyd v. Preston, 146 U. S. 630 (construing the Ohio statute). And see *supra*, this subsection, *Estate of Deceased Stockholder*.

The Land of an Infant in the hands of a

e. SHOWING CHARACTER AS STOCKHOLDER — (1) *Necessity for Proof.* — In order to hold a person liable as a stockholder, it must be plainly made to appear that he is such, by showing either that he actually subscribed to the stock of the company or that he so acted as to estop himself from denying that he is a stockholder.¹ But if it be shown that the defendant was one of the original stockholders, he will be presumed to have continued so unless the contrary is shown.²

(2) *Sufficiency of Proof.* — To make one a stockholder, and liable as such, it is not essential that a certificate should have been issued to him, the certificate being a mere evidence of property;³ nor is it necessary that he should have made any payments on his shares, since the corporation has a right to give him credit for his stock.⁴ It is sufficient to show that the company agreed that the defendant should be entitled to a certain number of shares and that he agreed to take and pay for them,⁵ provided such contracts were not canceled by mutual consent before the formation of the company;⁶ and mere irregularities in the mode of becoming a stockholder cannot avail the indi-

guardian is liable on stock held by the guardian for the infant. *Mansur v. Pratt*, 101 Mass. 60.

An Estate in the Hands of a Trustee is liable on stock belonging thereto, and no liability attaches to the trustee, under the *Massachusetts* statute. *Stedman v. Eveleth*, 6 Met. (Mass.) 114.

In England the trustee is ordinarily held liable, but if there is no *bona fide* trusteeship the beneficiary does not escape liability. *Matter of Companies Act*, 4 De G. J. & S. 53, 33 L. J. Ch. 145.

Who Is Not Equitable Owner. — An agent with authority to take stock in pledge cannot be held liable as an equitable owner where, relying on the statements of the holder of the legal title, he exceeds his authority and takes the stock in payment, there having been no transfer on the books of the company, and the transaction having been immediately repudiated by his principal. *Aspinwall v. Torrance*, 1 Lans. (N. Y.) 381.

1. Must Be Shown to Be Stockholder. — *Steel v. Dunne*, 65 Ill. 298; *Harrison Nat. Bank v. Votaw*, 51 Kan. 362; *Powell v. Eldred*, 39 Mich. 552. And see *McAdams v. Boyer*, 37 Fed. Rep. 73.

Finding of Jury Conclusive. — *Glenn v. Sumner*, 132 U. S. 152.

A Conditional Subscription Does Not per Se Render One a Stockholder. — *Stearns v. Sopris*, 4 Colo. App. 191.

Policy Holder Not Stockholder in Insurance Company. — *Farmers', etc., Ins. Co. v. Smith*, 63 Ill. 187.

An Agreement to Make a Future Purchase of stock does not make the signer liable as a stockholder where no action was ever taken on such agreement. *U. S. Wind-Engine, etc., Co. v. Davies*, 2 Kan. App. 611.

A Corporation Which Had Invested in Stock Ultra Vires was held not liable as a stockholder. *Wilbur v. Stockholders*, 18 Nat. Bankr. Reg. 178, 29 Fed. Cas. No. 17,636.

2. Herries v. Wesley, 13 Hun (N. Y.) 492. See also the title **PRESUMPTIONS**, vol. 22, p. 1240.

3. United States. — *Hawley v. Upton*, 102 U. S. 314.

California. — *Mitchell v. Beckman*, 64 Cal. 117.

Illinois. — *Corwith v. Culver*, 69 Ill. 502.

Massachusetts. — *Hawes v. Anglo-Saxon Petroleum Co.*, 101 Mass. 385.

Minnesota. — *Holland v. Duluth Iron Min., etc., Co.*, 65 Minn. 324, 60 Am. St. Rep. 480.

Missouri. — *Kimball v. Davis*, 52 Mo. App. 194.

New York. — *Burr v. Wilcox*, 22 N. Y. 551, affirming 6 Bosw. (N. Y.) 198; *Wheeler v. Millar*, 90 N. Y. 353. And see *Hallett v. Metropolitan Messenger Co.*, 69 N. Y. App. Div. 258.

Ohio. — *Royce v. Tyler*, 1 Ohio Cir. Dec. 428, 2 Ohio Cir. Ct. 175.

Texas. — *Mathis v. Pridham*, 1 Tex. Civ. App. 58.

And see *supra*, this title, *Definition and Nature of Corporate Stock* — *Certificates of Stock*.

As to Stock "Issued and Outstanding" within Laws N. Y. 1892, c. 688, § 54, see *Hallett v. Metropolitan Messenger Co.*, 69 N. Y. App. Div. 258.

The Nonissuance of a Certificate to one stockholder is no defense to other stockholders whose certificates were duly issued to them. *Hallett v. Metropolitan Messenger Co.*, 69 N. Y. App. Div. 258.

4. Payments on Stock Not Essential. — *Mitchell v. Beckman*, 64 Cal. 117; *Wheeler v. Millar*, 90 N. Y. 353; *Spear v. Crawford*, 14 Wend. (N. Y.) 29, 28 Am. Dec. 513. But see *Hayne v. Beauchamp*, 5 Smed. & M. (Miss.) 515.

5. Agreement Between Company and Individual Sufficient. — *Mitchell v. Beckman*, 64 Cal. 117; *Corwith v. Culver*, 69 Ill. 502; *Kimball v. Davis*, 52 Mo. App. 194; *Wheeler v. Millar*, 90 N. Y. 353; *Spear v. Crawford*, 14 Wend. (N. Y.) 20, 28 Am. Dec. 513; *Powers v. Knapp*, 71 Hun (N. Y.) 371.

Destruction of Subscription List. — *Pickering v. Templeton*, 2 Mo. App. 424.

6. Royce v. Tyler. 1 Ohio Cir. Dec. 428, 2 Ohio Cir. Ct. 175; *Balfour v. Baker City Gas, etc., Co.*, 27 Oregon 300.

A Subscriber Who Cancels His Subscription before the company begins to do business is not liable as a stockholder. *Alling v. Wenzell*, 35 Ill. App. 246; *Biggio v. Sandheger*, 10 Ohio Dec. 316.

vidual if the corporation has waived the informalities and recognized him as a stockholder.¹ The fact that a person's name appears on the stock book is *prima facie* proof that he is a stockholder, the burden being on him to disprove it,² but his liability depends, not on whether the stock book shows him to be a stockholder, but on whether he is such in fact.³

(3) *Estoppel to Deny.* — One may make himself liable as a stockholder not only by formal subscription but also by his conduct in relation to the corporation and its stock. If, with full knowledge of the facts, he has dealt with the corporation as such, and has allowed himself to be held out as a stockholder, he is estopped to deny either the legal existence of the corporation or his own character as a stockholder therein.⁴ But it is held that if the stock issued to him is absolutely void, he is not estopped to deny his liability as a stockholder.⁵

f. EFFECT OF TRANSFER — (1) *Liability of Transferrer* — (a) *In General.* — It is well settled that, in the absence of any statute to the contrary, a regular and *bona fide* transfer, made at a time when the corporation is solvent and assented to by the corporation, relieves the transferrer from further liability for unpaid subscriptions.⁶

1. Holyoke Bank v. Goodman Paper Mfg. Co., 9 Cush. (Mass.) 576.

What Is Sufficient Subscription. — Hawley v. Upton, 102 U. S. 314; Fry v. Lexington, etc., R. Co., 2 Met. (Ky.) 314.

Sufficient Proof of Subscription. — Ross v. Gold Hill Bank, 20 Nev. 191.

2. Hammond v. Straus, 53 Md. 1; Holland v. Duluth Iron Min., etc., Co., 65 Minn. 324, 60 Am. St. Rep. 480. And see *supra*, this title, *Who Are Stockholders — Evidence.*

3. White v. Marquardt, 105 Iowa 145.

The Stock Book Is Not the Only Evidence of who are stockholders. Herries v. Wesley, 13 Hun (N. Y.) 492.

4. *Estoppel to Deny Character as Stockholder* — *United States.* — Keyser v. Hitz, 133 U. S. 138; Upton v. Hansbrough, 3 Biss. (U. S.) 417; Brown v. Finn, 34 Fed. Rep. 124.

Alabama. — Lehman v. Warner, 61 Ala. 455.

California. — Tulare Sav. Bank v. Talbot, 131 Cal. 45.

Connecticut. — Johnston v. Allis, 71 Conn. 207.

Illinois. — Boggs v. Olcott, 40 Ill. 303.

Iowa. — Tuthill Spring Co. v. Smith, 90 Iowa 331.

Louisiana. — Jackson F. & M. Ins. Co. v. Walle, 105 La. 89.

Michigan. — Bissell v. Heath, 98 Mich. 472; Foster v. Row, 120 Mich. 1, 77 Am. St. Rep. 565.

Minnesota. — Olson v. State Bank, 67 Minn. 267; Blien v. Rand, 77 Minn. 110.

Missouri. — Griswold v. Seligman, 72 Mo. 110; Fisher v. Seligman, 75 Mo. 13.

Montana. — Kelly v. Clark, 21 Mont. 291.

Nevada. — Ross v. Gold Hill Bank, 20 Nev. 191.

New York. — Herries v. Wesley, 13 Hun (N. Y.) 492; Dayton v. Borst, 7 Bosw. (N. Y.) 115. And see Buffalo, etc., R. Co. v. Gifford, 87 N. Y. 294.

Ohio. — Gaff v. Flesher, 33 Ohio St. 107; Ryan v. Miami Valley R. Co., 6 Ohio Dec. (Reprint) 1071, 10 Am. L. Rec. 263; Biggio v. Sandheger, 10 Ohio Dec. 316.

Pennsylvania. — McHose v. Wheeler, 45 Pa. St. 32.

Wisconsin. — Heinze v. South Green Bay Land, etc., Co., 109 Wis. 99.

Stockholder Estopped to Deny Eligibility to Membership. — Blien v. Rand, 77 Minn. 110.

Where Whole Capital Stock Has Not Been Subscribed. — If there has been no act or participation on the stockholder's part on the faith of which debts have been contracted, he is not estopped from setting up that the whole capital stock has not been subscribed, that being a prerequisite to the attaching of his liability. Garling v. Baechtel, 41 Md. 305.

5. Scovill v. Thayer, 105 U. S. 143; Tschumi v. Hills, 6 Kan. App. 549.

6. *Transfer Relieves from Subscription Liability* — *England.* — Huddersfield Canal Co. v. Buckley, 7 T. R. 36; *In re* Smith, L. R. 4 Ch. 20; *In re* European Bank, L. R. 7 Ch. 292, 41 L. J. Ch. 501. But see *Watson v. Eales*, 23 Beav. 294.

Canada. — McKenzie v. Kittridge, 24 U. C. C. P. 1; Provincial Ins. Co. v. Shaw, 19 U. C. Q. B. 533.

United States. — Burke v. Smith, 16 Wall. (U. S.) 390; Johnston v. Laffin, 103 U. S. 800; Ricaud v. Wilmington Sav., etc., Co., (C. C. A.) 70 Fed. Rep. 424.

Alabama. — Allen v. Montgomery R. Co., 11 Ala. 437.

Georgia. — Fouche v. Merchants' Nat. Bank, 110 Ga. 827.

Iowa. — Davenport First Nat. Bank v. Gifford, 47 Iowa 575.

Kansas. — Van Demark v. Barons, 52 Kan. 779; Merrill v. Meade, 6 Kan. App. 620.

Louisiana. — Haynes v. Palmer, 13 La. Ann. 240.

Massachusetts. — Brigham v. Mead, 10 Allen (Mass.) 245; Bond v. Appleton, 8 Mass. 472, 5 Am. Dec. 111; Leland v. Marsh, 16 Mass. 389. And see Holyoke Bank v. Burnham, 11 Cush. (Mass.) 183.

Michigan. — Foster v. Row, 120 Mich. 1, 77 Am. St. Rep. 565.

Minnesota. — *In re* People's Live Stock Ins. Co., 56 Minn. 180.

Missouri. — Chouteau Spring Co. v. Harris, 20 Mo. 382; Miller v. Great Republic Ins. Co.,

Transfer to Escape Liability. —In the *United States* the doctrine seems to be well established that a shareholder in a corporation which is insolvent or verging on insolvency cannot avoid his liability to the corporate creditors by a transfer, made for that purpose, to an irresponsible person.¹ In *England*, however, while some of the cases hold that a colorable transfer, made with reservation and to escape liability, cannot be upheld,² it seems to be the generally accepted rule that if the transfer is real and substantial, and without reservation, it will be supported although the object of the transferer be to avoid his liability as a stockholder.³

50 Mo. 55; *Alexander v. Rollins*, 14 Mo. App. 109; *Simmons v. Dent*, 16 Mo. App. 288.

New York. — *Isham v. Buckingham*, 49 N. Y. 216; *Wakefield v. Fargo*, 90 N. Y. 213; *Billings v. Robinson*, 94 N. Y. 415, 28 Hun (N. Y.) 122; *Cowles v. Cromwell*, 25 Barb. (N. Y.) 413; *Cole v. Ryan*, 52 Barb. (N. Y.) 168.

Ohio. — *Gilmore v. Cincinnati Bank*, 8 Ohio 62; *Porter v. Laws*, 5 Ohio Dec. (Reprint) 582, 6 Am. L. Rec. 756; *Hardman v. Cincinnati, etc., R. Co.*, 9 Ohio Dec. (Reprint) 578, 15 Cinc. L. Bul. 164.

Tennessee. — *Jackson v. Sligo Man., etc., Co.*, 1 Lea (Tenn.) 210.

Texas. — *Cole v. Adams*, 19 Tex. Civ. App. 507.

Washington. — *Stewart v. Walla Walla Printing, etc., Co.*, 1 Wash. 521.

Contra, *Messersmith v. Sharon Sav. Bank*, 96 Pa. St. 440.

A Transfer from Husband to Wife, made in good faith and while the corporation is solvent, relieves the husband of liability if the wife is capable of becoming a stockholder under the laws of the state. *Simmons v. Dent*, 16 Mo. App. 288.

Transfer After Call Does Not Relieve Transferrer. — *North American Colonial Assoc. v. Bentley*, 15 Jur. 187, 19 L. J. Q. B. 427.

So a transfer does not relieve from liability for a call which should properly have been made before the transfer, but which was postponed by the directors. *In re National Provincial Marine Ins. Co.*, L. R. 5 Ch. 559.

A By-law Forbidding Transfer by a Corporate Debtor cannot be waived by the corporation as against a creditor. *In re Bachman*, 12 Nat. Bankr. Reg. 223, 2 Fed. Rep. Cas. No. 707.

A Failure of Directors to Assent to the transfer will prevent the liability from divesting though the stockholder has used every effort to transfer. *Chartre's Case*, 1 De G. & Sm. 581.

1. Transfer to Escape Liability Voidable by Creditors — *England.* — *Arthur v. Midland R. Co.*, 3 Kay & J. 204; *Matter of Companies Act*, 4 De G. J. & S. 53; *In re Hercules Ins. Co.*, L. R. 13 Eq. 566.

United States. — *Bowden v. Johnson*, 107 U. S. 251; *Richmond v. Irons*, 121 U. S. 27; *Bowden v. Santos*, 1 Hughes (U. S.) 158; *Stuart v. Hayden*, (C. C. A.) 72 Fed. Rep. 402; *Foster v. Lincoln*, (C. C. A.) 79 Fed. Rep. 170; *Ward v. Joslin*, 100 Fed. Rep. 676.

Alabama. — *Central Agricultural, etc., Assoc. v. Alabama Gold L. Ins. Co.*, 70 Ala. 120, 3 Am. & Eng. Corp. Cas. 78.

California. — *National Carriage Mfg. Co. v.*

Story, etc., Co., 111 Cal. 531; *Welch v. Sargent*, 127 Cal. 72.

Connecticut. — *Paine v. Stewart*, 33 Conn. 517.

Illinois. — *Florsheim v. Illinois Trust, etc., Bank*, 192 Ill. 382, affirming 93 Ill. App. 297; *Tuttle v. National Bank*, 48 Ill. App. 481.

Kentucky. — *Castleman v. Holmes*, 4 J. J. Marsh. (Ky.) 1.

Louisiana. — *Mandion v. Firemen's Ins. Co.*, 11 Rob. (La.) 177.

Maryland. — *Rider v. Morrison*, 54 Md. 429.

Michigan. — *May v. McQuillan*, 129 Mich. 392.

Missouri. — *McClaren v. Franciscus*, 43 Mo. 452; *Provident Sav. Inst. v. Jackson Place Skating, etc., Rink*, 52 Mo. 557; *Tredway v. St. Louis Commercial Agency*, 13 Mo. App. 582; *Gottschalk v. Stover*, 85 Mo. App. 566.

New York. — *Nathan v. Whitlock*, 9 Paige (N. Y.) 152, 3 Edw. (N. Y.) 215; *Sinclair v. Fuller*, 9 N. Y. App. Div. 297; *Veiller v. Brown*, 18 Hun (N. Y.) 571; *Billings v. Robinson*, 28 Hun (N. Y.) 122.

Pennsylvania. — *Everhart v. West Chester, etc., R. Co.*, 28 Pa. St. 339; *Aultman's Appeal*, 98 Pa. St. 505; *Burt v. Real Estate Exch.*, 175 Pa. St. 619, 52 Am. St. Rep. 858. And see *Modern L. Ins., etc., Co. v. Keller*, 3 Pa. Co. Ct. 118.

South Dakota. — *South Bend Toy Mfg. Co. v. Pierre F. & M. Ins. Co.*, 4 S. Dak. 173.

Texas. — *Nenny v. Waddill*, 6 Tex. Civ. App. 244.

Vermont. — *Dauchy v. Brown*, 24 Vt. 210.

An Assignment to a Fictitious Person is a mere nullity. *Muskingum Valley Turnpike Co. v. Ward*, 13 Ohio 127, 42 Am. Dec. 191.

2. Colorable Transfers Not Upheld. — *In re Mexican, etc., Min. Co.*, 27 Beav. 465, 28 L. J. Ch. 628; *Matter of Mexican, etc., Co.*, 1 De G. F. & J. 75, 29 L. J. Ch. 243; *Matter of Mexican, etc., Co.*, 2 De G. F. & J. 302, 30 L. J. Ch. 113; *Ex p. Alexander*, 9 W. R. 410, 3 L. T. N. S. 883; *Chinnock's Case*, Johns. Ch. (Eng.) 714, 8 W. R. 255. See also *In re Imperial Mercantile Credit Assoc.*, L. R. 9 Eq. 223; *Colquhoun v. Courtenay*, 43 L. J. Ch. 338.

A Transfer to One Without Means has been held not in good faith. *Ex p. Hatton*, 31 L. J. Ch. 340, 10 W. R. 313; *Matter of Electric Tel. Co.*, 3 De G. F. & J. 297, 30 Beav. 143.

3. Transfers Upheld Though to Escape Liability. — *Matter of Mexican, etc., Co.*, 4 De G. F. & J. 544; *Matter of Mexican, etc., Co.*, 2 De G. F. & J. 302; *Ex p. Jessop*, 27 L. J. Ch. 757; *In re Hindustan Bank*, L. R. 6 Ch. 286; *Colquhoun v. Courtenay*, 43 L. J. Ch. 338, 29 L. T. N. S. 877; *In re Wheel Unity Wood Min. Co.*, 15 Ch. D. 13; *In re Smith*, L. R. 4 Ch. 20. See also

(b) *As Affected by Statute.*—The liability of one who has transferred his stock is largely controlled by statute in most jurisdictions. Under some of these statutes it is held that a *bona fide* transfer to a solvent transferee cuts off any liability on the part of the transferor.¹ But under other statutes the transferor is held liable as to debts which were contracted by the corporation while he was a stockholder,² although as to debts incurred subsequently to the transfer he will not be held liable,³ unless he is guilty of fraud.⁴

(2) *Liability of Transferee*—(a) *In General.*—A transferee of stock, who takes it with notice that, although nominally full paid, it is not so in fact, assumes the liability of the original subscriber to creditors of the corporation for the unpaid amount.⁵ But it is held that one who purchases, without

In re European Bank, L. R. 7 Ch. 292; *Hakim's Case*, L. R. 7 Ch. 296, note; *Bishop's Case*, L. R. 7 Ch. 296, note; *In re Humber Ironworks, etc., Co.*, 1 Ch. D. 576; *In re Great Wheel Busy Min. Co.*, L. R. 6 Ch. 196; *In re Taurine Co.*, 25 Ch. D. 118; *Moore v. McLaren*, 11 U. C. C. P. 534; *Battie's Case*, 39 L. J. Ch. 391; *Matter of Electric Tel. Co.*, 2 De G. F. & J. 275; *Case v. McClellan*, 25 L. T. N. S. 753; *Re Hafod Lead Min. Co.*, 35 Beav. 391, 35 L. J. Ch. 304; *East of England Banking Co.*, 2 Drew & Sm. 452.

A Gift of Stock, although made with the purpose of escaping liability, was upheld. *In re European Bank*, L. R. 7 Ch. 292, 41 L. J. Ch. 501, reversing 25 L. T. N. S. 582.

1. Transfer Relieves Transferor of Liability—*Connecticut*.—*Middletown Bank v. Magill*, 5 Conn. 28; *Deming v. Bull*, 10 Conn. 409.

Georgia.—*Fouche v. Merchants' Nat. Bank*, 110 Ga. 827.

Kansas.—*Van Demark v. Barons*, 52 Kan. 779.

Maine.—*Longley v. Little*, 26 Me. 162.

Massachusetts.—*Bond v. Appleton*, 8 Mass. 472, 5 Am. Dec. 111; *Leland v. Marsh*, 16 Mass. 389; *Child v. Coffin*, 17 Mass. 64; *Marcy v. Clark*, 17 Mass. 330; *Ripley v. Sampson*, 10 Pick. (Mass.) 371.

Michigan.—*Foster v. Row*, 120 Mich. 1, 77 Am. St. Rep. 565.

Missouri.—*McClaren v. Franciscus*, 43 Mo. 452; *Skrainka v. Allen*, 76 Mo. 384.

Wisconsin.—*Cleveland v. Burnham*, 55 Wis. 598.

A Bona Fide Gift of Bank Stock made before the bank becomes insolvent relieves the donor of liability. *Foster v. Row*, 120 Mich. 1, 77 Am. St. Rep. 565.

2. Liable for Debts Contracted Before Transfer—*Illinois*.—*Fuller v. Ledden*, 87 Ill. 310; *Hull v. Burtis*, 90 Ill. 213; *Alling v. Wenzel*, 133 Ill. 264.

Iowa.—*White v. Greene*, (Iowa 1897) 70 N. W. Rep. 182, 105 Iowa 176.

Massachusetts.—*Mill Dam Foundry v. Hovey*, 21 Pick. (Mass.) 417; *Holyoke Bank v. Burnham*, 11 Cush. (Mass.) 183; *Johnson v. Somerville Dyeing, etc., Co.*, 15 Gray (Mass.) 216.

Michigan.—*Voigt v. Dregge*, 97 Mich. 322; *Macomber v. Wright*, 108 Mich. 109.

Minnesota.—*Gunnison v. U. S. Invest. Co.*, 70 Minn. 292.

Missouri.—*Glenn v. Hunt*, 120 Mo. 330.

Nebraska.—*Commercial Nat. Bank v. Gibson*, 37 Neb. 750.

Ohio.—*Brown v. Hitchcock*, 36 Ohio St.

667; *Mason v. Alexander*, 44 Ohio St. 318; *Newberry v. Alexander*, 44 Ohio St. 346; *Herrick v. Wardwell*, 58 Ohio St. 294; *Boice v. Hodge*, 51 Ohio St. 236, 46 Am. St. Rep. 569; *Wick Nat. Bank v. Union Nat. Bank*, 62 Ohio St. 446, 78 Am. St. Rep. 734; *Wehrman v. Reakirt*, 1 Cinc. Supm. Ct. 237; *Painesville Nat. Bank v. King Varnish Co.*, 4 Ohio Cir. Dec. 511, 8 Ohio Cir. Ct. 563; *Gates v. Tippecanoe Stone Co.*, 6 Ohio Cir. Dec. 23, 9 Ohio Cir. Ct. 99; *Biles v. Charles S. Looker Co.*, 9 Ohio Cir. Dec. 685, 17 Ohio Cir. Ct. 538; *Kilgour v. Pendleton St. R. Co.*, 8 Ohio Dec. (Reprint) 453, 8 Cinc. L. Bul. 23.

Oregon.—*Ladd v. Cartwright*, 7 Oregon 329; *Branson v. Oregonian R. Co.*, 10 Oregon 278; *Hawkins v. Citizens' Real-Estate, etc., Co.*, 38 Oregon 544.

Rhode Island.—*Sayles v. Bates*, 15 R. I. 342.

Tennessee.—*Jackson v. Meek*, 87 Tenn. 69, 10 Am. St. Rep. 620.

Under the Virginia Statute a subscriber who does not fully pay for his stock remains liable for the unpaid amount notwithstanding a transfer of his shares. *Glenn v. Scott*, 28 Fed. Rep. 804.

3. Debts Incurred After Transfer—*California*.—*Yule v. Bishop*, 133 Cal. 574.

Maryland.—*Matthews v. Albert*, 24 Md. 527. *New York*.—*Tucker v. Gilman*, 121 N. Y. 189; *Close v. Brady*, (Buffalo Super. Ct. Gen. T.) 4 Misc. (N. Y.) 474.

Ohio.—*Peter v. Union Mfg. Co.*, 56 Ohio St. 181; *Taylor v. West Liberty Wheel Co.*, 6 Ohio Dec. (Reprint) 947, 9 Am. L. Rec. 28.

Pennsylvania.—*Fuller, etc., Co. v. Brereton*, 29 Pittsb. Leg. J. N. S. (Pa.) 366.

Rhode Island.—*New England Commercial Bank v. Newport Steam Factory*, 6 R. I. 154, 75 Am. Dec. 688; *Demelman v. Brown*, 23 R. I. 596.

McBryan v. Universal Elevator Co., (Mich. 1902) 89 N. W. Rep. 683. See also *Pioneer Fuel Co. v. St. Peter St. Imp. Co.*, 64 Minn. 386.

5. Transferee Liable for Unpaid Amount—*England*.—*Huddersfield Canal Co. v. Buckley*, 7 T. R. 36; *In re Veuve Monnier et ses Fils*, (1896) 2 Ch. 525.

United States.—*Upton v. Tribilcock*, 91 U. S. 45; *Webster v. Upton*, 91 U. S. 65; *Pullman v. Upton*, 96 U. S. 328; *Upton v. Hansbrough*, 3 Biss. (U. S.) 417; *Moore v. Jones*, 3 Woods (U. S.) 53; *Myers v. Seeley*, 10 Nat. Bankr. Reg. 411, 17 Fed. Cas. No. 9,994; *Wilbur v. Stockholders*, 18 Nat. Bankr. Reg. 178, 29 Fed. Cas. No. 17,636.

notice or anything to put him on inquiry, stock purporting to be full paid and nonassessable, cannot be held liable unless made so by statute, for the unpaid amount of such stock is in fact not fully paid up.¹ And a *bona fide* transferee without notice cannot generally be held liable by corporate creditors for the par value of shares originally issued for an overvalued consideration;² nor does any liability attach to one to whom shares are transferred without his knowledge unless he performs some act of ratification.³

(b) **As Affected by Statute.**—In most jurisdictions the liability of transferees

Connecticut.—Hartford, etc., R. Co. v. Boorman, 12 Conn. 530.

Georgia.—Fouche v. Merchants' Nat. Bank, 110 Ga. 827.

Illinois.—Alling v. Wenzel, 133 Ill. 264; Coleman v. Howe, 154 Ill. 458, 45 Am. St. Rep. 133; Higgins v. Illinois Trust, etc., Bank, 193 Ill. 394, affirming 96 Ill. App. 29; Foote v. Illinois Trust, etc., Bank, 194 Ill. 600; Trendley v. St. Louis, etc., Rapid Transit Co., 84 Ill. App. 109; Rogan v. Illinois Trust, etc., Bank, 93 Ill. App. 39.

Iowa.—Wishard v. Hansen, 99 Iowa 307, 61 Am. St. Rep. 238.

Maine.—Libby v. Tobey, 82 Me. 397, 31 Am. & Eng. Corp. Cas. 526.

Maryland.—Hall v. U. S. Insurance Co., 5 Gill (Md.) 484; Bend v. Susquehanna Bridge, etc., Co., 6 Har. & J. (Md.) 128, 14 Am. Dec. 261.

Massachusetts.—Brigham v. Mead, 10 Allen (Mass.) 245.

Michigan.—Merrimac Min. Co. v. Bagley, 14 Mich. 501.

Minnesota.—Basting v. Northern Trust Co., 61 Minn. 307; *In re* People's Live Stock Ins. Co., 56 Minn. 180; Oswald v. Minneapolis Times Co., 65 Minn. 249.

Missouri.—Shickle v. Watts, 94 Mo. 410.

New York.—Mann v. Currie, 2 Barb. (N. Y.) 204; Close v. Sherwood, (Buffalo Super. Ct. Gen. T.) 5 Misc. (N. Y.) 550.

Ohio.—Brown v. Hitchcock, 36 Ohio St. 667.

Oregon.—Ladd v. Cartwright, 7 Oregon 329.

Pennsylvania.—Merrimac Min. Co. v. Levy, 54 Pa. St. 227, 93 Am. Dec. 697.

See also *Matter of Monmouthshire, etc., Banking Co.*, 2 De G. M. & G. 562; *Matter of Mexican, etc., Co.*, 4 De G. & J. 544; *Thebus v. Smiley*, 110 Ill. 316; *Briggs v. Waldron*, 83 N. Y. 582.

Transfer After Insolvency of Corporation Held Liable.—Robison v. Beall, 26 Ga. 17.

Where Not Required by Act of Incorporation.—In *Pennsylvania* it has been held that a transferee of stock, subject to future calls, is not personally liable for such unpaid instalments if the act of incorporation does not require it. *Palmer v. Ridge Min. Co.*, 34 Pa. St. 288.

If the Capital Stock Is Full Paid, a transferee incurs no liability, as for unpaid subscription, although he himself did not pay full value for it. *Davis v. Montgomery Furnace, etc., Co.*, 101 Ala. 127. See also *Alling v. Wenzel*, 133 Ill. 264.

1. **Innocent Transferee Not Liable.**—Cleveland Rolling-Mill Co. v. Texas, etc., R. Co., 27 Fed. Rep. 250; *Rood v. Whorton*, 67 Fed. Rep. 434; *Dunn v. Howe*, 96 Fed. Rep. 160; *White v. Greene*, (Iowa 1897) 70 N. W. Rep. 182; *Morgan v. Howland*, 89 Me. 484; *Johnson v. Lull-*

man, 88 Mo. 567; *Keystone Bridge Co. v. McCluney*, 8 Mo. App. 496; *Erskine v. Lowenstein*, 11 Mo. App. 595; *Paterson v. Arnold*, 45 Pa. St. 410; *Messersmith v. Sharon Sav. Bank*, 96 Pa. St. 440. And see *In re Veue Monnier et Ses Fils*, (1896) 2 Ch. 525. *Contra*, *Myers v. Seeley*, 10 Nat. Bankr. Reg. 411, 17 Fed. Cas. No. 9,994.

In *Wisconsin* a transferee is not liable for the amount unpaid on the stock unless he has allowed himself to be held out to creditors as a shareholder and they have given credit to the corporation on the strength of his liability. *Sturtevant v. National Foundry, etc., Works*, (C. C. A.) 88 Fed. Rep. 613.

2. *England.*—*Waterhouse v. Jamieson*, L. R. 2 H. L. Sc. 29; *Burkinshaw v. Nicolls*, 3 App. Cas. 1004.

United States.—*Phelan v. Hazard*, 5 Dill. (U. S.) 45; *Stacey v. Little Rock, etc., R. Co.*, 5 Dill. (U. S.) 348; *Foreman v. Bigelow*, 4 Cliff. (U. S.) 508; *Du Pont v. Tilden*, 42 Fed. Rep. 87. And see *Seaboard Nat. Bank v. Slater*, 105 Fed. Rep. 179.

Illinois.—*Goodrich v. Reynolds*, 31 Ill. 490, 83 Am. Dec. 240.

Iowa.—*Spense v. Iowa Valley Constr. Co.*, 36 Iowa 407.

Maryland.—*Brant v. Ehlen*, 59 Md. 1.

Michigan.—*Young v. Erie Iron Co.*, 65 Mich. 111, 16 Am. & Eng. Corp. Cas. 626.

Missouri.—*Erskine v. Loewenstein*, 82 Mo. 301.

Nevada.—*Smith v. North American Min. Co.*, 1 Nev. 423.

New York.—*Boynton v. Hatch*, 47 N. Y. 225; *Schenck v. Andrews*, 57 N. Y. 134; *Boynton v. Andrews*, 63 N. Y. 93; *Douglass v. Ireland*, 73 N. Y. 100; *Wintringham v. Rosenthal*, 25 Hun (N. Y.) 580. But see *White, etc., Co. v. Jones*, 86 Hun (N. Y.) 57.

Tennessee.—*West Nashville Planing Mill Co. v. Nashville Sav. Bank*, 86 Tenn. 252, 6 Am. St. Rep. 835.

Contra.—*Cover v. Manaway*, 115 Pa. St. 338, 2 Am. St. Rep. 552.

3. **Transfer Without Knowledge of Transferee.**—*Keyser v. Hitz*, 133 U. S. 138; *Wilbur v. Stockholders*, 18 Nat. Bankr. Reg. 178, 29 Fed. Cas. No. 17,636; *Vermont Marble Co. v. Declez Granite Co.*, 135 Cal. 579; *Robinson v. Lane*, 19 Ga. 337; *Simmons v. Hill*, 96 Mo. 679; *Glenn v. Garth*, 133 N. Y. 18; *De Camp v. Levoy*, 10 Ohio Cir. Dec. 509, 19 Ohio Cir. Ct. 335.

A Distributee of a Deceased Stockholder's Estate was held not to be liable as a stockholder when no portion of the stock had been distributed, and the distributee, as administrator, had refused to inventory the stock on the ground that it might prove a liability rather than an asset. *Simmons v. Ellis*, 17 Mo. App. 470.

is regulated by statute. Under some statutes it is held that a transferee is not liable for debts incurred by the corporation before he became a stockholder.¹ But under other statutes a person who holds stock at the time the corporation becomes insolvent, or when the proceeding to enforce the liability is commenced, is held liable for all the existing debts of the corporation regardless of whether they were incurred before or after he became a stockholder.²

(3) *Sufficiency of Transfer to Shift Liability.* — In order for a stock transfer to have the effect of releasing the transferor from further liabilities, the prescribed formalities must be observed.³ Thus, where there is a requirement that transfers shall be entered on the books of the company, a transfer does not ordinarily relieve the transferor from liability until it has been so registered.⁴ But a substantial compliance with the requirements as to registration

1. Not Liable for Debts Incurred Before Transfer — *California.* — *Larrabee v. Baldwin*, 35 Cal. 155. And see note to *Prince v. Lynch*, 38 Cal. 528, 99 Am. Dec. 434.

Indiana. — *Williams v. Hanna*, 40 Ind. 535; *Reeder v. Maranda*, 66 Ind. 485.

Maryland. — *Norris v. Johnson*, 34 Md. 485; *Norris v. Wrenschall*, 34 Md. 492.

Michigan. — *Kamp v. Wintermute*, 107 Mich. 635.

Minnesota. — *Deadwood First Nat. Bank v. Gustin Minerva Consol. Min. Co.*, 42 Minn. 327.

Nevada. — *Fleeson v. Savage Silver Min. Co.*, 3 Nev. 157.

New Hampshire. — *Chesley v. Pierce*, 32 N. H. 388.

New York. — *Moss v. Oakley*, 2 Hill (N. Y.) 269; *Judson v. Rossie Galena Co.*, 9 Paige (N. Y.) 598, 38 Am. Dec. 569; *Moss v. McCullough*, 7 Barb. (N. Y.) 279; *Tracy v. Yates*, 18 Barb. (N. Y.) 152; *Phillips v. Therasson*, 11 Hun (N. Y.) 141; *Freeland v. McCullough*, 1 Den. (N. Y.) 414, 43 Am. Dec. 685; *Harger v. McCullough*, 2 Den. (N. Y.) 119; *McCullough v. Moss*, 5 Den. (N. Y.) 567. And see *McMaster v. Davidson*, 29 Hun (N. Y.) 542. Compare *Hastings v. Drew*, 76 N. Y. 9.

2. Liable for Debts Incurred Before Transfer — *United States.* — *Rhode Island Mortg., etc., Co. v. Moulton*, 82 Fed. Rep. 979; *Brown v. Trail*, 89 Fed. Rep. 641 (both cases decided under the *Kansas* statute).

Connecticut. — *Ball Electric Light Co. v. Child*, 68 Conn. 522.

Illinois. — *Root v. Sinnock*, 120 Ill. 350, 60 Am. Rep. 558, 19 Am. & Eng. Corp. Cas. 317, note; *Florsheim v. Illinois Trust, etc., Bank*, 93 Ill. App. 297, affirmed 192 Ill. 382. See also *Gay v. Keys*, 30 Ill. 413.

Iowa. — *Calumet Paper Co. v. Stotts Invest. Co.*, 96 Iowa 147, 59 Am. St. Rep. 362.

Massachusetts. — *Curtis v. Harlow*, 12 Met. (Mass.) 3.

Minnesota. — *Gebhard v. Eastman*, 7 Minn. 56; *Olson v. Cook*, 57 Minn. 552; *Winona First Nat. Bank v. Winona Plow Co.*, 58 Minn. 167.

Missouri. — *Bagley v. Tyler*, 43 Mo. App. 195.

Ohio. — *Brown v. Hitchcock*, 36 Ohio St. 667; *Wheeler v. Faurot*, 37 Ohio St. 26; *Bonewitz v. Van Wert County Bank*, 41 Ohio St. 78; *Barrick v. Gifford*, 47 Ohio St. 180, 21 Am. St. Rep. 798; *Railroad Co. v. Smith*, 48 Ohio St. 219.

Rhode Island. — *Sayles v. Bates*, 15 R. I. 342.

Tennessee. — *Jones v. Whitworth*, 94 Tenn. 602.

Vermont. — *Barton Nat. Bank v. Atkins*, 72 Vt. 33.

Wisconsin. — *Gilman v. Gross*, 97 Wis. 224.

See also *Story v. Furman*, 25 N. Y. 215; *Shaler, etc., Quarry Co. v. Bliss*, 27 N. Y. 298; *Davis v. Weed*, 44 Conn. 569; *Weber v. Fickey*, 47 Md. 196; *Devoss v. Gray*, 22 Ohio St. 159; *Young v. New York, etc., Steamship Co.*, (Supm. Ct. Spec. T.) 10 Abb. Pr. (N. Y.) 229, 15 Abb. Pr. (N. Y.) 69; *Chaffin v. Cummings*, 37 Me. 76; *Libby v. Tobey*, 82 Me. 397, 31 Am. & Eng. Corp. Cas. 526; *Bordman v. Osborn*, 23 Pick. (Mass.) 295; *Handrahan v. Cheshire Iron Works*, 4 Allen (Mass.) 396; *Mason v. Cheshire Iron Works*, 4 Allen (Mass.) 398; *Milliken v. Whitehouse*, 49 Me. 527; *Wheeler v. Faurot*, 37 Ohio St. 26.

An Intermediate Holder who has transferred his stock before the action is brought will not be held liable for a debt incurred before he became a stockholder. *Holyoke Bank v. Burnham*, 11 Cush. (Mass.) 183; *Sayles v. Bates*, 15 R. I. 342.

3. Formalities Must Be Observed. — *In re Overend*, L. R. 2 Eq. 554; *In re Merchants' Co.*, L. R. 9 Eq. 5; *In re Imperial Mercantile Credit Assoc.*, L. R. 2 Ch. 596; *In re Overend*, L. R. 5 Eq. 193; *Vermont Marble Co. v. Declez Granite Co.*, 135 Cal. 579; *Lane v. Morris*, 8 Ga. 468.

Georgia Statute — *Transfer without Notice Does Not Release Liability.* — *Lane v. Morris*, 8 Ga. 468; *Force v. Dahlonga Fanning, etc., Mfg. Co.*, 22 Ga. 86; *Robinson v. Beall*, 26 Ga. 17; *Mason v. Force*, 30 Ga. 99; *Brobston v. Downing*, 95 Ga. 505.

Acceptance of Transferee by Company Required. — *Murray v. Bush*, L. R. 6 H. L. 37.

4. Registration Necessary to Release Liability — *England.* — *Reynell v. Lewis*, 15 M. & W. 517; *Landman v. Entwistle*, 7 Exch. 632; *Higgins v. Hopkins*, 3 Exch. 163; *Bailey v. Macaulay*, 13 Q. B. 815, 66 E. C. L. 815; *Newton v. Belcher*, 12 Q. B. 921, 64 E. C. L. 921; *Carrick's Case*, 1 Sim. N. S. 505; *Matter of Wolverhampton, etc., R. Co.*, 2 Macn. & G. 185; *Matter of Direct Exeter, etc., R. Co.*, 2 Macn. & G. 192; *Wood v. Argyll*, 6 M. & G. 928, 46 E. C. L. 928; *Burnside v. Dayrell*, 3 Exch. 224; *Norris v. Cottle*, 2 H. L. Cas. 647; *London, etc., R. Co. v. Fairclough*, 2 M. & G. 674, 40 E. C. L. 570; *McEuen v. West London Wharves, etc., Co.*, L. R. 6 Ch. 655; *Midland Great Western*

of transfers is sufficient.¹ And it is generally held that where a stockholder has made a *bona fide* sale of his stock and has done everything in his power to comply with all the requirements, he ceases to be a stockholder, although, through the fault or omission of the corporation, the transfer is not entered on the stock book.² Of course, where there is no requirement that transfers shall be registered, a failure to register does not affect the validity of the transfer.³

The Transferee's Liability has been held to attach at the time when the actual transfer is made, although the prescribed formalities, such as registration, be not then observed.⁴

R. Co. v. Gordon, 16 M. & W. 804; *Sayles v. Blane*, 19 L. J. Q. B. 19, 6 R. & Can. Cas. 79; *In re Contract Corp.*, L. R. 3 Eq. 84; *Evans v. Wood*, L. R. 5 Eq. 9.

United States.—*Richmond v. Irons*, 121 U. S. 27; *Giesen v. London, etc., Mortg. Co.*, (C. C. A.) 102 Fed. Rep. 584; *In re Bachman*, 12 Nat. Bank Reg. 223, 2 Fed. Cas. No. 707; *Irons v. Manufacturers' Nat. Bank*, 27 Fed. Rep. 591. *Connecticut*.—*Davis v. Essex First Baptist Soc.*, 44 Conn. 582.

Illinois.—*Kellogg v. Stockwell*, 75 Ill. 68.

Kansas.—*Plumb v. Bank of Enterprise*, 48 Kan. 484.

Louisiana.—*Louisiana Ins. Co. v. Gordon*, 8 La. 174.

Maine.—*Fowler v. Ludwig*, 34 Me. 455; *Dane v. Young*, 61 Me. 160.

Missouri.—*A. Wight Co. v. Steinkemeyer*, 6 Mo. App. 574.

New Jersey.—*Hood v. McNaughton*, 54 N. J. L. 425.

New York.—*Shellington v. Howland*, 53 N. Y. 376, 67 Barb. (N. Y.) 14; *Worrall v. Judson*, 5 Barb. (N. Y.) 210; *Powers v. Knapp*, 71 Hun (N. Y.) 371. See also *Cutting v. Damerel*, 23 Hun (N. Y.) 339.

Ohio.—*Brown v. Hitchcock*, 36 Ohio St. 667; *Harpold v. Stobart*, 46 Ohio St. 397, 15 Am. St. Rep. 618; *Herrick v. Wardwell*, 58 Ohio St. 294. And see *Biles v. Charles S. Looker Co.*, 9 Ohio Cir. Dec. 685, 17 Ohio Cir. Ct. 538.

Pennsylvania.—*Burt v. Real-Estate Exch.*, 175 Pa. St. 619, 52 Am. St. Rep. 858.

South Carolina.—*Parker v. Carolina Sav. Bank*, 53 S. Car. 583, 69 Am. St. Rep. 888.

Registration After the Insolvency of the Company will not make the transfer good as against creditors although the sales of the stock were made in good faith some time previously. *Richmond v. Irons*, 121 U. S. 27.

Mississippi Statute—Liability Continues a Year After Registration.—*Kruger v. Hanover Nat. Bank*, 72 Miss. 462 (year begins from time of registration).

1. *Basting v. Northern Trust Co.*, 61 Minn. 307. And see *Wehrman v. Reakirt*, 1 Cinc. Super. Ct. 230.

2. **When Failure to Register Excused—England.**—*Murray v. Bush*, L. R. 6 H. L. 37; *In re Joint Stock Discount Co.*, L. R. 4 Ch. 768; *In re Joint Stock Discount Co.*, L. R. 3 Eq. 77; *In re Hercules Ins. Co.*, L. R. 9 Eq. 589; *In re Manchester, etc., Bank*, 54 L. J. Ch. 926; *In re Newcastle-upon-Tyne Marine Ins. Co.*, 19 Beav. 107; *Shortridge v. Bosanquet*, 16 Beav. 84, *overruling* 4 Exch. 699; *White's Case*, L. R. 3 Eq. 86,

United States.—*Upton v. Burnham*, 3 Biss. (U. S.) 431; *Young v. McKay*, 50 Fed. Rep. 394; *Earle v. Coyle*, (C. C. A.) 97 Fed. Rep. 410.

Michigan.—*Foster v. Row*, 120 Mich. 1, 77 Am. St. Rep. 565.

New York.—*Isham v. Buckingham*, 49 N. Y. 216; *Cutting v. Damerel*, 88 N. Y. 410; *Chemical Nat. Bank v. Colwell*, 132 N. Y. 250.

Pennsylvania.—*Chambersburg Ins. Co. v. Smith*, 11 Pa. St. 120.

But see *In re Bachman*, 12 Nat. Bankr. Reg. 223, 2 Fed. Cas. No. 707; *Johnson v. Laffin*, 5 Dill. (U. S.) 65; *In re County Palatine Loan, etc., Co.*, L. R. 9 Ch. 691; *In re Merchants' Co.*, L. R. 9 Eq. 5; *Midland Great Western R. Co. v. Gordon*, 16 M. & W. 804; *Ex p. Hall*, 5 R. & Can. Cas. 624.

A Transfer, When Calls Are Unpaid, if subsequently canceled, is invalid, though passed by the board of directors. *In re Hindustan Bank*, L. R. 8 Eq. 509.

Transferrer Owning Duty to Keep Stock Book Not Relieved by Unregistered Transfer.—*Beals v. Buffalo Expanded Metal Constr. Co.*, 49 N. Y. App. Div. 589.

3. *Sayles v. Bates*, 15 R. I. 342.

4. **Transferee's Liability Attaches on Actual Transfer.**—*Washburn, etc., Mfg. Co. v. Clarke*, (Supm. Ct. Gen. T.) 43 N. Y. St. Rep. 700; *Shepherd v. Gillespie*, 17 L. T. N. S. 280; *Ex p. Holmes*, 15 W. R. 188. See also *In re Asiatic Banking Corp.*, L. R. 7 Eq. 91; *Burnes v. Pennell*, 2 H. L. Cas. 497.

The Fact that No Formal Transfer Appears on the books of the corporation will not enable a transferee to escape liability, where a certificate was issued to him and he has for a number of years received dividends thereon. *Bissell v. Heath*, 98 Mich. 472.

A Distributee, the Widow, of a Deceased Stockholder has been held to liability although she had not actually received the stock and no transfer had been made on the books of the company. *Coquard v. Marshall*, 14 Mo. App. 80.

Where No Stock Standing in Transferrer's Name.—*In England*, liability passes and attaches to the transferee, though the transferrer had not, at the time of transfer, any stock in his name. *In re Land Credit Co.*, L. R. 8 Ch. 831. But see *Simmons v. Hill*, 96 Mo. 679.

Failure to Record a Deed transferring stock (where transfer by deed acknowledged and recorded is required) has been held not to prevent personal liability from attaching to the transferee. *Eames v. Wheeler*, 19 Pick. (Mass.) 442.

g. CORPORATIONS EXEMPTED FROM OPERATION OF STATUTE — Manufacturing Corporations. — The exception in the provision of the *Minnesota* constitution imposing liability upon the stockholders of corporations, in favor of the stockholders of corporations which are "organized for the purpose of carrying on any kind of manufacturing or mechanical business,"¹ has been construed to apply to those corporations only which are organized exclusively for the purposes mentioned in the exception.²

The Character of the Corporation is determined by the purpose set forth in its articles of incorporation, and not by the business in which it actually engages. Thus, the fact that a corporation organized for a purpose wholly foreign to manufacturing engages in manufacturing does not make it a manufacturing corporation;³ nor, on the other hand, does the fact that a manufacturing corporation engages in and conducts a non-manufacturing business, destroy its character as a manufacturing concern.⁴ So, if the articles of incorporation show that the purpose of the corporation is to carry on both a manufacturing business and another kind of business, not properly incidental to or necessarily connected with the manufacturing business, the fact that the corporation never actually engages in such other kind of business will not entitle its stockholders to the benefit of the constitutional exemption.⁵

Railroad Corporations. — The *Iowa* statute, exempting stockholders in railroad corporations from the liability imposed upon stockholders generally, has been construed to apply, not merely to corporations operating railroads, but also to those organized for the purpose of furnishing materials for building and equipping them.⁶

3. Who May Enforce Liability — a. CREDITORS — (1) In General. — Where a remedy at law to enforce the stockholder's liability is available, the creditor may ordinarily sue alone;⁷ but where the remedy is in equity, it is usually

1. Const. Minn., art. 10, § 3.

2. *Arthur v. Willius*, 44 Minn. 409; *Densmore v. Shepard*, 46 Minn. 54; *Winona First Nat. Bank v. Winona Plow Co.*, 58 Minn. 167; *Oswald v. St. Paul Globe Pub. Co.*, 60 Minn. 82; *Anchor Invest. Co. v. Columbia Electric Co.*, 61 Minn. 510; *St. Paul Barrel Co. v. Minneapolis Distilling Co.*, 62 Minn. 448; *Anderson v. Anderson Iron Co.*, 65 Minn. 281; *In re Minnesota Thresher Mfg. Co.*, (Minn. 1903) 95 N. W. Rep. 767.

3. **The Publishing of a Newspaper** is not exclusively a manufacturing business. *Oswald v. St. Paul Globe Pub. Co.*, 60 Minn. 82.

4. **A Corporation Organized for the Brewing of Lager Beer**, and selling the same, together with such other business as may be incidental thereto, is exclusively a manufacturing corporation. *Hastings Malting Co. v. Iron Range Brewing Co.*, 65 Minn. 28.

5. **A Corporation Engaged in Mining Iron Ore** is engaged in a mechanical business within the constitutional exception. *Cowling v. Zenith Iron Co.*, 65 Minn. 263, 60 Am. St. Rep. 471.

6. *State v. Minnesota Thresher Mfg. Co.*, 40 Minn. 213; *Mohr v. Minnesota Elevator Co.*, 40 Minn. 343.

7. *Senour Mfg. Co. v. Church Paint, etc.*, Co., 81 Minn. 294.

8. *Arthur v. Willius*, 44 Minn. 409; *Densmore v. Shepard*, 46 Minn. 54.

9. *Davenport First Nat. Bank v. Davies*, 43 Iowa 424; *Lengan v. Iowa, etc., Constr. Co.*, 49 Iowa 317.

10. **Suit by Single Creditor — United States.** — *Mechanics' Sav. Bank v. Fidelity Ins., etc.*,

Co., 87 Fed. Rep. 113 (construing the *Kansas* statute).

Illinois. — *Thebus v. Smiley*, 110 Ill. 316.

Maine. — *Cole v. Butler*, 43 Me. 401; *Ingalls v. Cole*, 47 Me. 530.

Maryland. — *Garling v. Baechtel*, 41 Md. 305.

Mississippi. — *Scott v. Windham*, 73 Miss. 76.

Missouri. — *Donnelly v. Mulhall*, 12 Mo. App. 139.

New York. — *Thompson v. Nicolai* (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 700.

Ohio. — *Dunbar v. Harrison*, 18 Ohio St. 24.

Priority Among Creditors. — A creditor who first sues a stockholder to enforce his personal liability acquires thereby a priority of payment over other creditors to the extent of such stockholder's liability. *Cole v. Butler*, 48 Me. 401; *Ingalls v. Cole*, 47 Me. 530; *Donnelly v. Mulhall*, 12 Mo. App. 139; *Dunbar v. Harrison*, 18 Ohio St. 24. Even though another creditor may precede him in obtaining judgment. *Thebus v. Smiley*, 110 Ill. 316; *Johnson v. Somerville Dyeing, etc., Co.*, 15 Gray (Mass.) 216. *Contra*, *State Sav. Assoc. v. Kellogg*, 63 Mo. 540. Or may subsequently garnishee the debt of such stockholder or stockholders to the corporation. *Scott v. Windham*, 73 Miss. 76. Nor is such right of priority defeated by the subsequent institution of a suit in equity on behalf of all the creditors of the corporation. *Garling v. Baechtel*, 41 Md. 305; *Judson v. Rossie Galena Co.*, 9 Paige (N. Y.) 598, 40 Am. Dec. 244.

required that the suit be instituted for the benefit of all creditors who may choose to come in and become parties to the proceeding.¹

After Assignment of Corporation. — The execution by the corporation of a deed of assignment for the benefit of its creditors does not preclude them from enforcing the statutory liability of the stockholders, since this liability cannot be enforced by the assignee.² But the right to recover the subscription liability, being in the assignee, cannot be exercised by creditors after the assignment,³ unless, it seems, the assignee consents to the proceeding.⁴

After Appointment of Receiver. — A receiver of the assets of an insolvent corporation has primarily the exclusive right to enforce the liability of its stockholders, and creditors, after the appointment of a receiver, cannot institute proceedings on their own behalf,⁵ even though they join the receiver as a party defendant,⁶ without first showing good cause and obtaining leave of court.⁷

(2) **Creditors by Assignment** — (a) **In General.** — The liability of stockholders for corporate debts may be enforced, not only by those to whom such debts were originally contracted, but also by the assignee of such debts;⁸ and the fact that the assignment was made after the dissolution of the corporation,⁹ or that the debt was purchased at a discount after the corporation became insolvent,¹⁰ does not affect the right of the assignee to recover.

(b) **Holder of Negotiable Paper.** — The holder of a negotiable instrument issued by a corporation who acquires it after its maturity, though he may maintain an action thereon in his own name against stockholders,¹¹ takes the instrument subject to any defenses which might have been pleaded against it in the hands of his indorser.¹² What greater rights a *bona fide* purchaser for value before maturity would have is an undetermined question. In *New York*, it seems, the rule controlling commercial paper does not apply between the

1. **Suit for Benefit of All Creditors** — *United States*. — *State Nat. Bank v. Sayward*, (C. C. A.) 91 Fed. Rep. 443 (construing *Ohio* statute). *California*. — *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158.

Georgia. — *Brobst v. Downing*, 95 Ga. 505. *Nebraska*. — *Farmers' L. & T. Co. v. Funk*, 49 Neb. 353; *Hastings v. Barnd*, 55 Neb. 93. *New York*. — *Mann v. Pentz*, 3 N. Y. 415; *Hirshfeld v. Bopp*, 39 N. Y. App. Div. 613; *Hagmayer v. Alten*, 41 N. Y. App. Div. 487.

Wisconsin. — *Foster v. Posson*, 105 Wis. 99; *Eau Claire Nat. Bank v. Benson*, 106 Wis. 624.

2. **After Assignment of Corporation.** — *Zang v. Wyant*, 25 Colo. 551, 71 Am. St. Rep. 145; *International Trust Co. v. American L. & T. Co.*, 62 Minn. 501; *Minneapolis Paper Co. v. Swinburne Printing Co.*, 66 Minn. 378; *Sturtevant-Larabee Co. v. Mast*, 66 Minn. 437.

3. *Franklin v. Menown*, 10 Mo. App. 570; *Hallett v. Metropolitan Messenger Co.*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 659, judgment modified 69 N. Y. App. Div. 258.

4. *Painesville Nat. Bank v. King Varnish Co.*, 4 Ohio Cir. Dec. 511, 8 Ohio Cir. Ct. 563.

5. **After Appointment of Receiver.** — *Woodworth v. Bowles*, 61 Kan. 569; *Anderson v. Seymour*, 70 Minn. 358; *Brown v. Brink*, 57 Neb. 606; *Persons v. Gardner*, 42 N. Y. App. Div. 490. Especially where the court has directed the receiver to proceed to enforce such liability. *Castleman v. Templeman*, 87 Md. 546, 67 Am. St. Rep. 363. But see *Brown v. Trail*, 89 Fed. Rep. 641.

Substitution of Receiver as Plaintiff in Suit Commenced by Stockholder. — *Dunlap v. Rauch*, 24 Wash. 620.

6. *Castleman v. Templeman*, 87 Md. 546, 67 Am. St. Rep. 363.

7. *Barnes v. Arnold*, (Supm. Ct. Eq. T.) 23 Misc. (N. Y.) 197, 45 N. Y. App. Div. 314, 169 N. Y. 611.

8. **Creditors by Assignment.** — *Herman v. Hecht*, 116 Cal. 553; *Came v. Brigham*, 39 Me. 35; *Hagmayer v. Alten*, 41 N. Y. App. Div. 487.

An Assignee of a Claim for Professional Services as attorneys of a corporation is not precluded from recovering against a stockholder by the fact that one of the attorneys was also a stockholder, where it appears that the employment and services of the plaintiffs' assignors were joint and not several. *Montgomery v. Brush Electric Illuminating Co.*, 48 N. Y. App. Div. 12, affirmed 168 N. Y. 657.

9. *Moosbrugger v. Walsh*, 89 Hun (N. Y.) 564.

10. *Coquard v. Prendergast*, 35 Mo. App. 237. **Assignee of Judgment.** — *Whitman v. Citizens' Bank*, 110 Fed. Rep. 503; *Harger v. McCullough*, 2 Den. (N. Y.) 119; *Woodruff*, etc., *Iron Works v. Chittenden*, 4 Bosw. (N. Y.) 406.

Consideration Necessary. — *Wilson v. St. Louis*, etc., R. Co., 120 Mo. 45.

11. **Holders of Corporation Paper.** — *Kisseberth v. Prescott*, 91 Fed. Rep. 611; *Freeland v. McCullough*, 1 Den. (N. Y.) 414, 43 Am. Dec. 685.

12. **Payee's Knowledge that Stock Was Paid for with Overvalued Property.** — *State Trust Co. v. Turner*, 111 Iowa 664. See generally the title **BILLS AND NOTES**, vol. 4, p. 312.

holder of corporation paper and stockholders, and the latter when sued upon a corporate note may interpose defenses of which the corporation could not avail itself.¹

(3) *Creditors Who Are Also Stockholders* — (a) *Legal Remedies.* — Whether a creditor of a corporation who is also a stockholder therein can enforce his debt, or the part of it which is not extinguished by his own liability, by an action at law against another stockholder, depends largely upon the nature of the stockholders' liability and the practice in the particular jurisdiction in which the action is brought.²

Several Liability for Proportionate Parts of Debts. — Under statutes making stockholders severally liable for their respective proportions of the debts of the corporation, it has been held that a creditor-stockholder may sue other stockholders for their proportionate parts of his debts.³

When Stockholders Are Liable as Partners. — But where the relation of stockholders is that of partners, as has been decided in the case of a statute making stockholders jointly and severally liable for the payment of all debts or demands contracted by the corporation, it has been held that a stockholder cannot bring an action at law against another stockholder to enforce a debt due to the former by the corporation.⁴

When Stockholders Are Liable until Capital Stock Is Paid In. — The same principle has been applied in *New York* under a statute making stockholders individually liable for corporate debts until the whole amount of the capital stock has been paid in;⁵ but under a similar statute in *Colorado*, an action at law was permitted in the case of a creditor who as a stockholder had paid in full for the stock held by him.⁶

(b) *Equitable Remedies.* — A stockholder who is a creditor of the corporation may have an equitable adjustment of his claim against the other stockholders, and his own liability, by a creditor's bill,⁷ or in a proceeding in the nature thereof,⁸ or by a bill praying contribution from the other stockholders.⁹

1. *Close v. Potter*, 155 N. Y. 145.

Holder Not Bona Fide Purchaser. — *Thayer v. Union Tool Co.*, 4 Gray (Mass.) 75 (note over-
due).

The Holders of Bank Bills, though acquired after the charter of the bank has expired, may enforce them against its stockholders. *Crease v. Babcock*, 10 Met. (Mass.) 525.

The fact that a broker from whom the holder purchased bank bills at a discount exacted an agreement from the latter to keep the bills out of circulation for a certain time is not notice that such bills were improperly issued. *Grew v. Breed*, 10 Met. (Mass.) 569.

2. *Right of Stockholder-creditor to Sue Other Stockholders.* — In *Kansas* a stockholder who is a creditor of the corporation may sue another stockholder to recover upon his statutory liability. *Brown v. Trail*, 89 Fed. Rep. 641; but not until the plaintiff has discharged his own liability. *Milford Sav. Bank v. Joslyn*, 59 Kan. 778, 53 Pac. Rep. 756.

When Subscription Liability Exceeds Debts. — A corporate creditor who is liable as a stockholder for an unpaid subscription greater in amount than his debt against the corporation cannot sue another stockholder thereon. *Franklin v. Menown*, 10 Mo. App. 570.

In an Action by the Survivors of Two Joint Creditors of a corporation against individual stockholders, the fact that the decedent creditor was a stockholder cannot be pleaded as a defense, since the entire right of action for the debt vests in the survivor. *Newberry v. Robinson*, 41 Fed. Rep. 458.

A Stockholder Who Wrongfully Erases His Name and Unpaid Subscription from the records of the corporation cannot enforce his right as a creditor against the other stockholders upon their unpaid subscription. *Jackson v. Cherokee Medicine Co.*, 47 S. Car. 215.

3. *Several Liability for Proportionate Part of Debts.* — *Brown v. Merrill*, 107 Cal. 446, 48 Am. St. Rep. 145; *Knowles v. Sandercock*, 107 Cal. 629; *Herman v. Hecht*, 116 Cal. 553; *For v. Robinson*, 31 Me. 189.

4. *When Stockholders Are Liable as Partners.* — *Corning v. McCullough*, 1 N. Y. 47, 49 Am. Dec. 287; *Bailey v. Bancker*, 3 Hill (N. Y.) 188; *Beers v. Waterbury*, 8 Bosw. (N. Y.) 396; *Richardson v. Abendroth*, 43 Barb. (N. Y.) 162. But see *Woodruff, etc., Iron Works v. Chittenden*, 4 Bosw. (N. Y.) 406.

5. *McDowall v. Sheehan*, 129 N. Y. 200; *Klug v. Bosch*, (Supm. Ct.) 31 Abb. N. Cas. (N. Y.) 27.

6. *Smith v. Londoner*, 5 Colo. 365.

7. *Creditor's Bill.* — *Bissit v. Kentucky River Nav. Co.*, 15 Fed. Rep. 353; *Richardson v. Chicago Packing, etc., Co.*, 131 Cal. xviii, (Cal. 1900) 63 Pac. Rep. 74; *Wilson v. Kiesel*, 9 Utah 397.

8. *Oswald v. Minneapolis Times Co.*, 65 Minn. 249; *Harper v. Carroll*, 66 Minn. 487; *Mendenhall v. Duluth Dry Goods Co.*, 72 Minn. 312; *Janney v. Minneapolis Industrial Exposition*, 79 Minn. 488.

9. *Contribution.* — *Cocking v. Ward*, (Tenn. Ch. 1898) 48 S. W. Rep. 287. See also *Thayer v. Union Tool Co.*, 4 Gray (Mass.) 75. But

b. ASSIGNEES FOR BENEFIT OF CREDITORS. — An assignee for the benefit of creditors succeeds to the rights of the corporation, and may enforce the subscription liability of its stockholders,¹ except where an exclusive remedy is provided by statute.² But the statutory liability of stockholders is to the corporate creditors, and not to the corporation, and an assignee cannot sue to enforce it³ except where there is a statute expressly authorizing it.⁴

c. RECEIVERS. — A receiver who succeeds to the rights of corporate creditors at whose instance he is appointed may enforce the liability of stockholders,⁵ but not where the liability created by the statute is directly to the creditors and does not pass to him.⁶

4. Mode of Enforcement — *a. ENFORCEMENT BY ACTION* — (1) *In General* — **Subscription Liability.** — In some jurisdictions an action at law may be brought to subject the unpaid subscription of a stockholder to the payment of a corporate debt,⁷ but the more usual remedy is in equity.⁸

Statutory Liability. — The statutory liability may be enforced either at law⁹

see under a more recent statute *Potter v. Stevens Mach. Co.*, 127 Mass. 592, 34 Am. Rep. 428. And see the title CONTRIBUTION AND EXONERATION, vol. 7, p. 363.

1. Assignee for Benefit of Creditors — Subscription Liability. — *Sanger v. Upton*, 91 U. S. 56; *Potts v. Wallace*, 146 U. S. 689; *Citizens, etc., Sav. Bank v. Gillespie*, 115 Pa. St. 564.

2. Stoddard v. Lum, 32 N. Y. App. Div. 565.

3. Statutory Liability. — *Runner v. Dwiggins*, 147 Ind. 238; *Thompson v. Knight*, 74 N. Y. App. Div. 316.

4. Somers v. Dawson, 86 Minn. 42.

5. Receiver of Corporation May Enforce Stockholders' Liability. — *State v. Union Stock Yards State Bank*, 103 Iowa 549; *McBryan v. Universal Elevator Co.*, (Mich. 1902) 89 N. W. Rep. 683, 8 Detroit Leg. N. 1191; *Watterson v. Masterson*, 15 Wash. 511; *New York Nat. Exch. Bank v. Metropolitan Sav. Bank*, 28 Wash. 553.

A provision to this effect in a statute has been held not retroactive. *Mahoney v. Bernhardt*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 339, 45 N. Y. App. Div. 499, construing the amendment of 1897 to the *New York Banking Law*.

A Receiver Succeeds to the Rights of the Creditors at whose instance he was appointed, and no defense to an action by him for unpaid subscriptions is valid which would not have been valid against the creditors themselves. *Cole v. Satsop R. Co.*, 9 Wash. 487, 43 Am. St. Rep. 858.

A Call for an Unpaid Stock Subscription is a corporate asset which may be sued for and collected by a receiver subsequently appointed. *Wyman v. Williams*, 53 Neb. 670.

Special Receiver. — As to the right of a special receiver appointed under the *Minnesota* statute, see *Hale v. Haddon*, (C. C. A.) 95 Fed. Rep. 747; *Hale v. Hilliker*, 109 Fed. Rep. 273; *Hale v. Coffin*, 114 Fed. Rep. 567.

6. When Receiver Cannot Enforce Liability. — *Hancock Nat. Bank v. Ellis*, 172 Mass. 39, 70 Am. St. Rep. 232; *Minneapolis Baseball Co. v. City Bank*, 66 Minn. 441; *White v. Ingersoll*, 4 Ohio Dec. (Reprint) 540, 2 Cleve. L. Rep. 362. See also *Millisack v. Moore*, 76 Mo. App. 528.

7. Subscription Liability — Action at Law. — *Flash v. Com.*, 109 U. S. 371; *Potts v. Wallace*,

146 U. S. 689; *Glenn v. Soule*, 22 Fed. Rep. 417; *Allen v. Montgomery R. Co.*, 11 Ala. 437; *Smith v. Londoner*, 5 Colo. 365; *Farmers Bank v. Gallaher*, 43 Mo. App. 482.

8. Suit in Equity — *United States*. — *Hatch v. Dana*, 101 U. S. 205; *Patterson v. Lynde*, 106 U. S. 519; *Holmes v. Sherwood*, 16 Fed. Rep. 725; *Brown v. Fisk*, 23 Fed. Rep. 228.

Alabama. — *Allen v. Montgomery R. Co.*, 11 Ala. 437; *Harris v. Gateway Land Co.*, 128 Ala. 652.

California. — *Harmon v. Page*, 62 Cal. 448. *Georgia*. — *Dalton, etc., R. Co. v. McDaniel*, 56 Ga. 191; *Cherry v. Lamar*, 58 Ga. 541.

Maryland. — *Crawford v. Rohrer*, 59 Md. 599.

Mississippi. — *Payne v. Bullard*, 23 Miss. 88, 55 Am. Dec. 74.

New York. — *Mann v. Pentz*, 3 N. Y. 415.

Pennsylvania. — *Johnston v. Markle Paper Co.*, 153 Pa. St. 189; *Lexow v. Pennsylvania Diamond Drill Co.*, 5 Pa. Dist. 491.

Washington. — *Burch v. Taylor*, 1 Wash. 245; *Burch v. Glover*, 1 Wash. 250.

A Suit in the Nature of a Creditor's Bill will lie. *Walser v. Seligman*, 13 Fed. Rep. 415; *Masters v. Rossie Lead Min. Co.*, 2 Sandf. Ch. (N. Y.) 301; *Henry v. Vermillion, etc., R. Co.*, 17 Ohio 187; *Martin v. South Salem Land Co.*, 94 Va. 28.

If the Stockholders of a Corporation Divide Its Capital Stock Among Themselves, leaving corporate funds insufficient to discharge the corporate indebtedness, a court of equity will grant relief, but no action can be maintained at law against the individual stockholder to recover the proportion paid to him. *Vose v. Grant*, 15 Mass. 505; *Spear v. Grant*, 16 Mass. 9.

9. Statutory Liability — Action at Law — *United States*. — *Morley v. Thayer*, 3 Fed. Rep. 737; *Flour City Nat. Bank v. Wechselberg*, 45 Fed. Rep. 549; *Bank of North America v. Rindge*, 57 Fed. Rep. 279; *Medberry v. Troutman*, 94 Fed. Rep. 952.

Illinois. — *Wincok v. Turpin*, 96 Ill. 135; *Helmle v. Queenan*, 18 Ill. App. 103; *National Bank v. Zinser*, 55 Ill. App. 510.

Kansas. — *Howell v. Manglesdorf*, 33 Kan. 194.

Maine. — *Cummings v. Maxwell*, 45 Me. 190. *Maryland*. — *Norris v. Wrenschall*, 34 Md. 402.

Missouri. — *Bagley v. Tyler*, 43 Mo. App. 195.

or in equity,¹ according to the circumstances.

Where the Statute Prescribes the Remedy for the enforcement of the liability created by it, that remedy is ordinarily held to be exclusive.²

(2) *Necessity of Exhausting Remedy Against Corporation.* — It is a general rule, in enforcing the stockholders' liability, whether ordinary or statutory, and some statutes expressly make it necessary, that the creditor must have obtained a judgment against the corporation with a return of *nulla bona*, thus exhausting his remedies against it, before he may hold the stockholders liable.³

New York. — *Simonson v. Spencer*, 15 Wend. (N. Y.) 548; *Poughkeepsie Bank v. Ibbotson*, 24 Wend. (N. Y.) 473; *Lang v. Lutz*, 83 N. Y. App. Div. 534.

Oregon. — *Aldrich v. Anchor Coal Co.*, 24 Oregon 32, 41 Am. St. Rep. 831.

1. *Suit in Equity — United States.* — *Pollard v. Bailey*, 20 Wall. (U. S.) 520; *Andrews v. Bacon*, 38 Fed. Rep. 777.

Alabama. — *Smith v. Huckabee*, 53 Ala. 191.

Arkansas. — *Jones v. Jarman*, 34 Ark. 323.

Illinois. — *Richardson v. Akin*, 87 Ill. 139; *Harper v. Union Mfg. Co.*, 100 Ill. 225; *Rounds v. McCormick*, 114 Ill. 252; *Queenan v. Palmer*, 117 Ill. 619.

Maine. — *Maine Trust, etc., Co. v. Southern L. & T. Co.*, 92 Me. 444.

Massachusetts. — *Harris v. First Parish*, 23 Pick. (Mass.) 112; *Knowlton v. Ackley*, 8 Cush. (Mass.) 93; *Bell v. Spaulding*, 3 Allen (Mass.) 485.

Mississippi. — *Perkins v. Sanders*, 56 Miss. 733.

Montana. — *Kelly v. Clark*, 21 Mont. 291.

New Hampshire. — *Hadley v. Russell*, 40 N. H. 109.

New York. — *Pfohl v. Simpson*, 74 N. Y. 137; *Pennimann v. Briggs*, Hopk. (N. Y.) 300; *Klug v. Bosch*, (Supm. Ct.) 31 Abh. N. Cas. (N. Y.) 27; *Hallett v. Metropolitan Messenger Co.*, 69 N. Y. App. Div. 258.

West Virginia. — *Stiles v. Laurel Fork Oil, etc., Co.*, 47 W. Va. 838.

Wyoming. — *McLaughlin v. O'Neill*, 7 Wyo. 187.

It has been held that the right of action at law does not exclude the jurisdiction of a court of equity, if there are proper grounds for its interposition. *Helmle v. Queenan*, 18 Ill. App. 103; *Eames v. Doris*, 102 Ill. 350; *Emmert v. Smith*, 40 Md. 123. See also *Connecticut River Sav. Bank v. Fiske*, 60 N. H. 363.

A Bill of Discovery Will Lie to compel a disclosure of the names of the stockholders and the amount of stock held by each, for the purpose of making them parties. *Middletown Bank v. Russ*, 3 Conn. 135, 8 Am. Dec. 164; *Brewer v. Michigan Salt Assoc.*, 58 Mich. 351; *Morgan v. New York, etc., R. Co.*, 10 Paige (N. Y.) 290, 40 Am. Dec. 244; *Bogardus v. Rosendale Mfg. Co.*, 7 N. Y. 147.

2. *Statutory Remedy Exclusive — United States.* — *New York Fourth Nat. Bank v. Franklyn*, 120 U. S. 747.

California. — *Russell v. Pacific R. Co.*, 113 Cal. 258.

Illinois. — *Fowler v. Lamson*, 146 Ill. 472, 37 Am. St. Rep. 163.

Massachusetts. — *Sargent v. Webster*, 13 Met. (Mass.) 497, 46 Am. Dec. 743.

But see under the *Kansas* statute, *Buist v.*

Citizens' Sav. Bank, 4 Kan. App. 700; *Howell v. Manglesdorf*, 33 Kan. 194; *Henley v. Stevenson*, (Kan. 1903) 72 Pac. Rep. 518. See also *Bank of North America v. Rindge*, 57 Fed. Rep. 279; *Marshall v. Sherman*, 84 Hun (N. Y.) 186.

Sequestration Proceeding under Minnesota Statute. — *Johnson v. Fischer*, 30 Minn. 173; *Arthur v. Willius*, 44 Minn. 409; *M'Kusick v. Seymour*, 48 Minn. 158; *Hospes v. Northwestern Mfg., etc., Co.*, 48 Minn. 174, 31 Am. St. Rep. 637; *In re People's Live Stock Ins. Co.*, 56 Minn. 180; *Clarke v. Cold Spring Opera-House Co.*, 58 Minn. 16; *Winnebago Paper Mills v. Northwestern Printing, etc., Co.*, 61 Minn. 373; *Winthrop Nat. Bank v. Minneapolis Terminal Elevator Co.*, 77 Minn. 329; *Hale v. Hardon*, (C. C. A.) 95 Fed. Rep. 747.

3. *Remedy Against Corporation Must Be First Exhausted — United States.* — *Swan Land, etc., Co. v. Frank*, 148 U. S. 603; *New York Fourth Nat. Bank v. Francklyn*, 120 U. S. 747; *Whitman v. Citizens Bank*, 110 Fed. Rep. 503, 49 C. C. A. 122.

Arkansas. — *Fletcher v. Lonoke Bank*, (Ark. 1902) 69 S. W. Rep. 580.

California. — *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158.

Illinois. — *Patterson v. Lynde*, 112 Ill. 196, 10 Am. & Eng. Corp. Cas. 195.

Indiana. — *Ewing v. Stultz*, 9 Ind. App. 1.

Kansas. — *Valley Bank, etc., Inst. v. Ladies' Cong. Sewing Soc.*, 28 Kan. 423; *Merrill v. Meade*, 6 Kan. App. 620; *Carey Lumber Co. v. Neal*, 3 Kan. App. 399.

Kentucky. — *Dudley v. Price*, 10 B. Mon. (Ky.) 84.

Maine. — *Hathorn v. Calef*, 53 Me. 471; *Whitney v. Hammond*, 44 Me. 305; *Grose v. Hilt*, 36 Me. 22; *Stanley v. Stanley*, 26 Me. 191; *Drinkwater v. Portland Marine R. Co.*, 18 Me. 35.

Massachusetts. — *Remington v. Samana Bay Co.*, 140 Mass. 494; *Peele v. Phillips*, 8 Allen (Mass.) 86; *Cambridge Water-Works v. Somerville Dyeing, etc., Co.*, 4 Allen (Mass.) 239.

Michigan. — *Macomber v. Wright*, 108 Mich. 109; *Ripley v. Evans*, 87 Mich. 217; *Thompson v. Jewell*, 43 Mich. 240.

Minnesota. — *Rule v. Omega Stove, etc., Co.*, 64 Minn. 326.

Mississippi. — *Payne v. Bullard*, 23 Miss. 88, 55 Am. Dec. 74.

Missouri. — *Guerney v. Moore*, 131 Mo. 650; *Bagley v. Tyler*, 43 Mo. App. 195; *Knight v. Frost*, 14 Mo. App. 331.

Nebraska. — *Ball v. Wicks*, 45 Neb. 367; *Globe Pub. Co. v. State Bank*, 41 Neb. 175; *Commercial Nat. Bank v. Gibson*, 37 Neb. 750.

New York. — *Rocky Mountain Nat. Bank v. Bliss*, 89 N. Y. 338; *Handy v. Draper*, 89 N. Y. 334; *Jessup v. Carnegie*, 80 N. Y. 441, 36 Am.

But the law does not require the doing of a useless thing, and therefore, where the company has become bankrupt, dissolved, or extinct, the suit to enforce the stockholders' liability may be commenced against them by creditors without first recovering a judgment against the company and having an execution issued and returned unsatisfied.¹ Under the statutes in some juris-

Rep. 643; *Hovey v. Ten Broeck*, 3 Robt. (N. Y.) 316; *U. S. Glass Co. v. Levett*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 429; *Lindsley v. Simonds*, (Supm. Ct. Spec. T.) 2 Abb. Pr. N. S. (N. Y.) 69; *Birmingham Nat. Bank v. Keck*, (Brooklyn City Ct. Spec. T.) 55 How. Pr. (N. Y.) 222; *Berwind-White Coal-Min. Co. v. Ewart*, 90 Hun (N. Y.) 60; *United Glass Co. v. Vary*, 79 Hun (N. Y.) 103, *affirmed* 152 N. Y. 121; *Terry v. Rothschild*, 83 Hun (N. Y.) 486; *Andrew v. Vanderbilt*, 37 Hun (N. Y.) 468; *Wheeler v. Miller*, 24 Hun (N. Y.) 541; *Birmingham Nat. Bank v. Mosser*, 14 Hun (N. Y.) 665. See also *Boutwell v. Townsend*, 37 Barb. (N. Y.) 205.

Ohio.—*Younglove v. Kelly Island Lime Co.*, 49 Ohio St. 663; *Bronson v. Schneider*, 49 Ohio St. 438; *Barrick v. Gifford*, 47 Ohio St. 180, 21 Am. St. Rep. 798; *Cowles v. Bartell*, 2 Ohio Dec. (Reprint) 424, 3 West L. Month. 41; *Wehrman v. Reakirt*, 1 Cinc. Super. Ct. 230.

Oregon.—*Hodges v. Silver Hill Min. Co.*, 9 Oregon 200; *Ladd v. Cartwright*, 7 Oregon 329.

Pennsylvania.—*Craig's Appeal*, 92 Pa. St. 396; *Suydam v. North Western Ins. Co.*, 51 Pa. St. 394.

Rhode Island.—*Allen v. Arnold*, 18 R. I. 809; *New England Commercial Bank v. Newport Steam Factory*, 6 R. I. 154, 75 Am. Dec. 688.

Tennessee.—*Albitztigui v. Guadalupe*, etc., Min. Co., 92 Tenn. 598.

Utah.—*Salt Lake Hardware Co. v. Tintic Milling Co.*, 13 Utah 423.

Vermont.—*Dauchy v. Brown*, 24 Vt. 197.

Washington.—*Burch v. Glover*, 1 Wash. 250; *Burch v. Taylor*, 1 Wash. 245.

Wisconsin.—*Adler v. Milwaukee Patent Brick Mfg. Co.*, 13 Wis. 63.

In *New York* it was decided under the Act of 1875, defining the liability of stockholders in limited liability companies organized thereunder that action may be brought against a stockholder after bringing suit against the corporation and before judgment, but that execution cannot issue against the stockholder until a judgment is rendered against the corporation and the execution against the corporation is exhausted. *Walton v. Coe*, 47 Hun (N. Y.) 160, *affirmed* 110 N. Y. 109; *Richards v. Beach*, (C. Pl. Gen. T.) 22 N. Y. St. Rep. 296, *reversing* 12 N. Y. St. Rep. 136. See also *Young v. Brice*, (N. Y. City Ct. Gen. T.) 18 N. Y. St. Rep. 945.

Personal Guaranty of Certain Stockholders Need Not Be First Exhausted Before General Liability of Stockholders Can Be Enforced.—*Winthrop Nat. Bank v. Minneapolis Terminal Elevator Co.*, 77 Minn. 329.

Sufficiency of Return under Kansas Statute.—*Thompson v. Pfeiffer*, 60 Kan. 409.

Justice's Judgment and Execution Will Support Action Against Stockholder.—*Voight v. Dregge*, 97 Mich. 322.

When Cause of Action Accrues Against Stockholder.—*Garrettsville First Nat. Bank v. Greene*, 64 Iowa 445.

In What State Judgment Should Be Recovered and Execution Returned.—*Globe Rolling-Mill Co. v. Ballou*, 42 Fed. Rep. 749; *Patterson v. Lynde*, 112 Ill. 196, 10 Am. & Eng. Corp. Cas. 196; *Turner v. Alabama Min., etc., Co.*, 25 Ill. App. 144; *Rocky Mountain Nat. Bank v. Bliss*, 89 N. Y. 338; *Dean v. Mace*, 19 Hun (N. Y.) 391; *Brice v. Munro*, 5 Can. L. T. 130.

Under the Statute of New York Imposing Liability on the Members of Manufacturing Corporations it has been held that the judgment must be obtained and the execution must be issued in that state. *Rocky Mountain Nat. Bank v. Bliss*, 89 N. Y. 338. See also *Dean v. Mace*, 19 Hun (N. Y.) 391.

Effect of Foreign State Judgment Against Corporation in State Where Remedy Is Sought.—*Shickle v. Watts*, 94 Mo. 410.

Creditor's Remedy Held Confined to State of Corporation's Creation.—*Young v. Farewell*, (Ill. 1891) 36 Am. & Eng. Corp. Cas. 158.

Force of Domestic State Judgment in Foreign State.—*Hancock Nat. Bank v. Farnum*, 176 U. S. 640.

Enforcement of Liability Against Deceased Stockholder's Estate.—*Nolan v. Hazen*, 44 Minn. 478.

1. Corporation Insolvent or Extinct—United States.—*Flash v. Conn*, 109 U. S. 371.

Arkansas.—*Fletcher v. Lonoke Bank*, (Ark. 1902) 69 S. W. Rep. 580.

Colorado.—*Zang v. Wyant*, 25 Colo. 551, 71 Am. St. Rep. 145.

Minnesota.—*Rule v. Omega Stove, etc., Co.*, 64 Minn. 326.

Missouri.—*Guerney v. Moore*, 131 Mo. 650; *State Sav. Assoc. v. Kellogg*, 52 Mo. 583; *Dryden v. Kellogg*, 2 Mo. App. 87.

New York.—*Hirshfeld v. Bopp*, 145 N. Y. 84; *Hardman v. Sage*, 124 N. Y. 25, *affirming* 47 Hun (N. Y.) 230; *Kincaid v. Dwinelle*, 59 N. Y. 548; *Shellington v. Howland*, 53 N. Y. 371; *Barnes v. Arnold*, (Supm. Ct. Eq. T.) 23 Misc. (N. Y.) 197, *affirmed* 45 N. Y. App. Div. 315, 169 N. Y. 611; *Hetzel v. Tannehill Silver Min. Co.*, (C. Pl. Spec. T.) 4 Abb. N. Cas. (N. Y.) 40; *Moosbrugger v. Walsh*, 89 Hun (N. Y.) 564; *United Glass Co. v. Vary*, 152 N. Y. 121, *affirming* 79 Hun (N. Y.) 103.

Ohio.—*Peter v. Farrel Foundry, etc., Co.*, 53 Ohio St. 534; *Barrick v. Gifford*, 47 Ohio St. 180, 21 Am. St. Rep. 798; *Morgan v. Lewis*, 46 Ohio St. 1; *De Camp v. Levoy*, 10 Ohio Cir. Dec. 509; *Wehrman v. Reakirt*, 1 Cinc. Super. Ct. 230.

Oregon.—*Hodges v. Silver Hill Min. Co.*, 9 Oregon 200.

Utah.—*Salt Lake Hardware Co. v. Tintic Milling Co.*, 13 Utah 423.

See also *Train v. Marshall Paper Co.*, 180 Mass. 513.

In New York the Decisions Have Dispensed with the Condition Precedent“(1) where the corporation has been dissolved by judicial decree; (2) where by final judgment in an action for sequestration a perpetual injunction has been

dictions, imposing under certain circumstances a personal liability on the stockholders for the company's obligations, it has been held that the stockholders' liability is primary, unconditional, and not secondary. These decisions are governed by the particular provisions of the statutes or charters of the corporations.¹

(3) *Effect of Judgment Against Corporation on Stockholders.*—A valid judgment against the corporation establishing its liability for an obligation for which the stockholders are by law made liable is generally conclusive evidence of the corporation's indebtedness in a subsequent action against the stockholders,² but this rule is not without exception.³

issued restraining suits by creditors, and (3) where, by statute, such suits are prohibited." *United Glass Co. v. Vary*, 152 N. Y. 121.

1. *Stockholders Primarily Liable*—*California*.—*Morrow v. Superior Ct.*, 64 Cal. 383; *Davidson v. Rankin*, 34 Cal. 503; *Young v. Rosenbaum*, 39 Cal. 646.

Illinois.—*First Nat. Bank v. Peoria Watch Co.*, 77 Ill. App. 663.

Indiana.—*Tripp v. Huncheon*, 82 Ind. 307; *Shafer v. Moriarty*, 46 Ind. 9; *Marion Tp. Union Draining Co. v. Norris*, 37 Ind. 424; *Todhunter v. Randall*, 29 Ind. 275; *Ewing v. Stultz*, 9 Ind. App. 1.

Iowa.—*Marshall v. Harris*, 55 Iowa 182.

Kansas.—*Grund v. Tucker*, 5 Kan. 70.

Minnesota.—*Gebhard v. Eastman*, 7 Minn. 56.

New Hampshire.—*Connecticut River Sav. Bank v. Fiske*, 60 N. H. 363.

South Carolina.—*Bird v. Calvert*, 22 S. Car. 292.

Wisconsin.—*Sleeper v. Goodwin*, 67 Wis. 577; *Merchants' Bank v. Chandler*, 19 Wis. 457; *Cleveland v. Marine Bank*, 17 Wis. 545; *Coleman v. White*, 14 Wis. 700, 80 Am. Dec. 797. See *Cleveland v. Burnham*, 55 Wis. 598.

2. *Judgment Conclusive Against Stockholders*—*United States*.—*American Nat. Bank v. Supplee*, 115 Fed. Rep. 657, 52 C. C. A. 293; *Ward v. Joslin*, 100 Fed. Rep. 676; *Hale v. Hardon*, (C. C. A.) 95 Fed. Rep. 747; *Brown v. Trail*, 89 Fed. Rep. 641; *Dexter v. Edmands*, 89 Fed. Rep. 467; *Hendrickson v. Bradley*, 85 Fed. Rep. 508, 55 U. S. App. 715; *Powell v. Oregonian R. Co.*, 38 Fed. Rep. 187; *Glenn v. Springs*, 26 Fed. Rep. 494.

California.—*Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158.

Illinois.—*Schertz v. Chester First Nat. Bank*, 47 Ill. App. 124.

Iowa.—*Corse v. Sanford*, 14 Iowa 235.

Kansas.—*Steffins v. Gurney*, 61 Kan. 292; *Ball v. Reese*, 58 Kan. 614, 62 Am. St. Rep. 638.

Maine.—*Childs v. Cleaves*, 95 Me. 498; *Baron v. Paine*, 83 Me. 312; *Milliken v. Whitehouse*, 49 Me. 527; *Came v. Brigham*, 39 Me. 35.

Minnesota.—*Hinckley v. Kettle River R. Co.*, 80 Minn. 32; *Holland v. Duluth Iron Min., etc.*, Co., 65 Minn. 324, 60 Am. St. Rep. 480; *Oswald v. Minneapolis Times Co.*, 65 Minn. 249.

Missouri.—*Nichols v. Stevens*, 123 Mo. 96, 45 Am. St. Rep. 514.

New York.—*Hovey v. Ten Broeck*, 3 Robt. (N. Y.) 316; *Miller v. White*, 57 Barb. (N. Y.) 504, 59 Barb. (N. Y.) 434, reversed 50 N. Y. 137; *Slee v. Bloom*, 20 Johns. (N. Y.) 669, followed in *Conklin v. Furman*, (Supm. Ct. Gen. T.) 8 Abb. Pr. N. S. (N. Y.) 161.

North Carolina.—*Heggie v. People's Bldg., etc., Assoc.*, 107 N. Car. 581.

Oregon.—*Saylor v. Com. Banking Co.*, 38 Oregon 204.

Pennsylvania.—*Wilson v. Pittsburgh, etc., Coal Co.*, 43 Pa. St. 424.

Utah.—*Wilson v. Kiesel*, 9 Utah 397.

Vermont.—*Dauchy v. Brown*, 24 Vt. 197.

See the title RES JUDICATA, vol. 24, p. 755.

3. *That Such a Judgment Is Prima Facie Evidence*, see *Grund v. Tucker*, 5 Kan. 70; *Belmont v. Coleman*, 21 N. Y. 96, affirming 1 Bosw. (N. Y.) 188; *Hastings v. Drew*, 76 N. Y. 9; *Moss v. Averell*, 10 N. Y. 449; *Hoagland v. Bell*, 36 Barb. N. Y. 57; *Moss v. McCullough*, 7 Barb. (N. Y.) 279; *Squires v. Brown* (N. Y. Super. Ct. Gen. T.) 22 How. Pr. (N. Y.) 35; *Merchants' Bank v. Chandler*, 19 Wis. 457. See also *Union Bank v. Wando Min., etc., Co.*, 17 S. Car. 339.

That Judgment Is Not Conclusive nor Prima Facie Evidence, see *Moss v. McCullough*, 5 Hill (N. Y.) 131.

Stockholder Not Party to Proceedings Held Not Bound by Recitals in Decree Against Insurance Company.—*Chesnut v. Pennell*, 92 Ill. 55, distinguished *Black v. Womer*, 100 Ill. 328.

Judgment Against Bank After Repeal of Charter Held Not Binding on Stockholder.—*Whitman v. Cox*, 26 Me. 335.

Judgment Is Competent Evidence of Status of Plaintiff as Creditor and of Amount Due.—*Stephens v. Fox*, 83 N. Y. 313.

Judgment Rendered After Dissolution of Corporation Not Prima Facie Evidence Against Stockholders.—*Bonaaffe v. Fowler*, 7 Paige (N. Y.) 576.

Stockholder Not Bound by ex Parte Adjudication of Liability.—*Rood v. Whorton*, 67 Fed. Rep. 474.

Collusive Judgment Not Conclusive.—*Bissit v. Kentucky River Nav. Co.*, 15 Fed. Rep. 353; *Wilson v. Kiesel*, 9 Utah 397.

Judgment May Be Impeached for Fraud.—*Warrington v. Ball*, (C. C. A.) 90 Fed. Rep. 464; *Saylor v. Com. Banking Co.*, 38 Oregon 204. See also *McBryan v. Universal Elevator Co.*, (Mich. 1902) 89 N. W. Rep. 683.

Judgment Against Corporation on Ultra Vire Contracts Held Not Conclusive on Stockholders.—*Ward v. Joslin*, 186 U. S. 142, affirming (C. C. A.) 105 Fed. Rep. 224.

Judgment Rendered Without Jurisdiction Not Conclusive.—*Choat v. Boyd*, 59 Kan. 682; *Prescott v. Farmers' Nat. Bank*, (Kan. App. 1808) 53 Pac. Rep. 769.

Stockholder May Show that Judgment Is Wholly Void.—*McBryan v. Universal Elevator Co.*, (Minn. 1902) 89 N. W. Rep. 683.

Other Conditions Allowing the Enforcement of the Liability of Stockholders are prescribed by statute in some jurisdictions, and the provision that the stockholders shall be liable for obligations of the corporation upon its dissolution is quite general.¹ Under such a provision it has been held unnecessary that a judgment of ouster or dissolution should have been pronounced in any other proceeding before a creditor can maintain an action against a stockholder and that the question of dissolution may be litigated in the suit by the creditor against the stockholder.²

Necessity of Demand. — It has also been made a statutory requirement that no suit shall be maintained against the stockholders of a corporation until after a demand for payment shall have been made upon the company.³

6. EXECUTION AGAINST STOCKHOLDER ON JUDGMENT AGAINST CORPORATION. — In some states statutes have been enacted authorizing judgment creditors of corporations to levy upon the property of their stockholders after the return unsatisfied of executions against the corporations themselves. The requisites and modes of procedure prescribed by these statutes vary in the several states.⁴

5. Limitations and Laches — *a. WHEN STATUTE BEGINS* — (1) *Necessity for Exhausting Remedy Against Corporation.* — In most jurisdictions it is held that no right of action accrues against the stockholder and hence the statute of limitations does not begin to run in his favor until the return of an execution unsatisfied in whole or in part against the corporation.⁵

1. Stockholders Made Liable upon Dissolution of Corporation. — *Gibbs v. Davis*, 27 Fla. 531; *Merrill v. Meade*, 6 Kan. App. 620; *Penniman v. Briggs*, Hopk. (N. Y.) 300.

What Constitutes Dissolution Within Statute. — *Slee v. Bloom*, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273.

Bankruptcy Amounts to Dissolution Which Will Charge Stockholders. — *State Sav. Assoc. v. Kellogg*, 52 Mo. 583.

Under Kansas Statute Corporation Is Deemed Dissolved by Suspending Business More than One Year. — *Whitman v. Citizens' Bank*, 110 Fed. Rep. 503, 49 C. C. A. 122; *Atchison First Nat. Bank v. King*, 60 Kan. 733; *Chase v. Horton Bank*, 9 Kan. App. 186; *Fox v. Atchison First Nat. Bank*, 9 Kan. App. 18; *Merrill v. Meade*, 6 Kan. App. 620.

2. Judgment of Ouster or Dissolution Unnecessary. — *Penniman v. Briggs*, Hopk. (N. Y.) 300, affirmed 8 Cow. (N. Y.) 387, 18 Am. Dec. 454. See also *Gibbs v. Davis*, 27 Fla. 531; *Atchison First Nat. Bank v. King*, 60 Kan. 733.

3. Necessity of Demand. — *Connecticut River Sav. Bank v. Fiske*, 60 N. H. 363; *Harvey v. Chase*, 38 N. H. 272; *Haynes v. Brown*, 36 N. H. 545.

4. Execution Against Stockholders on Judgment Against Corporation — *Florida.* — *Hood v. French*, 37 Fla. 117.

Georgia. — *Mason v. Force*, 30 Ga. 99; *Stone v. Davidson*, 56 Ga. 179.

Iowa. — *Donworth v. Coolbaugh*, 5 Iowa 300; *Bayliss v. Swift*, 40 Iowa 648; *Singer v. Given*, 61 Iowa 93.

Kansas. — *Howell v. Manglesdorf*, 33 Kan. 194; *Wells v. Robb*, 43 Kan. 201; *McClelland v. Cragan*, 54 Kan. 599; *U. S. National Bank v. Magnuson*, 57 Kan. 573; *Achenbach v. Pomeroy Coal Co.*, 2 Kan. App. 357; *Carey Lumber Co. v. Neal*, 3 Kan. App. 399; *Beers v. Bunker*, 6 Kan. App. 697; *Parkinson Sugar Co. v. Topeka Sugar Co.*, 8 Kan. App. 79;

Chenault v. Chappell, 8 Kan. App. 807; *Warner v. Imbeau*, 63 Kan. 415.

Maine. — *Chaffin v. Cummings*, 37 Me. 76; *Whitney v. Hammond*, 44 Me. 305.

Massachusetts. — *Leland v. Marsh*, 16 Mass. 389; *Sargent v. Webster*, 13 Met. (Mass.) 497, 46 Am. Dec. 743; *Johnson v. Somerville Dyeing, etc., Co.*, 15 Gray (Mass.) 216; *Hancock Nat. Bank v. Ellis*, 172 Mass. 39, 70 Am. St. Rep. 232.

Missouri. — *Hannah v. Moberly Bank*, 67 Mo. 678; *Marks v. Hardy*, 86 Mo. 232; *Wilson v. St. Louis, etc., R. Co.*, 108 Mo. 588, 32 Am. St. Rep. 624; *Scanlan v. Crawshaw*, 5 Mo. App. 337; *Mechanics' Sav. Inst. v. Pott-hoff*, 9 Mo. App. 574; *Cummings v. Wright*, 11 Mo. App. 348; *Paxson v. Talmage*, 14 Mo. App. 585.

Priority Between Judgment Creditors. — Where the statute authorizes a judgment creditor of an insolvent corporation to levy his execution upon the property of its stockholders, the creditor who first moves so to charge a stockholder acquires a priority of right against him. *Wells v. Robb*, 43 Kan. 201; *Hoyt v. Bunker*, 50 Kan. 574; *Marks v. Hardy*, 12 Mo. App. 595.

5. Statute Begins from Return of Execution Against Corporation. — *Bank of North America v. Rindge*, 57 Fed. Rep. 279; *Powell v. Oregonian R. Co.*, 38 Fed. Rep. 187; *Kelly v. Clark*, 21 Mont. 291; *Van Pelt v. Gardner*, 54 Neb. 701; *Globe Pub. Co. v. State Bank*, 41 Neb. 175; *Handy v. Draper*, 89 N. Y. 334, reversing 23 Hun (N. Y.) 256; *Merritt v. Reid*, 10 Daly (N. Y.) 311; *Christensen v. Quintard*, 36 Hun (N. Y.) 334; *Kilton v. Providence Tool Co.*, 22 R. I. 605. *Compare Garrettsville First Nat. Bank v. Greene*, 64 Iowa 445.

Where the Sheriff Fails to Return the Execution the statute begins to run from the date of the return as procured by proceedings taken by the creditor or after the lapse of a reasonable

Statutes. — In some cases the time is limited by statute within which the action against the corporation must be brought in order to render the stockholder liable.¹

(2) *Circumstances Rendering Judgment and Execution Against Corporation Unnecessary.* — The above requirement may be rendered unnecessary by circumstances which would make an execution against the corporation legally impossible, as in the case of an injunction restraining such action,² or by circumstances which would render such action ineffectual, as where the corporation has been dissolved or become insolvent, in which cases the statute will begin to run from the date of the dissolution³ or insolvency.⁴ In some jurisdictions it is held that a practical dissolution will start the running of the statute,⁵ and in others that the dissolution must be judicially determined.⁶

In Kansas it is provided by statute that a corporation shall be deemed to be dissolved in one year after a suspension of the regular business for which it was organized.⁷

A Bank Will Be Deemed Insolvent so as to start the running of the statute from the time when it makes a permanent suspension of specie payments.⁸

In Ohio some judicial proceedings must have been instituted for the application of the assets of the corporation to the payment of its debts.⁹

(3) *Where Stockholder's Liability Is Primary.* — Where by the general law or the particular incorporating act the liability of the stockholder is made primary and not contingent, the statute will run in favor of the stockholder from the date when the right of action accrues against the corporation.¹⁰ In such cases the fact that a creditor first proceeds against the corporation does not suspend the running of the statute as to the stockholder.¹¹

(4) *Effect of Extending Time of Payment.* — The beginning of the statute as to a stockholder's liability is not postponed by an extension of the time of payment of the corporation's indebtedness, as in the case of renewal notes given by the corporation.¹² But a new period of limitation will be created if

time within which such proceedings might have been taken. *Mills v. Hicks*, 44 N. Y. Super. Ct. 527.

1. Limitation as to Action Against Corporation. — *Haskins v. Harding*, 2 Dill. (U. S.) 99; *Close v. Potter*, 155 N. Y. 145; *Hardman v. Sage*, 124 N. Y. 25, *affirming* 47 Hun (N. Y.) 230; *Jagger Iron Co. v. Walker*, 76 N. Y. 521, *affirming* 43 N. Y. Super. Ct. 275, *overruling* *Fisher v. Marvin*, 47 Barb. (N. Y.) 159.

Dissolution Within Time Limited Renders Action Unnecessary. — *Arnot v. Sage*, (Supm. Ct. Gen. T.) 5 N. Y. Supp. 477, *affirmed* 52 Hun (N. Y.) 613.

2. Hunting v. Blun, 143 N. Y. 511, *affirming* 69 Hun (N. Y.) 562; *Shellington v. Howland*, 53 N. Y. 371.

3. Garesche v. Lewis, 15 Mo. App. 565, *affirmed* 93 Mo. 197.

4. Insolvency of Corporation. — *Garrettsville First Nat. Bank v. Greene*, 64 Iowa 445; *Baldwin v. Atwater Coal Co.*, 8 Ohio Dec. (Reprint) 533, 8 Cinc. L. Bul. 296; *Barrick v. Gifford*, 47 Ohio St. 180, 21 Am. St. Rep. 798; *Hawkins v. Iron Valley Furnace Co.*, 40 Ohio St. 507; *Jones v. Whitworth*, 94 Tenn. 602.

5. Practical Dissolution Held Sufficient. — *Platt v. Hungerford*, 116 Fed. Rep. 771; *Seattle Nat. Bank v. Pratt*, 103 Fed. Rep. 62, *affirmed* (C. C. A.) 111 Fed. Rep. 841; *McDonnell v. Alabama Gold L. Ins. Co.*, 85 Ala. 401.

6. Kincaid v. Dwinelle, 59 N. Y. 548.

7. When Corporation Deemed Dissolved — Kansas Statute. — *Platt v. Hungerford*, 116 Fed. Rep.

771; *Seattle Nat. Bank v. Pratt*, 103 Fed. Rep. 62, *affirmed* (C. C. A.) 111 Fed. Rep. 841; *Brigham v. Nathan*, 62 Kan. 243; *Cottrell v. Manlove*, 58 Kan. 405; *Jones v. Edson*, 10 Kan. App. 110; *Chase v. Horton Bank*, 9 Kan. App. 186.

8. Insolvency of Bank Dates from Suspension of Specie Payments. — *Terry v. McLure*, 103 U. S. 442; *Godfrey v. Terry*, 97 U. S. 171; *Terry v. Anderson*, 95 U. S. 628; *Terry v. Tubman*, 92 U. S. 156; *Baker v. Atlas Bank*, 9 Met. (Mass.) 182; *Long v. Yanceyville Bank*, 90 N. Car. 405; *Amer v. Armstrong*, 6 Pa. Co. Ct. 392.

9. Bronson v. Schneider, 49 Ohio St. 438; *Younglove v. Kelly Island Lime Co.*, 49 Ohio St. 663.

10. California. — *Hyman v. Coleman*, 82 Cal. 650; 16 Am. St. Rep. 178; *Mitchell v. Beckman*, 64 Cal. 117; *Davidson v. Rankin*, 34 Cal. 503.

Primary Liability under Special Statutes. — *Fleischer v. Rentchler*, 17 Ill. App. 402; *Conklin v. Furman*, 48 N. Y. 527, *affirming* 57 Barb. (N. Y.) 484; *Bower v. Cyano Chemical Co.*, 20 Pa. Super. Ct. 33.

11. Stilphen v. Ware, 45 Cal. 110.

12. Extending Time of Payment. — *Goodall v. Jack*, 127 Cal. 258; *Santa Rosa Nat. Bank v. Barnett*, 125 Cal. 407; *Hyman v. Coleman*, 82 Cal. 650, 16 Am. St. Rep. 178; *Brigham v. Nathan*, 62 Kan. 243; *Close v. Potter*, 155 N. Y. 145; *Hardman v. Sage*, 124 N. Y. 25, *affirming* 47 Hun (N. Y.) 230; *Jagger Iron Co. v. Walker*, 76 N. Y. 521, *affirming* 43 N. Y. Super. Ct. 275.

Volume XXVI.

the original indebtedness is extinguished and a new and different liability incurred.¹

b. PERIOD OF LIMITATION — (1) *How Determined.* — The period within which a stockholder's liability for corporate debts may be enforced is sometimes regulated by the general law or special act under which the corporation is formed.² In a few states there are special statutes of limitations relating to actions to enforce the liability of stockholders in general, or with regard to certain classes of corporations;³ but in most states the actions are left to be governed by general statutes of limitations.⁴

(2) *What General Statute Applicable.* — The authorities differ widely as to the nature of the stockholder's liability and hence as to what section of the general statute of limitations should be applied. Actions to enforce the liability have been variously held to be governed by the limitations relating to actions upon specialties,⁵ contracts without specialty,⁶ contracts not in writing,⁷ and liabilities created by statute.⁸

Liabilities Arising Out of a Failure to Perform Certain Corporate Acts, such as publishing notices of the corporation's indebtedness, are generally held to be governed by the statutes relating to penalties.⁹

Equitable Actions. — The same statute of limitations is usually followed in suits in equity as in actions at law.¹⁰

(3) *What Law Governs.* — Where the statute imposing the liability limits the period within which it may be enforced this limitation will govern wherever the action is brought.¹¹ If the limitation is not thus prescribed, the court will apply the statute of limitations of the state where the action is brought, and not the general statute of limitations of the state creating the corporation.¹² In the federal courts the state statutes of limitations are followed.¹³

c. LACHES. — Courts of equity will deny relief to creditors of a corporation who are guilty of laches in seeking to enforce a stockholder's liability;¹⁴ but

overruling *Fisher v. Marvin*, 47 Barb. (N. Y.) 159.

1. *Ryland v. Commercial, etc., Bank*, 127 Cal. 525.

2. *Period Regulated by Incorporating Acts.* — See *Cummings v. Maxwell*, 45 Me. 190; *Adamson v. Davis*, 47 Mo. 268; *Chrisman-Sawyer Banking Co. v. Independence Wool Mfg. Co.*, 168 Mo. 634; *Bower v. Cyano Chemical Co.*, 20 Pa. Super. Ct. 33; *Union Bank v. Wando Min., etc., Co.*, 17 S. Car. 339.

Limitation as to Assignor of Stock. — *Hollingshead v. Woodward*, 107 N. Y. 96; *Sadler v. Nicholson*, 49 S. Car. 7.

3. *Under Special Statutes of Limitations.* — *Hobbs v. National Bank*, (C. C. A.) 96 Fed. Rep. 396; *Seattle Nat. Bank v. Pratt*, 103 Fed. Rep. 62, affirmed (C. C. A.) 111 Fed. Rep. 841; *Nellis v. Pacific Bank*, 127 Cal. 166; *Santa Rosa Nat. Bank v. Barnett*, 125 Cal. 407; *Moore v. Boyd*, 74 Cal. 167; *Hunt v. Ward*, 99 Cal. 612, 37 Am. St. Rep. 87; *Green v. Beckman*, 59 Cal. 545; *Amer v. Armstrong*, 6 Pa. Co. Ct. 392.

4. See *infra*, this subsection, *What General Statutes Applicable.*

5. *What General Statute Applicable.* — *Andrews v. Bacon*, 38 Fed. Rep. 777; *Thornton v. Lane*, 11 Ga. 459; *Kilton v. Providence Tool Co.*, 22 R. I. 605.

6. *Carrol v. Green*, 92 U. S. 509.

7. *Contracts Not in Writing.* — *Hutchings v. Lampton*, 82 Fed. Rep. 960; *Brunswick Terminal Co. v. National Bank*, 88 Fed. Rep. 607; *Baldwin v. Atwater Coal Co.*, 8 Ohio Dec. (Reprint) 533, 8 Cinc. L. Bul. 296.

8. *Liabilities Created by Statute.* — *Bullard v. Bell*, 1 Mason (U. S.) 243; *Hawkins v. Iron Valley Furnace Co.*, 40 Ohio St. 507. But see the title *LIMITATION OF ACTIONS*, vol. 19, p. 281.

9. *Penalties.* — *Globe Pub. Co. v. State Bank*, 41 Neb. 175 [overruling *Howell v. Roberts*, 29 Neb. 483; *Coy v. Jones*, 30 Neb. 798]; *Merchants' Bank v. Bliss*, 1 Robt. (N. Y.) 391, 21 How. Pr. (N. Y.) 365, affirmed 35 N. Y. 412. Compare *Kilton v. Providence Tool Co.*, 22 R. I. 605.

10. *In Equity.* — *Carrol v. Green*, 92 U. S. 509; *Baker v. Atlas Bank*, 9 Met. (Mass.) 182. See also *Terry v. McLure*, 103 U. S. 442.

11. *What Law Governs.* — See *Brunswick Terminal Co. v. National Bank*, 88 Fed. Rep. 607; *Pulsifer v. Greene*, 96 Me. 438. See also the title *PRIVATE INTERNATIONAL LAW*, vol. 22, p. 1386.

12. *Law of State in Which Suit Is Brought.* — *Seattle Nat. Bank v. Pratt*, 103 Fed. Rep. 62, affirmed (C. C. A.) 111 Fed. Rep. 841; *Hobbs v. National Bank*, (C. C. A.) 96 Fed. Rep. 396; *Dexter v. Edmonds*, 89 Fed. Rep. 467; *Brunswick Terminal Co. v. National Bank*, 88 Fed. Rep. 607; *Schiffer v. Columbia College*, 87 Fed. Rep. 166; *Pulsifer v. Greene*, 96 Me. 438. Compare *Andrews v. Bacon*, 38 Fed. Rep. 777.

13. *In Federal Courts.* — *Andrews v. Bacon*, 38 Fed. Rep. 777. See also *Dexter v. Edmonds*, 89 Fed. Rep. 467; *Hobbs v. National Bank*, (C. C. A.) 96 Fed. Rep. 396.

14. *Laches.* — *Wilson v. St. Louis, etc., R. Co.*, 120 Mo. 45; *Gilmore v. Cincinnati Bank*, 8 Ohio 62.

the defense of laches is not available in an action at law brought within the period of the statutory limitation.¹

6. Set-off of Debt of Corporation — a. AGAINST SUBSCRIPTION LIABILITY. — In jurisdictions where the amount due upon unpaid stock subscriptions is administered as a trust fund for equal distribution among corporate creditors, it is held that a stockholder who is also a creditor cannot gain an advantage for himself by setting off his debt from the corporation against his liability as a subscriber to its stock.² In jurisdictions where suits by individual creditors are countenanced, a stockholder-creditor is as much entitled to preference as any other corporate creditor, and it is therefore held that he may use his debt as a set-off to his liability.³

b. AGAINST ADDITIONAL STATUTORY LIABILITY. — Whether a debt due him by the corporation may be set off by a stockholder in an action against him on his statutory liability is a disputed question, the solution of which depends largely upon the provisions of the statute of the particular state and the mode in which the liability created by it is enforced. In some jurisdictions such set-off is permitted,⁴ but in others the right to do so is denied.⁵ In *New York* it is held that where a creditor proceeds at law against a stockholder, under the special right to sue conferred by statute, the stockholder so sued may set up as a defense that he himself is a creditor of the corporation;⁶ but where the suit is for an equitable distribution of the effects of the corpora-

1. *Sadler v. Nicholson*, 49 S. Car. 7.

2. **Set-off of Debt of Corporation Against Subscription Liability**—*United States*.—*Sawyer v. Hoag*, 17 Wall. (U. S.) 610; *Gilchrist v. Helena, etc.*, R. Co., 49 Fed. Rep. 519; *Wilbur v. Stockholders*, 18 Nat. Bankr. Reg. 178, 29 Fed. Cas. No. 17,636; *Bausman v. Kinnear*, (C. C. A.) 79 Fed. Rep. 172; *Wingate v. Orchard*, (C. C. A.) 75 Fed. Rep. 241.

Colorado.—*Colorado Fuel, etc., Co. v. Seldalia Smelting Co.*, 13 Colo. App. 474.

Georgia.—*Wilkinson v. Bertock*, 111 Ga. 187.

Iowa.—*Singer v. Given*, 61 Iowa 93; *Boulton Carbon Co. v. Mills*, 78 Iowa 460; *Tama Water-Power Co. v. Hopkins*, 79 Iowa 653.

Minnesota.—*Richardson v. Merritt*, 74 Minn. 354.

Nevada.—*Thompson v. Reno Sav. Bank*, 19 Nev. 103, 3 Am. St. Rep. 797.

Ohio.—*Union Cent. L. Ins. Co. v. Jones*, 35 Ohio St. 351; *Painesville Nat. Bank v. King Varnish Co.*, 4 Ohio Cir. Dec. 511, 8 Ohio Cir. Ct. 563.

South Carolina.—*Efrid v. Piedmont Land Imp., etc., Co.*, 55 S. Car. 78.

Texas.—*Mathis v. Pridham*, 1 Tex. Civ. App. 58.

3. *Appleton v. Turnbull*, 84 Me. 72; *Washington Sav. Bank v. Butchers, etc.*, Bank, 130 Mo. 155; *Webber v. Leighton*, 8 Mo. App. 502; *Shields v. Hobart*, 172 Mo. 491.

Waiver of Right of Set-off.—A stockholder, who as a creditor of the corporation receives a dividend upon his debt, waives his right to set off such debt against his liability. *Hall v. U. S. Insurance Co.*, 5 Gill (Md.) 484.

4. **Stockholder May Set Off Debt**—*Georgia*.—*Boyd v. Hall*, 56 Ga. 563.

Kansas.—*Crocker v. Ball*, 10 Kan. App. 364; *Pierce v. Topeka Commercial Security Co.*, 60 Kan. 164; *Kendall v. Underhill*, 8 Kan. App. 521.

Maryland.—*Cahill v. Original Big Gun Bene-*

ficial, etc., Assoc., 94 Md. 353. Compare *Mattheus v. Albert*, 24 Md. 527.

Massachusetts.—*Broadway Nat. Bank v. Baker*, 176 Mass. 294 (construing the Kansas statute).

Missouri.—*Jerman v. Benton*, 79 Mo. 148; *Merchants' Ins. Co. v. Hill*, 12 Mo. App. 148; *Simmons v. Heman*, 17 Mo. App. 444.

Pennsylvania.—*Ball v. Anderson*, 196 Pa. St. 86.

5. **Stockholder May Not Set Off Debt**—*United States*.—*Burget v. Robinson*, (C. C. A.) 113 Fed. Rep. 669. See also *Sheafe v. Larimer*, 79 Fed. Rep. 921.

Connecticut.—*Ball Electric Light Co. v. Child*, 68 Conn. 522.

Illinois.—*Buchanan v. Meisser*, 105 Ill. 639; *Thompson v. Meisser*, 108 Ill. 359; *Thebus v. Smiley*, 110 Ill. 316.

Indiana.—*Gentry v. Alexander*, 16 Ind. 471. *Massachusetts*.—*Howe v. Snow*, 3 Allen (Mass.) 111.

Minnesota.—*Helm v. Smith-Fee Co.*, 76 Minn. 328.

Ohio.—*Hardman v. Cincinnati, etc., R. Co.*, 9 Ohio Dec. (Reprint) 578, 15 Cinc. L. Bul. 164.

South Carolina.—*Lauraglen Mills v. Ruff*, 57 S. Car. 53; *Parker v. Carolina Sav. Bank*, 53 S. Car. 583, 69 Am. St. Rep. 888.

Where the Stockholder and the Corporation Are Both Insolvent, and the property of the former is in the hands of an assignee, equity will set off one claim against the other. *Markell v. Ray*, 75 Minn. 138.

6. **Rule in New York.**—*Garrison v. Howe*, 17 N. Y. 458; *Mathez v. Neidig*, 72 N. Y. 100; *Agate v. Sands*, 73 N. Y. 620; *Wheeler v. Millar*, 90 N. Y. 353; *Briggs v. Penniman*, 8 Cow. (N. Y.) 387, 18 Am. Dec. 454; *Richards v. Kinsley*, 14 Daly (N. Y.) 334; *Remington v. King*, (Supm. Ct. Spec. T.) 11 Abb. Pr. (N. Y.) 278; *Christensen v. Colby*, 43 Hun (N. Y.) 362; *Richards v. Crocker*, (N. Y. City Ct. Spec. T.) 19 Abb. N. Cas. (N. Y.) 73.

tion among its creditors, the stockholder-creditor must discharge his liability in full, and file his claim for allowance in the same manner as any other creditor.¹

7. Contribution Between Stockholders. — A stockholder who pays more than his share of the corporate debts may recover from the other stockholders by an equitable suit for contribution,² unless the statute prescribes another remedy.³

1. Empire City Bank's Case, (Ct. App.) 8 Abb. Pr. (N. Y.) 192; *Barnes v. Arnold*, 169 N. Y. 611, 45 N. Y. App. Div. 314.

2. Contribution Between Stockholders — United States. — *Kisseberth v. Prescott*, 91 Fed. Rep. 611 (construing the Kansas statute).

Illinois. — *Wincock v. Turpin*, 96 Ill. 135; *Buchanan v. Meisser*, 105 Ill. 638; *Meisser v. Thompson*, 9 Ill. App. 368.

Iowa. — *Stewart v. Lay*, 45 Iowa 604.

Kansas. — *Hinshaw v. Austin*, 64 Kan. 460.

Massachusetts. — *Cary v. Holmes*, 16 Gray (Mass.) 127.

Michigan. — *Bagley v. Beecher*, 35 Mich. 108.

Missouri. — *Guerney v. Moore*, 131 Mo. 650.

Nebraska. — *Bennison v. McConnell*, 56 Neb. 46; *Van Pelt v. Gardner*, 54 Neb. 701. See also *Davidson v. Gretna State Bank*, 59 Neb. 63.

New York. — *Aspinwall v. Torrance*, 1 Lans. (N. Y.) 381; *Aspinwall v. Sacchi*, 57 N. Y. 331; *Bagley v. Pettibone*, (Buffalo Super. Ct.

Eq. T.) 20 N. Y. Supp. 305; *Clark v. Myers*, 11 Hun (N. Y.) 608; *Koons v. Martin*, 66 Hun (N. Y.) 554.

Ohio. — *Umsted v. Buskirk*, 17 Ohio St. 113.

Rhode Island. — *Sayles v. Bates*, 15 R. I. 342.

And see the title CONTRIBUTION AND EXONERATION, vol. 7, p. 363.

An Action at Law Against Other Stockholders cannot be maintained. *Clark v. Myers*, 11 Hun (N. Y.) 608; *Koons v. Martin*, 66 Hun (N. Y.) 555.

Contribution Cannot Be Enforced Against Non-resident Stockholders where liability is created by a statute which is penal in its nature. *Sayles v. Brown*, 40 Fed. Rep. 8.

3. Contribution under Statute. — *Myers v. Sierra Valley Stock, etc., Assoc.*, 122 Cal. 669; *Brinham v. Wellersburg Coal Co.*, 47 Pa. St. 43; *O'Reilly v. Bard*, 105 Pa. St. 569.

Contribution for Payment of Federal Taxes. — *Richter v. Henningsan*, 110 Cal. 530; *Wolters v. Henningsan*, 114 Cal. 433.

STOCKBROKERS.

BY JAMES A. GWYN.

- I. DEFINITIONS AND DISTINCTIONS, 1054.**
 - 1. *Stockbroker Defined*, 1054.
 - 2. *Terms Used with Reference to Stockbrokers*, 1054.
 - 3. *Distinction between Stockbrokers and Ordinary Brokers*, 1055.
- II. RELATION BETWEEN CLIENT AND BROKER, 1055.**
 - 1. *Principal and Agent*, 1055.
 - 2. *Pledgor and Pledgee*, 1055.
 - 3. *Relation Contractual*, 1055.
- III. DUTIES OF BROKER TO CLIENT, 1055.**
 - 1. *Obedying Instructions*, 1055.
 - 2. *Good Faith, Skill, and Diligence*, 1056.
 - 3. *Keeping Accounts*, 1056.
 - 4. *Notifying Client of Transactions*, 1056.
 - 5. *Duties in Particular Transactions*, 1056.
- IV. METHOD OF DEALING THROUGH BROKERS ON EXCHANGES, 1056.**
- V. PARTICULAR TRANSACTIONS CONSIDERED, 1057.**
 - 1. *Purchases on Margin*, 1057.
 - a. *Character of Transaction*, 1057.
 - b. *Ownership of Stock*, 1057.
 - c. *Custody and Control of Stock*, 1057.
 - d. *Closing Transaction*, 1058.
 - (1) *By Sale on Order of Client*, 1058.
 - (2) *On Failure of Client to Take Stock After Reasonable Time*, 1058.
 - (3) *On Failure of Client to Furnish Margins*, 1059.
 - (4) *On Death or Bankruptcy of Client*, 1059.
 - (5) *Method of Sale in Closing Transaction*, 1059.
 - e. *Legality of Transaction*, 1059.
 - 2. *Settlements of Differences*, 1060.
 - 3. *Short Sales*, 1060.
 - a. *Definition*, 1060.
 - b. *Mode of Conducting Transaction*, 1060.
 - c. *Closing Transaction*, 1060.
 - (1) *On Order of Client to Buy In*, 1060.
 - (2) *Right of Broker to Close Transaction*, 1060.
 - (a) *After Reasonable Time*, 1060.
 - (b) *On Failure of Margins*, 1061.
 - (c) *On Repudiation of Sale by Client*, 1061.
 - (d) *On Death of Client*, 1061.
 - d. *Legality of Transaction*, 1061.
 - 4. *Options*, 1061.
 - a. *Character of Transaction*, 1061.
 - b. *Legality of Transaction*, 1062.
- VI. CORNERS IN STOCKS, 1062.**
- VII. JOINT UNDERTAKINGS BETWEEN BROKER AND CLIENT, 1062.**
- VIII. RIGHTS AND LIABILITIES OF BROKER, 1063.**
 - 1. *Right to Buy and Sell in Customary Manner*, 1063.
 - 2. *Liable for Only Ordinary Care and Diligence*, 1063.
 - 3. *Broker Not Liable as Guarantor*, 1063.

4. *Right to Delegate Authority*, 1063.
5. *Acting in Dual Capacity in Same Transaction*, 1063.
6. *Right to Commissions*, 1064.
 - a. *When Earned*, 1064.
 - b. *How Lost*, 1064.
7. *Right to Recover Advances*, 1064.
8. *Broker's Lien*, 1064.
9. *Broker's Liability on Contract for Undisclosed Principal*, 1065.
10. *Right of Broker on Client's Refusal to Deliver Stock Sold*, 1065.
11. *Other Rights and Liabilities*, 1065.

IX. RIGHTS AND LIABILITIES OF CLIENT, 1065.

1. *Right to Revoke Broker's Agency*, 1065.
2. *Right to Secret Profits Made by Broker*, 1065.
3. *Right Where Transactions Reported by Broker Are Fictitious*, 1066.
4. *Rights on Unauthorized Sale by Broker*, 1066.
5. *Rights on Failure of Broker*, 1066.
6. *Rights on Refusal of Broker to Deliver Stock*, 1066.
7. *Liability to Indemnify Broker*, 1066.
8. *Other Rights and Liabilities*, 1066.

X. USAGES AND CUSTOMS, 1066.

1. *General Rule*, 1066.
2. *Qualification of General Rule*, 1067.
3. *Usages and Customs Approved*, 1067.
4. *Usages and Customs Disapproved*, 1067.

XI. WAGERING CONTRACTS, 1068.**XII. STOCK-JOBGING ACTS**, 1068.

1. *In General*, 1068.
2. *Particular Acts Considered*, 1068.
3. *Burden of Proof*, 1071.

XIII. BREACH OF CONTRACT AND MEASURE OF DAMAGES, 1071.

1. *In General*, 1071.
2. *In Cases of Conversion*, 1071.
3. *Breach of Contract to Carry as Affecting Contract of Purchase*, 1072.

CROSS-REFERENCES.

As to the Statute of Frauds as relating to stock transactions, see the title STATUTE OF FRAUDS, ante.

As to the Transfer, Registration, and Negotiability of Certificates, see the title STOCK AND STOCKHOLDERS, ante.

As to Pledge of Stock Certificates, see the title PLEDGE AND COLLATERAL SECURITY, vol. 22, p. 839.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this title, see the following titles in this work: AGENCY, vol. 1, p. 930; BROKERS, vol. 4, p. 959; GAMBLING CONTRACTS, vol. 14, p. 576; STOCK AND STOCKHOLDERS, ante; STOCK AND PRODUCE EXCHANGES, ante; USAGES AND CUSTOMS; and the cross-references throughout this title.

I. DEFINITIONS AND DISTINCTIONS — 1. Stockbroker Defined. — A stockbroker is a broker who, for a commission, attends to the purchase and sale of stocks or shares, and of government and other securities, in behalf and for the account of clients.¹

2. Terms Used with Reference to Stockbrokers. — There are certain well-defined terms used with reference to stockbrokers which are in general usage and are recognized by the courts: A "bear" is one who sells "short" with

1. **Stockbroker Defined.** — Cent. Dict.; Banta *Stock Brokers* 33; Cook on *Stock and Stockholders* (3d ed.), § 445.

the expectation of a decline in prices.¹ A "bull" is one who buys stock with the expectation of making a profit through a rise of prices. Such person is said to be "long of stocks."² The term "jobber" is peculiar to the English exchange, and denotes a person who acts as intermediary, dealing on his own account between brokers on the exchange.³ The term "lame duck," also peculiar to the English exchange, is used with reference to one who is unable to meet his contracts in the exchange — an insolvent.⁴

3. Distinction between Stockbrokers and Ordinary Brokers. — An ordinary broker is generally a mere negotiator, acting avowedly for another as principal and having neither the title to nor possession of the property bought or sold.⁵ The functions of a stockbroker, however, are in a great majority of his transactions much broader. He makes the purchase in his own name, frequently paying all or a part of the purchase price, and is intrusted with the possession of the securities dealt in, receiving or delivering them without the name of his principal appearing in the transaction.⁶

II. RELATION BETWEEN CLIENT AND BROKER — 1. Principal and Agent. — In the execution of his client's orders for the purchase or sale of stock a broker is the client's agent.⁷

2. Pledgor and Pledgee. — In transactions where the broker advances all or a part of the purchase price and holds or carries the stock for his client, he acquires rights and assumes liabilities not incident to ordinary brokerage transactions. It has frequently been held that in such cases the relation between the client and the broker is that of pledgor and pledgee, the broker holding the stock as security for the payment of his commissions and the amount which he has advanced upon the purchase price.⁸

3. Relation Contractual. — In some jurisdictions it is held that the relation between the client and the broker in such cases is not that of pledgor and pledgee, but merely that arising out of a contract on the part of the broker to convey to the client the shares purchased or a similar amount of like stock upon demand and tender of the amount due.⁹

III. DUTIES OF BROKER TO CLIENT — 1. Obeying Instructions. — A broker, being in the execution of his client's orders a mere agent, is bound to obey the client's instructions.¹⁰ If he is limited as to the price to be paid, he must buy at or below the price named,¹¹ and if he is instructed to buy in a particular manner, as for cash or at buyer's option, he must buy in the manner indicated.¹² An order, however, to purchase a given number of shares at a limited price is sufficiently complied with by the purchase of all the shares that can

1. Bear — Short Sales. — See *SHORT SALES*, vol. 25, p. 1061, and the title *GAMBLING CONTRACTS*, vol. 14, p. 605; and *infra*, this title, *Particular Transactions Considered — Short Sales*.

2. Bull. — See *BULL*, vol. 5, p. 18.

3. Jobber. — See *Maxted v. Paine*, L. R. 4 Exch. 203; *Coles v. Bristowe*, L. R. 4 Ch. 3; *Duncan v. Hill*, L. R. 6 Exch. 255. And see *JOBBER*, vol. 17, p. 615.

4. Lame Duck. — Biddle on Stock Brokers 71.

5. Ordinary Broker Defined. — *Northrup v. Shook*, 10 Blatchf. (U. S.) 243; *Morgan v. Jaudon*, (Ct. App.) 40 How. Pr. (N. Y.) 366; *Com. v. Yerkes*, 119 Pa. St. 266. See also the title *BROKERS*, vol. 4, p. 959.

6. Stockbroker Distinguished from Ordinary Broker. — *Banta v. Chicago*, 172 Ill. 204; *Northrup v. Shook*, 10 Blatchf. (U. S.) 243. See also *Markham v. Jaudon*, 41 N. Y. 235.

7. Principal and Agent. — *Northrup v. Shook*, 10 Blatchf. (U. S.) 243; *Galigher v. Jones*, 129 U. S. 193; *Rice v. Winslow*, 180 Mass. 500; *Zimmermann v. Heil*, 86 Hun (N. Y.) 114.

8. Pledgor and Pledgee. — *Markham v. Jaudon*, 41 N. Y. 235; *Stenton v. Jerome*, 54 N. Y. 480; *Baker v. Drake*, 66 N. Y. 518, 23 Am. Rep. 80; *Gruman v. Smith*, 81 N. Y. 25; *Gillett v. Whiting*, 120 N. Y. 402; *Zimmermann v. Heil*, 86 Hun (N. Y.) 114.

9. Relation Contractual. — *Bentinck v. London Joint Stock Bank*, (1893) 2 Ch. 120; *In re Swift*, 105 Fed. Rep. 493, (C. C. A.) 112 Fed. Rep. 315; *Covell v. Loud*, 135 Mass. 41, 46 Am. Rep. 446; *Wood v. Hayes*, 15 Gray (Mass.) 375; *Chase v. Boston*, 180 Mass. 458. See also *Weston v. Jordan*, 168 Mass. 401.

10. Broker Must Obey Instructions. — *Galigher v. Jones*, 129 U. S. 193; *Day v. Holmes*, 103 Mass. 306; *Zimmermann v. Heil*, 86 Hun (N. Y.) 114. See generally the title *AGENCY*, vol. 1, p. 1058 *et seq.*

11. Must Buy at or Below Price Named. — *Genin v. Isaacson*, 6 N. Y. Leg. Obs. 213.

12. Must Buy in Manner Indicated. — *Pickering v. Demerritt*, 100 Mass. 416; *Day v. Holmes*, 103 Mass. 306.

be procured at that price, though less than the whole number ordered, unless it is expressly stipulated that the contract is to be entire.¹

The Client May Ratify an Unauthorized Act of his broker, and the ratification will relate back to the time of the act ratified;² and where a client's instructions to his broker are susceptible of two different constructions, and the broker honestly acts upon the construction not intended by his client, but advises the client of his action and the client does not correct the mistake, he will be deemed to have accepted the broker's act.³

2. Good Faith, Skill, and Diligence. — The broker must act with good faith toward his principal,⁴ not attempting to make for himself any secret profit out of the transaction,⁵ and must at all times exercise reasonable skill and diligence.⁶

3. Keeping Accounts. — The broker should keep accounts showing the names of persons with whom he deals on behalf of his client, and the transactions entered into,⁷ and if he fails to do so all presumptions of value will be against him.⁸

4. Notifying Client of Transactions. — It is the duty of the broker whenever a transaction is entered into to give notice thereof to the client.⁹

5. Duties in Particular Transactions. — The duties of the broker to his client incident to the peculiar character of certain stock transactions are noted hereinafter in the treatment of the particular transactions under which they arise.

IV. METHOD OF DEALING THROUGH BROKERS ON EXCHANGES. — In *England* dealers on the stock exchange are divided into two classes, brokers and jobbers. The broker deals on behalf of the client and contracts for the purchase or sale of stock with the jobber, who is an intermediary, dealing always on his own account between the buying and selling brokers. The transactions are either "for money," which is a contract for immediate execution, or "for the account." In the latter case the jobber's contract is that on a certain day, called the "name day," he will pass to the broker a ticket containing the name or names of persons able and willing to complete the contract. The jobber may pass his own name or that of any other responsible person who has authorized his name to be used. Until the name day the jobber is individually liable on the contract, but not thereafter unless the name passed is objected to. The contract is completed at a later day, called the "settling day," between the first broker and the person whose name was furnished by the jobber.¹⁰ In the *United States* the buying and selling brokers deal directly with each other. They contract in their own names and generally without disclosing at any time the names of their clients. They thus appear as the principals to the transaction, and the contracts are enforced between them as such by the rules of the exchange, after which each broker settles with his respective client on the outside.¹¹

1. **When Purchase of Less than Number of Shares Ordered Is Sufficient.** — *Mayne v. Strouse*, 5 Fed. Rep. 483.

2. **Client May Ratify an Unauthorized Act.** — *Clews v. Jamieson*, 182 U. S. 461. See generally the title *Agency*, vol. 1, p. 1181 *et seq.*

3. **Ratification by Failure to Correct Mistake of Broker.** — *Coquard v. Weinstein*, 16 Mont. 312.

4. **Broker Must Act with Good Faith.** — *Hafner v. Herron*, 165 Ill. 242; *Hoffman v. Livingston*, 46 N. Y. Super. Ct. 552; *Levy v. Loeb*, 85 N. Y. 365; *Bate v. McDowell*, 49 N. Y. Super. Ct. 106.

5. **Broker Cannot Make Secret Profit.** — *Erskine v. Sachs*, (1901) 2 K. B. 504, 85 L. T. N. S. 385; *Illingworth v. DeMott*, 59 N. J. Eq. 8.

6. **Must Exercise Reasonable Skill and Diligence.** — *Boyle v. Henning*, 121 Fed. Rep. 376; *Harris*

v. Tumbridge, 83 N. Y. 92, 38 Am. Rep. 398; *Bate v. McDowell*, 49 N. Y. Super. Ct. 106.

7. **Broker Should Keep Accounts.** — *Prout v. Chisolm*, 89 Hun (N. Y.) 108, *affirmed* 21 N. Y. App. Div. 54.

8. **Presumptions of Value Against Broker Failing to Keep Accounts.** — *Bate v. McDowell*, 49 N. Y. Super. Ct. 106.

9. **Must Notify Client of Transactions Made.** — *Hoffman v. Livingston*, 46 N. Y. Super. Ct. 552.

10. **Method of Dealing in England.** — *Maxted v. Paine*, L. R. 4 Exch. 203; *Nickalls v. Merry*, L. R. 7 H. L. 530; *Coles v. Bristowe*, L. R. 4 Ch. 3; *Biddle on Stock Brokers* 44 *et seq.*

11. **Method of Dealing in United States.** — See *Northrup v. Shook*, 10 Blatchf. (U. S.) 243; *Banta v. Chicago*, 172 Ill. 204; *Markham v. Jaudon*, 41 N. Y. 235; *Horton v. Morgan*, 19 N. Y. 170.

V. PARTICULAR TRANSACTIONS CONSIDERED — 1. Purchases on Margin —

a. CHARACTER OF TRANSACTION. — By far the greater part of a broker's purchases are made on margin.¹ The obligations of the parties in a transaction of this kind may be stated as follows: The broker undertakes to buy at once for his client the stocks indicated, advancing all the money necessary for the purchase beyond the margin deposited by the client; to hold or carry the stocks for the client's benefit as long as the margin is kept good or until notice is given by either party that the transaction must be closed; to have at all times in his name or under his control the shares purchased or an equal amount of other shares of the same stock; and, upon receipt of the amount due to him thereon, to deliver the shares to the client or to sell them as the client may direct and account to him for the proceeds. The client, on the other hand, undertakes to pay the required margin, to keep it good according to the fluctuations of the market, and to take the shares purchased on his order whenever required by the broker, paying to him his commissions and the difference between the original margin and the amount which the broker has advanced.²

b. OWNERSHIP OF STOCK. — The client is the owner of the stock purchased on margin from the time of the purchase, and is entitled to its possession at any time upon demand and payment of the broker's commissions and the balance due thereon;³ or he may order that the stock be sold or converted into other securities, and the broker will be liable for any damages resulting in case he fails to comply with the instructions given.⁴ The client must pay all calls or assessments on the shares carried, or reimburse the broker in case they have been paid by him.⁵

In Case of Broker's Insolvency. — Since the client is owner, it follows that in case of a broker's insolvency stock which is being carried by him goes to the client instead of to the broker's assignee.⁶ So in case the insolvent broker has executed his client's order by himself purchasing on margin and in his own name from a second broker, the balance remaining in the second broker's hands after satisfying the amount due to him from the first broker must be paid to the client for whom the original purchase was made;⁷ and if the second broker, after notice of the client's claim, pays over such money to the insolvent's assignee he will be liable therefor to the client.⁸

c. CUSTODY AND CONTROL OF STOCK. — The broker has a right to hold the stock which he has purchased on margin as security for his commissions and advances,⁹ and may take the title thereto in his own name.¹⁰ As one share is similar to any other share of the same stock, it is not necessary that he should keep the stock of one client separate from that belonging to other clients or to himself.¹¹ For the same reason he need not, unless he has espe-

1. *Margin Defined.* — Margin is merely security. *McNeill v. New York Tenth Nat. Bank*, 55 Barb. (N. Y.) 59; *Hopkins v. O'Kane*, 169 Pa. St. 478; *Taylor's Estate*, 192 Pa. St. 304, 73 Am. St. Rep. 812.

2. *Character of Transaction.* — *Markham v. Jaudon*, 41 N. Y. 235. See also the title *GAMBLING CONTRACTS*, vol. 14, p. 606; and see *MARGIN*, vol. 19, p. 928.

3. *Client Is Owner of Stock Purchased on Margin.* — *Tuell v. Paine*, (Suprn. Ct. Spec. T.) 39 Misc. (N. Y.) 712; *Matter of Pierson*, 19 N. Y. App. Div. 478; *Markham v. Jaudon*, 41 N. Y. 245.

4. *Client May Order Stock Sold or Converted into Other Securities.* — *Galigher v. Jones*, 129 U. S. 193; *Zimmermann v. Heil*, 86 Hun (N. Y.) 114.

5. *Client Liable for Calls and Assessments.* — *Bayley v. Wilkins*, 7 C. B. 886, 62 E. C. L. 886; *Marshall v. Levy*, 66 Cal. 236.

6. *On Broker's Insolvency Stock Carried Goes to Client Instead of to Assignee.* — *Willard v. White*, 56 Hun (N. Y.) 581. See also *Taylor v. Plumer*, 3 M. & S. 562; *Ex p. Cooke*, 4 Ch. D. 123.

7. *Willard v. White*, 56 Hun (N. Y.) 581.
8. *Le Marchant v. Moore*, 79 Hun (N. Y.) 352, *affirmed* 150 N. Y. 209.

9. *Stock as Security for Commissions and Advances.* — *Markham v. Jaudon*, 41 N. Y. 235; *Wronkow v. Clews*, 52 N. Y. Super. Ct. 176.

10. *Title to Stock.* — *Horton v. Morgan*, 19 N. Y. 170.

11. *Need Not Keep Shares Purchased Separate from Other Shares of Same Stock.* — *Worthington v. Tormey*, 34 Md. 182; *Horton v. Morgan*, 19 N. Y. 170; *Harding v. Field*, 1 N. Y. App. Div. 391.

cially agreed to do so,¹ retain the identical shares purchased,² but may sell³ or pledge them,⁴ or may use them as the necessities of his business may require, provided, however, that he keeps at all times in his possession or under his control an equal amount of similar stock in such condition that the customer may at any time obtain possession thereof upon payment of the amount due thereon from him to the broker. In such case the law will presume that the stock thus under the broker's control is the stock purchased for the client.⁵ But the broker may not, without retaining control of sufficient similar stock to make a delivery to his client, sell the shares purchased⁶ or pledge them for an amount greater than the amount of his lien thereon.⁷ In short, any unauthorized disposition of the stock by which a broker deprives his client of the power to obtain it at any time upon payment of the amount due from him is an unlawful conversion,⁸ and he cannot relieve himself from liability by subsequently repurchasing the stock, the object of the rule being to prevent the broker from speculating on his own account with stock belonging to his client.⁹ The broker's right to deal with stock as his own which he is carrying for a client expires with his lien, and any such use or disposition after the client has discharged his indebtedness to him is a conversion of the stock.¹⁰

d. CLOSING TRANSACTION — (1) By Sale on Order of Client. — The client may at any time, in the absence of an agreement to the contrary, order that the stock be sold; and the broker, after the receipt of such order, will be liable for any loss occasioned by continuing to carry the stock.¹¹

Stop Orders. — The client may order that the sale be made whenever the stock reaches a certain price or upon the event of certain conditions.¹² The broker must then sell whenever the price or condition occurs or render himself liable for any resulting loss.¹³ In such cases the broker may not make the price himself, but must wait until some other broker has made the stock sell at the price designated.¹⁴

(2) On Failure of Client to Take Stock After Reasonable Time. — The broker is not obliged to carry stock for an indefinite time,¹⁵ but has the right to tender the stock to his client after a reasonable time and demand payment, and if the client then refuses to take the stock the broker may proceed to sell it after giving to the client notice of the time and place of sale;¹⁶ and if the

1. *Levy v. Loeb*, 85 N. Y. 365.

2. *Broker Need Not Retain Identical Shares Purchased.* — *Nourse v. Prime*, 4 Johns. Ch. (N. Y.) 490, 8 Am. Dec. 606; *Harding v. Field*, 1 N. Y. App. Div. 391; *Stewart v. Drake*, 46 N. Y. 449; *Taussig v. Hart*, 58 N. Y. 425. See also *Levy v. Loeb*, 85 N. Y. 365.

3. *Broker May Sell Shares Purchased.* — *Price v. Gover*, 40 Md. 102; *Caswell v. Putnam*, 120 N. Y. 153.

4. *Broker May Pledge Shares Purchased.* — See *Douglas v. Carpenter*, 17 N. Y. App. Div. 329.

5. *Sufficient if Broker Has at All Times Control of Enough Stock for Delivery.* — *Worthington v. Tormey*, 34 Md. 193; *Price v. Gover*, 40 Md. 102; *Nourse v. Prime*, 4 Johns. Ch. (N. Y.) 490, 8 Am. Dec. 606; *Douglas v. Carpenter*, 17 N. Y. App. Div. 329; *Harding v. Field*, 1 N. Y. App. Div. 391; *Caswell v. Putnam*, 120 N. Y. 153; *Taussig v. Hart*, 58 N. Y. 425; *Stewart v. Drake*, 46 N. Y. 449; *Horton v. Morgan*, 19 N. Y. 170. See also *Thompson v. Toland*, 48 Cal. 100.

6. *Taussig v. Hart*, 58 N. Y. 425.

7. *Broker May Not Pledge Stock for Amount Greater than His Lien.* — *Matter of Pierson*, 19 N. Y. App. Div. 478; *Douglas v. Carpenter*, 17

N. Y. App. Div. 329; *McNeil v. New York Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341.

8. *Conversion.* — *Matter of Pierson*, 19 N. Y. App. Div. 478; *Douglas v. Carpenter*, 17 N. Y. App. Div. 329.

9. *Repurchase.* — *Taussig v. Hart*, 58 N. Y. 429. See also *Clarke v. Meigs*, 10 Bosw. (N. Y.) 337.

10. *After Expiration of Lien.* — *Van Voorhis v. Rea*, 153 Pa. St. 19.

11. *Client May Order Sale of Stock.* — *Galigher v. Jones*, 129 U. S. 193; *Allen v. McConihe*, 124 N. Y. 342.

12. *Client May Direct Sale on Stop Order.* — *Porter v. Wormser*, 94 N. Y. 431; *Wicks v. Hatch*, 62 N. Y. 535; *Hope v. Lawrence*, 50 Barb. (N. Y.) 258.

Stop Order Defined. — See *STOP ORDER*, *post*.

13. *Broker Must Sell Whenever Price or Condition Occurs.* — *Hope v. Lawrence*, 50 Barb. (N. Y.) 258; *Porter v. Wormser*, 94 N. Y. 431.

14. *Selling Broker May Not Make Stop-order Price.* — See *Porter v. Wormser*, 94 N. Y. 431.

15. *Broker Not Bound to Carry Stock for Indefinite Time.* — See *Stenton v. Jerome*, 54 N. Y. 480.

16. *Refusal of Client to Take Stock.* — *Rosen-*

proceeds of such sale are less than the amount due to the broker, he may recover from the client the deficiency.¹

(3) *On Failure of Client to Furnish Margins.* — The client, in the absence of an agreement to the contrary, must at all times keep good his margin according to the fluctuations of the market, and if he fails to furnish margin when demanded, the broker may, after due notice, sell the stock,² and may thereafter recover from the client any balance due to him for commissions and advances in case the proceeds of the sale are insufficient.³ Before such a sale is authorized, however, the broker must not only make a demand for the margin required,⁴ but must notify the client that the stock will be sold,⁵ unless it has been expressly agreed that on failure of margins the stock may be sold without notice.⁶ A sale without such demand and notice is a conversion of the stock rendering the broker liable for any loss resulting thereby to the client.⁷

(4) *On Death or Bankruptcy of Client.* — In *England* it is well settled that upon the death, bankruptcy, or insolvency of the client the broker may at once close the transaction,⁸ and if instead of so doing he enters into a new carrying-over contract on the next settling day, and the stock is subsequently sold at a loss, the loss must be borne by him.⁹ In the *United States* it has been held that if, after the bankruptcy of a client, a broker continues to carry the stock for an unreasonable time, and then sells it without leave of court or notice to the assignee in bankruptcy, he cannot charge any resulting loss against the insolvent estate.¹⁰

(5) *Method of Sale in Closing Transaction.* — The parties, on entering into the transaction, may agree that the place and manner of sale in closing the transaction shall be left to the broker's discretion.¹¹ In the absence of any special agreement, the broker may sell in the manner customary in such cases, provided the sale is fairly conducted.¹²

e. LEGALITY OF TRANSACTION. — Purchases on margin, even for the purpose of speculation, are not necessarily gambling transactions; and in the absence of proof that the parties on entering into such transactions did not intend an actual payment for and delivery of the stocks, but merely a settle-

stock *v. Tormey*, 32 Md. 169, 3 Am. Rep. 125; Durant *v. Burt*, 98 Mass. 161; Stenton *v. Jerome*, 54 N. Y. 480.

1. *Deficiency After Sale.* — Rosenstock *v. Tormey*, 32 Md. 169, 3 Am. Rep. 125; Durant *v. Burt*, 98 Mass. 161.

2. *Failure to Furnish Margin.* — Worthington *v. Tormey*, 34 Md. 182; Covell *v. Loud*, 135 Mass. 41, 46 Am. Rep. 446; Markham *v. Jaudon*, 41 N. Y. 235; Stewart *v. Drake*, 46 N. Y. 449; Gruman *v. Smith*, 81 N. Y. 25; Gillett *v. Whiting*, 120 N. Y. 402. See also Van Dusen-Harrington Co. *v. Jungeblut*, 75 Minn. 298, 74 Am. St. Rep. 463; Wicks *v. Hatch*, 62 N. Y. 535.

3. *Deficiency on Sale.* — Wicks *v. Hatch*, 62 N. Y. 535. See also Robinson *v. Crawford*, 31 N. Y. App. Div. 228.

4. *Demand of Margin Before Sale.* — Markham *v. Jaudon*, 41 N. Y. 235; Stenton *v. Jerome*, 54 N. Y. 480; Gillett *v. Whiting*, 120 N. Y. 402; Brass *v. Worth*, 40 Barb. (N. Y.) 648. See also Milliken *v. Dehon*, 27 N. Y. 364.

5. *Broker May Not Sell Without Notice to Client.* — Baker *v. Drake*, 66 N. Y. 518, 23 Am. Rep. 80; Gruman *v. Smith*, 81 N. Y. 25; Gillett *v. Whiting*, 120 N. Y. 402; Brass *v. Worth*, 40 Barb. (N. Y.) 648; Ritter *v. Cushman*, (N. Y. Super. Ct. Gen. T.) 35 How. Pr. (N. Y.) 284; Markham *v. Jaudon*, 41 N. Y. 235; *overruling* Hanks *v. Drake*, 49 Barb. (N. Y.) 186, and

Sterling *v. Jaudon*, 48 Barb. (N. Y.) 459. Compare Covell *v. Loud*, 135 Mass. 41, 46 Am. Rep. 446.

Notice Need Not Specify Place of Sale. — Worthington *v. Tormey*, 34 Md. 182.

6. *By Special Agreement Broker May Sell Without Notice.* — Robinson *v. Norris*, (Supm. Ct. Spec. T.) 51 How. Pr. (N. Y.) 442; Milliken *v. Dehon*, 27 N. Y. 364. See also Ritter *v. Cushman*, (N. Y. Super. Ct. Gen. T.) 35 How. Pr. (N. Y.) 284; Stenton *v. Jerome*, 54 N. Y. 480; Baker *v. Drake*, 66 N. Y. 518, 23 Am. Rep. 80.

7. *Sale Without Demand and Notice Is Conversion.* — Ritter *v. Cushman*, (N. Y. Super. Ct. Gen. T.) 35 How. Pr. (N. Y.) 284; Markham *v. Jaudon*, 41 N. Y. 235; Baker *v. Drake*, 66 N. Y. 518; Gruman *v. Smith*, 81 N. Y. 25; Gillett *v. Whiting*, 120 N. Y. 402.

8. *Death or Insolvency of Client.* — Lacey *v. Hill*, L. R. 18 Eq. 182, 43 L. J. Ch. 551; *In re Overweg*, (1900) 1 Ch. 209, 81 L. T. N. S. 776.

9. *In re Overweg*, (1900) 1 Ch. 109, 81 L. T. N. S. 776.

10. *In re Daniels*, 13 Nat. Bankr. Reg. 46.

11. *Place and Manner of Sale.* — Wicks *v. Hatch*, 62 N. Y. 535; Robinson *v. Norris*, (Supm. Ct. Spec. T.) 51 How. Pr. (N. Y.) 442.

12. *Broker May Sell in Customary Manner.* — Rosenstock *v. Tormey*, 32 Md. 169, 3 Am. Rep. 125; Porter *v. Wormser*, 94 N. Y. 431.

ment of the difference between the contract and market prices, such contracts are valid and enforceable.¹ The contract is void if the parties intend to settle by the payment of differences,² and in some jurisdictions there are special statutes relating to purchases of this character.³

2. Settlements of Differences.—The term "settlement of differences" is used in two distinct senses. First, with reference to those transactions where the parties on entering into the contract do not contemplate that there shall be any actual payment for or delivery of the stocks bargained for, but merely a settlement, at the maturity of the contract, of the difference between the contract and market prices. Such contracts are purely wagers upon the fluctuations of the market, and are void.⁴ The second use of the term is with reference to those transactions which in their inception are not tainted with any gambling intent or device, but wherein the parties subsequently agree to substitute a settlement of differences instead of an actual performance of the contract according to its original terms. Contracts arising out of this class of transactions are valid and enforceable.⁵

3. Short Sales—*a. DEFINITION.*—A sale of stock "short" means a sale of stock which the seller does not at the time possess, but which, by the future date or time agreed upon for its delivery to the customer under the terms of the contract, the seller must in some way acquire for the purpose of such delivery.⁶

b. MODE OF CONDUCTING TRANSACTION.—In making a short sale it is not expected that the client will furnish the stock for delivery. This is the duty of the broker, who makes the delivery by borrowing from some other broker on his own account a sufficient amount of the stock, repeating the borrowing process as often as the exigencies of the case require until the transaction is closed; the client, in the meanwhile, furnishing to the broker a sufficient margin to protect him against any loss due to a rise in the market before such shares are to be returned.⁷

c. CLOSING TRANSACTION—(1) *On Order of Client to Buy In.*—The client may at any time order the broker to buy in stock and cover the short sale, and the broker will be liable for any resulting loss in case he fails to execute the order.⁸ If, however, the broker complies with the order without unreasonable delay under the circumstances, and is obliged to buy in at a higher price than that at which he sold, the client will be liable to him for the difference.⁹

Stop Order.—The client's order to buy in may be given in the form of a stop order.¹⁰

(2) *Right of Broker to Close Transaction*—(a) **After Reasonable Time.**—After carrying the stock for a reasonable time the broker may, upon notice to the client, close the transaction. But as the object of the transaction on the part

1. Purchase on Margin Not Gambling Contracts.

—See the title *GAMBLING CONTRACTS*, vol. 14, p. 608; and see *Dillaway v. Alden*, 88 Me. 230; *Pratt v. Boody*, 55 N. J. Eq. 175; *Goodhart v. Rastert*, 10 Ohio Dec. 40; *Taylor's Estate*, 192 Pa. St. 304, 73 Am. St. Rep. 812; *Wagner v. Hildebrand*, 187 Pa. St. 136; *Peters v. Grim*, 149 Pa. St. 163, 34 Am. St. Rep. 599.

2. See *infra*, this section, *Settlements of Differences*, and *infra*, this title, *Wagering Contracts*. See also the title *GAMBLING CONTRACTS*, vol. 14, p. 604 *et seq.*

3. See *infra*, this title, *Stock-jobbing Acts*.

4. Settlements of Differences Which Are Void.—See *infra*, this title, *Wagering Contracts*; and see the title *GAMBLING CONTRACTS*, vol. 14, pp. 604-606.

5. Settlements of Differences Which Are Valid.—See the title *GAMBLING CONTRACTS*, vol. 14,

p. 609; and see *Clarke v. Foss*, 7 Biss. (U. S.) 548; *Ward v. Vosburgh*, 31 Fed. Rep. 12. See also *Sawyer v. Taggart*, 14 Bush (Ky.) 727; *Winward v. Lincoln*, 23 R. I. 476.

6. Short Sale Defined.—See *SHORT SALES*, vol. 25, p. 1061, and the title *GAMBLING CONTRACTS*, vol. 14, p. 605. See also *Boyle v. Henning*, 121 Fed. Rep. 376.

7. Mode of Conducting Transaction.—*Boyle v. Henning*, 121 Fed. Rep. 376; *Hess v. Rau*, 95 N. Y. 359; *Knowlton v. Fitch*, 52 N. Y. 288; *White v. Smith*, 54 N. Y. 522.

8. Covering Short Sale.—*Lazare v. Allen*, 20 N. Y. App. Div. 616; *Campbell v. Wright*, 118 N. Y. 594.

9. *Boyle v. Henning*, 121 Fed. Rep. 376; *Smith v. Bouvier*, 70 Pa. St. 325.

10. *Campbell v. Wright*, 118 N. Y. 594. See also *STOP ORDER*, *post*.

of the client is to remain short until the price shall fall, and then secure the difference between the sum for which the borrowed shares were sold and the cost of those purchased for return to the lender,¹ it is held to be a part of the broker's bargain that he shall carry the stock for a reasonable time, and that he has no right, unless it be specially conferred upon him, to buy in stock to cover the sale and close the transaction without notice to or direction from his client.²

(b) **On Failure of Margins.** — If the client does not keep good his margins, and after notice from the broker fails to deposit such margins within a reasonable time, the broker may proceed to buy in stock to cover the sale and may charge the client with any loss to him in the purchase.³ A broker is not authorized, however, to buy in stock on his client's account unless he has given a reasonable notice to furnish more margin.⁴ The demand for margins must be definite and certain,⁵ and a reasonable time under the circumstances of the case must be allowed to the client in which to comply with the order.⁶

(c) **On Repudiation of Sale by Client.** — If the client repudiates a short sale which he has instructed the broker to make, the broker may at once buy in stock to cover the sale and charge the client with the difference in price.⁷

(d) **On Death of Client.** — On the death of the client the broker, whose agency, being coupled with an interest, is not revoked, need not close the transaction, but may continue it until the appointment and qualification of a representative of the estate, who thereupon succeeds to the client's right to direct the conduct of the transaction.⁸

d. LEGALITY OF TRANSACTION. — It is now held both in *England* and in the *United States* that short sales, even though made for purposes of speculation, are valid and enforceable unless it be shown that it was the mutual intention of the parties to the contract to have no actual delivery of and payment for the stock,⁹ or unless such contracts are expressly prohibited by statute.¹⁰ Short sales were at one time in *England* held to be wagering contracts,¹¹ but this doctrine was soon questioned and afterwards directly overruled.¹²

4. Options — *a. CHARACTER OF TRANSACTION.* — The term "option" is used in two senses. The first is with reference to those contracts under which the only privilege acquired by the holder of the option is as to the time when the stock bought or sold shall be delivered.¹³ The general use, however, and the one in which it is used in the following discussion, is with reference to contracts under which the privilege acquired is as to whether there shall be a delivery of the stock bargained for. Options of this class may be defined as future contracts under which the party paying the consideration acquires for a limited time the right to insist upon a compliance with the terms of the con-

1. *Knowlton v. Fitch*, 52 N. Y. 288; *White v. Smith*, 54 N. Y. 522.

2. *White v. Smith*, 54 N. Y. 522.

3. **Broker May Buy In on Client's Account on Failure of Margins.** — *Appleman v. Fisher*, 34 Md. 540; *Knowlton v. Fitch*, 52 N. Y. 288; *Lazare v. Allen*, 20 N. Y. App. Div. 616. See also *White v. Smith*, 54 N. Y. 522; *Campbell v. Wright*, 118 N. Y. 594.

4. **Reasonable Notice to Furnish Margins.** — *Lazare v. Allen*, 20 N. Y. App. Div. 616.

5. See *Boyle v. Henning*, 121 Fed. Rep. 376.

6. *Boyle v. Henning*, 121 Fed. Rep. 376; *Lazare v. Allen*, 20 N. Y. App. Div. 616.

7. **Repudiation of Sale by Client.** — *Birnbaum v. May*, 58 N. Y. App. Div. 76.

8. **Death of Client.** — *Hess v. Rau*, 95 N. Y. 359.

9. **Short Sales Valid.** — *Mortimer v. McCallan*, 6 M. & W. 58; *Clews v. Jamieson*, 182 U. S.

461; *Boyle v. Henning*, 121 Fed. Rep. 376; *Dillaway v. Alden*, 88 Me. 230; *Goodhart v. Rastert*, 10 Ohio Dec. 40; *Smith v. Bouvier*, 70 Pa. St. 325. See also *Williams v. Carr*, 80 N. Car. 294; *Seeligson v. Lewis*, 65 Tex. 215, 57 Am. Rep. 593; *Brown v. Speyers*, 20 Gratt. (Va.) 296.

10. See *infra*, this title, *Stock-jobbing Acts*.

11. **Former English Doctrine.** — *Bryan v. Lewis*, R. & M. 386, 21 E. C. L. 467.

12. **Later English Doctrine.** — *Mortimer v. McCallan*, 6 M. & W. 58; *Hibblewhite v. M'Morine*, 5 M. & W. 462. See also *Wells v. Porter*, 2 Bing. N. Cas. 722, 29 E. C. L. 469.

13. **Option Relating Merely to Time of Delivery.** — See the title *GAMBLING CONTRACTS*, vol. 14, p. 605; and see *Gilbert v. Gaugar*, 8 Biss. (U. S.) 214; *Pixley v. Boynton*, 79 Ill. 351; *Logan v. Musick*, 81 Ill. 415.

tract or to cancel the contract as he may choose.¹ These option contracts are of three kinds, viz., puts, calls, and straddles. These terms have been fully defined elsewhere in this work.²

b. LEGALITY OF TRANSACTION. — The legality of an option contract depends not upon the form of the contract, but upon the intent with which the parties enter into it.³ In the absence of evidence showing that the contract is made in violation of the statutes against gaming, it will be presumed to be valid and will be enforced.⁴ But a contract purporting on its face to be a contract of sale may, if illegality is set up in defense, be impeached by parol evidence showing that the parties did not contemplate a delivery of the stock, but intended merely to wager upon the rise or fall in prices,⁵ and where such intent is shown the contract is void.⁶

Special Statutory Rule. — In *Illinois* option contracts are made void by statute whether the parties intended to settle by differences or otherwise.⁷

VI. CORNERS IN STOCKS. — A corner is a scheme to create an unnatural rise in the price of a certain stock by obtaining control of the available supply and thereby forcing those who have made contracts for the future delivery of such stock to pay an exorbitant amount for it or by way of differences in settlement of their contracts.⁸

VII. JOINT UNDERTAKINGS BETWEEN BROKER AND CLIENT. — Stockbrokers and their clients sometimes enter into joint undertakings whereby each is to contribute to the cost of the undertaking, or one is to furnish information concerning the market or his services in promoting the transaction, and the other contributes the money for the purchase of the stock or margins necessary in carrying it, the profits or losses to be shared in such proportions as may be agreed upon.⁹ In such cases it has been held to be a question for the jury whether under the terms of the agreement the relation between the parties is that of a partnership or merely an agency.¹⁰ The giving of information as to facts upon which the future price of stock will depend is sufficient consideration for a contract in regard to a joint undertaking in such stock, and is as effective to take the case out of the statute of frauds as if a cash payment had been made.¹¹ If no time is limited for the continuation of the arrangement it is terminable at any time at the will of either party, and either party may maintain a bill in equity against the other for an accounting or for an adjustment of losses occasioned by the misconduct of the other party.¹² Under an agreement by which a broker agrees to purchase and carry stock for a certain time, the client agreeing to pay the loss, if any, and to divide the

1. Option as to Whether Stock Shall Be Delivered. — See the title *GAMBLING CONTRACTS*, vol. 14, p. 605; and see *Harris v. Tumbridge*, 83 N. Y. 92, 38 Am. Rep. 398; *Yerkes v. Salomon*, 11 Hun (N. Y.) 471.

2. Puts — Calls — Straddles. — See the title *GAMBLING CONTRACTS*, vol. 14, p. 605; and see *CALL*, vol. 5, p. 107; *PUT*, vol. 23, p. 529; *STRADDLE*, *post*.

3. Legality of Contract Depends upon Intent of Parties. — *Yerkes v. Salomon*, 11 Hun (N. Y.) 471; *Bigelow v. Benedict*, 70 N. Y. 202, 26 Am. Rep. 573.

4. Option Contracts Presumed to Be Valid. — *Bigelow v. Benedict*, 70 N. Y. 202; *Yerkes v. Salomon*, 11 Hun (N. Y.) 471; *Story v. Salomon*, 71 N. Y. 420; *Harris v. Tumbridge*, 83 N. Y. 92, 38 Am. Rep. 398.

5. Parol Evidence Admissible to Show Gambling Intent. — *Yerkes v. Salomon*, 11 Hun (N. Y.) 471. See also *Story v. Salomon*, 71 N. Y. 420; *Bigelow v. Benedict*, 70 N. Y. 202, 26 Am. Rep. 573. Compare *Porter v. Viets*, 1 Biss. (U. S.) 177.

6. Contract Void if Parties Intend to Settle by Differences. — *North v. Phillips*, 89 Pa. St. 250. See also *Bigelow v. Benedict*, 70 N. Y. 202, 26 Am. Rep. 573; *Yerkes v. Salomon*, 11 Hun (N. Y.) 471.

7. Illinois Statute. — See *infra*, this title, *Stock-jobbing Acts*.

8. This subject has already been fully discussed. See the title *GAMBLING CONTRACTS*, vol. 14, pp. 605, 612.

9. Joint Undertakings Between Broker and Client. — See *White v. Drew*, (Supm. Ct. Spec. T.) 56 How. Pr. (N. Y.) 53; *Monroe v. Peck*, 3 Daly (N. Y.) 128; *Butler v. Finck*, 21 Hun (N. Y.) 210; *Marston v. Gould*, 69 N. Y. 220; *Wight v. Wood*, 85 N. Y. 402; *Crosby v. Watts*, (N. Y. Super. Ct. Spec. T.) 49 How. Pr. (N. Y.) 364, *affirmed* 41 N. Y. Super. Ct. 208.

10. *Butler v. Finck*, 21 Hun (N. Y.) 210.

11. Information as Consideration — Statute of Frauds. — *White v. Drew*, (Supm. Ct. Spec. T.) 56 How. Pr. (N. Y.) 53.

12. Relation Terminable at Any Time by Either Party. — *Marston v. Gould*, 69 N. Y. 220.

profits, if any, the broker cannot recover from the client the losses which a sale at the end of the time limited would have occasioned if he fails to sell at that time, but sells at a later date at a smaller loss.¹

VIII. RIGHTS AND LIABILITIES OF BROKER — 1. **Right to Buy and Sell in Customary Manner.** — In the absence of special instructions to the contrary, the broker may buy and sell in the customary manner, and in accordance with the usages of the exchange on which he deals,² but a sale made in an unusual manner without special authority, as a sale on credit where the custom is to sell for cash, is not binding on the client.³ So a broker employed to sell has no implied authority to warrant the stock sold, and the client will not be bound by such warranty even though he receive the proceeds of the sale, provided he does so without knowledge of the broker's unauthorized act.⁴

2. **Liable for Only Ordinary Care and Diligence.** — A broker is liable only for the exercise of reasonable care and diligence such as an ordinarily prudent purchaser would exercise in the conduct of his own business.⁵

3. **Broker Not Liable as Guarantor.** — A broker is not a guarantor of the genuineness of stock purchased on his client's order, and if he has acted with reasonable care and diligence he will not be liable although the stock should prove to be entirely worthless.⁶

4. **Right to Delegate Authority.** — A stockbroker is in general subject to the same rules as other agents, and may not delegate his authority in matters involving the exercise of a discretion as to whether the transaction shall be entered into.⁷ There are cases, however, where by virtue of the necessities of the case or the usages of the business the broker may act by substitute, as where the purchase must be made in a distant city or on an exchange of which he is not a member.⁸ Authority to perform acts connected with the transaction which are purely ministerial may of course be delegated.⁹

5. **Acting in Dual Capacity in Same Transaction.** — A stockbroker, in making sales or purchases for a client, may not act as both principal and agent in the same transaction without his client's assent given upon full knowledge of the facts. If he assumes to do so the client may either repudiate the transaction or may affirm it and hold the broker to the price reported.¹⁰ And if, before discovery of the broker's action, the client has received the stock and paid the broker therefor, he may tender to the broker the same or similar shares and recover from him the amount so paid.¹¹ Also, the broker may not act as agent for both the buyer and seller in the same transaction.¹² In each of the cases above mentioned it is immaterial whether or not there was actual fraud intended or actual injury done, such dealings being prohibited upon grounds of public policy.¹³

1. *Monroe v. Peck*, 3 Daly (N. Y.) 128.

2. **Broker May Buy and Sell in Customary Manner.** — *Mitchell v. Newhall*, 15 M. & W. 308; *Porter v. Wormser*, 94 N. Y. 431. See also *infra*, this title, *Usages and Customs*.

3. **Credit Sale.** — *Wiltshire v. Sims*, 1 Campb. 258; *Illinois v. Delafield*, 8 Paige (N. Y.) 527, *affirmed* 26 Wend. (N. Y.) 192.

4. **Warranty.** — *Smith v. Tracy*, 36 N. Y. 79.

5. **Ordinary Care and Diligence.** — *Peckham v. Ketchum*, 5 Bosw. (N. Y.) 506; *Gheen v. Johnson*, 90 Pa. St. 38.

6. **Guaranty.** — *Lambert v. Heath*, 15 M. & W. 486; *Taylor v. Stray*, 2 C. B. N. S. 175, 89 E. C. L. 175; *Peckham v. Ketchum*, 5 Bosw. (N. Y.) 506.

7. **Delegation of Authority.** — See *Sims v. May*, (Supm. Ct. Gen. T.) 1 N. Y. Supp. 671, and see generally the title *AGENCY*, vol. 1, p. 972 *et seq.*

8. See the title *AGENCY*, vol. 1, p. 979.

9. *Sims v. May*, (Supm. Ct. Gen. T.) 1 N. Y. Supp. 671.

10. **Broker May Not Act as Both Principal and Agent in Same Transaction.** — *Brookman v. Rothschild*, 3 Sim. 153, *affirmed* 5 Bligh. N. S. 165; *Marye v. Strouse*, 5 Fed. Rep. 483; *Day v. Holmes*, 103 Mass. 306; *Mayo v. Knowlton*, 134 N. Y. 250. See also *Pickering v. Demeritt*, 100 Mass. 416; *Todd v. Bishop*, 136 Mass. 386; *Porter v. Woodruff*, 36 N. J. Eq. 180; *Porter v. Wormser*, 94 N. Y. 431. See also the title *AGENCY*, vol. 1, p. 1077.

Broker May Not Buy from or Sell to Member of His Own Firm. — *Marye v. Strouse*, 5 Fed. Rep. 483. See also *Connor v. Black*, 119 Mo. 126.

11. *Mayo v. Knowlton*, 134 N. Y. 250.

12. **Agent for Both Buyer and Seller.** — *Levy v. Loeb*, 85 N. Y. 365; *Rice v. Davis*, 136 Pa. St. 439, 20 Am. St. Rep. 931.

13. **Question of Actual Fraud or Injury Immaterial.** — *Gillett v. Peppercorne*, 3 Beav. 78; *Marye v. Strouse*, 5 Fed. Rep. 483; *Conkey v. Bond*, 36 N. Y. 427; *Rice v. Davis*, 136 Pa. St. 439, 20 Am. St. Rep. 931. See also *Connor v.*

6. Right to Commissions — a. WHEN EARNED. — The rules governing the rights of brokers of other classes to recover commissions, which have been stated under another title,¹ are generally applicable to stockbrokers. Thus, a broker is not entitled to a commission on any transaction unless it was the direct result of his agency and his action was the procuring cause thereof.² If, however, the broker has been the efficient cause in bringing about the transaction, he is entitled to his commission although the client negotiates the contract himself.³ To entitle a broker to commissions on a transaction which was never actually consummated, he must show that he procured a person ready, willing, and able to carry out the transaction on the terms stipulated, and that he either procured from such person a valid and binding contract to that effect or that he brought such person and his client together so that the latter might have secured such contract had he desired.⁴ If by the terms of the agreement the broker's right to compensation is dependent upon his making a sale or purchase at a given price, he cannot recover for the value of his services in case he fails to make the sale upon the terms stipulated.⁵ The exchange rules usually prescribe regular rates of commission for different transactions by which the members will be governed in the absence of special agreement,⁶ but the parties on entering into the transaction may stipulate as to the commission to be received.⁷

b. HOW LOST. — Any act of gross negligence or bad faith on the part of the broker forfeits his right to commissions.⁸ In jurisdictions where a broker is required to have a license, an unlicensed broker cannot recover commissions.⁹ If a broker's contract to purchase and carry stock for his client is an entire contract, he cannot recover commissions for the purchase if he has violated his contract to carry.¹⁰

7. Right to Recover Advances. — Where a broker acting under his client's instructions and within the scope of his authority pays at his client's request, express or implied, any advances or losses incurred in the transaction, or is compelled to do so by the rules of the exchange on which he deals, his client must make good to him the loss sustained.¹¹

An **Unlicensed Broker**, although he cannot in jurisdictions where a license is required recover commissions,¹² is nevertheless entitled to recover from his client any advances made at the latter's request, express or implied.¹³

8. Broker's Lien. — As has been previously stated, the broker has a right to retain stock purchased for a client as security for his commissions and any

Black, 119 Mo. 126; *Porter v. Wormser*, 94 N. Y. 431.

1. See the title **BROKERS**, vol. 4, p. 969 *et seq.*

2. **Transaction Must Be Direct Result of Broker's Agency.** — *Jones v. Frost*, (Supm. Ct. Tr. T.) 24 Misc. (N. Y.) 208.

3. *Hafner v. Herron*, 165 Ill. 242.

4. *Mattingly v. Pennie*, 105 Cal. 514, 45 Am. St. Rep. 87.

5. *Rees v. Pellow*, (C. C. A.) 97 Fed. Rep. 167.

6. **Exchange Rules Relating to Rate of Commission.** — See for example the constitution of the Chicago Stock Exchange, art. 19, § 1, stated in *Banta v. Chicago*, 172 Ill. 204.

7. **Parties May Stipulate as to Rate of Commission.** — See *Mattingly v. Pennie*, 105 Cal. 514, 45 Am. St. Rep. 87.

8. **Gross Negligence or Bad Faith.** — *Hoffman v. Livingston*, 46 N. Y. Super. Ct. 552. And see the title **BROKERS**, vol. 4, p. 971.

9. **Unlicensed Broker Cannot Recover Commissions.** — *Cope v. Rowlands*, 2 M. & W. 149; *Field v. Sawyer*, 5 C. B. 844, 57 E. C. L. 844;

Pidgeon v. Burslem, 3 Exch. 465; *Hustis v. Pickands*, 27 Ill. App. 270. See also *Johnson v. Williams*, 8 Ind. App. 677, in which case, however, it was held that a person not regularly engaged as a stockbroker might recover. See generally the title **BROKERS**, vol. 4, p. 982.

10. *Ball v. Clark*, 24 Blatchf. (U. S.) 81.

11. **Advances Made on Behalf of Client.** — *Sutton v. Tatham*, 10 Ad. & El. 27, 37 E. C. L. 25; *Westropp v. Solomon*, 8 C. B. 345, 65 E. C. L. 345; *Pollock v. Stables*, 12 Q. B. 765, 64 E. C. L. 765; *Bayley v. Wilkins*, 7 C. B. 886, 62 E. C. L. 886; *Taylor v. Stray*, 2 C. B. N. S. 175, 89 E. C. L. 175; *Rosewarne v. Billing*, 15 C. B. N. S. 316, 109 E. C. L. 316; *Chapman v. Shepherd*, L. R. 2 C. P. 228; *Cover v. Smith*, 82 Md. 586; *Sistare v. Best*, 16 Hun (N. Y.) 611, 88 N. Y. 527. See also the title **BROKERS**, vol. 4, pp. 985, 986.

12. See *supra*, this section, **Right to Commissions.**

13. **Unlicensed Broker May Recover Advances.** — *Smith v. Lindo*, 5 C. B. N. S. 587, 94 E. C. L. 587; *Jessopp v. Lutwyche*, 10 Exch. 614, 3 C. L. R. 359; *Pidgeon v. Burslem*, 3 Exch. 465.

balance due thereon from the client.¹ If, however, the client fails or refuses to carry out his contract, the broker need not rely upon his lien on the stock, but may sue the client for the full amount due, including his commissions.²

9. Broker's Liability on Contract for Undisclosed Principal. — There are very few cases in which the courts have been called upon to adjudicate differences between stockbrokers and the clients of other brokers with whom they deal. This is due to the fact that the brokers generally contract with each other without revealing the names of their clients, and that these contracts are enforced between the brokers as principals by the rules of the exchanges on which they deal, the brokers being left to make the final settlement on the outside with their respective clients, who are the real parties to the contract. It has been held, however, that there is a privity of contract between the undisclosed principal of one broker and the opposite broker, and that a broker who does not disclose the name of his client is liable to the other contracting party as if he were himself the principal.³ In *England* a jobber is individually liable on a contract made with a broker for a client until he has passed to the broker on the same day the name of an acceptable person willing and able to complete the contract; and his liability continues if the name passed is that of a fictitious person or a person not legally capable of making the contract, or if the name passed was unauthorized.⁴ If, however, the jobber passes a name which is not objected to, he is thereafter released from liability.⁵

10. Right of Broker on Client's Refusal to Deliver Stock Sold. — Where a broker has made, according to his client's instructions, a contract for the sale of stock owned by the latter, and the client refuses to deliver the stock, the broker may purchase similar stock at the market price for delivery and recover from the principal his commissions and whatever losses he has sustained in the transaction.⁶

11. Other Rights and Liabilities. — The rights and liabilities of brokers in regard to stock carried on margin,⁷ and in regard to closing the transaction,⁸ and as affected by the wagering character of certain transactions,⁹ have been treated elsewhere.

IX. RIGHTS AND LIABILITIES OF CLIENT — **1. Right to Revoke Broker's Agency.** — Where the broker's agency is not limited as to time it may be terminated by the client at any time, provided this is not done in bad faith and as a mere device to escape the payment of the broker's commissions,¹⁰ and the client may recover from the broker any advances made to him prior to such revocation.¹¹

2. Right to Secret Profits Made by Broker. — The broker by virtue of his relation to his client, is not permitted to make any secret profit out of a transaction which he is conducting for the latter, and, if he does so, such profits may be recovered by the client;¹² but as the broker is primarily the agent of

1. Broker's Lien. — See *supra*, this title, *Particular Transactions Considered — Purchases on Margin*.

2. Broker Need Not Rely upon Lien, but May Sue Client. — *Esser v. Linderman*, 71 Pa. St. 76; *Wynkoop v. Seal*, 64 Pa. St. 361.

3. Broker of Undisclosed Principal Liable to Other Contracting Party. — *Lichten v. Verner*, 8 Pa. Dist. 218. See also *Royal Exch. Assur. Co. v. Moore*, 11 W. R. 592, and see generally the title *BROKERS*, vol. 4, pp. 988, 989.

4. Liability of Jobber. — *Nickalls v. Merry*, L. R. 7 H. L. 530.

Jobber Liable Where Name Passed Is Unauthorized. — *Maxted v. Paine*, L. R. 4 Exch. 81.

5. Jobber's Liability Released After Passing Acceptable Name. — *Coles v. Bristowe*, L. R. 4 Ch. 3; *Grissell v. Bristowe*, L. R. 4 C. P. 36; *Maxted v. Paine*, L. R. 6 Exch. 132.

6. Right of Broker on Client's Refusal to Deliver Stock Sold. — *Baily v. Carnduff*, 14 Colo. App. 169; *Sistare v. Best*, 16 Hun (N. Y.) 611, 88 N. Y. 527. See also *Sutton v. Tatham*, 10 Ad. & El. 27, 37 E. C. L. 25.

7. See *supra*, this title, *Particular Transactions Considered — Purchases on Margin*.

8. See *supra*, this title, *Particular Transactions Considered — Purchases on Margin; Short Sales*.

9. See *infra*, this title, *Stock-jobbing Acts*, and see the title *GAMBLING CONTRACTS*, vol. 14, p. 604 *et seq.*

10. Client May Revoke Broker's Agency. — *Rees v. Pellow*, (C. C. A.) 97 Fed. Rep. 167. See generally the title *BROKERS*, vol. 4, p. 967.

11. Client May Recover Prior Advances Made to Broker. — *Fletcher v. Marshall*, 15 M. & W. 755.

12. Secret Profits Made by Broker. — *Erskine v.*

the person who first employs him, any secret profits made by him belong to that employer, and cannot be recovered by an adverse party for whom the broker fraudulently assumed to act in the same transaction.¹

3. Right Where Transactions Reported by Broker Are Fictitious. — Where a broker does not obey his client's orders in making actual sales and purchases, but reports to him fictitious transactions, the client may recover from the broker any money or other securities deposited as margins or any payments made to the broker in settlement of such transactions;² and it is not necessary for the client, in order to recover, to show that all of the transactions reported were fictitious.³

4. Rights on Unauthorized Sale by Broker. — Where a broker makes an unauthorized sale of stock carried for the client, the client may ratify and claim the benefit of the sale or may recover from the broker the value of the shares on the day of the sale.⁴

5. Rights on Failure of Broker. — In *England* a defaulting broker's client, if not himself in default, has the right either to have the transaction carried through between himself and the jobber with whom his broker contracted, or to accept the official assignee's closing, or to transfer the account to another broker for the purpose of carrying out the bargain through him.⁵ If, however, he does neither of these, but repudiates the transaction, the jobber may sell the stock and hold the client for the difference between the contract and selling prices, in case it is sold at a loss.⁶

6. Rights on Refusal of Broker to Deliver Stock. — Where a broker who has purchased stock for a client refuses, without legal excuse, to deliver the stock on demand, the client may either sue in tort for a conversion or may waive the tort, treat the broker as purchaser, and recover the value of the stock in an action on an account.⁷ A right of action against the broker for simply failing to deliver stock purchased does not arise until after a demand and tender of the amount due thereon, unless, as by becoming a bankrupt, he has rendered himself unable to comply with the contract.⁸

7. Liability to Indemnify Broker. — In accordance with the general law of agency, the client is bound to indemnify the broker against the consequences of all acts done by him in pursuance of the authority conferred upon him,⁹ but in such cases the client is liable for only such amount as the broker was legally bound to pay.¹⁰

8. Other Rights and Liabilities. — The rights and liabilities of the client as to stock carried on margin¹¹ and as affected by the wagering character of certain transactions¹² are treated elsewhere.

X. USAGES AND CUSTOMS — 1. General Rule. — As in contracts with other

Sachs, (1901) 2 K. B. 504, 85 L. T. N. S. 385; Porter v. Woodruff, 36 N. J. Eq. 174. See also Illingworth v. De Mott, 59 N. J. Eq. 8. And see the title **BROKERS**, vol. 4, p. 969.

1. Illingworth v. De Mott, 59 N. J. Eq. 8.

2. **Margins and Payments on Fictitious Transactions.** — Todd v. Bishop, 136 Mass. 386; Prout v. Chisolm, 21 N. Y. App. Div. 54.

3. Prout v. Chisolm, 21 N. Y. App. Div. 54.

4. **Unauthorized Sale.** — Taussig v. Hart, 58 N. Y. 425. See also *infra*, this title, *Breach of Contract and Measure of Damages*.

5. **Failure of Broker.** — Beckhouson v. Hamblet, (1900) 2 Q. B. 18, 82 L. T. N. S. 459; Anderson v. Beard, (1900) 2 Q. B. 260, 82 L. T. N. S. 714.

6. Anderson v. Beard, (1900) 2 Q. B. 260, 82 L. T. N. S. 714.

7. **Refusal of Broker to Deliver Stock.** — Bradford v. Patterson, 106 Ala. 397.

8. **Bankruptcy of Broker.** — *In re Swift*, (C.

C. A.) 112 Fed. Rep. 315, affirming 105 Fed. Rep. 493.

9. **Client Must Indemnify Broker.** — Pollock v. Stables, 12 Q. B. 765, 64 E. C. L. 765; Sutton v. Tatham, 10 Ad. & El. 27, 37 E. C. L. 25; Westropp v. Solomon, 8 C. B. 345, 65 E. C. L. 345; Bayley v. Wilkins, 7 C. B. 886, 62 E. C. L. 886; Taylor v. Stray, 2 C. B. N. S. 175, 89 E. C. L. 175; Rosewarne v. Billing, 15 C. B. N. S. 316, 109 E. C. L. 316; Chapman v. Shepherd, L. R. 2 C. P. 228; Durant v. Burt, 98 Mass. 161; Sistare v. Best, 16 Hun (N. Y.) 611, 88 N. Y. 527.

10. Westropp v. Solomon, 8 C. B. 345, 65 E. C. L. 345.

11. See *supra*, this title, *Particular Transactions Considered — Purchases on Margin*.

12. See *infra*, this title, *Stock-jobbing Acts*, and see the title **GAMBLING CONTRACTS**, vol. 14, p. 604 *et seq.*

brokers,¹ it is a general rule with regard to the purchase and sale of stocks through brokers that the client will be presumed to have given to the broker authority to conduct the transaction in accordance with the usages and customs of the exchange on which he deals,² and in the application of this rule it is immaterial whether such usages and customs were known or unknown to the client.³

2. Qualification of General Rule. — The rule, however, is subject to the qualification that the usage or custom must be reasonable and not in violation of the principles of law or public policy.⁴

3. Usages and Customs Approved. — A custom among brokers to sell stock deposited with each other as collateral security for call loans, without further notice on failure of the borrower to pay the loan when called, is valid.⁵ The customs of the *English* exchange by which a jobber is allowed on the name day to substitute another responsible person in his stead and be released from his liability on the contract,⁶ which allow a broker immediately to close the transaction upon the death or insolvency of his client,⁷ and which require the closing of all a broker's transactions upon his becoming a defaulter,⁸ have been held to be reasonable and valid. The client will not be liable, however, under the rule last mentioned, for losses on the closing sale of stock carried for him by the broker at the time of the latter's insolvency, where the losses are not the result of the agency but merely of the broker's own default.⁹

4. Usages and Customs Disapproved. — The following usages and customs of stockbrokers have been expressly disapproved: not to make an actual purchase or sale, but only a fictitious transaction effected by mere entries upon books;¹⁰ to use stock intrusted to them for the purpose of sale in filling orders for other clients;¹¹ to sell stock which has been deposited with them as a pledge to secure advances;¹² when ordered to buy stock to be delivered within a certain time at the buyer's option, to purchase the stock in their own names on a shorter time and deliver it to the customer at an advanced price at the time of the original contract;¹³ when dealing through brokers in other cities, to put all the transactions between them into one account and remit or

1. See the title *BROKERS*, vol. 4, p. 962.

2. Broker May Deal According to Usages and Customs of Exchange — *England*. — Grissell v. Bristowe, L. R. 4 C. P. 36; Sutton v. Tatham, 10 Ad. & El. 27, 37 E. C. L. 25; Pollock v. Stables, 12 Q. B. 765, 64 E. C. L. 765; Mitchell v. Newhall, 15 M. & W. 308; Smith v. Lindo, 5 C. B. N. S. 587, 94 E. C. L. 587; Taylor v. Stray, 2 C. B. N. S. 175, 89 E. C. L. 175; Chapman v. Shepherd, L. R. 2 C. P. 228; Forget v. Baxter, 82 L. T. N. S. 510, 69 L. J. P. C. 101; Nickalls v. Merry, L. R. 7 H. L. 530; Lacey v. Hill, L. R. 8 Ch. 921; Stray v. Russell, 1 El. & El. 888, 102 E. C. L. 888; Coles v. Bristowe, L. R. 4 Ch. 3; Maxted v. Paine, L. R. 4 Exch. 203; Westropp v. Solomon, 8 C. B. 345, 65 E. C. L. 345; Hodgkinson v. Kelly, L. R. 6 Eq. 496.

Illinois. — Taylor v. Bailey, 169 Ill. 181.

Minnesota. — Van Dusen-Harrington Co. v. Jungeblut, 75 Minn. 298, 74 Am. St. Rep. 463.

New York. — Nourse v. Prime, 7 Johns. Ch. (N. Y.) 69, 11 Am. Dec. 403; Horton v. Morgan, 19 N. Y. 170; Whitehouse v. Moore, (N. Y. Super. Ct. Spec. T.) 13 Abb. Pr. (N. Y.) 142; Peckham v. Ketchum, 5 Bosw. (N. Y.) 506; Kingsbury v. Kirwin, 43 N. Y. Super. Ct. 451.

3. Client's Knowledge of Usages and Customs Immaterial. — Sutton v. Tatham, 10 Ad. & El. 27, 37 E. C. L. 25; Pollock v. Stables, 12 Q. B. 765, 64 E. C. L. 765; Mitchell v. Newhall, 15 M. & W. 308; Taylor v. Bailey, 169 Ill. 181;

Van Dusen-Harrington Co. v. Jungeblut, 75 Minn. 298, 74 Am. St. Rep. 463; Whitehouse v. Moore, (N. Y. Super. Ct. Spec. T.) 13 Abb. Pr. (N. Y.) 142.

4. Usage or Custom Must Be Reasonable and Not in Violation of Principles of Law or Public Policy. — Neilson v. James, 9 Q. B. D. 546, 51 L. J. Q. B. 369; Maxted v. Paine, L. R. 4 Exch. 203; Hamilton v. Young, 7 L. R. Ir. 289; Magee v. Atkinson, 2 M. & W. 440; Rosenstock v. Tormey, 32 Md. 169, 3 Am. Rep. 125; Parsons v. Martin, 11 Gray (Mass.) 111; Day v. Holmes, 103 Mass. 306; Lombardo v. Case, (Supm. Ct. Spec. T.) 30 How. Pr. (N. Y.) 117; Lawrence v. Maxwell, 53 N. Y. 19; Spear v. Hart, 3 Robt. (N. Y.) 420; Evans v. Waln, 71 Pa. St. 69. And see generally the title *USAGES AND CUSTOMS*.

5. Colket v. Ellis, 10 Phila. (Pa.) 375, 32 Leg. Int. (Pa.) 82.

6. Grissell v. Bristowe, L. R. 4 C. P. 36; Maxted v. Paine, L. R. 6 Exch. 132.

7. Lacey v. Hill, L. R. 8 Ch. 921.

8. Duncan v. Hill, L. R. 6 Exch. 255.

9. Duncan v. Hill, L. R. 8 Exch. 242, reversing L. R. 6 Exch. 255.

10. Usages and Customs Disapproved. — Rosenstock v. Tormey, 32 Md. 169, 3 Am. Rep. 125.

11. Parsons v. Martin, 11 Gray (Mass.) 111.

12. Lawrence v. Maxwell, 53 N. Y. 19.

13. Day v. Holmes, 103 Mass. 306.

draw from the general balance, whereby money rightfully belonging to a client might be applied to the payment of his broker's general account;¹ to disregard statutory requirements as to the manner of conducting certain transactions;² and any custom which creates in the broker an interest adverse to that of his client,³ or the effect of which is to contradict, alter, or add to the express contract between the parties.⁴

XI. WAGERING CONTRACTS. — There are now in *England* and probably all the *United States* statutes designed to prevent gambling, and certain stock transactions have been held to be wagering contracts within the purview of these statutes. These transactions and the rights and liabilities of the parties thereto have been fully treated in a former title.⁵ The stock transactions which have been generally held to be within the application of these statutes are those where the parties do not intend that there shall be any actual payment for or delivery of the stock dealt in, but merely a settlement at the maturity of the contract of the difference between the contract and market prices, and it seems that in most jurisdictions such contracts would, in the absence of statute, be held to be void on grounds of public policy.⁶ Unless, however, it is shown by the party seeking to avoid the contract that it was the mutual intention of the parties not to have any actual delivery of and payment for the stock, the contract will be presumed to be valid and will be enforced.⁷

XII. STOCK-JOBGING ACTS — 1. In General. — In the absence of statutes aimed directly at stock jobbing, dealings in stock, even for purposes of speculation, are as legitimate as dealings in any other commodity, and such contracts are valid and enforceable except in so far as they may be held to fall within the application of the statutes relating to gambling contracts in general.⁸ The fact, however, that stocks have been very largely used as a means for speculation of a purely wagering character has led to the passage of legislative acts in some jurisdictions aimed specifically at stock jobbing, and intended to restrict or entirely prohibit certain classes of these transactions.

2. Particular Acts Considered. — The *Earliest English Stock-jobbing Act*, known as Sir John Barnard's Act, was passed to prevent future contracts in regard to the public securities of England where the parties thereto intended merely to speculate on the market price. It declared such contracts to be void and provided for the recovery of the money lost.⁹ The act did not prevent *bona fide* future contracts for these securities,¹⁰ and did not apply to foreign securities¹¹ or to the stock of private corporations.¹² This act was repealed by a later statute.¹³

1. *Evans v. Waln*, 71 Pa. St. 69.

2. *Neilson v. James*, 9 Q. B. D. 546, 51 L. J. Q. B. 369.

3. *Day v. Holmes*, 103 Mass. 306.

4. *Magee v. Atkinson*, 2 M. & W. 440; *Parsons v. Martin*, 11 Gray (Mass.) 111; *Lombardo v. Case*, (Supm. Ct. Spec. T.) 30 How. Pr. (N. Y.) 117; *Markham v. Jaudon*, 41 N. Y. 235; *Spear v. Hart*, 3 Robt. (N. Y.) 420.

5. See generally the title GAMBLING CONTRACTS, vol. 14, p. 604 *et seq.*

6. *Contracts to Be Settled by Differences Void as Against Public Policy.* — See *In re Green*, 7 Biss. (U. S.) 338; *Hawley v. Bibb*, 69 Ala. 52; *Cothran v. Ellis*, 125 Ill. 496.

7. See the title GAMBLING CONTRACTS, vol. 14, p. 609, and see *supra*, this title, *Particular Transactions Considered*.

8. *Speculative Dealings in Stocks Legitimate.* — *Forget v. Ostigny*, (1895) A. C. 318; *Goodhart v. Rastert*, 10 Ohio Dec. 40; *Taylor's Estate*, 192 Pa. St. 304, 73 Am. St. Rep. 812; *Hopkins*

v. O'Kane, 169 Pa. St. 478; *Peters v. Grim*, 149 Pa. St. 163, 34 Am. St. Rep. 599.

9. *Sir John Barnard's Act.* — 7 Geo. II., c. 8; 10 Geo. II., c. 8. See *Mortimer v. M'Callan*, 6 M. & W. 58; *Steers v. Lashley*, 6 T. R. 61; *Hewitt v. Price*, 4 M. & G. 355, 43 E. C. L. 188; *Wells v. Porter*, 2 Bing. N. Cas. 722, 29 E. C. L. 469.

10. *Bona Fide Future Contracts Not Affected.* — *Sanders v. Kentish*, 8 T. R. 162; *Mortimer v. M'Callan*, 6 M. & W. 58, *affirmed* 7 M. & W. 20.

11. *Act Not Applicable to Foreign Securities.* — *Wells v. Porter*, 2 Bing. N. Cas. 722, 29 E. C. L. 469; *Oakley v. Rigby*, 2 Bing. N. Cas. 732, 29 E. C. L. 469; *Elsworth v. Cole*, 2 M. & W. 31; *Henderson v. Bise*, 3 Stark. 158, 14 E. C. L. 174.

12. *Act Not Applicable to Stock of Private Corporations.* — *Hewitt v. Price*, 4 M. & G. 355, 43 E. C. L. 188; *Williams v. Trye*, 18 Beav. 366.

13. *Sir John Barnard's Act Repealed.* — 23 & 24 Vict., c. 28; *Thacker v. Hardy*, 4 Q. B. D. 685.

In Arkansas the statute declares "dealing in what is known as futures" to be gambling, and makes such dealing in futures a misdemeanor. The act, however, does not apply to contracts for future delivery entered into in good faith, but is applicable only to those where a settlement of differences is contemplated.¹ Under this statute a broker who negotiates a wagering contract is *particeps criminis* and punishable as principal.²

In California it is provided by the state constitution that all contracts for the sale of stock on margin or to be delivered at a future day shall be void, and that money paid on such contracts may be recovered by the party paying it.³ This provision has been held to be not in violation of the Fourteenth Amendment of the Constitution of the United States.⁴ The action for recovery is not for the recovery of a penalty, but an action for money had and received.⁵

In Illinois all option contracts are made void by statute, whether the parties intended to settle by the payment of differences or otherwise, and persons entering into such contracts are liable to fine or imprisonment.⁶ This statute has been held to be constitutional.⁷ The statute, however, is intended to apply only to those options commonly known as puts and calls, and does not affect *bona fide* contracts for future delivery where the only option is a privilege as to the time of delivering the stock.⁸ Money lost on transactions of the class prohibited by the statute may be recovered by the loser,⁹ and if he does not *bona fide* sue for and recover the same an action may be brought by any other person for treble the amount lost.¹⁰

The Earliest Massachusetts Statute merely declared that contracts for the short sale of stock should be void, but imposed no penalty for entering into them.¹¹ It was held that contracts within this statute, though unenforceable, were not illegal, and that a broker might recover advances made thereon at his client's request,¹² and a note given in consideration of money paid on such contract was valid and enforceable.¹³ A later Massachusetts statute provided that whoever contracts to buy or sell upon credit or upon margin any stock, having at the time of the contract no intention to perform the same by the actual receipt or delivery of the securities and the payment of the price, or whoever employs another so to buy and sell on his behalf, may recover from the other party to the contract, or from the person so employed, any payment made or the value of anything delivered, provided such other party or other person so employed had reasonable cause to believe that no intention actually to perform

1. Arkansas Statute Does Not Prohibit Bona Fide Future Contracts. — Sand. & H. Dig. Stat. Ark. (1894), §§ 1634, 1635; Johnston v. Miller, 67 Ark. 172; Fortenbury v. State, 47 Ark. 188.

2. Broker Punishable as Principal. — Fortenbury v. State, 47 Ark. 188.

3. In California Contracts on Margin or for Future Delivery Void. — Const. Cal., art. 4, § 26; Parker v. Otis, 130 Cal. 322; Rued v. Cooper, 119 Cal. 463; Kullman v. Simmens, 104 Cal. 595; Wetmore v. Barrett, 103 Cal. 246; Sheehy v. Shinn, 103 Cal. 325; Cashman v. Root, 89 Cal. 373, 23 Am. St. Rep. 482.

4. Otis v. Parker, 187 U. S. 606.

5. Parker v. Otis, 130 Cal. 322.

Recovery Does Not Include Interest. — Parker v. Otis, 130 Cal. 322; Baldwin v. Zadig, 104 Cal. 594.

6. In Illinois All Option Contracts Void. — Starr & Curt. Annot. Stat. Ill. (1896), c. 38, par. 253 (§ 130); Schneider v. Turner, 130 Ill. 28; Pearce v. Foote, 113 Ill. 228, 55 Am. Rep. 414; Wolsey v. Neeley, 62 Ill. App. 141; Peter-

son v. Currier, 62 Ill. App. 163; Locke v. Towler, 41 Ill. App. 66; Carroll v. Holmes, 24 Ill. App. 453.

7. Booth v. Illinois, 184 U. S. 425.

8. Contracts Optional Only as to Time of Delivery Not Affected. — Gilbert v. Gaugar, 8 Biss. (U. S.) 214; Ward v. Vosburgh, 31 Fed. Rep. 12; Jackson v. Foote, 12 Fed. Rep. 37; Logan v. Musick, 81 Ill. 415; Pixley v. Boynton, 79 Ill. 351; Wolcott v. Heath, 78 Ill. 433; Barnett v. Baxter, 64 Ill. App. 544.

9. Client May Recover Losses. — Pearce v. Foote, 113 Ill. 228, 55 Am. Rep. 414.

10. Kruse v. Kennett, 181 Ill. 199.

11. Massachusetts Stock-jobbing Act. — Gen. Stat. Mass. (1860), c. 105, § 6 (Rev. Laws Mass. 1892, c. 74, § 7); Barrett v. Mead, 10 Allen (Mass.) 337; Price v. Minot, 107 Mass. 49. See also Wyman v. Fiske, 3 Allen (Mass.) 238, 80 Am. Dec. 66.

12. Jones v. Ames, 135 Mass. 431; Durant v. Burt, 98 Mass. 161.

13. Wyman v. Fiske, 3 Allen (Mass.) 238, 80 Am. Dec. 66.

existed.¹ This statute has been held to be constitutional.² Under this statute a client may recover margins deposited with the broker, but the broker cannot recover payments made to the client.³ An agreement entered into prior to the transaction not to avail oneself of the benefit of the statute is void as against public policy,⁴ but after the right of action has accrued it may be discharged by a release under seal executed by the person entitled to sue.⁵ A recent amendment to the above statute makes the fact that settlements of differences were made *prima facie* evidence that an intention existed not to make an actual sale, and that there was cause to believe that such intention existed.⁶

The Mississippi Stock-jobbing Act declared dealing in contracts "commonly called futures" to be unlawful, making such dealings punishable by fine, and provided further that no such contract should be enforced in any court of that state.⁷ The act was held to apply only to those future contracts where the parties did not contemplate actual delivery of and payment for the stock.⁸ This act was superseded by the present code, which declares the making of such contracts to be a misdemeanor punishable by fine and imprisonment, and provides that the contracts so made shall be unenforceable.⁹ The making of such contracts is also declared to be a ground of attachment.¹⁰

In Missouri the statute prohibits all purchases and sales of stock or contracts for the same where the seller does not intend a delivery or the purchaser does not intend to receive and pay for the stock contracted for. Such contracts are declared to be gambling contracts and void, and a penalty by way of fine may be imposed for entering or offering to enter into them.¹¹ Under this statute it is not necessary that the intent to enter into a contract in violation of the terms of the statute should have been mutual.¹² A broker cannot recover commissions on a transaction within the prohibition of the statute.¹³

The New York Stock-jobbing Act declaring short sales to be void and providing that either party paying any money as premiums or differences in pursuance of such contracts might recover the same¹⁴ was repealed by a subsequent statute,¹⁵ under which the defense of illegality is removed even as to contracts entered into in violation of the former act while in force.¹⁶ This statute, how-

1. Massachusetts Stock-jobbing Act of 1890. — Acts Mass. 1890, c. 437, § 2 (as revised in 1901, Rev. Laws Mass. 1902, c. 99, § 4); Crandell v. White, 164 Mass. 54; Davy v. Bangs, 174 Mass. 238; Lyons v. Coe, 177 Mass. 382; Corey v. Griffin, 181 Mass. 229; Marks v. Metropolitan Stock Exch., 181 Mass. 251; Allen v. Fuller, 182 Mass. 202; Thompson v. Brady, 182 Mass. 321. See also Rice v. Winslow, 180 Mass. 500.

2. Crandell v. White, 164 Mass. 54.

3. Lyons v. Coe, 177 Mass. 382.

4. Agreement to Waive Benefit of Statute Void. — Corey v. Griffin, 181 Mass. 229.

5. Wall v. Metropolitan Stock Exch., 168 Mass. 282; Shea v. Metropolitan Stock Exch., 168 Mass. 284, note.

6. Settlement of Differences Prima Facie Evidence of Intent of Parties. — Acts 1901, c. 459, § 2 (Rev. Laws Mass. 1902, c. 99, § 6); Thompson v. Brady, 182 Mass. 321.

7. Mississippi Stock-jobbing Act. — Laws Miss. 1882, pp. 140, 141; Lemonius v. Mayer, 71 Miss. 514; Dillard v. Brenner, 73 Miss. 130; Western Union Tel. Co. v. Littlejohn, 72 Miss. 1025; White v. Eason, (Miss. 1894) 15 So. Rep. 66.

8. Western Union Tel. Co. v. Littlejohn, 72 Miss. 1025.

9. Mississippi Code Provision. — Annot. Code Miss. (1892) §§ 1120, 1121, 2117. See also Lemonius v. Mayer, 71 Miss. 514.

10. Dealing in Futures a Ground of Attachment. — Annot. Code Miss. (1892), § 129, subdiv. 9; Dillard v. Brenner, 73 Miss. 130.

11. Missouri Stock-jobbing Act. — Rev. Stat. Mo. (1899), §§ 2337, 2338, 2342; A. G. Edwards Brokerage Co. v. Stevenson, 160 Mo. 516; Connor v. Black, 119 Mo. 126, 132 Mo. 150.

12. Connor v. Black, 119 Mo. 126, 132 Mo. 150. Otherwise, if Contract to Be Performed in Another State. — A. G. Edwards Brokerage Co. v. Stevenson, 160 Mo. 516.

13. Connor v. Black, 119 Mo. 126, 132 Mo. 150.

14. New York Stock-jobbing Act. — 2 Rev. Laws N. Y., p. 187, § 18; 1 Rev. Stat. N. Y., p. 710, § 6; Frost v. Clarkson, 7 Cow. (N. Y.) 24; Ward v. Van Duzer, 2 Hall (N. Y.) 162; Dykers v. Townsend, 24 N. Y. 57; Gram v. Stebbins, 6 Paige (N. Y.) 124; Staples v. Gould, 5 Sandf. (N. Y.) 411, affirmed 9 N. Y. 520.

15. New York Stock-jobbing Act Repealed. — Laws N. Y. 1858, p. 251, c. 134; Washburn v. Franklin, (Supm. Ct. Gen. T.) 13 Abb. Pr. (N. Y.) 140, 24 How. Pr. (N. Y.) 515, 35 Barb. (N. Y.) 599. See also Johnson v. Mulry, 4 Robt. (N. Y.) 401, affirmed 51 N. Y. 634.

16. Washburn v. Franklin, (Supm. Ct. Gen. T.) 13 Abb. Pr. (N. Y.) 140, 24 How. Pr. 515, 35 Barb. (N. Y.) 599, reversing 11 Abb. Pr. (N. Y.) 93.

ever, does not affect the former requirements in regard to the statute of frauds.¹

The Ohio Statute provides that option contracts where the parties do not intend a delivery, but merely a settlement of differences, are gambling contracts and void, and the parties thereto punishable by fine and imprisonment.²

The South Carolina Statute provides that future contracts for the sale of stock shall be void unless the seller is the owner or assignee of the stock, or authorized by the owner or assignee to enter into the contract, or unless it is the *bona fide* intention of both parties that there shall be an actual delivery and receipt of the stock contracted for.³ If the contract is within the prohibition of the statute the broker cannot recover advances made thereon for his client.⁴

The Tennessee Statute makes contracts for the future delivery of stock void if either party does not intend a delivery of and payment for the stock, and the making of such contracts is declared to be a misdemeanor.⁵ Money lost on such contracts may be recovered,⁶ and a note given in settlement of such losses is void even in the hands of an innocent holder.⁷

3. Burden of Proof. — The burden of proving that a contract is invalid under a stock-jobbing act rests upon the party asserting such invalidity,⁸ unless by the express provisions of the statute the burden of proof is placed upon the other party.⁹

XIII. BREACH OF CONTRACT AND MEASURE OF DAMAGES — 1. In General. — In most breaches of contracts arising out of stock transactions the law of damages is the same as in other contracts, and need not be specially considered.¹⁰

2. In Cases of Conversion. — The majority of actions between brokers and clients arise out of the unauthorized sale or disposition of stock carried on margins, it being an implied part of the broker's contract to carry the stock for a reasonable time and not to dispose of it for want of margins or other cause except upon due notice to the client.¹¹ In such cases, owing to the rapidly fluctuating value of stocks, an exception has generally been made to the customary rule of damages for the conversion of personal property. The rules adopted, however, have not been uniform. In some jurisdictions the measure of damages has been held to be the highest market value of the stock between the time of the conversion and the trial.¹² This rule, which gives to the plaintiff the undue advantage of a presumption that he would have disposed of his stock at the most favorable moment between the time of the conversion and the trial, has been disapproved by the later *New York* cases, and the present rule, which has been approved by the Supreme Court of the United States and seems to be the most reasonable, allows as the measure of damages the highest price for which similar stock has sold between the time of the conversion and a reasonable time after notice to the owner of such conversion; or, in other words, the price at which he might have replaced the

1. Requirement as to Statute of Frauds Not Repealed. — *Johnson v. Mulry*, 4 Robt. (N. Y.) 401, affirmed 51 N. Y. 634.

2. Ohio Stock-jobbing Act. — Bates's Annot. Stat. Ohio (1897), § 6934a; *Lester v. Buel*, 49 Ohio St. 240, 34 Am. St. Rep. 556.

3. South Carolina Stock Jobbing. — Civ. Code S. Car. (1902), § 2310 *et seq.*; *Gist v. Western Union Tel. Co.*, 45 S. Car. 344, 55 Am. St. Rep. 763; *Riordan v. Doty*, 50 S. Car. 537.

4. Broker Cannot Recover Advances. — *Riordan v. Doty*, 50 S. Car. 537.

5 Annot. Code Tenn. (1896), §§ 3166-3168; *Snoddy v. American Nat. Bank*, 88 Tenn. 573, 17 Am. St. Rep. 918; *McGrew v. City Produce Exch.*, 85 Tenn. 572, 4 Am. St. Rep. 771.

6. Money Lost May Be Recovered. — See *Snoddy v. American Nat. Bank*, 88 Tenn. 573,

17 Am. St. Rep. 918; *McGrew v. City Produce Exch.*, 85 Tenn. 572, 4 Am. St. Rep. 771.

7. Snoddy v. American Nat. Bank, 88 Tenn. 573, 17 Am. St. Rep. 918.

8. Burden of Proof. — *Johnston v. Miller*, 67 Ark. 172; *Dykens v. Townsend*, 24 N. Y. 57. *Contra*, *Stebbins v. Leowolf*, 3 Cush. (Mass.) 137.

9. Gist v. Western Union Tel. Co., 45 S. Car. 344, 55 Am. St. Rep. 763; *Riordan v. Doty*, 50 S. Car. 537.

10. See the title DAMAGES, vol. 8, p. 537.

11. See supra, this title, *Particular Transactions Considered — Purchases on Margin*.

12. Highest Value Between Conversion and Trial — *Dent v. Holbrook*, 54 Cal. 145; *Markham v. Jaudon*, 41 N. Y. 235; *Lawrence v. Maxwell*, 6 Lans. (N. Y.) 469, affirmed 53 N. Y. 19. See

stock within a reasonable time.¹ What is a reasonable time must depend somewhat upon circumstances, and the cases are not uniform as to the time which should be allowed.² Under this rule, if the price of stock which a broker has sold without authority does not within a reasonable time thereafter advance above the price received by him, a client who has paid nothing on account of the purchase is entitled to receive only nominal damages for the conversion.³ The actual replacing of the stock, however, is not a condition precedent to the right to recover for its conversion,⁴ and in case of a wrongful sale of stock by a broker the client may elect to affirm the sale and hold the broker liable for the price received.⁵ In *England* it seems that all presumptions are in favor of the client, and he may recover upon an unauthorized sale by his broker the highest value of the stock between the conversion and the date to which the broker was to carry the stock.⁶ Other cases, not however between broker and client, have allowed the plaintiff to recover either the value of the stock at the time of the breach of contract, or, at his election, the value at the time of trial in case the stock had by that time advanced in price.⁷ In *Pennsylvania* the highest value between the breach of contract and the time of trial has been allowed,⁸ but this rule has been held to apply only to cases where there is a relation of trust between the parties.⁹ In other jurisdictions there is apparently no distinction made between cases of stock and other contracts.¹⁰

3. Breach of Contract to Carry as Affecting Contract of Purchase. — The unauthorized disposition by a broker of stock carried on margin does not as a matter of law extinguish all claim against the client. The failure to carry is not the breach of a condition precedent to a right to recover on the contract of purchase, and if the broker has substantially complied with such contract the client must pay for the stock, his remedy being an action for damages against the broker for the subsequent conversion.¹¹ If, however, the contract of purchase expressly stipulates for the carrying of the stock, an unauthorized disposition of the stock carried is a breach of the entire contract.¹²

STOCK DIVIDENDS. — See the title *DIVIDENDS*, vol. 9, p. 693.

STOCKINGS. — See *HOSIERY*, vol. 15, p. 756.

STOCK JOBBING. — Stock jobbing is defined as "the business of dealing in

also *Romaine v. Van Allen*, 26 N. Y. 309; *Nau-
man v. Caldwell*, 2 Sweeny (N. Y.) 212.

1. Highest Value Within Reasonable Time After Conversion. — *Galigher v. Jones*, 129 U. S. 193; *Wolff v. Lockwood*, 70 N. Y. App. Div. 569; *Burhorn v. Lockwood*, 71 N. Y. App. Div. 301; *Minor v. Beveridge*, 141 N. Y. 399, 38 Am. St. Rep. 804; *Wright v. Metropolis Bank*, 110 N. Y. 237, 6 Am. St. Rep. 356; *Colt v. Owens*, 90 N. Y. 368; *Gruman v. Smith*, 81 N. Y. 25; *Baker v. Drake*, 53 N. Y. 211, 13 Am. Rep. 507, 66 N. Y. 518, 23 Am. Rep. 80; *Randall v. Albany City Nat. Bank*, (Supm. Ct. Gen. T.) 1 N. Y. St. Rep. 592; *Brass v. Worth*, 40 Barb. (N. Y.) 648. See also *Hoyt v. Fuller*, (C. C. A.) 104 Fed. Rep. 192.

2. What Is Reasonable Time. — See *Burhorn v. Lockwood*, 71 N. Y. App. Div. 301; *Colt v. Owens*, 90 N. Y. 368; *Smith v. Savin*, 141 N. Y. 315; *Randall v. Albany City Nat. Bank*, (Supm. Ct. Gen. T.) 1 N. Y. St. Rep. 592.

3. Colt v. Owens, 90 N. Y. 368.

4. Burhorn v. Lockwood, 71 N. Y. App. Div. 301.

5. Taussig v. Hart, 49 N. Y. 301, 58 N. Y. 425.

6. Michael v. Hart, (1901) 2 K. B. 867, 85 L. T. N. S. 548.

7. Value at Time of Breach or at Time of Trial. — *M'Arthur v. Seaforth*, 2 Taunt. 257; *Shepherd v. Johnson*, 2 East 211; *Owen v. Routh*, 14 C. B. 327, 78 E. C. L. 327; *Harrison v. Harrison*, 1 C. & P. 412, 11 E. C. L. 436; *Downes v. Back*, 1 Stark 318, 2 E. C. L. 125; *Cud v. Rutter*, 1 P. Wms. 572.

8. Highest Value Between Breach and Trial. — *Montgomery Bank v. Reese*, 26 Pa. St. 143; *Musgrave v. Beckendorff*, 53 Pa. St. 310.

9. Rule Applicable Only to Cases Involving Trust Relations. — *North v. Phillips*, 89 Pa. St. 250; *Huntingdon, etc., R., etc., Co. v. English*, 86 Pa. St. 247; *Pennsylvania Ins. Co. v. Philadelphia, etc., R. Co.*, 153 Pa. St. 160.

10. Ordinary Rule of Damages Applied. — *Sturges v. Keith*, 57 Ill. 451; *Smith v. Dunlap*, 12 Ill. 184; *Parsons v. Martin*, 11 Gray (Mass.) 111.

11. Conversion of Stock Carried Not Breach of Entire Contract. — *Minor v. Beveridge*, 141 N. Y. 399, 38 Am. St. Rep. 804; *Capron v. Thompson*, 86 N. Y. 418; *Gruman v. Smith*, 81 N. Y. 25.

12. Ball v. Clark, 24 Blatchf. (U. S.) 81.

stocks or shares; the purchase and sale of stocks, bonds, etc., as carried on by jobbers who operate on their own account." 1

STOCK LAW. — See the title *FENCES*, vol. 12, p. 1035.

STOCK NOTE. — See note 2.

STOCK PASS. — See note 3.

STOCK RUNNING AT LARGE. — See *LARGE — AT LARGE*, vol. 18, p. 536; and see the titles *ANIMALS*, vol. 2, p. 378; *FENCES*, vol. 12, p. 1035; *INJURIES TO ANIMALS BY RAILROADS*, vol. 16, p. 478.

1. **Stock Jobbing.** — *State v. Debenture Guarantee, etc., Co.*, 51 La. Ann. 1887, *quoting* Cent. Dict. See the title *STOCKBROKERS*.

2. **Stock Note.** — In *Dunlap v. Smith*, 12 Ill. 402, it was said: "The term *stock note* has no technical meaning, and may as well apply to a note given on the sale of stock which the bank had purchased or taken in the payment of doubt-

ful debts as to a note given on account of an original subscription to stock." See also *Hope Mut. L. Ins. Co. v. Weed*, 28 Conn. 51; *Savage v. Medbury*, 19 N. Y. 32; *Elwell v. Crocker*, 4 Bosw. (N. Y.) 22.

3. **Stock Pass.** — See the title *TICKETS AND FARES*, and see *Graham v. Pacific R. Co.*, 66 Mo. 536.

STOCKYARDS.

BY HERBERT WHARTON BEALL.

I. DEFINITION AND ANALOGIES, 1074.

II. RIGHTS, DUTIES, AND LIABILITIES, 1075.

1. *Charges and Fees*, 1075.
2. *Duty to Furnish Facilities Impartially*, 1075.
3. *Liability for Injuries*, 1075.
4. *Stockyards as Nuisances*, 1075.
5. *Right to Sell Unclaimed Stock*, 1076.

III. LIVE-STOCK EXCHANGES, 1076.

CROSS-REFERENCES.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the titles *CARRIERS OF LIVE STOCK*, vol. 5, p. 472; *INJURIES TO ANIMALS BY RAILROADS*, vol. 16, p. 471; *INTERSTATE COMMERCE*, vol. 17, p. 34; *NUISANCES*, vol. 21, p. 679.

I. DEFINITION AND ANALOGIES. — A stockyard is primarily an inclosure in which cattle are temporarily confined for the purpose of either sale or shipment. The immense business carried on in the great stockyards of the United States is of recent growth, and the law relating thereto is still in rather a crude and formative state.¹

Analogous to Warehousemen Rather than to Common Carriers. — Some of the earlier cases were based upon the assumption that there was a close resemblance between a stockyard and a railroad or canal company in their character as common carriers, both in respect of the powers which each might exercise and the duties which they were bound to perform for the public. But later cases have denied the existence of any such resemblance and have considered the legal principles commonly applied to warehousemen, rather than those governing common carriers, as applicable to the business done by stockyards.²

Not Public Markets. — It has been held that the fact that the business of a given stockyard has become so great as to influence the trade of a large section of country does not make it a public market or impress it with a public use, in the absence of a declaration by the legislature that it is of such public character.³

Not Engaged in Interstate Commerce. — Because of the immense proportions to which the business has attained in some of the larger cities of the United States and because of the very extensive area of country affected thereby, attempts have been made to bring stockyards within the purview of the acts regulating commerce between the states. But it has been held that the fact that a stockyard is located in two adjoining states and that cattle are herded on both sides of the state line and are driven to and fro across the line does not make the business of such stockyard interstate commerce;⁴ and that

1. See Delaware, etc., R. Co. v. Central Stock-Yard, etc., Co., 43 N. J. Eq. 71, 45 N. J. Eq. 59.

2. **Whether Warehousemen or Common Carriers.** — Delaware, etc., R. Co. v. Central Stock-Yard, etc., Co., 43 N. J. Eq. 71, 45 N. J. Eq. 59. See also generally the cases cited in this title, and see the titles *COMMON CARRIERS*, vol. 6, p. 236; *WAREHOUSES AND WAREHOUSEMEN*.

3. **Not Public Markets.** — American Live Stock Commission Co. v. Chicago Live Stock Exch., 143 Ill. 210, 36 Am. St. Rep. 385. See also the title *MARKETS*, vol. 19, p. 1139.

4. **Not Engaged in Interstate Commerce.** — Hopkins v. U. S., 171 U. S. 578; Anderson v. U. S., 171 U. S. 604; Cotting v. Kansas City Stock-Yards Co., 82 Fed. Rep. 850, affirmed 183 U. S. 79.

a live-stock exchange, the business of whose members is to receive consignments of cattle and other live stock from owners in various states and territories, is not engaged in interstate commerce merely because the cattle traded in come from several states into the state where the exchange does business; and agreements entered into between the members of such exchange whereby they regulate their mode of doing business and restrict the number of yard dealers with whom they will do business are not agreements in restraint of trade within the condemnation of the Interstate Commerce Act, since such agreements cannot possibly affect interstate trade in any but a remote way.¹

II. RIGHTS, DUTIES, AND LIABILITIES — 1. Charges and Fees. — It has been held that the property of a stockyard company used for yarding, feeding, watering, and weighing cattle may, by the voluntary act of the corporation which owns it, become affected with a public use and therefore subject to legislative control, state or national, to the extent at least that the proper legislative body may regulate the rates of compensation to be charged for services rendered by such yards. Moreover, in determining whether given rates for stockyard services are reasonable or confiscatory, the valuation placed upon the property of the stockyards company is a prime factor. The capital of such a company cannot, however, be taken as truly representing the value of the corporate property, nor can the opinion of experts as to the value of the property be regarded as conclusive.²

2. Duty to Furnish Facilities Impartially. — Stockyard owners are entitled to equal facilities in the use of railroads upon which they are largely dependent for success; hence, railroads centering at a given city may not combine and establish a stockyard as a private enterprise, and by agreement make such yard the depot of such roads for the receipt and delivery of all stock brought into or carried through the city, and withhold like accommodations from competing stockyards. To allow them to do so would suppress competition, establish and maintain a monopoly, and in all likelihood subject the public to unreasonable exactions. The power to prevent such an abuse is vested in a court of equity unless the legislature has provided other and different remedies.³ Thus, an injunction has been granted restraining the officers and agents of a railroad company from interfering with the facilities afforded thereby to a private stockyard, built by the permission or acquiescence of the railroad company, although no contract existed between the complainant and such railroad company.⁴

3. Liability for Injuries. — Where a stockyard company is a body politic incorporated with the power to construct and maintain railroad lines, etc., upon its property, it is liable for injuries resulting from the negligence or unlawful operation of such railroad, whether by the stockyard corporation to which the franchise is granted, or by another corporation, or by individuals whom the owner authorizes or permits to use its track.⁵

4. Stockyards as Nuisances. — If a stockyard creates a nuisance, a court of equity may regulate its business so as to protect the public and may enjoin

1. *Hopkins v. U. S.*, 171 U. S. 578, reversing U. S. v. *Hopkins*, 82 Fed. Rep. 529; *Anderson v. U. S.*, 171 U. S. 604. See also the title INTERSTATE COMMERCE, vol. 17, pp. 65, 92, 131.

2. **Rights, Duties, and Liabilities — Charges and Fees.** — *Cotting v. Kansas City Stock-Yards Co.*, 82 Fed. Rep. 850, reversed, however, 183 U. S. 79, on the ground that the particular statute under consideration, defining what should constitute public stockyards, defining the duties of the person or persons operating them, regulating all charges thereof, removing restrictions in the trade of dead animals, and providing penalties for violations of the act, was in violation of the

Fourteenth Amendment of the Constitution of the United States, in that it applied only to one stockyard company, and not to other companies or corporations engaged in like business in the state, and thereby denied to that company the equal protection of the laws.

3. **Must Furnish Facilities Impartially.** — *McCoy v. Cincinnati, etc.*, R. Co., 13 Fed. Rep. 9.

4. *Coe v. Louisville, etc.*, R. Co. 3 Fed. Rep. 775.

5. **Liability for Injuries.** — *Pennsylvania Co. v. Ellett*, 132 Ill. 654. See also generally the titles CARRIERS OF LIVE STOCK, vol. 5, p. 427; INJURIES TO ANIMALS BY RAILROADS, vol. 16, p. 471.

the business in part or altogether, or may appoint a commission to examine and report.¹ But an injunction will not issue to restrain the building of a stockyard where it appears by affidavits that the projectors intend so to carry on the business as not to create a nuisance;² nor will an injunction issue where the erection of the stockyard is expressly authorized by law, even though it be shown that a nuisance has been created.³

5. Right to Sell Unclaimed Stock. — Stock left in the custody of a stockyard company may be sold by such company when no owner can be found therefor, and the purchaser thereof cannot refuse to pay for it on the ground that the vendor had no title to it.⁴

III. LIVE-STOCK EXCHANGES. — An outgrowth of the stockyard business has been the live-stock exchange or commission company, usually not formed for pecuniary profit. These exchanges are governed by the rules of law applicable to exchanges generally, which have been fully treated in another title.⁵

STOLE. — See STEAL, *ante*.

STOLEN GOODS. — See the titles LARCENY, vol. 18, p. 456; LOST PROPERTY, vol. 19, p. 579; RECEIVING STOLEN PROPERTY, vol. 24, p. 43.

STONE. — A stone is earthy or mineral matter condensed into a hard state.⁶

STOP ORDER. — See note 7.

STOPPAGE. (See also the title SET-OFF, RECOUPMENT, AND COUNTERCLAIM, vol. 25, p. 484.) — In the old books set-off is sometimes called stoppage, because the amount sought to be set off was stopped or deducted from the cross-demand.⁸

1. Stockyards as Nuisances. — *Babcock v. New Jersey Stock Yard Co.*, 20 N. J. Eq. 296. See also the titles ABATEMENT OF NUISANCES, vol. 1, p. 63; NUISANCES, vol. 21, p. 679.

For cases in which stockyards were held to be or not to be nuisances, see the title NUISANCES, vol. 21, pp. 694, 697.

2. Atty.-Gen. v. Steward, 20 N. J. Eq. 416.

3. London, etc., R. Co. v. Truman, 11 App. Cas. 45.

4. May Sell Cattle. — *Millcreek Tp. v. Brighton Stock Yards Co.*, 27 Ohio St. 435.

5. Live-stock Exchanges. — See the title STOCK AND PRODUCE EXCHANGES, *ante*.

6. Stone. — *Jenkins v. Johnson*, 9 Blatchf. (U. S.) 519.

A statute imposed a toll upon "goods, wares, merchandises and commodities," and a lower toll upon *stone*. It was held that blocks of *stone* squared and reduced to certain dimensions were *stone* within the statute, and not "merchandises," and were therefore subject to the lower toll. *Fisher v. Lee*, 12 Ad. & El. 622, 40 E. C. L. 136.

Limestone. — An ordinance provided for the construction of crosswalks to be composed of *stone*. It was objected that the kind of *stone* to be used was not specified. The court said: "It was proven, without contradiction, that

among the inhabitants of the village of Hinsdale, and contractors and builders there, the word *stone* has a well-known and established meaning, and that it means limestone. Such being the case, the ordinance would not be held to be indefinite or uncertain in that respect." *Shannon v. Hinsdale*, 180 Ill. 204.

7. Stop Order. (See also the titles GAMBLING CONTRACTS, vol. 14, p. 606; STOCKBROKERS, *ante*.) — In *Porter v. Wormser*, 94 N. Y. 443, it was said: "The definition of a *stop order* was given by Nathan, one of the defendants, in his evidence on the trial, and was not controverted. He said: 'The meaning of a *stop order* is to await a certain figure, and whenever this figure is reached, to stop the transaction by then selling or buying, as the case may be, as well as possible,' and was explained by another witness as follows: 'For instance, if you give a *stop order* at 109 or 110, you must sell as soon as the stock or bonds have sold at that price by some one else. If you can sell at that price you must do it, but if you cannot, you must sell at whatever the price is after they have sold at that price.'" See also *Wronkow v. Clews*, 52 N. Y. Super. Ct. 176.

8. Stoppage. — *Wood's Byles on Bills and Notes* (8th ed.) 365; *Jeffs v. Wood*, 2 P. Wms. 128.

STOPPAGE IN TRANSITU.

By HERBERT B. HAWES.

I. IN GENERAL, 1079.

1. *Definitions*, 1079.
2. *Nature and Origin of Right*, 1079.
3. *Basis of Right*, 1081.
4. *Present Status of Right*, 1082.

II. LIMITATIONS OF RIGHT, 1083.

1. *Persons Having Right of Stoppage*, 1083.
 - a. *In General*, 1083.
 - b. *Persons Having Partial Interest in Goods*, 1083.
 - c. *Principal and Agent*, 1083.
 - d. *Parties Paying Purchase Price*, 1083.
 - e. *Sureties for Purchase Price*, 1084.
 - f. *Lienors*, 1084.
2. *Property Subject to Stoppage*, 1084.
 - a. *In General*, 1084.
 - b. *Proceeds of Attachment Against Buyer*, 1084.
 - c. *Bonds Representing Goods*, 1084.
 - d. *Proceeds of Subsale*, 1084.

III. ACCRUAL OF RIGHT, 1084.

1. *In General*, 1084.
2. *Goods Must Be Unpaid For*, 1084.
 - a. *In General*, 1084.
 - b. *Effect of Credit*, 1085.
 - c. *Part Payment*, 1085.
 - d. *Payment by Bill or Note*, 1085.
3. *Goods Must Be in Transit*, 1086.
 - a. *In General*, 1086.
 - b. *Beginning of Transit*, 1086.
 - (1) *Delivery to Carrier*, 1086.
 - (2) *Delivery to Middleman*, 1086.
 - (3) *Constructive Transit*, 1086.
 - c. *Destination of Goods*, 1086.
 - (1) *Importance of Question*, 1086.
 - (2) *What Is Destination*, 1087.
 - d. *End of Transit*, 1089.
4. *Buyer Must Be Insolvent*, 1089.
 - a. *In General*, 1089.
 - b. *Meaning of Insolvency*, 1089.
 - c. *Time of Insolvency*, 1089.
 - d. *Evidence of Insolvency*, 1090.
 - (1) *In General*, 1090.
 - (2) *Admissibility*, 1090.
 - (3) *Sufficiency*, 1090.

IV. TERMINATION OF RIGHT, 1091.

1. *Delivery*, 1091.
 - a. *In General*, 1091.
 - b. *Necessity of Delivery*, 1091.
 - c. *Sufficiency of Delivery*, 1092.
 - (1) *Necessity of Acceptance of Goods*, 1092.
 - (2) *Delivery Short of Destination*, 1093.

STOPPAGE IN TRANSITU.

- (3) *Constructive Delivery or Delivery by Attornment, 1094.*
 - (a) *In General, 1094.*
 - (b) *Method of Attornment, 1095.*
 - aa. *Agreement Between Carrier or Middleman and Buyer, 1095.*
 - bb. *Effect of Payment or Nonpayment of Freight, 1098.*
 - cc. *Demand and Refusal of Delivery, 1098.*
 - dd. *Partial Delivery, 1099.*
 - ee. *Delivery and Entry at Custom House, 1100.*
 - ff. *Order of Delivery, 1101.*
 - (c) *Revocation of Attornment, 1101.*
- (4) *Delivery to Persons Other than Buyer, 1102.*
 - (a) *Scope of Topic, 1102.*
 - (b) *To Carrier or Middleman, 1102.*
 - (c) *On Board Buyer's Ship, 1103.*
 - (d) *To Buyer's Agent, 1104.*
 - (e) *To Warehouseman or Wharfinger, 1106.*
 - (f) *To Buyer's Assignee, Mortgagee, or Pledgee, 1107.*
 - (g) *To Subpurchaser, 1108.*
- 2. *Subsale, 1108.*
- 3. *Transfer of Bill of Lading, 1108.*
 - a. *In General, 1108.*
 - b. *Who Are Transferees for Value Without Notice, 1110.*
 - (1) *For Value, 1110.*
 - (2) *Without Notice, 1111.*
- 4. *Assignment by Buyer, 1111.*
- 5. *Seizure of Goods under Legal Process Against Buyer, 1111.*
- 6. *Waiver, 1113.*
- 7. *Laches, 1114.*

V. EXERCISE OF RIGHT, 1114.

- 1. *In General, 1114.*
- 2. *By Agent, 1114.*
- 3. *Notice, 1115.*
 - a. *In General, 1115.*
 - b. *Effect of Notice, 1115.*
 - c. *Sufficiency of Notice, 1116.*
 - (1) *By Whom Given, 1116.*
 - (2) *To Whom Given, 1116.*
 - (3) *Form and Contents, 1117.*

VI. EFFECT OF STOPPAGE, 1117.

- 1. *Upon Rights of Parties, 1117.*
- 2. *Upon Rights of Carrier or Middleman, 1119.*
- 3. *Wrongful Stoppage, 1119.*

CROSS-REFERENCES.

For matters of *PROCEDURE*, see the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, titles *ATTACHMENT*, vol. 3, p. 1; *CARRIERS*, vol. 3, p. 812; *INTERPLEADER*, vol. 11, p. 444; *LIENS*, vol. 13, p. 122; *MARSHALING ASSETS*, vol. 13, p. 888; *PLEDGES*, vol. 16, p. 629; *REPLEVIN*, vol. 18, p. 494; *SALES*, vol. 19, p. 1; *TITLE, OWNERSHIP, AND POSSESSION*, vol. 21, p. 710; *TRESPASS ON THE CASE*, vol. 21, p. 901; *TROVER AND CONVERSION*, vol. 21, p. 1009.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *AGENCY*, vol. 1, p. 930; *ASSIGNMENTS*, vol. 2, p. 1007; *ASSIGNMENTS FOR THE BENEFIT OF CREDITORS*, vol. 3, p. 1; *ATTACHMENT*, vol. 3, p. 181; *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 65; *BILLS OF LADING*, vol.

4, p. 507; *BILLS OF SALE*, vol. 4, p. 555; *CARRIERS OF GOODS*, vol. 5, p. 154; *CONSIDERATION*, vol. 6, p. 667; *EXPRESS COMPANIES*, vol. 12, p. 542; *FORWARDERS*, vol. 13, p. 1165; *INSOLVENCY AND BANKRUPTCY*, vol. 16, p. 630; *LIENS*, vol. 19, p. 3; *MARSHALING ASSETS*, vol. 19, p. 1255; *PAYMENT*, vol. 22, p. 513; *PLEDGE AND COLLATERAL SECURITY*, vol. 22, p. 839; *SALES*, vol. 24, p. 1018; *SHIPS AND SHIPPING*, vol. 25, p. 854; *TITLE, OWNERSHIP, AND POSSESSION; WAREHOUSE AND WAREHOUSEMEN; WHARVES AND WHARFINGERS*.

I. IN GENERAL — 1. Definitions. — The Right of Stoppage in Transitu is the right of an unpaid seller of merchandise to resume possession thereof after shipment and before actual or constructive delivery to the buyer or some one claiming under him or acting for him in some capacity other than that of carrier or middleman, for the purpose of securing himself, to the extent of the purchase price remaining unpaid, against the insolvency of the buyer, existing unknown to the seller at the time of the sale, or arising thereafter.¹

Stoppage in Transitu is the successful exercise of the right of stoppage, whereby the seller regains possession of the goods and acquires a lien thereon for the unpaid purchase money.²

2. Nature and Origin of Right — First Recognized in Equity. — The right of stoppage *in transitu* seems to have been first recognized in 1690, in a suit wherein it was held that where a seller of merchandise, on learning of the bankruptcy of the buyer, regains possession of the goods before they reach the buyer, equity will not assist the assignee of the bankrupt to recover the goods from the seller, the court saying that if the seller of goods to an insolvent buyer can get the goods back into his possession or prevent their going into the hands of the buyer, it is lawful for him so to do and very allowable in equity.³ This decision was based upon purely equitable principles, analogous to the equitable doctrine of "tacking," whereby the owner of an equity may, by getting in the legal title, defeat another equal or prior equity.⁴ The court, however, seemed to consider the seller as having some sort of proprietary right in the goods, notwithstanding the fact that in an action of trover, had in order to ascertain whether the title to the goods was transferred to the buyer by the consignment, it was held that the title did so pass. In 1743 the same question again arose in a court of equity, resulting in a similar decision, which, however, was based not only upon principles of equity, but also upon the custom of merchants.⁵ In 1761 the right of stoppage was again recognized in equity, this time, however, in a somewhat different and more extended form, the question being not the seller's right to retain possession after having regained it, but his right to possession where the

1. Definition of Right. — *Phelps v. Comber*, 29 Ch. D. 813; *D'Aquila v. Lambert*, 2 Eden 76; *Gibson v. Carruthers*, 8 M. & W. 321; *Jones v. Earl*, 37 Cal. 630, 99 Am. Dec. 338; *Hause v. Judson*, 4 Dana (Ky.) 10, 29 Am. Dec. 377; *Newhall v. Vargas*, 15 Me. 314, 33 Am. Dec. 617; *O'Brien v. Norris*, 16 Md. 122, 77 Am. Dec. 284; *Walsh v. Blakely*, 6 Mont. 194; *Fenkhausen v. Fellows*, 20 Nev. 312; *Inslee v. Lane*, 57 N. H. 454; *Atkins v. Colby*, 20 N. H. 154; *Harris v. Pratt*, 17 N. Y. 249; *Farrell v. Richmond*, etc., R. Co., 102 N. Car. 390, 11 Am. St. Rep. 760; *Benedict v. Schaettle*, 12 Ohio St. 515; *Jordan v. James*, 5 Ohio 88; *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188.

2. Definition of Stoppage. — *Newhall v. Vargas*, 15 Me. 314, 33 Am. Dec. 617.

Resumption of Possession Essential to Complete

Stoppage. — *Jordan v. James*, 5 Ohio 88. See also *infra*, this title, *Exercise of Right — In General*.

3. Right First Recognized in Equity. — *Wiseman v. Vandeputt*, 2 Vern. 203.

4. Doctrine of Stoppage Analogous to Equitable Doctrine of Tacking. — The decision in *Wiseman v. Vandeputt*, 2 Vern. 203, was based on the authority of *Hitchcock v. Sedgwick*, 2 Vern. 156, wherein it was held that one who has lent money to a bankrupt without knowledge of the bankruptcy, taking a second mortgage as security, may protect himself by purchasing the first mortgage, such mortgage being prior to the bankruptcy, notwithstanding there is nothing due upon the first mortgage.

5. Right Based upon Principles of Equity and Custom of Merchants. — *Snee v. Prescott*, 1 Atk. 245.

Volume XXVI.

carrier refused to redeliver. It was held upon a bill to determine the right of possession that the seller was entitled thereto.¹ From these cases, which, though probably not the only ones decided during the period covered by them,² are certainly the leading cases on the subject, it would seem that the right of stoppage originated in equity as a purely equitable doctrine, but was subsequently extended by the law merchant and by judicial decisions until it began to assume the semblance of a legal right. The refusal of equity to interfere after the seller has regained possession may perhaps be sustained upon purely equitable principles; but it is more difficult thus to sustain the seller's right of stoppage where the carrier refuses to redeliver the goods and the buyer or his assignees are also claiming them. This is generally based upon the equitable principle that one man's goods should not be taken to pay the debts of another.³

Right Recognized at Common Law in 1759. — In 1759 the right of stoppage was recognized at common law in an action by the buyer against the carrier for refusing to deliver. The defendant justified his refusal on the ground that the seller had ordered him not to deliver. Judgment was rendered for the defendant, it being held that the seller's right of stoppage was based not only upon principles of equity, but upon the laws of property.⁴

Origin Doubtful. — From the foregoing decisions it appears that, though the right of stoppage was first recognized in its simplest form in courts of equity, its real origin and the principles on which it is based are involved in serious doubt, which has not been lessened by the custom prevailing in common-law courts of ascribing the origin of the doctrine to equity, and in courts of equity of ascribing it to the common law.⁵ This uncertainty is still further reflected in the difference of judicial opinion as to the true basis of the right of stoppage.⁶

The True Origin of the right of stoppage is probably, as already suggested, that the doctrine was introduced in its simplest form as an equitable principle, and was subsequently expanded and extended by the law merchant and by judicial decisions.

Doctrine Anomalous. — Whatever be the origin of the doctrine of stoppage *in transitu*, this doctrine, as it stands to-day, is certainly one of the most peculiar anomalies of the law. While the earlier decisions, both in equity and at common law, may be supported by well-accepted principles of equity and law prevailing at the time when they were rendered,⁷ the law of sales seems to have outgrown these principles, leaving the doctrine of stoppage, as it now stands in its expanded and extended form, seemingly without foundation in either law or equity. This uncertainty as to the origin and basic principles is probably responsible for the difficulty in the application of the rules governing the right of stoppage, which are now well settled and clearly defined, and are themselves entitled to classification as settled principles peculiar to this particular subject, without reference to their origin.

Right of Stoppage Not Peculiar to English Law. — It is to be noted that the right of stoppage is not peculiar to the English law, but has been for a long time, in a

1. Seller's Right of Possession Enforceable in Equity. — *D'Aquila v. Lambert*, 2 Eden 76.

2. See *Fearon v. Bowers*, 1 H. Bl. 364, note, decided in 1753. This was an action at law, but evidence was received therein indicating that it was already a settled rule of equity that the seller might regain possession in any way he could, provided he did not steal the goods.

3. See *infra*, this section, *Basis of Right*.

4. *Burghall v. Howard*, 1 H. Bl. 365, note a. And see *infra*, this section, *Basis of Right*.

5. Origin of Doctrine Ascribed by Common-law Courts to Equity, and by Courts of Equity to Common Law. — See opinion of Lord Abinger in *Gibson v. Carruthers*, 8 M. & W. 321.

6. Difference of Judicial Opinion. — See *infra*, this section, *Basis of Right*.

7. See *Lickbarrow v. Mason*, 2 T. R. 63, 1 Smith Lead. Cas. (8th ed.) 781, wherein Lord Loughborough based the right of stoppage upon the early doctrine that a sale was not entirely complete until the buyer had acquired actual possession of the goods.

more or less varied form, a principle of the laws of Holland,¹ Russia,² and France.³ Indeed, the doctrine of stoppage existed in France, under the name of *revendication*, prior to its introduction into the English law, in a form so nearly identical with the form which it finally assumed in the English law that it has been suggested that the English doctrine was adopted from the French law, under which, even after delivery, the purchaser did not, without paying or securing the price, obtain a perfect right to the property as against the seller's claim for the purchase price.⁴

3. Basis of Right. — The basic fact of the right of stoppage *in transitu* is the insolvency of the buyer;⁵ but there is considerable conflict of opinion as to the basic principle underlying this right.

Right Generally Considered Equitable. — The right of stoppage is generally considered as a purely equitable right which has been adopted by the common law for the purpose of substantial justice; in other words, it is considered as an equitable extension of the vendor's lien.⁶

Equitable Basis of Right. — Where the seller has regained possession, he is regarded as having a higher equity to retain the goods as security for the purchase price than the assignee of the debtor, who has not paid for the property, has to claim it for the debtor's general creditors;⁷ and this seems to have been the principle upon which the first reported case of stoppage *in transitu* was decided.⁸ But it is evident that this principle does not extend to a case where the seller has not obtained possession, and is suing the carrier or the assignees of the debtor for the possession of the goods or for conversion. Indeed, it has been questioned as late as 1801 whether a carrier who, after notice of stoppage, delivers the goods to the buyer's assignee is liable to the seller in trover.⁹ There is, however, no longer any doubt as to these questions; and the right of an unpaid seller to repossess himself of the goods on account of the insolvency of the buyer at any time during their transit is now established beyond dispute, this right being usually based upon the equitable principle that one man's goods should not be applied to the payment of another's debts.¹⁰ But however, forceful this reason may have been at a

1. Right Recognized in Holland. — Mason v. Lickbarrow, 1 H. Bl. 364, 1 Smith Lead. Cas. (8th ed.) 753.

2. Right Recognized in Russia. — Inglis v. Usherwood, 1 East 515; Bohtingk v. Inglis, 3 East 381.

3. Right Recognized in France. — Gibson v. Carruthers, 8 M. & W. 321; The Constantia, 6 C. Rob. 321.

4. Doctrine of Stoppage Borrowed from French Law. — Newhall v. Vargas, 15 Me. 314, 33 Am. Dec. 617.

5. Right Based on Insolvency of Buyer. — See *infra*, this title, *Accrual of Right — Buyer Must Be Insolvent*.

6. Equitable Extension of Vendor's Lien — England. — Hodgson v. Loy, 7 T. R. 440; Tucker v. Humphrey, 4 Bing. 516, 15 E. C. L. 63, 1 M. & P. 378, note; Bloxam v. Sanders, 4 B. & C. 941, 10 E. C. L. 477; Lickbarrow v. Mason, 2 T. R. 63, 1 Smith Lead. Cas. (8th ed.) 753.

Louisiana. — Blum v. Marks, 21 La. Ann. 268, 99 Am. Dec. 725.

Maine. — Newhall v. Vargas, 15 Me. 314, 33 Am. Dec. 617.

Maryland. — Thompson v. Baltimore, etc., R. Co., 28 Md. 406.

Massachusetts. — Potts v. New York, etc., R. Co., 131 Mass. 455, 41 Am. Rep. 247; Rowley v. Bigelow, 12 Pick. (Mass.) 307, 23 Am. Dec.

607; Arnold v. Delano, 4 Cush. (Mass.) 33, 50 Am. Dec. 754.

Michigan. — Mann v. White River Log, etc., Co., 46 Mich. 38, 41 Am. Rep. 141.

Missouri. — Schwabacher v. Kane, 13 Mo. App. 126.

New Hampshire. — Insee v. Lane, 57 N. H. 454; Atkins v. Colby, 20 N. H. 154.

New York. — Harris v. Pratt, 17 N. Y. 249; Buckley v. Furniss, 15 Wend. (N. Y.) 137.

North Carolina. — Farrell v. Richmond, etc., R. Co., 102 N. Car. 390, 11 Am. St. Rep. 760.

Ohio. — Jordan v. James, 5 Ohio 88.

Pennsylvania. — Patten's Appeal, 45 Pa. St. 151, 84 Am. Dec. 479; White v. Welsh, 38 Pa. St. 396.

Texas. — Chandler v. Fulton, 10 Tex. 2, 60 Am. Dec. 188.

7. Seller in Possession Has Higher Equity than Assignee of Debtor. — Mills v. Ball, 2 B. & P. 457; Arnold v. Delano, 4 Cush. (Mass.) 33, 50 Am. Dec. 754.

8. Wiseman v. Vandeputt, 2 Vern. 203.

9. Seller's Right to Enforce Redelivery by Carrier Questioned. — Mills v. Ball, 2 B. & P. 457.

10. Equitable Basis of Right. — *Ex p.* Wilkin-son, cited in D'Aquila v. Lambert, 2 Eden 76; Litt v. Cowley, 7 Taunt. 169, 2 E. C. L. 168; Chicago, etc., R. Co. v. Painter, 15 Neb. 394; Farrell v. Richmond, etc., R. Co., 102 N. Car. 390, 11 Am. St. Rep. 760; Cabcen v. Campbell,

time when the goods were considered as not in fact belonging to the buyer until he had acquired actual possession thereof,¹ it is difficult to perceive how this principle can apply under the present law of sales, according to which the complete title passes to the buyer upon delivery of the goods to the carrier.²

Right of Stoppage Not Proprietary Right. — It was held at an early date that the right of stoppage *in transitu* was based upon a proprietary right in the seller;³ but it is now well settled that the right is not based upon any proprietary right of the seller in the goods, but is a right or charge superimposed upon the title which passes to the buyer upon the delivery of the goods to the carrier.⁴

Right Based on Custom of Merchants. — It has been held that the right of stoppage is not founded on any contract between the parties or on any equitable principle whatever, but that it is based upon the custom of merchants, originally proved in evidence, and thereafter adopted as a matter of principle both at law and in equity.⁵

Right Based on Implied Condition in Contract of Sale. — It has also been held that the right of stoppage is based upon an implied condition in the contract of sale that if the buyer becomes insolvent between the shipment of the goods and the receipt thereof by the buyer, the seller may reassert his vendor's lien and reclaim the goods.⁶

Rule to Be Followed in Applying Doctrine of Stoppage. — In view of the uncertainty as to the origin of the right of stoppage *in transitu*, and hence as to the general principles underlying it,⁷ it seems that the best rule to be followed in applying the doctrine is to accept it as an anomaly and to look for the principles which are to govern any particular case, not in the history of the doctrine or in any general principle of law or equity, but in the long line of precedents which have established certain well-defined rules peculiar to this subject but sufficient for the determination of almost any case which may arise within the scope thereof.

4. Present Status of Right — Common-law Right. — Whatever may have been the origin of the right of stoppage *in transitu*, it is now treated as a common-law right and is enforced even more often by courts of common law than by courts of equity.⁸

Right Regarded with Favor. — The right of stoppage is now regarded not only as a common-law right, but as a right to be highly favored on account of its intrinsic justice.⁹

30 Pa. St. 254; *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188.

1. Perfect Title Not Acquired by Buyer until Actual Delivery. — *Mason v. Lickbarrow*, 1 H. Bl. 357, 1 Smith Lead. Cas. (8th ed.) 781; *Burghall v. Howard*, 1 H. Bl. 365, note a; *Oppenheim v. Russell*, 3 B. & P. 42.

2. Delivery to Carrier Passes Title. — See the title SALES, vol. 24, p. 1071. See also *infra*, this title, *Termination of Right — Delivery — Delivery to Persons Other than Buyer — To Carrier or Middleman*.

3. Right Held to Be Dependent upon Right of Property in Seller. — *Mason v. Lickbarrow*, 1 H. Bl. 357, 1 Smith Lead. Cas. (8th ed.) 781; *Burghall v. Howard*, 1 H. Bl. 365, note a; *Oppenheim v. Russell*, 3 B. & P. 42.

4. Right of Stoppage Not Proprietary Right. — *Berndtson v. Strang*, L. R. 3 Ch. 588; *Gibson v. Carruthers*, 8 M. & W. 321; *Parker v. Byrnes*, 1 Lowell (U. S.) 539; *Rowley v. Bigelow*, 12 Pick. (Mass.) 307, 23 Am. Dec. 607.

5. Right Based on Custom of Merchants. — *Kendal v. Stevens*, 11 Q. B. D. 356; *Cox v. Burns*, 1 Iowa 64; *Grout v. Hill*, 4 Gray

(Mass.) 361. See also *Gibson v. Carruthers*, 8 M. & W. 321.

6. Right Based on Implied Condition in Contract of Sale. — *Cox v. Burns*, 1 Iowa 64; *Arnold v. Delano*, 4 Cush. (Mass.) 33, 50 Am. Dec. 754.

7. See *supra*, this section, *Nature and Origin of Right*.

8. Right Now Regarded as Common-law Right. — *Oppenheim v. Russell*, 3 B. & P. 42. Additional cases need not be cited to this proposition, since it is too well settled ever to be questioned, and is recognized by a large majority of the decisions cited in other portions of this title. See especially the cases cited *infra*, this title, *Termination of Right — Delivery — Constructive Delivery or Delivery by Attornment — Demand and Refusal of Delivery*.

9. Right Regarded with Favor. — *Oppenheim v. Russell*, 3 B. & P. 42; *O'Brien v. Norris*, 16 Md. 122, 77 Am. Dec. 284; *Langstaff v. Stix*, 64 Miss. 171, 60 Am. Rep. 49; *Farrell v. Richmond*, etc., R. Co., 102 N. Car. 390, 11 Am. St. Rep. 760; *Calahan v. Babcock*, 21 Ohio St. 281, 8 Am. Rep. 63.

II. LIMITATIONS OF RIGHT — 1. Persons Having Right of Stoppage — a. IN GENERAL. — The Relation of Seller and Buyer Is Essential to the right of stoppage *in transitu*;¹ and this relation must be a direct one, that is, there must be a privity of contract between the party asserting the right of stoppage and the party to whom the goods are consigned. Thus, where goods purchased by one person are, pursuant to the direction of such person, shipped by the seller to a third person who has purchased them from the first buyer, the original seller cannot stop the goods *in transitu* on account of the insolvency of the original buyer.²

Purchaser Partner in Selling Firm. — The fact that the purchaser is a partner in the firm which sells the goods will not affect such firm's right of stoppage.³

b. PERSONS HAVING PARTIAL INTEREST IN GOODS. — A person who has a partial interest in the goods and the right to receive a portion thereof may exercise the right of stoppage so as to protect such interest. Thus, where one purchases an interest in goods in transit and sells such interest to another, he may, upon the insolvency of his vendee, exercise the right of stoppage so as to prevent delivery to such vendee of the portion of the goods represented by such interest.⁴

c. PRINCIPAL AND AGENT. — A Principal who has consigned goods to a factor may exercise the right of stoppage⁵ even where the principal is indebted to the factor for advances upon the consignment,⁶ or where the factor has a joint interest in the goods.⁷

A Factor who buys upon his own credit and ships upon the credit which he extends to his principal is considered as a seller, and may exercise the right of stoppage,⁸ the factor being considered as having purchased the goods and then resold them to his correspondent at cost, plus his commission.⁹

A Purchasing Agent who buys in his own name and then ships to his principal may exercise the right of stoppage.¹⁰

Where the Principal Is Liable to the Original Seller, the agent does not stand in the position of a seller, and cannot stop the goods;¹¹ nor can he stop them merely because his principal owes him money advanced for the purchase of the goods.¹²

d. PARTIES PAYING PURCHASE PRICE. — The right of stoppage *in transitu* may be exercised by one who pays the purchase price for the buyer and takes as security an assignment of the bill of lading,¹³ but not by one who has merely

1. Relation of Seller and Buyer Essential. — Lickbarrow v. Mason, 2 T. R. 63; 1 Smith Lead. Cas. (8th ed.) 753; Kinloch v. Craig, 3 T. R. 787; Wright v. Campbell, 4 Burr. 2050.

2. Privity of Contract Essential. — Ex p. Miles, 15 Q. B. D. 39; Memphis, etc., R. Co. v. Freed, 38 Ark. 614; A. J. Neimeyer Lumber Co. v. Burlington, etc., R. Co., 54 Neb. 321; Shepard, etc., Lumber Co. v. Burroughs, 62 N. J. L. 469.

3. Right Exercisable by Partnership Against Partner. — Ex p. Cooper, 11 Ch. D. 68.

4. Right Exercisable by Owner of Partial Interest in Goods. — Jenkyns v. Osborne, 7 M. & G. 678, 49 E. C. L. 678, 8 Scott N. R. 505.

5. Right Exercisable by Principal Against Factor. — Newsom v. Thornton, 6 East 17; Kinloch v. Craig, 3 T. R. 119; Wright v. Campbell, 4 Burr. 2047.

6. Right Not Defeated by Principal's Indebtedness to Factor. — Kinloch v. Craig, 3 T. R. 119.

7. Right Not Defeated by Factor's Interest in Goods. — Newsom v. Thornton, 6 East 17. See also *supra*, this subsection, *Persons Having Partial Interest in Goods*.

8. Right Exercisable by Factor Against Principal. — Feise v. Wray, 3 East 93; Imperial Bank v. London, etc., Docks Co., 5 Ch. D. 195; Snee v. Prescott, 1 Atk. 245; Newhall v. Vargas, 13 Me. 93, 29 Am. Dec. 489; Seymour v. Newton, 105 Mass. 272; Ilsley v. Stubbs, 9 Mass. 71.

9. Factor Considered as Having Purchased and then Resold. — Tucker v. Humphrey, 4 Bing. 516, 15 E. C. L. 63; Feise v. Wray, 3 East 93; Patten v. Thompson, 5 M. & S. 350; Ogle v. Atkinson, 5 Taunt. 759, 1 E. C. L. 255; Oakford v. Drake, 2 F. & F. 493; Turner v. Liverpool Docks, 6 Exch. 543, 20 L. J. Exch. 393; Ellershaw v. Magniac, 6 Exch. 570; Cassaboglou v. Gibb, 11 Q. B. D. 797; Ex p. Miles, 15 Q. B. D. 39; Phelps v. Comber, 29 Ch. D. 826; Ex p. Banner, 2 Ch. D. 278; Ireland v. Livingstone, L. R. 5 H. L. 395; The Tigress. Brown & L. 38, 32 L. J. Adm. 97.

10. Right Exercisable by Purchasing Agent. — Oakford v. Drake, 2 F. & F. 493; Hawkes v. Dunn, 1 Tyrw. 413.

11. Oakford v. Drake, 2 F. & F. 493.

12. Gwyn v. Richmond, etc., R. Co., 85 N. Car. 429, 39 Am. Rep. 708.

13. Gossler v. Schepeler, 5 Daly (N. Y.) 476.

discounted the purchase-money draft, without taking an assignment of the bill of lading.¹

e. SURETIES FOR PURCHASE PRICE. — A surety for the purchase money cannot exercise the right of stoppage, even though he is entitled to a commission on the amount of the purchase, the reason being that he is not primarily liable for the price, and hence does not stand in the position of a seller to his principal.²

By Statute in England, however,³ it would seem that the right of stoppage has been given to sureties for the purchase price.⁴

f. LIENORS. — The right of stoppage cannot be exercised by one having a mere lien on the goods.⁵

2. Property Subject to Stoppage — *a. IN GENERAL.* — As a general rule it may be stated that the right of stoppage extends only to the specific property for which the securing of payment is sought by the exercise of such right. Thus, it has been held that the seller cannot claim insurance money due to the buyer for damages received by the goods during transit.⁶

b. PROCEEDS OF ATTACHMENT AGAINST BUYER. — The right of stoppage extends to the proceeds of a sale made in attachment proceedings against the buyer, so long as such proceeds remain under the control of the court.⁷

c. BONDS REPRESENTING GOODS. — Where the goods, after having been attached, are delivered to a claimant upon the execution of a forthcoming bond, the seller may intervene and claim the benefit of the bond.⁸ Likewise, where the court, after the goods have been sold, directs the payment of the proceeds to one of the parties to the suit, upon his entering into a bond for the repayment of the money, the nature of the fund is not thereby changed, and the seller may claim it by virtue of his right of stoppage.⁹

d. PROCEEDS OF SUBSALE. — It seems that where the subpurchaser obtains a good title as against the original seller's right of stoppage before such right is exercised, the right is entirely lost, and the original seller cannot claim the proceeds of the subsale.¹⁰ But where the right of stoppage is exercised, as by notice to the carrier, before the subpurchaser's title has become complete, and the goods are nevertheless delivered to the subpurchaser, the original seller will be entitled to the proceeds of the subsale.¹¹

III. ACCRUAL OF RIGHT — **1. In General.** — As already seen, the first essential of the right of stoppage *in transitu* is that the relation of seller and buyer should exist between the party asserting the right and the party to whom the goods are consigned.¹² Where this relation exists the right accrues upon the concurrence of three conditions, viz., the goods must be unpaid for,¹³ the goods must be in transit,¹⁴ and the buyer must be insolvent.¹⁵

2. Goods Must Be Unpaid For — *a. IN GENERAL.* — The right of stoppage

1. *Phelps v. Comber*, 29 Ch. D. 813; *Lake Shore, etc., R. Co. v. National Live Stock Bank*, 178 Ill. 506.

2. *Surety for Purchase Money.* — *Siffken v. Wray*, 6 East 371.

3. *Right Given to Surety by English Statute.* — See 19 & 20 Vict., c. 97.

4. *Benjamin on Sales*, § 831.

5. *Right Not Exercisable by Lienors.* — *Sweet v. Pym*, 1 East 4; *Leuckhart v. Cooper*, 3 Bing. N. Cas. 99, 32 E. C. L. 55; *Morley v. Hay*, 3 M. & R. 696; *Freeman v. Birch*, 3 Q. B. 492 note, 43 E. C. L. 835 note.

6. *Insurance Money Due to Buyer Not Subject to Stoppage.* — *Berndtson v. Strang*, L. R. 3 Ch. 591.

7. *Proceeds of Attachment Against Buyer Subject to Stoppage.* — *Hause v. Judson*, 4 Dana (Ky.) 10, 29 Am. Dec. 377; *O'Brien v. Norris*,

16 Md. 122, 77 Am. Dec. 284; *Hall v. Richardson*, 16 Md. 410, 77 Am. Dec. 303.

8. *Seller Entitled to Benefit of Forthcoming Bond.* — *Dreyfus v. Mayer*, 69 Miss. 282.

9. *Hall v. Richardson*, 16 Md. 397, 77 Am. Dec. 303.

10. *Phelps v. Comber*, 29 Ch. D. 813; *Kemp v. Falk*, 7 App. Cas. 573.

11. *Kemp v. Falk*, 7 App. Cas. 573; *Ex p. Falk*, 14 Ch. D. 455; *Ex p. Davis*, 13 Ch. D. 628.

12. *Relation of Seller and Buyer Essential.* — See *supra*, this title, *Limitations of Right*.

13. See *infra*, this section, *Goods Must Be Unpaid For*.

14. See *infra*, this section, *Goods Must Be in Transit*.

15. See *infra*, this section, *Buyer Must Be Insolvent*.

being derived either from the equities of an unpaid seller or from some property right remaining in him until he is paid,¹ it is manifest that an essential element of such right is the nonpayment of the purchase money or some part thereof.² It is not essential, however, that payment be due to the original seller. It is sufficient if any one subrogated to the original seller's rights have a claim against the buyer for the purchase price.³

b. EFFECT OF CREDIT. — The extension of credit will not prevent the accrual of the right of stoppage, credit transactions being subject to an implied condition that the buyer shall keep his credit good.⁴

c. PART PAYMENT — In General. — The right of stoppage may arise notwithstanding that the buyer has paid a part of the purchase price, the effect of such payment being merely to diminish the seller's claim *pro tanto*, without affecting his right to stop the goods for the protection of the portion of the price remaining unpaid.⁵

Where the Contract of Sale Is Apportionable, and the part of the goods paid for is separable from the part unpaid for, the seller may stop only that part for which payment has not been made.⁶

Duty of Seller to Refund. — The seller need not, in order to protect his right of stoppage, refund what he may have received in part payment.⁷

d. PAYMENT BY BILL OR NOTE — In General. — In the absence of a special agreement whereby the seller receives the buyer's note or accepted bill of exchange in satisfaction of the purchase price, payment by such note or bill will not prevent the right of stoppage from arising upon the concurrence of the other essential conditions thereof.⁸

Negotiation of Bill or Note. — The fact that the bill or note which has been given for the purchase money has been negotiated by the seller and is outstanding at the time when the right of stoppage is asserted will not prevent the accrual of such right.⁹

Necessity for Return of Bill or Note. — Where the seller has accepted the buyer's

1. See *supra*, this title, *In General — Nature and Origin of Right*.

2. **Goods Must Be Unpaid For.** — Wood v. Roach, 2 Dall. (Pa.) 180, 1 Am. Dec. 276; Walsh v. Blakely, 6 Mont. 194; More v. Lott, 13 Nev. 376. See *infra*, this subsection, *Part Payment*.

3. See *supra*, this title, *Limitations of Right — Persons Having Right of Stoppage*.

4. **Accrual of Right Not Prevented by Extension of Credit.** — Arnold v. Delano, 4 Cush. (Mass.) 33, 50 Am. Dec. 754; Stubbs v. Lund, 7 Mass. 453, 5 Am. Dec. 63; Heinz v. Railroad Transfer Co., 82 Mo. 233; Atkins v. Colby, 20 N. H. 154; Mottram v. Heyer, 5 Den. (N. Y.) 629.

5. **Right May Accrue Notwithstanding Part Payment.** — Hodgson v. Loy, 7 T. R. 440; Feise v. Wray, 3 East 93; Edwards v. Brewer, 2 M. & W. 375; Van Casteel v. Booker, 2 Exch. 702; Newhall v. Vargas, 13 Me. 108, 29 Am. Dec. 489.

6. **Right Confined to Part Unpaid for Where Goods Are Separable.** — Merchant Banking Co. v. Phoenix Bessemer Steel Co., 5 Ch. D. 205.

7. Newhall v. Vargas, 13 Me. 108, 29 Am. Dec. 489.

8. **Payment by Buyer's Note Insufficient to Prevent Accrual of Right.** — Feise v. Wray, 3 East 93; Rogers v. Schneider, 13 Ind. App. 23; Clapp v. Sohmer, 55 Iowa 273; Newhall v. Vargas, 13 Me. 103, 29 Am. Dec. 489; Brewer Lumber Co. v. Boston, etc., R. Co., 179 Mass. 228; Davis v. Parsons, 157 Mass. 587; Arnold v. Delano, 4

Cush. (Mass.) 33, 50 Am. Dec. 754; Ains v. Ayres, 62 Hun (N. Y.) 376; Hays v. Mouille, 14 Pa. St. 48; Donath v. Broomhead, 7 Pa. St. 301; Bell v. Moss, 5 Whart. (Pa.) 189.

Payment by Accepted Bill Insufficient to Prevent Accrual of Right. — Dixon v. Yates, 5 B. & Ad. 313, 27 E. C. L. 86; Jenkyns v. Osborne, 7 M. & G. 678, 49 E. C. L. 678, 8 Scott N. R. 505; Edwards v. Brewer, 2 M. & W. 375; Feise v. Wray, 3 East 93; Miles v. Gorton, 2 Crompt. & M. 504; Lewis v. Mason, 36 U. C. Q. B. 590; Bell v. Moss, 5 Whart. (Pa.) 189.

As to Payment by Bill or Note in General, see the title PAYMENT, vol. 22, pp. 550 *et seq.*, 555 *et seq.*

9. **Accrual of Right Not Prevented by Negotiation of Bill or Note — England.** — Feise v. Wray, 3 East 93; Miles v. Gorton, 2 Crompt. & M. 504; Edwards v. Brewer, 2 M. & W. 375; Pattem v. Thompson, 5 M. & S. 350. But see Bunney v. Poyntz, 4 B. & Ad. 568, 24 E. C. L. 118.

Canada. — Lewis v. Mason, 36 U. C. Q. B. 590.

Illinois. — Lake Shore, etc., R. Co. v. National Live Stock Bank, 59 Ill. App. 451.

Maine. — Newhall v. Vargas, 13 Me. 103, 29 Am. Dec. 489.

Massachusetts. — Brewer Lumber Co. v. Boston, etc., R. Co., 179 Mass. 228.

New York. — Holbrook v. Vose, 6 Bosw. (N. Y.) 76.

Pennsylvania. — Bell v. Moss, 5 Whart. (Pa.) 189.

bill or note he need not tender a return thereof before exercising his right of stoppage.¹

Payment by the Bill or Note of a Third Party Without the Indorsement or Guaranty of the Buyer constitutes a satisfaction, and prevents the right of stoppage from thereafter arising.²

3. Goods Must Be in Transit — *a. IN GENERAL.* — It is manifest *ex vi termini* that an essential element of the right of stoppage *in transitu* is that the goods must be in transit.³

b. BEGINNING OF TRANSIT — (1) *Delivery to Carrier* — *In General.* — The transit begins as soon as the goods are delivered to the carrier for transportation, although they are still in the carrier's warehouse awaiting shipment.⁴

Private Carrier. — It is not essential that the carrier should be a public carrier, The transit begins upon the delivery to a private carrier, as, for instance, where logs are delivered to a booming or logging company to be driven down a stream.⁵

(2) *Delivery to Middleman.* — Delivery to a middleman charged with the duty of delivery to the carrier begins the transit,⁶ whether such middleman be a forwarding agent,⁷ a packer,⁸ or a warehouseman.⁹

(3) *Constructive Transit.* — The goods may be constructively in transit without any actual transfer of possession. Thus, where the goods, when sold, are in the warehouse of a third party, as between seller and buyer they will be considered as in transit so long as they are held by the warehouseman as agent for the seller.¹⁰

c. DESTINATION OF GOODS — (1) *Importance of Question.* — In view of the facts that mere arrival of the goods at their destination does not end the transit,¹¹ and that on the other hand a delivery short of destination ends the transit,¹² it would seem that the question what is the destination of any particular consignment is of little importance. Indeed, it has been held that this question is entirely immaterial in the determination of the existence or non-existence of the right of stoppage at the time when its exercise is sought.¹³

1. Return of Bill or Note Need Not Be Tendered. — *Edwards v. Brewer*, 2 M. & W. 375; *Hays v. Mouille*, 14 Pa. St. 48; *Bell v. Moss*, 5 Whart. (Pa.) 189; *Story on Sales* (4th ed.) § 327.

In Massachusetts, however, it seems that the seller cannot enforce his right of stoppage as against the buyer's assignee without tendering a return of the bill or note. *Brewer Lumber Co. v. Boston, etc., R. Co.*, 179 Mass. 228; *Davis v. Parsons*, 157 Mass. 584. See also *Arnold v. Delano*, 4 Cush. (Mass.) 33, 50 Am. Dec. 754.

2. No Right of Stoppage After Payment by Bill or Note of Third Party. — *Cowas Jee v. Thompson*, 5 Moo. P. C. 165; *Bank of England v. Newman*, 1 Ld. Raym. 442, 12 Mod. 241; *Breed v. Cook*, 15 Johns. (N. Y.) 241; *Whitbeck v. Van Ness*, 11 Johns. (N. Y.) 409, 6 Am. Dec. 383; *Eaton v. Cook*, 32 Vt. 58.

3. Goods Must Be in Transit. — *Walsh v. Blakely*, 6 Mont. 194; *More v. Lott*, 13 Nev. 376. See also *infra*, this title, *Termination of Right* — *Delivery*. Compare *Thompson v. Baltimore, etc., R. Co.*, 28 Md. 406; *Arnold v. Delano*, 4 Cush. (Mass.) 33, 50 Am. Dec. 754, in which latter case was intimated that the right of stoppage depends upon the seller's ability to obtain possession of the goods, regardless of the question whether they have or have not been delivered.

4. Transit Begun by Delivery to Carrier. — *Berndtson v. Strang*, L. R. 4 Eq. 481; *Hodgson*

v. Loy, 7 T. R. 440; *Ex p. Rosevear China Clay Co.*, 11 Ch. D. 560; *Northey v. Field*, 2 Esp. 613; *Holst v. Pownall*, 1 Esp. 240; *Tiedeman on Sales*, § 129.

5. Transit Begun by Delivery to Private Carrier. — *Johnson v. Eveleth*, 93 Me. 306; *Mann v. White River Log, etc., Co.*, 46 Mich. 38, 41 Am. Rep. 141.

6. Transit Begun by Delivery to Middleman. — *Mann v. White River Log, etc., Co.*, 46 Mich. 38, 41 Am. Rep. 141.

7. Transit Begun by Delivery to Forwarding Agent. — *Nicholls v. Le Feuvre*, 2 Bing. N. Cas. 81, 29 E. C. L. 262; *Atkins v. Colby*, 20 N. H. 154.

8. Transit Begun by Delivery to Packer. — *Ellis v. Hunt*, 3 T. R. 467; *Atkins v. Colby*, 20 N. H. 154.

9. Transit Begun by Delivery to Warehouseman. — *Nicholls v. Le Feuvre*, 2 Bing. N. Cas. 81, 29 E. C. L. 262; *Powell v. McKechnie*, 3 Dak. 319; *Atkins v. Colby*, 20 N. H. 154.

10. Goods in Warehouse of Third Party When Sold Considered in Transit until Delivery. — *Dixon v. Yates*, 5 B. & Ad. 313, 27 E. C. L. 86; *Lackington v. Atherton*, 8 Scott N. R. 38.

11. See *infra*, this title, *Termination of Right* — *Delivery* — *Necessity of Delivery*.

12. See *infra*, this title, *Termination of Right* — *Delivery* — *Sufficiency of Delivery* — *Delivery Short of Destination*.

13. Destination Immaterial. — See *Bolin v. Hufnagle*, 1 Rawle (Pa.) 8, *per Rogers*, J.

Viewed, however, from the standpoint that the transit, if not sooner terminated by the interception of the goods by the buyer, continues at least until the goods have reached the place where, according to the contract of sale, they are to come into the possession of the buyer, the question of destination is an important one.¹ The question is also of considerable importance in determining the effect of delivery at a point from which the goods are thereafter reshipped to some other point. In such case the right of stoppage may depend entirely upon whether the point of delivery is, as between seller and buyer, the destination of the goods, or is merely an intermediate stopping place.²

(2) *What Is Destination.* — The General Rule is that, so far as the right of stoppage is concerned, the destination of the goods is the destination contemplated by the contract of sale or understood between the seller and the buyer at the time of shipment.³

Reshipment Immaterial. — The fact that the goods, upon their arrival at any particular point, are reshipped by the buyer or some one acting for him to some other point is entirely immaterial in determining the right of stoppage so far as such right is dependent upon destination. The sole question in such case is which point is the destination contemplated by the contract of sale or understood between the seller and the buyer,⁴ regardless of the person to whom the goods are to be delivered at the point of reshipment, whether such person be a carrier,⁵ a warehouseman,⁶ or a forwarding agent.⁷ Nor will the question of destination be affected by the fact that the goods, upon their reshipment, are consigned to one who has purchased them from the buyer,⁸ nor by the mere fact that the seller knows of the buyer's intention to reship.⁹

No Public Conveyance from Intermediate Point to Destination. — The fact that there is no public conveyance between the point on the carrier's line to which the goods are directed to be sent and the destination as understood between the seller and buyer, and that the buyer will therefore have to send for the goods by private conveyance, will not make such intermediate point the controlling destination.¹⁰

1. Transit Usually Continues until Destination Is Reached. — *Atkins v. Colby*, 20 N. H. 154; *Cabeen v. Campbell*, 30 Pa. St. 254.

2. See *infra*, this title, *Termination of Right — Delivery — Sufficiency of Delivery — Delivery to Persons Other than Buyer*.

3. Destination Dependent upon Intention of Seller and Buyer. — *Ex p. Davis*, 13 Ch. D. 628; *Mohr v. Boston, etc., R. Co.*, 106 Mass. 67; *Mann v. White River Log, etc., Co.*, 46 Mich. 38, 41 Am. Rep. 141; *Lewis v. Sharvey*, 58 Minn. 464; *Atkins v. Colby*, 20 N. H. 154; *Covell v. Hitchcock*, 23 Wend. (N. Y.) 611; *Buckley v. Furniss*, 15 Wend. (N. Y.) 137; *Cabeen v. Campbell*, 30 Pa. St. 254; *Half v. Allyn*, 60 Tex. 278; *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188.

4. Destination Unaffected by Reshipment. — *Ex p. Davis*, 13 Ch. D. 628; *Ex p. Watson*, 5 Ch. D. 35; *Dodson v. Wentworth*, 4 M. & G. 1080, 43 E. C. L. 555; *Ex p. Rosevear China Clay Co.*, 11 Ch. D. 569; *Ex p. Gibbes*, 1 Ch. D. 101; *Brooke Iron Co. v. O'Brien*, 135 Mass. 442; *Becker v. Hallgarten*, 86 N. Y. 167.

5. Place of Delivery to Carrier Held Not Destination. — *Ex p. Rosevear China Clay Co.*, 11 Ch. D. 560.

Ship Chartered by Buyer Held to Be Destination — *Pequeno v. Taylor*, 38 Barb. (N. Y.) 375. See also *infra*, this title, *Termination of Right — Delivery — Delivery to Persons Other than Buyer — On Board Buyer's Ship*.

Place of Delivery of Logs to Booming Company Held to Be Destination. — *Muskegon Booming Co. v. Underhill*, 43 Mich. 629.

Delivery F. O. B. Cars. — A provision in a contract of sale providing for delivery of the goods f. o. b. cars of a certain carrier at a certain place does not necessarily make the place of such delivery the destination of the goods, such provision being merely an indication of the agreement as to the payment of freight. *Ex p. Rosevear China Clay Co.*, 11 Ch. D. 560.

6. Place of Delivery to Warehouseman Not Destination. — *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188.

7. Place of Delivery to Forwarding Agent Held to Be Destination. — *Leeds v. Wright*, 3 B. & P. 320; *Kendal v. Stevens*, 11 Q. B. D. 356; *Dixon v. Baldwin*, 5 East 175; *Valpy v. Gibson*, 4 C. B. 837, 56 E. C. L. 837; *Guilford v. Smith*, 30 Vt. 49.

Place of Delivery to Forwarding Agent Held Not to Be Destination. — *Markwald v. Their Creditors*, 7 Cal. 213; *Holbrook v. Vose*, 6 Bosw. (N. Y.) 76; *Harris v. Pratt*, 17 N. Y. 249; *Cabeen v. Campbell*, 30 Pa. St. 254.

8. Destination Unaffected by Reshipment to Sub-purchaser. — *Ex p. Davis*, 13 Ch. D. 628; *Ex p. Miles*, 15 Q. B. D. 39.

9. Destination Unaffected by Seller's Knowledge of Buyer's Intention to Reship. — *Dixon v. Baldwin*, 5 East 175; *Ex p. Miles*, 15 Q. B. D. 39.

10. *Covell v. Hitchcock*, 23 Wend. (N. Y.) 611.

Actual Knowledge of Destination by Seller Unnecessary. — Where the seller knows that the goods are purchased for shipment and delivers them to a carrier designated by the buyer, the destination is the point to which the buyer has directed the carrier to convey the goods, notwithstanding that the seller has no actual knowledge of this destination.¹

Where No Destination Is Named at the Time of the Sale, but subsequently the buyer directs that the goods be shipped to a certain point, such point will be the destination.²

The Destination Named in the Bill of Lading is not necessarily the controlling one, as where such destination is a point short of the destination understood between the seller and the buyer.³

The Destination Indicated by the Marking of the Goods is not necessarily the destination understood between the seller and the buyer. Such markings are mere evidence of the destination, and are not conclusive.⁴

Destination of Goods Purchased by Agent. — Where a purchasing agent has authority merely to purchase and ship to a particular place, such place will be deemed the destination of the goods, although they are delivered to the agent for shipment;⁵ but where the agent has a general authority to ship the goods to any one of several different places, and he makes his purchase without reference, so far as the seller knows, to any particular destination, the destination of the goods will be held to be the place to which the agent directs them to be sent, though such place be merely a place where they are to be prepared for shipment.⁶

Destination of Goods Shipped by Boat. — It has been held that where goods are shipped by boat to a certain city, the destination will not be reached until the goods have arrived at the wharf.⁷ So where the boat upon arriving at her port of destination is ordered back to quarantine, the goods on board will be considered as still in transit.⁸ In some cases the boat herself may be the destination.⁹

Name of Consignee Essential to Destination. — It has been held that where the buyer directs the goods to be sent to a shipping agent, by him to be shipped to another point, the name of the consignee at such point not being disclosed, the point to which the goods are to be reshipped cannot be the destination as between the original seller and buyer, it being considered that the name of the consignee is essential to every destination.¹⁰

A Good Test as to whether the goods have reached their destination is that if, upon reaching any particular point, they will continue to move forward to some other point without any new orders from the buyer, the intermediate point will not be considered the destination; but that when the goods have reached a point where they will remain stationary without new orders from the buyer giving to them another substantive destination, such point will, as between seller and buyer, be the controlling destination.¹¹ Where, however, the new order without which the goods will not move forward relates merely to the time and manner of shipment from an intermediate point to another

1. **Actual Knowledge of Destination by Seller Unnecessary.** — *Ex p. Rosevear* China Clay Co., 11 Ch. D. 560. Compare *Ex p. Miles*, 15 Q. B. D. 39.

2. *Jackson v. Nichol*, 5 Bing. N. Cas. 508, 35 E. C. L. 202; *Kendal v. Stevens*, 11 Q. B. D. 356.

3. *Haiff v. Allyn*, 60 Tex. 278. See also *Harris v. Pratt*, 17 N. Y. 249.

4. *Harris v. Pratt*, 17 N. Y. 249.

5. *Aguirre v. Parmelee*, 22 Conn. 473. See also *Holbrook v. Vose*, 6 Bosw. (N. Y.) 76.

6. *Leeds v. Wright*, 3 B. & P. 320.

7. *Jackson v. Nichol*, 5 Bing. N. Cas. 508, 35 E. C. L. 202.

8. *Holst v. Pownal*, 1 Esp. 240.

9. See *infra*, this title, *Termination of Right — Delivery — Delivery to Persons Other than Buyer — On Board Buyer's Ship.*

10. **Name of Consignee Essential to Destination.** — *Ex p. Miles*, 15 Q. B. D. 39.

11. **Destination Reached Where New Orders from Buyer Required to Move Goods.** — *Dixon v. Baldwin*, 5 East 175; *Wentworth v. Outhwaite*, 10 M. & W. 436; *Bethell v. Clark*, 19 Q. B. D. 553, 20 Q. B. D. 615; *Wait v. Scott*, 6 Grant Ch. (U. C.) 154; *Biggs v. Barry*, 2 Curt. (U. S.) 259; *Lewis v. Sharvey*, 58 Minn. 464; *Becker v. Hallgarten*, 86 N. Y. 167; *Cabeen v. Campbell*, 30 Pa. St. 254; *Treadwell v. Aydlett*, 9 Heisk. (Tenn.) 388; *Guilford v. Smith*, 30 Vt. 49.

point contemplated as their destination by the contract of sale, the necessity for the new order will not make the intermediate point the destination of the goods.¹

d. END OF TRANSIT. — The transit ends when the goods have come into the actual or constructive possession of the buyer or of some one acting for him in some capacity other than that of carrier or middleman, either at their destination or at an intermediate point.²

4. Buyer Must Be Insolvent — *a. IN GENERAL* — **Insolvency Basis of Right.** — The right of stoppage *in transitu* never accrues except on account of the insolvency of the buyer. Such insolvency is the very basis of the right.³

The Seller Acts at His Peril in assuming that the buyer is insolvent. Where, through excessive caution, he stops the goods when the buyer is solvent, he assumes a right which does not belong to him, and the buyer will be entitled to the delivery of the goods with damages for the wrongful stoppage.⁴ The mere fact, however, that the seller has no evidence of the buyer's insolvency at the time of the stoppage will not render him liable in damages where the insolvency actually exists;⁵ and it seems that no one, except the buyer or persons claiming under him, can contest the right of stoppage on the ground that the buyer is solvent.⁶

b. MEANING OF INSOLVENCY. — The term "insolvency" does not mean a declared or adjudicated insolvency or bankruptcy, but merely a general inability to pay debts in the ordinary course of business.⁷

c. TIME OF INSOLVENCY — **When Insolvency Occurs Immaterial.** — It has been held that the insolvency must intervene between the time of the sale and the exercise of the right of stoppage;⁸ but it is now well settled that the right of stoppage may accrue on account of the insolvency of the buyer either arising after the sale and before the end of the transit⁹ or existing, unknown to the

1. *Harris v. Pratt*, 17 N. Y. 249, *distinguishing* *Dixon v. Baldwin*, 5 East 175.

2. **End of Transit.** — See *infra*, this title, *Termination of Right* — *Delivery*.

3. **Right of Stoppage Based on Insolvency of Buyer.** — *Walley v. Montgomery*, 3 East 585; *The Constantia*, 6 C. Rob. 321; *Wood v. Roach*, 2 Dall. (Pa.) 180, 1 Am. Dec. 276; *O'Brien v. Norris*, 16 Md. 122, 77 Am. Dec. 284; *Gustine v. Phillips*, 38 Mich. 674; *Walsh v. Blakely*, 6 Mont. 194; *Schuster v. Carson*, 28 Neb. 612; *More v. Lott*, 13 Nev. 376; *Farrell v. Richmond*, etc., R. Co., 102 N. Car. 390, 11 Am. St. Rep. 760; *Jordan v. James*, 5 Ohio 38.

4. **Seller Acts at His Peril in Assuming Insolvency of Buyer.** — *The Constantia*, 6 C. Rob. 321; *Walsh v. Blakely*, 6 Mont. 194; *More v. Lott*, 13 Nev. 383; *Benedict v. Schaettle*, 12 Ohio St. 518. See also *infra*, this title, *Effect of Stoppage* — *Wrongful Stoppage*.

5. *The Constantia*, 6 C. Rob. 321; *Blum v. Marks*, 21 La. Ann. 268, 99 Am. Dec. 725; *Benedict v. Schaettle*, 12 Ohio St. 520.

6. **Who May Contest Question of Insolvency.** — *Howe v. Cincinnati*, etc., R. Co., 10 Ohio Cir. Dec. 182; *Bloomington v. Memphis*, etc., R. Co., 6 Lea (Tenn.) 616. See also *infra*, this title, *Exercise of Right* — *Notice* — *Effect of Notice*.

7. **Insolvency Means General Inability to Pay Debts** — *England.* — *Biddlecombe v. Bond*, 4 Ad. & El. 332, 31 E. C. L. 80; *Edwards v. Brewer*, 2 M. & W. 375; *James v. Griffin*, 2 M. & W. 623; *Gibson v. Carruthers*, 8 M. & W. 329; *Bavly v. Schofield*, 1 M. & S. 338; *Mills v. Ball*, 2 B. & P. 457; *Shone v. Lucas*, 3 Dowl. & R. 218, 16 E. C. L. 166; *Parker v. Gossage*, 2 C.

M. & R. 617; *Billson v. Crofts*, L. R. 15 Eq. 314; *Reg. v. Saddlers' Co.*, 10 H. L. Cas. 404.

Kentucky. — *Secomb v. Nutt*, 14 B. Mon. (Ky.) 264.

Massachusetts. — *Durgy Cement, etc., Co. v. O'Brien*, 123 Mass. 13; *Lee v. Kilburn*, 3 Gray (Mass.) 600; *Thompson v. Thompson*, 4 Cush. (Mass.) 134; *Naylor v. Dennie*, 8 Pick. (Mass.) 205, 19 Am. Dec. 319.

Nevada. — *More v. Lott*, 13 Nev. 383.

New Hampshire. — *Inslee v. Lane*, 57 N. H. 454; *Reynolds v. Boston*, etc., R. Co., 43 N. H. 580.

New York. — *Herrick v. Borst*, 4 Hill (N. Y.) 650.

Ohio. — *Benedict v. Schaettle*, 12 Ohio St. 515.

Pennsylvania. — *Hays v. Mouille*, 14 Pa. St. 48; *Bender v. Bowman*, 2 Pearson (Pa.) 517.

Tennessee. — *Bloomington v. Memphis*, etc., R. Co., 6 Lea (Tenn.) 616, 6 Am. & Eng. R. Cas. 371.

Wisconsin. — *Jeffris v. Fitchburg R. Co.*, 93 Wis. 250, 57 Am. St. Rep. 919.

See also the title **INSOLVENCY AND BANKRUPTCY**, vol. 16, p. 636. Compare *Rogers v. Thomas*, 20 Conn. 53, wherein it was held that in order to authorize stoppage *in transitu* there must be some notorious act on the part of the buyer calculated to affect his credit.

8. **Insolvency Must Arise After Sale.** — *Rogers v. Thomas*, 20 Conn. 53.

9. **Insolvency Arising Pending Transit Sufficient.** — *Bayonne Knife Co. v. Umbenhauer*, 107 Ala. 496, 54 Am. St. Rep. 114; *Loeb v. Peters*, 63 Ala. 243, 35 Am. Rep. 17; *Blum v. Marks*, 21 La. Ann. 268, 99 Am. Dec. 725; *O'Brien v.*

seller, at the time of the sale.¹

Knowledge of Insolvency. — Where the seller knows at the time of the sale that the buyer is insolvent, he will have no right of stoppage thereafter;² but in the absence of evidence to the contrary it will be presumed that at the time of the sale the seller believed the buyer to be solvent,³ and this presumption will not be rebutted by the mere fact that the seller knew at the time of the sale that the buyer was insolvent several years prior thereto.⁴

d. EVIDENCE OF INSOLVENCY — (1) *In General.* — While the seller need not, at the time of exercising his right of stoppage, prove the buyer's insolvency,⁵ such insolvency, when contested by one competent to raise the question,⁶ becomes a question of fact,⁷ to be established like any other fact and by the same kind and quality of evidence.⁸

(2) *Admissibility.* — Subject to the general rules applicable to the proof of any question of fact,⁹ insolvency need not be proved in any particular manner,¹⁰ and any evidence bearing on the question, whether direct or circumstantial, is admissible.¹¹

(3) *Sufficiency* — **Stoppage of Payment.** — Evidence that the buyer has stopped payment of his general debts is sufficient to establish his insolvency.¹²

Failure to Pay the Purchase Price according to the contract of sale is not alone sufficient to show insolvency.¹³

Norris, 16 Md. 122, 77 Am. Dec. 284; Naylor v. Dennie, 8 Pick. (Mass.) 198, 19 Am. Dec. 319; Kingman v. Denison, 84 Mich. 612, 22 Am. St. Rep. 711; Gustine v. Phillips, 38 Mich. 674.

1. Insolvency at Time of Sale, Unknown to Seller, Sufficient — *Alabama.* — Bayonne Knife Co. v. Umbenhauer, 107 Ala. 496, 54 Am. St. Rep. 114; Loeb v. Peters, 63 Ala. 243, 35 Am. Rep. 17.

Louisiana. — Blum v. Marks, 21 La. Ann. 268, 99 Am. Dec. 725.

Maryland. — O'Brien v. Norris, 16 Md. 122, 77 Am. Dec. 284.

Michigan. — Kingman v. Denison, 84 Mich. 612, 22 Am. St. Rep. 711; White v. Mitchell, 38 Mich. 390; Gustine v. Phillips, 38 Mich. 674.

Missouri. — Schwabacher v. Kane, 13 Mo. App. 126.

Nevada. — More v. Lott, 13 Nev. 376.

New Hampshire. — Reynolds v. Boston, etc., R. Co., 43 N. H. 580.

New York. — Buckley v. Furniss, 15 Wend. (N. Y.) 137.

North Carolina. — Farrell v. Richmond, etc., R. Co., 102 N. Car. 390, 11 Am. St. Rep. 760.

Ohio. — Benedict v. Schaettle, 12 Ohio St. 515.

Pennsylvania. — Bender v. Bowman, 2 Pearson (Pa.) 517.

2. Sale Made with Knowledge of Buyer's Insolvency. — Blum v. Marks, 21 La. Ann. 268, 99 Am. Dec. 725; O'Brien v. Norris, 16 Md. 122, 77 Am. Dec. 284; Fenkhausen v. Fellows, 20 Nev. 312.

3. Seller Presumed to Believe Buyer Solvent. — Inglis v. Usherwood, 1 East 524.

4. Knowledge of Previous Insolvency. — Buckley v. Furniss, 15 Wend. (N. Y.) 137.

Evidence Held to Show Knowledge of Insolvency. — Fenkhausen v. Fellows, 20 Nev. 312.

5. See supra, this section, In General.

6. See supra, this section, In General.

7. Insolvency Question of Fact. — Kingman v. Denison, 84 Mich. 612, 22 Am. St. Rep. 711; Hays v. Mouille, 14 Pa. St. 48.

8. Insolvency Proved Like Any Other Question of Fact. — Walsh v. Blakely, 6 Mont. 194; Reynolds v. Boston, etc., R. Co., 43 N. H. 580; Hays v. Mouille, 14 Pa. St. 48.

9. See the title EVIDENCE, vol. 11, p. 484, and the cross-references there given.

Hearsay Inadmissible. — The testimony of the seller that his agent, who was authorized to collect a bill, informed him of the buyer's insolvency is inadmissible to prove such fact. Walsh v. Blakely, 6 Mont. 194.

10. Hays v. Mouille, 14 Pa. St. 48.

11. Reynolds v. Boston, etc., R. Co., 43 N. H. 580.

Evidence of Property in Another State. — Evidence that the buyer owns property in a state other than that in which the question of his solvency is raised is admissible to show solvency. Bayonne Knife Co. v. Umbenhauer, 107 Ala. 496, 54 Am. St. Rep. 114.

12. Stoppage of Payment Sufficient Evidence of Insolvency. — Bird v. Brown, 4 Exch. 786; Dixon v. Yates, 5 B. & Ad. 313, 27 E. C. L. 86; Newsom v. Thornton, 6 East 17; Vertue v. Jewell, 4 Campb. 31; Secomb v. Nutt, 14 B. Mon. (Ky.) 264; O'Brien v. Norris, 16 Md. 122, 77 Am. Dec. 284; Inslee v. Lane, 57 N. H. 454; Benedict v. Schaettle, 12 Ohio St. 515; Bender v. Bowman, 2 Pearson (Pa.) 517; Chandler v. Fulton, 10 Tex. 2, 60 Am. Dec. 188.

13. Failure to Pay Purchase Price Insufficient to Show Insolvency. — Wilmshurst v. Bowker, 7 M. & G. 882, 49 E. C. L. 882. But see Naylor v. Dennie, 8 Pick. (Mass.) 198, 19 Am. Dec. 319, wherein it was held that it is sufficient to show that the affairs of the buyer are so involved that he would be unable to pay for the goods, if so required, upon their delivery. See also Jeffris v. Fitchburg R. Co., 93 Wis. 250, 57 Am. St. Rep. 919, wherein it was held that nonpayment of the purchase price for over ten months, taken in connection with the fact that the buyer could not be found at his alleged place of business and that his purported firm was not named in the city directory, was sufficient evidence of insolvency.

Attachment Against Buyer. — The mere fact that an attachment has been issued against the buyer is insufficient to prove that he is insolvent.¹

The Absconding of the Buyer is not alone sufficient to show insolvency;² but the fact that he has absconded, taken in connection with the fact that he has converted all of his visible property into cash, has been held to be sufficient.³

The Buyer's Admission of insolvency is, in the absence of evidence to the contrary, sufficient to sustain the right of stoppage.⁴

IV. TERMINATION OF RIGHT — 1. Delivery — a. IN GENERAL — Right Terminated by Delivery. — The right of stoppage expires upon the actual or constructive delivery of the goods to the buyer⁵ or to some one subrogated to his rights or acting for him in some capacity other than as an intermediary in expediting the goods to or delivering them at their destination.⁶

Reason of Rule. — That delivery terminates the right of stoppage seems always to have been accepted as a settled principle of the law of stoppage *in transitu*, without reference to the reason why it should so operate. It has been suggested that it would be inequitable to allow the seller to repossess himself of the goods after delivery on account of the appearance of credit given to the buyer by the possession of the goods.⁷ This reason, however, is far from satisfactory, and it is more probable that the rule is an arbitrary one, well settled by precedents, but uncertain as to origin and underlying principles.

b. NECESSITY OF DELIVERY. — **Mere Arrival at Destination** does not terminate the right of stoppage. The goods will be considered as still in transit until they have been delivered.⁸

Possession as Agent for Another. — Even actual possession may be insufficient to

1. **Attachment Against Buyer Insufficient to Show Insolvency.** — *Gustine v. Phillips*, 38 Mich. 674; *Schuster v. Carson*, 28 Neb. 612.

2. *Smith v. Barker*, 102 Ala. 679.

3. *Schwabacher v. Kane*, 13 Mo. App. 126.

4. *Secomb v. Nutt*, 14 B. Mon. (Ky.) 261.

5. **Right Terminated by Actual or Constructive Delivery to Buyer — England.** — *Whitehead v. Anderson*, 9 M. & W. 518; *Ellis v. Hunt*, 3 T. R. 464; *Bolton v. Lancashire, etc.*, R. Co., L. R. 1 C. P. 431; *Coates v. Railton*, 6 B. & C. 422, 13 E. C. L. 223; *Winks v. Hassall*, 9 B. & C. 372, 17 E. C. L. 397.

Alabama. — *Bayonne Knife Co. v. Umbenhauer*, 107 Ala. 496, 54 Am. St. Rep. 114.

California. — *Blackman v. Pierce*, 23 Cal. 509; *Markwald v. Their Creditors*, 7 Cal. 213.

Iowa. — *Greve v. Dunham*, 60 Iowa 108; *Clapp v. Peck*, 55 Iowa 270; *McFetridge v. Piper*, 40 Iowa 627; *O'Neil v. Garrett*, 6 Iowa 480.

Kentucky. — *Secomb v. Nutt*, 14 B. Mon. (Ky.) 261.

Maine. — *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489.

Massachusetts. — *Brewer Lumber Co. v. Boston, etc.*, R. Co., 179 Mass. 228; *Durgy Cement, etc., Co. v. O'Brien*, 123 Mass. 12; *Mohr v. Boston, etc.*, R. Co., 106 Mass. 67; *Stubbs v. Lund*, 7 Mass. 453, 5 Am. Dec. 63; *Stanton v. Eager*, 16 Pick. (Mass.) 467; *Arnold v. Delano*, 4 Cush. (Mass.) 33, 50 Am. Dec. 754; *Grout v. Hill*, 4 Gray (Mass.) 361.

Missouri. — *O'Neal v. Day*, 53 Mo. App. 139; *Shoninger v. Day*, 53 Mo. App. 147.

Nebraska. — *Schuster v. Carson*, 28 Neb. 612.

Nevada. — *More v. Lott*, 13 Nev. 376.

New Hampshire. — *Hall v. Dimond*, 63 N. H. 565; *Inslee v. Lane*, 57 N. H. 454.

North Carolina. — *Williams v. Hodges*, 113 N. Car. 36.

Ohio. — *Wheeling, etc., R. Co. v. Koontz*, 9 Ohio Cir. Dec. 102, affirmed 61 Ohio St. 551, 76 Am. St. Rep. 435.

Pennsylvania. — *Hays v. Mouille*, 14 Pa. St. 48.

Texas. — *Half v. Allyn*, 60 Tex. 278.

Vermont. — *Guilford v. Smith*, 30 Vt. 49; *Sawyer v. Joslin*, 20 Vt. 172, 49 Am. Dec. 768.

Wisconsin. — *Hoover v. Tibbits*, 13 Wis. 79.

6. See *infra*, this subsection, *Sufficiency of Delivery — Delivery to Persons Other than Buyer.*

7. *D'Aquila v. Lambert*, 2 Eden 75, Amb. 400.

8. **Right Not Terminated by Arrival of Goods at Destination — England.** — *Ex p. Cooper*, 11 Ch. D. 68; *Ex p. Barrow*, 6 Ch. D. 783; *Whitehead v. Anderson*, 9 M. & W. 518; *Jackson v. Nichol*, 5 Bing. N. Cas. 508, 35 E. C. L. 202; *Kemp v. Falk*, 7 App. Cas. 573; *Coventry v. Gladstone*, L. R. 6 Eq. 44.

Dakota. — *Powell v. McKechnie*, 3 Dak. 319.

Indiana. — *Rogers v. Schneider*, 13 Ind. App. 23.

Iowa. — *Greve v. Dunham*, 60 Iowa 108; *McFetridge v. Piper*, 40 Iowa 627; *Alsberg v. Latta*, 30 Iowa 442.

Kansas. — *Symms v. Shotten*, 35 Kan. 310.

Massachusetts. — *Seymour v. Newton*, 105 Mass. 272; *Naylor v. Dennie*, 8 Pick. (Mass.) 198, 19 Am. Dec. 319.

Michigan. — *White v. Mitchell*, 38 Mich. 390.

Missouri. — *O'Neal v. Day*, 53 Mo. App. 139; *Shoninger v. Day*, 53 Mo. App. 147.

Nebraska. — *Schuster v. Carson*, 28 Neb. 612.

New Hampshire. — *Hall v. Dimond*, 63 N. H. 565.

Ohio. — *Calahan v. Babcock*, 21 Ohio St. 281, 8 Am. Rep. 63.

Pennsylvania. — *Bender v. Bowman*, 2 Pearson (Pa.) 517.

defeat the right of stoppage where there has been no delivery. Thus, where one buys goods and leaves them in the seller's warehouse, the seller agreeing to hold them for the buyer, and the latter thereafter sells the same goods to the first seller's clerk, but does not give to him an order of delivery, acts of possession performed by the clerk while the goods are in the warehouse and without the specific consent of either the first or the second seller will not terminate the second seller's right to repossess himself of the goods on account of the insolvency of the subpurchaser.¹

c. SUFFICIENCY OF DELIVERY — (1) *Necessity of Acceptance of Goods — Buyer Must Consent to Receive.* — The buyer's acceptance is an essential element of a complete delivery, either actual or constructive, to the buyer himself or to some one for him. No one can, without his consent, receive the goods for him.² The carrier can neither constitute himself the buyer's agent to receive³ nor appoint any one else to receive the goods.⁴

When Buyer Refuses to Receive. — As a corollary of the principle just stated, where the buyer refuses to receive there can be no delivery, and the goods will be in transit in the hands of any one who takes possession of them,⁵ even though such possession be taken under the direction of the buyer, as where the buyer directs a third person to receive and hold the goods for the benefit of the seller,⁶ or directs a wharfinger to receive the goods in order that the vessel upon which they are loaded may be cleared, but does not intend to receive them.⁷ The buyer's consent to receive is so essential that the goods may even come into his actual possession and yet there may be no delivery, as where they are deposited in front of his place of business by a person unauthorized to receive them, and are thereupon refused and sent back to the depot,⁸ or where they are taken into the buyer's place of business by his servant, but are immediately returned to the carrier as soon as the buyer discovers their presence,⁹ or where the goods are delivered on board the buyer's vessel of which he himself is the master, for transportation to their destination.¹⁰ *A fortiori*, the buyer's creditors cannot receive the goods for him after he has refused them;¹¹ nor in such case can an officer holding an execution or attachment against the buyer receive the goods;¹² but it has been held that where the buyer, after ordering the carrier to return the goods, made an assignment for the benefit of creditors, and the assignee took possession of the goods, the right of stoppage was ended, though the carrier was preparing to return the goods when the assignee took possession.¹³

Refusal to Receive Not Unlawful Preference. — It has been contended that a buyer's refusal to receive the goods and a notice by him to the seller that he will not

1. See *infra*, this subsection, *Sufficiency of Delivery — Necessity of Acceptance of Goods.*

Right Not Terminated by Possession as Agent for Another. — *Dixon v. Yates*, 5 B. & Ad. 313, 27 E. C. L. 86.

2. **No One Can Receive Without Buyer's Consent.** — *Greve v. Dunham*, 60 Iowa 108; *White v. Mitchell*, 38 Mich. 390; *Heinz v. Railroad Transfer Co.*, 82 Mo. 233; *More v. Lott*, 13 Nev. 376.

3. See *infra*, this subsection, *Constructive Delivery or Delivery by Attornment.*

4. **Carrier Cannot Appoint Agent to Receive.** — *Weber v. Baessler*, 3 Colo. App. 459; *McLean v. Breithaupt*, 12 Ont. App. 388. *Contra*, *Lane v. Robinson*, 18 B. Mon. (Ky.) 623, wherein it was held that a delivery to a third person to keep for the buyer was a complete delivery, ending the transit. The court evidently lost sight of the principle that no one can become the agent of another without the latter's consent, and thus rendered a decision which cannot

be sustained upon either principle or authority.

5. **No Delivery Where Buyer Refuses to Receive.** — *Lane v. Jackson*, 5 Mass. 157; *Naylor v. Dennie*, 8 Pick. (Mass.) 198, 19 Am. Dec. 319.

6. *Scholfield v. Bell*, 14 Mass. 40; *Grout v. Hill*, 4 Gray (Mass.) 361.

7. *James v. Griffin*, 2 M. & W. 623.

8. *Jenks v. Fulmer*, 160 Pa. St. 527.

9. *Bolton v. Lancashire, etc., R. Co.*, L. R. 1 C. P. 431.

10. *Cross v. O'Donnell*, 44 N. Y. 661, 4 Am. Rep. 721. See also *infra*, this subsection, *Delivery to Persons Other than Buyer — On Board Buyer's Ship.*

11. *Greve v. Dunham*, 60 Iowa 108; *Heinz v. Railroad Transfer Co.*, 82 Mo. 233.

12. *Weber v. Baessler*, 3 Colo. App. 459. See also *infra*, this section, *Seizure of Goods under Legal Process Against Buyer.*

Officer Holding Attachment Against Buyer Cannot Receive. — *More v. Lott*, 13 Nev. 376.

13. *Millard v. Webster*, 54 Conn. 415.

accept them on account of his insolvency constitute an unlawful preference in favor of the seller of the goods, but this position has not been sustained. It is held that the fact of such refusal and notice does not affect the seller's right of stoppage.¹

A Conditional Acceptance for any purpose whatever will complete the delivery. Thus, delivery is complete where the buyer causes the goods to be delivered to a third person who agrees, without the consent or knowledge of the seller, not merely to hold the goods for him, but to sell them for his use,² or where, after the goods have been delivered to the buyer's agent, the buyer refuses to receive them and returns them to the carrier merely on account of the inconvenience which would attend their storage at that particular time.³

Acceptance of Delivery under Mistake.—Where there has been a complete delivery, the facts that the buyer in taking possession thought that the goods were some other goods, and that if he had known what they really were he would not have accepted them, will not render the delivery incomplete, even though after being acquainted with the true nature of the goods the buyer regards them not as his own, but as belonging to the seller.⁴

Rejection of Goods After Constructive Delivery.—Where there has been a complete constructive delivery by the entry and bonding of the goods in a government warehouse, the right of stoppage will not be revived by the buyer's subsequent rejection of the goods as unmerchantable.⁵

(2) **Delivery Short of Destination — Transit Ended.**—The buyer may anticipate the natural end of the transit by intercepting the goods and taking possession thereof short of their destination; and in such case the right of stoppage will be cut off as effectually as by delivery at destination.⁶

No Delivery unless Destination Changed.—In order to affect a delivery short of destination, the buyer must, in effect at least, change the destination of the goods.⁷ Thus, where the buyer meets the ship carrying the goods before she has reached her destination, and asserts his ownership of the goods, but does not change their destination, the right of stoppage will not be defeated;⁸ nor will the right be defeated by an order to the carrier to hold the goods at an intermediate point, such order not being followed up by a change of destination;⁹ nor by an order to an agent to sell at an intermediate point, whereupon the agent takes possession, but subsequently, having failed to effect a sale, reships the goods to their original destination.¹⁰ It has even been held that where the goods are consigned to a certain destination, a delivery on board the buyer's ship, of which he himself is master, for the purpose of carriage to such destination will not be such a delivery as will defeat the right of stoppage.¹¹ On the other hand, it has been held that where the goods, after hav-

1. *Mills v. Ball*, 2 B. & P. 457.

2. *Lane v. Jackson*, 5 Mass. 157.

3. *O'Neal v. Day*, 53 Mo. App. 139. See also *Shoninger v. Day*, 53 Mo. App. 147.

4. *Smith v. Gail*, (Fla. 1903) 33 So. Rep. 527, distinguishing *James v. Griffin*, 2 M. & W. 623, and disapproving the doctrine laid down in that case.

5. *Wilds v. Smith*, 2 Ont. App. 8.

6. **Transit Ended by Delivery Short of Destination.**—2 Kent's Com. 547; *Benjamin on Sales* (6th Am. ed.), § 854; *Story on Sales* (4th ed.), § 342a; *Tiedeman on Sales*, § 131. And see the following cases:

England.—*Nix v. Olive*, cited in *Abbott on Shipping* (5th Am. ed.) 539; *Valpy v. Gibson*, 4 C. B. 837, 56 E. C. L. 837; *London, etc., R. Co. v. Bartlett*, 7 H. & N. 400, 31 L. J. Exch. 92; *Cork Distilleries Co. v. Great Southern, etc., R. Co.*, L. R. 7 H. L. 269; *Wright v. Lawes*, 4 Esp. 82; *Whitehead v. Anderson*, 9 M. & W.

518; *Oppenheim v. Russell*, 3 B. & P. 54; *Mills v. Ball*, 2 B. & P. 461.

Kentucky.—*Wood v. Yeatman*, 15 B. Mon. (Ky.) 280; *Secomb v. Nutt*, 14 B. Mon. (Ky.) 264.

Massachusetts.—*Mohr v. Boston, etc., R. Co.*, 106 Mass. 72.

Montana.—*Walsh v. Blakely*, 6 Mont. 194.

New York.—*Harris v. Pratt*, 17 N. Y. 264;

Stevens v. Wheeler, 27 Barb. (N. Y.) 658.

Ohio.—*Jordan v. James*, 5 Ohio 88.

Texas.—*Poole v. Houston, etc., R. Co.*, 58 Tex. 134, 9 Am. & Eng. R. Cas. 197.

7. *Secomb v. Nutt*, 14 B. Mon. (Ky.) 261.

8. *Holst v. Pownal*, 1 Esp. 240.

9. *Lewis v. Sharvey*, 58 Minn. 464.

10. *Secomb v. Nutt*, 14 B. Mon. (Ky.) 261.

See also *In re Foot*, 11 Blatchf. (U. S.) 530.

11. *Cross v. O'Donnell*, 44 N. Y. 661, 4 Am. Rep. 721. See also *infra*, this subsection, *Delivery to Persons Other than Buyer*.

ing been put on board the ship which was to carry them, were relanded by the order of the buyer and returned to the seller's warehouse to be repacked, the transit was ended and the right of stoppage was defeated.¹

Constructive Delivery. — The intermediate delivery may be constructive as well as actual.²

Delivery to the Buyer's Agent short of destination may, under certain circumstances, have the same effect as a delivery to the buyer himself, thus defeating the right of stoppage.³

Forcible Interception of Goods. — Whether the buyer can defeat the seller's right of stoppage by forcibly intercepting the goods at an intermediate point seems to be unsettled.⁴ It would seem, however, that if the seller cannot derive benefit from the carrier's wrongful refusal to deliver to the buyer,⁵ the buyer should not be allowed to derive benefit from his own wrong in forcibly taking possession.⁶ This position is supported to some extent by the cases holding that a mere demand by the buyer upon the carrier for a delivery at an intermediate point will not, if refused, constitute a constructive delivery.⁷

(3) *Constructive Delivery or Delivery by Attornment* — (a) **In General — Meaning of Term.** — In the early history of the doctrine of stoppage *in transitu*, it was held that the right of stoppage continued until there had been such an actual delivery as placed the goods within the corporal touch of the buyer.⁸ This doctrine was soon overruled,⁹ but at the same time arose another doctrine equally as untenable as the one overruled, viz., that the right of stoppage continued until there had been an actual delivery.¹⁰ The error in this doctrine lies in its generality, and arose from a confusion of distinctions between actual and constructive delivery. This same confusion, together with an indiscriminate use of the word "constructive," has given rise to a line of authorities seemingly sustaining the doctrine that constructive delivery will not defeat the right of stoppage; but this doctrine, though announced with sufficient generality to negative the efficiency of every kind of constructive delivery, was in every case asserted in disposing of some such contention as that there could be no stoppage after delivery to the carrier,¹¹ or after arrival at destination,¹² or after attachment at the instance of the buyer's creditors and delivery to the officer holding the writ,¹³ or after delivery to the buyer's mortgagee,¹⁴ or after entry of goods in the buyer's name, notwithstanding that the seller,

1. Valpy v. Gibson, 4 C. B. 837, 56 E. C. L. 837.

2. **Intermediate Delivery May Be Constructive.** — Foster v. Frampton, 6 B. & C. 107, 13 E. C. L. 111; Whitehead v. Anderson, 9 M. & W. 518; Secomb v. Nutt, 14 B. Mon. (Ky.) 264; Stevens v. Wheeler, 27 Barb. (N. Y.) 662; Jordan v. James, 5 Ohio 88. See also *infra*, this subsection, *Constructive Delivery or Delivery by Attornment — Method of Attornment — Demand and Refusal of Delivery*.

3. **Delivery to Buyer's Agent** — See *infra*, this subsection, *Delivery to Persons Other than Buyer*.

4. **Forcible Interception of Goods.** — See Whitehead v. Anderson, 9 M. & W. 518, wherein Parke, B., said: "If the vendee take them out of the possession of the carrier into his own before their arrival, with or without the consent of the carrier, there seems to be no doubt that the transit would be at end, though in case of the absence of the carrier's consent, it may be a wrong to him for which he would have a right of action."

5. See *infra*, this subsection, *Constructive Delivery or Delivery by Attornment — Method of Attornment — Demand and Refusal of Delivery*.

6. See Blackburn on Sales (2d ed.) 375.

7. See *infra*, this subsection, *Constructive Delivery or Delivery by Attornment — Method of Attornment — Demand and Refusal of Delivery*.

8. Hunter v. Beal, cited in Ellis v. Hunt, 3 T. R. 464. See also Snee v. Prescott, 1 Atk. 248.

9. Ellis v. Hunt, 3 T. R. 464.

10. **Constructive Delivery Insufficient to Terminate Right of Stoppage.** — See opinion of Buller, J., in Ellis v. Hunt, 3 T. R. 464. See also Dixon v. Baldwin, 5 East 175, wherein it was intimated that the goods must at least come to the corporal touch of an agent of the buyer.

11. **Cases Involving Effect of Delivery to Carrier.** — Ex p. Rosevear China Clay Co., 11 Ch. D. 560; Powell v. McKechnie, 3 Dak. 319; Alsberg v. Latta, 30 Iowa 442; Newhall v. Vargas, 15 Me. 314, 33 Am. Dec. 617; Thompson v. Baltimore, etc., R. Co., 28 Md. 406; Stanton v. Eager, 16 Pick. (Mass.) 467; Stubbs v. Lund, 7 Mass. 453, 5 Am. Dec. 63; Arnold v. Delano, 4 Cush. (Mass.) 33, 50 Am. Dec. 754; Buckley v. Furniss, 15 Wend. (N. Y.) 137; Parker v. M'Iver, 1 Desaus. (S. Car.) 274, 1 Am. Dec. 656.

12. Calahan v. Babcock, 21 Ohio St. 281, 8 Am. Rep. 63.

13. Weber v. Baessler, 3 Colo. App. 459.

14. Kingman v. Denison, 84 Mich. 612, 22 Am. St. Rep. 711.

under the contract of sale, retained practical control over the goods for the purpose of thereafter shipping them to the buyer on the day specified.¹ In view of this indiscriminate use of the word "constructive" and the resulting confusion wherein, on the one hand, not only is delivery to the carrier termed constructive delivery, but delivery to the buyer's agent is placed in the same category,² while on the other hand delivery to the buyer's agent is held to be actual delivery,³ and even a marking of the goods is called an actual delivery,⁴ it has been deemed advisable to confine the term "constructive delivery," as used in this title, to cases wherein no actual change of possession occurs, treating under a distinctive topical division⁵ the cases involving delivery to the carrier or to any person other than the buyer. The topical division under present consideration therefore includes, with one exception,⁶ all and only those cases of delivery where no actual change of custody of the goods occurs. Thus, constructive delivery becomes identical with delivery by attornment.

Constructive Delivery Sufficient. — With the above-indicated restriction upon the meaning of the word "constructive," it is settled beyond question that the right of stoppage is as effectually terminated by a constructive as by an actual delivery.⁷

By Statute in Georgia the right of stoppage continues until the buyer has obtained actual possession of the goods.⁸

Intermediate Constructive Delivery. — The constructive delivery or agreement of attornment may be made at an intermediate point with the same effect as at the destination of the goods;⁹ but acts which at the destination constitute a constructive delivery may or may not effect such a delivery at an intermediate point.¹⁰

(b) **Method of Attornment** — *aa. AGREEMENT BETWEEN CARRIER OR MIDDLEMAN AND BUYER* — **In General.** — A constructive delivery or delivery by attornment is effected by an agreement between the carrier or middleman and the buyer or persons claiming under him whereby the former agrees to hold the goods for the latter for some purpose other than that of carriage to and delivery at their original destination,¹¹ as where the carrier, upon the arrival of the goods at their destination, stores them in his own warehouse and holds them as the buyer's bailee

1. *Mohr v. Boston, etc.*, R. Co., 106 Mass. 67.

2. *Jackson v. Nichol*, 5 Bing. N. Cas. 508, 35 E. C. L. 202; *Kendal v. Stevens*, 11 Q. B. D. 356.

3. *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489; *Bolin v. Hufnagle*, 1 Rawle (Pa.) 9.

4. **Marking of Goods Called Actual Delivery.** — See opinion of Buller, J., in *Ellis v. Hunt*, 3 T. R. 464.

5. See *infra*, this subsection, *Delivery to Persons Other than Buyer*.

6. See *infra*, this section, *Transfer of Bill of Lading*.

7. **Constructive Delivery Sufficient** — *England.* — *Coventry v. Gladstone*, L. R. 6 Eq. 44; *Ellis v. Hunt*, 3 T. R. 464; *Jackson v. Nichol*, 5 Bing. N. Cas. 508, 35 E. C. L. 202.

Canada. — *Wilds v. Smith*, 2 Ont. App. 8; *Wiley v. Smith*, 1 Ont. App. 179, affirmed 2 Can. Sup. Ct. 1.

Mississippi. — *Langstaff v. Stix*, 64 Miss. 171, 60 Am. Rep. 49.

Nevada. — *More v. Lott*, 13 Nev. 376.

New Hampshire. — *Hall v. Dimond*, 63 N. H. 565; *Atkins v. Colby*, 20 N. H. 154.

New York. — *Buckley v. Furniss*, 15 Wend. (N. Y.) 137.

North Carolina. — *Williams v. Hodges*, 113 N. Car. 36.

Texas. — *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188.

Vermont. — *Sawyer v. Joslin*, 20 Vt. 172, 49 Am. Dec. 768.

See also generally the cases cited in the subdivisions immediately following.

8. **Statute in Georgia.** — 2 Code Ga. (1895), §§ 2285, 3552; *Branan v. Atlanta, etc.*, R. Co., 108 Ga. 70, 75 Am. St. Rep. 26; *Ocean Steamship Co. v. Ehrlich*, 88 Ga. 502, 30 Am. St. Rep. 164; *Macon, etc.*, R. Co. v. *Meador*, 65 Ga. 705.

9. **Right Terminated by Intermediate Constructive Delivery.** — *Jones v. Jones*, 8 M. & W. 431; *Foster v. Frampton*, 6 B. & C. 107, 13 E. C. L. 111; *Whitehead v. Anderson*, 9 M. & W. 518; *Stevens v. Wheeler*, 27 Barb. (N. Y.) 662; *Jordan v. James*, 5 Ohio 104.

10. See *infra*, this subsection, *Method of Attornment*.

11. **Attornment by Agreement Between Carrier and Buyer.** — *Whitehead v. Anderson*, 9 M. & W. 518; *Allan v. Gripper*, 2 Crompt. & J. 218; *Rowe v. Pickford*, 1 Moo. 526; *Morley v. Hay*, 3 M. & R. 696; *Richardson v. Goss*, 3 B. & P. 127; *Scott v. Pettit*, 3 B. & P. 469; *Coventry v. Gladstone*, L. R. 6 Eq. 44; *Langstaff v. Stix*, 64 Miss. 171, 60 Am. Rep. 49; *Hall v. Dimond*, 63 N. H. 565; *Calahan v. Babcock*, 21 Ohio St. 281, 8 Am. Rep. 63.

pursuant to an agreement to that effect,¹ or where upon the arrival of the goods at their destination the buyer gives to them a new destination which is acquiesced in by the carrier.² Likewise a similar agreement may be made between the buyer and a warehouseman holding the goods in transit, with like effect.³

Necessity of Agreement. — In the absence of an agreement with the buyer to the contrary, the carrier will be presumed to hold the goods in his original capacity.⁴ The carrier cannot constitute himself the buyer's agent for the custody of the goods,⁵ and the same principle is, of course, applicable to a wharfinger⁶ or warehouseman;⁷ nor can the buyer make the carrier his agent for custody without the carrier's consent.⁸

Implied Agreement Sufficient. — Attornment as the buyer's bailee need not be founded on an express contract, but may be implied from particular acts⁹ or from a general course of dealing between the parties whereby it has become the custom of the carrier to receive and hold the goods as the buyer's bailee.¹⁰ But such agreement will not be implied from a general course of dealing according to which the carrier has been accustomed to store the goods subject to removal by the buyer whenever convenient for him to do so, upon payment of freight;¹¹ nor from a sale to the carrier for freight, the sale being held

1. Attornment by Agreement to Store Goods at Destination as Buyer's Warehouseman. — *Rogers v. Schneider*, 13 Ind. App. 23; *McFetridge v. Piper*, 40 Iowa 627; *Hall v. Dimond*, 63 N. H. 565; *Williams v. Hodges*, 113 N. Car. 36; *Guilford v. Smith*, 30 Vt. 49.

No Delivery by Attornment in Georgia. — Under the Georgia statute providing that the right of stoppage shall continue until the goods have come to the actual possession of the buyer (now 2 Code Ga. 1895, § 2285), it has been held that where, upon the arrival of the goods at their destination, the consignee agreed with the carrier that they should be set aside by the latter in its depot to be sold for the payment of freight arrearages due from the buyer to the carrier, the balance, if any, to be paid to the buyer, the setting aside of the goods pursuant to such agreement was not sufficient to terminate the seller's right of stoppage. *Macon, etc., R. Co. v. Meador*, 65 Ga. 705.

2. Lewis v. Sharvey, 58 Minn. 464.

3. Attornment by Agreement Between Warehouseman and Buyer. — *Ex p. Barrow*, 6 Ch. D. 783; *O'Neil v. Garrett*, 6 Iowa 480; *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188.

4. Carrier Presumed to Hold as Carrier until Contrary Is Shown — England. — *Ex p. Cooper*, 11 Ch. D. 68.

Canada. — *McLean v. Breithaupt*, 12 Ont. App. 383.

Dakota. — *Powell v. McKechnie*, 3 Dak. 319. *Iowa.* — *Clapp v. Peck*, 55 Iowa 270; *McFetridge v. Piper*, 40 Iowa 627; *Alsberg v. Latta*, 30 Iowa 442; *O'Neil v. Garrett*, 6 Iowa 480.

Kansas. — *Symms v. Schotten*, 35 Kan. 310.

Massachusetts. — *Brewer Lumber Co. v. Boston, etc., R. Co.*, 179 Mass. 228.

New Hampshire. — *Inslee v. Lane*, 57 N. H. 454; *Reynolds v. Boston, etc., R. Co.*, 43 N. H. 580.

New York. — *Covell v. Hitchcock*, 23 Wend. (N. Y.) 611.

North Carolina. — *Farrell v. Richmond, etc., R. Co.*, 102 N. Car. 390, 11 Am. St. Rep. 760.

Ohio. — *Calahan v. Babcock*, 21 Ohio St. 281, 8 Am. Rep. 63.

Pennsylvania. — *Bender v. Bowman*, 2 Pearson (Pa.) 517.

Wisconsin. — *Jeffris v. Fitchburg R. Co.*, 93 Wis. 250, 57 Am. St. Rep. 919.

5. Carrier Cannot Constitute Himself Buyer's Agent for Custody. — *Bolton v. Lancashire, etc., R. Co.*, L. R. 1 C. P. 431; *Whitehead v. Anderson*, 9 M. & W. 518; *McLean v. Breithaupt*, 12 Ont. App. 383; *Powell v. McKechnie*, 3 Dak. 319; *Atkins v. Colby*, 20 N. H. 154. See also *supra*, this subsection, *Necessity of Acceptance of Goods*. But see *Wentworth v. Outhwaite*, 10 M. & W. 436, wherein it was held that storage of the goods by the carrier at their destination and notification to the buyer that they were held on his account, subject to warehouse charges, constituted a constructive delivery. It is to be noted, however, that in this case it appeared that the buyer took a portion of the goods, thus affording some basis for an implied agreement of attornment, which was in fact found by the court.

6. Mills v. Ball, 2 B. & P. 457.

7. Warehouseman Cannot Constitute Himself Buyer's Agent for Custody. — *Ex p. Barrow*, 6 Ch. D. 783; *O'Neil v. Garrett*, 6 Iowa 480.

8. Carrier's Consent Necessary to Attornment. — *Whitehead v. Anderson*, 9 M. & W. 518; *McLean v. Breithaupt*, 12 Ont. App. 383; *Farrell v. Richmond, etc., R. Co.*, 102 N. Car. 390, 11 Am. St. Rep. 760. But see *infra*, this subsection, *Demand and Refusal of Delivery*.

9. Agreement of Attornment Implied from Particular Acts. — *Whitehead v. Anderson*, 9 M. & W. 518; *Langstaff v. Stix*, 64 Miss. 171, 60 Am. Rep. 49; *Guilford v. Smith*, 30 Vt. 49.

10. Attornment Implied from General Course of Dealing. — *Ex p. Gibbs*, 1 Ch. D. 101; *Foster v. Frampton*, 6 B. & C. 107, 13 E. C. L. 111; *Richardson v. Goss*, 3 B. & P. 127; *Tucker v. Humphrey*, 4 Bing. 516, 15 E. C. L. 63; *Scott v. Pettit*, 3 B. & P. 469; *Powell v. McKechnie*, 3 Dak. 319.

11. Attornment Not Implied from Custom of Storing Goods Subject to Payment of Freight. — *Jeffris v. Fitchburg R. Co.*, 93 Wis. 250, 57 Am. St. Rep. 919.

insufficient to defeat the right of stoppage because made in consideration of a pre-existing debt;¹ nor from the bare fact that the freight has been paid² or that a part of the goods has been delivered.³ *A fortiori*, the agreement will not be implied from the original contract of carriage⁴ nor from the mere storage of the goods in the carrier's warehouse at their destination.⁵

Delivery on a Railroad Siding devoted to the exclusive use of the buyer, from which he is at liberty to remove the goods to his place of business without prepayment of freight or the performance of any other condition, constitutes a constructive delivery sufficient to cut off the right of stoppage.⁶

Marking Goods.—It has been held that the mere marking of goods in the hands of a middleman is sufficient to effect a constructive delivery, where nothing further is necessary in order to perfect the right to take the goods away.⁷

A Promise to Deliver as soon as the goods can be reached by the carrier in unloading does not constitute a delivery by attornment;⁸ neither will a promise to deliver upon the payment of freight constitute such a delivery.⁹

Stipulations in the Bill of Lading that the responsibility of the carrier as such shall cease when the goods are in its warehouse will not give to a deposit in such warehouse the force of a constructive delivery;¹⁰ nor will such an effect result from a stipulation in the bill of lading according to which the carrier is authorized to hold and does hold the goods as security for freight arrearages due from the buyer.¹¹

At an Intermediate Point the attornment may be effected by an agreement between the carrier or middleman and the buyer whereby the former agrees to hold as agent or bailee for a new purpose, the effect being the same as if the agreement were made at the destination.¹² Likewise it has been held that if the buyer goes on board the ship containing the goods before the ultimate destination has been reached, takes samples of the goods with the intention of taking possession of the whole, sells a portion of the goods, and orders the balance to be taken by the same ship to the original destination, the transit will be deemed to have ended at the place where the samples were taken and the portion of the goods was sold.¹³ On the other hand, it has been held that there can be no delivery, either actual or constructive, short of destination

1. **Attornment Not Implied from Sale to Carrier for Freight.**—*Koontz v. Wheeling*, etc., R. Co., 7 Ohio Dec. 478, affirmed 9 Ohio Cir. Dec. 102, 61 Ohio St. 551, 76 Am. St. Rep. 435. See also *infra*, this section, *Subsale*; and as to the sufficiency of a pre-existing debt as a consideration for a subsale, see *infra*, this section, *Transfer of Bill of Lading*.

2. See *infra*, this subsection, *Effect of Payment or Nonpayment of Freight*.

3. See *infra*, this subsection, *Partial Delivery*.

4. **Attornment Not Implied from Contract of Carriage.**—*Ex p. Cooper*, 11 Ch. D. 68; *Powell v. McKechnie*, 3 Dak. 319; *Clapp v. Peck*, 55 Iowa 270; *Alsberg v. Latta*, 30 Iowa 442; *Inslee v. Lane*, 57 N. H. 454; *Reynolds v. Boston*, etc., R. Co., 43 N. H. 580; *Covell v. Hitchcock*, 23 Wend. (N. Y.) 611; *Farrell v. Richmond*, etc., R. Co., 102 N. Car. 390, 11 Am. St. Rep. 760; *Calahan v. Babcock*, 21 Ohio St. 281, 8 Am. Rep. 63.

5. **Attornment Not Implied from Storage at Destination.**—*McFetridge v. Piper*, 40 Iowa 627; *Alsberg v. Latta*, 30 Iowa 442; *O'Neil v. Garrett*, 6 Iowa 480; *Symms v. Schotten*, 35 Kan. 310; *Brewer Lumber Co. v. Boston*, etc., R. Co., 179 Mass. 228; *Calahan v. Babcock*, 21

Ohio St. 281, 8 Am. Rep. 63; *Bender v. Bowman*, 2 Pearson (Pa.) 517.

6. *Ex p. Gibbs*, 1 Ch. D. 101.

7. **Delivery Effected by Marking Goods in Hands of Middleman.**—*Ellis v. Hunt*, 3 T. R. 464. It was held in this case that the delivery was actual, but since there was no change of custody, it was really constructive by way of an implied attornment. But see *Whitehead v. Anderson*, 9 M. & W. 518, wherein it was doubted whether marking the goods or taking samples, without removing the goods from the custody of the carrier, would be alone sufficient to show a constructive delivery.

8. *Covenry v. Gladstone*, L. R. 6 Eq. 44.

9. *Whitehead v. Anderson*, 9 M. & W. 518; *Farrell v. Richmond*, etc., R. Co., 102 N. Car. 390, 11 Am. St. Rep. 760. In such case there is neither any assumption of a new obligation on the part of the carrier nor any consideration, the promise being merely to do that which the carrier was already bound to do.

10. *McLean v. Breithaupt*, 12 Ont. App. 383.

11. *Farrell v. Richmond*, etc., R. Co., 102 N. Car. 390, 11 Am. St. Rep. 760.

12. *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188.

13. *Jones v. Jones*, 8 M. & W. 431.

without a substantial change of destination.¹

bb. EFFECT OF PAYMENT OR NONPAYMENT OF FREIGHT. — **Payment of Freight** will not alone constitute a delivery by attornment, especially where after such payment something stands in the way of the buyer's right to remove the goods, as where they are held by the carrier to secure payment of arrearages on other goods² or where the buyer cannot obtain possession on account of the loss of the invoice.³ It has even been held that a constructive delivery will not be effected by payment of freight, followed by receipt of a delivery check by the buyer, entitling him to an actual delivery upon presentation of such check to the clerk in charge of the goods.⁴ Likewise it has been held that where the goods are so mingled with the general cargo as not to be susceptible of a present delivery, the payment of freight by the buyer and the promise of the carrier to deliver as soon as the goods can be reached do not constitute a constructive delivery.⁵ On the other hand, it has been held that payment of freight and execution of a receipt for the goods, the latter being left in the depot to be called for, constitute a constructive delivery.⁶

Nonpayment of Freight. — The carrier may, by attornment to the buyer, become the agent of the latter so as to effect constructive delivery notwithstanding the fact that the freight has not been paid;⁷ but the presumption from the nonpayment of freight is that the carrier holds as carrier, and in order to rebut such presumption there must be proof of an agreement whereby the carrier, notwithstanding his claim for freight, has agreed to retain possession of the goods as the agent or bailee of the buyer.⁸

cc. DEMAND AND REFUSAL OF DELIVERY — At Destination. — It has been held that the right of stoppage cannot be terminated by a mere demand by the buyer upon the carrier for the goods;⁹ but it seems well settled that where the buyer, upon the arrival of the goods at their destination, makes a demand for delivery which is wrongfully refused by the carrier, the right of stoppage is thereupon terminated.¹⁰ This rule is manifestly based upon an attornment implied or created by law, whereby, after the wrongful refusal to deliver, the carrier is considered as holding the goods as the agent or bailee of the buyer.

Present Right of Possession Essential. — The demand must be supported by a present right of possession. Thus, a demand upon a warehouseman unsupported by a valid order of delivery cannot effect a constructive delivery.¹¹

Where the Claimant's Right of Possession Is Doubtful, the carrier is entitled to a reasonable time in which to investigate the matter; and where such time is demanded, delivery not being positively refused, and the claimant takes no further steps to enforce delivery until after the right of stoppage has been asserted, such right will be deemed to have been asserted in due time.¹²

1. See *supra*, this subsection, *Delivery Short of Destination*.

2. *Reynolds v. Boston, etc., R. Co.*, 43 N. H. 580.

3. *Donath v. Broomhead*, 7 Pa. St. 301.

4. *Reynolds v. Boston, etc., R. Co.*, 43 N. H. 580.

5. *Coventry v. Gladstone*, L. R. 6 Eq. 44.

6. *Langstaff v. Stix*, 64 Miss. 171, 60 Am. Rep. 49.

7. **Payment of Freight Not Essential to Delivery by Attornment.** — *Ex p. Gibbs*, 1 Ch. D. 101; *Kemp v. Falk*, 7 App. Cas. 573; *Allan v. Gripper*, 2 Crompt. & J. 218; *Hall v. Dimond*, 63 N. H. 565; *Guilford v. Smith*, 30 Vt. 49.

8. **Carrier Presumed to Hold as Such until Payment of Freight.** — *Crawshay v. Eades*, 1 B. & C. 181, 8 E. C. L. 78; *Kemp v. Falk*, 7 App. Cas. 573; *Ex p. Falk*, 14 Ch. D. 446; *Ex p. Cooper*, 11 Ch. D. 68; *Ex p. Barrow*, 6 Ch. D. 783; *Whitehead v. Anderson*, 9 M. & W. 518;

Jeffris v. Fitchburg R. Co., 93 Wis. 250, 57 Am. St. Rep. 919.

9. **Buyer's Demand upon Carrier for Goods.** — *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489. It is to be noted, however, that the demand in this case was for the shipping papers in order that the goods might be entered in a government custom house. See *infra*, this subsection, *Delivery and Entry at Custom House*.

10. **Buyer's Demand and Carrier's Wrongful Refusal to Deliver.** — *Bird v. Brown*, 4 Exch. 786, 19 L. J. Exch. 154; *Bohtlingk v. Inglis*, 3 East 381; *Walley v. Montgomery*, 3 East 585; *Reynolds v. Boston, etc., R. Co.*, 43 N. H. 591.

11. **Demand upon Warehouseman Unsupported by Order of Delivery.** — *Lackington v. Atherton*, 8 Scott N. R. 38.

12. **Carrier Entitled to Time to Investigate.** — *Anderson v. Fish*, 16 Ont. 476, affirmed 17 Ont. App. 28.

Demand upon Custom-house Officer. — It has been held that where goods in a custom house were demanded by the buyer's assignee after default in the payment of duties, and the customs officer agreed that such assignee was entitled to the goods, but they were, by agreement, thereafter sold for the payment of the duties, the seller's claim to the excess of the proceeds of the sale was superior to that of the assignee.¹

Demand Short of Destination. — It has been held that a mere demand by the buyer for possession at a point short of the destination of the goods will not, if refused by the carrier, defeat the right of stoppage.² The reason of this doctrine is probably that though the buyer may waive a delivery at destination, and by taking possession at an intermediate point may relieve the carrier from all further responsibility as to the goods,³ the contract of carriage is for delivery at destination, and hence a refusal to deliver short of destination is not wrongful, and there is nothing from which the law may imply an attornment of the carrier to the buyer.

As Between the Carrier and the Consignor, the former cannot assert his own wrongful refusal to deliver in support of an attachment for freight arrearages due from the buyer. In such case the seller's right of stoppage will prevail over the attachment, notwithstanding a previous demand by the buyer for delivery and the carrier's refusal to deliver.⁴

dd. **PARTIAL DELIVERY — Effect of Partial Delivery Question of Attornment.** — The question whether a delivery of a part of the goods constitutes a constructive delivery of the balance depends upon whether the partial delivery amounts to such an attornment by the party making it to the party to whom it is made as will render the former the latter's agent or bailee for the custody of the part not delivered.⁵

Delivery of Part Not Delivery of Balance. — The bare fact that a part of the goods has been delivered is insufficient to show such an attornment as to the balance as will amount to a constructive delivery thereof.⁶ Instances of circumstances under which the delivery of a part has been held not to constitute a constructive delivery of the balance are where the following facts were relied upon as showing such delivery: payment of freight upon and delivery of a part of the goods, the freight remaining unpaid on the balance;⁷ the taking away of a portion of a haystack by the buyer thereof with the consent of the seller, permission to take away the balance being subsequently refused;⁸ the selling of separate portions of the goods by the buyer to different persons holding separately without any joint interest, and the delivery of some of such portions to the purchasers thereof;⁹ the delivery to a subpurchaser of a portion of the goods which has been sold to him;¹⁰ the delivery of a part of the goods by a

1. *Northey v. Field*, 2 Esp. 613.

2. **Demand and Refusal Short of Destination.** — *Jackson v. Nichol*, 5 Bing. N. Cas. 508, 35 E. C. L. 102.

3. **Buyer May Waive Delivery at Destination.** — See *Cork Distillery Co. v. Great Southern etc., R. Co.*, L. R. 7 H. L. 269; *London, etc., R. Co. v. Bartlett*, 7 H. & N. 400, 31 L. J. Exch. 92. See also *supra*, this subsection, *Delivery Short of Destination*.

4. *Allen v. Mercier*, 1 Ashm. (Pa.) 103.

5. **Effect of Partial Delivery Question of Attornment.** — *Ex p. Falk*, 14 Ch. D. 455; *Hammond v. Anderson*, 1 B. & P. N. R. 69.

6. **Part Delivery Alone Not Constructive Delivery of Balance.** — *Dixon v. Yates*, 5 B. & Ad. 313, 27 E. C. L. 86; *Ex p. Falk*, 14 Ch. D. 455; *Tanner v. Scovell*, 14 M. & W. 36; *Ex p. Cooper*, 11 Ch. D. 68; *Simmons v. Swift*, 5 B. & C. 857, 12 E. C. L. 388; *Jones v. Jones*, 8 M. & W. 431; *Ocean Steamship Co. v. Ehrlich*, 88

Ga. 502, 30 Am. St. Rep. 164; *White v. Welsh*, 38 Pa. St. 396; *Cabeen v. Campbell*, 30 Pa. St. 258. Compare *Crawshaw v. Eades*, 1 B. & C. 181, 8 E. C. L. 78 (dictum); *Betts v. Gibbins*, 2 Ad. & El. 57, 29 E. C. L. 29 (dictum); *Slubey v. Heyward*, 2 H. Bl. 504; *Hammond v. Anderson*, 1 B. & P. N. R. 69, in both of which cases, last cited, there were circumstances other than the mere partial delivery tending to show an attornment by the carrier to the consignee, and the decisions were not based upon the fact of the partial delivery, but upon such other circumstances; *Stevens v. Wheeler*, 27 Barb. (N. Y.) 658 (dictum, based solely on the authority of *Slubey v. Heyward*, 2 H. Bl. 504).

7. *Ex p. Cooper*, 11 Ch. D. 68; *Jeffris v. Fitchburg R. Co.*, 93 Wis. 250, 57 Am. St. Rep. 919. 8. *Bunney v. Poyntz*, 4 B. & Ad. 568, 24 E. C. L. 118.

9. *Kemp v. Falk*, 7 App. Cas. 573.

10. *Miles v. Gorton*, 2 Crompt. & M. 504.

wharfinger under an order to deliver the whole, it appearing, however, from the course of dealing between the buyer and the wharfinger and from the fact that the buyer claimed an allowance against the weight of the goods not actually delivered and requested the wharfinger to mark them for the purpose of reweighing, that the part delivery was not intended as a delivery of the balance also;¹ payment of duties on and taking away of part of goods stored in a customs warehouse;² delivery of a part of goods in a warehouse under an order calling for such part alone;³ delivery of a part to the buyer's agent, who through mistake took them to the buyer, who thereupon refused to receive them and returned them to the carrier;⁴ the drifting of a portion of a drive of logs into the buyer's possession, the balance of the drive being still in actual transit in the river;⁵ payment for the goods, a part of which were delivered, with a single accepted bill;⁶ and delivery of a portion of a single shipment, where the goods had become divided during their journey and the balance was still in actual transit.⁷

Part Delivery Held to Constitute Delivery of Balance. — A delivery of a part of the goods will be held to constitute a constructive delivery of the balance when, and only when, the partial delivery takes place under circumstances indicating an intent by the party to whom it is made to take possession of the whole, such intent being acquiesced in by the carrier or the party making the delivery, the result being an attornment for the custody of the balance not actually delivered.⁸ Some of the circumstances under which a delivery of a part will be held to constitute a constructive delivery of the balance are as follows: where the cargo consists of goods, such as a single machine not susceptible of division;⁹ where all the goods which are lying at the wharf are weighed and a part taken away, there being no wharfage charges against the balance;¹⁰ and where in connection with a part delivery it appears that the carrier has been in the habit of receiving the goods as the buyer's agent.¹¹

ee. DELIVERY AND ENTRY AT CUSTOM HOUSE. — Removal of the goods to a customs warehouse in default of payment of duties or of bonding and entry does not constitute a constructive delivery.¹² So the mere entry of the goods at a custom house in the name of the buyer, without payment of duties or the execution of a proper bond in lieu thereof, does not constitute a constructive delivery, the buyer having no control whatever over the goods until the duties have been paid or a proper bond has been given.¹³ But where there is a perfect entry in the name of the buyer, and the goods are regularly bonded and warehoused, they thereupon become subject to the absolute control of the

1. *Tanner v. Scovell*, 14 M. & W. 28.

2. *Graham v. Smith*, 27 U. C. C. P. 1; *Burr v. Wilson*, 13 U. C. Q. B. 478.

3. *In re Bearns*, (N. Y. 1878) 18 Nat. Bankr. Reg. 500.

4. *Bolton v. Lancashire, etc.*, R. Co., L. R. 1 C. P. 431.

5. *Mann v. White River Log, etc., Co.*, 46 Mich. 38, 41 Am. Rep. 141.

6. **Payment by Single Bill Not Alone Sufficient.** — *Ex p. Falk*, 14 Ch. D. 455. See also *Hammond v. Anderson*, 1 B. & P. N. R. 69.

7. *Buckley v. Furniss*, 17 Wend. (N. Y.) 504.

8. **Delivery of Part Delivery of Balance When So Intended by Parties.** — *Bolton v. Lancashire, etc.*, R. Co., L. R. 1 C. P. 431; *Wentworth v. Outhwaite*, 10 M. & W. 436; *Jones v. Jones*, 8 M. & W. 431; *Dixon v. Yates*, 5 B. & Ad. 313, 27 E. C. L. 86; *Bunney v. Poyntz*, 4 B. & Ad. 568, 24 E. C. L. 118; *Simmons v. Swift*, 5 B. & C. 857, 12 E. C. L. 388; *Ex p. Falk*, 14 Ch. D. 455; *Hammond v. Anderson*, 1 B. & P. N. R. 69; *Pollock on Possession* 70.

9. *Ex p. Cooper*, 11 Ch. D. 68.

10. *Hammond v. Anderson*, 1 B. & P. N. R. 69.

11. **Delivery of Part Held to Be Delivery of Balance in View of Course of Dealing Between Parties.** — *Ex p. Gibbes*, 1 Ch. D. 101; *Slubey v. Heyward*, 2 H. Bl. 504; *Crawshay v. Eades*, 1 B. & C. 181, 8 E. C. L. 78; *Hall v. Diamond*, 63 N. H. 565; *Stevens v. Wheeler*, 27 Barb. (N. Y.) 658.

12. **Removal to Customs Warehouse Without Payment of Duties or Bonding and Entry.** — *Northey v. Field*, 2 Esp. 613; *Lewis v. Mason*, 36 U. C. Q. B. 590; *Burr v. Wilson*, 13 U. C. Q. B. 478; *Parker v. Byrnes*, 1 Lowell (U. S.) 539; *Harris v. Pratt*, 17 N. Y. 252; *Mottram v. Heyer*, 5 Den. (N. Y.) 629; *Fraserchier v. Henriques*, (C. Pl. Gen. T.) 6 Abb. Pr. N. S. (N. Y.) 261; *Donath v. Broomhead*, 7 Pa. St. 301.

13. **Entry Without Payment of Duties.** — *Harris v. Pratt*, 17 N. Y. 249; *Holbrook v. Vose*, 6 Bosw. (N. Y.) 76; *Mottram v. Heyer*, 5 Den. (N. Y.) 620.

Entry Without Bonding. — *Fraserchier v. Henriques*, (C. Pl. Gen. T.) 6 Abb. Pr. N. S. (N. Y.) 251; *Graham v. Smith*, 27 U. C. C. P. 1.

buyer, subject only to the government's lien for duties, the effect being a constructive delivery analogous to a delivery by way of attornment of a carrier or ordinary warehouseman.¹

Entry in Name of Seller. — Where the goods are entered at a custom house in the name of the seller under a regulation requiring an order from the seller before the buyer can obtain possession, they will be considered as still in transit, although the buyer has complied with his contract, and except for his insolvency would be entitled to the necessary delivery order upon demand.²

Goods under Bond at Time of Sale. — It has been held that where the goods are under bond in a government warehouse at the time of the sale, an entry in the name of the buyer, who does not take them away, it being agreed between him and the seller that the latter shall pay the warehouse charges, taxes, stamps, etc., until the day of shipment provided for in the contract of sale, and shall draw on the buyer for the amount so paid, is not a constructive delivery, and the goods may be stopped by the seller after shipment on the day specified.³ On the other hand, it has been held that where the seller gives to the buyer an order upon the keeper of a customs warehouse for the delivery of specific goods, which order is accepted by the warehouseman, the delivery is complete.⁴

Entry by Subpurchaser. — The entry and bonding of the goods by a subpurchaser will terminate the right of stoppage as effectually as if the entry were made by the buyer himself.⁵

ff. **ORDER OF DELIVERY — When Essential.** — Where it is the custom of merchants to give an order of delivery in order to transfer possession of goods stored in a warehouse, a sale of such goods and the delivery of an invoice thereof will not constitute a constructive delivery of the goods themselves,⁶ even though the buyer has complied with his contract of sale, and except for his insolvency would be entitled to the required order on demand.⁷

Effect. — The acceptance by a warehouseman of a delivery order for specific goods stored in his warehouse, which have been purchased from the owner thereof by the party presenting the order, constitutes a constructive delivery of the goods.⁸ The same effect will result from the mere delivery to the warehouseman of a valid delivery order,⁹ but the presentation of an invalid order of delivery will have no such effect, even when the party presenting it has no knowledge of its invalidity;¹⁰ and even though the order be valid, its presentation will not effect a constructive delivery where anything, such as payment of freight, is necessary as a condition precedent to the right of possession.¹¹

(c) **Revocation of Attornment.** — It has been held that where there is an agreement between a railroad company and a manufacturer under which the company holds all goods received by it for the manufacturer, subject to his orders of delivery without prepayment of freight, after the company has received goods for the manufacturer it cannot, without notice to him, revoke its attornment as his agent for the custody of the goods, so as to nullify the effect

1. **Constructive Delivery Effected by Bonding and Entry.** — *Sheppard v. Newhall*, (C. C. A.) 54 Fed. Rep. 306; *Parker v. Byrnes*, 1 Lowell (U. S.) 539; *Cartwright v. Wilmerding*, 24 N. Y. 521; *Fraschieris v. Henriques*, (C. Pl. Gen. T.) 6 Abb. Pr. N. S. (N. Y.) 251; *Mottram v. Heyer*, 5 Den. (N. Y.) 629; *Guilford v. Smith*, 30 Vt. 49; *Lewis v. Mason*, 36 U. C. Q. B. 590; *Wiley v. Smith*, 1 Ont. App. 179, *affirmed* 2 Can. Sup. Ct. 1 [*overruling* *Howell v. Alport*, 12 U. C. C. P. 375]; *Graham v. Smith*, 27 U. C. C. P. 1; *Wilds v. Smith*, 2 Ont. App. 8.

2. *In re Bearns*, (N. Y. 1878) 18 Nat. Bankr. Reg. 500.

3. *Mohr v. Boston, etc., R. Co.*, 106 Mass. 67.

4. *Parker v. Byrnes*, 1 Lowell (U. S.) 539. See also *infra*, this subsection, *Order of Delivery*.

5. *Sheppard v. Newhall*, (C. C. A.) 54 Fed. Rep. 306.

6. *Dixon v. Yates*, 5 B. & Ad. 313, 27 E. C. L. 86.

7. *In re Bearns*, (N. Y. 1878) 18 Nat. Bankr. Reg. 500.

8. *Parker v. Byrnes*, 1 Lowell (U. S.) 539.

9. *Lackington v. Atherton*, 8 Scott N. R. 38; *Harman v. Anderson*, 2 Campb. 243.

10. *Lackington v. Atherton*, 8 Scott N. R. 38.

11. *Jeffris v. Fitchburg R. Co.*, 93 Wis. 250, 57 Am. St. Rep. 919.

of the constructive delivery resulting from its receipt of the goods, and thus place the goods again in transit.¹

(4) *Delivery to Persons Other than Buyer* — (a) *Scope of Topic.* — The delivery discussed in the next succeeding four subdivisions is commonly called constructive delivery; but, as already seen, considerable confusion has arisen from the equivocal meaning of the word "constructive" when applied to a delivery of goods, and an attempt has been made in this title to avoid the confusion by confining the term "constructive delivery" to such deliveries as are construed by law to have been made, notwithstanding that no actual change of possession or custody has taken place.² The deliveries, therefore, treated of in the present topic are discussed exclusively in relation to their effect, without reference to the question whether they may or may not properly be termed constructive. Another limitation of the present topic is that while the effect of many of the deliveries herein discussed depends upon whether they are made at the destination of the goods or at a point short thereof, the question as to what is the controlling destination within the doctrine of stoppage *in transitu* has been treated elsewhere in this title, and hence need not be discussed here.³

(b) *To Carrier or Middleman* — *In General.* — While delivery to the carrier for the purpose of carriage to destination passes title to the buyer and is for most purposes a delivery to him,⁴ it is not such a delivery as will terminate the right of stoppage.⁵ The transit does not begin until delivery to the carrier,⁶ and to hold that the transit is begun and ended by the same delivery would render the doctrine of stoppage *in transitu* an absurdity.

Carrier Appointed by Buyer. — The fact that the carrier is appointed by the buyer does not change the rule just stated. A delivery to such a carrier does not terminate the right of stoppage⁷ even though the goods be consigned in the name of the buyer as consignor.⁸

Delivery to a Corporation of Which the Buyer Is a Member does not terminate the right of stoppage, where the delivery is made for carriage to destination.⁹

A Delivery to a Carrier at an Intermediate Point for further carriage to destination has no more effect upon the right of stoppage than has the original delivery at the place of sale. It does not terminate the right.¹⁰

At Destination. — It may happen that the place appointed for delivery to the carrier is, as between the seller and the buyer, the destination of the goods. In such case delivery to the carrier terminates the right of stoppage.¹¹

1. *Ex p. Gibbes*, 1 Ch. D. 101.

2. See *supra*, this subsection, *Constructive Delivery or Delivery by Attornment*.

3. See *supra*, this title, *Accrual of Right — Goods Must Be in Transit — Destination of Goods*.

4. See the title *SALES*, vol. 24, pp. 1059, 1071.

5. *Right Not Terminated by Delivery to Carrier.* — *Lake Shore, etc., R. Co. v. National Live Stock Bank*, 178 Ill. 506; *Hause v. Judson*, 4 Dana (Ky.) 10, 29 Am. Dec. 377; *Stanton v. Eager*, 16 Pick. (Mass.) 467; *Grout v. Hill*, 4 Gray (Mass.) 361; *Mann v. White River Log, etc., Co.*, 46 Mich. 38, 41 Am. Rep. 141; *Walsh v. Blakely*, 6 Mont. 194; *Harris v. Pratt*, 17 N. Y. 249; *Buckley v. Furniss*, 15 Wend. (N. Y.) 137; *Jordan v. James*, 5 Ohio 88; *Hays v. Mouille*, 14 Pa. St. 48; *Parker v. M'Iver*, 1 Desaus. (S. Car.) 274, 1 Am. Dec. 656.

Delivery to Carrier Sufficient Within Statute of Frauds. — *Walsh v. Blakely*, 6 Mont. 194; *Cross v. O'Donnell*, 44 N. Y. 661, 4 Am. Rep. 721. And see generally the title *VERBAL AGREEMENTS (STATUTE OF FRAUDS)*.

Extent of Seller's Right in Goods After Delivery.

— The contingent right of the vendor to stop the goods *in transitu* is not even sufficient to sustain an action by him against the carrier in tort for loss of or damage to the goods. *Northwestern Pac. R. Co. v. Lewis*, 89 Ill. App. 30. See generally the title *CARRIERS*, 3 ENCYC. OF PL. AND PR. 824 *et seq.*

6. See *supra*, this title, *Accrual of Right — Goods Must Be in Transit*.

7. *Right Not Terminated by Delivery to Carrier Appointed by Buyer.* — *Ex p. Rosevear China Clay Co.*, 11 Ch. D. 560; *Weber v. Baessler*, 3 Colo. App. 459; *Cross v. O'Donnell*, 44 N. Y. 661, 4 Am. Rep. 721; *Buckley v. Furniss*, 15 Wend. (N. Y.) 137; *Holbrook v. Vose*, 6 Bosw. (N. Y.) 76; *Hays v. Mouille*, 14 Pa. St. 48; *Half v. Allyn*, 60 Tex. 278. See also *infra*, this subsection, *To Buyer's Agent*.

8. *Lyons v. Hoffnung*, 15 App. Cas. 391.

9. *Mann v. White River Log, etc., Co.*, 46 Mich. 38, 41 Am. Rep. 141.

10. *Buckley v. Furniss*, 15 Wend. (N. Y.) 137.

11. *Right Terminated by Delivery to Carrier at Destination.* — *Meletopulo v. Ranking*, 6 Jur. 1095; *Muskegon Booming Co. v. Underhill*, 43

Delivery to a Local Transportation Company for the purpose of transfer to the buyer's actual possession or to the place appointed by him does not terminate the right of stoppage,¹ even though the local carrier receives the goods under previous general orders from the buyer.² On the other hand, it has been held that delivery to a local transportation company, having authority to receipt for the goods, *prima facie* ends the transit and terminates the right of stoppage;³ but this presumption may be rebutted by circumstances, such as the refusal of the buyer to receive the goods⁴ or the absconding of the buyer before the goods have been delivered to him by the local carrier.⁵ The rule that delivery to a local transportation company at destination does not terminate the right of stoppage is a seeming exception to the rule laid down above that delivery to a carrier at destination terminates the transit.

Delivery on Board the Buyer's Ship may or may not terminate the right of stoppage, according to circumstances. The question depends upon whether, as between the seller and the buyer, the ship herself or the place to which the goods are to be carried by her is the destination of the goods. The question, therefore, might properly have been discussed under consideration of what is destination;⁶ but as it is generally treated by the courts as a question of delivery, it has been reserved for the present topic, and but for its importance might have been treated under the present subdivision. In consideration, however, of the importance of this question, a separate subdivision, immediately following, will be devoted to the consideration thereof.

(c) **On Board Buyer's Ship — Effect of Delivery Dependent on Intent of Parties.** — The question whether delivery on board a buyer's ship will terminate the right of stoppage depends upon the intention of the parties to the contract of sale. If the ship herself is the destination contemplated by the seller and the buyer, a delivery on board the ship terminates the right of stoppage. If, on the other hand, some place to which the goods are to be carried by the ship is the destination contemplated by the seller and the buyer, a delivery on board the ship does not terminate the right.⁷ The rule is the same whether the ship be absolutely owned by the buyer or only chartered by him.⁸

Test of Intention — Rule in United States. — In determining whether the buyer's ship herself or the place to which she is to carry the goods is the destination contemplated by the seller and the buyer, the authorities in the United States make no distinction between a ship absolutely owned by the buyer and one chartered by him, the test of the intention of the parties being whether the goods are consigned to the buyer himself at his place of business or to some one else at some other point — that is, whether the goods are being imported or exported by the buyer. If the goods are being imported by the buyer and are consigned to him at his place of business, such place will be deemed to be the destination, and the right of stoppage will not be terminated by delivery

Mich. 629. See also *infra*, this subsection, *On Board Buyer's Ship*.

1. **Right Not Terminated by Delivery to Local Carrier.** — *Weber v. Baessler*, 3 Colo. App. 459; *Harris v. Tenney*, 85 Tex. 254, 34 Am. St. Rep. 796.

2. *Weber v. Baessler*, 3 Colo. App. 459; *Scott v. William B. Grimes Dry-Goods Co.*, 48 Mo. App. 521. See also *Heinz v. Railroad Transfer Co.*, 82 Mo. 233.

3. **Right Terminated by Delivery to Local Carrier Having Authority to Receipt for Goods.** — *O'Neal v. Day*, 53 Mo. App. 139; *Shoninger v. Day*, 53 Mo. App. 147, the latter case following the former, and the former *distinguishing* *White v. Mitchell*, 38 Mich. 390; *Inslee v. Lane*, 57 N. H. 454; *Mason v. Wilson*, 43 Ark. 174; and *Macon*, etc., *R. Co. v. Meador*, 65 Ga. 705.

4. **Where Buyer Refuses to Receive.** — *Mason v. Wilson*, 43 Ark. 174; *O'Neal v. Day*, 53 Mo. App. 139; *Shoninger v. Day*, 53 Mo. App. 147.

5. **Where Buyer Absconds.** — *White v. Mitchell*, 38 Mich. 390; *Inslee v. Lane*, 57 N. H. 454.

6. See *supra*, this title, *Accrual of Right — Goods Must Be in Transit — Destination of Goods*.

7. **Effect of Delivery on Buyer's Ship Dependent upon Intent of Parties as to Destination.** — *Brooke Iron Co. v. O'Brien*, 135 Mass. 442; *Stubbs v. Lund*, 7 Mass. 453, 5 Am. Dec. 63; *Pequeno v. Taylor*, 38 Barb. (N. Y.) 375.

8. *Bohtlingk v. Inglis*, 3 East 381; *Inglis v. Usherwood*, 1 East 515; *Stubbs v. Lund*, 7 Mass. 453, 5 Am. Dec. 63; *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489.

on board the ship.¹ If the goods are not being imported by the consignee, but are to be transported from the place of shipment to a foreign market, the right of stoppage ceases upon delivery on board the ship, the transit then being complete.²

English Rule.— In determining the effect of a delivery on board the buyer's ship, the English authorities make a distinction between a ship owned by the buyer and one chartered by him, holding that a delivery on board a ship owned by the buyer terminates the right of stoppage regardless of the question whether the goods are being imported or exported,³ while a delivery on board a ship chartered by the buyer ends the transit and terminates the right of stoppage when the chartering amounts to a demise of the ship to the buyer,⁴ but not when the chartering amounts merely to a contract for the carriage of the goods, the master and crew remaining employees of the shipowner and the buyer having no control over the ship except that it shall bring his goods and no others from a certain point.⁵

Where the Seller Takes a Bill of Lading to His Own Order he will be protected from the effect of a delivery on board the buyer's own ship, and thus his right of stoppage may be preserved until delivery according to his orders.⁶

Where the Buyer Is Master of the Vessel, the rule is the same as in other cases, and the question whether a delivery on board such vessel terminates the right of stoppage still depends upon whether the vessel herself or the place to which the goods are shipped is the destination understood between the seller and the buyer.⁷

(d) **To Buyer's Agent — In General.**— It has been held that where the goods, after delivery to the buyer's agent, will remain stationary until a new substantive destination has been impressed upon them by the buyer, the delivery terminates the right of stoppage.⁸ It will be seen at once, however, that this rule is also the test whether the goods have arrived at their destination,⁹ and that the effect of the delivery to the agent still depends upon what was the destination as between the seller and the buyer, for even where the buyer gives another destination to the goods after they have been delivered to the agent, it cannot be ascertained, until the original destination has been determined, whether the new order from the buyer really impresses upon the goods a new substantive destination or merely expedites them to their original destination. This ambiguity has been removed to a certain extent by judicial

1. Right Not Terminated by Delivery on Buyer's Ship for Importation.— *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489; *Ilsley v. Stubbs*, 9 Mass. 65; *Stubbs v. Lund*, 7 Mass. 453; *Cross v. O'Donnell*, 44 N. Y. 661, 4 Am. Rep. 721. But see *Bolin v. Huffnagle*, 1 Rawle (Pa.) 9, wherein it was held that a delivery on board the buyer's ship ends the transit regardless of the destination of the goods; *Thompson v. Stewart*, 7 Phila. (Pa.) 187.

2. Right of Stoppage Terminated by Delivery on Buyer's Ship for Exportation.— *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489; *Stubbs v. Lund*, 7 Mass. 453, 5 Am. Dec. 63; *Rowley v. Bigelow*, 12 Pick. (Mass.) 307, 23 Am. Dec. 607. See also *Bohtlingk v. Inglis*, 3 East 381; *Inglis v. Usherwood*, 1 East 515.

3. *Ex p. Rosevear China Clay Co.*, 11 Ch. D. 571; *Van Casteel v. Booker*, 2 Exch. 691; *Schotsmans v. Lancashire, etc.*, R. Co., L. R. 2 Ch. 332; *Blakey v. Dinsdale*, 2 Cowp. 664; *Ogle v. Atkinson*, 5 Taunt. 759, 1 E. C. L. 255. But see *Bohtlingk v. Inglis*, 3 East 381; *Inglis v. Usherwood*, 1 East 515.

4. *Fowler v. M'Taggart*, cited in 1 East 522. See also *Inglis v. Usherwood*, 1 East 515.

Charter-party Held to Be Demise.— *Meiklereid v. West*, 1 Q. B. D. 428.

5. *Bohtlingk v. Inglis*, 3 East 381; *Ex p. Rosevear China Clay Co.*, 11 Ch. D. 560; *Berndtson v. Strang*, L. R. 3 Ch. 588.

Charter-party Held Not to Be Demise.— *Sandeman v. Scurr*, L. R. 2 Q. B. 86, 36 L. J. Q. B. 58; *Omoa, etc., Coal, etc., Co. v. Huntley*, 2 C. P. D. 464.

6. Delivery on Buyer's Ship Where Seller Takes Bill of Lading to His Own Order.— *Schotsmans v. Lancashire, etc.*, R. Co., L. R. 2 Ch. 336; *Turner v. Liverpool Docks*, 6 Exch. 543, 20 L. J. Exch. 393; *Brown v. North*, 8 Exch. 1; *Jenkyns v. Brown*, 14 Q. B. 496, 68 E. C. L. 496; *Walley v. Montgomery*, 3 East 589.

7. *Cross v. O'Donnell*, 44 N. Y. 661, 4 Am. Rep. 721.

8. Delivery to Agent to Await New Orders from Buyer.— *Dixon v. Baldwin*, 5 East 175; *Jackson v. Nichol*, 5 Bing. N. Cas. 508, 35 E. C. L. 202; *Lewis v. Sharvey*, 58 Minn. 464; *Becker v. Hallgarten*, 86 N. Y. 167; *Harris v. Pratt*, 17 N. Y. 267; *Cabeen v. Campbell*, 30 Pa. St. 254.

9. See *supra*, this title, *Accrual of Right*—

interpretation of the rule to the effect that if the new order of the buyer necessary to move the goods out of the hands of the agent relates merely to the time and manner in which they shall be expedited to a destination previously understood between the seller and the buyer, the delivery to the agent is not final and does not terminate the right of stoppage.¹ Thus interpreted the rule seems clear and reliable. A more satisfactory rule, however, and one which does not confuse the question of destination and delivery, is based upon the capacity in which the agent receives. According to this rule, if the agent receives the goods for the mere purpose of transmission to or delivery at destination, the transit is not ended and the right of stoppage is not cut off; but if he receives them for any other purpose, the delivery has the same effect as a delivery to the buyer in person.² In order to apply this rule, the destination of the goods must be first determined according to principles applicable thereto,³ and then the effect of the delivery may be considered according to whether it is at destination or at a point short thereof.

At Destination. — Delivery to the buyer's agent at destination for any purpose other than that of a transfer of the goods by such agent from the possession of the carrier to that of the buyer, or some one for him, terminates the right of stoppage.⁴ It is manifest, therefore, that a delivery to the buyer's agent at destination generally terminates the right of stoppage. This rule is strikingly illustrated by the principle that a delivery at destination to the buyer's forwarding agent ends the transit though the goods are intended for shipment to some other point and are in fact shipped to such point.⁵ The principle is the same even where the agent has received previous instructions as to the new destination, and hence no new order is required from the buyer in order to move the goods out of the possession of the agent,⁶ and likewise where the seller knows that the goods are intended for further shipment from the point at which they are delivered to the buyer's agent.⁷ The most common exceptions to the rule that delivery to the buyer's agent at destination terminates the right of stoppage arise where the delivery is to a local carrier⁸ or to a warehouseman or wharfinger.⁹

At Point Short of Destination. — Delivery at an intermediate point to the buyer's agent for the mere purpose of forwarding to the buyer at the original destination does not terminate the right of stoppage.¹⁰ It has even been held that the second transit is a continuation of the first and the right of stoppage is not lost where the agent intercepts the goods under a conditional order, such as an order to sell if possible, and thereafter, in default of fulfilment of the condition, forwards them to their original destination,¹¹ or where the agent inter-

Goods Must Be in Transit — Destination of Goods.

1. *Harris v. Pratt*, 17 N. Y. 249, *distinguishing* *Dixon v. Baldwin*, 5 East 185.

2. **Effect of Delivery to Agent Dependent upon Capacity in Which Agent Receives.** — *Tucker v. Humphrey*, 1 M. & P. 378, note; *Dixon v. Baldwin*, 5 East 184; *Jackson v. Nichol*, 5 Bing. N. Cas. 508, 35 E. C. L. 202; *Weber v. Baessler*, 3 Colo. App. 459; *Aguirre v. Parmelee*, 22 Conn. 473; *Covell v. Hitchcock*, 23 Wend. (N. Y.) 611; *Stevens v. Wheeler*, 27 Barb. (N. Y.) 658; *Cabeen v. Campbell*, 30 Pa. St. 254; *Hays v. Mouille*, 14 Pa. St. 48.

3. See *supra*, this title, *Accrual of Right — Goods Must Be in Transit — Destination of Goods*.

4. *The Natchez*, 31 Fed. Rep. 615; *Stevens v. Wheeler*, 27 Barb. (N. Y.) 658.

5. **Right Terminated by Delivery at Destination to Buyer's Forwarding Agent.** — *Leeds v. Wright*, 3 B. & P. 320; *Kendal v. Stevens*, 11

Q. B. D. 356; *Dixon v. Baldwin*, 5 East 175; *Valpy v. Gibson*, 4 C. B. 837, 56 E. C. L. 837; *Meletopulo v. Ranking*, 6 Jur. 1095; *Guilford v. Smith*, 30 Vt. 49.

6. *Kendal v. Stevens*, 11 Q. B. D. 356.

7. *Dixon v. Baldwin*, 5 East 175; *Valpy v. Gibson*, 4 C. B. 837, 56 E. C. L. 837.

8. See *supra*, this subsection, *To Carrier or Middleman*.

9. See *infra*, this subsection, *To Warehouseman or Wharfinger*.

10. **Delivery to Buyer's Forwarding Agent Short of Destination.** — *Jackson v. Nichol*, 5 Bing. N. Cas. 508, 35 E. C. L. 202; *Jones v. Earl*, 37 Cal. 630, 99 Am. Dec. 338; *Blackman v. Pierce*, 23 Cal. 509; *Markwald v. Their Creditors*, 7 Cal. 213; *Aguirre v. Parmelee*, 22 Conn. 473; *Harris v. Pratt*, 17 N. Y. 249; *Cabeen v. Campbell*, 30 Pa. St. 254; *Hays v. Mouille*, 14 Pa. St. 48; *Half v. Allyn*, 60 Tex. 278; *Guilford v. Smith*, 30 Vt. 49.

11. *Secomb v. Nutt*, 14 B. Mon. (Ky.) 264.

Volume XXVI.

cepts the goods and sells them because their transit has been interrupted by an act of God, as by the freezing of a ship canal, the real purpose of such interception and sale being to forward the goods to their destination.¹ The same rule applies to a delivery to the buyer's agent at the place of sale, the right of stoppage in such case not being cut off where the delivery is merely for the purpose of forwarding the goods to the destination understood between the seller and the buyer,² even though the goods be purchased by the agent himself.³ On the other hand, a delivery at an intermediate point to the buyer's agent for a purpose other than that of expediting the goods to their original destination will terminate the right of stoppage as effectually as a delivery to the buyer in person,⁴ as where the agent takes charge of the goods and reships them to a point other than their original destination,⁵ or where he intercepts them and holds them for further orders, even though thereafter, under new directions from the buyer, they are forwarded to their original destination.⁶ The new purpose, however, for which the agent takes possession must be a *bona fide* one, and not a mere subterfuge to enable the buyer to evade the consequences of his insolvency.⁷ Furthermore, the new purpose for which the agent receives the goods must specifically appear.⁸

The Authority of the Agent to Receive may be a general one, such as the settling up of the buyer's business.⁹ Indeed, it has been intimated that a delivery to a general agent, as distinguished from a special forwarding or carrying agent, necessarily ends the transit.¹⁰

An Attaching Creditor of the buyer cannot act as the latter's agent to receive the goods, although expressly appointed by the buyer for this purpose in order that the goods may be subjected to the agent's attachment.¹¹

(e) To Warehouseman or Wharfinger — When Delivery Not Final. — Delivery at the destination of the goods to a warehouseman who receives in the ordinary course of his business as a middleman between carrier and buyer is not final, and does not terminate the right of stoppage.¹² *A fortiori* the right will not be terminated by delivery to a warehouseman at an intermediate point for the purpose of forwarding to destination;¹³ nor will the right be terminated by such a delivery even though it be made at a point from which there is no public conveyance to the original destination, and from which the goods will have to be conveyed by teams owned or hired by the buyer.¹⁴ The effect of

1. *In re* Foot, 11 Blatchf. (U. S.) 530.

2. *Holbrook v. Vose*, 6 Bosw. (N. Y.) 76.

3. *Lake Shore, etc., R. Co. v. National Live Stock Bank*, 59 Ill. App. 451.

4. *Walsh v. Blakely*, 6 Mont. 194; *Stevens v. Wheeler*, 27 Barb. (N. Y.) 658; *Half v. Allyn*, 60 Tex. 278.

5. *The Natchez*, 31 Fed. Rep. 615.

6. *Secomb v. Nutt*, 14 B. Mon. (Ky.) 264; *Walsh v. Blakely*, 6 Mont. 194.

7. **Interception Must Be in Good Faith.** — *Poole v. Houston, etc., R. Co.*, 58 Tex. 134, holding that where an agent took possession of the goods at an intermediate point, erased the name of the buyer from them, and re-consigned and re-shipped them over the same transportation line to a bogus firm at the original destination, the right of stoppage was not defeated.

8. **New Purpose for Which Agent Receives Must Appear.** — *Half v. Allyn*, 60 Tex. 278, holding that where goods are shipped to a certain point on the carrier's line, thence to be transported, by means of conveyance not designated, to their destination, the mere fact that the buyer's agent presents an order for the goods at an intermediate point and takes them into his possession is not sufficient to show a final delivery,

there being nothing to show the purpose for which he received the goods, and, in the absence of such showing, the goods being presumed to be still in transit towards their original destination.

9. **Authority of Agent May Be General.** — *The Natchez*, 31 Fed. Rep. 615.

10. *Covell v. Hitchcock*, 23 Wend. (N. Y.) 611.

11. *Harris v. Tenney*, 85 Tex. 254, 34 Am. St. Rep. 796. See also *infra*, this section, *Seizure of Goods under Legal Process Against Buyer*.

12. **Right Not Terminated by Delivery to Warehouseman at Destination.** — *Powell v. McKech-nie*, 3 Dak. 319; *O'Neil v. Garrett*, 6 Iowa 480; *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188; *Hoover v. Tibbits*, 13 Wis. 79.

13. **Delivery to Warehouseman at Intermediate Point for Purpose of Forwarding.** — *Mills v. Ball*, 2 B. & P. 457; *Ellis v. Hunt*, 3 T. R. 466; *In re* Foot, 11 Blatchf. (U. S.) 530; *Inslee v. Lane*, 57 N. H. 459; *Atkins v. Colby*, 20 N. H. 156.

14. **Delivery to Warehouseman at Intermediate Point from Which there Is No Public Conveyance.** — *Blackman v. Pierce*, 23 Cal. 508; *Covell v. Hitchcock*, 23 Wend. (N. Y.) 611; *Buckley v. Furniss*, 15 Wend. (N. Y.) 137; *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188.

delivery to a wharfinger is precisely the same as that of delivery to a warehouseman, a wharfinger being only a species of warehouseman; and hence where the wharfinger receives in the course of his usual business, the delivery is not final and does not terminate the right of stoppage.¹ It has even been held that a delivery at the buyer's own wharf does not cut off the right of stoppage where anything, such as weighing the goods and paying the freight, remains to be done before the buyer will have the right to remove the goods.² Likewise delivery to a packer for the purpose of having the goods packed for shipment does not terminate the right of stoppage.³

When Delivery Final. — Where the warehouseman receives the goods at their destination not merely as a middleman, but as the buyer's receiving agent, the delivery is final and the right of stoppage is cut off.⁴ If the delivery be made at an intermediate point the same rule applies, the principle being the same as that applicable to a delivery to any other agent of the buyer.⁵

Agreement to Receive as Buyer's Agent. — The warehouseman cannot, however, constitute himself the buyer's agent. There must be some understanding or agreement between the buyer and the warehouseman whereby the latter undertakes to receive the goods in some capacity other than as a mere middleman.⁶ Such an undertaking may be implied from the previous course of dealing between the warehouseman and the buyer,⁷ as where the former has been accustomed to receive and hold the goods without storage charges and at the buyer's risk, until taken away by him or under his orders.⁸ But such an agreement will not be implied from a custom of receiving and storing the buyer's goods and thereafter notifying him and delivering to him upon the payment of freight,⁹ nor from the mere fact that the warehouseman has been designated by the buyer as the person to whom the carrier should deliver the goods, either at their destination or at a point short thereof.¹⁰

(f) **To Buyer's Assignee, Mortgagee, or Pledgee — Assignee.** — Delivery to the buyer's assignee in bankruptcy terminates the right of stoppage.¹¹ It has even been held that where the assignee takes possession before the seller exercises his right of stoppage, such right is defeated although the goods have previously been rejected by the buyer on account of his insolvency;¹² but a mere insolvency messenger, whose duty it is to take possession of the insolvent's estate pending the appointment of an assignee, acts as a middleman, and cannot defeat the right of stoppage by accepting the goods, especially where the buyer has refused to receive them.¹³

Mortgagee or Pledgee. — It has been held that where the buyer pledges the

1. **Delivery to Wharfinger.** — *Jackson v. Nichol*, 5 Bing. N. Cas. 508, 35 E. C. L. 202; *Bartram v. Farebrother*, 1 M. & P. 515; *O'Neil v. Garrett*, 6 Iowa 480; *Atkins v. Colby*, 20 N. H. 154; *Hays v. Mouille*, 14 Pa. St. 48.

2. *Crawshay v. Eades*, 1 B. & C. 181, 8 E. C. L. 78.

3. *Hays v. Mouille*, 14 Pa. St. 48.

4. **Delivery at Destination to Warehouseman Who Receives as Buyer's Agent.** — *Harman v. Anderson*, 2 Campb. 243; *Dixon v. Baldwin*, 5 East 184; *Lucas v. Dorrien*, 7 Taunt. 279, 2 E. C. L. 278; *Brooke Iron Co. v. O'Brien*, 135 Mass. 442; *Walsh v. Blakely*, 6 Mont. 194; *Atkins v. Colby*, 20 N. H. 156; *Hoover v. Tibbits*, 13 Wis. 79.

5. **Delivery Short of Destination to Warehouseman Acting as Buyer's Receiving Agent.** — *Covell v. Hitchcock*, 23 Wend. (N. Y.) 611; *Buckley v. Furniss*, 15 Wend. (N. Y.) 137; *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188. See also *supra*, this subsection, *To Buyer's Agent*.

6. *Ex p. Barrow*, 6 Ch. D. 783.

7. *Richardson v. Goss*, 3 B. & P. 119; *Wentworth v. Outhwaite*, 10 M. & W. 436; *Rowe v. Pickford*, 8 Taunt. 83, 4 E. C. L. 27.

8. *Dodson v. Wentworth*, 4 M. & G. 1080, 43 E. C. L. 555. See also *Sawyer v. Joslin*, 20 Vt. 172, 49 Am. Dec. 768.

9. *Ex p. Barrow*, 6 Ch. D. 783.

10. **Agreement Not Implied from Mere Fact that Warehouseman Is Appointed by Buyer.** — *Blackman v. Pierce*, 23 Cal. 508; *Powell v. McKechnie*, 3 Dak. 319; *Covell v. Hitchcock*, 23 Wend. (N. Y.) 611; *Buckley v. Furniss*, 15 Wend. (N. Y.) 137; *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188; *Hoover v. Tibbits*, 13 Wis. 79.

11. **Delivery to Buyer's Assignee in Bankruptcy.** — *Tooke v. Hollingworth*, 5 T. R. 226; *Ellis v. Hunt*, 3 T. R. 467; *Scott v. Pettit*, 3 B. & P. 460; *Inglis v. Usherwood*, 1 East 515.

12. *Millard v. Webster*, 54 Conn. 415. But see *supra*, this subsection, *Necessity of Acceptance of Goods*.

13. *Tufts v. Sylvester*, 70 Me. 213, 1 Am. St. Rep. 303.

goods, and pursuant to his directions they are delivered to the pledgee, the right of stoppage is terminated.¹ On the other hand, it has been held that such right is not terminated by delivery to one holding a general mortgage on the buyer's property, even though the mortgage specifically includes after-acquired property.²

(g) **To Subpurchaser.** — Where the buyer sells the goods to a third party the right of stoppage is ended by delivery to such party, either at the destination of the goods³ or at an intermediate point;⁴ but the mere issuing of a bill of lading to a subpurchaser by a connecting carrier before the latter has received the goods will not constitute a delivery to the subpurchaser, especially where the buyer has no bill of lading, and as between him and the original seller the title to the goods is not to pass until payment.⁵ The subpurchaser must be a *bona fide* purchaser for value without notice; but mere knowledge that the original buyer has not paid for the goods is not sufficient to defeat the subpurchaser's right,⁶ and a pre-existing debt is a sufficient consideration to support the subsale.⁷

2. Subsale. — A subsale made by the buyer pending transit, but without either a delivery of the goods or an indorsement and delivery of the bill of lading to the subpurchaser, does not terminate the right of stoppage.⁸

3. Transfer of Bill of Lading — *a. IN GENERAL.* — **Right of Stoppage Terminated.** — Owing to the *quasi*-negotiable character of a bill of lading, an indorsement thereof not only transfers the title to the goods, but has the same effect as a delivery of possession of the goods themselves,⁹ and hence the right of stoppage is terminated by the indorsement and delivery of the bill of lading to a *bona fide* transferee for value without notice, the right being terminated absolutely where the transferee is a purchaser,¹⁰ and to the extent of the

1. Brooke Iron Co. v. O'Brien, 135 Mass. 442; Walsh v. Blakely, 6 Mont. 194.

2. **Delivery to Mortgagee.** — Kingman v. Denison, 84 Mich. 608, 22 Am. St. Rep. 711. This decision seems to have been based upon the ground that the buyer did not acquire a complete ownership of the goods before delivery, and that hence the mortgage lien never attached to the goods in question, they never having come to the possession of the buyer.

3. Klein v. Fischer, 30 Mo. App. 568; U. S. Wind Engine, etc., Co. v. Oliver, 16 Neb. 612.

4. Stevens v. Wheeler, 27 Barb. (N. Y.) 658.

5. Pattison v. Culton, 33 Ind. 240, 5 Am. Rep. 199.

6. Shepard, etc., Lumber Co. v. Burroughs, 62 N. J. L. 469. See also *infra*, this section, *Transfer of Bill of Lading*.

7. **Pre-existing Debt Sufficient to Support Subsale.** — Shepard, etc., Lumber Co. v. Burroughs, 62 N. J. L. 469. See also *infra*, this section, *Transfer of Bill of Lading. Contra*, Koontz v. Wheeling, etc., R. Co., 7 Ohio Dec. 478, *affirmed* 9 Ohio Cir. Dec. 102, 61 Ohio St. 551, 76 Am. St. Rep. 435. *Compare* Macon, etc., R. Co. v. Meador, 65 Ga. 705.

8. **Subsale Without Indorsement and Delivery of Bill of Lading.** — Kemp v. Falk, 7 App. Cas. 573; *Ex p.* Davis, 13 Ch. D. 628; Small v. Moates, 9 Bing. 574; Dixon v. Yates, 5 B. & Ad. 313, 27 E. C. L. 86; McEwen v. Smith, 6 Rolls App. 340; Craven v. Ryder, 6 Taunt. 433, 1 E. C. L. 439; Branan v. Atlanta, etc., R. Co., 108 Ga. 70, 75 Am. St. Rep. 26; Pattison v. Culton, 33 Ind. 240, 5 Am. Rep. 199; Ilsley v. Stubbs, 9 Mass. 71; Holbrook v. Vose, 6 Bosw. (N. Y.) 76; Chandler v. Fulton, 10 Tex. 2, 60 Am. Dec. 188.

9. **General Effect of Indorsement of Bill of Lading.** — Lickbarrow v. Mason, 2 T. R. 63, 1 Smith Lead. Cas. (8th ed.) 753; Winslow v. Norton, 29 Me. 419, 50 Am. Dec. 601. See also the title **BILLS OF LADING**, vol. 4, p. 546 *et seq.*

10. **Indorsement and Delivery of Bill of Lading to Bona Fide Purchaser for Value Without Notice** — *England.* — Haille v. Smith, 1 B. & P. 570; Salomons v. Nissen, 2 T. R. 681; Lickbarrow v. Mason, 2 T. R. 63; Cuming v. Brown, 9 East 506; Newsom v. Thornton, 6 East 22; Walley v. Montgomery, 3 East 585; Leask v. Scott, 2 Q. B. D. 376; Jones v. Jones, 8 M. & W. 431; Evans v. Marlett, 1 Ld. Raym. 271; Kemp v. Canavan, 15 Ir. C. L. 216.

Canada. — Clementson v. Grand Trunk R. Co., 42 U. C. Q. B. 273.

United States. — Conard v. Atlantic Ins. Co., 1 Pet. (U. S.) 445; Walter v. Ross, 2 Wash. (U. S.) 283.

Alabama. — Loeb v. Peters, 63 Ala. 243, 35 Am. Rep. 17.

California. — Newhall v. Central Pac. R. Co., 51 Cal. 345, 21 Am. Rep. 713.

Colorado. — Denver First Nat. Bank v. Schmidt, 6 Colo. App. 216.

Georgia. — Branan v. Atlanta, etc., R. Co., 108 Ga. 70, 75 Am. St. Rep. 26.

Maine. — Lee v. Kimball, 45 Me. 172.

Massachusetts. — Brooke Iron Co. v. O'Brien, 135 Mass. 442; Stanton v. Eager, 16 Pick. (Mass.) 467; Rowley v. Bigelow, 12 Pick. (Mass.) 307, 23 Am. Dec. 607; Stubbs v. Lund, 7 Mass. 457, 5 Am. Dec. 63.

New York. — Becker v. Hallgarten, 86 N. Y. 167; Dows v. Perrin, 16 N. Y. 325; Blossom v. Champion, 28 Barb. (N. Y.) 217; Stevens v.

amount advanced or secured where the transferee is a pledgee.¹ In the latter case the right of stoppage remains, in equity at all events, subject to the charge in favor of the pledgee, entitling the seller to the residue remaining after the satisfaction of the pledgee's claim;² and this right to such residue cannot be defeated by reason of debts due from the pledgor to the pledgee, but not covered by the pledge.³ The seller may, moreover, require the pledgee to marshal assets.⁴ After the amount secured by the pledge has been paid the right of stoppage revives *in toto*, and the parties stand in the same position as if the pledge had never been made.⁵

Necessity of Good Faith. — The transfer must be *bona fide*. The right of stoppage will not be defeated by an apparent sale, fraudulently made for the purpose of defeating the rights of the original seller.⁶

Necessity of Delivery. — An assignment of the bill of lading by the buyer, without delivery to the assignee, will not defeat the right of stoppage.⁷ Even the execution of the bill of lading in the name of the subpurchaser and the delivery thereof to the original buyer will not cut off the right of stoppage, where the bill is not delivered to the subpurchaser.⁸

Necessity of Indorsement. — The right of stoppage will be terminated by the transfer of an unindorsed bill of lading where the lack of indorsement is due to the neglect of the person asserting such right; as, for example, where the shipper sends to a bank, for acceptance and collection, a draft with an unindorsed bill of lading drawn to his own order attached thereto, and upon acceptance the bank delivers the unindorsed bill to the buyer, who in turn indorses and transfers it for value.⁹ On the other hand, the right of stoppage will not be defeated where the lack of indorsement is not traceable to the person seeking to assert such right, as where the bill of lading is made out to the carrier's transfer agent, who thereafter sends it, without indorsement, to the buyer, who in turn indorses and transfers it for value.¹⁰

Where the Bill Is Issued Without Delivery of the Goods to the Carrier, the general rule is that it is without force or effect even in the hands of a *bona fide* transferee for value without notice, at least until the goods are received by the carrier;¹¹ but the transfer of such bill may nevertheless, under some circumstances,

Wheeler, 27 Barb. (N. Y.) 661; Haggerty v. Palmer, 6 Johns. Ch. (N. Y.) 437.

Ohio. — Wheeling, etc., R. Co. v. Kootz, 9 Ohio Cir. Dec. 102, 15 Ohio Cir. Ct. 288, affirmed 61 Ohio St. 551, 76 Am. St. Rep. 435.

Pennsylvania. — Schumacher v. Eby, 24 Pa. St. 521.

Tennessee. — Boyd v. Mosely, 2 Swan (Tenn.) 661.

Texas. — Missouri Pac. R. Co. v. Heidenheimer, 82 Tex. 195, 27 Am. St. Rep. 861; Chandler v. Fulton, 10 Tex. 2, 60 Am. Dec. 188.

1. **Pledge of Bill of Lading.** — Lickbarrow v. Mason, 2 T. R. 63, 1 Smith Lead. Cas. (8th ed.) 753; Coventry v. Gladstone, L. R. 6 Eq. 44; Kemp v. Falk, 7 App. Cas. 576; Matter of West-zinthus, 5 B. & Ad. 817, 27 E. C. L. 201; Spalding v. Ruding, 6 Beav. 376, 12 L. J. Ch. 503; Sewell v. Burdick, 10 App. Cas. 74, 13 Q. B. D. 159, 10 Q. B. D. 363; *Ex p.* Davis, 13 Ch. D. 628; Denver First Nat. Bank v. Schmidt, 6 Colo. App. 216; Holbrook v. Vose, 6 Bosw. (N. Y.) 76; Missouri Pac. R. Co. v. Heidenheimer, 82 Tex. 195, 27 Am. St. Rep. 861; Chandler v. Fulton, 10 Tex. 2, 60 Am. Dec. 188.

2. Chandler v. Fulton, 10 Tex. 2, 60 Am. Dec. 188.

3. Spalding v. Ruding, 6 Beav. 376.

4. **Seller May Require Pledgee to Marshal Assets.** — Spalding v. Ruding, 6 Beav. 376; Kemp v.

Falk, 7 App. Cas. 575. See generally the title MARSHALING ASSETS, vol. 19, p. 1255.

Thus, for example, it has been held that where the pledgee has previously advanced money to the buyer on the credit of other goods belonging to the buyer and in the pledgee's possession, the value of which is sufficient to satisfy all claims due from the buyer to the pledgee, including the advance for the security of which the bill is pledged, the seller may require the pledgee to exhaust his general security before enforcing the specific pledge. Matter of West-zinthus, 5 B. & Ad. 817, 27 E. C. L. 201.

5. **Right of Stoppage Revived by Payment of Pledge.** — Short v. Simpson, L. R. 1 C. P. 248, 35 L. J. C. Pl. 147. See also Chandler v. Fulton, 10 Tex. 2, 60 Am. Dec. 188.

6. **Fraudulent Transfer of Bill.** — Rosenthal v. Dessau, 11 Hun (N. Y.) 49.

7. *Ex p.* Davis, 13 Ch. D. 628; Chandler v. Fulton, 10 Tex. 2, 60 Am. Dec. 188.

8. *Ex p.* Davis, 13 Ch. D. 628.

9. St. Paul Roller-Mill Co. v. Great Western Despatch Co., 27 Fed. Rep. 434.

10. Sheppard v. Newhall, (C. C. A.) 54 Fed. Rep. 306, reversing 47 Fed. Rep. 468, and distinguishing St. Paul Roller-Mill Co. v. Great Western Despatch Co., 27 Fed. Rep. 434.

11. See the title BILLS OF LADING, vol. 4, pp. 511, 532.

operate to defeat the right of stoppage. Thus, it has been held that where the buyer delivers the bills of lading to a connecting carrier at the place of original destination, receiving new bills of lading which he then indorses and delivers to a *bona fide* purchaser of the goods for value without notice, and such purchaser, upon learning that the new bills were issued without a delivery of the goods to the carrier issuing them, notifies the first carrier of his claim to the goods before the seller gives to such carrier notice of stoppage, the right of stoppage is defeated.¹

Transfer After Notice of Stoppage. — The indorsement and transfer of the bill of lading of a *bona fide* purchaser for value will defeat the right of stoppage even where the transfer is made after notice of stoppage has been given to the carrier, provided the transferee has no notice of the attempted stoppage.²

Transfer of Duplicate Bill. — It has been held that the transfer of a duplicate bill of lading, marked as such, will not terminate the right of stoppage, the reason being that the absence of the other part or parts of the bill is sufficient to put the transferee upon notice as to the *bona fides* of the transfer;³ but the decision in which this doctrine was enunciated has been expressly disapproved, and, though the question seems somewhat unsettled, the weight of authority seems to be that the transfer of a duplicate bill, though marked as such, terminates the right of stoppage as effectually as if the bill were marked "original" or were not marked at all.⁴

In Georgia the right of stoppage is preserved by statute until there has been an actual delivery of the goods to the buyer,⁵ except where the bill of lading has been assigned to a *bona fide* transferee for value without notice;⁶ but nothing short of the actual assignment of the bill will place the transferee within the exception.⁷

A Delivery Order given to a subpurchaser will not have the effect of an assigned bill of lading, this effect being due to the *quasi* negotiability of the bill, a quality not possessed by a delivery order.⁸

b. WHO ARE TRANSFEREES FOR VALUE WITHOUT NOTICE — (1) *For Value.* — One to Whom the Goods Are Sold by the original buyer and to whom the bill of lading is transferred is manifestly a transferee for value where he gives a new consideration for the sale and transfer; but it has been held that a pre-existing debt is not such a valuable consideration as will support the subsale as against the original seller's right of stoppage.⁹ There are, however, many cases to the contrary, a pre-existing debt being held to be a consideration sufficient to make the subpurchaser a transferee for value.¹⁰

1. *Ætna Nat. Bank v. Union Pac. R. Co.*, 69 Mo. App. 246.

2. *Newhall v. Central Pac. R. Co.*, 51 Cal. 345, 21 Am. Rep. 713; *Ætna Nat. Bank v. Union Pac. R. Co.*, 69 Mo. App. 246.

3. *Castanola v. Missouri Pac. R. Co.*, 24 Fed. Rep. 267.

4. **Right Terminated by Transfer of Duplicate Bill.** — *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 27 Am. St. Rep. 861. See also note to *Castanola v. Missouri Pac. R. Co.*, 24 Fed. Rep. 270. And see generally, as to the transfer of duplicate bills, the title **BILLS OF LADING**, vol. 4, p. 552.

5. **Georgia Statute.** — See 2 Code Ga., §§ 2285, 3552, and *supra*, this section, *Delivery — Constructive Delivery or Delivery by Attornment.*

6. *Branan v. Atlanta, etc.*, R. Co., 108 Ga. 70, 75 Am. St. Rep. 26.

7. *Ocean Steamship Co. v. Ehrlich*, 88 Ga. 502, 30 Am. St. Rep. 164.

8. *Jenkyns v. Osborne*, 7 M. & G. 678, 49 E.

C. L. 698, 8 Scott N. R. 505; *Kemp v. Falk*, 7 App. Cas. 573; *Ocean Steamship Co. v. Ehrlich*, 88 Ga. 502, 30 Am. St. Rep. 164.

9. *Koontz v. Wheeling, etc.*, R. Co., 7 Ohio Dec. 478, *affirming* 9 Ohio Cir. Dec. 102, 61 Ohio St. 551, 76 Am. St. Rep. 435.

10. **Indorsement of Bill in Payment of Pre-existing Debt Held to Be Transfer for Value.** — *Leask v. Scott*, 2 Q. B. D. 376; *Clementson v. Grand Trunk R. Co.*, 42 U. C. Q. B. 273; *St. Paul Roller-Mill Co. v. Great Western Despatch Co.*, 27 Fed. Rep. 434; *Davis v. Russell*, 52 Cal. 611, 28 Am. Rep. 647; *Denver First Nat. Bank v. Schmidt*, 6 Colo. App. 216; *Peters v. Elliott*, 78 Ill. 321; *Lee v. Kimball*, 45 Me. 172; *Dymock v. Midland Nat. Bank*, 67 Mo. App. 97; *Dymock v. Missouri, etc.*, R. Co., 54 Mo. App. 400; *Shepard, etc., Lumber Co. v. Burroughs*, 62 N. J. L. 469; *Atkinson v. Brooks*, 26 Vt. 569, 62 Am. Dec. 592. See also the titles **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 285; **SALES**, vol. 24, p. 1171.

One to Whom the Bill Is Pledged as security for advancements made upon the faith of such pledge is, without question, a transferee for value;¹ and the fact that the money is actually advanced before the delivery of the bill does not impair the rights of the pledgee,² it being sufficient if the advance in fact be made with reference to the bill as security.³ Where, however, the pledge is to secure a pre-existing debt the authorities are in conflict, one line of cases holding that such a debt is sufficient to make the indorsee of the bill a transferee for value,⁴ and the other line holding exactly the contrary.⁵

The Buyer's Assignee for Creditors is not a purchaser for value, and the right of stoppage will not be defeated by an indorsement of the bill of lading to him.⁶

(2) *Without Notice* — *Notice of Nonpayment* — Mere knowledge on the part of the transferee that the buyer has not paid for the goods will not defeat his right as against the seller.⁷

Notice of Insolvency. — It has even been held that knowledge of the buyer's actual insolvency, though evidence of notice, is not alone sufficient to charge the transferee with such notice as will defeat his rights;⁸ but the question seems to be unsettled, a contrary rule having been enunciated by authority equally as respectable as that sustaining the doctrine just stated.⁹

The General Test is whether the transferee has notice of any circumstances rendering the bill of lading not fairly and honestly assignable, the application of the rule being dependent upon the peculiar facts of each particular case in which the question of notice arises.¹⁰

4. *Assignment by Buyer.* — The right of stoppage is not terminated by an assignment by the buyer for the benefit of his creditors, the assignee in such case being vested with all the rights of the assignor, but no others.¹¹

5. *Seizure of Goods under Legal Process Against Buyer.* — The Right of Stoppage Is Not Defeated by the seizure of the goods, before delivery to the buyer, under attachment proceedings instituted by the buyer's creditors,¹² nor by seizure

1. *Pledge of Bill as Security for Advancements — Transfer for Value.* — *Kemp v. Falk*, 7 App. Cas. 576; *Matter of Westzinthus*, 5 B. & Ad. 817, 27 E. C. L. 201; *Spalding v. Ruding*, 6 Beav. 376, 12 L. J. Ch. 503; *Sewell v. Burdick*, 10 App. Cas. 74, 13 Q. B. D. 159, 10 Q. B. D. 363; *Coventry v. Gladstone*, L. R. 6 Eq. 44; *Ex p. Davis*, 13 Ch. D. 628; *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188; *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 27 Am. St. Rep. 861.

2. *Becker v. Hallgarten*, 86 N. Y. 167.

3. *Becker v. Hallgarten*, 86 N. Y. 167.

4. *Pledge of Bill as Security for Pre-existing Debt Held to Be Transfer for Value.* — *Leask v. Scott*, 2 Q. B. D. 376; *Clementson v. Grand Trunk R. Co.*, 42 U. C. Q. B. 273; *St. Paul Roller-Mill Co. v. Great Western Despatch Co.*, 27 Fed. Rep. 434; *Davis v. Russell*, 52 Cal. 611, 28 Am. Rep. 647; *Denver First Nat. Bank v. Schmidt*, 6 Colo. App. 216; *Peters v. Elliott*, 78 Ill. 321; *Atkinson v. Brooks*, 26 Vt. 569, 62 Am. Dec. 592.

5. *Pledge of Bill to Secure Pre-existing Debt Held Not to Be Transfer for Value.* — *Lesassier v. The Southwestern*, 2 Woods (U. S.) 35; *Loeb v. Peters*, 63 Ala. 243, 35 Am. Rep. 17; *Dymock v. Midland Nat. Bank*, 67 Mo. App. 97; *Dymock v. Missouri*, etc., R. Co., 54 Mo. App. 400; *Barnard v. Campbell*, 58 N. Y. 73, 17 Am. Rep. 208. See also *Lee v. Kimball*, 45 Me. 172.

6. *Assignee for Creditors.* — *Stanton v. Eager*, 16 Pick. (Mass.) 467. See also *Harris v. Hart*, 6 Duer (N. Y.) 606, *affirmed* 17 N. Y. 249.

7. *Rights of Transferee Not Affected by Mere Knowledge of Nonpayment by Buyer.* — *Cuming*

v. Brown, 9 East 506; *Salomons v. Nissen*, 2 T. R. 681; *Jones v. Jones*, 8 M. & W. 431; *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188. See also *Shepard, etc., Lumber Co. v. Burroughs*, 62 N. J. L. 469.

8. *Loeb v. Peters*, 63 Ala. 243, 35 Am. Rep. 17; *Rosenthal v. Dessau*, 11 Hun (N. Y.) 49.

9. *Stanton v. Eager*, 16 Pick. (Mass.) 467; *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188.

10. *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188.

11. *Buyer's Assignment for Creditors.* — *Tufts v. Sylvester*, 79 Me. 213, 1 Am. St. Rep. 303; *Stanton v. Eager*, 16 Pick. (Mass.) 467; *Arnold v. Delano*, 4 Cush. (Mass.) 33, 50 Am. Dec. 754; *Harris v. Hart*, 6 Duer (N. Y.) 606, *affirmed* 17 N. Y. 249; *Buckley v. Furniss*, 17 Wend. (N. Y.) 504; *Bell v. Moss*, 5 Whart. (Pa.) 205; *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188.

12. *Right of Stoppage Superior to Attachment Against Buyer — England.* — *Smith v. Goss*, 1 Campb. 282.

Canada. — *McLean v. Breithaupt*, 12 Ont. App. 383.

Alabama. — *Bayonne Knife Co. v. Umbenhauer*, 107 Ala. 496, 54 Am. St. Rep. 114.

Arkansas. — *Mason v. Wilson*, 43 Ark. 172.

California. — *Blackman v. Pierce*, 23 Cal. 509.

Connecticut. — *Aguirre v. Parmelee*, 22 Conn. 473; *Woodruff v. Noyes*, 15 Conn. 335.

Iowa. — *Greve v. Dunham*, 60 Iowa 108; *O'Neil v. Garrett*, 6 Iowa 480; *Cox v. Burns*, 1 Iowa 64.

Kansas. — *Symms v. Schotten*, 35 Kan. 310; *Rucker v. Donovan*, 13 Kan. 251, 19 Am. Rep. 84.

under an execution against the buyer.¹ This principle has been applied even in a case where, but for the attachment, the goods would have reached the possession of the buyer before the notice of stoppage was given.²

The Time of Attachment Is Immaterial, the right of stoppage being paramount regardless of the question whether the attachment be levied before or after such right is asserted.³

Payment of Freight by the Attaching Creditor will not render the attachment superior to the right of stoppage,⁴ since no one can constitute himself the buyer's agent to receive without the latter's consent;⁵ and it has even been held that the interests of the buyer and the attaching creditor are so antagonistic that the latter cannot, in order to defeat the right of stoppage, act as the receiving agent of the former even though specifically appointed by him to receive the goods.⁶ But where the creditor or the officer representing him has paid the freight, he is subrogated to the rights of the carrier in regard thereto, and may retain the goods until he has been reimbursed by the party exercising the right of stoppage.⁷

A Sale of the Goods under process against the buyer does not defeat the right of stoppage.⁸

An Attachment by the Carrier for freight arrearages due from the consignee stands on the same ground as any other attachment, and does not defeat the right of stoppage.⁹

An Attachment by the Seller operates as a waiver of the right of stoppage.¹⁰

Duty of Carrier. — The carrier is not bound to exercise any diligence to prevent the attachment of the goods by the buyer's creditors,¹¹ nor to notify the attaching officer of the receipt of notice of stoppage and request him not to deliver the goods to the buyer,¹² nor to notify the seller of the attachment

Kentucky. — *Hause v. Judson*, 4 Dana (Ky.) 10, 29 Am. Dec. 377; *Wood v. Yeatman*, 15 B. Mon. (Ky.) 270; *Secomb v. Nutt*, 14 B. Mon. (Ky.) 261.

Louisiana. — *Blum v. Marks*, 21 La. Ann. 268, 99 Am. Dec. 725.

Maine. — *Newhall v. Vargas*, 15 Me. 314, 33 Am. Dec. 617.

Maryland. — *O'Brien v. Norris*, 16 Md. 122, 77 Am. Dec. 284.

Massachusetts. — *Durgy Cement, etc., Co. v. O'Brien*, 123 Mass. 12; *Seymour v. Newton*, 105 Mass. 272; *Naylor v. Dennie*, 8 Pick. (Mass.) 198, 19 Am. Dec. 319.

Mississippi. — *Dreyfus v. Mayer*, 69 Miss. 282; *Langstaff v. Stix*, 64 Miss. 171, 60 Am. Rep. 49; *Morris v. Shryock*, 50 Miss. 590; *Dickman v. Williams*, 50 Miss. 500.

Missouri. — *Estey v. Truxel*, 25 Mo. App. 238; *Schwabacher v. Kane*, 13 Mo. App. 126.

Nebraska. — *Schuster v. Carson*, 28 Neb. 612; *Chicago, etc., R. Co. v. Painter*, 15 Neb. 394.

Nevada. — *More v. Lott*, 13 Nev. 376.

New Hampshire. — *Inlee v. Lane*, 57 N. H. 454; *Atkins v. Colby*, 20 N. H. 154.

New York. — *Covell v. Hitchcock*, 23 Wend. (N. Y.) 611; *Buckley v. Furniss*, 15 Wend. (N. Y.) 137, 17 Wend. (N. Y.) 504; *Clark v. Lynch*, 4 Daly (N. Y.) 83.

Ohio. — *Calahan v. Babcock*, 21 Ohio St. 281, 8 Am. Rep. 63; *Benedict v. Schaettle*, 12 Ohio St. 515.

Pennsylvania. — *Cabeen v. Campbell*, 30 Pa. St. 258; *Hays v. Mouille*, 14 Pa. St. 48; *Eastern Lumber Co. v. Gill*, 9 Pa. Co. Ct. 630; *Bender v. Bowman*, 2 Pearson (Pa.) 517.

South Carolina. — *Parker v. M'Iver*, 1 Desaus. (S. Car.) 274, 1 Am. Dec. 656.

Tennessee. — *Mississippi Mills v. Union, etc., Bank*, 9 Lea (Tenn.) 314.

Texas. — *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188.

Vermont. — *Kitchen v. Spear*, 30 Vt. 545.

Wisconsin. — *Sherman v. Rugee*, 55 Wis. 346.

1. Right Superior to Execution Against Buyer. — *Weber v. Baessler*, 3 Colo. App. 459; *Buckley v. Furniss*, 15 Wend. (N. Y.) 137; *Jenks v. Fulmer*, 160 Pa. St. 527; *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188.

2. O'Neil v. Garrett, 6 Iowa 480.

3. Time of Attachment Immaterial. — *Cox v. Burns*, 1 Iowa 64; *Calahan v. Babcock*, 21 Ohio St. 281, 8 Am. Rep. 63.

4. Paying Freight. — *Greve v. Dunham*, 60 Iowa 108; *Heinz v. Railroad Transfer Co.*, 82 Mo. 233; *More v. Lott*, 13 Nev. 376.

5. See supra, this section, *Delivery — Sufficiency of Delivery — Necessity of Acceptance of Goods*.

6. Harris v. Tenney, 85 Tex. 254, 34 Am. St. Rep. 796.

7. Party Paying Freight May Retain Goods until Reimbursed. — *Greve v. Dunham*, 60 Iowa 108; *Rucker v. Donovan*, 13 Kan. 251, 19 Am. Rep. 84; *Langstaff v. Stix*, 64 Miss. 171, 60 Am. Rep. 49.

8. See supra, this title, *Limitations of Right — Property Subject to Stoppage*.

9. Farrell v. Richmond, etc., R. Co., 102 N. Car. 390, 11 Am. St. Rep. 760.

10. See infra, this section, *Waiver*.

11. MacVeagh v. Atchison, etc., R. Co., 3 N. Mex. 205.

12. French v. Star Union Transp. Co., 134 Mass. 288.

where the latter already has knowledge thereof.¹

Rights and Liabilities of Parties. — After the notice of stoppage has been given, the seller may enforce his right of possession thereupon accruing by intervention in the attachment proceedings,² by interpleader to determine the rights of the parties,³ or by an appropriate action against the creditor at whose instance the goods were levied on,⁴ or against the officer who levied the writ,⁵ or jointly against the creditor and the officer,⁶ or against the carrier or middleman who has refused, on account of the attachment, to redeliver the goods to the seller.⁷ On the other hand, the creditor, officer, or carrier may resort to legal proceedings to determine the rights of the respective claimants, and thus protect himself from any further liability than such as may have already accrued when the notice of stoppage is given.⁸

6. Waiver — Claiming under Authority of Buyer. — Where the seller claims the right of possession under the authority of the buyer, as by virtue of an indorsement of a bill of lading or by any other act of transfer, and does not rely upon his right to stoppage, he waives such right;⁹ but the mere fact that the right is exercised with the consent of and pursuant to an agreement with the consignee is insufficient to show such a waiver.¹⁰

Attachment by Seller. — Where the seller attaches the goods while in transit he thereby waives his right of stoppage.¹¹

1. *MacVeagh v. Atchison, etc., R. Co.*, 3 N. Mex. 205; *Baltimore, etc., R. Co. v. Davis*, (Pa. 1888) 12 Atl. Rep. 335.

2. **Intervention by Seller in Attachment Proceedings.** — *Bayonne Knife Co. v. Umbenhauer*, 107 Ala. 496, 54 Am. St. Rep. 114; *Symms v. Schotten*, 35 Kan. 310; *Secomb v. Nutt*, 14 B. Mon. (Ky.) 261; *Hause v. Judson*, 4 Dana (Ky.) 8, 29 Am. Dec. 377; *Blum v. Marks*, 21 La. Ann. 268, 99 Am. Dec. 725; *O'Brien v. Norris*, 16 Md. 122, 77 Am. Dec. 284; *Dreyfus v. Mayer*, 69 Miss. 282; *Langstaff v. Stix*, 64 Miss. 171, 60 Am. Rep. 49; *Dickman v. Williams*, 50 Miss. 500; *Morris v. Shryock*, 50 Miss. 590; *Estey v. Truxel*, 25 Mo. App. 238.

3. **Interpleader by Seller.** — *Bender v. Bowman*, 2 Pearson (Pa.) 517; *McLean v. Breithaupt*, 12 Ont. App. 383.

4. **Action by Seller Against Creditor.** — *Mississippi Mills v. Union, etc., Bank*, 9 Lea (Tenn.) 314.

Trover by Seller Against Creditor. — *Kitchen v. Spear*, 30 Vt. 545.

5. **Action by Seller Against Officer for Possession.** — *Weber v. Baessler*, 3 Colo. App. 459; *More v. Lott*, 13 Nev. 376; *Calahan v. Babcock*, 21 Ohio St. 281, 8 Am. Rep. 63.

Replevin by Seller Against Officer. — *Mason v. Wilson*, 43 Ark. 172; *Greve v. Dunham*, 60 Iowa 108; *O'Neil v. Garrett*, 6 Iowa 480; *Rucker v. Donovan*, 13 Kan. 251, 19 Am. Rep. 84; *Durgy Cement, etc., Co. v. O'Brien*, 123 Mass. 12; *Seymour v. Newton*, 105 Mass. 272; *Schwabacher v. Kane*, 13 Mo. App. 126; *Schuster v. Carson*, 28 Neb. 612; *Atkins v. Colby*, 20 N. H. 154; *Buckley v. Furniss*, 15 Wend. (N. Y.) 137; *Benedict v. Schaettle*, 12 Ohio St. 515; *Sherman v. Rugee*, 55 Wis. 346.

Trover by Seller Against Officer. — *Aguirre v. Parmelee*, 22 Conn. 473; *Woodruff v. Noyes*, 15 Conn. 335; *Inslee v. Lane*, 57 N. H. 454; *Clark v. Lynch*, 4 Daly (N. Y.) 83; *Covell v. Hitchcock*, 23 Wend. (N. Y.) 611; *Kitchen v. Spear*, 30 Vt. 545.

Trespass by Seller Against Officer. — *Jenks v. Fulmer*, 160 Pa. St. 527.

Action for Damages by Seller Against Officer. — *Harris v. Tenney*, 85 Tex. 254, 34 Am. St. Rep. 796.

6. **Action by Seller Against Creditor and Officer.** — *Blackman v. Pierce*, 23 Cal. 509. See also cases cited in the preceding note.

7. **Replevin by Seller Against Carrier.** — *Chicago, etc., R. Co. v. Painter*, 15 Neb. 394. See also *infra*, this title, *Exercise of Right — Notice*.

Action for Possession by Seller Against Middleman. — *Cabeen v. Campbell*, 30 Pa. St. 254.

Trover by Seller Against Insolvency Messenger. — *Tufts v. Sylvester*, 79 Me. 213, 1 Am. St. Rep. 303.

Trover by Seller Against Wharfinger. — *Smith v. Goss*, 1 Campb. 282.

8. **Interpleader by Sheriff.** — *Eastern Lumber Co. v. Gill*, 9 Pa. Co. Ct. 630.

Interpleader by Creditors. — *Parker v. M'Iver*, 1 Desaus. (S. Car.) 274, 1 Am. Dec. 656.

Interpleader by Carrier. — *Howe v. Cincinnati, etc., R. Co.*, 10 Ohio Cir. Dec. 182.

As to Interpleader in General, see the title INTERPLEADER, 11 ENCYC. OF PL. AND PR. 444.

9. **Waiver by Claim under Authority of Buyer.** — *Siffken v. Wray*, 6 East 371; *Lane v. Jackson*, 5 Mass. 163. Compare *Scholfield v. Bell*, 14 Mass. 40.

10. **Buyer's Consent to Stoppage.** — *Feise v. Wray*, 3 East 93; *Scholfield v. Bell*, 14 Mass. 40; *Naylor v. Dennie*, 8 Pick. (Mass.) 198, 19 Am. Dec. 319; *Lane v. Jackson*, 5 Mass. 163.

11. **Waiver by Attachment of Goods.** — *Woodruff v. Noyes*, 15 Conn. 335; *Fox v. Willis*, 60 Tex. 373, in which latter case, however, it was held that there was no waiver by an attachment sued out under an erroneous impression that the right of stoppage had been lost, where such attachment was withdrawn as soon as the error was discovered and the right of stoppage thereafter was exercised before actual or constructive delivery.

Suit for the Purchase Price constitutes a waiver of the right of stoppage.¹ Such a suit is not a waiver of the rights which have been acquired by the seller against the carrier by reason of a previous notice of stoppage.²

The Seller's Refusal to Furnish the Carrier with Evidence of His Claim may under some circumstances be considered a waiver of the right of stoppage and justify the carrier, after a reasonable time, in delivering the goods to the buyer; but failure to make satisfactory proof of the claim is not such a waiver, it being the carrier's duty in such case to interplead the respective claimants or to investigate the matter for himself.³

Election of Remedies. — Where the seller has the right of stoppage and also the right to rescind the contract of sale, if he elects the latter remedy, as by taking possession of the goods and selling them as his own without notice to the buyer, he cannot thereafter assert the right of stoppage and hold the buyer's assignee liable for any proportion of the deficiency in the proceeds of the resale.⁴

Acceptance of Part Payment After Stoppage does not constitute a waiver of the right of stoppage, but merely reduces the amount of the seller's claim against the goods.⁵

7. Laches. — No laches other than such as results in the delivery of the goods to the buyer or to some one claiming under him will defeat the right of stoppage.⁶

V. EXERCISE OF RIGHT — 1. In General — Right Exercised by Resumption of Possession. — The right of stoppage is completely exercised when the seller has resumed possession of the goods.⁷ He need not, however, resume possession in person;⁸ nor is it essential that actual possession be resumed,⁹ a constructive repossession being equally efficient, as where the seller enters the goods in his own name at a custom house,¹⁰ or, the goods having been attached, the seller files his claim in the attachment proceedings,¹¹ or where the seller merely notifies the person in possession of the goods not to deliver them to the buyer.¹²

The Manner in Which Possession Is Regained is immaterial, provided only that the methods employed are not criminal.¹³

Stoppage of Portion of Goods. — Where goods covered by a single order are shipped in separate consignments over different routes, a stoppage of the goods in transit over one of the routes will not operate as a stoppage of the balance.¹⁴

Conflict of Laws. — The sufficiency of any particular attempt at stoppage is determined by the law of the country wherein such attempt is made. If the attempt amounts to a stoppage in the country where it is made, it will be held sufficient even in a country wherein, under the same circumstances, the attempt would have been held to be too late to be effective.¹⁵

2. By Agent — In General. — The right of stoppage may be exercised as effectually through the agency of another as by the seller in person.¹⁶

1. Waiver by Suit for Purchase Price. — *Calahan v. Babcock*, 21 Ohio St. 294, 8 Am. Rep. 63, wherein it was held that where a suit is instituted under an erroneous impression that the transit of the goods has ended, and the right of stoppage is properly asserted after the mistake has been discovered, the suit being abandoned, there is no waiver.

2. *Bloomingdale v. Memphis, etc.*, R. Co., 6 Lea (Tenn.) 616.

3. *Allen v. Maine Cent. R. Co.*, 79 Me. 327, 1 Am. St. Rep. 370.

4. *Kearney Milling, etc., Co. v. Union Pac. R. Co.*, 97 Iowa 719, 59 Am. St. Rep. 434.

5. *Secomb v. Nutt*, 14 B. Mon. (Ky.) 261.

6. Right Not Barred by Laches. — *Schwabacher v. Kane*, 13 Mo. App. 126; *Buckley v. Furmss*, 15 Wend. (N. Y.) 137.

7. Resumption of Possession of Goods. — *New-*

hall v. Vargas, 15 Me. 314, 33 Am. Dec. 617; *Jordan v. James*, 5 Ohio 88.

8. See *infra*, this section, *By Agent*.

9. *Mills v. Ball*, 2 B. & P. 457; *Rucker v. Donovan*, 13 Kan. 253, 19 Am. Rep. 84; *Atkins v. Colby*, 20 N. H. 156.

10. *Ex p. Walker*, cited in *Benjamin on Sales* (6th Am. ed.), § 859.

11. *O'Brien v. Norris*, 16 Md. 122, 77 Am. Dec. 284. See also *supra*, this title, *Termination of Right* — *Seizure of Goods under Legal Process Against Buyer*.

12. See *infra*, this section, *Notice*.

13. *Cabeen v. Campbell*, 30 Pa. St. 254.

14. *Dixon v. Baldwin*, 5 East 175.

15. *Inglis v. Usherwood*, 1 East 515.

16. Right Exercisable by Agent. — *Whitehead v. Anderson*, 9 M. & W. 518; *Northey v. Field*, 2 Esp. 613; *Holst v. Pownall*, 1 Esp. 240; *Hutch-*

The Authority of the Agent need not relate specifically to the matter of stoppage, a general authority to look after the consignment and the security of the purchase price being sufficient.¹ Thus, stoppage has been held to be sufficient when made by an expressman charged with the collection of the purchase price and with the duty of seeing that the goods were not delivered before payment;² by a bank cashier charged with the duty of collecting the purchase-money draft;³ and by an agent authorized to take such steps as he deemed advisable for the purpose of securing the purchase price.⁴ On the other hand, it has been held that a forwarding agent to whom the goods have been shipped by the direction of the buyer cannot, after the goods have been shipped by him, stop them as the agent of the seller.⁵

Ratification. — Any defect in the agent's authority will be cured by a subsequent ratification of the stoppage by the principal,⁶ provided such ratification be made before the buyer has obtained possession of the goods.⁷ The principle of ratification has been extended even to cases where the buyer refused to receive the goods and placed them in the possession of a third party subject to the orders of the seller, a subsequent ratification of such disposition of the goods being held to constitute a sufficient exercise of the right of stoppage;⁸ but it seems hardly necessary to invoke the doctrine of ratification to sustain the seller's right to the goods in such a case, the operation of the so-called ratification as an effectual stoppage being fully sustained by the principle heretofore discussed that where the buyer refuses to receive the goods any one into whose hands they come is a middleman,⁹ and the principle hereafter stated that any indication by the seller to the person in possession of the goods of an intention to resume possession is a sufficient stoppage.¹⁰

3. Notice — *a.* IN GENERAL. — The right of stoppage may be exercised by a notice to the proper parties indicating an intention on the part of the seller to resume possession of the goods.¹¹

b. EFFECT OF NOTICE — In General. — Upon service of the notice of stoppage the seller acquires a right of possession, subject only to the lien for freight¹² and to the rights of *bona fide* purchasers,¹³ which may be enforced against any one into whose possession the goods thereafter may come,¹⁴ including the buyer himself¹⁵ or his assignee.¹⁶

ing v. Nunes, 1 Moo. P. C. C. N. S. 243; *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489.

1. Agent's Authority May Be General. — *Bell v. Moss*, 5 Whart. (Pa.) 189; *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188.

2. *Reynolds v. Boston, etc.*, R. Co., 43 N. H. 580.

3. *Seymour v. Newton*, 105 Mass. 272.

4. *Whitehead v. Anderson*, 9 M. & W. 518.

5. *Becker v. Hallgarten*, 86 N. Y. 167.

6. Defects in Agent's Authority Cured by Ratification. — *Hutchings v. Nunes*, 1 Moo. P. C. C. N. S. 243; *Newhall v. Vargas*, 13 Me. 109, 29 Am. Dec. 489; *Durgy Cement, etc.*, Co. v. O'Brien, 123 Mass. 12; *Bell v. Moss*, 5 Whart. (Pa.) 189; *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188.

7. Ratification Must Be Made Before Delivery of Goods. — *Bird v. Brown*, 4 Exch. 786; *Davis v. McWhirter*, 40 U. C. Q. B. 599; *Reynolds v. Boston, etc.*, R. Co., 43 N. H. 589.

8. Ratification of Deposit of Goods with Third Person for Seller. — *Salte v. Field*, 5 T. R. 211; *Atkin v. Barwick*, 1 Stra. 165; *Grout v. Hill*, 4 Gray (Mass.) 361; *Lane v. Jackson*, 5 Mass. 157.

9. See *supra*, this title, *Termination of Right — Delivery — Sufficiency of Delivery — Necessity of Acceptance of Goods*.

10. See *infra*, this section, *Notice*.

11. Right Exercisable by Notice. — *Bohtlingk v. Inglis*, 3 East 381; *Syeds v. Hay*, 4 T. R. 260; *Snee v. Prescott*, 1 Atk. 250; *Litt v. Cowley*, 7 Taunt. 169, 2 E. C. L. 168; *Whitehead v. Anderson*, 9 M. & W. 518; *Ascher v. Grand Trunk R. Co.*, 36 U. C. Q. B. 609; *Bierce v. Red Bluff Hotel Co.*, 31 Cal. 160; *Rucker v. Donovan*, 13 Kan. 251, 19 Am. Rep. 84; *Seymour v. Newton*, 105 Mass. 272; *Langstaff v. Stix*, 64 Miss. 171, 60 Am. Rep. 49; *Reynolds v. Boston, etc.*, R. Co., 43 N. H. 580; *Atkins v. Colby*, 20 N. H. 154; *Mottram v. Heyer*, 5 Den. (N. Y.) 629; *Bell v. Moss*, 5 Whart. (Pa.) 189; *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188. *Compare Mills v. Ball*, 2 B. & P. 457, wherein it was questioned whether a mere notice, not acquiesced in by the party to whom it is given, is sufficient.

12. See *supra*, this title, *Termination of Right — Seizure of Goods under Legal Process Against Buyer*; *infra*, this title, *Effect of Stoppage — Upon Rights of Carrier or Middleman*.

13. See *supra*, this title, *Termination of Right — Transfer of Bill of Lading*, and *infra*, this subdivision, the next following text paragraph.

14. *Mottram v. Heyer*, 5 Den. (N. Y.) 629.

15. *Litt v. Cowley*, 7 Taunt. 169, 2 E. C. L. 168.

16. *Bell v. Moss*, 5 Whart. (Pa.) 189.

Delivery After Notice to a Bona Fide Purchaser for value without notice defeats the seller's right to the goods and leaves him to his recourse upon the party making the delivery.¹

As Between the Seller and the Carrier, if the carrier disregards the notice and refuses to redeliver the goods to the seller or delivers them to the buyer, a cause of action accrues in favor of the seller against the carrier,² which may be enforced by any appropriate form of action;³ and such action is not barred by the recovery of a judgment against the buyer for the purchase money.⁴ If the seller's right to the goods is doubtful, the carrier is entitled to a reasonable time to investigate the claims of the respective parties,⁵ and in a proper case may resort to legal proceedings to determine the right of possession;⁶ but whenever he assumes to deliver the goods to either one party or the other he does so at his peril, even though there are no legal proceedings to which, under the circumstances, he may resort.⁷ Notwithstanding the carrier's right to investigate, it has been held that where he acquiesces in the notice of stoppage and agrees to redeliver the goods to the seller, he cannot thereafter justify a delivery to the buyer on the ground that the latter was not insolvent when the notice was given, though he may show as a defense that by due diligence the seller could have made his claim out of the buyer.⁸ But the taking of the goods from the carrier's possession by an officer acting under legal process against the buyer is a sufficient justification for the carrier's failure to redeliver.⁹ The carrier may, moreover, refuse to redeliver until the freight has been paid.¹⁰

c. SUFFICIENCY OF NOTICE—(1) *By Whom Given*.—The notice may be given by the seller's agent with equal effect as if given by the seller in person.¹¹

(2) *To Whom Given*—**Party in Possession**.—The notice should be given to the person having actual custody of the goods.¹²

Notice to an Agent in Possession is notice to the principal,¹³ even to the extent of

1. *U. S. Wind Engine, etc., Co. v. Oliver*, 16 Neb. 612. See also *supra*, this title, *Termination of Right—Transfer of Bill of Lading*.

2. **Disregard of Notice**.—*Litt v. Cowley*, 7 Taunt. 169, 2 E. C. L. 168; *The Tigress, Brown & L.* 38, 32 L. J. Adm. 97; *Ascher v. Grand Trunk R. Co.*, 36 U. C. Q. B. 609; *Jones v. Earl*, 37 Cal. 630, 99 Am. Dec. 338; *Blackman v. Pierce*, 23 Cal. 509; *Allen v. Maine Cent. R. Co.*, 79 Me. 327, 1 Am. St. Rep. 310; *Chicago, etc., R. Co. v. Painter*, 15 Neb. 394; *Hays v. Mouille*, 14 Pa. St. 48; *Bloomington v. Memphis, etc., R. Co.*, 6 Lea (Tenn.) 616; *Howatt v. Davis*, 5 Munf. (Va.) 34, 7 Am. Dec. 681.

3. **Trover by Seller Against Carrier**.—*Bohtlingk v. Inglis*, 3 East 381; *Morison v. Gray*, 2 Bing. 260, 9 E. C. L. 405; *Litt v. Cowley*, 7 Taunt. 169, 2 E. C. L. 168, 2 Marsh. 457; *Childs v. Northern R. Co.*, 25 U. C. Q. B. 165; *Jones v. Earl*, 37 Cal. 630, 99 Am. Dec. 338; *Inslee v. Lane*, 57 N. H. 454; *Reynolds v. Boston, etc., R. Co.*, 43 N. H. 580.

Replevin by Seller Against Carrier.—*Chicago, etc., R. Co. v. Painter*, 15 Neb. 394; *Benedict v. Schaettle*, 12 Ohio St. 515.

Trespass on Case by Seller Against Carrier.—*Calahan v. Babcock*, 21 Ohio St. 281, 8 Am. Rep. 63; *Pottinger v. Hecksher*, 2 Grant Cas. (Pa.) 309.

4. *Bloomington v. Memphis, etc., R. Co.*, 6 Lea (Tenn.) 616.

5. **Carrier Entitled to Time to Investigate**.—*Reynolds v. Boston, etc., R. Co.*, 43 N. H. 580;

Howe v. Cincinnati, etc., R. Co., 10 Ohio Cir. Dec. 182.

6. *Howe v. Cincinnati, etc., R. Co.*, 10 Ohio Cir. Dec. 182.

7. *Allen v. Maine Cent. R. Co.*, 79 Me. 327, 1 Am. St. Rep. 310. See also *infra*, this title, *Effect of Stoppage—Wrongful Stoppage*.

8. **Buyer's Solvency**.—*Bloomington v. Memphis, etc., R. Co.*, 6 Lea (Tenn.) 616. See also *Howe v. Cincinnati, etc., R. Co.*, 10 Ohio Cir. Dec. 182. Since, however, the buyer's insolvency is a condition precedent to the seller's right to stop the goods, it would seem that where the carrier does not acquiesce in the notice, he should be allowed to set up the buyer's solvency as a justification.

9. *MacVeagh v. Atchison, etc., R. Co.*, 3 N. Mex. 205; *Baltimore, etc., R. Co. v. Davis*, (Pa. 1888) 12 Atl. Rep. 335.

10. See *infra*, this title, *Effect of Stoppage—Upon Rights of Carrier or Middleman*.

11. **Notice May Be Given by Agent**.—*Seymour v. Newton*, 105 Mass. 272; *Reynolds v. Boston, etc., R. Co.*, 43 N. H. 580. See also *supra*, this section, *By Agent*.

12. **Notice to Actual Custodian of Goods**.—*Whitehead v. Anderson*, 9 M. & W. 518; *Ex p. Falk*, 14 Ch. D. 455; *Bierce v. Red Bluff Hotel Co.*, 31 Cal. 160; *Jones v. Earl*, 37 Cal. 630, 99 Am. Dec. 338; *Rucker v. Donovan*, 13 Kan. 253, 19 Am. Rep. 84; *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489; *Langstaff v. Stix*, 64 Miss. 171, 60 Am. Rep. 49; *Mottram v. Heyer*, 5 Den. (N. Y.) 629.

13. *Jones v. Earl*, 37 Cal. 630, 99 Am. Dec. 338.

rendering the principal liable for a delivery to the buyer short of the destination of the goods, where notice has previously been given to the carrier's agent at the destination.¹

Notice to a Principal Whose Agent Has Possession will not of itself, without communication to the agent, operate as a stoppage;² and if the seller would hold the principal liable for a delivery to the buyer, the notice must be given in time for communication to the agent.³

Notice to Shipowner. — It has been held that notice to a shipowner imposes upon him no duty of communication to the master;⁴ but there is equally respectable authority to the effect that the notice imposes a duty upon the owner to use reasonable diligence to communicate it to the master.⁵

Where the Goods Have Been Seized under Legal Process against the buyer, and the officer has taken possession, the notice should be given to the officer,⁶ a notice to the carrier being not only unnecessary,⁷ but ineffectual for any purpose whatever.⁸

Where the Goods Are in the Carrier's Customs Warehouse, a notice to the carrier is sufficient, though it is advisable to give notice to the customs officer also.⁹

Notice to the Buyer has been held to be sufficient;¹⁰ but the weight of authority is to the contrary.¹¹

(3) **Form and Contents.** — **No Particular Form** of notice is essential.¹²

The Basis of the Claim need not be stated; that is, the notice need not expressly indicate that the seller is exercising the right of stoppage. At least, such is the doctrine enunciated by respectable authority.¹³

No Express Demand need be made for a redelivery of the goods to the seller. The notice will be sufficient if it clearly indicates the seller's intention to resume possession or to prevent delivery to the buyer;¹⁴ and failure to indicate such intention is fatal to the validity of the notice.¹⁵

The Goods Must Be Described with sufficient definiteness to enable the party in possession to identify them.¹⁶

VI. EFFECT OF STOPPAGE — 1. **Upon Rights of Parties** — **Sale Not Rescinded.** — Stoppage *in transitu* does not rescind the contract of sale, but merely places the parties, as nearly as may be, in the same position as if the seller had not parted with the possession of the goods.¹⁷ Indeed, the mere insolvency of

1. *Poole v. Houston, etc.*, R. Co., 58 Tex. 138.
2. *Whitehead v. Anderson*, 9 M. & W. 518;
Ex p. Falk, 14 Ch. D. 455.

3. *Litt v. Cowley*, 7 Taunt. 169, 2 E. C. L. 168; *Whitehead v. Anderson*, 9 M. & W. 518; *Langstaff v. Stix*, 64 Miss. 171, 60 Am. Rep. 49; *Mottram v. Heyer*, 5 Den. (N. Y.) 629.

4. *Ex p. Falk*, 14 Ch. D. 446.

5. *Kemp v. Falk*, 7 App. Cas. 580; *Whitehead v. Anderson*, 9 M. & W. 518; *The Tigress*, Brown & L. 38, 32 L. J. Adm. 97.

6. **Notice to Be Given to Attaching Officer Who Has Taken Possession.** — *Rucker v. Donovan*, 13 Kan. 253, 19 Am. Rep. 84; *French v. Star Union Transp. Co.*, 134 Mass. 288; *Schwabacher v. Kane*, 13 Mo. App. 126.

7. *Schwabacher v. Kane*, 13 Mo. App. 126.

8. *French v. Star Union Transp. Co.*, 134 Mass. 288.

9. *Ascher v. Grand Trunk R. Co.*, 36 U. C. Q. B. 609.

10. **Notice to Buyer Held to Be Sufficient.** — *Bell v. Moss*, 5 Whart. (Pa.) 189.

11. **Notice to Buyer Insufficient.** — *Whitehead v. Anderson*, 9 M. & W. 519; *Rucker v. Donovan*, 13 Kan. 253, 19 Am. Rep. 84; *Mottram v. Heyer*, 5 Den. (N. Y.) 629. See also *Phelps v. Comber*, 29 Ch. D. 813.

12. **No Particular Form of Notice Essential.** — *Rucker v. Donovan*, 13 Kan. 253, 19 Am. Rep. 84; *Mottram v. Heyer*, 5 Den. (N. Y.) 629; *Bell v. Moss*, 5 Whart. (Pa.) 189.

13. *Allen v. Maine Cent. R. Co.*, 79 Me. 327, 1 Am. St. Rep. 310; *Clementson v. Grand Trunk R. Co.*, 42 U. C. Q. B. 263.

14. **Express Demand for Redelivery Not Essential.** — *Litt v. Cowley*, 7 Taunt. 169, 2 E. C. L. 168; *Whitehead v. Anderson*, 9 M. & W. 518; *Jones v. Earl*, 37 Cal. 630, 99 Am. Dec. 338; *Reynolds v. Boston, etc.*, R. Co., 43 N. H. 580; *Bell v. Moss*, 5 Whart. (Pa.) 189; *Bloomingdale v. Memphis, etc.*, R. Co., 6 Lea (Tenn.) 616.

15. *Phelps v. Comber*, 29 Ch. D. 813. See also the cases cited in the next preceding note.

16. **Goods Must Be Identified.** — *Clementson v. Grand Trunk R. Co.*, 42 U. C. Q. B. 263.

17. **Sale Not Rescinded.** — *England.* — *Dixon v. Yates*, 5 B. & Ad. 313, 27 E. C. L. 86; *Stephens v. Wilkinson*, 2 B. & Ad. 323, 22 E. C. L. 86; *Phelps v. Comber*, 29 Ch. D. 813, *per Cotton*, L. J.; *Lickbarrow v. Mason*, 6 East 27, note; *Sweet v. Pym*, 1 East 4; *Clay v. Harrison*, 10 B. & C. 99, 21 E. C. L. 31; *Bloxam v. Sanders*, 4 B. & C. 948, 10 E. C. L. 477; *Ex p. Gwynne*, 12 Ves. Jr. 379; *Martindale v. Smith*, 1 O. B. 389, 41 E. C. L. 592; *James v. Griffin*, 2 M. &

the buyer is not ground for rescission.¹

The Buyer May Redeem the goods by paying the purchase price at any time before they have been applied to the seller's claim.²

Insurance Losses accruing as to a part of the goods while in transit belong to the buyer, notwithstanding a stoppage as to the balance by the seller.³

Part Payments made before the right of stoppage is exercised cannot be recovered by the buyer on account of the stoppage, the effect of such payments being merely to reduce *pro tanto* the amount of the seller's lien.⁴

Disposition of Goods. — The seller should hold the goods until the purchase price becomes due, so as to be able to deliver them to the buyer if he or his assignee desires to redeem.⁵ After the term of credit has expired the seller may, after reasonable notice to the buyer, sell the goods and apply the proceeds to the payment of the purchase price;⁶ and the residue, if any, above the amount necessary for this purpose belongs to the buyer or his assignee.⁷

A Deficiency Judgment may be recovered by the seller against the buyer if the proceeds of the sale of the goods are insufficient to pay the purchase price.⁸

The Seller May Sue for the Whole Price, provided he is able and willing to deliver the goods upon payment.⁹

Seller's Right to Share in Buyer's Assignment for Creditors. — It has been held that the right of the seller to share in the proceeds of an assignment by the buyer for the benefit of creditors is not defeated by his refusal to bring into the common fund the amount which he may have received from the sale of the goods; and that he is entitled to a *pro rata* distribution out of the assigned estate, and to

W. 632; *Edwards v. Brewer*, 2 M. & W. 379; *Wentworth v. Outhwaite*, 10 M. & W. 436; *Hodgson v. Loy*, 7 T. R. 440.

Canada. — *Wait v. Scott*, 6 Grant Ch. (U. C.) 154.

Connecticut. — *Rogers v. Thomas*, 20 Conn. 58.

Illinois. — *Shaw v. Lady Ensley Coal, etc., R. Co.*, 147 Ill. 526, 46 Ill. App. 603.

Iowa. — *Kearney Milling, etc., Co. v. Union Pac. R. Co.*, 97 Iowa 719, 59 Am. St. Rep. 434.

Kansas. — *Rucker v. Donovan*, 13 Kan. 251, 19 Am. Rep. 84.

Maine. — *Newhall v. Vargas*, 15 Me. 314, 33 Am. Dec. 617.

Massachusetts. — *Stanton v. Eager*, 16 Pick. (Mass.) 467; *Rowley v. Bigelow*, 12 Pick. (Mass.) 307, 23 Am. Dec. 607.

New York. — *Babcock v. Bonnell*, 80 N. Y. 251; *Cross v. O'Donnell*, 44 N. Y. 661, 4 Am. Rep. 721.

Ohio. — *Jordan v. James*, 5 Ohio 88.

Pennsylvania. — *Pennsylvania R. Co. v. American Oil Works*, 126 Pa. St. 485, 12 Am. St. Rep. 885.

Texas. — *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188.

Stoppage Called Rescission. — In *Litt v. Cowley*, 7 Taunt. 169, 2 E. C. L. 168, and *Naylor v. Dennie*, 8 Pick. (Mass.) 198, 19 Am. Dec. 319, stoppage was casually spoken of as being a rescission; but that the sale is not rescinded is abundantly illustrated by the several propositions immediately hereinafter enunciated.

1. See generally the title SALES, vol. 24, p. 1101.

Stoppage and Rescission Distinguished — Evidence Held to Show Rescission. — *Kearney Milling, etc., Co. v. Union Pac. R. Co.*, 97 Iowa 719, 59 Am. St. Rep. 434.

2. **Buyer May Redeem Goods.** — *Kearney Mill-*

ing, etc., Co. v. Union Pac. R. Co., 97 Iowa 719, 59 Am. St. Rep. 434; *Newhall v. Vargas*, 15 Me. 314, 33 Am. Dec. 617; *Diem v. Koblitz*, 49 Ohio St. 41, 34 Am. St. Rep. 531; *Patten's Appeal*, 45 Pa. St. 151, 84 Am. Dec. 479.

3. *Berndtson v. Strang*, L. R. 3 Ch. 591.

4. **Part Payments Not Recoverable After Stoppage.** — *Kymer v. Suwercroft*, 1 Campb. 109; *Lickbarrow v. Mason*, 6 East 27, note; *Langford v. Tyler*, 6 Mod. 162; *Newhall v. Vargas*, 15 Me. 314, 33 Am. Dec. 617; *Jordan v. James*, 5 Ohio 99.

5. *Shaw v. Lady Ensley Coal, etc., R. Co.*, 147 Ill. 526, 46 Ill. App. 603.

6. **Goods May Be Sold by Seller After Notice to Buyer.** — *Kymer v. Suwercroft*, 1 Campb. 109; *Lickbarrow v. Mason*, 6 East 27, note; *Langford v. Tyler*, 6 Mod. 162; *Shaw v. Lady Ensley Coal, etc., R. Co.*, 147 Ill. 526, 46 Ill. App. 603; *Newhall v. Vargas*, 15 Me. 314, 33 Am. Dec. 617; *Jordan v. James*, 5 Ohio 99.

Failure to Give Notice Held to Be Evidence of Intention to Rescind. — *Kearney Milling, etc., Co. v. Union Pac. R. Co.*, 97 Iowa 719, 59 Am. St. Rep. 434.

Failure to Enforce Lien by Sale Evidence of Intention to Rescind. — *Shaw v. Lady Ensley Coal, etc., R. Co.*, 147 Ill. 526. See also *Langford v. Tyler*, 1 Salk. 113; *Newhall v. Vargas*, 15 Me. 314, 33 Am. Dec. 617.

7. *People v. Haynes*, 14 Wend. (N. Y.) 565, 28 Am. Dec. 530.

8. **Deficiency Judgment Recoverable by Seller.** — *Kymer v. Suwercroft*, 1 Campb. 109; *Lickbarrow v. Mason*, 6 East 27, note; *Langford v. Tyler*, 6 Mod. 162; *Newhall v. Vargas*, 15 Me. 314, 33 Am. Dec. 617; *Jordan v. James*, 5 Ohio 99.

9. **Seller May Sue for Whole Price.** — *Shaw v. Lady Ensley Coal, etc., R. Co.*, 147 Ill. 526, 46 Ill. App. 603.

a dividend upon the whole amount of his claim at the date of the assignment.¹ On the other hand, it has been held that the seller cannot prove his claim against the assigned estate unless he is able and willing to return the goods which he has seized in the exercise of his right of stoppage.²

2. Upon Rights of Carrier or Middleman.—The Carrier Holds as a Warehouseman after the right of stoppage, his liability as a carrier being terminated by the stoppage, and no new contract of carriage will be created by the mere request of the seller to forward the goods to another destination, there being no undertaking on the carrier's part to comply with such request.³

The Carrier's Lien for Freight is paramount to the seller's right of possession, and the carrier may retain the goods until the freight is paid, the same principle being, of course, applicable to the lien of a warehouseman or of any other middleman.⁴ Even where the goods are shipped on the buyer's own vessel, the seller must pay the freight before he can take possession of them. In such case the seller, by stopping the goods, asserts that they are still in transit, and is estopped to object to the payment of freight on the ground that the goods have been delivered to the buyer.⁵ But where the goods are shipped in the buyer's vessel, freight free on account of the buyer, a subsequent sale of the ship without the knowledge of the master or the consignor will not affect the latter's right of stoppage free of freight.⁶ The lien for freight, however, extends only to the freight on the particular consignment which is stopped, and does not entitle the carrier to withhold the goods from the seller on account of freight arrearages due from the buyer on other goods; and this notwithstanding a stipulation in the bill of lading expressly giving to the carrier a lien for such arrearages.⁷ But the lien for freight may be waived, and if, upon the demand of the seller, the carrier states that he has no charges against the goods, such waiver will be held to have taken place.⁸

3. Wrongful Stoppage.—The Seller Is Liable for stopping the goods when the right of stoppage does not exist, not only to the buyer and persons claiming under him,⁹ but also to the carrier to the extent of the damages which may be recovered against him by the buyer or his assignee on account of a refusal to deliver the goods because of the notice of stoppage.¹⁰

The Carrier Is Liable to the buyer or his assignee for refusing to deliver when the right of stoppage does not exist or has not been properly exercised,¹¹ and also for delivering the goods to one not having the right of stoppage.¹²

STOPPING PLACE.—See the title STATIONS (RAILROAD), and see USUAL STORAGE. — See the title WAREHOUSE AND WAREHOUSEMEN.

1. Patten's Appeal, 45 Pa. St. 151, 84 Am. Dec. 479.

2. Shaw v. Lady Ensley Coal, etc., R. Co., 147 Ill. 526, reversing 46 Ill. App. 603.

3. MacVeagh v. Atchison, etc., R. Co., 3 N. Mex. 205.

4. Potts v. New York, etc., R. Co., 131 Mass. 455, 41 Am. Rep. 247; Hays v. Mouille, 14 Pa. St. 48. And see the title CARRIERS OF GOODS, vol. 5, p. 410.

Lien for Warehouse Charges Paramount to Seller's Right of Possession.—Blackman v. Pierce, 23 Cal. 509.

Lien of Attaching Creditor Who Pays Freight.—See *supra*, this title, *Termination of Right—Seizure of Goods under Legal Process Against Buyer*.

5. Newhall v. Vargas, 15 Me. 314, 33 Am. Dec. 617.

6. Mercantile, etc., Bank v. Gladstone, L. R. 3 Exch. 233.

7. Lien for Freight Limited to Freight on Goods Stopped.—See the title CARRIERS OF GOODS, vol. 5, p. 410.

But Where a Part of the Consignment Has Been Delivered Before Stoppage, without payment of freight, the carrier retains his lien for the whole freight on the balance after stoppage. Potts v. New York, etc., R. Co., 131 Mass. 455, 41 Am. Rep. 247.

8. Waiver of Lien for Freight.—Blackman v. Pierce, 23 Cal. 509.

9. Wrongful Stoppage.—The Constantia, 6 C. Rob. 321; Walsh v. Blakely, 6 Mont. 194; More v. Lott, 13 Nev. 383; Benedict v. Schaettle, 12 Ohio St. 518; Guilford v. Smith, 30 Vt. 74.

10. Betts v. Gibbins, 2 Ad. & El. 57, 29 E. C. L. 29.

11. Betts v. Gibbins, 2 Ad. & El. 57, 29 E. C. L. 29.

12. Carrier Liable to Buyer for Delivery to One Not Having Right of Stoppage.—Memphis, etc., R. Co. v. Freed, 38 Ark. 614.

STORAGE BATTERIES.— See note 1.

STORAGE RECEIPT.— See note 2.

STORE, STORING, STOREHOUSE, ETC. (See also *SHOP*, vol. 25, p. 1058, and see the title *WAREHOUSE AND WAREHOUSEMEN*.)— To store is to keep goods and merchandise for safe custody, to be delivered in the same condition substantially as when received. The term applies only when the safe-keeping is the principal object of the deposit.³ A store is any place where goods are sold by either wholesale or retail; a shop; as, a book store, a dry-goods store, etc.⁴ "Store" also means a place where supplies, as provisions, ammunition, arms, clothing, or goods of any kind, are kept for future use or distribution; a storehouse; a warehouse; a magazine.⁵ The term is used in the United States as

1. **Storage Batteries.**— See *Electrical Accumulator Co. v. Brush Electric Co.*, 1 U. S. App. 320.

2. **Storage Receipt.**— A receipt was as follows: "Received on storage in my canning house, from E. B. M. & Co., seventeen hundred and twenty cases 3x tomatoes, my own packing. Deliverable to order of E. B. M. & Co., only on production of this receipt, properly indorsed." It was held that this was not a warehouse or *storage receipt*. *State v. Bryant*, 63 Md. 68. See also the title *WAREHOUSE AND WAREHOUSEMEN*.

3. **Store.**— *Smith v. German Ins. Co.*, 107 Mich. 270; *Renshaw v. Missouri State Mut. F. & M. Ins. Co.*, 103 Mo. 605; *New York Equitable Ins. Co. v. Langdon*, 6 Wend. (N. Y.) 628; *O'Neil v. Buffalo F. Ins. Co.*, 3 N. Y. 127; *Hynds v. Schenectady County Mut. Ins. Co.*, 16 Barb. (N. Y.) 119.

Storing. (See also the title *FIRE INSURANCE*, vol. 13, p. 293.)— Where a policy of insurance forbade the *storing* of hazardous goods upon the premises, it was said that "the object of that clause was to prevent the house from being used for the ordinary deposit of hazardous goods, and not for their occasional introduction for a temporary purpose necessary to make the house tenable as a dwelling." *O'Neil v. Buffalo F. Ins. Co.*, 3 N. Y. 127.

In *New York Equitable Ins. Co. v. Langdon*, 6 Wend. (N. Y.) 628, it was said: "If I send a cask of wine to a warehouse to be kept for me, that is a *storing* of it; but if I put it into my cellar or my garret to be drawn on and drank, I apprehend the term would not be considered as applying." See also *Smith v. German Ins. Co.*, 107 Mich. 270.

Storing applies only to habitual keeping, and not to occasional introduction for a temporary purpose. *Smith v. German Ins. Co.*, 107 Mich. 280; *Hynds v. Schenectady County Mut. Ins. Co.*, 16 Barb. (N. Y.) 129, 11 N. Y. 554, stated under the title *FIRE INSURANCE*, vol. 13, p. 292, note 14.

In *Phoenix Ins. Co. v. Taylor*, 5 Minn. 492, it was held that keeping articles for retail purposes in a store was not *storing*, within the meaning of a policy of insurance.

In *Rafferty v. New Brunswick F. Ins. Co.*, 18 N. J. L. 480, it was held that the keeping of spirituous liquors for the purpose of consumption or for sale by retail to boarders and others was not a *storing*, within a prohibition in a fire-insurance policy.

Same—Blowing Up of Building.— A building was blown up by order of the mayor of a

city to arrest the progress of a fire. In an action on an insurance policy, the court said: "According to the terms of the policy, if the building was used for the purpose of *storing* gunpowder, the contract was, for the time, suspended. And see *Duncan v. Sun F. Ins. Co.*, 6 Wend. (N. Y.) 488. But placing gunpowder with a lighted match in the building, for the express purpose of producing an explosion, which immediately followed, was a very different thing from what the parties contemplated when they inserted this provision in the contract." *City F. Ins. Co. v. Corlies*, 21 Wend. (N. Y.) 369.

Same—Keeping as Medicine.— See *Williams v. Fireman's Fund Ins. Co.*, 54 N. Y. 573, stated under the title *FIRE INSURANCE*, vol. 13, p. 293, note 2.

Storing Distinguished from Keeping for Sale.— *Phoenix Ins. Co. v. Taylor*, 5 Minn. 492; *Renshaw v. Missouri State Mut. F. & M. Ins. Co.*, 103 Mo. 605.

Storing Distinguished from Having in Possession.— In *Easley v. Pegg*, 63 S. Car. 103, it was said: "We think the offense of *storing* and keeping in possession of contraband liquors involves more than the mere having in possession of such liquors. *Storing* means, as stated in the request, the laying away for future use; 'keeping in possession' means to have habitually in possession."

Stored—Placed.— A statute made it a felony for any person to take and steal and carry away a bale or any number of bales of cotton from any place where they might be *stored*. In *Moseley v. State*, 74 Ga. 404, it was held that the word *store* in the act was equivalent to "placed." See also *Morris v. State*, 84 Ga. 9.

4. **Place Where Goods Are Sold.**— *Martin v. Portland*, 81 Me. 293, *quoting* *Webst. Dict.*; *Com. v. Whalen*, 131 Mass. 419; *State v. Sprague*, 149 Mo. 419, *quoting* *Cent. Dict.*

5. **Store.**— *State v. Sprague*, 149 Mo. 418, *quoting* *Cent. Dict.* See also *State v. Wilson*, 47 N. H. 104.

Burglary.— See the title *BURGLARY*, vol. 5, pp. 55, 56.

Store in Sense of Storehouse.— In *Burress v. Blair*, 61 Mo. 140, it was said: "The word *store*, which is used in this contract, if used in connection with a description or designation of buildings on a street, might, and frequently would, be construed to mean the house in which goods were kept for sale, or a house erected for that purpose."

Store Not Necessarily Building.— In *Com. v. M'Monagle*, 1 Mass. 517, it was held that an

nearly synonymous with "shop."¹ "Store" is also used in the sense of the

indictment for breaking a *store* could not be supported under a statute making it a felony to break up any dwelling house, shop, mill, etc., or other building whatsoever, with criminal intent, unless it were averred in the indictment that the *store* was a building. But in that case Sewell, J., doubted whether it was necessary to aver it, "because the word *store* has in this state a settled, known meaning and is not used otherwise than as and for the name of a building." See also *Folkes v. State*, 63 Miss. 83.

And it has been held several times that a "shop" must necessarily be a structure of some sort. See *SHOP*, vol. 25, p. 1058.

Bakery.—An insurance policy stated that the building insured was used as a *store* and residence. It was held that a bakery was a *store*. *Richards v. Washington F. & M. Ins. Co.*, 60 Mich. 425.

Banking House.—See the title *BURGLARY*, vol. 5, p. 56, note 2.

Butcher Shop.—In *Petty v. State*, 58 Ark. 1, it was held that a butcher shop was a *store* within the meaning of a Sunday act which forbade the keeping open of any *store* on Sunday.

Desk Room Not "Store."—A *Maine* statute provided that all personal property employed in trade should be taxed in the town in which it was so employed, provided the owner had his *store* or shop in such town. It was held that a stockbroker who merely had desk room in a city did not occupy a *store* or shop within the statute. *Martin v. Portland*, 81 Me. 293.

Election.—In *Hayes v. Kirkwood*, 136 Cal. 396, it was said: "In a populous and closely built up city or large town, no doubt, the designation of a particular building or room in which an election is to be held would have to be quite strictly complied with; but in the country the designation of a well-known *store* not near any other houses—as was shown in the case at bar—would certainly include as part of the 'place' a building on the trading premises used in connection with the business. No one who went to the *store* for the purpose of voting could possibly be deceived as to the place of voting, and no one was so deceived."

Factory.—The term *store* is never applied to a factory. *Thurston v. Union Ins. Co.*, 17 Fed. Rep. 129.

Junk Shop.—Junk shops have been held to be embraced in the term *stores* as the latter term was used in a statute by which a privilege tax was levied on *stores*. *Pitts v. Vicksburg*, 72 Miss. 181.

An Icehouse in which a dealer in ice had stored his stock was held not to be a *store* within a *Massachusetts* tax statute. The court, *per Colburn, J.*, said: "We are of opinion that the natural import and common use in this country of the word *store*, when applied to a building, is to designate a place where traffic is carried on in goods, wares, or merchandise, and not to designate a *storehouse*." *Hittinger v. Westford*, 135 Mass. 259.

Land upon Which It Stands.—In *Hooper v. Farnsworth*, 128 Mass. 487, it was held that the lease of a *store* included the land under it and to the middle of a private way in the rear, the fee of which was in the lessor,

So in *Toms v. Williams*, 41 Mich. 559, it was held that a devise of two *stores*, which were attached to the freehold and formed a part of the realty, covered the ground upon which the *stores* stood.

A deed was of a certain lot with a *store* thereon, "together with all the rights, easements, privileges, and appurtenances thereto belonging and now had and used and enjoyed therewith, being the same premises which A B conveyed to me." It was held that this did not include a lot in the rear of the described premises which had not been conveyed by A B, although the grantor owned such lot and had built thereon a *store* connected with the *store* on the described premises by a covered passage. *Ammidown v. Granite Bank*, 8 Allen (Mass.) 285.

Plantation Store.—In *Alcorn v. State*, 71 Miss. 464, it appeared that the appellant was the owner of a large plantation on which he had about five hundred tenants, and that on this plantation he had a *store* and a corps of clerks working in it. By contract between the appellant and his tenants it was the duty of the former to furnish the latter with all necessary goods, provisions, etc. The goods kept in the *store* were sold to the tenants for a profit and at the customary credit prices charged by merchants generally, but no goods were sold from the *store* to persons who were not tenants. It was held that the establishment on the plantation was a *store* as that term was used in a statute taxing *stores*.

A Saloon and Restaurant was held to be a *store* in *Com. v. Whalen*, 131 Mass. 419.

Wholesale Store.—The term *store* has been held to apply as well to a wholesale *store* as to a retail one. *Salomon v. Pioneer Co-operative Co.*, 21 Fla. 384.

1. Shop and Store Synonymous.—*Petty v. State*, 58 Ark. 1; *Barth v. State*, 18 Conn. 432; *Wilson v. State*, 24 Conn. 57; *Salomon v. Pioneer Co-operative Co.*, 21 Fla. 384; *Com. v. M'Monagle*, 1 Mass. 517; *Com. v. Riggs*, 14 Gray (Mass.) 376, 77 Am. Dec. 333; *Com. v. Annis*, 15 Gray (Mass.) 197; *Richards v. Washington F. & M. Ins. Co.*, 60 Mich. 425.

In *Barth v. State*, 18 Conn. 432, under a statute prohibiting certain persons from keeping "any house, *store*, shop, or other place for the purpose of selling any wine or spirituous liquor to be drank thereat," the words *store* and "shop" were held to be of equivalent import. "Considering," said the court, "the mode of using the words *store* and 'shop' in this country, and the meaning usually attached to them, especially when they are applied to a place where goods are bought and sold, in which sense they are obviously used in the act, * * * we think that they are to be considered, in that statute and also in this information, which is in the very words of it, as synonymous terms."

Store and Shop Distinguished.—In *State v. Hanlon*, 32 Oregon 100, it was said: "In England the word 'shop' is understood to be a structure or room in which goods are kept and sold at retail. Bishop on Statutory Crimes, § 295. In this country, however, such a build-

stock in trade of a merchant.¹ A storehouse is a house in which things are stored; a building for the storing of grain, foodstuffs, or goods of any kind; a magazine; a repository; a warehouse; a store.²

STORE FIXTURES. — See the title FIRE INSURANCE, vol. 13, p. 115, and generally the title FIXTURES, vol. 13, p. 594.

STOREKEEPER. — See note 3.

ing is usually called a *store*, and universally so in the western and Pacific coast states, where a 'shop' is understood to be a building in which an artisan carries on his business, or laborers, workmen, or mechanics, by the use of tools or machinery, manufacture, alter, or repair articles of trade." See also *State v. Canney*, 19 N. H. 137; *Boston Loan Co. v. Boston*, 137 Mass. 336.

A shop is a place where goods are sold by retail, and a *store* a place where goods are deposited. But in the United States shops for the sale of goods are frequently called *stores*. *Com. v. Annis*, 15 Gray (Mass.) 199.

In *Sparrenberger v. State*, 53 Ala. 483, it was said: "The word *store* is of larger significance than the word 'shop.' It not only comprehends all that is embraced in the word 'shop,' when that word is used to designate a place in which goods or merchandise are sold, but more, a place of deposit, a *storehouse*. In common parlance the two words have a distinct meaning. We speak of shops as places in which mechanics pursue their trades, as a carpenter's shop, a blacksmith's shop, a shoemaker's shop, while if we refer to a place where goods and merchandise are bought and sold, whether by wholesale or retail, we speak of it as a *store*."

1. **Store in Sense of Stock in Trade of Merchant.** — *Mathews v. Stephenson*, 6 Pa. St. 500.

Dissolution of Partnership. — See *Burress v. Blair*, 61 Mo. 133.

Ship Stores. — See PROVISIONS, vol. 23, p. 291, and the titles REVENUE LAWS, vol. 24, p. 893; SHIPS AND SHIPPING, vol. 25, pp. 889, 890, and the references there given; and see *U. S. v. Twenty-four Coils Cordage*, *Baldw.* (U. S.) 502.

2. **Storehouse.** — *Metz v. State*, 46 Neb. 547; *State v. Wilson*, 47 N. H. 104.

A building in which goods are kept for sale by a retail merchant is a *storehouse*. *State v. Sandy*, 3 Ired. L. (N. Car.) 573.

The terms *storehouse* and "warehouse," as used in Gen. Stat. Ky., c. 29, art. 6, § 4, in force in 1876, were held to mean "any house not an office, or a shop, or a room in a steam or other boat, in which goods, wares, and merchandise are usually deposited for safe-keeping or for sale." *Ray v. Com.*, 12 Bush (Ky.) 397.

Burglary. — As to various buildings held to be *storehouses* within the meaning of burglary statutes, see the title BURGLARY, vol. 5, p. 56.

Cornerib. — See *Metz v. State*, 46 Neb. 547, stated under the title BURGLARY, vol. 5, p. 56.

Dwelling House. — Upon the death of the owner of a building, part of which was used for a dry-goods *store* and the residue for a dwelling, the widow continued in the dwelling and the heirs leased the *storeroom*. The

whole building having afterwards been set off to the widow, she brought suit against the lessee of the *storeroom* for rent. In holding that she could not recover, the court said: "But for the statute giving the widow a right to occupy the dwelling, the heirs might have excluded her from that. The right to occupy the dwelling did not extend to the *storeroom*. It was not appropriated to nor in any way necessary for the use or convenience of the dwelling house." *Williamson v. Ash*, 7 Ind. 495. See also *Rimes v. State*, 36 Fla. 90.

Livery Stable. — See *Webb v. Com.*, (Ky. 1896) 35 S. W. Rep. 1038, stated under the title BURGLARY, vol. 5, p. 56.

News Stand. — See *Bauer v. State*, 25 Ohio St. 70, stated under the title BURGLARY, vol. 5, p. 56.

Tobacco Barn. — See *White v. Com.*, 87 Ky. 454, stated under the title BURGLARY, vol. 5, p. 56.

Wine Room. — In the back of a cellar under a dwelling house a little room had been partitioned off in which were kept some six jugs of wine for family consumption. It was held that such a room was not a *storehouse* within a statute against burglary. *Mason v. Com.*, 101 Ky. 397.

"Storehouse" and "Warehouse" Synonymous. — In *State v. Sprague*, 149 Mo. 409, it was held that where an indictment described the place of burglary as a *storehouse* and the evidence showed that it was a warehouse, there was no variance, as the terms were synonymous.

Storehouse — Public House — Gaming. — A *storehouse* has been held to be a public house within a statute against gaming. *Brown v. State*, 27 Ala. 50, in which case it was further held that if the building consisted of two rooms, one above the other, and the owner controlled both, using the lower room as a *store*, the upper room also was within the prohibition of the statute, unless it affirmatively appeared that it was not used as an appendage to the *store*, nor in the prosecution of its business, nor in connection with the *store*. See also *Huffman v. State*, 29 Ala. 42.

3. **Storekeeper.** — In holding that one who obtained credit on the false representation of being a *storekeeper* might be convicted of false pretenses, the court said: "The term is indefinite; it may mean a wholesale merchant, or a petty dealer in toys or candies; it may imply a principal, or an agent, or a servant; it may be applied to one notoriously without capital and who lives by his wits rather than by legitimate trades; in short, disconnected from all else, it can never indicate that the person who bears the designation is one who can safely be trusted with a loan." *Higler v. People*, 44 Mich. 302, 38 Am. Rep. 268. See generally the title FALSE PRETENSES AND CHEATS, vol. 12, p. 841.

STORE ORDER ACTS.

BY HERBERT WHARTON BEALL.

- I. DEFINITION AND GENERAL NATURE, 1123.
- II. ENGLISH ACTS, 1123.
- III. AMERICAN ACTS, 1124.
 - 1. *In General*, 1124.
 - 2. *Such Acts Held Unconstitutional*, 1124.
 - 3. *Such Acts Held Not Unconstitutional*, 1125.

CROSS-REFERENCES.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *CONSTITUTIONAL LAW*, vol. 6, p. 882; *CONTRACTS*, vol. 7, p. 88; *ILLEGAL CONTRACTS*, vol. 15, p. 927; *POLICE POWER*, vol. 22, p. 914.

I. DEFINITION AND GENERAL NATURE.—In *England* and certain of the *United States* statutes have been enacted forbidding the payment of laborers in goods and merchandise, or by orders, checks, tickets, or in any other way than in the current coin of the realm or in money. The words "Truck Acts" are generally applied to such statutes in England and sometimes in the United States, as in the *Illinois* statute, where the offense is defined to mean "the payment of wages otherwise than in lawful money or otherwise than to the full amount earned by the employee."¹

II. ENGLISH ACTS.—As otherwise expressed, the evil intended to be remedied by the statute was the giving by masters to their workmen, in exchange for their labor, in whole or in part, things of uncertain value instead of money, the value of which is ascertained.²

By the **Truck Amendment Act**, an employer is forbidden to exact of his employee any condition opposed to the spirit of the statute above quoted.³

No Option Allowed.—If an artificer receives, as and for wages, anything in goods save those accepted under certain conditions, such mode of remuneration is prohibited by the act. Hence it has been held that the act is contravened where an employer compels a workman to take, as part payment of wages, an article damaged by the workman in the course of manufacture.⁴ It has been said, moreover, that it is within the condemnation of the act for an artificer to prefer and elect to take payment in goods rather than in cash. The act is intended to protect workmen against themselves.⁵

Deductions Allowed.—An employer is permitted by the act, however, to deduct from the wages of an employee for medicine or medical attendance or for fuel, materials, tools, hay, corn, or provender, provided the deduction shall not exceed the real value of such articles, and is made only upon an agreement in writing signed by the employee; and omitting to make such written agreement violates the act.⁶ It is not necessary, however, that the sums to be deducted

1. **Store Order Acts.**—1 & 2 Wm. IV., c. 37; Ill. Act of May 28, 1891, § 7.

2. **English Acts.**—*Archer v. James*, 2 B. & S. 61, 110 E. C. L. 61; *Wilson v. Cookson*, 13 C. B. N. S. 496, 106 E. C. L. 496; *Ather-smith v. Drury*, 1 El. & El. 46, 102 E. C. L. 46.

3. **Truck Amendment Act.**—50 & 51 Vict. 46,

§ 6; *Lamb v. Great Northern R. Co.*, (1891) 2 Q. B. 281.

4. **No Option Allowed.**—*Smith v. Walton*, 3 C. P. D. 109.

5. *Smith v. Walton*, 3 C. P. D. 109; *Gould v. Haynes*, 16 Cox C. C. 732.

6. **Deductions Allowed.**—*Pillar v. Llynvi Coal, etc., Co.*, L. R. 4 C. P. 752.

in respect to these items be specified in the written contract. It is sufficient if there is a general contract which states in general terms the charges of such things as may be deducted, and the actual amount of the deductions may be shown by parol evidence.¹ And where, by an agreement between the employer, the employees, and a doctor, sums due by the employees to the doctor were retained by the employer, it was held that the employees were entitled to have such sums refunded where they had not been paid over to the doctor, but were still in the hands of the employer, on the ground that under the act that part of the wages had not been paid in coin nor indeed paid to any one.² But payment made by an employer at the request of an employee is payment to the latter, as much as if the current coin of the realm had been paid immediately to the employee.³

Employee Estopped to Deny Payment. — Though the deductions made by the employer be not strictly in compliance with the terms of the act, still if the employee has received their full value or more, in medical attendance upon himself and family, he is estopped to take advantage of the act.⁴

Who Are Artificers. — As to who are artificers under the act, if the contract is not for the labor but for the result of the labor, it is not within the act, but if the contractor is bound himself to perform labor in the execution of the contract, he is within the act.⁵ One whose duty requires care, skill, and experience, and whose labor is mental rather than physical, is not a workman within the act of 1875. Thus it has been held to exclude a railway guard whose duty it was to see that the train was properly put together, and to protect the tracks, although part of his duty at times was to assist in coupling and uncoupling and unloading the cars.⁶

Domestic Servants Not Within the Act. — The act does not apply to domestic or agricultural servants.⁷

III. AMERICAN ACTS — 1. In General. — Acts similar in their provisions or spirit to the English statute have been enacted in quite a few of the United States. The chief question that has arisen in connection therewith has been as to the constitutionality of such acts, and for this reason the cases, though not numerous, are considered by the courts of great importance to the public, and the question of constitutionality has been discussed very fully and with a marked difference of opinion among the judges, nearly all the cases containing elaborate dissenting opinions.

2. Such Acts Held Unconstitutional. — The majority of such statutes have applied to persons engaged in certain industries only, such as mining or manufacturing, and for this reason have been held to be unconstitutional and void as class legislation, as opposed to the Fourteenth Amendment, depriving the class specified of due process of law, as preventing persons *sui juris* from making their own contracts, and as not coming within the legitimate exercise of the police power of the state.⁸ Such a statute has been characterized as an

1. Specification of Deductions Not Necessary. — *Cutts v. Ward*, L. R. 2 Q. B. 357; *Chawner v. Cummings*, 8 Q. B. 311, 55 E. C. L. 311.

2. Strict Construction of Word "Paid." — *Ex p. Cooper*, 26 Ch. D. 693.
3. *Hewlett v. Allen*, (1894) A. C. 383, *overruling* (1892) 2 Q. B. 662.

4. **Employee Estopped to Deny Payment.** — *Lamb v. Great Northern R. Co.*, (1891) 2 Q. B. 281.

5. **Who Are "Artificers."** — *Ingram v. Barnes*, 7 El. & Bl. 115, 90 E. C. L. 115 (*criticising* *Bowers v. Lovekin*, 6 El. & Bl. 584, 88 E. C. L. 584); *Sleeman v. Barrett*, 2 H. & C. 934; *Riley v. Warden*, 2 Exch. 59; *Sharman v. Sanders*, 13 C. B. 166, 76 E. C. L. 166; *Floyd v. Weaver*, 16 Jur. 289.

6. *Hunt v. Great Northern R. Co.*, (1891) 1 Q. B. 601.

7. **Domestic Servants Not Within the Act.** — 23 & 24 Vict., c. 151, § 28.

8. **Such Acts Unconstitutional.** — *Millet v. People*, 117 Ill. 294, 57 Am. Rep. 869; *Fraser v. People*, 141 Ill. 171; *Braceville Coal Co. v. People*, 147 Ill. 66, 37 Am. St. Rep. 206; *State v. Haun*, 61 Kan. 146, *overruling* 7 Kan. App. 509; *State v. Loomis*, 115 Mo. 307; *Godcharles v. Wigeman*, 113 Pa. St. 431; *State v. Goodwill*, 33 W. Va. 179, 25 Am. St. Rep. 863.

It was held in *State v. Haun*, 61 Kan. 146, that the statute was not restricted in its legislation to corporations and trusts employing ten or more persons, but applied to any employer in the specified industries.

infringement alike of the right of the employer and of the employee, and an insulting attempt to put the laborer under a legislative tutelage which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any and every law which proposes to prevent him from so doing is an infringement of his constitutional privileges and consequently vicious and void.¹ Some courts have condemned such statutes as a species of sumptuary legislation and as an attempt to degrade the intelligence, virtue, and manhood of the American laborer and to thrust upon the people a paternal government of the most objectionable character because it assumes that the employer is a knave and the laborer an imbecile.²

Distinctions as to Price Unlawful. — Likewise a section of the *West Virginia* act, which prohibited the same restricted classes of persons from selling supplies to their employees at a greater per cent of profit than to others, has come under the same condemnation.³

Act Does Not Extend to Stockholders. — It has been held, however, that it is not a violation of the statute for stockholders of the corporation for which the laborer works, to keep a store and furnish the laborer with goods upon an assignment of his claim for wages. The prohibition contained in the act does not extend to individual stockholders, but to the corporation as such.⁴

The Pennsylvania Act of 1891 prohibited any mining or manufacturing company, or the officers or stockholders of any such company acting in the interest thereof, from carrying on by direct or indirect means a company store where any goods were sold other than those mined or manufactured by such company, and prohibited the lease or grant of the right to keep such a store upon their property, and the making of any contract with any storekeeper whereby the employees of such company should be obliged to trade with him; providing, as a penalty for violation of the act, a forfeiture of its charter.⁵ The statute has been before the inferior courts for adjudication, but its constitutionality seems not to have been passed upon.⁶

Employee May Assign Wages. — It has been held, however, that the act, having been intended to do away with company stores, did not affect the right of an employee to make a valid assignment of his wages to pay a store bill due to a third person.⁷

3. Such Acts Held Not Unconstitutional. — In three or four of the states such statutes have been held not to be unconstitutional. Thus in *Maryland*, such an act has been upheld as a valid exercise of legislative power upon the ground that the legislature, when the appellee company was incorporated, reserved the right to amend or alter its charter at their pleasure, and that such reservation included the power to forbid the corporation from making contracts to pay in anything but money, and also, as one of the means of securing the observance of the law, to withdraw from the appellee the right to set off, in a suit against it for wages, goods sold to its employees in contravention of the act.⁸ But it has been held in the same state that an act which made it unlaw-

In *New Jersey*, the question of the constitutionality of such an act has been raised but not decided. *Cumberland Glass Mfg. Co. v. State*, 58 N. J. L. 224.

1. Mr. Justice Gordon, in *Godcharles v. Wigeman*, 113 Pa. St. 431.

2. *State v. Goodwill*, 33 W. Va. 186, 25 Am. St. Rep. 863. See also *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869; *Matter of Jacobs*, 98 N. Y. 114.

3. **Distinctions as to Price Unlawful.** — *State v. Fire Creek Coal, etc., Co.*, 33 W. Va. 188, 25 Am. St. Rep. 891.

4. **Act Does Not Extend to Stockholders.** — *McManaman v. Hanover Coal Co.*, 6 Kulp (Pa.) 181.

5. Act of June 9, 1891, P. L. 256, §§ 1, 2.

6. *Funk v. Cambria Iron Co.*, 17 Pa. Co. Ct. 415; *Company Stores*, 7 Pa. Dist. 53, *sub nom.* *Price v. Sonman Coal Min. Co.*, 20 Pa. Co. Ct. 287.

7. *McManaman v. Hanover Coal Co.*, 6 Kulp (Pa.) 181; *Evans v. Kingston Coal Co.*, 6 Kulp (Pa.) 351.

8. **Such Acts Not Unconstitutional.** — *Shaffer v. Union Min. Co.*, 55 Md. 74.

ful for any officer or director of a railroad or mining corporation doing business in a certain county, to have any interest in any general merchandise store in that county, or to sell any goods, wares, or merchandise therein, was void and in conflict with the Fourteenth Amendment of the Federal Constitution, on the ground that it made an arbitrary and unreasonable classification of persons who might sell.¹ In *Tennessee* an act which compelled employers to pay the face value of all scrip, store orders, etc., in money, has been upheld on the ground that it was general in its terms and scope, and embraced equally every employer and employee in like circumstances.² In *Indiana* an act forbids employers and employees to contract, before the relation of employer and employee begins, for the payment of wages in anything except lawful money of the United States, and this law has been upheld.³ In *West Virginia* it has been held that another act of the legislature, from which the invidious distinctions of a prior unconstitutional act were entirely removed, and which was made general in its terms, applying to any person or corporation engaged in business, was not unconstitutional but was a legitimate exercise of the police power of the state.⁴ In *Kentucky* it has been held that under a statute which gave the laborer the power to demand his wages in money whenever due, and condemned any device or contract requiring him to accept anything else than money, the employer might give the laborer, before any wages were due, an order or check on his store for provisions needed before the labor could be performed.⁵

STORM.—See note 6.

STORM TIDE MARK.—See note 7.

STORY.—See note 8.

STOVE.—See the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 113.

STOWAGE.—See the title SHIPS AND SHIPPING, vol. 25, p. 854.

STOWAWAY.—A stowaway is one who conceals himself on board a vessel about to leave a port, in order to obtain a free passage.⁹

STRADDLE.—See note 10.

STRAND. (See also BEACH, vol. 3, p. 901; SHORE, vol. 25, p. 1059).—The term "strand" is synonymous with "shore" or "beach," and means land which lies between ordinary high-water and low-water marks.¹¹

1. *Exception in Maryland.*—Act of General Assembly of Md. (1898), c. 493, § 1; *Luman v. Hitchens Bros. Co.*, 90 Md. 14, following *Gulf, etc.*, R. Co. v. *Ellis*, 165 U. S. 150. See also *Atchison, etc.*, R. Co. v. *Matthews*, 174 U. S. 96; *State v. Broadbelt*, 89 Md. 565, 73 Am. St. Rep. 201.

2. *In Tennessee.*—*Harbison v. Knoxville Iron Co.*, 103 Tenn. 421, 76 Am. St. Rep. 682; *Dayton Coal, etc.*, Co. v. *Barton*, 103 Tenn. 604.

3. *In Indiana.*—*Elliott's Supp.*, §§ 1599, 1610; *Hancock v. Yaden*, 121 Ind. 366, 16 Am. St. Rep. 396.

4. *In West Virginia.*—Act 1891, c. 76, § 1; *State v. Peel Splint Coal Co.*, 36 W. Va. 802.

5. *In Kentucky.*—*Avent-Beattyville Coal Co. v. Com.*, 96 Ky. 218.

6. *Storm.*—In *Stover v. Insurance Co.*, 3 Phila. (Pa.) 38, 15 Leg. Int. (Pa.) 37, it was held that a freshet, caused by prevailing south winds and rain and melting snow, was not a *storm* within the meaning of a policy of insurance against loss by "fire or *storm*."

7. *Storm Tide Mark.*—See *Camden, etc.*, Land Co. v. *Lippincott*, 45 N. J. L. 405.

8. *Story.*—In a statement filed in order to obtain a mechanic's lien, the building intended

to be covered by the lien was described as being of three *stories*. The court, *per* Knowlton, J., said: "The description of the house was not inaccurate nor misleading. If the lower part of it was properly called a basement, it was, according to the definitions of lexicographers and the common understanding of the word, a *story* of the building." *Cleverly v. Moseley*, 148 Mass. 284.

But in *Benedict v. Ocean Ins. Co.*, 1 Daly (N. Y.) 8, it was held that a cellar was not a *story* of a building.

9. *Stowaway.*—*U. S. v. Sandrey*, 48 Fed. Rep. 551.

10. *Straddle.*—See the titles GAMBLING CONTRACTS, vol. 14, p. 605; STOCKBROKERS, *ante*; and see *Story v. Salomon*, 71 N. Y. 420.

11. *Strand.*—*Doane v. Willcutt*, 5 Gray (Mass.) 335; *Stillman v. Burfeind*, 21 N. Y. App. Div. 13; *East Hampton v. Kirk*, 68 N. Y. 463; *Elliott v. Stewart*, 15 Oregon 261.

In *Bell v. Hayes*, 60 N. Y. App. Div. 387, it was said: "While, in lexicons, the word *strand* is defined to be the equivalent of 'beach,' which is the space on the shore between ordinary high and low water mark (3 AM. AND ENG. ENCYC. OF LAW [2d ed.] 901)—a definition conceded by both parties—it is

STRANDING. — See the title MARINE INSURANCE, vol. 19, p. 1068.

STRANGER. (See also PRIVY — PRIVIES — PRIVITY, vol. 23, p. 101; THIRD PERSON.) — A stranger is one who is not a party or privy to an act or contract.¹

STRATAGEM — STRATEGY. — A stratagem is defined to be any artifice; a trick by which some advantage is intended to be obtained.²

STRAW. — See note 3.

STRAW BAIL. (See also the title BAIL (IN CIVIL CASES), vol. 3, p. 591.) — Common bail; one or more fictitious sureties formally entered in the proper office of the court, in contradistinction from special bail, who are real and

well known that a *strand* on the ocean shore does not always continue to maintain its location within definite lines. High and low tide marks vary almost daily, and there is always more or less erosion and increment of the shore."

1. **Stranger.** — Burr. L. Dict.

"In its general legal signification, *stranger* is opposed to the word 'privy.'" O'Donnell v. McIntyre, 118 N. Y. 162.

Parties and Strangers. (See also the title PARTIES TO ACTIONS, 15 ENCYC. OF PL. AND PR. 456.) — Under the term "parties" "the law includes all who are directly interested in the subject-matter, and had a right to make defense or to control the proceedings and to appeal from the judgment. This right involves also the right to adduce testimony and to cross-examine the witnesses adduced on the other side. Persons not having these rights are regarded as *strangers* to the cause." 1 Greenleaf on Evidence (14th ed.), § 523, quoted in Lloyd v. Barr, 11 Pa. St. 51, and Giltinan v. Strong, 64 Pa. St. 245.

A *stranger* to a cause is one who has no direct interest in the subject-matter of the suit, and who has no right to make defense, control proceedings, examine and cross-examine witnesses, or appeal from the judgment. Robbins v. Chicago, 4 Wall. (U. S.) 672.

Attachment. — A statute provided that goods taken in attachment might be replevied by the defendant, or in his absence by a *stranger*. In construing this provision the court said: "In the section of the code above cited, the word *stranger* was substituted for the words 'or some other person,' as found in Aiken's Digest. Both were intended, however, to mean the same thing, namely, a person not a party to the suit, who acts for the benefit of the defendant in attachment." Kirk v. Morris, 40 Ala. 229.

Escrow. (See also the title Escrow, vol. 11, p. 333.) — The term *stranger*, in the law of escrow, is used in opposition merely to the party to whom the contract runs. Minneapolis Threshing Mach. Co. v. Davis, 40 Minn. 116.

In Tyler v. Cate, 29 Oregon 523, it was said: "A *stranger*, within the meaning of this rule, is a person not a party to the deed."

Strangers in Sense of Aliens. (See also the title ALIENS, vol. 2, p. 64.) — In Lynch v. Clarke, 1 Sandf. Ch. (N. Y.) 677, quoting 2 Domat's Civil Law, by Dr. Strahan, 376, title Public Law, B. 1, tit. 6, § 4, subds. 2, 5, it was said: "*Strangers*, who are likewise called aliens, are those who, being born in another

country and subjects of another kingdom than that of which they are inhabitants, have not been naturalized."

Strangers in Blood. — In Skottowe v. Young, L. R. 11 Eq. 477, upon the meaning of the term "*strangers* in blood," as used in a legacy duty act, the court said: "The status of these ladies being that of daughters legitimated according to the law of France by a declaration of the father, it is impossible to hold that they are for any purpose *strangers* in blood, on the mere ground that if they had been English and their father domiciled in England they would have been illegitimate." See also Birtwhistle v. Vardill, 7 Cl. & F. 895, and see also the title SUCCESSION TAXES.

2. **Stratagem.** — Payne v. State, 38 Tex. Crim. 498, quoting Cent. Dict., in which case it was held that copulation by the defendant with the wife of another person while she was asleep was rape by force, and not by fraud. The court said further: "Moreover, the record fails to disclose that he used any *stratagem*, his only action being to go to her bed, get on top of her, and begin the act of copulation while she was asleep. What was done after the act of copulation began, even if it could be conceded that he then resorted to some *stratagem* to continue the operation, would not constitute this offense; but the record fails to disclose, even during the continuance of the act, that he resorted to any artifice or trick to induce her to believe that he was her husband." See also Mooney v. State, 29 Tex. App. 257, and see the title RAPE, vol. 23, p. 845.

Strategy. — A jury found that the vendor used *strategy* in bringing about a contract for the sale of land. It was held that, in connection with other findings, the term *strategy* must be interpreted to mean that the contract "was brought about by acts and perhaps representations not in themselves unlawful, but such as are common to persons entering into contract relations, each endeavoring to make the best terms for himself in the transaction," and not as if it was intended "to convey a meaning incompatible with fair dealing and approximating to that conveyed in the word *stratagem*, which implies artifice, trickery, deception, and perhaps even positive fraud." Fortune v. Watkins, 94 N. Car. 317.

3. **Straw.** — In Blydenburgh v. Magone, 40 Fed. Rep. 574, small rushes cut from a tall grass or plant in China, cut and cured but not split or dyed, were held to be "*straw* unmanufactured" as those words were used in a tariff act.

Definition.

STRAW BAIL.

Definition.

substantial bondsmen.¹ Also, worthless bail, as being given by an irresponsible person.²

1. **Straw Bail.**— See And. L. Dict.; Bouv. L. Dict.

2. Webst. Dict.; Cent. Dict.

INDEX.

- ACKNOWLEDGMENT** (see SPECIFIC PERFORMANCE; STATE AND PUBLIC LANDS):
Specific performance, 23
- ACTORS**, see SPECIFIC PERFORMANCE.
- ADOPTION OF CHILDREN:**
Specific performance, 87
- ADVERSE POSSESSION** (see STATE AND PUBLIC LANDS):
Specific performance:
Title by adverse possession, 107
- AGENCY**, see SPECIFIC PERFORMANCE; STATE AND PUBLIC LANDS; STOPPAGE IN TRANSITU.
- ALIENS:**
Specific performance, 133
- ALTERNATIVE CONTRACTS**, see SPECIFIC PERFORMANCE.
- AMENDMENT**, see STATUTES.
- "AND SO FORTH:"**
Statutes, 584
- ANNUITIES:**
Specific performance, 124
- "APPROPRIATED:"**
State and public lands, 213
- ARBITRATION AND AWARD**, see SPECIFIC PERFORMANCE.
- ARTIFICERS**, 1124
- ASSIGNMENTS**, see SPECIFIC PERFORMANCE.
- ATTACHMENT:**
Stock and stockholders, 866
- AUTHORS**, see SPECIFIC PERFORMANCE.
- BILL OF EXCHANGE OR PROMISSORY NOTES** (see STOPPAGE IN TRANSITU):
Specific performance:
Delivery, assignment, and cancellation of notes and claims, 96
- BONDS**, see SPECIFIC PERFORMANCE.
- BOUNDARIES**, see STATES.
- CAPITAL STOCK**, see STOCK AND STOCKHOLDERS.
- CARRIERS OF GOODS**, see STOPPAGE IN TRANSITU.
- CARRIERS OF LIVESTOCK**, see STOCKYARDS.
- CERTIFICATES OF STOCK**, see STOCK AND STOCKHOLDERS.
- CHATTEL MORTGAGES:**
Specific performance:
Parol contracts to mortgage, 94
- CLASS LEGISLATION**, 683
- COMMON CARRIERS**, see STOCKYARDS; STOPPAGE IN TRANSITU.
- COMMUNITY PROPERTY:**
State and public lands, 288
- COMPROMISE**, see SPECIFIC PERFORMANCE.
- CONFIRMATION:**
State and public lands, 213
- CONSIDERATION**, see SPECIFIC PERFORMANCE.
- CONSTITUTIONAL LAW** (see STATES; STATUTES; STOCK AND STOCKHOLDERS):
Store order acts, see STORE ORDER ACTS.
- CONTEMPT:**
Specific performance, 134
- CONTRACTS**, see SPECIFIC PERFORMANCE.
- CONTRIBUTION AND EXONERATION**, see STOCK AND STOCKHOLDERS.
- CORPORATIONS**, see SPECIFIC PERFORMANCE; STATUTES; STOCK AND PRODUCE EXCHANGES; STOCK AND STOCKHOLDERS.
- COSTS**, see STATUTES.
- COURTS**, see STARE DECISIS; STENOGRAPHERS.
- COVENANT**, see SPECIFIC PERFORMANCE.
- DAMAGES**, see SPECIFIC PERFORMANCE.
- DEATH BY WRONGFUL ACT:**
Statutes:
Strict or liberal construction, 668
- DECLARATORY STATUTES**, see STATUTES.
- DEDICATION**, see STATE AND PUBLIC LANDS.
- DE FACTO OFFICERS:**
Statutes:
De facto legislature, 534
- DEFAULT**, see SPECIFIC PERFORMANCE.
- DEMAND**, see SPECIFIC PERFORMANCE.
- DEPOT**, see STATIONS.
- DICTA**, see STARE DECISIS.
- DISTRICT OF COLUMBIA**, see STATES.
- DOWER**, see SPECIFIC PERFORMANCE; STATE AND PUBLIC LANDS.
- ELECTION OF REMEDIES:**
Specific performance, 20
- ELECTION**, see STATUTES.
- EMINENT DOMAIN** (see STATUTES):
Stations, 506

ENTRY:

State and public lands, 213

EQUITY, see SPECIFIC PERFORMANCE.

ESTOPPEL, see SPECIFIC PERFORMANCE; STATE AND PUBLIC LANDS.

ET CETERA:

Statutes, 584

EVIDENCE, see SPECIFIC PERFORMANCE; STATUTES.

EXCHANGES, see STOCK AND PRODUCE EXCHANGES.

EXECUTION, see STAY LAWS; STOCK AND STOCKHOLDERS.

EXEMPTIONS, see STATUTES.

EXPECTANCIES:

Specific performance, 105

FORFEITURES (see STOCK AND STOCKHOLDERS):

Specific performance, 66

FRAUD, see SPECIFIC PERFORMANCE.

FRAUDS, STATUTE OF, see SPECIFIC PERFORMANCE.

GARNISHMENT:

Stock and stockholders, 866

GIFTS, see SPECIFIC PERFORMANCE; STOCK AND STOCKHOLDERS.

GRANT, see STATE AND PUBLIC LANDS.

HEREAFTER:

Statutes, 565

HERETOFORE:

Statutes, 565

HOMESTEAD (see STATE AND PUBLIC LANDS; STATUTES):

Specific performance, 99.

HUSBAND AND WIFE, see SPECIFIC PERFORMANCE.

ILLEGAL CONTRACTS, see SPECIFIC PERFORMANCE; STORE ORDER ACTS.

IMPAIRMENT OF OBLIGATION OF CONTRACTS, see STATES.

INDEMNITY CONTRACTS:

Specific performance, 94

INDIANS, see STATE AND PUBLIC LANDS.

INFANCY, see SPECIFIC PERFORMANCE.

INJUNCTIONS, see SPECIFIC PERFORMANCE.

INSOLVENCY AND BANKRUPTCY, see SPECIFIC PERFORMANCE; STOCK AND STOCKHOLDERS; STOPPAGE IN TRANSITU.

INSTRUCTIONS, see STATUTES.

INTEREST:

States, 478

INTERPRETATION AND CONSTRUCTION, see SPECIFIC PERFORMANCE; STATUTES.

INTERSTATE COMMERCE, see STOCKYARDS.

JUDGMENTS, see STARE DECISIS.

LACHES, see SPECIFIC PERFORMANCE; STATE AND PUBLIC LANDS.

LAND DEPARTMENT, see STATE AND PUBLIC LANDS.

LANDLORD AND TENANT, see SPECIFIC PERFORMANCE.

LANDS, see STATE AND PUBLIC LANDS.

LARCENY:

Steal, 769

LEASES, see SPECIFIC PERFORMANCE.

LEGACIES AND DEVICES, see SPECIFIC PERFORMANCE.

LEGISLATURE, see STATUTES.

LICENSE, see SPECIFIC PERFORMANCE.

LIENS, see STOCK AND STOCKHOLDERS; STOPPAGE IN TRANSITU.

LIMITATION OF ACTIONS (see SPECIFIC PERFORMANCE; STATE AND PUBLIC LANDS; STATUTES):

Speciality, 3

LIQUIDATED DAMAGES:

Specific performance, 88

LIVESTOCK EXCHANGES, 1076

LOST PAPERS, see SPECIFIC PERFORMANCE.

MAJORITY:

Statutes, 542

MAN, 637

MARGIN, see STOCKBROKERS.

MARKETABLE TITLE, see SPECIFIC PERFORMANCE.

MARKETS, see STOCKYARDS.

MARRIAGE, see SPECIFIC PERFORMANCE.

MASTER AND SERVANT (see SPECIFIC PERFORMANCE):

Store order acts, see STORE ORDER ACTS.

MECHANICS' LIENS, see STATUTES.

MISTAKE:

Specific performance, 47

Mistake of fact, 47

Mistake of law, 48

MORTGAGES, see SPECIFIC PERFORMANCE.

MUNICIPAL AID, see STATE AND PUBLIC LANDS.

MUNICIPAL CORPORATIONS, see STATUTES.

NUISANCES:

Stockyards, 1075

OBITER DICTA, see STARE DECISIS.

OPTIONS, see SPECIFIC PERFORMANCE.

OTHER PURPOSES, 584

PAROL EVIDENCE, see STATUTES.

PARTITION:

Specific performance, 122

PATENTS, see SPECIFIC PERFORMANCE.

PRE-EMPTION, see STATE AND PUBLIC LANDS.

PRESUMPTIONS, see *STATUTES*.

PRIVATE INTERNATIONAL LAW:

Specific performance, 132, 133

PRIVITY, see *SPECIFIC PERFORMANCE*.

PRODUCE EXCHANGE, see *STOCK AND PRODUCE EXCHANGES*.

PUBLIC LANDS, see *STATE AND PUBLIC LANDS*.

PUBLIC OFFICERS, see *STATES; STATUTES*.

PUNCTUATION, see *STATUTES*.

PURSUANCE:

Statutes, 654

QUESTIONS OF LAW AND FACT:

Stare decisis, 191

QUORUM, see *STATUTES*.

RAILROADS (see *STATE AND PUBLIC LANDS; STATIONS*):

Specific performance:

Operation of railroads, 96

REASONABLE TIME:

Specific performance, 77

RECEIVERS, see *STOCK AND STOCKHOLDERS*.

RECORDING ACTS, see *STATE AND PUBLIC LANDS*.

RECORDS, see *STATUTES*.

REFORMATION, see *SPECIFIC PERFORMANCE*.

REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS:

Stock and stockholders:

Lien, 871

RESCISSION, see *SPECIFIC PERFORMANCE*.

RES JUDICATA:

Stare decisis, 188

Law of the case, 188

RESTRAINT OF TRADE:

Specific performance, 23

RIGHT OF STOPPAGE IN TRANSITU see *STOPPAGE IN TRANSITU*.

RIPARIAN RIGHTS:

Specific performance, 105

SALE:

State and public lands, 213

SALES, see *SPECIFIC PERFORMANCE; STOCK STOCKHOLDERS; STOPPAGE IN TRANSITU*.

SCHOOL LANDS, see *STATE AND PUBLIC LANDS*.

SEAL, see *SPECIALTY*.

SEAT IN STOCK EXCHANGE, see *STOCK AND PRODUCE EXCHANGES*.

SECTIONS, see *STATUTES*.

SEPARATE PROPERTY OF MARRIED WOMEN:

Specific performance, 99

SET-OFF RECOUPMENT, AND COUNTER-CLAIM, see *STOCK AND STOCKHOLDERS*.

SHARES OF STOCK, see *STOCK AND STOCKHOLDERS*.

SHOP:

Store, 1121

SHORT SALES, see *STOCKBROKERS*.

SIGNATURE (see *STATUTES*):

Specific performance, 48, 49

SPECIAL PARTNER, 1

SPECIAL PLEA, 1

SPECIAL POWER, 1

SPECIAL PRIVILEGE, 1

SPECIAL PROCEEDINGS, 1

SPECIAL PROMISE, 2

SPECIAL PROPERTY, 2

SPECIAL PURPOSE, 2

SPECIAL RELIEF, 2

SPECIAL REPLICATION, 2

SPECIAL STATUTES, 2

SPECIAL STOCK, 2

SPECIAL TAIL, 2

SPECIAL TAXES, 2

SPECIAL TERM, 2

SPECIAL TRAVERSE, 2

SPECIAL TRUST, 3

SPECIALTY, 3

Limitation of actions, 3

Seal, 3

SPECIAL VERDICT, 4

SPECIAL WORD, 4

SPECIE, 4

SPECIES, 5

SPECIFIC, 5

SPECIFICALLY, 5

SPECIFICATION, 6

SPECIFIC GRAVITY, 6

SPECIFIC LEGACY, 6

SPECIFIC LIEN, 6

SPECIFIC PERFORMANCE, 7

Abandonment, 43, 135

Acceptance, see *infra*, *MINDS MUST HAVE MET*.

Acknowledgment, 23

Instruments defectively acknowledged, 99

Acquiescence, 72, 80

Acquiescence in delay, 80, 81

Acquiescence in vendor's delay, 115

Action at law, 135

Actors, see *infra*, *INJUNCTION AGAINST BREACH*.

Acts beyond defendant's ability, 39

General rule, 39

When conveyance to third person set aside, 40

Where no title in defendant, 40

Adequacy of legal remedy, see *infra*, *INADEQUACY OF LEGAL REMEDY*.

Admissibility, see *infra*, *ENFORCEABILITY*.

Volume XXVI.

SPECIFIC PERFORMANCE, *cont'd.*

- Adoption of children, 87
- Adverse possession :**
 - Title by adverse possession, 107
- Agency, 24**
 - Agency of tenant in common, 24
 - Contract of agent in excess of authority, 24
- Aliens, 133
- Alternative contracts, 87**
 - Alternative to pay money, 88
 - Forfeiture to secure performance, 88
 - Forfeiture upon nonperformance, 88
 - General rule, 87
 - Liquidated damages, 88
- Ambiguities, 129
- Annuities, 124
- Antenuptial contracts, 90
- Arbitration and award :**
 - Arbitration, 88
 - Ascertainment of value, 89
 - Contracts to submit to arbitration, 89
 - Exceptions to general rule, 89
 - Executed contract, 89
 - General rule, 88
 - Incomplete and unreasonable contracts, 89
 - Renewal of lease, 89
 - Award, 89**
 - Award calling for payment of money, 90
 - Execution of award, 89
 - Illustrations, 90
- Assent, see infra, MINDS MUST HAVE MET.*
- Assignments :**
 - Assignee on contract, 126
 - Delivery, assignment, and cancellation of notes and claims, 96
 - Laches of assignor, 79
- Authors, see infra, INJUNCTION AGAINST BREACH.*
- Award, see infra, ARBITRATION AND AWARD.*
- Bankruptcy, see infra, INSOLVENCY.*
- Bills of exchange and promissory notes :**
 - Delivery, assignment, and cancellation of notes and claims, 96
- Bonds, 90**
 - General rule, 90
 - Title bond, 90
- Building contracts, see infra, CONTRACTS TO CONSTRUCT, ERECT, OR REPAIR.*
- Buildings, see infra, CONTRACTS TO CONSTRUCT, ERECT, OR REPAIR.*
- Burden of proof, 130**
 - Affirmative defenses, 131
 - Cases decided upon particular facts, 131
 - Conditions precedent, 130
 - Establishing contract, 130
 - General rule, 130
 - Making of contract and its terms, 130
 - Oral contracts to convey land, 131
 - Resulting trust, 131
 - To evade statute of frauds, 131
 - To show title, 131
- Cancellation of notes and claims, 96
- Certainty, 32, 59**
 - Arbitration, 89
 - Assignees, 38
 - Conjecture as to meaning and intention, 33
 - Consideration, 37
 - Contract must be certain, 32
 - Contracts for testamentary provisions, 92
 - Contracts sufficiently certain for enforcement, 34

SPECIFIC PERFORMANCE, *cont'd.*

- Certainty, *cont'd.***
 - Contracts too uncertain for enforcement, 34
 - Contract uncertain as to part, 38, 84
 - Description of property, 36
 - Duration of contract, 37
 - Id certum est quod certum reddi potest, 38*
 - Illustrations, 34
 - Parol evidence, 129
 - Parties, 36
 - Part performance, 59
 - Personal performance with compensation for residue, 84
 - Personal services, 102
 - Price, 37
 - Representatives, 38
 - Specific performance refused though contract not void at law, 38
 - Test as to requisite certainty, 33
 - Time of performance, 37
 - Uncertainty cured by acts of parties, 38
 - Where contract capable of being made certain, 38
 - Where contract not disputed, 38
- Change of circumstances :**
 - Acquiescence in delay as laches, 80
 - Delay coupled with change of circumstance, 81**
 - General rule, 81
 - Injury to innocent third parties, 82
 - Uncertainty of proof due to lapse of time, 81
 - Time as essence of contract, 76
- Change of possession (see *infra*, PART PERFORMANCE) :**
 - Gifts, 97
 - Time as essence of contract, 75
- Chattel mortgages :**
 - Parol contracts to mortgage, 104
- Claims :**
 - Delivery, assignment, and cancellation of notes and claims, 96
- Compromise, 26, 91
- Concealment, see infra, FRAUD.*
- Conditional contracts, 40
- Conditions :**
 - Burden of proof, 130
 - Conditional contracts, 40
 - Conditions to be performed by complainant, 40
 - Imposition of conditions upon plaintiff, 65
 - Performance of conditions precedent, see infra, PERFORMANCE OF CONDITIONS PRECEDENT.*
 - Performance of conditions subsequent, 65
 - Conflict of law, 132, 133
- Consideration, 25**
 - Certainty, 37
 - Compromise, 26
 - Contracts under seal, 28
 - Evidence, 127
 - Failure of consideration, 28
 - General rule, 25
- Gratuitous undertakings, 26**
 - Executed contracts, 26
 - General rule, 26
- Illegal consideration, 28
- Illustrations, 26
- Inadequacy of consideration, 26**
 - Does not defeat specific performance, 27
 - Fraud and inadequacy, 27
 - General rule, 26
 - Gross inadequacy, 28

SPECIFIC PERFORMANCE, *cont'd.***Consideration, *cont'd.*****Inadequacy of Consideration, *cont'd.***

Inadequacy at time when contract made, 27

Statutory rule, 28

Marriage, 26

Natural love and affection, 26

Necessity of valuable consideration, 25

Seal, 28

Statute of frauds, 49

Voluntary agreements, 26

Executed contracts, 26

General rule, 26

Construction, see *infra*, INTERPRETATION AND CONSTRUCTION.

Contemporaneous performance, 43

Contempt, 134

Continuing contracts, 95

Contracts contemplating successive acts, 95

Exceptions, 95

General rule, 95

Mere execution of contract, 96

Operation of railroads, 96

Contracts, 20Adoption of children, see *infra*, ADOPTION OF CHILDREN.Agreement to make will, see *infra*, CONTRACTS FOR TESTAMENTARY PROVISIONS.Alternative contracts, see *infra*, ALTERNATIVE CONTRACTS.Antenuptial contracts, see *infra*, ANTENUPTIAL CONTRACTS.Arbitration and award, see *infra*, ARBITRATION AND AWARD.Bonds, see *infra*, BONDS.Building contracts, see *infra*, BUILDING CONTRACTS.Certainty, see *infra*, CERTAINTY.

Competent parties, 20

Compromises, see *infra*, COMPROMISES.Conditional contracts, see *infra*, CONDITIONAL CONTRACTS.Conditions precedent, see *infra*, CONDITIONS PRECEDENT.Consideration, see *infra*, CONSIDERATION.Construction, see *infra*, INTERPRETATION AND CONSTRUCTION.Continuing contracts, see *infra*, CONTINUING CONTRACTS.

Contract requisite, 20

Contracts for testamentary provisions, see *infra*, CONTRACTS FOR TESTAMENTARY PROVISIONS.Contracts should be fair, just, and equitable, see *infra*, CONTRACTS SHOULD BE FAIR, JUST, AND EQUITABLE.Contracts to construct, erect, or repair, see *infra*, CONTRACTS TO CONSTRUCT, ERECT, OR REPAIR.Contracts to indemnify or secure, see *infra*, CONTRACTS TO INDEMNIFY OR SECURE.Contracts to mortgage, see *infra*, CONTRACTS TO MORTGAGE.Delivery, assignment, and cancellation of notes and claims, see *infra*, DELIVERY, ASSIGNMENT, AND CANCELLATION OF NOTES AND CLAIMS.Easements, see *infra*, EASEMENTS.Enforceability, see *infra*, ENFORCEABILITY.Equitable, see *infra*, CONTRACTS SHOULD BE FAIR, JUST, AND EQUITABLE,**SPECIFIC PERFORMANCE, *cont'd.*****Contracts, *cont'd.***Exchange, see *infra*, EXCHANGE.Form, see *infra*, FORM.Fraud, see *infra*, FRAUD.Gifts, see *infra*, GIFTS.Husband and wife, see *infra*, HUSBAND AND WIFE.

Injunction, 20

Insurance, see *infra*, INSURANCE.Just, see *infra*, CONTRACTS SHOULD BE FAIR, JUST, AND EQUITABLE.Landlord and tenant, see *infra*, LEASE.Lawfulness, see *infra*, LAWFULNESS.Lease, see *infra*, LEASE.Minds must have met, see *infra*, MINDS MUST HAVE MET.Mutuality, see *infra*, MUTUALITY.Options, see *infra*, OPTIONS.

Particular contracts, 124, 125

Partnership, see *infra*, PARTNERSHIP.Part performance, see *infra*, PART PERFORMANCE.Patents, see *infra*, PATENTS.

Payment of consideration, 104

Personal property contracts, see *infra*, PERSONAL PROPERTY CONTRACTS.Personal services, see *infra*, PERSONAL SERVICES.Statute of frauds, see *infra*, STATUTE OF FRAUDS.Stock in corporation, see *infra*, STOCK IN CORPORATION.Successive acts, see *infra*, CONTINUING CONTRACTS.Support and maintenance, see *infra*, SUPPORT AND MAINTENANCE.Time as essence of contract, see *infra*, TIME AS ESSENCE OF CONTRACT.Trusts, see *infra*, TRUSTS AND TRUSTEES.Working contracts, see *infra*, WORKING CONTRACTS.**Contracts for testamentary provisions, 91**

Acquiescence, 92

Contracts to make will, 93

Enforceable against heirs, devisees, etc., 92

General rule, 91

Parol agreements, 93

Ratification of inconsistent will, 92

Rescission, 92

Statute of frauds, 93

Unfair or inequitable contract, 92

Where terms of contract uncertain, 92

Will invalid or revoked, 92

Contracts should be fair, just, and equitable, 67

Consideration of time when contract made, 69

Contract enforceable at law, 68

Contracts for testamentary provisions, 92

General rule, 67

Improvident contract, 69

Innocent third parties, 68

Rash contract, 69

Unconscionable contracts, 68

Contracts to construct, erect, or repair, 93

Exceptions, 93

General rule, 93

Contracts to indemnify or secure, 94**Contracts to mortgage, 104, 119**

Agreement between incumbrancers, 120

Agreement to satisfy mortgage, 120

General rule, 119

SPECIFIC PERFORMANCE, *cont'd.***Contracts to mortgage, *cont'd.***

Parol contracts, 119

Corporations (see *infra*, STOCK IN CORPORATION):

Contracts with corporations, 87

Courts, see *infra*, DISCRETION OF COURT.

Damages:

Inadequacy of damages, see INADEQUACY OF LEGAL REMEDY.

Damages in addition to performance, 86

Damages in lieu of performance, 85

Case made must call for equitable relief, 86

Contract void by statute of frauds, 85

General rule, 85

Performance refused by reason of plaintiff's fraud or default, 86

Suit by vendee, 116

Voluntary conveyance, 86

Where plaintiff knew performance impossible, 86

Where specific performance inequitable, 86

Decree, see *infra*, OPERATION AND EFFECT OF DECREE.

Deed:

Tender of deed, 118

Default (see *infra*, RULE WHERE PLAINTIFF IN DEFAULT):

Damages in lieu of performance, 86

Laches and default, 82

Definition, 14

Delays, see *infra*, LACHES.

Delivery, assignment, and cancellation of notes and claims, 96

Demand, 44

Delay in demand for performance, 82

Necessity for demand, 44

Where demand would be unavailing, 44

Description of property, see *infra*, CERTAINTY.

Devises, 125

Discharge:

Evidence, 128

Discretion of court, 62

Arbitrary discretion, 63

Burdensome expense, 66

Contract already substantially performed, 66

Contract should be fair, just, and equitable, see *infra*, CONTRACT SHOULD BE FAIR, JUST, AND EQUITABLE.

Discretion not arbitrary, 63

Doubt as to title, 113

Effect of change of value, 70

Enforceability, 70

Illustrations, 70

Mere change of value, 70

Rule stated, 70

Forfeitures, 66

General aim of the court, 64

General rule as to court's discretion, 62

Gifts, 97

Imposition of conditions upon plaintiff, 65

Inflexible rules impossible, 64

Legal contract established, 64, 65

Mere fact of legal contract, 64

Performance of conditions subsequent, 65

Performance of no benefit to party seeking decree, 66

Plaintiff's inability to perform, 66

Public interest, 66

SPECIFIC PERFORMANCE, *cont'd.***Discretion of court, *cont'd.***

Qualified general principle, 63

Subject-matter of no value, 66

Substantial performance, 66

Valid legal contract established, 64

Dower:

Compensation or indemnity for dower, 98

Drunkenness, 20

Duress, 23

Duty to make a contract, 87

Easements, 120

Effect of plaintiff's fraud, misrepresentation, or bad faith, 45

Advantage taken of party's ignorance, 46

Bad faith towards third person, 46

Concealment of material facts, 46

Defendant's fraud, 47

General rule, 45

Ignorance of party, 46

Intent to defraud creditors, 46

Purchase of property with knowledge of sale to another, 47

Undue influence, 46

Election of remedies, 20

Enforceability (see *infra*, LAWFULNESS), 38, 68.

Approximate relief, 40

Conditions to be performed by complainant, 40

Damages where plaintiff knew performance impossible, 86

Equitable contract, 68

General rule, 38

Inequitable contract, 68

Plaintiff's inability to perform, 66

Property not in existence, 39

Where decree not enforceable, 39

Where party might nullify decree, 39

Where power of revocation exists, 39

Equitable, see *infra*, CONTRACTS SHOULD BE FAIR, JUST, AND EQUITABLE.**Equity cognizance, 14**

General rule, 14

Injunction against breach, see *infra*, INJUNCTION AGAINST BREACH.

Jurisdiction at law, 15

Requisites for equitable interposition, see *infra*, REQUISITES FOR EQUITABLE INTERPOSITION.

Retention of jurisdiction when once acquired, 15

Estoppel:

Performance of conditions precedent, 42

Evidence, 127

Burden of proof, see *infra*, BURDEN OF PROOF.

Consideration, 127

Intent and understanding of parties, 127

Mistake, 127

Opinion evidence, 128

Parol evidence, see *infra*, PAROL EVIDENCE.

Presumptions, 128

Rescission, release, or discharge, 128

Surrounding circumstances, 127

Exchange, 120

Expectancies, 105

Extension of doctrine, 14

Failure of consideration, 28

Fairness, see *infra*, CONTRACTS SHOULD BE FAIR, JUST, AND EQUITABLE.

False representation, see *infra*, FRAUD.

SPECIFIC PERFORMANCE, *cont'd.*

- Forfeiture**, 66
 - Forfeiture by default, 134
 - Forfeiture to secure performance, 88
 - Forfeiture upon nonperformance, 88
 - Provision in contract for forfeiture or default, 73
- Form**, 48
 - General rule, 48
 - Imperfect deeds, 48
 - Informal deeds, 48
 - Irregular deeds, 48
 - Signature, 48
- Fraud**:
 - Damages in lieu of performance, 86
 - Evidence, 127
 - Inadequacy of consideration and fraud, 27
 - Lost deeds, 20
 - Prevention of fraud, 20
 - Re-execution of deed, 20
 - Representations false but not fraudulent**, 47
 - General rule, 47
 - Material misstatements, 47
 - Mistake, 47
 - Test of materiality, 47
 - Statute of frauds as a cover for fraud, 52
- Frauds, statute of**, see *infra*, **STATUTE OF FRAUDS**.
- Gifts**, 96
 - Discretion of court, 97
 - Donee in possession, 97
 - In general, 96
 - Mere change of possession, 97
 - Nature of proof required, 98
 - Possession and improvements, 97
 - Undelivered deeds, 98
- Gratuitous undertakings*, see *infra*, **CONSIDERATION**.
- Grounds for relief**, 17
 - Election of remedies*, see *infra*, **ELECTION OF REMEDIES**.
 - Inadequacy of legal remedy*, see *infra*, **INADEQUACY OF LEGAL REMEDY**.
 - Insolvency*, see *infra*, **INSOLVENCY**.
 - Prevention of fraud*, see *infra*, **FRAUD**.
- Grub-stake contracts, 124
- Heirs, 125
- Homestead, 99
- Husband and wife** (see *infra*, **MARRIED WOMEN**), 29, 98
 - Antenuptial contracts, 90
 - Compensation or indemnity for dower right, 98
 - General rule, 98
 - Homestead, 99
 - Husband's contract to procure wife's conveyance, 98
 - Instruments defectively executed or acknowledged, 99
 - Married women in general, 99
 - Refusal of husband to join in wife's deed, 99
 - Refusal of wife to join in husband's deed, 98
 - Separate property of married women, 99
 - Suits by married women, 100
- Id certum est quod certum reddi potest*, 38
- Ignorance, 46
- Illegal consideration*, see *infra*, **LAWFULNESS**.
- Illegal contracts*, see *infra*, **LAWFULNESS**.
- Imperfect deeds, 48
- Impossible contracts*, see *infra*, **ENFORCEABILITY**.

SPECIFIC PERFORMANCE, *cont'd.*

- Improvements**, 57, 97
 - Time as essence of contract, 75
- Improvident contracts, 69
- Inadequacy of consideration*, see *infra*, **CONSIDERATION**.
- Inadequacy of legal remedy**, 17
 - Action brought to obtain legal relief only, 19
 - Adequacy of legal remedy, 17
 - Completeness of remedy at law, 19
 - General rule, 17
 - Insolvency, 19
 - Part performance, 54
- Personal-property contracts**, 103
 - Chattels possessing *pretium affectionis*, 104
 - Damages inadequate, 103
 - Where damages sole relief sought, 18
- Incumbrances, 115
- Indemnity contracts, 94
- Infancy**:
 - Laches, 79
- Informal deeds, 48
- Injunction**, 20
 - Injunction in aid of specific performance, 16
- Injunction against breach**, 15
 - Authors, actors, etc., 15
 - General rules, 15
 - Mandatory injunction, 15
 - Statute limiting right to injunction, 16
 - When injunction granted, 15
- Insolvency**, 19
 - Insolvency of defendant, 19
 - Judgment at law, inadequacy, 19
 - Sale of personalty, 19
- Insurance**:
 - Contracts to insure, 100
- Intent**:
 - Evidence, 127
- Interpretation and construction**, 48
 - General rules, 48
 - Legal effect followed in equity, 48
 - When question for jury, 48
- Irregular deeds, 48
- Judicial discretion*, see *infra*, **DISCRETION OF COURT**.
- Jurisdiction*, see *infra*, **EQUITY COGNIZANCE**.
- Just*, see *infra*, **CONTRACTS SHOULD BE FAIR, JUST, AND EQUITABLE**.
- Laches**, 77
 - Acquiescence, 80
 - Acquiescence in delay by both parties, 81
 - Acquiescence in violation of contract, 80
 - Action need not be barred by statute, 79
 - Assignor, 79
 - Cases where laches under particular circumstances was held to bar relief, 78
 - Cases where no laches under particular circumstances, 78
 - Change of circumstances, 80
 - Delay coupled with change of circumstance**, 81
 - General rule, 81
 - Injury to innocent third parties, 82
 - Uncertainty of proof due to lapse of time, 81
 - Delay due to mistake, 80
 - Delay due to promise of performance or negotiations for settlement, 80
 - Delay in demand for performance, 82
 - Excuse for delay, 79

SPECIFIC PERFORMANCE, *cont'd.***Laches, *cont'd.***

- General statement as to laches, 77
- Infancy, 79
- Laches and default, 82
- Laches of assignor, 79
- Mere delay, 79
- Mistake, 80
- Notice of repudiation, 81
- Period from which laches computed, 82
- Plaintiff's acquiescence, 80
- Plaintiff's laches due to or induced by defendant's conduct, 80
- Vendee in possession, 81
- Landlord and tenant*, see *infra*, LEASES.

Latent ambiguities, 129**Lawfulness, 22**

- Agency, 24
- Agency of tenant in common, 24
- Champertous agreement, 22
- Contracts in contemplation of marriage, 24
- Contracts in contravention of statute, 22
- Contracts of agent in excess of authority, 24
- Duress, 23
- General rule, 22
- Illegal consideration, 28
- Illegality or invalidity as to part, 24
- Marriage, 24, 26
- Mere fact of lawfulness, 24
- No right of action at law, 23
- Partial invalidity, 24
- Public policy, 23
- Question as to action at law, 23
- Restraint of trade or competition, 23
- Statute of limitations, 25
- Ultra vires* contracts, 24
- Void contracts, 22

Leases, 120

- Breach of covenant by lessee, 121
- Covenant to lease, 121
- General rule, 120
- Option in lease to renew and purchase, 30
- Option to purchase or renew, 121
- Parol leases, 121
- Renewal, 121
- Renewal of lease, 89
- Statute of frauds, 121
- Legacies and devises*, see *infra*, CONTRACTS FOR TESTAMENTARY PROVISIONS.

Legality, see *infra*, LAWFULNESS.**Legal Remedy, see *infra*, INADEQUACY OF LEGAL REMEDY.****License:**

- Injunction against breach, 15

Limitation of actions (see *infra*, LACHES):

- Action barred by statute, 25
- Title dependent upon statute of limitations, 107

Liquidated damages, 88**Maintenance, see *infra*, SUPPORT AND MAINTENANCE.****Marketable title, 109**

- Bare possibility, 111
- Captious objections, 111
- Danger of litigation, 111
- Deficiency in quantity, 112
- Free from reasonable doubt, 110
- General rule, 109
- Inability to offer defendant a marketable title, 110
- Irregular legal proceedings, 111

SPECIFIC PERFORMANCE, *cont'd.***Marketable title, *cont'd.***

- Lis pendens*, 109
- Material defects, 112
- Property adversely possessed, 112
- Substantive defects, 112
- Suspicion or conjecture, 111

Marriage:

- Consideration, 26
- Contracts in contemplation of marriage, 24
- Injunction, 15

Marriage as part performance, 60**Married women (see *infra*, HUSBAND AND WIFE):**

- Acknowledgment of debt, 23
- Contracts of, 29

Master and servant, see *infra*, PERSONAL SERVICES.**Minds must have met, 21**

- Complete contract, 21
- General rule, 21
- Haste, 22
- Mutuality, 21
- Offer must be accepted in terms and form as submitted, 21
- Positive assent, 21
- Question for court, 22

Misrepresentation, see *infra*, FRAUD.**Mistake, 47**

- Conveyance by mistake to third person, 134
- Evidence, 127
- Laches, 80
- Mistake of fact, 47
- Mistake of law, 48

Mortgage, see *infra*, CHATTEL MORTGAGE; CONTRACTS TO MORTGAGE.**Mutuality, 28**

- Conflict of cases, 31
- Contracts of husband and wife, 29
- Contracts performed on one side, 29
- Exception under terms of contract, 31
- General rule, 28
- Lesser covenant where greater enforceable, 30
- Minds must have met, 21
- Mutuality subsequently taken away or supplied, 31
- Necessity of mutuality, 28
- Options*, see *infra* OPTIONS.
- Unilateral contracts, 31

Natural love and affection, 26**Nature, 14****Nonresidents, 133****Offer, see *infra*, MINDS MUST HAVE MET.****Operation and effect of decree, 132**

- Aliens, 133
- Contempt, 134
- Contract executed in foreign country, 132
- Effect upon title to property, 134
- How decree enforced, 134
- How decree operates, 132
- In personam*, 132
- Nonresidents, 133
- Performance compelled through agent, 133
- Situs of subject-matter, 133
- To compel the performance of personal acts or covenants, 132

Options, 30, 100

- Contracts terminable at option of one party, 101
- Enforceability in equity, 30
- General rule, 30, 100

SPECIFIC PERFORMANCE, *cont'd.***Options, *cont'd.***

- Options in leases to renew or purchase, 30
- Option to nullify decree, 101
- Option to rescind, 30
- Refusal to accept purchase money, 101

Origin, 14**Parol evidence, 128**

- Curing defects in title, 112
- General rule, 128
- Latent ambiguities, 129
- Patent ambiguities, 129
- Statute of frauds, 129
- To cure uncertainty in contract, 129
- To explain contract, 130
- To identify property conveyed, 129
- Where property insufficiently described, 129

Partial performance with compensation for residue, 83

- Contract uncertain as to part, 84
- General rule, 83
- Rule as to vendee, 85
- Where general rule does not apply, 84

Parties, see *infra*, CERTAINTY.**Partition, 122****Partnership:**

- Contracts of partnership, 101
 - Duration fixed, 101
 - Duration not fixed, 101
 - General rule, 101
 - When enforceable, 101
 - Where party has acted to his prejudice on faith of agreement, 101

Part performance, 50, 82

- Acceptance in full of part performance, 83
- Acts as proof of contract, 53
- Acts done on faith of contract, 53
- Acts relied on must be those of plaintiff, 60

Change of possession, 56

- Abandonment of possession, 58
- Constructive possession, 59
- Continuance of existing possession, 58
- General as to change of possession, 56
- Improvements, 57
- Kind of possession necessary, 59
- Knowledge of vendor, 59
- Mere change of possession, 56
- Nature of possession required, 59
- Necessity for possession, 58
- Other acts in addition to continuance of possession, 58
- Possession and improvements, 57
- Possession held essential, 58
- Possession in lifetime of vendor, 59
- Possession of one of several parcels, 58
- Possession taken and purchase price paid, 56
- Right of vendor or lessor, 56
- Several parcels of land, 58
- Suspension of possession, 58
- Temporary suspension of possession, 58
- Tender of deed, 57
- When possession to be taken, 59
- Compensation in lieu of performance, 61
- Contract must be certain and definite, and part performance clearly shown, 59
- Contract of tenant in common, 83
- Contracts not performable within a year, 60
- Court not able to execute whole of contract, 82

Cover for fraud, 52**SPECIFIC PERFORMANCE, *cont'd.*****Part performance, *cont'd.***

- Election by vendee, 116
- Equity powers limited, 53
- General rule, 50
- Guaranties, 61
- Inadequacy of damage, 54
- Interest in land, 50
- Jurisdictions in which doctrines denied, 52
- Maine, 52
- Marriage as part performance, 60
- Massachusetts, 52
- Mere refusal by defendant, 52
- Payment of purchase money, 54**
 - Alabama, 55
 - Delaware, 55
 - General rule, 54
 - Iowa, 55
 - Payment together with other acts, 55
 - Reason of the rule, 55
- Performance must have been on faith of contract, 53
- Personal services, 54
- Preliminary acts, 60
- Revocable acts, 60
- Rule by statute, 52
- Separable contracts, 83
- Theory of the cases, 51
- Title of vendor defective, 83

Party seeking performance must himself do equity, 43

- Maxim, 43
- Plaintiff's duty, 44
- Patent ambiguities, 129

Patents:

- Illustrations, 102
- Plaintiff applicant for patent, 101
- Renewal of license, 102
- Sale or assignment of patent, 101

Payment, see *infra*, CONSIDERATION; SUITS BY VENDEE.**Payment of purchase money, see *infra*, PART PERFORMANCE.****Performance (see *infra*, PART PERFORMANCE):**

- Reasonable time, 77
- Performance of conditions precedent, 41**
 - Abandonment of contract, 43
 - Conditions to be performed by complainant, 40
 - Dependent covenants, 43
 - Estoppel, 42
 - Excuse for default, 42
 - General rule, 41
 - Nature of offer to perform, 42
 - Offer to perform, 42
 - Plaintiff's failure due to defendant's default, 41
 - Repudiation of contract, 43
 - Substantial performance, 41
 - Undertaking not amounting to a condition, 41
 - Waiver, 42

Performance of conditions subsequent, 65**Personal property contracts, 103, 104**

- General rule, 103
- Property having market value, 103
- Where remedy at law is inadequate, 101**
 - Chattels possessing *pretium affectionis*, 104
 - Damages inadequate, 103

Personal services, 102**Certainty, 102**

SPECIFIC PERFORMANCE, *cont'd.*

- Personal services, *cont'd.*
 - Contracts for personal services, 102
 - When equity will enforce, 102
- Possession (see *infra*, CHANGE OF POSSESSION; PART PERFORMANCE):
 - Gifts, 97
 - Restitution of possession, 112
- Presumptions, 129
- Pretium affectionis*, 104
- Price, see *infra*, CONSIDERATION.
- Private international law, 132, 133
- Privies, see *infra*, RULE AS TO PRIVIES AND REPRESENTATIVES.
- Public interest, 66
- Public policy, see *infra*, LAWFULNESS.
- Purchase money, see *infra*, PART PERFORMANCE.
- Question of law and fact:
 - Assent to contract, 22
 - Sufficiency of title, 113
- Railroads:
 - Operation of railroads, 96
- Rash contracts, 69
- Real property contracts, 104
 - Contracts for lands, 104
 - Contracts of sale, 106
 - Equitable interest, 105
 - Expectancies, 105
 - General rule, 104
 - Marketable title, see *infra*, MARKETABLE TITLE.
 - Riparian rights, 105
 - Suits by vendee, see *infra*, SUITS BY VENDEE.
 - Suits by vendor, see *infra*, SUITS BY VENDOR.
 - Tender of title, see *infra*, TENDER OF TITLE.
 - Title to be conveyed, see *infra*, TITLE TO BE CONVEYED.
- Reasonable time, 77
- Reconveyance:
 - Contracts to reconvey, 118
- Record title, 107
- Reformation:
 - Making different contract, 17
 - Reformation and specific performance compared, 16
- Release:
 - Evidence, 128
- Remedy at law, see *infra*, INADEQUACY OF LEGAL REMEDY.
- Renewal of lease, see *infra*, LEASE.
- Repairs, see *infra*, CONTRACTS TO CONSTRUCT, ERECT, OR REPAIR.
- Representatives, see *infra*, FRAUD; RULE AS TO PRIVIES AND REPRESENTATIVES.
- Requisites for equitable interposition, 20
 - Certainty, see *infra*, CERTAINTY.
 - Conditional contracts, see *infra*, CONDITIONAL CONTRACTS.
 - Consideration, see *infra*, CONSIDERATION.
 - Contract requisite, 20
 - Effect of plaintiff's fraud, misrepresentation, or bad faith, see *infra*, FRAUD.
 - Enforceability, see *infra*, ENFORCEABILITY.
 - Intoxication, 20
 - Lawfulness, see *infra*, LAWFULNESS.
 - Minds must have met, see *infra*, MINDS MUST HAVE MET.
 - Mistake, see *infra*, MISTAKE.
 - Mutuality, see *infra*, MUTUALITY.

SPECIFIC PERFORMANCE, *cont'd.*

- Requisites for equitable interposition, *cont'd.*
 - Nature of contract to be enforced, 20
 - Party seeking performance must himself do equity, see *infra*, PARTY SEEKING PERFORMANCE MUST HIMSELF DO EQUITY.
 - Performance of conditions precedent, see *infra*, PERFORMANCE OF CONDITIONS PRECEDENT.
- Rescission:
 - Evidence, 128
 - Mutual rescission, 134
 - Specific performance as compared with rescission, 16
- Restraint of trade, 23
- Riparian rights, 105
- Rule as to privies and representatives, 125
 - Assignees, 126
 - Devisees, 125
 - Fraud, 127
 - General rule as to privies and representatives, 125
 - Heirs, 125
 - Innocent purchasers, 127
 - Mere personal covenants, 127
 - Strict legal privy unnecessary, 125
 - Vendee in voluntary conveyance, 127
 - Vendees, 126
- Rule where plaintiff in default, 70
 - Acquiescence, 72
 - Bond for performance, 72
 - Contract to convey land, 71
 - Default in executory promises, 71
 - Default which would not justify rescission, 71
 - General rule, 70
 - Performance prevented by plaintiff or defendant, 72
 - Performance within reasonable time, 77
 - Provision in contract for forfeiture or default, 73
 - Readiness to perform, 73
 - Statements of rule, 71
 - Surrender of possession, 71
 - Time as essence of contract, 74
 - Time as essence of contract, see *infra*, TIME AS ESSENCE OF CONTRACT.
- Waiver of default, 72
 - General rule, 72
 - Illustration, 72
 - Notice by vendor, 72
 - Waiver where time of essence, 72
- Satisfactory title, 114
- Seal:
 - Importing consideration, 28
- Security:
 - Contracts to secure, 94
- Separable contracts, 83
- Separate property of married women, 99
- Signature, 48, 49
- Stitus of subject-matter, 133
- Stations:
 - Contracts to locate stations, 502, 503
- Statute of frauds (see *infra*, CONTRACTS FOR TESTAMENTARY PROVISIONS), 49, 61
- Antenuptial Contracts, 90
- Burden of proof, 131
- Consideration to be stated, 49
- Damages in lieu of performance, 85
- Doctrine of part performance, see *infra*, PART PERFORMANCE.
- Exchange, 120

SPECIFIC PERFORMANCE, *cont'd.***Statute of frauds, *cont'd.***

- Executed contracts, 61
- Failure to set up statute as defense, 50
- Full performance on one side, 61
- Future formal agreement, 50
- General rule, 49
- Leases, 121
- Mortgages, 119
- Parol evidence, 129
- Part performance*, see *infra*, PART PERFORMANCE.
- Preliminary memoranda, 50
- Requirements, 48, 49
- Signature, 49
- Trusts, 61, 124

Statute of limitations, see *infra*, LACHES; LIMITATION OF ACTIONS.**Statutes**, see *infra*, LAWFULNESS.**Stock in corporations, 122**

- Contract contrary to public policy, 123
- Contract induced by fraud, 123
- Contracts for sale of stock, 122
- Corporation to be organized in *futuro*, 123
- Laches, 123
- Stock of peculiar value to plaintiff, 122
- Stock readily purchasable, 122
- Subscriptions, 123
- When performance denied, 122
- Where defendant not owner of stock, 123

Subject-matter:

- Contracts classified according to nature and subject-matter, 87

Subscriptions, see *infra*, STOCK IN CORPORATIONS.**Successive acts**, 95**Sufficiency**, 28**Suits by vendee, 115**

- Contracts to reconvey, 118
- Damages in lieu of performance, 116
- Election by vendee, 116
- General rule, 115
- Inability of vendor to perform, 116
- Partial performance, 116
- Payment or tender, 116**
 - Ability and willingness to perform, 118
 - General rule, 116
 - Misapprehension as to correct amount, 117
 - Technical legal tender unnecessary, 117
 - Vendor's defenses, 117
 - When tender unnecessary, 117
- Tender of deed, 118
- Vendee's refusal to accept title, 118
- Vendee's right to specific performance, 115

Suits by vendor, 106

- Curing defects, 102
- Discretion of court, 113
- Marketable title*, see *infra*, MARKETABLE TITLE.
- Parol evidence, 112
- Question for court, 113
- Restitution of possession, 112
- Tender of title*, see *infra*, TENDER OF TITLE.
- Title to be conveyed*, see *infra*, TITLE TO BE CONVEYED.
- Vendee should state objections, 112
- Vendor's right to specific performance, 106
- Support and maintenance (see *infra*, CONTRACTS FOR TESTAMENTARY PROVISIONS), 123
- Tender*, see *infra*, SUITS BY VENDEE.

SPECIFIC PERFORMANCE, *cont'd.***Tender of deed, 57****Tender of title, 113**

- Acquiescence in vendor's delay, 115
- Acquisition of title by vendor, 114
- Assignee of contract for deed, 113
- General rule, 113
- Incumbrances, 115
- Insufficient tender, 114
- "Satisfactory title," 114
- Tender must conform to contract, 114
- Time to perfect title, 115
- Where vendor did not have title when contract made, 114
- Where tender dispensed with, 114
- Testamentary provisions*, see *infra*, CONTRACTS FOR TESTAMENTARY PROVISIONS.
- Time as essence of contract** (see *infra*, TIME AS ESSENCE OF CONTRACT), 73
 - General rule, 73
 - Original contract changed by consent, 74
 - Reasonable time, 77
 - Rule where plaintiff in default, 74
 - Time not generally deemed of essence of contract, 73
 - Waiver, 74
 - Waiver of delay though provision that time of essence, 72
- When time deemed essence of contract and when not, 74**
 - Change of circumstances or relation of parties, 77
 - Change of possession, 75
 - Change of value or circumstances, 76
 - Contracts in regard to realty, 75
 - Express stipulation or necessary implication, 74
 - Fluctuation in values, 76
 - General rule, 74
 - Improvements, 75
 - Injury, 76
 - Nature of contract considered, 75
 - Question of injury, 76
 - Subsequent conduct, 75
 - Test, 76
 - Where time not the essence, 73
 - Where time the essence, no enforcement by party in default, 74
- Time to perfect title, 115
- Title** (see *infra*, MARKETABLE TITLE):
 - Burden of proof, 131
 - Effect of decree upon title to property, 134
 - Satisfactory title, 114
 - Tender of title*, see *infra*, TENDER OF TITLE.
 - Vendee's refusal to accept title, 118
- Title bond, 90
- Title deeds, 96
- Title to be conveyed, 106**
 - Conditions, 108
 - Defects due to vendee, 107
 - Defects known to vendee, 107
 - Easements, 108
 - Good title to be conveyed, 106
 - Immaterial defects, 108
 - Known defects, 108
 - Liens dischargeable out of purchase money, 109
 - Marketable title*, see *infra*, MARKETABLE TITLE.
 - Record title, 107
 - Reservations, 108
 - Restrictions, 108

SPECIFIC PERFORMANCE, *cont'd.***Title to be conveyed, *cont'd.***

- Statute of limitations, 107
- Technical objections, 108
- Title acquired by adverse possession, 107
- Title subject to restrictions, 108
- Trifling incumbrances, 109
- Trifling variations, 109
- Waiver of defects, 108

Trusts and trustees, 124

- Burden of proof, 131
- Constructive trusts, 124
- Duration of trusts, 124
- Implied trusts, 124
- Statute of frauds, 124
- Trusts, 124

Ultra vires*, 24*Unconscionable bargain, 68****Undue influence, 46****Unilateral contracts, 31****Value:**

- Ascertainment of value, 98
- Change of value or circumstances, 76

Effect of change of value, 70

- Enforceability, 70
- Illustrations, 70
- Mere change of value, 70
- Rule stated, 70

Fluctuation in value, 76**Property having market value, 103****Vendor and purchaser (see *infra*, REAL PROPERTY CONTRACTS; SPECIFIC PERFORMANCE; SUITS BY VENDEE; SUITS BY VENDOR):****Marketable title, see *infra*, MARKETABLE TITLE.****Rights of vendee, 126****Title to be conveyed, see *infra*, TITLE TO BE CONVEYED.*****Void contract*, see *infra*, CONSIDERATION; LAWLESSNESS.*****Voluntary agreements*, see *infra*, CONSIDERATION.****Waiver, 134****Condition precedent, 42*****Waiver of default*, see *infra*, RULE WHERE PLAINTIFF IN DEFAULT.****Wills:*****Agreement to make will in person's favor*, see *infra*, CONTRACTS FOR TESTAMENTARY PROVISIONS.*****Contracts for testamentary provisions*, see *infra*, CONTRACTS FOR TESTAMENTARY PROVISIONS.****Wills improperly witnessed, 48*****Working contracts*, see *infra*, CONTRACTS TO CONSTRUCT, ERECT, OR REPAIR.****SPECIFIC QUESTION, 135****SPECIFIC TAXES, 135****SPECIFY, 136****SPECIMEN, 136****SPECULATE, 136****SPECULATIVE DAMAGES, 136****SPEECH, 136****SPEED, 136****SPEEDILY, 136****SPEEDWAY, 136****SPEEDY TRIAL, 136****SPELLING, 136****SPENDTHRIFTS AND SPENDTHRIFT TRUSTS, 137*****Active trusts*, see *infra*, TRUST MUST BE ACTIVE.****Alienability, 140****Beneficiary also trustee, 147****Beneficiary one of several cestui ques trustent, 146****Interest not joint, 146****Judgment at law, 146****Ratable portion of surplus, 146****Where interests are inseparable, 146****Where interests are separable, 146****Creation of trusts, 141*****Cestui que trust* in being not necessary, 142****Express words not necessary, 141****Grounds of inference, 142****Creditors:****Rights of creditors, 140****Definitions, 137****Moral obliquity not involved, 138****Spendthrifts, 137****Spendthrift trusts, 138*****Discretion of trustees*, see *infra*, INTEREST OF BENEFICIARY AND DISCRETION OF TRUSTEE.****Donors:****Donor also beneficiary, 145****Power over corpus of estate, 148****Education during minority, 145****Interest of beneficiary and discretion of trustee, 143****Discretion as to amount, 145****Discretion as to time, 145****Discretion narrowed by construction, 145****Discretion of trustee, 144****Endangering trusts, 144****Interest in mortgaged property, 144****Maintenance and education during minority, 145****Rule, 143.****Trustees' ordinary duties, 143****Unqualified discretion of trustee, 144****When trust fund may be reached, 144****When trust fund will be protected, 143****Maintenance and education during minority, 145****Statutory provisions, 148****New York, 148****Statute applies to personal property, 149****Statutes construed, 148****Surplus of income liable to creditors, 149****Trustees:****Beneficiary trustees, 147****Duties and liabilities, 147****Trust must be active, 143****Duties imposed upon trustees, 143****General rule, 143****Tests, 143****Validity, 138****Alienability and rights of creditors, 140****American doctrine, 139****Analogous to separate estate of wife and exemption laws, 141****Arguments *pro* and *con*, 140****Cesser or limitation of estate, 138****English doctrine, 138, 141****Trusts not immoral, 141****SPENT BILLS OF LADING, 150****SPILE, 150**

- SPINNING PLANT**, 150
SPIRIT, 151
SPIRIT GAS, 151
SPIRITUAL, 151
SPIRITUALISM, 151
SPIRITUALITY, 151
SPIRITS, 151
SPITTING BLOOD, 151
SPLINE KEY, 151
SPOIL, 151
SPOILIATION, 152
SPORT, 152
SPORTING, 152
SPRAG, 152
SPRAGGER, 152
SPRAIN, 152
SPRING, 152
SPRING HOUSE, 153
SPRINGING USE, 153
SPRING PLATE, 153
SPURIOUS, 153
SQUANDER, 153
SQUANDERER, 153
SQUARE, 153
SQUATTER (see **STATE AND PUBLIC LANDS**), 154
SR., 154
STAB, 154
STABLE, 154
STACK, 154
STAGE, 154
STAGECOACH, 155
STAKE, 155
STAKED OFF, 155
STAKEHOLDER, 155
STAKE RACE, 155
"STAL," 155
STALE CLAIM, 155
STALE DEMAND, 155
STALE LEVY, 155
STALL, 155
STALLAGE, 155
STALLION, 155
STAMP TAX, 155
STAND, 155
STANDARD, 156
STANDARD GRADE, 156
STANDARD TIME, 156
STAND COMMITTED, 156
STANDING, 155
STANDING ARMY, 156
STANDING ASIDE, 156
STANDING BY, 156
STANDING CROP, 156
STANDING DETACHED, 157
STANDING TREES, 157
STANDING WOOD, 157
STAND TO, 157
STARE DECISIS, 158
 Alienation, 181
 Appeal, see *infra*, **LAW OF THE CASE**.
 Application of the rule, 161
 Change in personnel of court, 168
 Decisions construing common law, 162
 Decisions construing constitutional questions, 162
 Decisions of co-ordinate courts, 165
 Decisions of court of last resort, see *infra*, **DECISIONS OF COURT OF LAST RESORT**.
 Decisions of intermediate courts, 165
 Decisions on former statutes, 161
 Dicta, see *infra*, **DICTA**.
 Divided court, 166
 How applied, 161
 Matters of practice, 163
 Single decision, see *infra*, **SINGLE DECISION**.
 Where precedent has been approved by legislature, 167
 Change in decision, 164
 Change in personnel of court, 168
 Charters, 182
 Common law:
 Decisions construing common law, 162
 Constitutional law, see *infra*, **CONSTRUCTION OF CONSTITUTION AND STATUTES OF OTHER STATES; FEDERAL DECISIONS AS PRECEDENTS IN STATE COURTS**.
 Construction of constitution and statutes of other states:
 Adopted statutes, 178
 Conflict between federal and state decisions, 178
 Decision not in evidence, 177
 Decision of foreign state as to rule of property, 178
 Decision of inferior courts, 177
 Effect of change of state boundary on precedent, 178
 General rule as to decisions of other states, 176
 Province of court and jury, 178
 Contracts, 183
 Corporation charters, 182
 Court of last resort, see *infra*, **DECISIONS OF COURT OF LAST RESORT**.
 Courts (see *infra*, **FEDERAL DECISIONS AS PRECEDENTS IN STATE COURTS**):
 Decisions of courts of another state as precedents, see *infra*, **CONSTRUCTION OF CONSTITUTION AND STATUTES OF OTHER STATES**.
 Criminal cases, 180
 Customs, see **USAGE AND CUSTOMS**.
 Decisions of co-ordinate courts, 165

STARE DECISIS, *cont'd.*

- Decisions of court of last resort, 163**
 - Affirmance without opinion, 165
 - Conflict between state and federal courts, 164
 - Decision binding on lower court, 163
 - Decision by divided court, 165
 - Dicta, 165
 - Effect of change in decision, 164
 - General rule, 163
 - Number of judges concurring, 165
- Decisions of House of Lords, 178
- Decisions of intermediate courts, 166
- Decisions of other departments of government, 176
- Definition, 158**
 - Obiter dicta*, 160
 - Precedent, 158
 - Stare decisis*, 158
- Departments of government, 176
- Dicta, 165, 168**
 - Dicta as rule of property, 171
 - General expressions, 169
 - General rule, 168
 - Illustrations in opinion, 170
 - Interpretation of language of court, 169
 - Obiter dicta*, 166
 - Point decided and dicta, 192
 - Presumption, 170
 - Questions not argued, 170
 - Reasoning, 170
 - State court not bound by dicta of federal court, 175
 - Subordinate propositions, 171
 - Where several points are decided, 171
- Divided court, 165, 166
- Erroneous precedents as rules of property, 180**
 - Alienation, 181
 - Charters of corporations, 182
 - Claim to an office, 182
 - Commercial usages, 183
 - Contracts, 182
 - Descent, 181
 - General rule, 180
 - Strict application, 180
 - Where property involved, 180, 181
 - Wills, 182
- Federal decisions as precedents in state courts, 172**
 - Comity, 172, 174
 - Constitutional and federal statutes, 172
 - Constitutionality of state statutes under Federal Constitution, 173
 - Construction of constitution and statutes, 172
 - Construction of state constitution and statutes, 175
 - Decisions of inferior courts, 174
 - Dicta, 175
 - Federal Constitution, 172
 - Federal statutes, 173
 - Generality, 172
 - Inferior courts, 174
 - In matters of general jurisprudence, 176
 - Insolvency laws, 174
 - National banking act, 174
 - Territorial courts, 176
 - Treaties, 173
 - Where federal court has appellate jurisdiction, 176
- Foreign laws*, see *infra*, CONSTRUCTION OF CONSTITUTION AND STATUTES OF OTHER STATES.

STARE DECISIS, *cont'd.*

- General consideration of the rule, 160
- House of Lords, decisions of, 178
- Injunction:**
 - Decision on appeal from grant or denial of preliminary injunction, 188
- Jurisdiction:**
 - Decision as to jurisdiction of lower court, 193
- Law of the case, 184**
 - Appellate court has no jurisdiction over itself, 189
 - Application of doctrine, 189
 - Changed circumstances at second trial, 191
 - Conclusiveness of decision on former appeal stated as *res judicata*, 188
 - Decision of trial court, 190
 - Decision on appeal from grant or denial of preliminary injunction, 188
 - Different state of facts on second trial, 191
 - Expiration of term at which decision is made, 189
 - Further proceedings in lower court, 193
 - General statement of doctrine, 184
 - Jurisdiction, 193
 - New trial and proceedings therein, 193
 - No error in following decision of appellate court, 194
 - Overruled case, 190
 - Point decided and dicta, 192
 - Point not raised, 193
 - Question of law and fact, 191
 - Questions on second appeal, 194
 - Reasons of doctrine, 189
 - Relations to *res judicata* and *stare decisis*, 188
 - Rule not confined to courts of last resort, 190
 - Subject-matter same, but parties different, 192
 - To what courts applicable, 190
- Limitation of rule, 183**
 - Nature of right involved, 184
 - Rule not inflexible, 183
 - Unconstitutional decisions, 184
- New trial, 193
- Obiter dicta*, see *infra*, DICTA, 166
- Opinion:**
 - Affirmance without opinion, 165
 - Practice, matters of, 163
- Precedent*, see *infra*, FEDERAL DECISIONS AS PRECEDENTS IN STATE COURTS.
- Questions of law and fact, 191
- Res judicata, 188**
 - Law of the case, 188
- Retrospective effect of change of decision, 179**
 - Criminal cases, 180
 - Effect on contract rights, 179
 - Federal Constitution, 179
 - General rule, 179
- Rules of property*, see *infra*, ERRONEOUS PRECEDENTS AS RULES OF PROPERTY.
- Second appeal*, see *infra*, LAW OF THE CASE.
- Second trial*, see *infra*, LAW OF THE CASE.
- Single decision, 167**
 - General rule, 167
 - Nature of question decided, 167
 - Single decision as rule of property, 168
 - Single decision reversing precedent, 168
 - Where former precedent has been overruled, 167
- Start, 195
- State, 195

STARE DECISIS, *cont'd.*

- State agent, 196
- State decisions as precedent in federal courts, 171
- Statement, 195
- Statutes, see *infra*, FEDERAL DECISIONS AS PRECEDENTS IN STATE COURTS.
- Succession, 181
- Treaties, 173
- United States courts (see *infra*, FEDERAL DECISIONS AS PRECEDENTS IN STATE COURTS):
 - Conflict between state and federal courts, 164
 - Usage and customs, 183
 - Where precedent has been approved by legislature, 167
 - Wills, 182

START, 195

STATE, 195

STATE AGENT, 196

STATE AND PUBLIC LANDS, 197

- Abandonment:
 - Cancellation by land department, 380, 382
- Acknowledgment:
 - Acknowledgment of patent, 422
 - School and university lands, 373
- Actions, see *infra*, REVIEW BY COURTS.
- Act to quiet land:
 - Titles in California, 340
- "Actual settler" (see *infra*, POSSESSORY RIGHTS IN PUBLIC LANDS), 262, 298, 353
- "Adjacent," 454
- Administration, see *infra*, POWER OF ADMINISTRATION AND SALE.
- Adverse possession, 228
 - Excepted land, 440
- Affidavit:
 - Homestead, 253
- Agency, see *infra*, LOCATION OF PUBLIC LANDS BY AGENT.
- Age of pre-emptor, 244
- Aid of railroads, see *infra*, GRANTS IN AID OF RAILROADS.
- Alaska, 315
- Alienation (see *infra*, ASSIGNMENT, INCUMBRANCE, AND ALIENATION OF INCHOATE RIGHT):
 - Restrictions on, 256
- Aliens, 244
- "Appropriated," 213
- Arkansas, 305
- Assignability of occupant's rights in town sites, 312
- Assignability of pre-emption right, 250
- Assignment, incumbrance, and alienation of inchoate right (see *infra*, SCHOOL AND UNIVERSITY GRANTS), 405
 - After the patent to public lands has been issued, 408
 - Agreements in violation of pre-emption and homestead acts, 410
 - Assignment of warrants, 405
 - Assignment of warrants prohibited, 405
 - Contracts to convey lands, 406
 - Contracts with regard to improvements, 415
 - Effect of unlawful transfers on title of patentee, 416
 - Execution sale, 413
 - Interests acquired from federal government, 405

STATE AND PUBLIC LANDS, *cont'd.*

- Assignment, incumbrance, and alienation of inchoate right, *cont'd.*
- Interests acquired from state, 416
 - Assignment forbidden by statute, 419
 - Certificate of purchase, 419
 - Delivery of warrant, 418
 - Generally, 416
 - Interest under certificate of purchase, 419
 - Involuntary alienation, 420
 - Land warrants, 417
 - Mode of assignment, 418
 - Preferential rights of purchase, 417
 - Proof of transfer, 418
 - Restrictions, 420
 - Sale of certificate after location, 419
 - Scrip, 417
 - Statutory restrictions, 416, 419
 - Transfer after location, 419
- Involuntary alienation, 413
- Land warrants, 405
- Mortgage, 411
 - Mortgage after perfecting right to patent, 411
 - Mortgage before perfecting right to patent, 411
- Patent, after issuance of, 408
- Patent, perfected right to, 410
- Perfecting right to patent, 410
- Pre-emption rights, 405
- Preferential rights held to be assignable, 405
- Provisions as to mortgage of the Federal Homestead Act, 412
- Recording acts, 445
- Relinquishment of entries and entry rights, 415
 - Restrictions on right to mortgage, 411
- Resulting trusts, 415
- Right to enter public lands, 405
- Sheriff's sale, 413
- Statutory exemptions, 413
- Statutory restrictions upon conditions, 408
- Traffic in public lands restricted, 408
- Voluntary conveyance, 406
- Warrants held to be assignable, 405
- "Attached," 331
- Bill to quiet title, 398
- Block surveys, 276
- Board of equitable adjudication, 378
- Bona fide purchasers, 442
 - Equitable doctrine of notice, 444
 - Failure to return survey, 442
 - General rule, 442
 - Immediate purchase from government, 442
 - Mistakes, wrongful acts, or omissions of government or its officers, 442
- Purchasers for value and without notice, 443
 - As against government, 444
 - Equitable title, 444
 - Land script, 444
 - Land warrants, 444
 - Of legal title, 443
- Purchasers with notice, 445
 - General rule, 445
 - Patents and other deeds, 446
 - Recording acts, 445
- Statutes adjusting invalid or forfeited rights or grants, 446
- Void grants, 443
- Boundaries, see *infra*, SURVEYS.

STATE AND PUBLIC LANDS, *cont'd.*

- Bounty and donation lands, 315**
 - Construction of grants, 315
 - Five per cent. bounty, 320
 - Louisiana grants, 321
 - Lovely claim, 321
 - Miscellaneous grants, 321
 - Mississippi donation, 320
 - North Carolina grants, 320
 - Oklahoma grants, 321
 - Oregon Donation Act*, see *infra*, OREGON DONATION ACT.
 - Technical terms unnecessary, 315
 - Virginia military district, 319
- California, 261**
 - Act to quiet lands, 340
 - Application to purchase, 263**
 - Curative statutes, 263
 - Necessity for compliance with statutory requirements, 263
 - Terms of payment and forfeiture for non-payment, 264
 - Construction of constitutional provisions, 262**
 - Generally, 262
 - What lands are suitable for cultivation, 262
 - Legislative confirmation of irregular or unauthorized selections, locations, and sales, 369
 - Meaning of "actual settler," 262
 - Policy of state declared by constitution, 261
 - Sale of lands suitable for cultivation restricted to actual settlers, 262
 - Title and power of disposal, 201**
 - Act of Congress "to quiet land titles," 261
 - In general, 261
 - Necessity for survey, 261
- Calls, 266, 270**
- Canada, 214**
 - License to cut timber, 259
 - Disposal of United States and Canada lands, 236
- Canal-land grants, 340**
- Cancellation by land department, 379**
 - Abandonment, 83
 - Cancellation of patent, 383**
 - Certification under granting act, 384
 - Correcting surveys, 384
 - Correction of clerical errors, 384
 - Delivery of patent not essential, 383
 - Generally, 383
 - In case of nonacceptance, 384
 - No jurisdiction to annul patent, 383
- Fraud:**
 - Return of purchase money, 383
- Prior to issuance of patent, 379**
 - Abandonment, 380
 - Cancellation obtained through fraud or error of law, 382
 - Cancellation of entries by federal land department, 379
 - Effect of cancellation on purchaser from entryman, 380
 - Error, 382
 - Fraud, 380, 382
 - Generally, 379
 - Hearing, 381
 - Necessity of notice and hearing, 381
 - Notice, 381

STATE AND PUBLIC LANDS, *cont'd.*

- Cancellation by land department, *cont'd.***
 - Prior to issuance of patent, *cont'd.***
 - Power of land department to order re-survey, 380
 - Return of purchase money, 382
 - Return of purchase money, 382**
 - Effect of fraud, 383
 - Generally, 382
 - Necessity of surrender of duplicate receipt, 383
 - Statutory provisions, 382
 - Voluntary abandonment, 383
 - Who entitled to redeem, 382
- Caveat proceedings, 387
- Caveats, 269
- Certificates** (see *infra*, ASSIGNMENT, INCUMBRANCE, AND ALIENATION OF INCHOATE RIGHT; TEXAS), 451
- Collateral attack:**
 - Surveys, 393
 - School and university grants, 370
- "Claims," 331
- Collateral taxes*, see *infra*, REVIEW BY COURTS.
- Colorado, 306
- Color of title:**
 - Depredations on public lands, 459
- Commissioner of general land office, 376**
 - Adjudication as to settlement and improvement, 376
 - Controversies between different settlers, 376
 - Limitation upon commissioner's power, 377
 - Statute, 376
 - Supervisory power of commissioner, 376
- Community property, 286, 288
- Conditions precedent and subsequent, 436**
 - Conditions subsequent not favored, 437
 - Construction of conditions precedent and subsequent, 437
 - Enlargement of time for performance of conditions, 439
 - Estate does not pass until performance of conditions precedent, 437
 - Estoppel to enforce forfeiture, 440
 - Forfeiture on breach of conditions, 438, 439
 - General rule, 436
 - Judicial proceedings or legislative assertion of ownership necessary, 438
 - Mode of enforcing forfeiture on breach of condition subsequent, 438
 - Necessity of office found at common law, 438
 - Office found, 438
 - Power to prescribe conditions, 437
 - Waiver of conditions precedent, 439
 - Waiver of conditions subsequent, 439
 - Who can enforce forfeiture on breach of conditions precedent, 437
- Confirmation, 213
- Conflicting grants to state*, see *infra*, SWAMP-LAND GRANTS.
- Conflicting patents, 392
- Conflicts between state and federal grants*, see *infra*, SWAMP-LAND GRANTS.
- Connecticut, 217
- Conquest, 215
- Constitutional law:**
 - California, see *infra*, CALIFORNIA.
 - School and university grants, 358

STATE AND PUBLIC LANDS, *cont'd.*

Construction, see *infra*, INTERPRETATION;
STRICT OR LIBERAL CONSTRUCTION AS TO
GRANTEE.

Construction of railroad grants, see *infra*,
GRANTS IN AID OF RAILROADS.

Contracts, see *infra*, IMPAIRMENT OF OBLIGA-
TION OF CONTRACT.

Counties:

Swamp-land grants, 351

Court-house grants, 343

Courts:

Review by courts, see *infra*, REVIEW BY
COURTS.

Credit, 240

Criminal law, see *infra*, OFFENSES AGAINST
LAND LAWS.

Cultivation, 254

"Lands suitable for cultivation," 353

Pennsylvania, 281

"Suitable for cultivation," 262

"Unfit for cultivation," 345

Damages:

Depredations on public lands, 459

Death of grantee before issuance of patent, 430

Canadian Heir-and-Devisee Act, 432

Common-law rule, 430

Construction and effect of federal act, 434

Construction of certificate, patent, or con-
firmation to heirs, 431

Conveyance by person entitled, 431

Entry in name of deceased person, 430

Executors or administrators, 432

Federal statutes, 432

"Heirs," 431

Kentucky statutes, 434

"Legal representative," 431

Limitation of successors restricted by stat-
ute under which patent is issued, 432

New York statute, 435

North Carolina statute, 435

Patent to heirs, 431

Patent void when issued after death of
grantee, 430

Practice adopted to avoid common-law rule,
430

Statutes passed to avoid common-law rule,
432

Tennessee statute, 435

Texas statute, 436

To what lands federal statutes applicable,
433

What law controls in ascertaining grantees,
432

Whether heirs take by descent or purchase,
431

Who are legal representatives, 431

Death of homesteader, 255**Death of pre-emptor, 246**

Devise by pre-emptor, 246

Entry in favor of heirs, 246

Heirs tenants in common, 246

Land not subject to debts of pre-emptor
or expenses of administration, 246

Location by agent, 322

Who entitled as heirs, 246

Debts contracted before issuance of patent,
256

Declaratory statement, 248

Acceptance, 249

Approval, 249

Assumed name, 248

STATE AND PUBLIC LANDS, *cont'd.***Declaratory statement, *cont'd.***

Defective statement, 248

Generally, 248

Lands must have been subject to pre-
emption, 248

Time for filing statement, 248

Effect of failure to file within required
time, 249

Land not proclaimed for sale, 248

Land subject to private entry, 248

Unsurveyed land, 248

Dedication:

Streets and public squares, 313

Definitions, 212

"Appropriated," 213

"Confirmation," 213

"Entry," 213

"Float," 213

"Grant," 213

Inclusive meaning of words "public lands"
and "state lands," 212

Public domain, 212

Public land, 121

Public land laws, 212

"Sale," 213

"Unappropriated," 213

"Vacant," 212

Depredations on public lands, 452

Act of government amounting to permis-
sion, 457

Color of title, 459

Condonation by government, 457

Cutting timber *prima facie* illegal, 456

Damages, 455

Defenses, 456

Enclosures, 453

Evidence, 459

Exemplary damages, 456

Generally, 452

Grants to railroads, 454

Homesteader's right to use timber, 456

Intent as affecting liability, 454

Intent in cutting timber, 454

Intent in inclosure of land, 454

Intention, 456, 459

Intermingling of logs, 456

Irregular permit, 457

Meaning of timber, 453

Nuisances, 453

Permission of agent in excess of authority,
457

Rules and regulations of secretary, 455

Statutes, 452

"Timber," 453

Timber on grants to railroads, 455

Trespasser buying land, 458

Unintentional trespass, 456

Descent and distribution, see *infra*, SUCCESSION.

Devise, see *infra*, WILLS.

Disposal of state lands, 261

Disposition, see *infra*, LANDS SUBJECT TO
DISPOSITION; POWER OF ADMINISTRATION
AND SALE.

Donation lands, see *infra*, BOUNTY AND DO-
NATION LANDS.

Dower after right to patent complete, 404

Ejectment, 386

Emblements, 229

"Entry" (see *infra*, VIRGINIA AND KEN-
TUCKY), 213, 430

STATE AND PUBLIC LANDS, *cont'd.*

- Equity title, 398
- Estoppel**, 447
 - Estoppel against United States, 447
- Estoppel to enforce forfeiture, 440
- Grants of land by state, 447
- State grants, 447
- Unauthorized act of officers, 447
- Evidence**, 448
 - Depredations on public lands, 459
 - Location of grant, 450
- Patents**, 448
 - As evidence, 449
 - Copy as evidence, 449
 - Execution of patent, 449
 - Exemplification, 449
 - Issuance, 448
 - Persons bound by facts recited in patent, 449
 - Recitals, 449
 - Pre-emption, 450
- Records of land office**, 451
 - Certificates, 451
 - Contest in land office, 451
 - Judicial notice, 451
 - To show title, 450
- Exceptions** (see *infra*, RESERVATIONS IN GRANT), 440
 - Adverse possession of excepted land, 440
 - Burden of proving locality of excepted lands, 440
 - Generally, 440
 - Insufficient description of exception does not effect grant, 441
 - Patentee acquires no title to excepted lands, 440
 - Sufficiency of description of exception in grant, 440
- Execution sales, 413, 420
- Executors and administrators** :
 - Death of grantee before issuance of patent*, see *infra*, DEATH OF GRANTEE BEFORE ISSUANCE OF PATENT.
- Exemplification, 449
- Exemptions from executions, 413, 414
- False swearing, 460
- Family, 244, 285
- Field notes*, see *infra*, TEXAS.
- Filing application and certificate, Texas, 291
- Filing claim for townsite, 315
- Filing statement*, see *infra*, DECLARATORY STATEMENT.
- "Float," 213
- Forfeiture** (see *infra*, CONDITIONS PRECEDENT AND SUBSEQUENT; GRANTS IN AID OF RAILROADS) :
 - Railroad right of way over public lands, 339
- Forfeiture of school and university lands**, 365
 - Forfeiture of state university lands, 367
 - Generally, 365
 - Notice of default, 365
 - Period of redemption and recovery of possession thereafter, 367
 - Repeal of statute authorizing forfeiture, 367
- Resale after forfeiture or default**, 367
 - Generally, 367
 - Purchaser's right of redemption, 368
 - Purchaser's right to surplus on resale, 368
 - Statutes, 367
 - Whether remedy by resale exclusive, 368
- Who can take advantage of default**, 366

STATE AND PUBLIC LANDS, *cont'd.*

- Forged patent, 394
- Forgery, 460
- Fraud**, 460
 - Cancellation by land department**, 380
 - Cancellation for fraud, 380
 - Cancellation obtained through fraud, 382
 - Return of purchase money, 383
 - Collateral attack on patent, 391
 - Patent, 280
 - Pre-emption, 249
 - School and university grants, 368
 - Suit by government, 396
 - Suit by individual, 399
- Fraudulent land certificates, 289
- Free grants*, see *infra*, HOMESTEADS AND FREE GRANTS.
- Georgia, 305
- Grant** (see *infra*, HOMESTEADS AND FREE GRANTS), 213
 - Conditions precedent and subsequent*, see *infra*, CONDITIONS PRECEDENT AND SUBSEQUENT.
 - Construction and operation of grants*, see *infra*, INTERPRETATION.
 - Death of grantee before issuance of patent*, see *infra*, DEATH OF GRANTEE BEFORE ISSUANCE OF PATENT.
 - Exceptions*, see *infra*, EXCEPTIONS.
 - Manner of granting public lands*, see *infra*, MANNER OF GRANTING PUBLIC LANDS.
 - Reservations*, see *infra*, RESERVATIONS IN GRANT.
- Grant by direct legislative act**, 423
 - Acts confirming claims, 424
 - Acts confirming grants, 424
 - Compliance with conditions, 423
 - Confirmation of claim operates as grant, 424
 - General rule, 423
 - Grant as highest evidence of title, 424
 - Grant superior to patent, 424
 - Intention of legislature, 423
 - Interpretation*, see *infra*, LEGISLATIVE GRANTS CONSTRUED AS STATUTES.
 - Necessity of patent, 423
 - Particular acts held to be grants *in præ-senti*, 423
 - Power to make grants, 423
 - Subsequent patent merely evidence of title, 424
 - Treaties, 425
- Grants for internal improvements**, 339
 - Canal grants, 340
 - Court-house grants, 343
- Grant of 1841**, 339
 - Act to quiet land titles in California, 340
 - Character of grant, 339
 - Generally, 339
 - Lands subject to location, 339
 - Time of making location, 339
- Miscellaneous grants, 342
- Public building grants, 343
- River improvements, 343
- Wagon-road grants*, see *infra*, WAGON-ROAD GRANTS.
- Grant in aid of railroads**, 324
 - Branches, 334
- Conflicting grants**, 335
 - Overlapping grants, 336
 - Priority, 335
- Construction of railroad grants, 324

STATE AND PUBLIC LANDS, *cont'd.***Grants in aid of railroads, *cont'd.***

Depredations on public lands, 454

Forfeiture, 327

Application of equitable rule, 329

Debts not transferred, 328

Declaration of forfeiture, 328

Defenses, 329

For nonperformance of conditions, 327

Prior grants not affected, 328

Self-executing, 328

General, 324

Indemnity lands, 325

Time of vesting, 326

Withdrawal, 330

Interpretation of railroad grants, 324

Mineral lands, 334

Mortgages, 336

Overlapping grants, 335

Place and indemnity lands, 325

Place lands, 325

Time of vesting, 325

Priority, 335

Right of way over public lands, see infra,
RAILROAD RIGHT OF WAY OVER PUBLIC LANDS.**Selections of lands by railroad in indemnity limits, 334**

Approval by secretary, 435

Generally, 334

Secretary acts judicially, 335

Swamp lands, 335

Selection of lands by railroad in place limits, 333

Branches, 324

Extensions, 334

Lands in another state, 334

Location, 333

Mineral lands, 334

Quantity, 333

Sidetracks, 334

Sidetracks, 334

Statute adjusting invalid or forfeited rights or grants, 446

Swamp lands, 352

Title, see infra, RAILROAD RIGHT OF WAY OVER PUBLIC LANDS.**Title of railroads, 325**

Act both grant and law, 325

Conditions precedent to vesting of title, 327

Construction of road as condition precedent, 327

Ejectment, 325

Forfeiture, 327

Location of line and filing of map as condition precedent, 327

Map, 327

Nature of title, 325

Paying cost of survey, 327

Time of vesting as to indemnity lands, 326

Time of vesting of title as to place lands, 325

Time of vesting of title where grant is to state, 326

Transportation of troops and mails, 339

Withdrawal of lands granted, 329

By secretary of interior, 329

Effect of withdrawal, 330

Illustrations, 329

Indemnity lands, 330

STATE AND PUBLIC LANDS, *cont'd.***Grants in aid of railroads, *cont'd.*****Withdrawal of lands granted, *cont'd.***

Mode of withdrawal, 329

Operation of law, 330

Reservation from sale does not exclude pre-emption, 330

Revocation of withdrawal, 330

When to be withdrawn, 329

Grants in aid of railroads as against settlers, 330

Canal and ditch claims, 332

Entry prior to survey, 332

Grant to railroad excludes private claims, 331

Meaning of "Attached," 331

Meaning of "Claims" and "Rights," 331

Sham claims and erroneous entries, 331

Within indemnity limits, 332

Within place limits, 330

Head of family, 224, 285

Hearing:

Cancellation by land department, 381

Heirs (see *infra*, DEATH OF PRE-EMPTOR):*Death of grantee before issuance of patent, see infra,* DEATH OF GRANTEE BEFORE ISSUANCE OF PATENT.

Death of homesteader, 255

Oregon donation act, 318, 319

Town sites, 312

Highways, see infra, WAGON-ROAD GRANTS.**Homestead:**

Possessory rights in state and public lands, 232.

Pre-emption distinct from, 242

School and university grants, 371

Texas, see infra, TEXAS.**Homesteads and free grants, 251**

Amount of land which may be acquired, 252

Change from pre-emption to homestead entry, 253

Cultivation, 254

Death of homesteader, 255

Debts contracted before issue of patent, 256

Entry, 253

Final proofs, 254

How homestead laid off, 252

Interest and rights of homesteader after entry and before right to patent complete, 254

Introductory, 251

Jurisdiction to pass on homestead claims, 255

Lands subject to homestead entry, 252

License to cut timber, see infra, TIMBER.

Nature of right, 251

New Madrid locations, see infra, NEW MADRID LOCATIONS.

Oklahoma lands, 253

Preliminary affidavit, 253

Relation back of patent, 255

Residence, 254

Restriction on alienation, 256

Right of possession, 254

Right to acquire adjoining homestead, 252

Right to cut timber, 254

Taxation of homestead, 255

Texas, see infra, TEXAS.*Timber culture, see infra,* TIMBER.

Who may acquire homestead rights, 252

Volume XXVI.

STATE AND PUBLIC LANDS, *cont'd.*

- How acquired by state, 213
- Early possessions, 213
- English dependencies** (see *infra*, **How Ac-**
QUIRED BY STATE), 213
 - Canada, 214
 - Colonial America, 213
 - General rule, 213
 - Proprietary colonies, 214
 - Royal colonies, 214
 - Generally, 213
- In United States**, 214
 - Boundary-line agreements, 215
 - Cessions by original states, 215
 - Kentucky, 216
 - Lands under navigable waters, 216
 - Maine, 216
 - National governments and new states,
215
 - Original states, 214
 - Private rights antedating cessions of ter-
ritory, 217
 - Proprietary colonies, 214
 - Tennessee, 216
 - Texas, 216
 - Tide lands, 216
 - Vermont, 216
 - West Virginia, 216
- Impairment of obligation of contracts :**
 - State grant a contract, 220
 - Vested rights, 221, 222
- Improvements** (see *infra*, **GRANTS FOR IN-**
TERNAL IMPROVEMENTS; PRE-EMPTION),
229.
 - Construction of grants for public improve-
ments, 428
 - Kentucky, 270
 - Pennsylvania, see *infra*, **PENNSYLVANIA**.
 - Warrants for improvements, 274
- Inchoate right :**
 - Decisions of land department as aids to
statutory construction, 403
- Inchoate right or title and grant**, 403
 - Assignment, incumbrance, and alienation of*
inchoate right, see *infra*, **ASSIGNMENT,**
INCUMBRANCE, AND ALIENATION OF IN-
CHOATE RIGHT.
- Inclosures**, see *infra*, **DEPREDACTIONS ON PUB-**
LIC LANDS.
- Incumbrance**, see *infra*, **ASSIGNMENT, IN-**
CUMBRANCE, AND ALIENATION OF INCHOATE
RIGHT.
- Indemnity lands**, see *infra*, **GRANTS IN AID OF**
RAILROADS.
- Indian lands :**
 - Pre-emption, 242
- Indians :**
 - Lands occupied or claimed by Indians**,
226
 - General grants of Indian country, 227
 - Grants specifically extinguishing Indian
claims, 227
 - Indian reservations, 227
 - Prohibition of grants under general land
laws, 226
 - Occupancy*, see *infra*, **POSSESSORY RIGHTS**
IN PUBLIC LANDS.
- Inhibition**, see *infra*, **PRE-EMPTION.**
- Injunction**, see *infra*, **REVIEW BY COURTS.**
- Interlocks**, 270
- Internal improvements**, see *infra*, **GRANTS FOR**
INTERNAL IMPROVEMENTS.

STATE AND PUBLIC LANDS, *cont'd.*

- Interpretation :**
 - Death of grantee before issuance of patent*,
see *infra*, **DEATH OF GRANTEE BEFORE**
ISSUANCE OF PATENT.
- Entry, 430
- Federal grants of lands abutting on waters,
429
- Grants for purpose of public improvement,
428
- Legislative grants construed as statutes*, see
infra, **LEGISLATIVE GRANTS CONSTRUED AS**
STATUTES.
- Operation of grant in respect of seizin or
possession, 429
- "Practical interpretation" shown by con-
duct of parties, 429
- Strict or liberal construction as to grantee*,
see *infra*, **STRICT OR LIBERAL CONSTRUC-**
TION AS TO GRANTEE.
- Interpretation of railroad grants*, see *infra*,
GRANTS IN AID OF RAILROADS.
- Intimidating occupant, 460
- Islands, 226
- Judicial notice :**
 - Records of land office, 451
- Jurisdiction** (see *infra*, **REVIEW BY COURTS;**
SUIT BY PRIVATE INDIVIDUAL) :
- Jurisdiction to pass on homestead claims, 255
- Pre-emption*, see *infra*, **PRE-EMPTION.**
- Kansas, 306
- Kentucky** (see *infra*, **VIRGINIA AND KEN-**
TUCKY), 216
 - Death of grantee before issuance of patent*,
434
- Laches**, 418
 - In proceedings to annul land patent, 448
 - Laches not imputable to government, 448
- Land certificates**, see *infra*, **TEXAS.**
- Land department officials and proceedings**, 374
 - Board of equitable adjudication*, see *infra*,
BOARD OF EQUITABLE ADJUDICATION.
 - Cancellation by land department*, see *infra*,
CANCELLATION BY LAND DEPARTMENT.
 - Commissioner of general land office*, see
infra, **COMMISSIONER OF GENERAL LAND**
OFFICE.
 - Conclusiveness of proceedings, 379
 - Decision of land department as aid to
statutory construction, 403
 - Effect of proceedings, 379
 - Establishment of federal land department,
374
 - Federal land department, 374
 - General statement, 374
 - Part of the interior department, 374
 - Registers and receivers*, see *infra*, **REGIS-**
TERS AND RECEIVERS.
 - Review by courts*, see *infra*, **REVIEW BY**
COURTS.
 - Rules of procedure*, see *infra*, **RULES OF**
PROCEDURE.
 - Secretary of interior*, see *infra*, **SECRETARY**
OF INTERIOR.
 - Specific officers considered, 375
 - State land department, 374
 - Statutory provisions for state land boards,
374
 - Surveyors*, see *infra*, **SURVEYORS.**
 - Timber agents*, see *infra*, **TIMBER AGENTS.**
- Lands subject to disposition**, 219
 - Failure to use and occupy granted land, 220

STATE AND PUBLIC LANDS, *cont'd.***Lands subject to disposition, *cont'd.***

- Inchoate rights, 221
- Islands, 226
- Lands claimed under Spanish, Mexican, or other foreign grants, 224
- Lands occupied by Indians, see *infra*, INDIAN LANDS.
- Lands previously granted, 219
- Lands reverted to government, 225
- Lands to which inchoate rights have attached, 221
- Lands under navigable waters, 226
- Lapse of right previously vested, 222
- Power to reserve or withdraw lands, 225
- Provision exempting lands from taxation, 220

Railroad land grants, 224

Reservation, see *infra*, RESERVATIONS.

State grant a contract, 220

Tide lands, 226

Vested right a contract, 222

Withdrawals, 224

"Land titled," 290

Leases (see *infra*, SCHOOL AND UNIVERSITY GRANTS), 306

Legal representatives:

Death of grantee before issuance of patent, see *infra*, DEATH OF GRANTEE BEFORE ISSUANCE OF PATENT.

Legislation, see *infra*, GRANT BY DIRECT LEGISLATIVE ACT.

Legislative grants construed as statutes, 427

Condition of country, 428

History, 428

How and when grant operates, 421

Intent and purchase override technical rules of construction, 427

Nature of estate granted, 428

Particular matters to be considered in construing grant, 428

Possibility of present identification unnecessary, 427

Principle stated, 427

Prior legislation upon same subject, 428

Quantum of estate granted, 428

Limitation of actions:

Applicability of statute of limitations against government, 448

Local improvements, see *infra*, GRANTS FOR INTERNAL IMPROVEMENTS.

Location of public lands by agents, 321

Claim as locator, 321

Contract for location, 321

Action upon, 323

By whom signed, 322

Death of party to, 322

Must be express, 321

Need not be written, 322

Power to make, 321

Locator, 323

Duties under contract, 323

Evidence of authority, 323

Powers under contract, 323

Rights on performance, 323

Louisiana grants, 321

Lovely claim, 321

Maine, 216, 305

Mandamus, see *infra*, REVIEW BY COURTS.

Manner of granting public lands:

Direct legislative act, see *infra*, GRANT BY DIRECT LEGISLATIVE ACT.

STATE AND PUBLIC LANDS, *cont'd.*

Manner of granting public lands by patent, see *infra*, PATENT.

Map (see *infra*, SURVEY):

Grants in aid of railroads, 327

Maryland, 305, 306

Mexican grants, see *infra*, SPANISH, MEXICAN, OR OTHER FOREIGN GRANTS.

Michigan, 306

Military law:

Transportation of troops and mails, 339

Mines and mining claims:

Grants in aid of railroads, 334

Pre-emption, 244

Town sites, 314

Mississippi donation, 320

Mistake:

Collateral attack on patent, 391

Mistakes, wrongful acts, or omissions of government or its officers, 442

School and university lands, 368

Suit by government, 326

Mortgages, 420

After perfecting right to patent, 411

Before perfecting right to patent, 411

Illustrations, 411, 412

Provisions of the homestead act, 412

Restrictions upon mortgage, 411, 412

Right of railroad to mortgage lands granted, 336

Municipal aids, see *infra*, GRANTS IN AID OF RAILROADS.

Navigable waters:

Lands under navigable waters, 216, 226

Nevada, 306

New Jersey, 305

New Madrid locations, 256

Actions of ejectment, 258

Lands subject to location, 257

Persons entitled to benefit of act, 256

Procedure for acquiring lands under act, 256

Provisions of act of 1822, 258

Provisions of act of 1864, 258

Purpose and provisions of act of 1815, 256

Relinquishment of injured lands, 257

When location complete, 257

New York, 305

Death of grantee before issuance of patent, 436

North Carolina, 306, 307, 308, 320

Death of grantee before issuance of patent, 436

Notice (see *infra*, BONA FIDE PURCHASERS):

Cancellation by land department, 381

Pre-emption rights, 271

Purchaser for value without notice, see *infra*, BONA FIDE PURCHASER.

Purchasers without notice, see *infra*, BONA FIDE PURCHASERS.

Notice of default, 366

Nuisances, 453

Obligation of contracts, see *infra*, IMPAIRMENT OF OBLIGATION OF CONTRACTS.

Occupants, see *infra*, SETTLERS; TOWN SITES.

Occupation, see *infra*, PRE-EMPTION.

"Occupied," see *infra*, POSSESSORY RIGHTS IN PUBLIC LANDS.

Offenses against land laws, 460

False swearing, 460

Forgery, 460

Fraud, 460

STATE AND PUBLIC LANDS, *cont'd.***Offenses against land laws, *cont'd.***

Intimidating occupant, 460

Perjury, 460

Office found, 438

Officers (see *infra*, LAND DEPARTMENT OFFICIALS AND PROCEEDINGS):

Fraud of officers, 400

Mistakes, wrongful acts, or omissions of government or its officers, 442

Suit by individual, 399, 400

Oklahoma, 315, 321

Operation of recording acts, 445

Oregon donation act, 316

Abandonment of location, 318

Affidavit required as to use, 317

Children's rights, 319

Conditions precedent, 316

Consideration for grant, 316

Damages for occupation, 318

Determination of boundary lines, 317

Devolution of local law, 319

Evidence, 318

Generally, 316

Grant not one *in presenti*, 316

Heirs, 319

Husband divorced, 317

Interest before patent not liable for debts, 316

Meaning of residence, 316

Performance of conditions vests title, 317

Proviso against sale before patent, 319

Reservation for military purposes, 317

Residence on either of two sections, 317

Sufficiency of description, 317

Women's rights under the act, 318

Married women, 318

Nature of wife's interest, 318

Rights of unmarried women, 319

Where husband died before proof, 318

Where husband failed to make proof, 318

Where wife was divorced, 318

Widow entitled to dower, 318

Overflowing lands, see *infra*, SWAMP-LAND GRANTS.**Patents (see *infra*, ASSIGNMENT, INCUMBRANCE, AND ALIENATION OF INCHOATE RIGHT; PENNSYLVANIA; REVIEW BY COURTS), 420**

Acceptance of patent, 421

Acknowledgment, 422

Cancellation by land department, see *infra*, CANCELLATION BY LAND DEPARTMENT.

Conflicting patents, 392

Copy as evidence, 449

Date of patent, 422

Death of grantee before issuance of patent, see *infra*, DEATH OF GRANTEE BEFORE ISSUANCE OF PATENT.

Delivery of patent, 421

Direct attack, 396

Evidence, see *infra*, EVIDENCE.

Execution by special agents, 421

Execution of patent, 420

Exemplification, 449

Grant by direct legislative act, see *infra*, GRANT BY DIRECT LEGISLATIVE ACT.

Name of grantee, 421

Patent is a government conveyance, 420

Patent is authorized act of public official, 420

STATE AND PUBLIC LANDS, *cont'd.***Patents, *cont'd.***

Patent is the usual mode of grant, 420

Patent passes title, 420

Patent to state lands, 421

Place of record, 422

Presumption of acceptance of patent, 422

Priorities, 392

Recitals in patent, 421

Recording patent, 422

Review by courts, see *infra*, REVIEW BY COURTS.*Right and title prior to issuance of patent*, see *infra*, RIGHT AND TITLE PRIOR TO ISSUANCE OF PATENT.

Signature of president, 420

Signature to patent for state lands, 421

Suit by private individual, see *infra*, SUIT BY PRIVATE INDIVIDUAL.*Texas*, see *infra*, TEXAS.

Time of taking effect, 422

When patent takes effect, 422

Pennsylvania, 217, 271**Application and warrant or location, 271**

Application, 271

Descriptive applications and warrants, 272

Effect of descriptive warrant, 272

Generally, 271

Loose or indescriptive warrants, 273

Necessity of warrant, 272

Operation of descriptive warrant, 272

Priority as between surveys returned on same day, 273

Shifted warrants and applications, 273

Title commences at date of descriptive warrant, 272

Warrant, 272

Warrant of acceptance, 272

Warrants for improvements, 274

Improvements, 280

Land office, 271

Modes of obtaining title, 271

Origin of title of state, 271

Patents, 279

Authority to issue, 279

Evidence of ownership, 279

Fraud, 280

Land not included in survey, 280

Ownership, 279

Payment of purchase money, 279

Validity, 279

Policy of land laws, 271

Pre-emption rights, 283

Under proprietary government, 283

Under state government, 283

Priorities, 282

Proceedings in land office, 271

Settlement and improvement, 280

Character of property rights acquired, 282

Cultivation without residence, 281

Danger excusing personal residence, 281

Defining claim, 282

Designation of claim, 282

Extent of claim, 282

Husband and wife, 280

Lands subject to settlement, 281

Nature and extent of settler's rights, 282

Priorities, 282

Purpose of occupation, 281

Quantity of land, 282

Requisites of settlement, 281

STATE AND PUBLIC LANDS, *cont'd.***Pennsylvania, *cont'd.*****Settlement and improvement, *cont'd.***

Residence of tenant or agent, 281

Settlement as a mode of acquiring title, 280

Validity of settlement, 281

Who may be settler, 280

Survey, 274

Authority to make, 274

Block surveys, 276

Compensation in quantity, 279

Deficiency in quantity, 279

Duty to make return, 278

Effect as evidence of title, 276

Excess in quantity, 278

Failure to return, 278

Necessity, 274

Presumption of regularity, 276

Priority as between surveys returned on same day, 273

Requisites, 275

Resurvey, 277

Return of survey, 277

Survey before receipt of warrant, 276

Surveyor acting for himself, 275

Surveyor acting out of proper district, 275

Surveyor must go on and measure ground, 275

Time of return, 278

Validity, 275

Perjury, 460

Place lands, see *infra*, GRANTS IN AID OF RAILROADS.*Plat*, see *infra*, SURVEYS.**Possession :**

Homestead, 254

Operation of grant in respect of possession, 429

Right to possession after right to patent complete, 404

Possessory rights in public lands (see *infra*, SETTLERS), 228**As against government and its grantees, 228**

Actual possession, 231

Adverse possession, 228

Betterments, 229

Compensation for improvements, 229

Constructive possession, 231

Emblements, 229

Exceptions to rule, 230

Forcible entry, 231

General rule, 228

Grants excepting occupied lands from location, 231

Homesteads, 230

Improvements, 229

Location, 231.

Occupancy as ground for equitable relief against grants to others, 232

"Occupied," 231

Policy of government toward actual settlers, 230

Possessory rights confirmed and perfected by grant, 230

Pre-emptions, 230

Prescription, 228

Presumption of grant, 228

Private entries and pre-emption rights, 232

STATE AND PUBLIC LANDS, *cont'd.***Possessory rights in public lands, *cont'd.*****As against government and its grantees, *con.***

Promise to pay for improvements made after purchase, 230

Town-site laws, 232

United States public lands, 231

United States settlement laws, 232

Vacant lands, 231

As between strangers to title, 232

Bare possession and occupancy give no rights as against government or its grantees, 228

Protection by courts, 385

Enforcement of contracts relating to possessory rights, 387

Equitable disposition of possession between contestants, 386

Homestead entries, 386

Injunction, 396

Successful claimant, 386

Power of administration and sale, 217

Public lands of states, 219

Public lands of United States, 217

Administration and sale by Congress, 218

Appropriation of public lands by treaty, 218

Congress, 217

Federal power ceases after sale where land lies within a state, 218

Lands within a state, 218

Power to lease, 218

Questions of title determined by laws of United States, 218

State interference with grants made prior to its admission, 219

State laws and decisions binding upon the United States courts, 219

Pre-emption, 241, 306

Abandonment of right, 251

Actions by and against pre-emptors, 251

Age, 244

Aliens, 244

Amount of land which may be pre-empted, 244

Arkansas, 306

Assignment, incumbrance, and alienation of inchoate right, see *infra*, ASSIGNMENT, INCUMBRANCE, AND ALIENATION OF IN-CHOATE RIGHT.

Assignment of right, 250

Change from pre-emption to homestead entry, 253

Computation of time, 250

Death of pre-emptor, see *infra*, DEATH OF PRE-EMPTOR.*Declaratory statement*, see *infra*, DECLARATORY STATEMENT.

Disqualifications, 245

Distinction between homestead and pre-emption, 242

Evidence, 450

Evidence of payment, 251

Final proof, 250

Fraud, 249

Head of family, 244

Homestead district from pre-emption, 242

Improvement, 246

Inhabitation, 247

Introductory, 241

STATE AND PUBLIC LANDS, *cont'd.***Pre-emption, *cont'd.*****Jurisdiction to pass on pre-emption claims, 249**

Claims, 249

Fraud in establishment of pre-emption, 249

Generally, 249

Register, 249

Kentucky, see *infra*, VIRGINIA AND KENTUCKY.**Lands subject to pre-emption, 242**

Generally, 242

Indian lands, 242

Lands excepted from pre-emption, 242

Lands occupied for purposes of trade and business, 244

Mining lands, 244

Particular statutes, 242

Reservations, 243

Saline lands, 244

Statutes, 242

Town-sites and lands within limits of town, see *infra*, TOWN-SITES.

Limitation of actions, 251

Louisiana, 306

Minnesota, 306

Missouri, 306

Nature of right, 241

Necessity for compliance with statute, 247

Occupation, 246

Officers of United States, 245

Payment, 250

Pennsylvania, see *infra*, PENNSYLVANIA.

Possessory rights in public lands, 232

Presumption of legality of entry, 251

Proceedings to acquire right, 247

Proprietorship of other lands, 245

Public officer, 245

Qualifications, 244

Right could be exercised but once, 250

Rights of pre-emptor during occupancy and before purchase, 250

Settlement, 246

Settlement by two or more persons, 245

Statement, see *infra*, DECLARATORY STATEMENT.

Statutes, compliance with, 247

Substantial compliance with statute, 247

Title acquired by completing purchase, 251

Two or more pre-emptors, 245

Virginia, see *infra*, VIRGINIA AND KENTUCKY.

Who might acquire pre-emption rights, 244

Who might attack title of pre-emptor, 251

Widow, 244

Wisconsin, 306

Prescription, 228**Presumption:**

Entries, 267

Presumption of acceptance of patent, 422

Presumption of grant, 228

Presumption of legality of entry, 251

Presumption of regularity of acts and conveyances of town-site trustee, 310

Presumption of regularity of surveys, 276

Presumption of validity of patent, 395

Price, see *infra*, PUBLIC AND PRIVATE SALES.**Price of land:**

Texas, 300

Private sales, see *infra*, PUBLIC AND PRIVATE SALES.**STATE AND PUBLIC LANDS, *cont'd.****Procedure*, see *infra*, LAND DEPARTMENT OFFICIALS AND PROCEEDINGS; RULE OF PROCEDURE.**Proceeds:**

Title to timber cut and goods and chattels left upon premises as between grantee and trespasser, 228

Public and private sales, 238

Agreements to pay premiums to purchasers declared void, 238

Applications for purchase at private sales, 239

Credit, 240

Entering different tract from that intended, 240

Erroneous sales, 240

Executive proclamations, 238

Generally, 238

Lands subject to public sale, 238

Penalty for preventing bids, 238

Price, 239

Proclamations, 238

Public buildings, 343

Public officers (see *infra*, LAND DEPARTMENT OFFICIALS AND PROCEEDINGS):

Pre-emption by officers of United States, 245

Purchases by public officers, 306

Public squares, see *infra*, TOWN SITES.**Purchase money** (see *infra*, CANCELLATION BY LAND DEPARTMENT):*Return of purchase money*, see *infra*, CANCELLATION BY LAND DEPARTMENT.*Purchaser without notice*, see *infra*, BONA FIDE PURCHASER.

Quieting titles, 340

Railroad (see *infra*, GRANTS IN AID OF RAILROADS):

Transportation of troops and mails, 339

Withdrawal from sale, 224

Railroad right of way over public lands, 336

Change of location, 338

Conditions precedent to vesting of title, 338

Exclusive right, 337

Forfeiture, 339

Grant by general statute, 337

Grant to named railroad, 337

Meaning of right of way, 336

Nature of grant, 337

Nature of title, 337

Right as against settlers, 338

Right of way over canyons, 338

School lands, 338

Title, 337

Title by estoppel, 338

Receivers, see *infra*, REGISTERS AND RECEIVERS.*Record*, see *infra*, EVIDENCE.**Recording acts, 446**

School and university grants, 373

Recording patent, 422

Redemption:

Period of redemption and recovery of possession thereafter, 367

Resale after forfeiture or default, 367

Registers and receivers, 375

Commissions, 375

Deputy, 375

Duties, 375

Liability on official bonds, 375

Powers, 375

STATE AND PUBLIC LANDS, *cont'd.***Registers and receivers, *cont'd.***

Reimbursement for rent, 375

Salary, 375

Remedies, see *infra*, REVIEW BY COURTS.**Resale:**

School and university grants, 365

Resale after forfeiture or default, see *infra*,
FORFEITURE OF SCHOOL AND UNIVERSITY
LANDS.**Rescission:**

School and university grants, 365

Reservations, 222

Forest reservations, 223

Generally, 222

Lands reserved for military purposes, 223

Miscellaneous reservations, 223

Oregon Donation Act, 317

Patent void, 224

Power to reserve or withdraw lands, 225

Pre-emption, 243

Salt and mineral land reservations, 223

Town-site reservations, 223

Withdrawals and reservations, 224

**Reservations in grants (see *infra*, EXCEP-
TIONS), 441**Nonexistence of beneficiary of reservation,
441Patent not containing reservation required
by statute, 441

Public uses, 441

Repugnant reservations, 441

Reservation of highways, 442

Reservations for public uses, 441

Right of patentee to maintain trover, 441

Right to revoke reservation, 441

Unauthorized reservations, 441

Residence (see *infra*, TEXAS), 254, 288

Oregon Donation Act, 316

Pennsylvania, 281

Texas, see *infra*, TEXAS.**Resulting trusts, 415****Return of purchase money (see *infra*, CAN-
CELLATION BY LAND DEPARTMENT), 402****Reverter:**

Grants in aid of railroads, 328

Review by courts, 384

Collateral attack upon patent, 391

Attack by mere intruder, 390

Attack by stranger, 395

Attacking surveys, 393

Conflicting patents, 392

Effect of statutes allowing equitable de-
fenses, 391

Equitable defense, 391

Error, 391

Forged patent, 394

Fraud, 391

Grants void in part, 394

Junior patent and senior entry held su-
perior to senior patent, 392Lands previously transferred from gov-
ernment, 394Lands reserved or dedicated to special
purposes, 395

Mistake, 391

Patent not subject to collateral attack,
390

Presumption of validity, 395

Priority, 392

Record of land office proceedings held
inadmissible to impeach patent, 390**STATE AND PUBLIC LANDS, *cont'd.*****Review by courts, *cont'd.*****Collateral attack upon patent, *cont'd.***

State lands, 390

Statutes giving certificate of purchase
effect as evidence of legal title, 392

Void patents, 393

Where government is without title, 394

Decisions of land department as aids to
statutory construction, 403**Prior to issuance of patent, 384**

Caveat proceedings, 387

Claimant of legal title not entitled to in-
junction, 385Effect in courts of pendency of matters
before land department, 384

Ejectment, 386

Enforcement of contracts relating to pos-
sessory rights, 387Equitable disposition of possession be-
tween contestants, 386

Injunction, 385

Injunction to enforce possessory rights,
386Interference with officials by mandamus
or injunction, 385Jurisdiction of action between contest-
ants in advance of action of land de-
partment, 385

Mandamus, 385

Possessory rights, 385

Protection of homestead entries, 386

Protection of possessory rights, 385

State land contests in courts, 387

Return of purchase money, 402**Subsequent Issuance of patent, 387**Adjudication as to physical character of
land, 389Circumstances giving right of review,
389

Collateral attack, 390

Conclusiveness of decision of land depart-
ment, 388Decision of governor of state acting as
agent of the United States, 388

Generally, 387

Swamp lands, 389

Timber lands, 389

Suit by government, see *infra*, SUIT BY GOV-
ERNMENT.Suit by private individual, see *infra*, SUIT
BY PRIVATE INDIVIDUAL.**Right and title prior to issuance of patent,
403**

Actions for damages, 404

After right to patent complete, 403

Before right to patent complete, 403

Descent, 404

Dower, 404

Equitable title, 403

Legal title under statutes, 403

Right to maintain actions for damages,
404

Right to maintain petitory action, 404

Right to maintain possessory action, 404

Right to possession, 404

Right of way over public lands, see *infra*,
RAILROAD RIGHT OF WAY OVER PUBLIC
LANDS."Rights" (see *infra*, WAGON-ROAD GRANTS),
331

River improvements, 343

STATE AND PUBLIC LANDS, *cont'd.***Rules of procedure, 379**

- Abrogation of rules promulgated by secretary of the interior, 379
- Application of rules of pleading, 379
- Right of the secretary of interior to adopt rules, 379

Sales (see *infra*, POWER OF ADMINISTRATION AND SALE; PUBLIC AND PRIVATE SALES; SCHOOL AND UNIVERSITY GRANTS), 213

- Arkansas, 306
- California, see *infra*, CALIFORNIA.
- Colorado, 306
- Georgia, 305
- Kansas, 306
- Maine, 305
- Maryland, 305
- Michigan, 306
- Nevada, 306
- New Jersey, 305
- Purchases by public officers, 306
- School and university grants, see *infra*, SCHOOL AND UNIVERSITY GRANTS.
- South Carolina, 305
- Surveys, see *infra*, SURVEYS.
- Swamp-land grants, see *infra*, SWAMP-LAND GRANTS.
- Tennessee, 305
- Texas, see *infra*, TEXAS.
- Utah, 306
- Wisconsin, 306

School and university grants (see *infra*, TEXAS), 354, 364

- Acknowledgment, 373
- Actions with respect to school lands, 359
- Assignment of certificate, 372
 - Assignability of certificate, 372
 - Assignment in blank, 373
 - Certificates not negotiable, 737
 - Distinction between assignment of certificate and conveyance of purchaser's title, 373
 - Land occupied as homestead, 373
 - Method of assignment, 372
- By states, 360
- Constitutional provisions, 358

Control and power of disposal after grant or reservation, 357

- Actions with respect to school lands, 359
- Before survey, 358
- Compact between general government and state, 357
- Constitutional provisions, 358
- Disposal of general government after reservation, 357
- Exclusive control by state, 357
- Land granted not subject to disposal as part of public domain, 357
- Management and control by unauthorized officials, 358
- Relinquishment of rights by state, 357
- Statutory provisions, 358
- Conveyance of purchaser's title distinct from assignment of certificate, 373
- Conveyance of purchaser's title or interest, 372

Diverting land or proceeds from purposes of grant, 370

- Generally, 370
- Purchaser's title not affected, 370

Federal government, 354

- Control and power of disposal after grant or reservation, 357

STATE AND PUBLIC LANDS, *cont'd.***School and university grants, *cont'd.*****Federal government, *cont'd.***

- Generally, 354
- Grants of land as indemnity for school sections otherwise disposed of, 359
- Provision for schools part of land system, 354
- Statutes, 354
- Title and tenure of state or territory, 354

Forfeiture, see *infra*, FORFEITURE OF SCHOOL AND UNIVERSITY LANDS.**Grants of land as indemnity for school sections otherwise disposed of, 359**

- Generally, 359
- Grant of sixteenth and thirty-sixth sections to California, 359
- Lands previously disposed of cannot pass under grant for use of schools, 359
- Selection of indemnity lands outside state, 360
- Statutes held not to contemplate exchange of lands between state and United States, 359
- Vesting of title, 360

Homestead rights, 371**Leases, 361****Legislative confirmation of irregular or unauthorized selections, locations, and sales, 369**

- Acts of Congress relating to California lands, 369
- Generally, 369

Mortgage of purchaser's interest, 372**Pre-emption, 243****Purchaser's contract and certificate of purchase or location, 370**

- By whom executed, 370
- Execution by deputy clerk, 370
- Nature and incidents of certificate, 370
- Title or interest acquired, 371
- Transfer of purchaser's title or interest, 372

Recording, 373**Resale after forfeiture or default, see *infra*, FORFEITURE OF SCHOOL AND UNIVERSITY LANDS.****Sales and leases of school and university lands, 361**

- Annulment of contract, 365
- Application for private sale, 363
- Appraisal of land, 363
- Consent of Congress under contract between United States and Tennessee, 362
- Consent of Congress under grant, 361
- Consent of Congress under reservation, 362
- Consent of inhabitants of township, 362
- Forfeiture, see *infra*, FORFEITURE OF SCHOOL AND UNIVERSITY LANDS.

Fraud, 368**Irregularity in sale, 368****Legislative confirmation of irregular or unauthorized selections, locations, and sales, 369**

- Method of obtaining consent, 363
- Mistake, 368
- Mode of conducting sale, 364
- Power to sell or lease, 361
- Proceedings prior to sale or lease, 363

STATE AND PUBLIC LANDS, *cont'd.***School and university grants, *cont'd.*****Sales and leases of school and university lands, *cont'd.***

Remedies for noncompliance with terms of sale or lease, 365

Re-offering for sale when land not sold, 369

Resale after forfeiture or default, see *infra*, FORFEITURE OF SCHOOL AND UNIVERSITY LANDS.

Resale on failure of immediate payment, 365

Rescission, 365

Settler's preferential right to purchase, 364

Terms of sale or lease, 365

Withholding lands from sale, 364

Who may make sale or lease, 363

Tenure, 356

Title and tenure of state or territory, 354

Effect of reservation from sale, 355

Necessity for completion and approval of survey, 355

Survey, 355

Survey, identification, or selection determines when title vests, 355

Tenure, 356

Vesting of title, 354

Title in state in trust for township, 356

Title or interest acquired, 371

Generally, 371

Nature and incidents of statutory title, 372

Title or interest defined by statute, 371

Transfer of purchaser's title or interest, 372

Townships, 356

Transfer of purchaser's title or interest, 372

Secretary of interior, 377

Appeal to President, 378

Review by secretary, 377

Review of decision of secretary, 377

Statutory provisions, 377

Supervisory power of secretary of interior, 377

Sections, 236

Seizin:

Operation of grant in respect of seizin, 429

Settlers (see *infra*, ACTUAL SETTLERS; COMMISSIONER OF GENERAL LAND OFFICE; GRANTS IN AID OF RAILROADS; PENNSYLVANIA; PRE-EMPTION; POSSESSORY RIGHTS IN PUBLIC LANDS):

Railroad right of way over public lands, 338

Settlement rights, 306

Texas, see *infra*, TEXAS.

Sheriff's sales, 413, 420

Shifted warrants, 273

Signature, see *infra*, PATENT.Sources of private rights, see *infra*, HOW ACQUIRED BY STATE.

South Carolina, 305

Spanish, Mexican, or other foreign grants:

Withdrawal from sale, 224

Squatter, see *infra*, POSSESSORY RIGHTS IN PUBLIC LANDS.**Statutes (see *infra*, GRANT BY DIRECT LEGISLATIVE ACT):**Legislative grants construed as statutes, see *infra*, LEGISLATIVE GRANTS CONSTRUED AS STATUTES.**STATE AND PUBLIC LANDS, *cont'd.*****Strangers to government title, 232**

Abandonment, 235

Actual possession necessary, 235

Character of right as property, 235

General rule, 232

Incumbrances, 234

Involuntary sale of possessory rights, 235

Possessory rights generally, 233

Reservation in favor of miners, 234

Sale, 234

United States public lands, 233

Streets and sidewalks, see *infra*, TOWN SITES.**Strict or liberal construction as to grantee, 425**

Grant made on consideration, 426

Gratuitous grant, 426

Intent and purpose override technical rules, 427

Intent of parties, 426

Legislative grants construed as statutes, see *infra*, LEGISLATIVE GRANTS CONSTRUED AS STATUTES.

Pre-existing government obligation, 426

Public improvements, 428

Strict construction, general rule, 425

Subject to disposition, see *infra*, LANDS SUBJECT TO DISPOSITION.**Subsequent to issuance of patent:**Direct attack, see *infra*, SUIT BY GOVERNMENT; SUIT BY PRIVATE INDIVIDUAL.Suit by government, see *infra*, SUIT BY GOVERNMENT.Suit by private individual, see *infra*, SUIT BY PRIVATE INDIVIDUAL.**Succession (see *infra*, HEIRS):**Death of grantee before issuance of patent, see *infra*, DEATH OF GRANTEE BEFORE ISSUANCE OF PATENT.

Succession after right to patent complete, 404

Suitable for cultivation, 262

Suit by government, 396

Fraud, 396

General rule, 396

Patent issued through error of law, 396

Patent issued without authority, 396

When government may sue to annul patent, 396

Suit by private individual, 397

Bill to declare patentee trustee, 397

Bill to quiet title, 398

Correcting surveys, 402

Equitable relief against patentee of state lands, 398

Equity anterior to patent essential to relieve, 401

Error of law, 399

Fraud, 399

Fraud of officers, 400

Inadvertence, 400

Intruder not entitled to sue, 401

Misconstruction of law, 399

Mistake, 399, 400

Newly-discovered evidence, 400

Plaintiff must show himself entitled to patent, 402

State lands, 398

Want of jurisdiction, 400

Who entitled to relief, 401

Surveyors, 378

Surveyor-general, 378

Surveys, 236, 287, 378

Ascertaining the boundaries, 236

STATE AND PUBLIC LANDS, *cont'd.***Surveys, *cont'd.***

- Boundaries, 236
- Correcting surveys, 384
- Correct surveys, 384
- Failure to return survey, 442
- Generally, 236
- Generally no portion of the public domain is open to sale until it has been surveyed, 237
- How divided, 236
- Kentucky, see *infra*, VIRGINIA AND KENTUCKY.
- Lands granted according to a judicial plat of the survey, 237
- Pennsylvania, see *infra*, PENNSYLVANIA.
- Power to make and correct surveys, 237
- Railroad paying cost of survey, 327
- School and university grants, 355
- Sections, 236
- Supervision for surveys, 378
- Surveyors, 378
- Surveyors-general, 378
- Texas, see *infra*, TEXAS.
- Townships, 236
- Virginia, see *infra*, VIRGINIA AND KENTUCKY.

Swamp-land grants, 343

- Character of land as to time, 346
- Conflict between state and federal grants, 349**
- Confirmation by state of federal grants, 350
- Generally, 349

- Conflicting grants to state, 350
- Cultivation, 352, 353

Disposition of swamp-land grants by state, 351

- Actual settlers, 353
- Application to purchase, 353
- Construction of levees, 353
- Effect of sub-grants, 352
- General rights of purchasers, 354
- Grants to county, 351
- Grants to railroad, 352
- Illustrations, 352
- Improvers, 353
- Occupants, 353
- Settlers, 353
- "Suitable for cultivation," 353
- Validity of state grants, 352
- Who may purchase, 353

Generally, 343**Grant *in presentis*, 344****Identification of lands, 344, 345, 347**

- Act of Congress of March 3, 1857, 349
- Act of Congress of July 23, 1866, 349
- Decision of secretary of interior as to character of land, 348

On failure of secretary of interior to determine character of land, 347

- Ex parte* proceedings of federal land department, 347
- Failure of state officers to select, 347
- Generally, 347
- Patents from state, 347
- Selection by state officers, 347

Legal subdivisions, 346**Louisiana grants, 344****Overflowed lands, 345****Priority of existing equities, 346****Sales, 351 *et seq.*****Selection by railroad of swamp lands, 335****Settlers, 353****STATE AND PUBLIC LANDS, *cont'd.*****Swamp-land grants, *cont'd.***

- Statutes, 343
- "Swamp and overflowed lands," 345
- "Unfit for cultivation," 345

Taxation of homestead, 255**Tennessee, 216, 305**

- Death of grantee before issuance of patent, 436

Texas, 216, 284**Abandonment of location and survey, 296**

- Issuance of patent, 297
- Land in two or more counties, 297
- Right acquired by patentee, 297
- Right to abandon, 296
- What constitutes abandonment, 296

Acquisition of public lands prior to annexation by United States, 284

- Actual presence of family, 285
- Citizens of Texas, 285
- Colonization contract, 286
- Community property, 285
- Decisions under former government as to qualification of grantee, 285
- Empresario* contracts, 286
- Family, 285
- General colonization laws, 284
- Mexican colonization laws, 284
- Recognition by republic of right acquired under Mexican law, 284

Acquisition of public lands since annexation, 286**Application, 286, 291****Certificates, 284****Community property, 288****Death of grantee before issuance of patent, 436****Filing application and certificate, 291****Homestead donation laws, 286, 298****Abandonment, 289****Application, 286****Generally, 286****Prerequisites to acquisition of title, 286****Residence for three consecutive years, 288****Return of field notes to general land office, 287****Settlement, 286****Survey, 287****Validity of patent, 288****What constitutes abandonment of claim, 289****What land open to acquisition, 288****When land acquired is community property, 288****Land certificates, 289****Abandonment of location and survey, 296****Act relating to issue of headright certificates, 289****Application, 291****Conditions essential to acquisition of title under confederate certificates, 296****Constitutional requirements, 291****Definition, 284****Effect of application, 292****Effect of filing, 292****Effect of void survey, 296****Entry, 291****Essential conditions to be performed before patent will issue, 291**

STATE AND PUBLIC LANDS, *cont'd.***Texas, *cont'd.*****Land certificates, *cont'd.***

- Filing application and certificate in surveyor's office, 291
- Floated location, 292
- Fraudulent land certificates, 289
- Generally, 289
- Land certificates defined and characterized, 284
- "Land titled," 290
- Land titled in part, 290
- Lifted location, 292
- Return of field notes and certificates to general land office, 294
- Right of location where certificate entitled two or more persons to land, 291
- Survey, 292
- To whom certificates may be issued, 289
- Upon what lands certificates may be located, 290
- When duplicate certificates may be issued, 290

Lease, 303**Located certificates, 284****Patent, 288, 291****Purchase of school and asylum lands, 298****Purchase or lease of unappropriated lands situated in organized counties, 297**

- Acquisition of lands under homestead donation laws not prohibited, 298

- Construction of former laws relating to purchase of unappropriated lands, 298

Generally, 297

- Lands situated within inclosures of actual *bona fide* settlers, 298

Residence, 301-303**Return of field notes and certificate to general land office, 287, 294**

- Certified copy of certificate as evidence, 295

Generally, 294

- Issuance of certificate for unlocated balance, 295

- Relocation of certificate on same land, 294

- Return of field notes after withdrawal, 295

- Waiver of neglect to return within time prescribed, 295

- Withdrawal of certificate not permissible, 295

School and asylum lands, 298**Acquisition by lease, 303**

- Acceptance of application, 304

- Amount of rent, 304

- Application for lease, 304

- Cancellation of lease for nonpayment of rent, 304

- Execution and delivery of lease, 304

Generally, 303

- Length of lease, 304

- Nonpayment of rent, 304

- Payment of rent, 304

- Right of lessee to purchase, 304

- Right of lessee to renew lease, 305

- When leased lands may be sold, 305

Acquisition by purchase, 298

- Affidavit, 300

- Application, 300

- Cash payment, 300

- Classification, 299

- Conditions essential to acquisition, 300

STATE AND PUBLIC LANDS, *cont'd.***Texas, *cont'd.*****School and asylum lands, *cont'd.*****Acquisition by purchase, *cont'd.***

- Conditions to be performed by vendee or purchaser, 302

- Constitutional provisions, 298

- Forfeiture of lands for nonpayment of interest, 303

- Forfeiture of lands for nonresidence, 303

- Generally, 298

- Mandamus, 302

- Mistake in acquisition does not authorize cancellation of sale, 303

- Patent upon payment in full after three years' occupancy, 301

- Powers of commissioner of general land office, 301

- Price of lands, 300

- Provision as to situation of lands purchased, 300

- Purchaser of home section may purchase additional land, 300

- Quantity that may be purchased, 299

- Remedies of applicants from whom lands are wrongfully withheld, 301

- Residence, 301

- Right of purchaser to sell, 302

- Sale of lands by purchaser, 302

- Valuation, 299

- When sale deemed effective, 301

- Who may purchase, 299

Settlement, 286**Survey, 292**

- Abandonment of location and survey, 296

- By whom made, 293

- Effect of void survey, 296

- Generally, 292

- How made, 293

- Necessity for survey, 293

- Proper person to make survey, 293

- Survey cannot be made until after application filed, 292

- Surveyor's certificate, 293

- Time of making survey, 293

- When certified copy of record of field notes may be obtained, 294

Unlocated certificates, 284**Validity of patent, 288****Tide lands, 216, 226****Timber, 389****License to cut timber, 258**

- Canada, 259

Depredations on public lands, see *infra*, DEPREDATIONS ON PUBLIC LANDS.

- Illustrations, 259, 260

- Nature of license, 259

- Rights and duties of locatee, 260

- United States, 261

- Right of homesteader to cut timber, 254

- Timber culture, 258

- Title to timber cut and goods and chattels left upon premises, as between grantee and trespasser, 228

Timber agents, 378**Time, computation of, 250****Time for filing statement, see *infra*, DECLARATORY STATEMENT.****Title (see *infra*, SCHOOL AND UNIVERSITY GRANTS):**

- Railroad right of way over public lands,

STATE AND PUBLIC LANDS, *cont'd.*Title, *cont'd.*

see *infra*, RAILROAD RIGHT OF WAY OVER PUBLIC LANDS.

Right and title prior to issuance of patent, see, *infra*, RIGHT AND TITLE PRIOR TO ISSUANCE OF PATENT.

School and university grants, see *infra*, SCHOOL AND UNIVERSITY GRANTS.

Title of railroad lands, see *infra*, GRANTS IN AID OF RAILROADS.

Evidence, see *infra*, EVIDENCE.

Township (see *infra*, SCHOOL AND UNIVERSITY GRANTS), 236

Town sites, 308

Abandonment, 314

Act of state legislature, 315

Acts of Congress, 308

Beneficiaries under town-site laws, 310

Conclusiveness of findings of facts, 310

Conflicting claims, 310

Conveyances, 310

Evidence, 314

Filing claim, 315

General legislation, 308

Mineral lands, 314

Occupants, 310, 311

Alienable interest, 312

Conflicting claims, 311

Descendible interest, 312

Occupants entitled to town-site lots, 311

Right of possession, 312

Rights of occupants in general, 311

What constitutes occupancy, 311

When rights vest, 312

Who may be occupants, 311

Possessory rights in public lands, 232

Pre-emption, 243

Actual occupancy necessary, 243

Judicial notice of situation of lands, 243

Not subject to pre-emption, 243

Settlement of land after it is ascertained to be within corporate limits, 243

Presumption as to acts and conveyances, 310

Public squares, 313

Special legislation, 315

For particular municipalities, 315

Oklahoma and Alaska, 315

State acts giving effect to act of Congress, 314

State legislatures, 315

Statutory provisions, 308

Streets and public squares, 313

Dedication by Congress, 313

Dedication by occupant or owner, 313

Dedication by trustees, 313

Title to streets, 314

Title and interest acquired by trustee, 309

Generally, 309

Occupied lands, 309

Title passes to successor, 309

Unoccupied lands, 309

Validity and conclusiveness of acts and conveyances of trustees, 310

When legal title vests, 312

When rights vest, 312

Treaties, 425

Acquisitions by treaty and by conquest, 215

Appropriation of public land by treaty, 218

Grant of land by treaty, 425

Treaty to be construed as a whole, 425.

Trespass, see *infra*, DEPREDATIONS ON PUBLIC LANDS.

STATE AND PUBLIC LANDS, *cont'd.*

Trespass on public lands, 228

Trustees, see *infra*, TOWN SITES.

"Unappropriated," 213

"Unfit for cultivation," 345

University lands, see *infra*, SCHOOL AND UNIVERSITY GRANTS.

Utah, 306

"Vacant," 212

Vacant lands, 231

Vermont, 216

Vested rights, 221, 222

Virginia and Kentucky, 264

Caveats, 269

Entries, 264

Ambiguity, 266

Calls, 266

Certainty, 264

Conflicting entries, 266

Evidence, 267

Notoriety, 265

Parol evidence, 267

Precision, 264

Presumptions, 267

Repugnance, 265

Right conferred by entry, 266

Several entries by one person, 266

Surplusage, 265

Surveyor's report, 267

Vacant lands only may be entered, 266

Withdrawal of entry, 266

Generally, 264

Interlocks, 270

Pre-emption rights, 270

Calls, 270

Generally, 270

Improvements, 270

Notice, 271

Time, 271

Surveys, 267

Conflicting patent, 268

Duty of surveyor, 269

Lines must approximate square, 268

Magnetic meridian used, 269

Mode of measurement, 269

Must be within prescribed time, 268

Must conform to entries, 267

Neither survey correct, 269

Older survey incorrect, 269

Record, 269

Surveyor's report, 267

Survey without warrant, 269

Title dates from survey, 268

Virginia military district, 319

Wagon-road grants, 341

Action to determine validity of certificates, 342

Character of grants, 341

Generally, 341

Terms and conditions of grants, 341

Warrants, see *infra*, ASSIGNMENT, INCUMBRANCE, AND ALIENATION OF INCHOATE RIGHT: PENNSYLVANIA.

West Virginia, 216

Widow, 244

Homesteader, 255

Wills, devise by pre-emption, 246

Wisconsin, 306

STATE ATTORNEY, 461

STATE BOND, 461

STATE CHARITABLE INSTITUTION, 461

STATE CONSTABLE, 461

STATE COURTS, 461

STATED, 461

STATED ACCOUNTS, 461

STATED DAMAGES, 461

STATE DEBT, 461

STATED SUPPLY, 461

STATE ELECTION, 462

STATE JAIL, 462

STATE LIBRARIES, 462

STATEMENT, 195

STATE OFFICER, 462

STATE OF NATURE, 462

STATE PRISON, 462

STATE PURPOSE, 462

STATE RELIGION, 462'

STATE ROAD, 462

STATES, 463

*Actions, see infra, SUITS AGAINST STATE;
SUITS BY STATE.***Admission into the Union, 466**

Binding force of compact, 466

Courts, 467

Division of state into several, 462

Effect of admission, 466

Equality with original states, 466

Federal laws, 466

Pending proceedings, 467

Power to admit, 466

Territorial laws, 466

When admission takes place, 466

Anti-trust laws, 479

Appropriations, 472Aid to institutions not under state control,
474

Aid to state normal school, 473

Aid to sufferers from flood or tornado, 474

Care of indigent and insane, 473

Contract made without express authority
of law, 475

Creating new liability, 474

Direct payment of license fees to private
corporation, 474

Duration, 475

Extra compensation to public officers, 474

Fund raised by popular vote, 476

Illustrations, 473

Industrial exhibitions or expositions, 474

Internal improvements, 474

Moral obligation, 473

Necessity for, 472

Priority, 475

Purpose, 473

Questioning validity of appropriation law,
475

Reimbursement of county, 473

Statutes, 472

Use of fund raised by popular vote, 476

Using county tax in aid of cities, 474

Bonds, 470

Debt limit exceeded, 471

Fraudulent or other improper circulation,
471

Fund pledged for interest, 471

STATES, *cont'd.***Bonds, *cont'd.***

Generally, 470

Illegal purpose, 471

Illustrations, 470

Scheme of compromise, 471

Security for loan of bonds, 471

Statute not observed, 471

Boundaries, 468

Certain state boundaries, 469

Effect, 468

Jurisdiction of court, 468

Possession under claim of title, 469

Power to establish, 468

River as boundary, 469

Supreme Court of the United States, 468

Claims:

Adjustment, 476

Release, 476

**Compacts by and between states (see *infra*,
CONTRACTS), 469**

Compact affecting commerce, 470

Congressional sanction, 469

Constitution of the United States, 469

Contract, 470

Effect of state decisions, 470

Form of congressional assent, 470

Compromise, 471

**Contracts (see *infra*, COMPACTS BY AND BE-
TWEEN STATES), 477**

Illegality, 478

Illustrations, 477

Impairment of obligation of contracts, 478

Incidents, 477

Intention, 478

Interest, 478

Power to defeat enforcement, 477

Power to make, 477

Prospective profits, 478

*Responsibility for acts of officers, see infra,
RESPONSIBILITY FOR ACTS OF OFFICERS.*

Sovereignty relinquished, 477

Subject to ordinary rules, 477

*Courts, see infra, SUITS AGAINST STATE;
SUITS BY STATE.***Credit:**

Loan of state's credit, 476

Creditor, 479

*Debts, see infra, APPROPRIATIONS.***Deeds:**

State as grantee, 479

Definition, 465

District of Columbia, 465, 466

Indian tribes, 465

International law, 465

State of the Union, 465

Territories, 465

District of Columbia, 465, 466

*Eleventh amendment of the United States
Constitution, see infra, SUITS AGAINST
STATE.*

Estoppel, 481

Illegal contracts, 471, 479

Impairment of obligation of contracts, 478

Indian tribes, 465

Interest, 479

Laches, 480

Limitation on indebtedness, 476

Bonds, 471

Debt limit exceeded, 471

Generally, 476

Illustrations, 476

Loan of state's credit, 476

STATES, *cont'd.*

- Mistake, 480
- Priority, 475, 479
- Public institutions, 477
- Public officers*, see *infra*, RESPONSIBILITY FOR ACTS OF OFFICERS.
- Relation between the states, 467
- Release, 476
- Responsibility for acts of officers, 479**
 - Acts of officer within scope of authority, 480
 - Assumption of liability, 481
- Contract, 481**
 - Acceptance of benefits, 485
 - Burden of proving officer's authority, 484
 - Conditions precedent, 483
 - Contracting officer cannot ratify, 484
 - Extent of state's liability, 482
 - Formalities in the execution of contract, 484
 - Illustrations, 482
 - Implied authority, 483
 - Implied ratification, 485
 - Liability always contractual, 481
 - Officer's authority to contract, 482
 - Partial ratification, 485
 - Quantum meruit*, 481
 - Ratification, 484
 - Strict compliance with requirement as to advertising for bids, 484
 - Strict compliance with requirement as to letting contract, 484
 - Unauthorized contract, 482
 - Who may ratify, 484
 - Writing, 484
- Errors, 480
- Estoppel, 481
- Illustrations, 480
- Laches, 480
- Limits of responsibility, 479
- Mistakes, 480
- Torts, 480
- Unauthorized acts of officers, 479
- Seat of government, 477
- Status of state as creditor, 479
- Suits against state, 486**
 - Illustrative cases, 492
 - In federal courts, 489**
 - Citizens of state, 490
 - Effect of amendment, 490
 - Eleventh amendment to the Constitution, 489
 - Foreign power, 490
 - General government, 490
 - Liberal construction of amendment to the Constitution, 490
 - National corporation, 490
 - Operation of amendment, 490
 - Origin of the amendment to the Constitution, 489
 - Parties, who may sue, 490
 - Purpose of the amendment to the Constitution, 489
 - Sister state, 490
 - Terms of amendment to the Constitution, 489
- In state courts, 486**
 - Consent may be conditional, 487
 - Consent necessary, 486
 - Constitutional provision not self-executing, 487
 - Construction of statutes authorizing suit, 487

STATES, *cont'd.*

- Suits against state, *cont'd.***
 - In state courts, *cont'd.***
 - Effect of consent, 486
 - Illustrative cases, 488
 - Suits against state officers, 488
 - Tests, 488
 - Who may give consent, 486
 - Withdrawal of consent, 488
 - Waiver of immunity, 492
- What is suit against state, 490**
 - Breach of contract, 491
 - Corporation in which state interested, 491
 - Defense to suit by state, 492
 - How question determined, 490
 - Mere assertion of title in state, 491
 - Ministerial duties of state officers, 491
 - Performance of contract, 491
 - Suggested test, 490
 - Torts against persons or property, 491
- Suits by state, 485**
 - In federal courts, 486
 - In state court, 485
 - Interest in subject-matter, 485
- Supreme Court of the United States:**
 - Boundaries, 468
 - Taxation*, see *infra*, APPROPRIATIONS.
 - Territories (see *infra*, ADMISSION INTO THE UNION), 465
 - Torts, 480
 - Treasury*, see *infra*, APPROPRIATIONS.
 - United States courts*, see *infra*, STATE COURTS;
 - SUITS AGAINST STATE; SUITS BY STATE.
 - Warrants in payment of debts due state, 476
- Wills.**
 - State as devisee, 479

STATE TAX, 493**STATE UNIVERSITIES, 493****STATING PART OF BILL, 493****STATION, 493****STATION AGENT, 493****STATIONARY, 493****STATIONERY, 493****STATIONS, 495**

- Abandonment of location, 499
- Acquisition of land for station purposes, 506
- Approaches (see *infra*, PERSONAL INJURIES), 512
- Assaults, 514
- Baggage, handling, 513
- Blackboards, 499
- Cars, unloading, 514
- Cattle guards, 512
- Change of location, 499
- Common-law obligation, 497
- Contracts to locate stations, 500**
 - Action for damages, 503
 - Against whom enforceable, 502
 - Agent's authority, 501
 - Construction of contract, 502
 - Contracts to locate stations upheld, 500
 - Contract with officer, 501
 - Covenants running with the land, 502
 - Equitable relief, 502
 - General rule, 500
 - Inhibition against other stations, 501
 - Measure of damages, 503
 - Permanency of station, 502

STATIONS, *cont'd.***Contracts to locate stations, *cont'd.***

- Promoters, 501
- Recovery of land, 503
- Remedies for breach, 503
- Specific performance, 503

Contributory negligence, 516

- Crossing tracks, 518
- Disregard of regulations, 517
- General rule, 516
- Illustrations, 516, 517
- Knowledge of unsafe condition, 518
- Looking out for holes, 517

Crossing tracks, 518**Crowd at station, 515****Damages:****Contracts to locate stations, 503****Definitions, 495****Depot, 496****Disorderly persons, 505****Doors of station, 513****Ejection from stations:****Hackmen, 505****Eminent domain, 506****Equipment of stations (see *infra*, ESTABLISHMENT AND EQUIPMENT OF STATIONS), 496****Establishment and equipment of stations, 496**

- Common-law obligation, 497
- General powers of railroad companies, 496
- Junction of two railroads, 497
- Legislative power to regulate, see infra*, LEGISLATIVE POWER TO REGULATE.
- Power of company to locate, 496
- Proximity to highway, 496

Excavations, 512**Exits, see *infra*, PERSONAL INJURIES.****Extraordinary crowds at station, 515****Freight depot, 496****Guard rails, 513****Hackmen, 504, 505, 506****Personal injuries, 510****Handling baggage, 513****Highways:**

- Proximity to, 496
- Station not highway, 504

Holes in platforms, 512**Ice, 512****Impairment of obligation of contracts (see *infra*, CONTRACTS TO LOCATE STATIONS), 498****Information as to trains, 499****Injuries from acts of third persons, 515****Injuries to persons at stations, see *infra*, PERSONAL INJURIES.****Junction of two railroads, 497****Legislative power to regulate, 497**

- Delegation of power, 498
- General rule, 497
- Information as to trains, 499
- Obligation of contracts, 498
- Penalties, 498
- Privy accommodations, 499
- Railroad commissioners, 498
- Stopping trains at stations, 499
- Waiting rooms, 498

License, 504**Lighting stations, 511****Mail bag thrown by postal clerk, 515****Negligence, see *infra*, PERSONAL INJURIES.****Obligation of contracts. see *infra*, IMPAIRMENT OF OBLIGATION OF CONTRACTS.****Obstructions on platforms, 512****Operation of trains, 514****STATIONS, *cont'd.*****Operation of trains on intervening track, 514****Passenger depot, 496****Penalties, 498****Permanency of station, 502****Personal injuries, 506****Approaches, 507, 512****Assaults, 514****Baggage, handling, 503****Cattle guards, 512****Condition of premises, 508****Contributory negligence, see *infra*, CONTRIBUTORY NEGLIGENCE.****Crowd at station, 515****Degree of care required, 508****Doors of stations, 513****Excavations, 512****Exits, 507****Extraordinary crowd at stations, 515****Friends of passengers, 510****Guard rails, 513****Hackmen, 510****Handling baggage, 513****Holes in platforms, 512****Ice, 512****Injuries from acts of third persons, 515****Liability in general, 506****Licensees, 507****Lighting stations, 511****Mail bag thrown by postal clerk, 515****Obstructions on platforms, 512****Operation of trains, 514****Operation of trains on intervening tracks, 514****Persons on freight business, 509****Persons without business at station, 510****Platforms, 506, 512****Platform's proximity to tracks, 513****Postal clerk throwing out mail bag, 515****Postal employees, 515****Questions of fact, 509****Several companies, 518****Snow, 512****Stairways, 512****Station grounds, 507****Stations used by several companies, 518****Third persons' acts, 515****To whom duty is due, 508, 509****Trains, operation of, 514****Unloading cars, 514****Platform (See *infra*, PERSONAL INJURIES), 512****Platform's proximity to tracks, 513****Postal clerk throwing out mail bag, 515****Postal employees, 515****Privy accommodations, 499****Railroad commissioners, 498****Change of location, 500****Regular station, 496****Regulations, see *infra*, LEGISLATIVE POWER TO REGULATE; RULES AND REGULATIONS.****Rules and regulations, 504****Disorderly persons, 505****Ejection from stations, 504, 505****Exclusion of persons, 504****Exclusive privileges, 505****Hackmen, 504****License to enter, 504****Not public highways, 504****Presentation of tickets, 505****Regulating stands, 506****Right to regulate use of stations, 504****Wharves used as stations, 505**

STATUTES, *cont'd.*

- Several companies using same station, 518
- Snow, 512
- Specific performance:**
 - Contracts to locate stations, 502, 503
- Stairways, 512
- Stopping trains at stations:**
 - Power of legislature, 499
- Streets and sidewalks:**
 - Use of streets for stations, 506
- Third persons' acts, 515
- Tickets, presentation of, 505
- Trains, operation of, 514
- Unloading cars, 514
- Usual stopping place, 496

STATUARY, 519**STATUS, 519****STATUTE FAIR, 519****STATUTE MERCHANT, 519****STATUTE MILE, 519****STATUTE OF FRAUDS (see SPECIFIC PERFORMANCE), 519****STATUTE OF JEOPARDIES, 519****STATUTE OF LIMITATIONS, 519****STATUTE OF USES, 519****STATUTE OF WILLS, 519****STATUTES, 520****Adjournment:**

- Approval of executive after adjournment, 549
- Failure of executive to act, *see infra*, FAILURE OF EXECUTIVE TO ACT.

Adopted statutes, 700

- Adopting construction of English statutes, 700
- Adoption of construction of another state, 701
- Construction subsequent to adoption, 702
- Decision adverse to constitutional provisions, 703
- English statutes re-enacted in Canada, 701
- Illustrations, 702, 703
- Limitation of rule, 702
- State statutes adopted by Congress, 702
- Statutes materially different, 702
- Adoption of existing statutes, 560

Adoption of statutes:

- Repeal, 744, 745
- Affirmative, 520
- "After the act goes into effect," 565
- "After the passage of the act," 565
- Ambiguity, *see infra*, INTERPRETATION AND CONSTRUCTION.

Amendatory act:

- Public statute, 531
- Title, *see infra*, EXPRESSION OF SUBJECT IN TITLE.

Amendment (see *infra*, CORRECTION OF ERRORS, OMISSIONS OR MISUSE OF WORDS), 703

- Amendment of bill changing original purpose, 703

Constitutional law:

- Identification of act amended, 705

STATIONS, *cont'd.***Amendment, *cont'd.***

- Constitutional requirement of recital of act, 707
 - Addition, 708
 - Addition of new sections, 708
 - Ambiguities resolved in favor of constitutionality, 707
 - Amendment by implication, 708
 - Codes, 707
 - Constitutional provision refers to body of act, 707
 - Construction in favor of validity, 707
 - Dependent acts, 707
 - Implied amendments, 708
 - Independent acts, 707
 - In general, 707
 - Partial invalidity of amendatory act, 710
 - Prospective operation, 707
 - Purpose of constitutional provision, 707
 - Revisions, 707
 - Supplemental acts, 708
 - Supplements, 708
 - To what legislation applicable, 707
 - What is sufficient recital, 709
 - Whether mandatory or directory, 709
- Contents of amendatory act, 706

Construction, 712

- Amendment as repeal or continuation, 713
- Construction adopted by re-enactment, 713
- Former act continued in part, repealed in part, 713
- In general, 712
- Intent of legislature, 712
- Old law and mischief, 713
- Reference statutes, 714
- Repeal of amendment, 713
- Retroactive construction, 712
- Statute and amendment treated as one act, 712
- Whether future changes in acts referred to are adopted, 714
- Construction of statutes relating to amendments, 677
- Definition, 703
- Effect of amendatory acts, 712
- Effect on amendment of repealing amended act, 744

Existence of act amended, 703

- Acts previously amended, 703
- Acts wholly unconstitutional, 704
- Amendment of amended statutes, 704
- Amendments taking effect as independent legislation, 705
- Repealed acts, 703
- Unconstitutional acts, 703, 704
- Void and unconstitutional acts, 703

Extending application of existing law, 710

- Adoption by reference, 711
- Constitutional provision, 710
- Construction of constitutional provision, 710, 711
- Prohibition against extending application, 710
- Reference statutes, 711
- Reference to local laws, 711
- Where such special constitutional provision is lacking, 711
- Form of amendatory act, 706

STATUTES, *cont'd.*Amendment, *cont'd.*

Identification of act amended, 705

Amendment of section, 706

Constitutional provisions, 705

Errors in reference, 706

General rule, 705

Illustrations, 705

Section, 706

Introduction, 538

Invalidity, 712

Operation of amendatory acts, 712

Readings, 540

Recital of act, 707

Repeal, 744

Retroactive construction, 712

Signing by presiding officers, see *infra*,
SIGNING BY PRESIDING OFFICERS.

"So as to read," 735, 761

"So as to read as follows," 706

Title of amendatory act, 706

Unnecessary change in law, see *infra*, UN-
NECESSARY CHANGE IN LAW.

Void act, 712

Yeas and nays on receding from amend-
ment, 544

Amendment during passage, 544

Defect or imperfection in the title, 540

Effect of amendment, 545

Printing of amendments for use of legis-
lators, 544

Prohibition of amendments, 544

Which house may amend, 545

Amendment of journal, 552

Ancient statutes, 634

"And for other purposes," 584

"And so forth," 584

Appeal:

Repeal, 748

Retrospective construction, 696

Approval of the executive (see *infra*, TIME OF
TAKING EFFECT), 548

Approval after adjournment, 549

Approval a legislative and not an execu-
tive act, 548

Approval during recess, 549

Bill must be that passed, 548

Disapproval, see *infra*, VETO.

Extra sessions, 536

Method of expressing approval, 548

Omission of unessential words, 549

Return of bill or notification of approval,
549

Signing, 548

Statute good in part, 549

Variance in title, 549

Withdrawal of approval, 549

Arbitration and award:

Statutory submission, 671

Authentication, see *infra*, ENROLLED BILL.

Bail:

Repeal, 750

Bastardy:

Acts to legitimate offspring of void mar-
riages, 678Bill, see *infra*, ENACTMENT.

"By virtue of," 654

Call for legislature, 534

Certificate of secretary of state, 561

Change in law, see *infra*, UNNECESSARY
CHANGE IN LAW.

Chapter titles, 629

Circulation, 566

STATUTES, *cont'd.*

Classification, 529

Class legislation, 683

Clerical errors, see *infra*, INTERPRETATION
AND CONSTRUCTION.

Codes:

Constitutional requirement of recital of
act, 707

Implied repeal, 733

In *pari materia*, 624

Interpretation and construction, 617

Titles and subjects under constitutions,
573Unnecessary change in law, see *infra*, UN-
NECESSARY CHANGE IN LAW.

Collocation, 612

Committee:

Reading in committee, 540

Reference to committees, 541

Reports of committees, 640

Common law, see *infra*, STATUTES IN DERO-
GATION OF COMMON LAW.Common right, see *infra*, STATUTES IN DERO-
GATION OF COMMON RIGHT.Computation of time, see *infra*, FAILURE OF
EXECUTIVE TO ACT; TIME OF TAKING EF-
FECT.

Concurrence of both houses necessary, 541

Constitutional law, 568

Amendment (see *infra*, AMENDMENT):

Unconstitutional acts, 703, 704

Amendment during passage, see *infra*,
AMENDMENT DURING PASSAGE.Approval of the executive, see *infra*, AP-
PROVAL OF THE EXECUTIVE.

Conformity with constitution, 568

Enacting clause, 560

Engrossed bill, see *infra*, ENGROSSED BILL.Enrolled bill, see *infra*, ENROLLED BILL.Expression of subject in title, see *infra*,
EXPRESSION OF SUBJECT IN TITLE.Extending application of existing laws, see
infra, AMENDMENT.

Extra sessions, 536

Failure of executive to act, see *infra*, FAIL-
URE OF EXECUTIVE TO ACT.General and special laws, see *infra*, GEN-
ERAL AND SPECIAL LAWS.

General principles, 568

General rule as to compliance with consti-
tutional requirements, 536Identification of act repealed, see *infra*,
EXPRESS REPEAL.

Implication, 568

Implied repeal, see *infra*, IMPLIED REPEAL.

Implied requirements, 537

Interpretation and construction, 618, 640

All presumptions in favor of constitu-
tionality, 640

Benefit of doubt given to statute, 642

Broad construction, 642

Construction in favor of constitutional-
ity, 640Doubt as to conformity of statute to con-
stitution, 642

Doubt as to meaning of constitution, 642

Doubt received in favor of statute, 641

Forced construction, 643

Illustrations, 641

Restricted construction, 642

Tax laws construed in favor of equality,
641Introduction, see *infra*, INTRODUCTION.

Volume XXVI.

STATUTES, cont'd.**Constitutional law, cont'd.**

Joint resolution, 561

Journal, see *infra*, JOURNAL.

Legislative construction of constitution, 637

Local laws, see *infra*, GENERAL AND SPECIAL LAWS.

Motives of legislature, 569

Parliament omnipotent, 568

Partial invalidity, 570

General rule, 570

Parts of section, 571

Statutes contemplating two or more objects, 571

Passage, see *infra*, PASSAGE.

Policy, 569

Possibility of unfair enforcement, 569

Presentation to the executive, see *infra*, PRESENTATION TO THE EXECUTIVE.

Presumption, 537

Presumption of constitutionality, 634, 640

Propriety, 568

Readings, see *infra*, READINGS.

Reference of special city laws to mayors, 546

Repeals, see *infra*, IMPLIED REPEAL.*Repeal*, see *infra*, REPEAL.

Repeal of inconsistent acts, 719

Signing by presiding officers, see *infra*, SIGNING BY PRESIDING OFFICERS.*Special law*, see *infra*, GENERAL AND SPECIAL LAWS.

Special provisions with reference to passage of special city laws, 537

Statutes against common right, 569

Statutes against constitutional right, 568

Subject, see *infra*, EXPRESSION OF SUBJECT IN TITLE; TITLES AND SUBJECTS UNDER CONSTITUTIONS.

Territorial legislation, 568

Title, 560

Titles and subjects under constitutions, see *infra*, TITLES AND SUBJECTS UNDER CONSTITUTIONS.

Total invalidity, 571

Veto, see *infra*, VETO.

Vote necessary to pass, 542

When journal shows failure to observe constitutional requirement, 537

Wisdom, 569

Yeas and nays on final passage, 543

Construction, see *infra*, INTERPRETATION AND CONSTRUCTION.*Contemporaneous exposition and long usage*, see *infra*, INTERPRETATION AND CONSTRUCTION.**Contracts (see *infra*, REPEAL):**

Married women, 664

Strict construction of statutes abridging power to make contracts, 662

Corporations:

Strict construction of powers of private corporations, 666

Correction of errors, omissions, or misuse of words (see *infra*, AMENDMENTS), 653

Acts authorized by statute, 654

Acts under, by virtue of or in pursuance of statute, 654

Casus omissus, 654

Clerical errors, 655

Done including "omitted," 654

Eliminating words, 655

STATUTES, cont'd.**Correction of errors, omissions, or misuse of words, cont'd.**

Eliminations, 654

Erroneous descriptions corrected, 656

Error must be manifest, 654

General rule, 653

Illustrations, 655, 656

Interpolations, 654

Obvious errors, 655

Strict construction, 655

Words altered or supplied, 654

Costs:

Repeal, 750

Strict construction of statutes imposing costs, 668

Courts:*Power of courts to examine into status of legislature*, see *infra*, LEGISLATURE.**Criminal law:****Repeal of statute, 755**

Connected with but independent of repealed statute, 758

Effect in general of repeal of statute, 755

General statutes limiting effect on repealing law, 757

Imposition of mitigated punishment with defendant's consent, 757

Power to enact general saving law doubted, 758

Repeal of statute prescribing punishment for crime previously committed, 755

Repeal pending appeal, 756

Saving clause in repealing act, 757

Statutes regulating procedure, 757

Statutory modifications of rule, 756

Strict construction, 658

Curative statutes, see *infra*, RETROSPECTIVE CONSTRUCTION):*Date*, see *infra*, TIME OF TAKING EFFECT.*Day* (see *infra*, TIME OF TAKING EFFECT), 551**Death by wrongful act:**

Strict or liberal construction, 668

Debts of decedents.

Statutes making real estate of decedent liable for his debts, 663

Declaratory, 529

Affirmative, 529

In general, 529

Negative, 529

Declaratory statutes (see *infra*, RETROSPECTIVE CONSTRUCTION.

Retrospective effect, 637

De facto officers:*De facto* legislature, 534

Definitions, 529

Derogation of common law, see *infra*, STATUTES IN DEROGATION OF COMMON LAW.*Derogation of common right*, see *infra*, STATUTES IN DEROGATION OF COMMON RIGHT.*Directory provisions*, see *infra*, MANDATORY OR DIRECTORY.*Disapproval of the executive*, see *infra*, VETO.**Discovery:**

Construction of act, 677

Done:

Done including omitted, 654

Dual state governments, 535

Duration, 715

Effect, see *infra*, TIME OF TAKING EFFECT.*Ejusdem generis*, 609

STATUTES, *cont'd.*

- Elections** (see *infra*, LEGISLATURE):
 - Mandatory or directory provisions, 691
- Eminent domain:**
 - Delegation of power of eminent domain, 666
 - Prescribed procedure under condemnation proceedings to be strictly pursued, 667
 - Strict construction of statutes, 662
- Enactment, 534**
 - Amendment during passage*, see *infra*, AMENDMENT DURING PASSAGE.
 - Bill or resolution, 560
 - Constitutional law*, see *infra*, CONSTITUTIONAL LAW.
- Enacting clause, 560**
 - Constitutional provision, 560
 - Mandatory or directory provision, 560
- Engrossed bill*, see *infra*, ENGROSSED BILL.
- Enrolled bill*, see *infra*, ENROLLED BILL.
- Evidence, 561**
 - Certificate of secretary of state, 561
 - General rule, 561
 - Illustrations, 561, 562
- Executive:**
 - Approval of executive*, see *infra*, APPROVAL OF EXECUTIVE.
 - Disapproval or veto*, see *infra*, VETO.
 - Presentation to executive*, see *infra*, PRESENTATION TO EXECUTIVE.
- Form of enactment, 560
- Governor:**
 - Disapproval or veto*, see *infra*, VETO.
 - Presentation to executive*, see *infra*, PRESENTATION TO EXECUTIVE.
- Introduction*, see *infra*, INTRODUCTION.
- Joint resolution, 560
- Journal*, see *infra*, JOURNAL.
- Legislative journal*, see *infra*, JOURNAL.
- Legislature*, see *infra*, LEGISLATURE.
- Parliamentary rules, 538
- Passage*, see *infra*, PASSAGE.
- Printing of bills, 541
- Reading bill before printing, 541
- Readings*, see *infra*, READINGS.
- Re-enactment or adoption of existing statute, 560
- Reference of special city laws to mayors*, see *infra*, REFERENCE OF SPECIAL CITY LAWS TO MAYORS.
- Reference to committees, 541
- Resolution, 560
- Statutory requirement, 538
- Title*, see *infra*, TITLE.
- Yeas and nays on final passage*, see *infra*, YEAS AND NAYS ON FINAL PASSAGE.

Engrossed bill, 559

- Definition, 559
- Engrossed bill as evidence, 559

Enrolled bill, 554

- Definitions, 554

Enrolled bill as evidence, 555

- Absence of enrolled bill conclusive against existence of act, 557
- Authentication, 555
- Conclusiveness, 556
- Conflict between journal and enrolled bill, 558
- Constitutional statutory provisions, 559
- Distinction in North Carolina, 559
- Enrolled bill controls printed statute, 555
- Evidence must be clear and convincing, 555
- Lack of authority to pass law, 557

STATUTES, *cont'd.***Enrolled bill as evidence, *cont'd.***

- No presumption of validity where no proper authentication, 555
- Original act, 555
- Presumption, 555
- United States courts, 559
- View that enrolled bill is conclusive, 556
- View that journal may be looked to, 557
- Filing of enrolled bills, 554**
 - Effect of filing on functions of executive, 554
 - In general, 554

Entireties:

- Statutes in derogation of common-law rule of tenancy by entireties, 665

Equitable construction, see *infra*, LIBERAL CONSTRUCTION.

"Et cetera," 584 •

Evasion, 657**Evidence** (see *infra*, PRESUMPTIONS), 762**Enactment, 561**

- Certificate of secretary of state, 561
- General rule, 561
- Illustrations, 561, 562

Engrossed bill, 559*Enrolled bill*, see *infra*, ENROLLED BILL.*Foreign statutes*, 763*Journal*, see *infra*, JOURNAL.*Mode of proof at common law*, 762*Mode of proof by statute*, 762*Necessity for proof*, 762*Proof of domestic statutes*, 762*Proof of private acts*, 762*Proof of public acts*, 762*Proof of statutes*, 762*Recitals in private statutes*, 763*Recitals in public statutes*, 763**Repeal:***Changing rules of evidence*, 749*Retrospective construction*, 697*Statutes as evidence*, 763*Exceptions*, see *infra*, PROVISOS, EXCEPTIONS, AND SAVING CLAUSES.**Executive:***Approval of executive*, see *infra*, APPROVAL OF EXECUTIVE.*Disapproval or veto*, see *infra*, VETO.*Failure to act*, see *infra*, FAILURE OF EXECUTIVE TO ACT.*Functions of executive*, 548*Presentation to executive*, see *infra*, PRESENTATION TO EXECUTIVE.**Exemptions:***Strict construction*, 668, 669**Expression of subject in title** (see *infra*, TITLES, AND SUBJECTS UNDER CONSTITUTIONS), 579*Act broader than title*, 590*Act narrower than title*, 582**Amending and supplemental acts, 591***Amendment of both title and body of acts*, 594*Covers provisions germane to original title*, 593*Independent title*, 594*Insufficient identification of act amended*, 592*Matters covered by title*, 593*Matters outside of scope of title*, 594*Reference to amended act by number only*, 592

STATUTES, *cont'd.***Expression of subject in title, *cont'd.*****Amending and supplemental acts, *cont'd.***

Repeal of previous germane acts, 594

Restricted title to amending act, 594

Trivial errors in describing title, 592

What is a sufficient title, 591

Change of title during passage of act, 579

Construction of language of title, 583

"And so forth," 584

Clerical errors, 583

Court cannot reconstruct title, 584

"Et cetera," 584

"For other purposes," 584

Illustration, 583

Meaningless words, 584

"Municipal corporations" includes townships, 583

Title liberally construed, 583

Defective title not cured by amendment, 581

Discretion of legislature in choice of title, 579

Effect of specification of details, 583

Expression of general subject sufficient, 579

Generality of title no objection, 582

How far defective title vitiates act, 595

Subject not expressed at all, 596

Void only as to provisions outside of title, 595

When void in part only, 595

When wholly void, 596

Index, 581

Interpretation and construction, 629

Local act, 581

Matters germane to subject expressed, 584

Means to accomplish purpose expressed, 588

Means to facilitate accomplishment of purpose, 588

Prohibition of violations, 588

Punishment of violation, 588

Title covers germane matters, 584

Matters outside of scope of title, 589

Act broader than title, 590

General rule as to such matters, 589

Provision for retrospective operation, 591

Restrictive title, 590

Misleading title, 580

Plurality in title but not in act, 582

Redundancy, 583

Repealing acts, 595

Repeal of previous acts, 591

Repeal of previous germane acts, 594

Subject not expressed, 580

Surplusage disregarded, 582

Title bad for generality, 582

Title broader than act not invalid, 582

Title need not index provisions, 581

What a sufficient expression of subject, 579

What provisions covered by title, 584

Expressio unius est exclusio alterius, 604, 610**Express repeal, 717**

Construction of repealing clause, 720

Identification of act repealed, 718

Act inadvertently included in schedule of acts repealed, 719

Constitutional provisions as to identification of law repealed, 718

General rule, 718

Mode of identification not prescribed by constitution, 718

Repeal by implication not within constitutional provisions, 718

STATUTES, *cont'd.***Express repeal, *cont'd.*****Identification of act repealed, *cont'd.***

Repeal not prevented by mistake in reference, 718

Repealing clause, 717

Repeal of acts within purview, 720

Cases not provided for by repealing act, 720

Purview defined, 720

Repeal, 720

Repeal of inconsistent acts, 719

Constitutional provisions, 719

Enumeration of acts repealed, 719

General rule, 719

Statutes affected by repealing clause, 719

Extended sessions, 536

Extra sessions, 536

Approval of act, 536

Constitutional restrictions, 536

Field of legislation, 536

General rules, 536

Failure of executive to act, 551

Day, 551

Effect of adjournment, 551

Extension of time, 551

Final adjournment, 551

General rule, 551

Parol evidence of adjournment, 552

What is meant by adjournment, 551

Failure to act within limited time, 551

General rule of computation of time, 551

Intervening Sunday excluded, 551

Invalid action within time limited, 551

Purpose of provision, 551

*Filing of enrolled bills, see infra, ENROLLED BILL.***Forfeiture:**

Repeal, 753

Fractions of a day, 563

Fraud:

Construction of acts for suppression of fraud, 678

General and special laws, 682

Constitutional inhibition against the enactment of special or local laws, 682

Effect and not form controls character of law, 687

Implied repeal, see infra, IMPLIED REPEAL.

Law not rendered special because its operation dependent upon adoption by vote of people, 685

Legislative determination, 683

Practical construction, 688

Reference of special city laws to mayors, see infra, REFERENCE OF SPECIAL CITY LAWS TO MAYORS.

Special laws not prohibited, 688

Test as to whether law general or special, 683

Uniform operation of general laws, 682

What are, 542

When a general law exists, 682

General statutes (see *infra*, LOCAL STATUTES; PUBLIC STATUTES), 531, 532

Certain terms distinguished, 532

Public and general, 531

Governor:*Disapproval or veto, see infra, VETO.**Failure to act, see infra, FAILURE OF EXECUTIVE TO ACT.*

Functions of governor, 548

Presentation to executive, see infra, PRESENTATION TO EXECUTIVE.

STATUTES, *cont'd.*

Grammar and collocation of words, 612

Associated words, 613

Collocation, 612

Expressio unius exclusio alterius, 613

General rule, 612

Mala grammatica non vitiat, 612

Punctuation, 612

Qualifying phrases confined to next antecedent, 613

Reddenda singula singulis, 613

Headings of sections, 629

"Hereafter," 565

"Heretofore," 565

History (see *infra*, INTERPRETATION AND CONSTRUCTION):

History of an amendment, 640

Homestead:

Strict construction, 669

Identification of act repealed, see *infra*, AMENDMENT; EXPRESS REPEAL.Implication, see *infra*, INTERPRETATION AND CONSTRUCTION.

Implied powers, 614

Implied repeal, 720

Acts covering same subject, 731

Acts passed at same session, 736

Amendments "so as to read," 735

Compilation, 733

Conflicting sections in revision, 734

Express declaration against repeal, 733

Inadvertent omissions, 734

Intent to substitute new act for old, 732

Limitations of rule, 734

Re-enactments, 733, 735

Repealing clause, 735

Repugnancy not essential, 732

Revisions, 733

Rule state, 731

Supplemental acts, 736

Acts passed at same session, 736

Amendments "so as to read," 735

Conflicting rights, 731

Constitutional provisions, 723

As to identification of act repealed, 718

Constitutional provision not self-executing, 723

Constitutional provision relating to future legislation only, 723

Expressio unius exclusio est alterius, 723

Implied repeal of statute by constitution, 723

Repeal implied by expressly retaining certain laws, 723

Disuse of law, 737

Express prohibition of implied repeal, 721

General and special laws, 739

Consistency between general and special acts, 743

Contemporaneous general and special acts, 744

Effect of general laws on particular customs, 741

General act inconsistent with prior special act, 742

General act repealed by later special act, 743

Inconsistency of provisions, 742

Later general acts, 739

Later special act, 743

Later statute exclusive, 742

STATUTES, *cont'd.*Implied repeal, *cont'd.*General and special laws, *cont'd.*

Reference to or incorporation of general act, 744

Repeal of special act, 744

Revenue laws, 741

Special provisions in general act, 743

Successive special acts, 744

How implied repeal is effected, 723

Identification of act repealed, 718

Inconsistent acts, 723

Intent of legislature, 720

Negative and affirmative terms, 729

Penal acts, 737

Change in degree of punishment, 738

Change in nature of offense, 738

Different remedies with different penalties, 738

General rule, 737

New statute covering whole subject-matter of earlier statute, 737

Reducing punishment, 738

Same object as well as subject, 737

Prescribing different powers, privileges, or duties, 730

Extension or restriction of powers, 730

Extension or restriction of privileges, 730

Liabilities or burdens decreased by later statute, 730

Liabilities or burdens increased by later statute, 730

Prescribing exclusive rule, 731

Re-enactments, 733

Removing reason of law, 736

Repeal by implication at same session as enactment, 716

Repeals by implication not favored, 721, 726

Conditions of implied repeal in general, 722

Express repeal of particular section, 722

General rule, 721

Intent must be plain, 721

Later act fully covering subject of earlier, 723

Repugnant acts, 723, 732

Acts must be reconciled if possible, 726

Apparent conflict, 728

Conflicting rights, 731

Diversity of object, 728

Extent of repugnancy, 725

Identity of object, 728

Identity of object and subject, 727

Illustrations, 729

Implied repeal only to extent of repugnancy, 727

Modification of or exceptions to earlier statute, 729

Nature of repugnancy, 725

Negative act in affirmative form, 729

Negative acts affirmative *inter se*, 730

Negative and affirmative terms, 729

Partial repugnancy, 727

Prescribing different powers, privileges, or duties, 730

Prescribing exclusive rule, 731

Repeal implied from repugnancy of acts, 723

Repugnancy must be clear, 726

Repugnancy must be irreconcilable, 725

STATUTES, *cont'd.***Implied repeal, *cont'd.*****Repugnant acts, *cont'd.***

Repugnancy must follow necessarily from language used, 726

State laws repugnant to acts of Congress, 729

Revisions, 733

Supplemental acts, 736

Title and subject of repealing acts, 720

What constitutes repeal by implication, 720

Inconsistent acts, see *infra*, IMPLIED REPEAL.

Index:

Title need not index provisions, 581

"In pursuance of," 654

Instructions:

Mandatory or directory provisions, 691

Intent, see *infra*, INTERPRETATION AND CONSTRUCTION.

International law:

Presumption that principles of international law are observed, 643

Interpretation and construction, 596

Absurdity, 648

Adding to statute, 690

Adopted statutes, see *infra*, ADOPTED STATUTES.

Aids to interpretation, 625

All parts of statute construed together, 616

Codes, 617

Enactment including several distinct acts, 617

General rule, 616

Repealed or unconstitutional clauses, 618

Revised statutes, 617

Section of a statute, 616

Amendments, see *infra*, AMENDMENTS.

Ancient statutes, 634

Associated words, 608

Broad construction to avoid unconstitutionality, 642

Chapter headings, 629

Clerical errors, 604, 655

Common law, see *infra*, STATUTES IN DEROGATION OF COMMON LAW.

Common right, see *infra*, STATUTES IN DEROGATION OF COMMON RIGHT.

Conflicting provisions, 604

Conflict with general legal principles, 640

Consequences to be guarded against, 640

Absurdity, 648

Broad construction to avoid unconstitutionality, 642

Conflict with general legal principles, 640

Disregard of international and interstate laws, 643

Against extraterritorial operation, 643

Clear intent must be enforced, 643

General rule, 643

General terms restricted to avoid extraterritorial operation, 644

Lex rei sitæ, 644

Presumption that principles of international law observed, 643

Statutes regulating vessels are territorial only, 644

Doubt as to conformity of statute to constitution, 642

Doubt as to constitutionality resolved in favor of statute, 641

Doubt as to meaning of constitution, 642

Forced construction, 643

Implication to sustain statute, 643

STATUTES, *cont'd.***Interpretation and construction, *cont'd.*****Consequences to be guarded against, *cont'd.*****Including government:**

Illustrations, 644, 645

Prerogatives not taken away except by necessary implication, 644

States and United States not bound by general words of statute, 644

When state is bound, 645

Inconvenience, 648

Ineffectiveness, 649

Intention to bind future legislatures, 640

Ousting jurisdiction, see *infra*, JURISDICTION.

Restricted construction to avoid unconstitutionality, 642

Unconstitutionality, 640

Unnecessary change in law, see *infra*, UNNECESSARY CHANGE IN LAW.

Unreason and injustice, see *infra*, UNREASON AND INJUSTICE.

Constitutionality, 640

All presumptions in favor of constitutionality, 640

Benefit of doubt given to statute, 642

Broad construction, 642

Construction in favor of constitutionality, 640

Doubt as to conformity of statute to constitution, 642

Doubt as to meaning of constitution, 642

Doubt resolved in favor of statute, 641

Forced construction, 643

Illustrations, 641

Implication, 643

Restricted construction, 642

Tax laws construed in favor of equality, 641

Construction and judicial function, 597

Construing entire statute as one whole, 616

All parts taken together, 616

Clauses absolutely irreconcilable, 619

Enactments in two languages, 620

Every clause to be given effect, 618

Contemporaneous exposition and long usage, 633

Age of statutes, 634

Ancient statutes, 634

Character of practice or usage, 636

Constitutionality presumed, 634

Construction by inferior courts, 635

Executive construction, 635

General rule, 633

Language must be ambiguous, 634

Local or special custom, 636

Long usage followed though apparently erroneous, 634

Not controlling, 636

Practical construction, 635

Rule not applied where language unambiguous, 634

Uniform opinion and practice of the bar, 636

Uniform usage, 636

Usage must be long, 636

Where rights of property have grown up on long usage, 634

Correction of errors, omissions, or misuse of words, see *infra*, CORRECTION OF ERRORS, OMISSIONS, AND MISUSE OF WORDS.

Debates, 639

STATUTES, *cont'd.*Interpretation and construction, *cont'd.*

Derogation of common law, see *infra*, STATUTES IN DEROGATION OF COMMON LAW.

Derogation of common right, see *infra*, STATUTES IN DEROGATION OF COMMON RIGHT.

Directory, see *infra*, MANDATORY OR DIRECTORY.

Disregard of international and interstate law, 643

Against extraterritorial operation, 643

Clear intent must be enforced, 643

General rule, 643

General terms restricted to avoid extraterritorial operation, 644

Lex rei sitae, 644

Presumption that principles of international law observed, 643

Statutes regulating vessels are territorial only, 644

Doubt as to conformity of statute to constitution, 642

Doubt as to constitutionality resolved in favor of statute, 641

Doubt as to meaning of constitution, 642

Effect of mistake or omissions substantial or formal, 653

Evasions, 657

Every clause to be given effect, 618

Clauses absolutely irreconcilable, 619

General and particular clauses, 618

General rule, 618

Last clause governs, 619

Revenue laws, 619

Exceptions (see *infra*, PROVISOS, EXCEPTIONS, AND SAVING CLAUSES), 601

Executive construction, 635

Expressio unius est exclusio alterius, 604, 610

Extraterritorial operation, 643

Forced construction, 643

Forms in schedules, 631

General and special laws, see *infra*, GENERAL AND SPECIAL LAWS.

General scope of doctrine, 597

General words and their limitation, 608

Ejusdem generis, 609

General language limited, 608

General words taken generally, 608

Illustrations, 609

Intent, 610

Intention controls, 608

Grammar and collocation of words, see *infra*, GRAMMAR AND COLLOCATION OF WORDS.

Headings in the United States, 630

Headings of sections, 629

Headings so used as to be part of subsequent sections, 629

History of an amendment, 640

History, the old law and mischief, 632

General rule, 632

Illustrations, 633

Resort to extrinsic facts only where there is ambiguity, 633

State of law at passage of act and matters of history examined, 632

Implication of incidents, 613

As to conferring jurisdiction, 614

Creation of new jurisdiction, 615

Creation of new jurisdiction not presumed, 615

STATUTES, *cont'd.*Interpretation and construction, *cont'd.*Implication of incidents, *cont'd.*

English county court acts of 1868, 615

Extension of jurisdiction, 615

General doctrine, 613

Grant of jurisdiction to inferior tribunal, 615

Implied powers, 614

Intent not imputed, 614

Powers and duties, 614

Remedies and procedure, 614

Statute of one jurisdiction conferring powers on courts of another, 615

Statute which imposes penalty, 614

Implication to sustain statute, 643

Implied repeal, see *infra*, IMPLIED REPEAL.

Including government, 644

Illustrations, 644, 645

Prerogatives not taken away except by necessary implication, 644

States and United States not bound by general words in statute, 644

When state is bound, 645

Inconvenience, 648

Inconvenience, 648

Inferior courts, construction by, 635

Inferior does not include superior, 610

Injustice, see *infra*, UNREASON AND INJUSTICE.

In pari materia, see *infra*, STATUTES IN PARI MATERIA.

Intent, 597, 598, 602, 608, 610

Intention to bind future legislatures, 640

International law, 643

Irreconcilable clauses, 619

Journals, 639

Jurisdiction, see *infra*, JURISDICTION.

Languages, enactments in two, 620

Legislative construction, 636

Constitution, 637

Construction of interpretation clauses, 638

Declaratory act not restrictive, 637

Erroneous legislative interpretation of a pre-existing statute, 637

General rule, 636

Intention controlling legislative definition, 638

Interpretation clauses, 637

Interpretation clauses binding on courts, 638

Interpretation clauses confined to interpretation of statutes, 638

Interpretation clauses do not control subsequent statutes, 638

Interpretation not for legislature, 637

Legislative construction not authoritative, 637

Legislative construction respectfully considered, 637

Opinions and motives of legislators, 638

Statutory construction, 637

Words importing singular may be implied to plural, 637

Legislative intent the object of interpretation, 597

Liberal construction, see *infra*, LIBERAL CONSTRUCTION.

Limitations, 601

Local or special customs, 636

Mandatory or directory, see *infra*, MANDATORY OR DIRECTORY.

STATUTES, *cont'd.*Interpretation and construction, *cont'd.*

- Marginal notes, 630
- Meaning of terms, 596
- Mistakes, 653
- Motives, 598
- Motives of legislators, 638
- Nature of rules of construction, 596
- Necessary implication, 613
- Noscitur a sociis*, 608
- Object, 598
- Object of construction, 597
- Omissions, 601, 653
- Opinion of legislators, 638
- Ousting jurisdiction, see *infra*, JURISDICTION.

Pari materia, see *infra*, STATUTES OF PARI MATERIA.

- Particular words construed generally, 610
- Policy, 598
- Popular meaning presumed, 605
- Popular words, 603, 606
- Practical construction, 635

Preamble, 625

- Dicta that preamble may extend but not restrict, 626
- Intention, 625
- No part of statute, 625
- No resort to preamble when meaning plain, 627
- Preamble more general than enacting clause, 627
- Preamble restricting enacting part of statute, 627
- Resort to preamble where meaning doubtful, 626
- Restricting act, 626
- Preamble reciting particular mischief, 627
- Presumption against mistakes in statutes*, see *infra*, PRESUMPTION AGAINST MISTAKES IN STATUTES.

Presumption as to meaning of words, 610

- Presumption that word is used with same meaning throughout statute, 611
- Same as to former acts *in pari materia*, 611
- Same throughout act, 610

Private acts, see *infra*, PRIVATE ACTS.

Provisos, see *infra*, PROVISOS, EXCEPTIONS. AND SAVING CLAUSES.

- Punctuation, 631
- Repealing clause, 720
- Reports of committees, 640
- Restricted construction to avoid unconstitutionality, 642
- Results, 598
- Retrospective construction*, see *infra*, RETROSPECTIVE CONSTRUCTION.
- Revenue laws, 607
- Saving clauses*, see *infra*, PROVISOS, EXCEPTIONS AND SAVING CLAUSES.
- Schedule, 630
- Special laws*, see *infra*, GENERAL AND SPECIAL LAWS.
- Speculation not admissible beyond import of words, 598
- Stare decisis*, 636
- Statutes imposing taxes*, see *infra*, TAXES.
- Statutes in derogation of common law*, see *infra*, STATUTES IN DEROGATION OF COMMON LAW.

STATUTES, *cont'd.*Interpretation and construction, *cont'd.*

Statutes in derogation of common right, see *infra*, STATUTES IN DEROGATION OF COMMON RIGHT.

Statutes in pari materia, see *infra*, STATUTES IN PARI MATERIA.

Statutes void for uncertainty, 656

Strict construction, see *infra*, STRICT CONSTRUCTION.

Subject-matter, 604

Taking from statute, 600

Taxes, see *infra*, TAXES.

Technical words:

- General rule, 606
- Intent and context may rebut the use of words in a legal sense, 607
- Legal terms, 607
- Revenue laws, 607
- Technical words taken technically, 606
- When a word has both a popular and a technical meaning, 606

Titles (see *infra*, EXPRESSION OF SUBJECT IN TITLE), 627

- Canada, 628
- Controlling express words, 629
- Effect of constitutional requirement that subject be expressed in title, 629
- England, 628
- Extending or restricting provisions, 629
- Title consulted, 628
- Title no part of act, 627
- Title now part of act in England, 628
- Title part of act, 629
- Title resorted to in case of ambiguity, 629
- United States, 628
- Title of chapters, 629
- Titles and subjects under constitutions, 574

To what time words or descriptions referred, 611

- Descriptive matter refers to what time, 611
- Meaning of words as at time of passage of act, 611
- Time, 611
- Words of time, 612

Unambiguous meaning must be enforced, 598

Uncertainty, 656

Unconstitutionality, 640

Unmeaning statutes, 656

Unnecessary change in law, see *infra*, UNNECESSARY CHANGE IN LAW.

Unreason, see *infra*, UNREASON AND INJUSTICE.

Void for uncertainty, 656

Where meaning in doubt, spirit controls, 601

- Ambiguity necessary, 602
- Clerical errors, 598
- Conflicting provisions, 604
- Effect of ambiguous language, 601
- Expressio unius est exclusio alterius*, 604
- Illustrations, 605
- Intention, 602
- Object, 602
- Subject-matter, 604
- Where the letter fails to give the sense, 602
- Words rejected and substituted, 604
- Where meaning plain, consequences and motives not to be considered, 599

STATUTES, *cont'd.***Interpretation and construction, *cont'd.***

- Where meaning plain the letter controls, 598
- Court may not add to or take from statute, 600
- Exceptions, 601
- General statement, 598
- General words, 601
- Literal construction defeating object of act, 600
- Literal construction observed where no ill consequences follow, 600
- Nothing added to or taken from statute, 600
- Omissions not supplied, 601
- Results, motives, and policy not considered, 598
- Whether intention deduced from letter or spirit of statute, 598
- Words and phrases, 605
- Words to be taken in ordinary acceptance, 598

Interpretation clauses, 637**Introduction, 538**

- Amendment, 538
- Amendment not connected with original object, 538
- Bill subjecting mortgages to taxation, 539
- First step, 538
- In which house bills may originate, 539
- Notice of introduction, 538
- Revenue bills, 539
- Same general object, 538
- Time for introduction, 538

Joint resolution, 560**Journal (see *infra*, PRESUMPTIONS), 552**

- Amendment of journal, 553
- Effect of omission, 552
- Interpretation and construction, 639

Journal as evidence (see *infra*, ENROLLED BILL), 553

- Conclusiveness, 553
- Journals cannot be contradicted, 553
- Printed copies, 554
- Proof, 554
- Public record, 553
- Transcript, 554

Necessity for journal, 552

- Omission, 552
- Omission of matters required to be entered, 552
- Presentation to governor, 547
- When journal shows failure to observe constitutional provisions, 537
- Yeas and nays, 544

Jurisdiction, 614

- Creation of new jurisdiction not presumed, 615
- English county court acts of 1868, 615
- Erroneous belief of the legislature that jurisdiction exists, 615
- Extension of jurisdiction, 615
- Grant of jurisdiction to inferior tribunal, 615
- Ousting jurisdiction, 645**
 - Grant in affirmative words of equity jurisdiction on courts of law, 646
 - Jurisdiction of superior courts ousted only by express words and necessary implication, 645
 - No intent to oust jurisdiction presumed, 645
 - Provision of a legal remedy does not affect the power of equity, 646

STATUTES, *cont'd.***Jurisdiction, *cont'd.***

- Repeal of statutes conferring jurisdiction, 751
- Special powers conferred on courts of general jurisdiction, 670
- Statutes enlarging jurisdiction of court to correct mischief of old law, 670
- Statutes of one jurisdiction conferring powers on courts of another, 615
- Strict construction of statutes affecting jurisdiction of courts, 670
- Supervising power, 615

Languages:

- Enactments in two languages, 620

Legislative construction, see *infra*, INTERPRETATION AND CONSTRUCTION.**Legislative journal, see *infra*, JOURNAL.****Legislature, 534**

- Call, 534
- Constitution, 534
- De facto* legislature, 534
- Dual state governments, 534
- Illegally constituted, 534
- Organization, 535
- Power of courts to examine into status, 535**
 - Rule as to election and qualification of legislators, 535
 - Where legal status of entire body attacked, 535
 - Where number of members exceeds constitutional limit, 535
- Presumption of legal constitution, 534
- Proclamation for convening legislature, 534
- Quorum*, see *infra*, QUORUM.

Sessions:

- Extended sessions, 536
- Extra sessions*, see *infra*, EXTRA SESSIONS.

Status, 534, 535**Legitimation:**

- Acts to legitimate offspring of void marriages, 678

Liberal construction (see *infra*, STRICT CONSTRUCTION), 674

- Death by wrongful act, 668
- Definition, 674
- Early application of rule, 674
- Equitable construction considered dangerous, 675
- Modern rule, 675

Remedial statutes, 676

- Acts for suppression of fraud, 677
- Acts giving suitors the benefit of discovery of documents, 677
- Acts in furtherance of proper administration of justice, 677
- Acts providing for redemption of property sold for taxes, 677
- Acts to legitimate offspring of void marriages, 678
- Application of rule, 677
- Donation land grants, 678
- Federal statutes prohibiting injunction in state court, 678
- General rule, 676
- Illustrations, 676, 677, 678
- Registration acts, 678
- Statute creating an agister's lien, 676
- Statutes fixing compensation of public officers, 678
- Statutes giving the right of appeal, 677
- Statutes relating to amendments, 677
- Statute of frauds, 675

STATUTES, *cont'd.***Limitation of actions:**

Equitable construction of statute of limitation, 675

Retrospective construction of statute, 699

Local statutes (see *infra*, GENERAL AND SPECIAL LAWS; PRIVATE STATUTES), 532

Duration of statute, 533

Expression of subject in title, 582

Local and private, 532

Local and public, 532

Meaning of the term, 532

Proviso repealing a general law, 533

What are, 542

Local terms, 607

Majority, 542

Man, 637

Mandatory or directory, 533, 688

Affirmative terms, 689

Constitutional requirement requiring recital of act amended, 709

Directory provisions:

Enacting clause, 560

Requirements as to reading bill, 539

Signing by presiding officer, 545

Titles and subjects under constitutions, 572

General rules, 688

Judicial procedure, 692

Mandatory provisions, 688

Enacting clause, 560

Printing of amendments for use of legislators, 544

Requirement as to reading bill, 539

Signing by presiding officers, 545

Titles and subjects under constitutions, 572

"May," 692

"Must," 692

Negative terms, 689

Particular words, 692

Provisions concerning the conduct of elections, 691

Provisions in regard to the assessment and collection of taxes, 690

"Shall," 692

Statutes conferring powers, privileges, or immunities, 691

Statutes regulating judicial procedure, 692

Statutes requiring instructions of court, 691

Time and mode of proceeding by public officers, 689

Marginal notes, 630

Marriage:

Acts to legitimate offspring of void marriages, 678

Strict construction of statutes abrogating common-law incidents of marriage, 665

Married women acts:

Strict construction, 664

Mayors, see *infra*, REFERENCE OF SPECIAL CITY LAWS TO MAYORS.

Mechanics' liens, 663

Repeal, 749

Retrospective construction of statutes, 700

Mistake, see *infra*, CORRECTION OF ERRORS, OMISSIONS, OR MISUSE OF WORDS; PRESUMPTION AGAINST MISTAKE IN STATUTES.

Misuse, see *infra*, CORRECTION OF ERRORS, OMISSIONS, OR MISUSE OF WORDS.

Mixed statutes, 533

Modes of repealing statutes, 717

Express repeal, see *infra*, EXPRESS REPEAL.

Implied repeal, see *infra*, IMPLIED REPEAL.

STATUTES, *cont'd.*

Monopolies, 674

Motives, 569, 598, 602, 638

Municipal corporations (see *infra*, REFERENCE OF SPECIAL CITY LAWS TO MAYORS):

Power of municipality to subscribe to stock or corporation, 666

Power to create monopolies, 674

Term "municipal corporations" includes townships, 583

Necessary implication, 613

Negative, 529

Notice of introduction, 538

Nova statuta, 533

Object (see *infra*, TITLES AND SUBJECTS UNDER CONSTITUTIONS), 598, 602

Subject and object, 575

Omissions:

Effect of omissions, 653

Omitted:

"Done" including "omitted," 654

Opinions of legislators, 638

Ordinances:

Titles and subjects under constitutions, 574

Other purposes, 584

Pari materia, see *infra*, STATUTES IN PARI MATERIA.

Parliamentary rules, see *infra*, SUSPENSION OF RULES.

Parol evidence:

Adjournment, 552

Journal, 553

Passage, 541

Bill must pass in both houses in the same form, 542

Concurrence of both houses necessary, 541

Local act, 542

Majority, 542

Methods of voting, 543

Private act, 542

Protest against passage, 543

Special act, 542

Statute void in part only, 542

Vote necessary to pass, 542

Yeas and nays on final passage, see *infra*, YEAS AND NAYS ON FINAL PASSAGE.

Passage over veto, 550

Signing by presiding officers not necessary in case of passage over veto, 545

Time of taking effect, 562

Payment:

Recovery of money paid under protest, 754

Penal statutes, 530

Implied repeal, see *infra*, IMPLIED REPEAL.

In pari materia, 625

Strict construction, see *infra*, STRICT CONSTRUCTION.

Penalties, 614

Repeal, 753

Permissive statutes, 533

Perpetual statutes, 534

Personal statutes, 533

Pleadings:

Retrospective construction, 697

Plurality of subjects, see *infra*, TITLES AND SUBJECTS UNDER CONSTITUTIONS.

Police power:

Strict construction of statutes passed in exercise of police power, 662

Policy, 508

Preamble, see *infra*, INTERPRETATION AND CONSTRUCTION.

STATUTES, *cont'd.***Presentation to executive, 547**

- Amendment to bill, 548
- Bill presented must be that actually passed, 547
- General rule, 547
- Legislative power of recall, 548
- Mode of presentation, 547
- Record of presentation, 547
- Time of presentation, 547

Presumption:

- Bill read as provided for, 541
- Constitutionality, 634, 640
- Constitutional requirement complied with, 537
- Enrolled bill, 555
- Legal constitution of legislature, 534
- Meaning of words, 610
- Pending actions, 696
- Popular words, 605

Presumption against mistakes in statutes, 653

- General rule, 653
- Statements of fact, 653
- Statements of law, 653
- Presumption of validity, 555
- Presumption that word is used with same meaning throughout statute, 611
- Technical words, 606
- Unnecessary change in law, see infra, UNNECESSARY CHANGE IN LAW.*
- Unreason and injustice, 646

Printed copies of journal, 554**Printing bills, 541****Printing of amendments for use of legislators, 544****Private acts:**

- Interpretation and construction, see infra, STRICT CONSTRUCTION.*

Strict construction (see *infra*, STRICT CONSTRUCTION), 672

- General rule, 672
- Manifest intention of legislature not to be defeated, 674
- Monopolies, 674
- Power of municipal corporations to create monopolies, 674
- Private acts conferring special privileges and rights, 673
- Reason of rule, 674

Private international law:

- Extraterritorial operation, 643

Private statutes (see *infra*, LOCAL STATUTES), 531

- Definition, 531
- Illustrations, 531
- In pari materia*, 625
- What are, 542

Proclamation:

- Proclamation for convening legislature, 534
- Time of taking effect, 567
- Prohibitory statutes, 533
- Propriety, 569
- Protest against passage, 543

Provision:

- Subject and provision, 575

Provisos, exceptions, and saving clauses, 678

- Construction of proviso with reference to enacting clause, 679
- Definitions, 678
- Exceptions, 679
- Exceptions distinguished from proviso, 679
- General saving clauses relating to repealing acts, 681

STATUTES, *cont'd.***Provisos, exceptions, and saving clauses, *cont'd.***

- Harmonizing proviso in enacting clause, 681
- Liberal construction of provisos in statutes strictly construed, 680
- Office of proviso, 678
- Powers not conferred by proviso, 679
- Proviso as aiding construction of enacting clause, 680
- Proviso as independent enactment, 680
- Proviso repugnant to body of statute, 681
- Provisos, 678
- Purview held invalidated by repugnant proviso, 681
- Repugnant proviso held invalid, 681
- Saving clauses, 679
- Saving clauses in repealing acts, 679
- Strict construction of proviso, 680

Publication, see *infra*, TIME OF TAKING EFFECT.**Public officers:**

- Effect of repeal on authority, 752
- Mandatory or directory provisions, 689

Public policy, 569, 598**Public statutes (see *infra*, PRIVATE STATUTES), 530**

- Definition, 530
- Illustrations, 530, 531
- Public and general, 531
- Repealing act, 531
- Supplemental or amendatory act, 531

Punctuation, 631

- Illustrations, 631, 632
- Interpretation and construction, 631
- Punctuation cannot have controlling effect, 632
- Punctuation disregarded, 631
- Punctuation of original act, 631
- Resort to punctuation, 631

Punishment, see *infra*, CRIMINAL LAW.**Pursuance, 654****Purview, 720****Quorum, 535**

- What constitutes, 535
- Who may be counted to ascertain existence of quorum, 535

Readings, 539

- Application to amendments, 540
- Application to codification, 540
- Constitutional requirement, 539
- Dispensing with requirement, 541
- Document referred to in bill, 540
- Presumptions, 541
- Provision as to manner of reading bills, 539
- Reading bill before printing, 541
- Reading by title, 540
- Reading in both houses on same day, 540
- Reading in committee, 540
- Reconsideration in house between readings in senate, 541
- Requirement directory or mandatory, 539
- Requirement of three readings, 539
- Substitute bill, 540
- Suspension of rules, 540
- Title, 540
- Where reading must be in full, 539

Real statutes, 533**Recess:**

- Approval of the executive, 549
- Record, see infra, ENROLLED BILL: JOURNAL.*

STATUTES, *cont'd.*

Recording acts:

- Liberal constructions, 678
- Record of presentation to governor, 547
- Reddenda singula singulis*, 613
- Re-enactment, 560

Reference of special city laws to mayors, 546

- Constitutional provision, 546
- Illustrations, 546
- Property affairs of government, 546
- Sunday laws, 546

Remedial statutes (see *infra*, LIBERAL CONSTRUCTION), 530

- Retrospective construction, 698

Remedies (see *infra*, CONSTRUCTION):

- Retrospective construction, 695

Repeal, 715

- Amendment, 713
- Amendment of repealed acts, 703
- Appeals, 748, 755, 756
- Bail, 750
- Common law, 665
- Constitutional provisions, 715
- Construction of repealing clause, 720
- Constructive repeal of common law, 665

Contracts, 750

- Acts declared by statute to constitute contract, 751
- Contract against sound morals, justice, or right, 751
- Effect of repeal, 751
- Statute becoming part of contract, 751

Costs, 750

Distinction between legislative and judicial power, 716

Effect of repeal, 744

- Adopting acts, 744, 745
- Appeals, 748
- Authority of public officers, 752
- Authority to collect taxes and assessments, 752
- Bail, 750
- Case pending on appeal, 755
- Changing rules of evidence, 749
- Competency of witnesses, 749
- Contracts, 750
- Costs, 750
- Crimes and punishments*, see *infra*, CRIMINAL LAW.
- Effect of saving clause, 748
- Effect on amendment of repealing amended act, 744
- Express and implied repeals same in effect, 744
- Forfeitures, 753
- General rules, 744
- Inchoate interests destroyed by repeal without saving clause, 747
- Interests dependent upon repeal statute, 747
- Interests past and closed, 746
- Jurisdiction, 751
- Liens, 749
- Matters affected by repeal in general, 745
- Mechanics' liens, 749
- Modification of remedy, 750
- Penalties, 753
- Pending interests, 747
- Powers, 751, 752
- Privileges, 751, 752
- Recovery of money paid under protest, 754

STATUTES, *cont'd.*Repeal, *cont'd.*Effect of repeal, *cont'd.*

- Remedies, 749
- Repeal of act after adoption of its provisions, 745
- Repeal of amended act, 744
- Repeal of exception to statute, 745
- Saving clause, 748, 754
- Statutory declaration as to effect of appeal, 747
- Time from which repeal takes effect, 745
- Transactions invalid under repealed statute, 747
- Vested rights, 746
- Vested rights in penalty, 754
- Effect on interests past and closed, 746
- Effect on pending interests, 747

Evidence:

- Changing rules of evidence, 749
- Exception to statute, 745
- Expiration of time limit, 715
- Express repeal*, see *infra*, EXPRESS REPEAL.

Forfeiture, 753

General principles, 715

Identification of act repealed, see *infra*, EXPRESS REPEAL.Implied repeal, see *infra*, IMPLIED REPEAL.Inconsistent acts, see *infra*, EXPRESS REPEAL.

Interpretation and construction, 618

Jurisdiction, 751

Operation of statutes in general, 715

Partial repeal, 716, 717

Penalty, 753

Pending cases, 755, 756

Pending interests, 747

Pending proceedings, 752

Power to repeal statutes, 715

Recovery of money paid under protest, 754

Recovery on common-law grounds, 754

Remedies, 749, 750

Repeal and re-enactment, 758

Interval between repeal and re-enactment, 759

Re-enactment and repeal by successive acts, 759

Re-enactment without express repeal, 758

Simultaneous repeal and re-enactment, 758

Repealing act substituted for act repealed, 717

Repeal of repealing act, 760

Amendment "so as to read," 761

Common law, 762

Intent not to revive original law, 760

Original law merely suspended by repeal, 760

Repeal of act repealing special law, 761

Repeal of amendatory act, 762

Repeal of modifying act, 761

Reviving original, 760

Rule at common law, 760

Statutory rule, 761

Suspension as distinguished from repeal of repealing act, 761

Saving clauses (see *infra*, PROVISOS, EXCEPTIONS, AND SAVING CLAUSES), 748, 754, 757

Statutes conferring powers or privileges, 752

Suspension of operation, 715

STATUTES, *cont'd.***Repeal, *cont'd.***

- Taxes, 752
- Temporary statutes, 715
- Time for exercise of power, 716
- Time from which repeal takes effect, 745
- Title, 591, 594, 595
- Validity of repealing act, 716
- Vested rights**, 746, 749
 - Penalty, 754
 - Perfect lien, 750
 - Right to mechanics' lien, 750
 - Statutory right to lien not vested right, 749
- Vested rights and completed transactions, 746
- Voluntary payments, 754

Repealed statutes :

In pari materia, 624

Repealing act :

Public statute, 531

Repugnant acts, see *infra*, IMPLIED REPEAL.

Resolution, 560

Retrospective construction, 533, 692, 693

- Adverse possession, 700
- Amendatory acts, 712
- Construction rendering statute unconstitutional, 694
- Curative statutes**, 698
 - Authorizing taxation to meet expenses unauthorized when incurred, 698
 - Curing irregularities in the exercise of the power of taxation, 699
 - Curing lack of legislative consent, 699
 - General rule, 698
 - Pending suits, 699
 - Power of legislature to validate, 699
 - Validity of curative acts, 699
 - Where legislature may legalize void act, 699
- Declaratory act, 637

Declaratory statutes, 697

- Changing meaning of statute, 697
- Statutes cannot reverse or vacate judicial decisions, 697

Definitions, 692

- General rule of construction, 693
- Legislative intent to make statute retrospective, 695

Mechanics' liens statutes, 700

Remedial statutes, 698

Statutes affecting judicial procedure, 695

- Change in form of action, 697
- Evidence, 697
- Form of action, 697
- Intent, 697
- Parties, 697
- Pending actions, 696
- Pleadings, 697
- Presumption as to pending actions, 696
- Statutes affecting remedy, 695
- Statutes relating to appeals, 696
- Venue, 697
- Witnesses, 697
- Statutes of limitation, 699
- Time of taking effect, 695
- Title, 591

Revenue laws (see *infra*, TAXES) :

- Interpretation, 607
- Interpretation and construction, 619
- Introduction, 539
- Repeal, 741

STATUTES, *cont'd.***Revenue laws, *cont'd.***

- Statutes to prevent frauds upon the revenue, 670
- Strict construction of tariff laws, 669
- Revised statutes (see *infra*, CODES) :**
 - In pari materia*, 624
 - Interpretation and construction, 617
 - Unnecessary change in law*, see *infra*, UNNECESSARY CHANGE IN LAW.

Revisions :

- Constitutional requirement of recital of act, 707
- Implied repeal, 733

Rules, see *infra*, PARLIAMENTARY RULES; SUSPENSION OF RULES.

Saving clauses (see *infra*, PROVISOS, EXCEPTIONS, AND SAVING CLAUSES), 748

Repeal, 754, 757

Schedule, 630

- Forms in schedules, 631
- Interpretation and construction, 630

Secretary of state :

- Certificate of secretary of state, 561
- Section, 706
- Section headings, 629

Separate property of married women :

- Strict construction of statutes, 664

Sessions (see *infra*, ADJOURNMENT; EXTRA SESSIONS; RECESS) :

- Extended sessions, 536

Signing :

- Executive, 548

Signing by presiding officers, 545

- Authentication, 545
- Bill must be that actually passed, 546
- Constitutional requirements, 545
- Mandatory or directory provisions, 545
- Rule in absence of constitutional requirement, 546
- Rule in case of passage over veto, 545
- Signing by speaker *pro tem.*, 546
- Singleness of subject*, see *infra*, TITLES AND SUBJECTS UNDER CONSTITUTIONS.
- "So as to read," 735, 761
- "So as to read as follows," 706
- Special statutes*, see *infra*, GENERAL AND SPECIAL LAWS.
- Stare decisis*, see STARE DECISIS.

States :

- States not bound by general words in statute, 644
- Strict construction of statutes conferring right to sue state, 670

Statutes in derogation of common law, 662

- Abrogation of rule by statute, 665
- Applications of rule, 664
- Constructive repeal of common law, 665
- General rule, 662
- Illustrations, 664
- Married women's acts, 664
- Mechanics' liens, 663
- Power to contract, 664
- Prescribed mode of making contract to be strictly pursued, 664
- Remedial statutes, 663
- Statutes abrogating common-law incidents of marriage, 665
- Statutes changing common-law rules of evidence, 664
- Statutes conferring separate property rights of married women, 664

STATUTES, *cont'd.***Statutes in derogation of common law, *cont'd.***

- Statutes in derogation of common-law rule of tenancy by entireties, 665
- Statutes making real estate of decedent liable for his debts, 663

Statutes in derogation of common right, 661

- Eminent domain, 662
- Statutes abridging power to make contracts, 662
- Statutes in derogation of personal rights, 662
- Statutes passed in exercise of police power, 662
- Statutes restricting and regulating use of private property, 662
- Statutes working a forfeiture or confiscation of private property strictly construed, 661
- Strict construction of statute in derogation of common right, 661

Statutes in *pari materia*, 620

- Acts in *pari materia* passed in same session, 623
- Codes, 624
- Construed together, 620
- Contemporaneous statutes, 623
- Decisions under one act in *pari materia* apply to another, 611
- Expired statutes, 624
- General doctrine, 620
- Illustrations of statutes held in *pari materia*, 623
- Illustrations of statutes held not in *pari materia*, 623
- Meaning of in *pari materia*, 622
- Penal statutes, 625
- Private statutes, 625
- Re-enactments, 624
- Repealed statutes, 624
- Revisions, 624
- Subsequent statutes, 624
- What statutes are in *pari materia*, 621
- When act clear no resort to other statutes, 623

Statutes of frauds:

- Equitable construction, 675

Statutes of limitations, see *infra*, LIMITATION OF ACTIONS.**Stock and stockholders:**

- Power of municipality to subscribe to stock of private corporation, 666

Strict construction (see *infra*, LIBERAL CONSTRUCTION), 657

- Common law, see *infra*, STATUTES IN DEROGATION OF COMMON LAW.

- Delegation of authority, 665

- Derogation of common law, see *infra*, STATUTES IN DEROGATION OF COMMON LAW.

- Derogation of common right, see *infra*, STATUTES IN DEROGATION OF COMMON RIGHT.

- Exemptions from liabilities, 668.

- Homestead exemptions, 669

- Jurisdiction of courts, 670

Penal statutes, 658

- Extension of penal statutes to things not in *esse* at time of passage, 660
- General rule, 658
- Illustrations, 660
- Intent of legislature not to be defeated by technical application of rule, 659

STATUTES, *cont'd.***Strict construction, *cont'd.*****Penal statutes, *cont'd.***

- Penal statutes not extended beyond obvious meaning, 659

- Reason of rule, 659

- Rule applicable to other than strictly criminal statutes, 659

- Statutes both penal and remedial, 661

- Statutes imposing penalty for failure to satisfy paid judgment or mortgage, 660

- Statutes imposing penalty on officer for taking excessive fees, 660

- Statutes prescribing forfeiture of interest for usury, 660

- Statutory provisions for construction of penal statutes, 659

- Strict construction of statutes not strictly criminal, 659

- Usury, 660

- Where penal clause is less comprehensive than body of act, 660

Provisos, exceptions, and saving clauses, see *infra*, PROVISOs, EXCEPTIONS, AND SAVING CLAUSES.**Remedies in statutory proceedings, 671**

- Statutes affecting jurisdiction of courts, 670

- Statutes conferring right to sue state, 670

Statutes delegating powers, 665

- Delegation of power of eminent domain, 666

- Delegation of power to levy taxes, 666

- Prescribed procedure under condemnation proceedings to be strictly pursued, 667

- Strict construction of powers of private corporations, 666

Statutes imposing liabilities, 668

- Costs, 668

- Death by wrongful act, 668

- General rule, 668

Statutes imposing taxes, see *infra*, TAXES.**Statutes in derogation of common law, see *infra*, STATUTES IN DEROGATION OF COMMON LAW.****Statutes in derogation of common right, see *infra*, STATUTES IN DEROGATION OF COMMON RIGHT.****Statutory remedies and proceedings, 671**

- Illustrations, 672, 673

- New remedies cumulative apart from express language or necessary implication, 671

- Remedy implied where right given, 672

- Statutes prescribing exclusive mode of procedure, 671

- Statutory submission to arbitrators, 671

- Strict pursuance of exclusive statutory remedy, 672

- Strict construction defined, 657

- Taxes, see *infra*, TAXES.

Subject:

- Expression of subject in title, see *infra*, EXPRESSION OF SUBJECT IN TITLE.

Subject-matter:

- Words interpreted by subject-matter, 604

Sunday:

- Taking effect on Sunday, 565

Suspension. 715**Suspension of rules:**

- Reading by title, 540

STATUTES, *cont'd.***Taxes** (see *infra*, REVENUE LAWS):

- Authorizing taxation to meet expenses unauthorized when incurred, 698
- Construction of acts providing for redemption of property sold for taxes, 677
- Curative acts, 698, 699
- Curing irregularities in the exercise of the power of taxation, 699
- Delegation of power to levy taxes, 666
- Effect of repeal on authority to collect taxes and assessments, 752
- Mandatory or directory provisions, 690
- Power to sell land for taxes, 667
- Strict construction of statutes imposing taxes,** 669
 - General rule, 669
 - Statutes to prevent fraud upon revenue, 670
 - Tariff laws, 669

Technical words, see *infra*, INTERPRETATION AND CONSTRUCTION.

Temporary statutes, 534

Title:

To what time words or descriptions referred, 611

Time, computation of, see *infra*, FAILURE OF EXECUTIVE TO ACT.

Time of introduction, 538

Time of presentation to governor, 547

Time of taking effect, 533, 562¹

- Approval, 562, 563
- Contingency, 567
- Day of approval, 563
- Disregarding fractions of a day, 563
- Early rule, 562
- Emergency clause, 567
- Excluding day of passage, 563
- Executive approval, 562
- Fractions of a day, 563

From future day named, 564

- Day of passage excluded, 564
- Effect of words "heretofore," "hereafter," and the like, 565
- Reference as to time of operation, 565
- Taking effect on Sunday, 565
- When there is a general law, 564

"From passage," 563

From publication, 565

- Illustrations, 566
- Publication "by authority," 565
- Whether day of publication included, 565
- From time of approval, 563
- "Immediately," 563
- Implication, 567
- Impossible date named, 568
- Postponement of operation of part, 568
- Provisions taking effect at different times, 568
- Publication, 565
- Publication and circulation, 566
- Retrospective construction, 695
- Statutory modification, 562
- When no time is fixed, 562
- Where time is to be prescribed by legislature, 563

Title:

Aid to construction, see *infra*, INTERPRETATION AND CONSTRUCTION.

Application to amendments, 540

Interpretation and construction, see *infra*, INTERPRETATION AND CONSTRUCTION.

Necessity for title, 560

STATUTES, *cont'd.***Title, *cont'd.***

Reading by title, 540

Title of amendatory act, 706

Variance in title, 549

Title defective:

Defect not cured by amendment, 581

Titles and subjects under constitutions (see *infra*, EXPRESSION OF SUBJECT IN TITLE), 572

Codes, 573

Compilations, 573

Constitutional provisions, 572

Construction, 574

Doubtful case act valid, 574

Existing laws, 573

Liberal construction in favor of act, 574

Long acquiescence in constitutionality, 575

Municipal ordinances, 574

Purpose of provisions, 572

Singleness of subject, 575

Act may contain any number of provisions, 575

Act plural, title single, 582

Acts containing but one general subject, 575

Act void for plurality, 578

Act wholly void, 579

General rule, 575

How far act void, 579

Illustrations, 576, 578

Plurality confused with sufficiency of title, 575

Question determined by body of act, 575

Subject and object, 575

Subject not synonymous with provisions, 575

When act not objectionable for plurality, 575

When act objectionable for plurality, 578

To what acts provisions applicable, 573

Whether provisions directory or mandatory, 572

Transcript of journal, 554

Uncertainty, 656

"Under," 654

United States:

United States not bound by general words in statutes, 644

Unnecessary change in law, 649

Adopting language of settled meaning, 650

Amendments, re-enactments, and revisions, 651

Change of phraseology, 651

Codes, 651

General rule, 649

Law not changed except as specified, 649

Material change of expression, 652

Omission of material words, 652

Omission of words in the amendments, 652

Omitted words surplusage, 652

Presumption, 649

Re-enactment and use of phrases judicially interpreted, 650

Statutory provisions, 651

Unreason and injustice, 646

Illustrations, 647

Presumption against unreason and injustice, 646

Sensible construction to avoid unreasonable and unjust consequences, 647

STATUTES, *cont'd.*

Usage:

Contemporaneous exposition and long usage, see *infra*, INTERPRETATION AND CONSTRUCTION.

Venue:

Retrospective construction, 697

Vested rights:

Repeal, 746, 749

Penalty, 754

Perfected lien, 750

Right to mechanics' liens, 750

Statutory right to lien not vested right, 749

Vetere statuta, 533

Veto (see *infra*, PASSAGE OVER VETO), 549

Mode of return of bill, 550

Passage over veto, see *infra*, PASSAGE OVER VETO.

Power of executive, 549

Return of bill, 550

Rule in case of partial veto, 550

Sufficiency of objections, 550

Veto a part of bill, 549

Virtue:

By virtue of, 654

Vote, see *infra*, PASSAGE; YEAS AND NAYS ON FINAL PASSAGE.

Wisdom, 569

Witnesses:

Retrospective construction, 697

Woman, 637

Yeas and nays on final passage, 543

Constitutional law, 543

Entry on journal, 544

Receding from amendment, 544

To what bills applicable, 543

What is final passage, 543

STATUTES OF DESCENT AND DISTRIBUTION, 763

STATUTE STAPLE, 763

STATUTORY ALLOWANCE, 763

STATUTORY AWARD, 763

STATUTORY CRIMES, 764

STATUTORY FORECLOSURE, 766

STATUTORY LIENS, 766

STAY, 766

STAY LAWS, 767

Definition, 767

Effect, 768

STAY OF PROCEEDINGS, 768

STEADY AND PERMANENT EMPLOYMENT, 768

STEAL, 769

Intent, 769

Larceny, 769

Theft, 769

STEAM, 770

STEAMSHIP, 770

STEATITE, 771

STEEL, 771

STEER, 771

STENCIL, 771

STENOGRAPHERS, 772

Appointment, see *infra*, APPOINTMENT.

Attendant, 775

Attorney and client:

Liability for compensation, 778

Certificate of stenographer, 776

By whom made, 776

Generally, 776

Notes must be certified by stenographer personally, 776

Sufficiency, 776

Translation, 776

What certificate must set forth, 777

Combination of stenographers, 784

Compensation for services, 777, 778

Before courts, 777

Before referee, 777

Coroner's inquest, 777

Costs, see *infra*, WHEN FEES TAXABLE AS COSTS OR DISBURSEMENTS.

Delivery of note to referee before payment of fees, 779

How estimated, 779

Mode of payment, 777

Payment in advance, 779

Refusal to pay, 779

Special examiner, 777

Who liable, 777

Generally, 777

Liability of county, 777

Parties, 778

Referee, 778

Transcript, 778

Where attorney employs stenographer, 778

Where defendant in criminal action is too poor for transcript, 778

Where stenographer employed before referee, 778

Where stenographer is employed by attorney for receiver, 778

Where stenographer is employed in contest between coexecutors, 778

Who liable for transcript, 778

Coroner's inquest, 777

Costs, see *infra*, WHEN FEES TAXABLE AS COSTS OR DISBURSEMENTS.

Court (see *infra*, WHO MAY APPOINT):

Compensation, 777

Officer of, 773

Definition, 773

Court stenographer, 773

Stenographer, 773

Stenography, 773

Transcript, 773

Duties, 775

Duty to attend court, 775

Duty to file transcript, 776

Duty to furnish transcript to litigants, 776

Duty to note exceptions, 775

Duty to propound questions to jurors upon their *voir dire*, 776.

Duty to read notes, 775

Duty to record objections and exceptions, 775

Duty to record testimony, 775

Duty to record what transpires, 775

Form of transcript, 776

General rule, 775

Illustrations, 775

Presumption that duties are performed, 775, 776

Transcripts, 776

STENOGRAPHERS, *cont'd.*

Evidence, see *infra*, STENOGRAPHER AS WITNESS; STENOGRAPHER'S NOTES IN EVIDENCE.

Filing of transcript, 776

Grand jury, 774

Notes as evidence, 781

Oath, 775, 783

Officer of court, 773

Presumption that duties are performed, 775, 777

Referee :

Liability for compensation, 778

Removal, 783

Stenographer as witness, 783

Impeachment of stenographer's testimony, 783

Necessity of oath, 783

Right to use notes to refresh memory, 783

Stenographer not only witness who may be examined, 783

To what stenographer may not testify, 783

Stenographer's notes in evidence, 780

Admissibility of notes on appeal, 781

Former trial, 781

General rule, 780

Harmless error in admitting notes, 783

Notes cannot be introduced to show who is petitioner in action, 783

Notes of testimony given in a foreign language, 782

Notes of testimony on former trial, 781

Notes of testimony taken on preliminary examination, 780

Notes taken and transcribed by different stenographers, 782

Notes taken before grand jury, 781

Taxation of costs, see *infra*, WHEN FEES TAXABLE AS COSTS OR DISBURSEMENTS.

Transcript, 776

Liability for compensation, 778

When fees taxable as costs or disbursements, see *infra*, WHEN FEES TAXABLE AS COSTS OR DISBURSEMENTS.

When fees taxable as costs or disbursement, 779

General rule, 779

Notes on former trial, 780

Referee, 779

Transcript for convenience of one party, 780

Transcript to aid court in reaching decision, 780

Where court ordered expenses to be paid by parties, 779

Who may appoint, 774

Common council, 774

District attorney, 774

General rule, 774

Grand jury, 774

Miscellaneous, 774

Parties, 774

Refusal to appoint, 774

Temporary stenographers, 774

Witness, see *infra*, STENOGRAPHER AS WITNESS.

STENOGRAPHY, 784**STEPCHILDREN**, 784**STEPFATHER**, 784**STEP IN THE PROCEEDINGS**, 784**STERLING MONEY**, 784**STEVEDORE**, 784**STICKS**, 784**STIFFENING ORDER**, 784**STIPEND**, 785**STIPULATED**, 785**STIPULATED DAMAGES**, 785**STIPULATIONS**, 785**STIPULATIONS IN ADMIRALTY**, 785**STIRPES**, 785**STOCK AND PRODUCE EXCHANGES**, 788**Arbitration clause**, 805

Effect of clause on jurisdiction of courts, 806

General rules, 805

Jurisdiction of arbitration committee or board, 805

Operation and effect of arbitrators' decision, 805

Associations, 789, 791

Bankruptcy, see BANKRUPTCY.

Benefit fund, see *infra*, GRATUITY OR BENEFIT FUND.

Brokers, see STOCK BROKERS.

Courts :

Interference of courts, 799

Death, 796

Definitions, 789

Associations private, 789

Associations voluntary, 789

Joint stock companies, 789

Partnerships, 789

Produce exchanges, 790

Stock exchanges, 789

Term "exchange" used to designate place, 790

Election to membership, 795

Execution, 795, 796

Expulsion of members, 796

Action for damages, 801

Crime, 798

Express regulations, 797

Grounds for expulsion, 797, 798

Inherent power to expel, 796

Injunction, see *infra*, INJUNCTION.

Interference of courts, 799

Legality of rules and regulations, 797

Mandamus, 799

Proceedings for expulsion, 798

Remedy for improper expulsion, 799

Rights of members, 798

Gratuity or benefit fund, 806

Beneficiaries, 806

Generally, 806

Nature of beneficial interest, 807

History, 792

Initiation fee, 795

Injunction, 800

General rules, 800

Illustrations, 800, 801

Incorporated exchanges, 800

Insolvent, 794

Compelling bankrupt to transfer seat, 794

Seat, property passing to assignee in bankruptcy, 794

Joint stock companies, 789

STOCK AND PRODUCE EXCHANGES,
cont'd.

- Mandamus**, 799
 Incorporated exchanges, 799
 Unincorporated associations, 800
Margin, see STOCKBROKERS.
- Members:**
 Election, 795
Expulsion of members, see *infra*, EXPULSION OF MEMBERS.
 Individual liability of stock exchange members, 792
 Property rights of stock exchange members, 782
- Members as preferred creditors**, 804
 Forfeiture of rights to membership, 804
 Fund arising from closing defaulting member's transactions, 804
 Proceeds from deceased member's seat, 805
 Proceeds from defaulting or insolvent members' seat, 804
 Seat a continuing security, 804
- Method of dealing through brokers on exchanges, 1056
- Nature and legal status**, 790
 Produce exchanges, 791
- Stock Exchanges**, 790
 Associations, 791
 Corporations, 791
 Partnerships, 791
- Origin, 792
 Partnerships, 789, 791
Preferred creditors, see *infra*, MEMBERS AS PREFERRED CREDITORS.
- Property:**
 Seat, 793
 Property rights of stock exchange members, 792
- Quotations**, 801
 Board of trade, 801
 Common-law property right before publication, 802
 Equity will protect property right of telegraph company in board of trade quotations, 802
 Property rights, 801
 Right of property in, 801
 Stock exchange, 801
- Rules and regulations**, 797, 803
Arbitration, see *infra*, ARBITRATION CLAUSE.
Gratuity or benefit fund, see *infra*, GRATUITY OR BENEFIT FUND.
 Legality, 803
Members as preferred creditors, see *infra*, MEMBERS AS PREFERRED CREDITORS.
 Right to adopt, 803
- Sale of seat*, see *infra*, SEATS IN STOCK AND PRODUCE EXCHANGES.
- Seats in stock and produce exchanges**, 793
 Acquisition, 795
 Analogy to membership in social club, 793
 Assignee in bankruptcy, 794
 Bankrupt, 794
 Consent of association to transfer, 795
 Disposal of deceased member's seat, 796
 Disposal of forfeited seat, 796
 Disposition, 795
 Election, 795
 Execution, 795, 796
 Inheritance tax, 794
 Initiation fee, 795
 Involuntary transfer at law, 795

STOCK AND PRODUCE EXCHANGES,
cont'd.

- Seats in stock and produce exchanges**, *cont'd.*
 Involuntary transfer in equity, 795
 Legal character and status, 793
Members as preferred creditors, see *infra*, MEMBERS AS PREFERRED CREDITORS.
 Property, 793
 Property for purposes of taxation, 794
- Signing by-laws**, 795
 Supplementary proceedings, 796
 Voluntary transfer, 795
- Signing by-laws**, 795
- Stock broker** (see STOCK BROKERS):
 Method of dealing through brokers on exchanges, 1056
 Succession taxes, 794
 Supplementary proceedings, 796
 Taxation, 794
Transfer of seat, see *infra*, STOCK AND PRODUCE EXCHANGES.

STOCK AND STOCKHOLDERS (see STOCK AND PRODUCE EXCHANGES; STOCK BROKERS), 808.

- Acceptance:**
 Subscription, 907
- Accounting:**
 Minority stockholders, 969
- Acquiescence:**
 Minority stockholders, 985
- Actions** (see *infra*, SUBSCRIPTIONS; NEW STOCK; RIGHTS OF MINORITY STOCKHOLDERS TO SUE OR DEFEND ON BEHALF OF CORPORATION):
 Inspection of books, 956
Liability of stockholders for corporate debts, see *infra*, LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS.
Minority stockholders, see *infra*, RIGHTS OF MINORITY STOCKHOLDERS TO SUE OR DEFEND ON BEHALF OF CORPORATION.
- Adjourned meetings, 996, 1005
- Admissions, 898
- Alienation** (see *infra*, SALES):
Gifts, see *infra*, GIFTS.
Obligation of corporation to transfer and issue new certificates, see *infra*, OBLIGATION OF CORPORATION TO TRANSFER AND ISSUE NEW CERTIFICATE.
Surrender of old and issuance of new certificate, see *infra*, SURRENDER OF OLD AND ISSUANCE OF NEW CERTIFICATE.
Transfer on books of corporation or registration, see *infra*, TRANSFER ON BOOKS OF CORPORATION OR REGISTRATION.
- Allotment*, see *infra*, SUBSCRIPTION.
- Amount of shares, 829
- Assessments*, see *infra*, CALLS.
- Assignment for benefit of creditors:**
 Liability of stockholders for corporate debts, 1044
- Assignment of certificate, 878
- Assignments** (see *infra*, GIFTS; SALES):
Effect of transfer of stock on liability for call, see *infra*, CALLS.
Obligation of corporation to transfer and issue new certificate, see *infra*, OBLIGATION OF CORPORATION TO TRANSFER AND ISSUE NEW CERTIFICATE.
Surrender of old and issuance of new certificate, see *infra*, SURRENDER OF OLD AND ISSUANCE OF NEW CERTIFICATE.

STOCK AND STOCKHOLDERS, *cont'd.*

Assignments, *cont'd.*

Transfer on books of corporation or registration, see infra, TRANSFER ON BOOKS OF CORPORATION OR REGISTRATION.

Attachment, 866

Attachment of levy without notice takes precedence over unrecorded assignment, 882

Unrecorded assignment takes precedence of attachment with notice, 883

Attorney, 1023

Blanks:

Assignment in blank, 878

Bona fide purchasers, 860

Generally, 860

Illustrations, 860, 861

Lien, 869

Purchaser from agent, 860

Purchaser from trustee, 861

Rights of *bona fide* purchaser of certificate as signed in blank, 879

Rights of *bona fide* purchaser of lost or stolen indorsed certificate, 879

Bonus stock:

Liability of stockholders on bonus stock, 1012

Books (see *infra*, INSPECTION OF CORPORATE BOOKS AND RECORDS; TRANSFERS ON BOOKS OF CORPORATION OR REGISTRATION):

Duty of foreign corporation to keep books within state, 953

Books of corporation, see infra, TRANSFER ON BOOKS OF CORPORATION OR REGISTRATION.

Burden of proof:

Call of stockholders' meetings, 989

Notice of meetings, 993

Performance of conditions, 912

By-laws:

Call of stockholders' meetings, 988

Inspection, 953

Lien of corporation on shares, see infra, LIEN OF CORPORATION ON SHARES.

Restraining alienation, 855

Statutory liability of stockholders, 1017

Voting, 999

Calling stockholders' meetings, see infra, STOCKHOLDERS' MEETINGS.

Calls, 914

Action for amount due, 925

By whom action brought, 926

Demand, 926

Prerequisites to bringing action, 926

Receivers, assignees, or trustees, 926

Right of action, 926

Separate action against subscribers, 927

Assessment proper, 915

Assessments on paid-up stock, 923

Assent to assessments, 925

Assessments under statutes, 924

General rule, 923

Power resides in stockholders, 925

Purposes for which assessments proper, 924

Restriction on statutory power by corporate by-laws, 924

Retrospective effect of statutes, 925

Statutory power to make assessments, 924

Strict construction of statutes, 924

Assignees, 918

STOCK AND STOCKHOLDERS, *cont'd.*

Calls, *cont'd.*

Call for unwarranted purpose, 940

Conditional subscription, 919

Courts, 917

Calls by court, 917

Filing of creditor's bill equivalent to call, 917

Insolvent corporation, 917

Definitions, 914

Directors, 915

Calls by *de facto* directors, 916

Directors cannot delegate power, 916

Extent of power, 916

Number of directors who must concur, 916

Power in general, 915

Distinctions, 914

Effect of transfer of stock on liability for call, 922

As between corporation and stockholder, 922

As between parties to transfer, 923

Evidence, 922

Fixing number of shares, 919

Formal resolution, 918

Full paid-up stock not liable to calls, 914

Full subscription, 919

How formulated, 918

Illegal calls, 928

Impartiality, 918

Interest, 921

Interest on anticipated payments, 925

Liability for, 921

Time from which interest runs, 922

Limitation of action, 941

Mandamus, 917

Maturity, 921

Necessity for calls, 915

Calls necessary, 915

Waiver of calls, 915

Where corporation insolvent, 915

Where time of payment fixed, 915

Notice and demand, 920

Action for amount due, 926

Form and contents, 920

Necessity for, 920

Notice by mail, 920

Notice by publication, 921

Time, 920

Verbal notice, 921

Number of shares must be fixed, 919

Payment, 925

Interest on anticipated payments, 925

Money or equivalent, 925

Presumption of payment, 926

Time and place of payment, 925

Place and recipient of payment, 918

Receivers, 918

Requisites, 918

Resolution, 918

Stipulations in contract must be respected, 919

Stockholders, 916

Delegation to directors of power vested in stockholders, 916

Power to make calls, 916

Trustees, 918

Uniformity, 918

Validity, 918

Waiver of irregularities, 920

What law governs, 919

Who may levy calls, 915

STOCK AND STOCKHOLDERS, cont'd.**Capital stock, 823**

- Amount subscribed but not paid in, 824
- Capital distinguished from capital stock, 824
- Capital stock does not fluctuate, 824
- Capital stock not fully subscribed, see infra,*
- DEFENSES IN ACTIONS ON SUBSCRIPTIONS.
- Definition, 823
- Distinction from property and assets, 823
- Increase of capital stock, 938
- Ownership of property not limited by capital stock, 824

Payment of capital stock, 1029

- Filing certificate of payment, 1030
- General rule, 1029
- Nature of liability, 1029
- Payment in property, 1030
- Statutes, 1029

Payment of dividend out of capital stock, 1015

- Reduction of capital stock, 1011
- Subscribed and authorized stock, 825
- Surplus, 824
- Undivided profits, 824
- Value of capital stock, 824

Cash (see *infra*, CONSIDERATION FOR ISSUE):

- Exercise of option to pay otherwise than in cash, 940
- Nonpayment of percentage required to be paid in cash, 937

Certificate, 829

- Certificate merely evidence of ownership, 829
- Construction of certificate, 896
- Contract, 831
- Deposit of certificate of transfer in public office, 885
- Distinct from stock, 829
- Evidence of ownership of stock, 898
- General nature, 829
- Lost certificates, 831
- Negotiability, 830
- Quasi-negotiability, 831
- Stolen certificates, 831

Gifts:

- Delivery of certificate, 862

Issuance of certificate, see *infra*, ISSUANCE OF CERTIFICATE.**Lien, see *infra*, LIEN OF CORPORATION ON SHARES.****Necessity of certificate, 893****New certificate:**

- Obligation of corporation to transfer and issue new certificate, see infra, OBLIGATION OF CORPORATION TO TRANSFER AND ISSUE NEW CERTIFICATE.*

- Surrender of old and issuance of new certificate, see infra, SURRENDER OF OLD AND ISSUANCE OF NEW CERTIFICATE.*

Right to transfer certificate, 877

- Assignment in blank, 878
- Assignment of certificate, 878
- Deposit of certificate or transfer in public office, see infra, DEPOSIT OF CERTIFICATE OR TRANSFER IN PUBLIC OFFICE.*
- General rule, 877
- Illustrations, 877
- Right of executor or administrator to transfer, 877
- Right of pledgee to transfer on corporate records, 877

STOCK AND STOCKHOLDERS, cont'd.**Certificate, cont'd.****Right to transfer certificate, cont'd.**

- Right of purchaser at execution sale to transfer, 878

- Surrender of old and issuance of new certificate, see infra, SURRENDER OF OLD AND ISSUANCE OF NEW CERTIFICATE.*

- Transfer on books of corporation or registration, see infra, TRANSFER ON BOOKS OF CORPORATION OR REGISTRATION.*

- Surrender of old and issuance of new certificate, 885

- Transfer on books of corporation or registration, see infra, TRANSFER ON BOOKS OF CORPORATION OR REGISTRATION.*

- Who are stockholders, 893

- Change in corporate design, 933

- Change in corporate name, 932

Charter:

- Alterations in charter as defense of subscription, 932

- Chattel mortgages, 864

- Choses in action, 828

- Common stock, 832

Competition:

- Rights of stockholders, 958

Conditional subscriptions, 910

- Calls, 919
- Capital stock not fully subscribed, 936
- Evidence, 912
- Nature, 910
- Nonperformance of conditions as defense, 934

- Parol conditions, 911

Performance, 912

- Burden of proof, 912
- Decisions of directors, 912
- Question for jury, 912
- Sufficiency in general, 912
- When performance excused, 912

Validity, 911

- Conditional subscriptions upheld, 911
- Generally, 911
- Subscriptions before incorporation, 911
- Written subscriptions cannot be varied by parol conditions, 911

Consideration, see *infra*, SUBSCRIPTIONS.**Consideration for issue, 839**

- Cash in absence of statute, 839

- Cash required by statute, 839

Issue for less than par, 842

- Acquiescence, laches, and estoppel, 848
- Bona fide* holders, 843
- Constitutional and statutory law, 842
- Dissenting stockholders entitled to relief, 843
- Fictitiously paid-up stock held void, 842
- Fictitiously paid-up stock held voidable, 842
- Illustrations, 842
- Injunction, 846

- Liability of stock issued for overvalued consideration, see infra, LIABILITY OF STOCK ISSUED FOR OVERVALUED CONSIDERATION.*

- Not necessarily fraudulent, 842

- Remedy, 846

- Stock fictitiously paid up, 842

- Stockholder not held liable for calls, 843

STOCK AND STOCKHOLDERS, cont'd.**Consideration for issue, cont'd.****Issue for less than par, cont'd.**

Stockholder's suit for cancellation, 846

Ultra vires, 842

Validity as between corporation and holder, 842

Labor, 841

Land, 840

Liability of stock issued for overvalued consideration, see *infra*, **LIABILITY OF STOCK ISSUED FOR OVERVALUED CONSIDERATION**.

Materials for construction of road, 840

Money, 439

Negotiable paper, 841

Patent rights, 840

Property, 840, 843

Satisfaction of debts, 841

Services, 841, 843

Stock in other corporations, 840

Sufficiency of consideration, 842

Property or services as consideration, 843

What may be received in payment of stock, 839

Consolidation of Corporation :

Minority stockholders, 967

Rights of stockholder, 958.

Constitutional law (see *infra*, **IMPAIRMENT OF OBLIGATION OF CONTRACTS) :**

Increase and reduction of stock, 850

Inspection of books, and records, 951

Statutory liability of stockholders, 1017

Construction, see *infra*, **INTERPRETATION**.**Contracts (see *infra*, **SALES ; SUBSCRIPTION**) :****Minority stockholders :**

Right to disaffirm voidable contracts, 964

Right to lien under contracts, see *infra*, **LIEN OF CORPORATION ON SHARES**.

Stockholders' right to contract with corporation, 957

Contribution and exoneration, 1043, 1052*Conversion*, see *infra*, **TROVER AND CONVERSION**.*Conveyances*, see *infra*, **GIFTS ; SALES**.**Corporation owning its own stock :**

Voting at stockholders' meetings, 1001

Courts (see *infra*, **CALLS) :**

Stockholders' meetings, 1005

Credit, see *infra*, **CASH**.**Creditors :****Enforcement :**

Liability of stockholders for corporate debt, 1041

Stockholders as creditors of corporation, 947

Creditor's bill :

Enforcement of liability of stockholders, 1043

Debenture stock, 836

Debts (see *infra*, **EQUITABLE LIABILITY OF STOCKHOLDERS ; LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS ; LIEN OF CORPORATION ON SHARES ; PARTNERSHIP LIABILITY ; STATUTORY LIABILITY) :**

Shares are not debts due owner, 826

Defenses in actions on subscriptions, 931

Abandonment of enterprise, 932

Alterations in charter, 932

Call for unwarranted purpose, 940

STOCK AND STOCKHOLDERS, cont'd.**Defenses in actions on subscriptions, cont'd.****Capital stock not fully subscribed, 934**

Abrogation of rule, 935

Formal resolution, 935

Full capital stock must be subscribed, 934

General rule, 934

Intention to commence business before full subscription, 935

Modification of rule, 935

Subscriptions to increase capital stock, 936

Subscription to limit fixed necessary, 935

Subscriptions to limit fixed sufficient, 935

What subscriptions may be counted, 936

Change in corporate design, 933

Change in corporate name, 932

Defendant not subscriber, 940

Delay in enterprise, 933

Exercise of option to pay otherwise than in cash, 840

Failure of corporate enterprise, 932

Failure to incorporate, 840

False representations, 938

Fraud, 937

Generally, 932

Illegal object of corporation, 940

Impeachment of corporate existence, 841

Improper issue of stock to others, 940

Inability of corporation to issue stock, 940

Increase of capital stock, 938

Irregular organization, 938

Making premature contract, 941

Mismanagement, 938

Misrepresentations, 938

Nonpayment of other subscriptions, 941

Nonpayment of percentage required to be paid in cash, 937

Nonperformance of conditions, 934

Particular defenses considered, 932

Payment, 940

Receipt of depreciated currency in payment of subscriptions, 841

Release, 939

Collusive agreement void, 939

Consideration necessary, 939

General rule, 939

Meaning of resolution, 939

Prejudice to rights of creditors, 939

Secret agreement to release other subscribers, 941

Subscriber cannot release himself after contract completed, 939

What amounts to release, 939

Right to set up defenses, 931

Secret agreement to release other subscribers, 941

Set-off and counterclaim, 940

Statute of limitations, 941

Effect of one call becoming barred on other calls, 942

May be set up, 941

Time from which state runs, 941

What law governs, 942

Taking invalid subscriptions, 941

Violations of charter, 941

Waiver of estoppel, 942

Circumstances showing waiver, 942

General rule, 942

Knowledge necessary, 943

Participation in corporate affairs, 942

Payment, 943

STOCK AND STOCKHOLDERS, *cont'd.*

- Definitions, 822, 832**
 - Before subscription, 823
 - Capital stock, see *infra*, CAPITAL STOCK.
 - Certificates of stock, see *infra*, CERTIFICATES OF STOCK.
 - In general, 822
 - Shares of stock, see *infra*, SHARES OF STOCK.
 - Stockholders, see *infra*, WHO ARE STOCKHOLDERS.
 - Stock not peculiar to corporations, 823
 - Various meanings of the term "stock," 822
- Delivery, see *infra*, GIFTS.**
- Demand :**
 - Calls, 920
 - Liability of stockholders for corporate debts, 1048
- Demand and refusal of corporate action as condition precedent to suit by stockholders, 976**
 - Application of the rule, 979
 - Necessity of appeal to other stockholders, 981
 - Origin of rule, 979
 - Stockholder required to show merits in addition to compliance with rule, 980
 - Suits in federal courts under ninety-four equity rule, 979
 - To whom demand addressed, 981
 - What demand sufficient, 980
 - What refusal sufficient, 981
 - When rule does not apply, 980
- Deposit of certificate of transfer in public office, 885**
- Directors :**
 - Calls, 915
 - Forfeiture, 929
- Minority stockholders :**
 - Rights as regards election of directors, 968
 - Sales by directors, 856
 - Voting, 999
- Dissolution of corporation :**
 - Individual liability, 1031
 - Liability of stockholders, 1011
 - Minority stockholders, 970, 971
 - Partnership liability, 1031
 - Statutory liability, 1026
- Dividends :**
 - Gift of dividends, 863
- Minority stockholders :**
 - Compelling or restraining declaration of dividends, 968
 - Participation in dividends, 945
 - Payment of dividend out of capital stock, 1015
 - Retention of dividends by donor, 863
 - Title to dividends, 859
 - Transfer on books of corporation or registration, 881
- Elections (see *infra*, STOCKHOLDERS' MEETINGS) :**
 - Minority stockholders, 968
- Equitable liability of stockholders, 1007**
 - Action to enforce, see *infra*, LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS.
 - Additional statutory liability, see *infra*, STATUTORY LIABILITY OF STOCKHOLDERS.
 - Application of doctrine, 1007
 - Defenses, 1011
 - Dissolution of corporation, 1011
 - English rule, 1016
 - Extent of liability, 1015
 - Fraudulent representations, 1011

STOCK AND STOCKHOLDERS, *cont'd.*

- Equitable liability of stockholders, *cont'd.***
 - Irregular organization of corporation, 1011
 - Laches, see *infra*, LIMITATIONS AND LACHES.
 - Liability for corporate assets withdrawn by stockholders, 1014
 - Liability on bonus stock, 1012
 - Limitation of actions, see *infra*, LIMITATIONS AND LACHES.
- Power of corporation to exempt, 1009**
 - Agreements in sale of stock, 1009
 - Colorable payment, 1009
 - Forfeiture of stock, 1011
 - Nominal payment, 1009
 - Reduction of capital stock, 1011
 - Release of unpaid balance, 1010
 - Rescission of subscription, 1010
 - Stock falsely issued as fully paid, 1009
 - Surrender of stock, 1010
- Statutory liability, see *infra*, STATUTORY LIABILITY OF STOCKHOLDERS.**
- Stock falsely issued as fully paid, 1009**
- Stock issued for overvalued consideration, see *infra*, LIABILITY OF STOCK ISSUED FOR OVERVALUED CONSIDERATION.**
- Subscriptions, 1007**
- Transfer, see *infra*, LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS.**
- Trust fund doctrine, 1007**
- Unpaid subscriptions, 1007**
- Waiver of liability by creditor by knowledge of facts, 1016**
- Who are liable, see *infra*, LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS.**
- Who may enforce liability, see *infra*, LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS.**
- Escrow :**
 - Delivery of subscription in escrow, 906
- Estoppel :**
 - Acquiescence, laches, and estoppel, see *infra*, ISSUE OF STOCK.
 - Defenses in actions on subscriptions, 942
 - Estoppel to deny character of stockholder, 1035
 - Increase of stock, 852
 - Lien of corporation on shares, 874
 - Stockholders' meetings, 995
 - Who are stockholders, 896
- Evidence (see *infra*, WHO ARE STOCKHOLDERS) :**
 - Calls, 922
 - Conditional subscriptions, 912
- Exchange, see STOCK AND PRODUCE EXCHANGE.**
- Execution, 864**
 - At common law, 864
 - Attachment or levy without notice takes precedence over unrecorded assignment, 882
 - Circumstances rendering judgment and execution against corporation unnecessary, 1049
 - Execution against stockholder on judgment against corporation, 1048
 - Levy, 865
 - National bank stock, 865
 - On what stock levied, 865
 - Sale, 865
 - Statutes, 864
 - Stock in foreign corporations, 865
- Execution sales, 866**
 - Right of purchaser at execution sale to transfer certificate, 878

STOCK AND STOCKHOLDERS, *cont'd*

Executors and administrators:

- Right of executor or administrator to transfer certificate, 877
- Voting at stockholders' meeting, 1000

Existence of Corporation:

- Stockholders denying existence of corporation, 958

Expulsion of stockholder:

- Termination of membership, 897

False representations (see *infra*, FRAUD):

- Sale, 860

Fictitiously paid up stock, 842, 844, 845

Fire company:

- Rights of members of volunteer fire company, 946

Foreign corporations:

- Courts will not interfere with management, 960
- Duty of foreign corporation to keep books within state, 953
- Mandamus to enforce right of inspection of books, 956

Forfeitures, 927

- Action for damages, 931
- Action of directors, 929
- Annulment of forfeiture, 930
- Assignees, 930
- Cumulative remedy, 928
- Deficiency, 930
- Delinquent subscribers, 927
- Effect on officer, 930
- Express statutory grant necessary, 927
- Forfeiture relieves subscriber from further liability, 930
- How power to forfeit stock exercised, 929
- Injunction, 930
- Legal call, 928
- Liability of stockholders, 1011
- Notice, 929
- Notice mandatory, 929
- Notice or threats not equivalent to forfeiture, 929
- Publication of notice, 929-930
- Remedy by forfeiture, 927
- Remedy purely statutory, 927
- Statutory requirements must be complied with, 929
- Stockholders' protective remedies, 931
- Subscriber liable for deficiency, 930
- Surplus, 931
- Tender, 931

Forged certificates, see *infra*, ISSUANCE OF CERTIFICATE.

Forgery, see *infra*, WRONGFUL TRANSFER BY CORPORATION.

Form of subscription, 903

- Authority of agent to subscribe, 904
- Entry of name as subscriber by secretary of corporation, 904
- Indefinite agreement, 905
- Inference from acquiescence, 904
- Mistake in or omission to name corporation, 903
- Mutual agreement to subscribe, 903
- Necessity of writing, 905
- Offer to subscribe, 904
- Option to recall to corporation, 905
- Promise to subscribe, 904
- Rule stated, 903
- Strict rule, 905
- Variance from form prescribed by charter, 903

STOCK AND STOCKHOLDERS, *cont'd*

Form of subscription, *cont'd*.

- Variance from statutory mode or formula, 903

Fraud (see *infra*, MINORITY STOCKHOLDERS):

- Defenses in actions on subscription, 937

Fraudulent issue, 839

- Remedy, 847

Fraudulent stock:

- Acquiescence, laches, and estoppel, 848
- Impeachment of judgment, 1047
- Individual liability of stockholders, 1027, 1031
- Partnership liability, 1031
- Rescission of subscription, 943
- Sale, 860
- Subscriptions, 937
- Garnishment, 866

Gifts, 861

- Causa mortis*, 863

- Declarations, 863

Delivery, 861

- Delivery of certificate, 862
- Necessity, 861
- Transfer on books of corporation, 862
- Written assignment, 862

Dividends, 863

- Effect of transfer of stock on liability for call, see *infra*, CALLS.

Evidence, 863

***Inter vivos*, 861**

Obligation of corporation to transfer and issue new certificate, see *infra*, OBLIGATION OF CORPORATION TO TRANSFER AND ISSUE NEW CERTIFICATE.

Possession by donee, 863

Proof of gift, 863

Retention of dividends by doner, 863

Revocation, 863

Revocation of gift *causa mortis*, 863

Right to transfer certificate, see *infra*, CERTIFICATE.

Shares may be aliened, 861

Subsequent legacy including stock, 863

Surrender of old and issuance of new certificate, see *infra*, SURRENDER OF OLD AND ISSUANCE OF NEW CERTIFICATE.

Transfer on books of corporation or registration, see *infra*, TRANSFER ON BOOKS OF CORPORATION OR REGISTRATION.

Husband and wife:

- Subscription by husband in name of wife, 909

Identification, 828

Illegal business:

- Stockholders' liability, 1031

Illegality, see *infra*, MINORITY STOCKHOLDERS.

Illegal object of corporation, 940

Impairment of obligation of contracts:

- Rights of minority stockholders, 962

Statutory liability of stockholders, 1018

General rule, 1018

Reservation of right to amend, 1019

Implied warranty, 857

Increase and reduction of stock, 849

Acquiescence, 851

Acquiescence, laches, and estoppel, 852

Amendment of articles, 852

Cancellation of shares, 853

Certificate of increase, 852

Conformity to statute, 851, 852

Courts, 851

Directors, 851

STOCK AND STOCKHOLDERS, *cont'd*

- Increase and reduction of stock, *cont'd*.**
 - Distribution of surplus after reduction, 854
 - Formal vote not indispensable, 852
- Increase of capital stock, 938**
- Increase of stock, 851**
- Issue of securities convertible into shares, 854**
- Liability of stockholders as affected by increase or reduction of stock, see infra, New Stock.***
- Mode of exercising power, 851**
- Notice of meeting, 852**
- Power to increase or reduce stock, 849**
 - Constitutionality of statutes granting power, 850
 - Express authority necessary, 849
 - General statutory provisions, 850
 - Sufficiency of authority, 850
 - Unanimous consent ineffective, 849
 - Unauthorized increase void, 849
- Preferred or common stock, 851**
- Purchase of shares, 853**
- Ratification, 851**
- Reduction must be fair and impartial, 853**
- Reduction of stock, 852**
- Right to subscribe for new shares, see infra, New Stock.***
- Stockholders, 851**
 - Who may exercise power, 851
 - Writing off loss, 853
- Independent contractors, 1023**
- Individual and partnership liability, see infra, PARTNERSHIP LIABILITY.***
- Injunctions:**
 - Elections, 1007
 - Forfeiture, 931
 - Inspection of books and records, 956
 - Invalid or irregular stock, 845
 - Issue for less than par, 846
 - Minority stockholders, 961
 - Voting, 1006
- Insolvency and bankruptcy:**
 - Action to enforce liability of stockholders, 1046
 - Calls, 917
 - Effect of discharge of corporation in bankruptcy upon statutory liability, 1025
 - Extent of subscriber's liability where corporation insolvent, 914
 - Necessity of calls where corporation is insolvent, 915
 - Rescission of subscription, 944
- Inspection of corporate books and records (see *infra*, INSPECTION OF CORPORATE BOOKS AND RECORDS), 951**
 - Absolute right, 951
 - Action at law for damages, 956
 - Actions to recover statutory penalty, 957
 - Agent, 954
 - Attorney, 954
 - By-laws affecting right of inspection, 953
 - Common-law right, 951
 - Constitutional right, 951
 - Copies, right to take, 954
 - Equitable remedies, 956
 - Expert account, 954
 - Foreign corporation's duty to keep books within state, 953
 - Inconvenient to corporation, 952
 - Injunction, 956
 - Interests of corporation and third persons to be safeguarded, 954

STOCK AND STOCKHOLDERS, *cont'd*

- Inspection of corporate books and records, *cont'd*.**
- Mandamus, 955**
 - Conditions precedent, 956
 - Criminal proceeding against officer, 955
 - Evil, improper, or unlawful purpose, 955
 - Foreign corporations, 956
 - General rule, 955
 - Inspection enforceable by mandamus, 955
 - Specific purposes not shown, 955
- Nature of right, 951**
- Penalties, 957**
- Qualified right, 951**
- Reasonable time for exercise of right, 954**
- Remedies for denial of right, 955**
- Statutory right, 951**
- Stockholder in rival concern, 952**
- Unfriendly stockholder, 952**
- What books and records may be inspected, 954**
- Who entitled to inspection, 952, 953**
- Interest (see *infra*, CALLS):**
 - Statutory liability, 1025
- Interest-bearing stock, 835**
- Interpretation:**
 - Statutory liability, 1019
- Issuance of certificate, 875**
 - Compelling issuance of certificate, 876
- Forged and spurious certificates, 875**
 - Corporation liable for spurious stock issued by officers, 875
 - Failure to cancel certificate surrendered for transfer, 876
 - Illustrations, 876
 - Issuance to officer signing certificate not notice of spurious character, 875
 - Where officer has no real nor ostensible authority, 876
- Mandamus, 877**
- Obligation of corporation to transfer and issue new certificate, see infra, OBLIGATION OF CORPORATION TO TRANSFER AND ISSUE NEW CERTIFICATES.***
- Place of issuance, 875**
- Right of owner of lost certificate to new certificate, 877**
- Statute of limitations, 877**
- Surrender of old and issuance of new certificate, see infra, SURRENDER OF OLD AND ISSUANCE OF NEW CERTIFICATE.***
- What constitutes sufficient issuance, 875**
- Wrongful transfer by corporation, see infra, WRONGFUL TRANSFER BY CORPORATION.***
- Issue of stock, 836**
 - Acquiescence, laches, and estoppel as bar to relief, 847**
 - Application of rule, 848
 - Fraudulent stock, 848
 - General rule, 847
 - Overissued stock, 848
 - Preferred stock, 848
 - Stock issued for less than par, 848
 - Voidable but not void stock, 847
 - Void stock, 1047
 - By corporate officers among themselves, 844
 - Consideration for issue, see infra, CONSIDERATION FOR ISSUE.***
 - Generally, 836
 - Inability of corporation to issue, 840
 - Minority stockholders, 967
 - Mode of issue, 839
 - Power to issue stock, see infra, POWER TO ISSUE STOCK.***

STOCK AND STOCKHOLDERS, *cont'd*

Issue of stock, *cont'd*.

Remedies in respect to invalid or irregular stock, 845

Corporation liable for damage, 845

Injunction, 845

Overissued stock, see *infra*, OVERISSUED STOCK.

Removal of cloud, 845

Special stock, 847

Stock fraudulently issued, 847

Stock issued for less than par, 846

What constitutes issuance, 836

Joint owners:

Voting at stockholders' meetings, 1001

Judgments:

Circumstances rendering judgment and execution against corporation unnecessary, 1049

Effect of judgment against corporation on stockholders, 1047

Illustrations, 1047, 1048

Impeachment for fraud, 1047

Judgment conclusive against stockholders, 1047

Judgment *prima facie* evidence, 1047

Execution against stockholder on judgment against corporation, 1048

Kinds of stock, 832

Laborer, 1023

Laches (see *infra*, LIMITATIONS AND LACHES):

Acquiescence, laches, and estoppel, see *infra*, ISSUE OF STOCK.

Increase of stock, 852

Minority stockholders, 985

Leases:

Minority stockholders, 966

Legacies, 864

Liability for corporate assets withdrawn by stockholders:

Division of property among stockholders, 1015

General rule, 1014

Payment of debt out of capital stock, 1015

Return of subscription, 1015

Liability of stockholders for corporate debts:

Action, 1044

Additional statutory liability, see *infra*, STATUTORY LIABILITY OF STOCKHOLDERS.

Common law, 1017

Contribution between stockholders, 1052

Corporation insolvent or extinct, 1046

Demand, 1048

Effect of judgment against corporation on stockholders, 1047

Enforcement of statutory liability, 1044

Enforcement of subscription liability, 1044

Equitable liability of stockholders, see *infra*, EQUITABLE LIABILITY OF STOCKHOLDERS.

Execution against stockholder on judgment against corporation, 1048

Exemption of corporation from operation of statutes, 1041

Extinct corporation, 1046

Individual liability, see *infra*, PARTNERSHIP LIABILITY.

Insolvent corporation, 1046

In what state judgment should be recovered and execution returned, 1046

Judgments against corporation, 1047

Laches, see *infra*, LIMITATIONS AND LACHES.

STOCK AND STOCKHOLDERS, *cont'd*

Liability of stockholders for corporate debts, *cont'd*.

Limitation of actions, see *infra*, LIMITATIONS AND LACHES.

Necessity of exhausting remedy against corporation, 1045

Partnership liability, see *infra*, PARTNERSHIP LIABILITY.

Railroads, 1041

Sequestration proceeding under Minnesota act, 1045

Set off of debt of corporation, see *infra*, SET OFF OF DEBT OF CORPORATION.

Statutory liability, 1044

Statutory liability of stockholders, see *infra*, STATUTORY LIABILITY OF STOCKHOLDERS.

Statutory remedy exclusive, 1045

Stockholders primarily liable, 1047

Subscription liability, 1044

Suit in equity, 1044

Transfer, 1035.

After call, 1036

Assignment to fictitious person, 1036

Colorable transfers, 1036

Debt contracted before transfer, 1037

Debts incurred after transfer, 1037

Debts incurred before transfer, 1039

Failure to register excused, 1040

Formalities, 1039

Innocent transferee not liable, 1038

Liability of transferee, 1037

Liability of transferee as affected by statute, 1038

Liability of transferrer, 1035

Liability of transferrer as affected by statute, 1037

Notice, 1039

Registration, 1039

Sufficiency of transfer to shift liability, 1039

Transfer relieves from subscription liability, 1035

Transferrer relieved of liability, 1037

Transfer to escape liability, 1036

Transfer without knowledge of transferee, 1038

Transferee's liability attaches on actual transfer, 1040

Transfer on books of corporation or registration, 881

Who are liable, 1032

Character of stockholder, 1034

Estoppel to deny, 1035

Necessity for proof, 1034

Sufficiency of proof, 1034

Estate of deceased shareholder, 1032

General rule, 1032

Holder of equitable title, 1033

Holder of legal title, 1033

Manufacturing corporations, 1041

Pledge holding stock as collateral, 1032

Stock held in fiduciary capacity, 1033

Transfer, 1035

Trusts and trustees, 1033

Who may enforce liability, 1041

Assignment for benefit of creditors, 1044

Creditors, 1041

After appointment of receiver, 1042

After assignment of corporation, 1042

Contribution, 1043

Creditor's bill, 1043

Creditors by assignment, 1042

Volume XXVI.

STOCK AND STOCKHOLDERS, *cont'd*

Liability of stockholders for corporate debts, *cont'd.*

Who may enforce liability, *cont'd.*

Creditors, *cont'd.*

Creditors who are also stockholders, 1043

Equitable remedies, 1043

General rule, 1041

Holders of negotiable paper, 1042

Legal remedies, 1043

Several liability for proportionate parts of debts, 1043

Stockholders liable as partners, 1043

Stockholders liable until capital stock is paid in, 1043

Suit for benefit of all creditors, 1042

Receivers, 1044

Liability of stock issued for overvalued consideration, 1012

Payment in depreciated stock, 1014

Property knowingly overvalued, 1013

Stock issued in payment for property, 1012

Stock issued in payment for services, 1014

Stock issued in payment of antecedent debt, 1014

Valuation made in good faith, 1013

Liability of subscriber, 912

Agreement that only portion shall be paid in, 913

Express promise necessary, 912

Express promise not necessary, 913

Extent of liability where corporation is insolvent, 914

Full paid-up stock not liable to calls, 914

Liability prior to incorporation, 913

Preliminary expenses, 913

Promise necessary, 912

Secret agreement that subscriber not bound void, 914

Statutory liability may be varied by contract, 913

What law governs liability, 914

Lien of corporation on shares, 866

By-laws, 869

Bona fide transferee, 869

Effect of valid by-law, 869

Enactment after transfer and before recording, 870

Power to enact, 869

Prohibited by-law giving lien, 870

Unauthorized by-law giving lien, 869

What constitutes notice of existence, 870

Common law, 866

Debts for which lien enforceable, 871

As dependent on character of debt, 871

Debts barred by statute of limitations, 873

Debts contracted before acquisition of shares, 872

Debts contracted prior to enactment of statute or by-law, 873

Debts contracted subsequent to transfer but before notice, 872

Debts not due, 872

Illustrations, 871

Liability as surety or indorser, 872

Lien not limited to debts for stock, 871

Partnership debt, 872

Time of contracting, 872

Enforcement of lien, 873

Estoppel, 874

Notice, 868, 870, 872

STOCK AND STOCKHOLDERS, *cont'd*

Lien of corporation on shares, *cont'd.*

Right to lien at common law, 866

Right to lien by usage, 870

Right to lien under contracts, 868

By-laws, 869

Express contract, 868

General rule, 868

Recitals of certificate as notice, 868

Right to lien under statutes and charters, 867

Corporation may assert lien in another state, 867

Effect of repeal of statute, 867

Generally, 867

Notice to third persons, 868

Prohibition of transfer while indebted creates lien, 867

What language sufficient to create lien, 867

Sale of shares, 873

Subrogation, 874

To what shares lien attaches, 871

Shares held in trust for debtor, 871

Where debtor's title to stock one in remainder, 871

Usage, 870

Waiver of lien, 874

Acceptance of additional security, 874

Consent to transfer, 874

Express waiver, 874

General rule, 874

Implied waiver, 874

Limitation of actions (see *infra*, DEFENSES IN ACTIONS ON SUBSCRIPTION):

Issuance of certificate, 877

Lien of corporation on shares where debt barred by statute of limitations, 873

Limitations and laches, 1048

Circumstances rendering judgment and execution against corporation unnecessary, 1049

Contracts not in writing, 1050

Extension of time of payment, 1049

General statutes of limitation, 1050

Laches, 1050

Necessity of exhausting remedy against corporation, 1048

Penalties, 1050

Period of limitation, 1050

Primary liability of stockholder, 1049

Statute begins from return of execution against corporation, 1048

What law governs, 1050

When statute begins to run, 1048

Lis pendens, 860.

Lost certificates, 831

Right of owner of lost certificate to new certificate, 877

Right of *bona fide* purchaser of lost or stolen indorsed certificate, 879

Management of corporation:

Stockholders' rights, 947

Management of stock, see *infra*, MINORITY STOCKHOLDERS.

Mandamus:

Call of stockholders' meetings, 989

Calls, 917

Compelling issuance of certificate, 876, 877

Issuance of new stock, 950

To compel transfer, 887

Manufacturing corporations:

Liability of stockholders for corporate debts, 1041

STOCK AND STOCKHOLDERS, *cont'd*

Master and servant :

Wages, see *infra*, STATUTORY LIABILITY.

Master in chancery :

Appointment of master to conduct election, 1007

Meetings, see *infra*, STOCKHOLDERS' MEETINGS.

Minority stockholders, 959

Accounting, 969

Acquiescence, 985

Acts not *ultra vires*, illegal or fraudulent, 959

Compelling officers to perform duties, 969

Consolidation, 967

Courts not inclined to interfere at suit of minority, 959

Courts will not interfere with business policy of corporation, 959

Directors, 968

Disaffirming voidable contracts, 964

Dissolution of corporation, 970

Dividends, compelling or restraining declaration, 968

Election of directors, 968

Enforcement of unlawful agreement, 970

Fraud, 963

Excessive salaries voted or paid, 963

Funds converted by officers, 963

One corporation wrecked in interests of another, 963

Right to relief against fraud, 963

Internal management of foreign corporations not interfered with, 960

Issue of stock, 967

Laches, 985

Leases, 966

Majority, see *infra*, MINORITY.

Majority's duty toward minority, 960

Property, 964

Purchase from stockholders or directors, 965

Purchase or sale of property by corporation, 964

Receiver, right to have appointed, 969

Reorganization, 967

Rights of minority stockholders, 962

Sale of all corporate property and assets, 965

Sale of corporate property, 965

Sale of stock, 967

Sale to majority of stockholders or directors, 965

Sue in own behalf on corporate cause of action, 970

Ultra vires or illegal acts, 961

Acts impairing obligation of contract, 962

Acts in violation of laws against monopoly, 962

Assessment of fully paid stock, 963

Attempts to change nature or corporate enterprise, 962

Injunction, 961

Rights in general 961

Ultra vires purchase, 964

Unlawful agreement, 970

Voidable contracts, 964

Waiver of rights by laches, acquiescence, or participation, 985

Winding up of corporation, 970

Misrepresentations, see *infra*, FRAUD.

STOCK AND STOCKHOLDERS, *cont'd*

Money (see *infra*, CASH):

Shares are not money, 826

Name :

Change in corporate name, 932

Negotiability of certificates, 830

New stock (see *infra*, INCREASE AND REDUCTION OF STOCK; NEW STOCK):

Sharing in distribution of new stock, 947

Action for damages, 949

Demand for shares and offer to subscribe as conditions precedent, 950

General rule, 947

Mandamus, 950

Property purchased, 948

Remedies for violation of right, 949

Sale of right, 949

Stockholders' pre-emptive right to proportionate share of new stock, 947

Suit in equity, 949

Waiver of right, 949

Who may exercise right, 948

Notice :

Calls, see *infra*, CALLS.

Forfeiture, 929

Lien of corporation on shares, 868

Lien where debt contracted subsequent to transfer but before notice, 872

Meetings, see *infra*, STOCKHOLDERS' MEETINGS.

Notice by mail, 920

Notice by publication, 921

Recitals of certificate as notice of lien of corporation, 868

Stockholders' meetings, see *infra*, STOCKHOLDERS' MEETINGS.

Notice of meeting :

Increase of stock, 852

Number of shares, 829

Obligation of corporation to transfer and issue new certificate, 886

Bill in equity to compel registration, 886

Compelling transfer by corporation, 886

Generally, 886

Mandamus, 887

Recovery of damages for wrongful refusal to transfer, 887

Officers :

Issue of stock by corporate officers among themselves, 844

Minority stockholders :

Compelling officers to perform duties, 969

Statutory liability, 1023

Overissue, 838

Overissued stock, 836, 845

Acquiescence, laches, and estoppel, 848

Remedy of corporation and stockholders, 846

Remedy of purchase, 845

Paid-up stock :

Assessment on paid-up stock, see *infra*, CALLS):

Parol evidence :

Conditional subscriptions, 912

To explain certificate, 898

Who are stockholders, 898

Written subscriptions cannot be varied by parol conditions, 911

Partnership :

Lien of corporation for debt of partnership, 873

Partnership liability (see *infra*, STATUTORY LIABILITY), 1027

STOCK AND STOCKHOLDERS, *cont'd*

Partnership liability, *cont'd*.

Action to enforce, see infra, LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS.

Antecorporate debts, 1027

Debts incurred in excess of statutory liability, 1031

Defective incorporation, 1027

Dissolution of corporation, 1031

Failure to comply with statutory requirements, 1028

Filing certificate of payment, 1030

General rule, 1028

Payment in property, 1030

Payment of capital stock, 1029

Penal act strictly construed, 1028

Provisions enforcing publicity, 1029

Publishing statements of liability, 1029

When act is a prerequisite of corporate existence, 1028

When statutes impose liability for failure, 1028

When the required act is not a prerequisite of corporate existence, 1028

Fraud on corporation, 1031

Fraudulent incorporation, 1027

Fraudulent misrepresentations, 1027

Illegal business, engaging in, 1031

Laches, see infra, LIMITATIONS AND LACHES.

Limitation of actions, see infra, LIMITATIONS AND LACHES.

Payment of capital stock, 1029

Filing certificate of payment, 1030

General rule, 1029

Nature of liability, 1029

Payment in property, 1030

Statutes, 1029

Transfer, see infra, LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS.

Ultra vires debts, 1031

Who are liable, see infra, LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS.

Who may enforce liability, see infra, LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS.

Payment (see *infra*, CONSIDERATION FOR ISSUE):

Calls, see infra, CALLS.

Payment of corporate debt:

Statutory liability, 1026

Penalties:

Acts providing that stockholders shall be liable for corporate debts until certain prescribed acts are performed, 1028.

Inspection of books and records, 957

Limitations, 1050

Penalties strictly construed, 1028

Personal property, 826

Place of meetings, 992

Place of stockholders' meetings, 987

Pledge, 864

Liability for debts of corporation, 1033

Right to transfer certificate, see infra, CERTIFICATE.

Transfer on books of corporation or registration, 884

Voting at meetings, 1001

Power of stockholders, see infra, RIGHTS, POWERS, AND PREROGATIVES OF STOCKHOLDERS IN GENERAL.

Power to issue stock:

Issuance, 836

Department upon statute or charter, 833

STOCK AND STOCKHOLDERS, *cont'd*

Power to issue stock, *cont'd*.

Issuance, *cont'd*.

Fraudulent issue, 839

Generally, 836

Issue for less than par, see infra, CONSIDERATION.

Limited to kind authorized, 836

Overissue, 838

Preferred stock, 837

Reissue or surrendered or purchased stock, 839

Special stock, 838

Ultra vires, 838

Preferred or guaranteed stock, 832, 837

Authorized issue of preferred stock, 837

Definition, 832

Dual relation, 833

Exchange of common for preferred stock, 835, 951

Generally, 836

Increase, see infra, INCREASE AND REDUCTION OF STOCK.

Issue, 832

Issue under authority to increase stock, 837

Mortgage, 833

Preference in distribution of assets, 834

Preferred shareholders not creditors, 832

Priority of creditors over preferred stockholders, 833

Reduction, see infra, INCREASE AND REDUCTION OF STOCK.

Rights of preferred or guaranteed stock, 946

Rights of preferred stockholders, 832

Right to dividends, 834

Right to vote, 835

Statute, 832

Subsequent issue, 837

Subsequent statute authorizing issue, 837

Validity, 832

Votes, 999

When transaction deemed a loan, 833

Prerogatives of stockholders, see infra, RIGHTS, POWERS, PREROGATIVES OF STOCKHOLDERS IN GENERAL.

Presumption:

Notice of meetings, 993

Presumption in favor of regularity of call, 989

Property:

Consideration for issue, see infra, CONSIDERATION FOR ISSUE.

Minority stockholders, see infra, MINORITY STOCKHOLDERS.

Shares are property, 826

Publication, 921

Publicity, provisions enforcing, 1029

Purchasers for value and without notice, see infra, BONA FIDE PURCHASERS.

Questions of law and fact:

Performance of conditions, 912

Quorum, 993, 1004

Railroads:

Exemption of stockholders from liability for corporate debts, 1041

Real property, 827

Receivers (see STOCKS AND STOCKHOLDERS):

Action on calls, 926

Calls, 918

Minority stockholders, 969

Receiver of corporation may enforce stockholders' liability, 1044

Statutory liability of stockholders, 1042

STOCK AND STOCKHOLDERS, *cont'd*

Recording (see *infra*, TRANSFER ON BOOKS OF CORPORATION OR REGISTRATION):

Deposit of certificate of transfer in public office, 885

Records (see *infra*, INSPECTION OF CORPORATE BOOKS AND RECORDS):

Transfer on books of corpotion or registration, see *infra*, TRANSFER ON BOOKS OF CORPORATION OR REGISTRATION.

Reduction of stock, see *infra*, INCREASE AND REDUCTION OF STOCK.

Registration, see *infra*, TRANSFER ON BOOKS OF CORPORATION OR REGISTRATION.

Reissue of surrendered or purchased shares, 839

Release, see *infra*, DEFENSES IN ACTIONS ON SUBSCRIPTIONS.

Remainders, reversions, and executory interests:
Lien, 871

Remedies, see *infra*, FRAUD.

Reorganization of corporation:

Minority stockholders, 967

Report:

Publishing statements of liability, 1029

Rescission:

Sale, 858

Rescission of subscription, 943

Damages, 944

Fraud or false representations, 943

Fraudulent intent, 944

Insolvency of corporation, 944

Ratification, 944

Statements as to future event, 944

Subscriber must act promptly, 944

Surrender of stock, 944

Right of minority stockholders to sue or defend on behalf of corporation:

Corporate property lost through gross negligence of directors, 975

Demand and refusal of corporate action as condition precedent to suit by stockholder, 976

Directors voting excessive salaries, 975

Dissolution of corporation, 971

Equity jurisdiction, 973

Excuses for failure to make demand, 978

General rule, 976

Grounds of action, 973

Illustrations, 978

Injury to corporation or stockholders, 974

Jurisdiction of equity, 973

Majority of stockholders oppressing minority, 974

Misappropriation of corporate property, 975

Nature of stockholders' suits, 972

No right to sue or defend on behalf of corporation, 970

One corporation wrecked in interest of another, 975

Refusal to resist collection of illegal taxes, 975

Specific grounds of action, 874

Stockholder entitled to sue in exceptional cases when corporation has refused, 971

Ultra vires acts, 973

When allowed to defend, 976

When demand not essential, 978

When stockholder may sue, 973

Right of stockholder to sue or defend on behalf of corporation:

Motive in bringing suit, 984

Necessity of showing injury from acts complained of, 984

STOCK AND STOCKHOLDERS, *cont'd*

Right of stockholder to sue or defend on behalf of corporation, *cont'd*.

Ownership of stock at time of transaction complained of, 984

Power of majority stockholders to ratify wrongful acts, 982

Rights of majority and strangers entitled to consideration, 984

Suit dismissed when not brought in good faith, 983

Waiver of right by laches, acquiescence, or participation, 985

Waiver of right to sue or defend, 982

Who may sue or defend, 982

Who may sue to enforce rights, 983

Rights, powers, and prerogatives of stockholders in general, 945

Bill of discovery, 957

Competition of corporation, 958

Consolidation of corporation, 958

Contract with corporation, 957

Corporate property, 946

Corporation formed for special purpose, 946

Denying existence of corporation, 958

Dividends, 945

General rights, 945

Information regarding corporate affairs, 957

Management of corporation, 946

Meetings, see *infra*, STOCKHOLDERS' MEETINGS.

Minority stockholders, see *infra*, MINORITY STOCKHOLDERS.

Preferred stockholders, see *infra*, PREFERRED OR GUARANTEED STOCK.

Property of corporation, 946

Reorganization of corporation, 958

Rights as creditors of corporation, 947

Right to alienate stock, 951

Right to exchange common for preferred stock, 951

Right to inspect corporate books and records, see *infra*, INSPECTION OF CORPORATE BOOKS AND RECORDS.

Sharing in distribution of new stock, see *infra*, SHARING IN DISTRIBUTION OF NEW STOCK.

Suing corporation, 958

Sales, 854

Bona fide purchasers, see *infra*, BONA FIDE PURCHASERS.

Certainty, 856

Contract of sale, 856

Defenses, 859

Delivery, 857

Dividends, 859

Effect of transfer of stock on liability for call, see *infra*, CALLS.

False representations, 860

Fraud and deceit, 860

Implied warranty, 857

Lis pendens, 860

Minority stockholders (see *infra*, MINORITY STOCKHOLDERS), 967

Misrepresentations, 860

Obligation of corporation to transfer and issue new certificate, see *infra*, OBLIGATION OF CORPORATION TO TRANSFER AND ISSUE NEW CERTIFICATES.

Parties to sale, 856

Performance, 857

Remedies, 859

Rescission, 858

STOCK AND STOCKHOLDERS, *cont'd*

Sales, *cont'd*.

- Right of alienation, 854
- Agreement between stockholders, 855
- By-laws restraining alienation, 855
- Cessation of right, 855
- Generally, 854
- Sales by directors, 856

Right to transfer certificate, see infra, CERTIFICATE.

Surrender of old and issuance of new certificate, see infra, SURRENDER OF OLD AND ISSUANCE OF NEW CERTIFICATE.

Tender of stock, 857

Transfer on books of corporation or registration, see infra, TRANSFER ON BOOKS OF CORPORATION OR REGISTRATION.

Securities:

Shares are not securities for money, 826

Sequestration, 1045

Servant, 1023

Set-off and counterclaim, 840

Set-off of debt of corporation:

Statutory liability, 1051

Subscription liability, 1051

Shares are not credits, 826

Shares of stock, 825

Amount of shares, 829

Chose in action, 828

Conversion, 828

Definition, 825

Distinction between "shares" and "stock," 826

Division of capital into shares, 825

General nature, 825

Identification, 828

Not credits, 826

Not money, 826

Not securities for money, 826

Number, 829

Ownership of capital stock and shares, 826

Personal property, 826

Property, 826

Realty, 827

Separate taxation of capital and shares, 826

Shares are not debts due owner, 826

Shares are property, 826

Shares represent interest of stockholder, 825

Situs, 828

Statute of frauds, 828

Trover, 827

Sharing in distribution of new stock, see infra, SHARING IN DISTRIBUTION OF NEW STOCK.

Sheriffs' sales, 866

Right of purchaser at execution sale to transfer certificate, 878

Situs of shares, 828

Special meetings, 996

Special stock, 835

Illegal issue, 847

Special stock issued, 838

Specific performance, see SPECIFIC PERFORMANCE.

Status and relation of stockholders inter se and as to corporation, 899

Contractual relation, 899

Corporation a separate entity, 901

Cosureties, 899

Creditors, 899

Fiduciary relation, 900

Generally, 899

STOCK AND STOCKHOLDERS, *cont'd*

Status and relation of stockholder inter se and as to corporation, *cont'd*.

Relation to corporate creditors, 900

Relation to corporate property, 899

Representation of stockholders by corporation, 901

Title in corporation and not in stockholders, 899

Trust relation, 900

Vested rights of stockholder, 899

Statutes:

Power of municipality to subscribe to stock of private corporation, 666

Statutory liability of stockholders (see *infra*, PARTNERSHIP LIABILITY), 1017

Action to enforce, see infra, LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS.

Amount for which liable, 1021, 1022

Antecedent debts, 1024

Attorney, 1023

By-laws, 1017

Claims *ex contractu*, 1022

Claims *ex delicto*, 1024

Collateral liability, 1021

Common law, 1017

Constitutional provision, 1017

Construction, 1019

Contractors, 1023

Contracts, 1022

Contractual liability, 1020

Contribution, 1052

Costs, 1025

Debts, 1024

Debts and demands to which liability extends, 1022

Defenses, 1025

Discharge of corporation in bankruptcy, 1025

Dissolution of corporation, 1026

Express waiver, 1026

Extension of time of payment to corporation, 1025

Implied waiver, 1027

Organization defective, 1025

Payment of corporate debt, 1026

Purchasing debts at discount, 1026

Release of stockholder, 1027

Waiver by creditor, 1026

Discharge of corporation in bankruptcy, 1025

Dissolution of corporation, 1026

Effect of constitutional and statutory provisions, 1017

Effect on existing relations, 1018

Exemption of corporation from operation of statute, 1041

Express waiver, 1026

Extension of time of payment to corporation, 1025

Extent of liability, 1021

Future contracted debts, 1019

General rule, 1017

Impairment of obligation of contracts, 1018

Implied waiver, 1027

Independent contractors, 1023

In personam or *in rem*, 1021

Interest, 1025

Joint or several liability, 1020

Laborer, 1023

Laches, see infra, LIMITATIONS AND LACHES.

STOCK AND STOCKHOLDERS, *cont'd*

Statutory liability of stockholders, *cont'd*.

- Liability for amount equal to subscription, 1021
- Limitation of actions, see *infra*, LIMITATIONS AND LACHES.
- Maturity of debt, 1024
- Nature of statutory liability, 1020
- Note, renewal, 1024
- Officers of corporation, 1023
- Organization defective, 1025
- Payment of corporate debt, 1026
- Penal liability, 1020
- Personam*, 1021
- Primary liability, 1021
- Professional men, 1023
- Proportional liability, 1021
- Purchasing debts at discount, 1026
- Release of stockholder, 1027
- Rem*, 1021
- Remedy, 1019
- Renewal note, 1024
- Secondary liability, 1021
- Servant, 1023
- Set-off, 1051
- Several liability, 1020
- Statutory provisions, 1018
- Strict construction, 1019
- Subscription, amount equal to 1021
- Subscription, double amount of, 1022
- Torts, 1024
- Transfer*, see *infra*, LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS.
- Unliquidated claims, 1022
- Unliquidated demands, 1024
- Validity of constitutional and statutory provisions, 1017
- Void as to creditors, 1019
- Wages due laborer, servants, etc., 1022**
 - General officers of corporation, 1023
 - General rule, 1022
 - Independent contractors, 1023
 - Professional men, 1023
 - Who are laborers, servants, etc., 1023
- Waiver by creditors, 1026
- When void as to stockholders, 1019
- Who are liable*, see *infra*, LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS.
- Who may enforce liability*, see *infra*, LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS.
- Stockbrokers, see STOCKBROKERS.
- Stockholders** (see *infra*, WHO ARE STOCKHOLDERS), 916
- Calls** (see *infra*, CALLS):
 - Assessments of fully paid stock unlawful, 963
 - Estoppel to deny character of stockholder, 1035
 - Relation of stockholders *inter se* and as to corporation, see *infra*, STATUS AND RELATION OF STOCKHOLDERS *INTER SE* AND AS TO CORPORATION.
 - Rights, powers, and prerogatives of shareholders, see *infra*, RIGHTS, POWERS, AND PREROGATIVES OF STOCKHOLDERS IN GENERAL.
 - Subscription, see *infra*, SUBSCRIPTION.
 - Who are stockholders*, see *infra*, WHO ARE STOCKHOLDERS.
- Stockholders' meetings, 986**
 - Adjourned meetings, 996
 - Adjournment, 1005

STOCK AND STOCKHOLDERS, *cont'd*

Stockholders' meetings, *cont'd*.

- Call, 987
 - Authority to call, 988
 - Burden of proof, 989
 - By-laws, 988
 - Charter provisions, 988
 - Mandamus to compel call, 989
 - Necessity, 987
 - Presumptions, 989
 - Remedy where constituted authorities refuse to make call, 989
 - Statutory provisions, 988
 - Sufficiency, 988
 - Waiver, 989
- Divided meetings, 994
- Estoppel, 995
- Judicial control of meetings, 1005**
 - Appointment of master to conduct election, 1007
 - General rule, 1005
 - Injunctions, 1006
 - Instances of equitable interference, 1006
- Legality, 986
- Manner of making call, 988
- Manner of voting, 1003**
 - Cumulative voting, 1004
 - Heads, 1003
 - In general, 1003
 - Proxy, 1003
 - Shares, 1003
- Minutes, 1005
- Minutes of meetings, 1005
- Moderation, 995
- Necessity, 986
- Notice, 989**
 - Burden of proof, 993
 - By whom given, 990
 - Conditional notice, 993
 - Contents, 992
 - Failure to give notice, 990
 - Form, 992
 - How given, 991
 - Necessity, 989
 - Objects, 992
 - Persons entitled to notice, 991
 - Presumption, 993
 - Statutory charter and by-law provisions, 991
 - Sufficiency, 990
 - Time of notice, 992
 - To whom given, 991
 - Waiver, 990, 991, 992, 993
- Number of votes, 1003
- Number of votes essential to corporate action, 1004
- Organization, 995
- Place, 987
- Proceedings at meetings, 995
- Proxy, 1003
- Purpose, 986
- Quorum, 993, 1004
- Ratification, 995
- Special meetings, 996
- Time, 986
- Votes, 1003
- Votes, error in receiving or rejecting, 1002
- Voting, 996
- Voting agreements, 1004
- Waiver, 994
- Waiver of restrictions, 996
- What business may be transacted at general or business meetings, 995

STOCK AND STOCKHOLDERS, *cont'd*

Stockholders' meetings, *cont'd*.

What business may be transacted at special or extraordinary meetings, 996

Who may vote, 996

Bondholders, 1002

Corporate stockholders, 999

Determination of right to vote, 999

Directors, 999

Effect of registration, 997

Executors and administrators, 1000

General rules, 996

Joint ownership, 1001

Legal title and beneficial ownership denied, 996

Municipal corporations, 1000

Necessity of registration, 997

Nonresident stockholders, 1001

Pledged stock, 1001

Preferred stockholders, 999

Record of corporation conclusive, 997

Restrictions on voting, 998

Right to vote, 996

Statutes making records conclusive, 997

Statutory, charter, and by-law restrictions on voting, 998

Stock covered by contracts of sale or options, 1002

Stockholders interested in matters to be voted on, 1001

Stock illegally issued, 1002

Stock not paid for, 1002

Stock owned by corporation itself, 1001

Trustees, 1000

Stockholders' suits, see *infra*, RIGHT OF STOCKHOLDERS TO SUE OR DEFEND ON BEHALF OF CORPORATION.

Stock in other corporations:

Considerations for issue, 839

Stock issued for less than par, see *infra*, CONSIDERATION FOR ISSUE.

Stolen certificates (see *infra*, LOST CERTIFICATES), 831

Subrogation:

Subrogation of surety of debtor shareholder to lien, 874

Subscription:

Acceptance, 907

Allotment, 907

Allotment by commissioners, 907

Delegation of power, 907

Necessity, 907

Power to allot, 907

Signers of memorandum of association, 907

Wrong apportionment, 907

Application for stock, 906

Articles or certificate of incorporation or association, 905

Calls, see *infra*, CALLS.

Conditional subscriptions, see *infra*, CONDITIONAL SUBSCRIPTIONS.

Consideration, 900

Advantages of membership, 910

Concessions to subscriber, 910

Implied consideration, 910

Mutual promise to subscribe, 910

Necessity of consideration, 909

Sufficient consideration, 910

Valid consideration, 910

Contract, 902

Contract must be mutual, 902

STOCK AND STOCKHOLDERS, *cont'd*

Subscription, *cont'd*.

Corporation must have right to issue stock, 902

Creation of contract, 903

Defense in actions on subscriptions, see *infra*, DEFENSES IN ACTIONS ON SUBSCRIPTIONS.

Delivery in escrow, 906

Escrow, 906

Forfeiture, see *infra*, FORFEITURE.

Form of subscription, see *infra*, FORM OF SUBSCRIPTION.

General nature of subscription, 902

Instruments necessary or sufficient to create contract, 905

Liability of stockholders for unpaid subscriptions, 1007

Liability of subscriber, see *infra*, LIABILITY OF SUBSCRIBER.

Parties to contract, 909

Private memorandum book, 906

Set-off, 1051

Statutory liability, see *infra*, STATUTORY LIABILITY OF STOCKHOLDERS.

Stock book, 906

Subscribers for shares as stockholders, see *infra*, WHO ARE STOCKHOLDERS.

Subscription before incorporation binding, 902

Subscription book, 906

Who are stockholders, see *infra*, WHO ARE STOCKHOLDERS.

Who are subscribers, 1009

Who may subscribe, 909

Commissioner appointed to receive subscriptions, 909

General rule, 909

Other corporations, 909

Subscriptions by husband in name of wife, 909

Withdrawal of subscription, 907

Writing, necessity of, 905

Surrender of old and issuance of new certificate, 885

Issuance of new certificate to assignee, 885

Liability of corporation for issuance of new without surrender of assigned certificate, 885

Necessity of surrender of old certificate as between the parties, 885

Surrender of stock, 897

Liability of stockholders, 1010

Taxation:

Separate taxation of capital and shares, 826

Tender:

Forfeitures, 931

Tender of stock, 857

Termination of membership, 897

Time of notice of meeting, 992

Time of stockholders' meetings, 986

Torts, 1024

Transfer on books of corporation or registration, 879

As against heirs of assignor, 880

As between corporation and assignor, 881

Assignee's creditors, 883

Assignor's creditors, 881

Attaching creditors, 880

Attachment, 882

Bona fide purchasers, 884

Calls, see *infra*, CALLS.

STOCK AND STOCKHOLDERS, *cont'd***Transfer on books of corporation or registration, *cont'd*.**

- Creditors of assignee, 883
- Creditors of assignor, 881
- Diligence in attempting to procure registration, 883
- Dividends, 881
- Effect of transfer of stock on liability for call*, see *infra*, CALLS.
- Equitable title only, 880
- Execution, 882
- Gifts, 862
- Legal and equitable title, 880
- Liability of stockholders for corporate debts*, see *infra*, LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS.
- Memorandum on stub, 884
- Necessity in the absence of statute, charter provision, or by-law, 879
- Necessity of registration, 893
- Necessity under statute, charter provision, or by-law requiring registration, 880
- Obligation of corporation to transfer and issue new certificate*, see *infra*, OBLIGATION OF CORPORATION TO TRANSFER AND ISSUE NEW CERTIFICATE.
- Priorities, 884
- Pledge, 884
- Right to transfer certificate*, see *infra*, CERTIFICATE.
- Stockholder's liability to corporate creditors, 881
- Transfer on books kept within the state, 884
- Unrecorded transfer good between parties, 880
- Voting, 997
- What constitutes registration or transfer on books, 884
- What law governs, 883
- Who are stockholders, 893
- Writing, 884
- Wrongful transfer by corporation*, see *infra*, WRONGFUL TRANSFER BY CORPORATION.
- Treasury stock, 836
- Trover and conversion :**
 - Conversion by pledgee, 828
 - Trover lies for shares of stock, 827
- Trust fund doctrine, 1007
- Trusts and trustees :**
 - Liability for debts of corporation, 1033
 - Voting by trustees at stockholders' meetings, 1000
- Wrongful transfer by corporation at instance of trustee in violation of trust, 890**
 - Generally, 890
 - Permitting wrongful transfer by trustee, 891
 - When corporation chargeable with notice that shares are held in trust, 891
- Ultra vires* issue, 838
- Usages and customs :**
 - Lien, 870
 - Voting agreements, 1004
- Wages*, see *infra*, STATUTORY LIABILITY OF STOCKHOLDERS.
- Waiver*, see *infra*, DEFENSES IN ACTIONS ON SUBSCRIPTIONS.
- Waiver of lien*, see *infra*, LIEN OF CORPORATION ON SHARES.
- Warranty*, see *infra*, IMPLIED WARRANTY.

STOCK AND STOCKHOLDERS, *cont'd*

- Watered stock, 836
- Who are stockholders, 892**
 - Acceptance, 895, 896
 - Acquiescence, 895, 896
 - Consent, 895, 896
 - Construction of certificate or agreement, 896
 - Definitions, 892
 - Equitable owner of shares, 894
- Evidence, 897**
 - Admissions of a stockholder, 898
 - Books, 897
 - Certificates of stock, 898
 - Mutual recognition, 898
 - Parol evidence, 898
 - Presumptions, 899
 - Records, 897
- Expulsion of stockholder, 897
- Holders of convertible securities, 894
- Irregularities in transfer, 893
- Knowledge, 895, 896
- Legal owner of shares, 893
- Liability as stockholders*, see *infra*, LIABILITY AS STOCKHOLDERS.
- Necessity of certificate, 893
- Necessity of registration, 893
- Option holders, 894
- Pledgors and pledgees, 894
- Principal or agent, 894
- Right to vote as stockholders*, see *infra*, STOCKHOLDERS' MEETINGS.
- Subscribers for shares, 894**
 - Acceptance of subscription, 895
 - Conditional sale, 896
 - Conditional subscriptions, 895
 - Evidence of acceptance and assent, 895
 - Nonpayment of subscriptions, 895
 - Subscribers as stockholders, 894
 - Subscribers not *ipso facto* stockholders, 895
- Surrender of stock, 897
- Termination of membership, 896
- Trustees, 894
- Who may receive subscriptions, 909**
 - Authority necessary, 909
 - Commissioners, 909
- Withdrawal of subscription, 907
- Writing :**
 - Subscription, 905
- Wrongful transfer by corporation, 888**
 - At instance of trustee in violation of trust, 890
 - Corporation liable as to conversion, 888
 - Corporation regarded as trustee of shareholder, 888
- Transfer pursuant to forged assignment or power of attorney, 889**
 - Bona fide* assignee of certificate, 890
 - Remedy of corporation, 890
 - Rights and remedies of person whose shares are transferred, 889
 - Rights, liabilities, and remedies of transferee under forged assignment, 889
- STOCKBROKERS (see STOCK AND PRODUCE EXCHANGE; STOCK AND STOCKHOLDERS), 1053**
 - Advances, 1064
 - Agency :**
 - Broker may not act as both principal and agent in same transaction, 1063
 - Bankruptcy*, see *INSOLVENCY AND BANKRUPTCY*.

STOCKBROKERS, *cont'd.*

- Bear, 1054
- Breach of contracts, 1071
- Breach of contract to carry as affecting contract of purchase, 1072
- Brokers :**
 - Ordinary brokers distinguished from, 1055
- Bull, 1054
- Commissions, 1064**
 - How lost, 1064
 - Lien, 1064
 - When earned, 1064
- Contractual relation, 1055
- Conversion :**
 - Measure of damages, 1071
- Corners in stock, 1062
- Death :**
 - Purchase of margin, 1059
 - Short sale, 1061
- Definitions, 1053
- Delegation of authority, 1063
- Diligence, 1056, 1063
- Dual capacity, 1063
- Duties of broker to client, 1055**
 - Diligence, 1056
 - Good faith, 1056
 - Keeping account, 1056
 - Notifying client of transaction, 1056
 - Obedying instructions, 1055
 - Ratification of unauthorized act, 1056
 - Skill, 1056
- Fictitious transaction, 1066
- Gambling contracts (see STOCKBROKERS):**
 - Purchases of margin, 1059
 - Settlement of differences, 1060
 - Short sales, 1062
 - Wagering contracts, 1068
- Good faith, 1066**
 - Act in dual capacity, 1063
- Good faith in dual capacity of same transaction, 1063
 - Right to secret profits made by broker, 1065
- Guarantor, 1063
- Illegal contracts, 1062**
 - Short sales, 1061
- Insolvency and bankruptcy, 1059**
 - Bankruptcy of client, 1059
 - Brokers insolvent, 1057
 - Purchase on margin, 1057, 1059
- Instructions :**
 - Duty to obey instructions, 1055
- Jobbers, 1055
- Joint undertaking between broker and client, 1062
- Keeping accounts, 1056
- Lame duck, 1055
- Legal contracts :**
 - Short sales, 1061
- Liabilities of brokers, see infra, RIGHTS AND LIABILITIES OF BROKERS.*
- Liabilities of client, see infra, RIGHTS AND LIABILITIES OF CLIENT.*
- License :**
 - Licensed broker may recover advances, 1064
- Lien, 1064
- Long of stock, 1055
- Margin defined, see infra, PURCHASES ON MARGIN.*
- Margins, see SALES.*
- Measure of damages for breach of contract, 1071

STOCKBROKERS, *cont'd.*

- Method of dealing through brokers on exchanges, 1056
- Options, 1061**
 - Character of transaction, 1061
 - Legality of transactions, 1061
- Ordinary brokers distinguished from, 1055
- Ordinary care, 1063
- Particular transactions considered, 1056
- Pledgor and pledgee, 1055
- Principal and agent, 1055
- Purchases on margin, 1057**
 - Assessment, 1057
 - Bankruptcy of client, 1059
 - By sale and order of client, 1058
 - Call, 1057
 - Character of transactions, 1057
 - Closing transaction, 1058
 - Control of stock, 1057
 - Custody of stock, 1057
 - Death of client, 1059
 - Failure of client to furnish margin, 1059
 - Failure of client to take stock after reasonable time, 1058
 - Insolvency of brokers, 1057
 - Legality of transaction, 1059
 - Margin defined, 1057
 - Method of sale in closing transactions, 1059
 - Onwership of stock, 1057
 - Stop orders, 1068
- Ratification of unauthorized act, 1056
- Relation between client and broker, 1055
- Revocation of broker's agency, 1065
- Rights and liabilities of broker, 1062**
 - Acting in dual capacity in same transaction, 1063
 - Agent for both buyer and seller, 1063
 - Broker may not act as both principal and agent in some transaction, 1063
 - Broker not liable as guarantor, 1063
 - Client's refusal to deliver stock sold, 1065
 - How commissions lost, 1064
 - Liability for undisclosed principal, 1065
 - Liable for only ordinary care and diligence, 1063
 - Lien, 1064
 - Right to buy and sell in customary manner, 1063
 - Right to commissions, 1064
 - Right to delegate authority, 1063
 - Right to recover advances, 1064
 - Unlicensed broker's right to advances, 1064
 - When commissions earned, 1064
- Rights and liabilities of client, 1065**
 - Failure of broker, 1066
 - Fictitious transactions, 1066
 - Liability to indemnify broker, 1066
 - Refusal of broker to deliver stock, 1066
 - Right to revoke broker's agency, 1065
 - Right to secret profits made by broker, 1065
 - Unauthorized sale by broker, 1066
- Secret profits, 1065
- Settlement of differences, 1060, 1068
- Short, 1054
- Short sales, 1060**
 - After reasonable time, 1060
 - Closing transaction, 1060
 - Closing transaction on failure of margins, 1061
 - Death of client, 1061
 - Definitions, 1060
 - Legality of transaction, 1061
 - Mode of conducting transactions, 1060

STOCKBROKERS, *cont'd.*

Short sales, *cont'd.*

- On order of client to buy in, 1060
- Right of broker to close transaction, 1060
- Stop order, 1060

Skill, 1056

Stock and produce exchange:

- Method of dealing through brokers on exchanges, 1056

Stock-jobbing acts, 1068

- Burden of proof, 1071
- Particular acts considered, 1068
- Sir John Barnard's Act, 1068
- Speculative dealings in stock legitimate, 1068

- Statutes in England and foreign states, 1068, 1071

Stop orders, 1058, 1060

Undisclosed principal, 1065

Undiscovered principal, 1065

Usages and customs, 1066

- Broker may deal according to usages and customs of exchange, 1067
- Client's knowledge of usages and customs immaterial, 1067
- General rule, 1066
- Public policy, 1067
- Reasonableness, 1067
- Usages and customs approved, 1067
- Usages and customs disapproved, 1067
- Violation of principles of law or public policy, 1067

Wagering contracts, 1068

STOCK DIVIDENDS, 1072

STOCKINGS, 1072

STOCK-JOBGING, 1072

STOCKLAW, 1073

STOCK NOTE, 1073

STOCK PASS, 1073

STOCK RUNNING AT LARGE, 1073

STOCK — STOCK IN TRADE, 785

STOCKYARDS, 1074

- Carriers, 1074
- Charges, 1075
- Common carriers, 1074
- Definitions, 1074
- Duties, 1075
- Duty to furnish facilities impartially, 1075
- Facilities, 1075
- Fees, 1075
- Injuries, 1075
- Interstate commerce, 1074
- Liabilities, 1075
- Liability for injuries, 1075
- Live-stock exchanges, 1076
- Markets, 1074
- Nuisances, 1075
- Rights, 1075
- Right to sell unclaimed stock, 1076
- Warehousemen, 1074

STOLE, 1076

STOLEN GOODS, 1076

STONE, 1076

STOP ORDER, 1076

STOPPAGE, 1076

STOPPAGE IN TRANSITU (see BILLS OF EXCHANGE OR PROMISSORY NOTES), 1077

Acceptance of goods:

- Necessity of acceptance of goods, see infra, DELIVERY.*

Accrual:

- Buyer must be insolvent, see infra, BUYER MUST BE INSOLVENT.*

- Goods must be in transit, see infra, GOODS MUST BE IN TRANSIT.*

Accrual of right, 1084

- Generally, 1084

- Goods must be paid for, see infra, GOODS MUST BE PAID FOR.*

Agency, 1083

- Delivery to buyer's agent, see infra, DELIVERY TO PERSONS OTHER THAN BUYER.*

- Destination of goods purchased by agent, 1088

Exercise of right by agent, 1114

- Authority of agent, 1115

- General rule, 1114

- Ratification, 1114, 1115

- Right of agent, 1083

- Right of principal, 1083

- Assignment for benefit of creditors, 1111

Attachment, 1106, 1111, 1112

- Insolvency, 1091

- Attornment, see infra, CONSTRUCTIVE DELIVERY OR DELIVERY BY ATTORNMENT.*

- Basis of right, 1081

- Bill of lading (see *infra*, BILL OF LADING; TRANSFER OF BILL OF LADING):**

- Constructive delivery, 1097

Bills of exchange and promissory notes:

- Payment by bill or note, 1085

Buyer must be insolvent (see *infra*, BUYER MUST BE INSOLVENT), 1089

- Abandoning of buyer, 1091

- Admission of insolvency, 1091

- Attachment against buyer, 1091

- Evidence of insolvency, 1090

- Failure to pay purchase price, evidence, 1090

- Inadmissibility of insolvency, 1090

- Insolvency arising pending transit, 1089

- Insolvency at time of sale, unknown to seller, sufficient, 1090

- Insolvency means general inability to pay debts, 1089

- Knowledge of insolvency, 1090

- Meaning of insolvency, 1089

- Right of stoppage based on insolvency of buyer, 1089

- Seller acts at his peril in assuming insolvency of buyer, 1089

- Stoppage of payment sufficient evidence, 1090

- Sufficiency of evidence, 1090

- Time of insolvency, 1089

- Carrier's lien for freight, 1119

- Commission merchants, 1083

- Common law, 1080

- Common-law right, 1082

Constructive delivery or delivery by attornment, 1094, 1101, 1102

- Agreement between carrier or middleman and buyer, 1095**

- Attornment not implied for storage at destination, 1097

- Attornment not implied from contract of carriage, 1097

STOPPAGE IN TRANSITU, *cont'd.*

- Constructive delivery or delivery by attornment, *cont'd.*
 - Agreement between carrier or middleman and buyer, *cont'd.*
 - Attornment not implied from sale to carrier, 1097
 - General rule, 1095
 - Implied agreement sufficient, 1096
 - Intermediate point, 1097
 - Necessity of agreement, 1096
 - Stipulations in bill of lading, 1097
 - Cases involving effect of delivery to carrier, 1094
 - Constructive delivery, 1095
 - Delivery to persons other than buyer (see *infra*, DELIVERY TO PERSONS OTHER THAN BUYER), 1102
- Delivery and entry at custom house, 1100
 - Constructive delivery effected by bonding and entry, 1101
 - Entry without bonding, 1100
 - Entry without payment of duties, 1100
 - Goods under bond at time of sale, 1101
 - Removal to customs warehouse without payment of duties or bonding and entry, 1100
- Demand and refusal of delivery, 1099
 - At destination, 1098
 - Buyer's demand and carrier's wrongful refusal to deliver, 1098
 - Buyer's demand upon carrier for goods, 1098
 - Claimant's right to possession doubtful, 1098
 - Demand short of destination, 1099
 - Demand upon custom house officer, 1099
 - Generally, 1094
 - Intention of parties, 1103
 - Meaning of term, 1094
 - Method of attornment, 1095
 - Nonpayment of freight, 1098
 - On board buyer's ship, 1103
 - Order of delivery, 1101
- Partial delivery, 1099
 - Delivery of part not delivery of balance, 1099
 - Effect of partial delivery question of attornment, 1099
 - Part delivery held to constitute delivery of balance, 1100
 - Payment of freight, 1098
 - Rejection of goods after delivery, 1093
 - Revocation of attornment, 1101
 - Right not terminated by delivery to carrier, 1102
 - Right not terminated by delivery to carrier appointed by buyer, 1102
 - Right terminated by delivery to carrier at destination, 1102
 - To carrier, 1102
 - To local transportation company, 1103
 - To middleman, 1102
- Custom house, see *infra*, CONSTRUCTIVE DELIVERY OR DELIVERY BY ATTORNMENT.
- Custom of merchants, 1082
- Definitions, 1079
- Delivery (see *infra*, DESTINATION OF GOODS; GOODS MUST BE IN TRANSIT), 1001
- Constructive delivery, see *infra*, CONSTRUCTIVE DELIVERY OR DELIVERY BY ATTORNMENT.

STOPPAGE IN TRANSITU, *cont'd.*

- Delivery, *cont'd.*
 - Delivery short of destination, 1093
 - Forcible interception of goods, 1094
 - Intermediate delivery may be constructive, 1094
 - No delivery unless destination changed, 1093
 - Transit ended, 1093
 - Necessity of acceptance of goods, 1092
 - Buyer must consent to receive, 1092
 - Conditional acceptance, 1093
 - Mistake, 1093
 - Refusal to receive not unlawful preference, 1092
 - When buyer refuses to receive, 1092
 - Right not terminated by arrival of goods at destination, 1091
 - Right terminated by actual or constructive delivery to buyer, 1091
 - Sufficiency of delivery, 1092
 - Delivery by attornment, see *infra*, CONSTRUCTIVE DELIVERY OR DELIVERY BY ATTORNMENT.
 - Delivery to persons other than buyer:
 - Agent of buyer, 1104
 - At destination, 1105
 - At point short of destination, 1105
 - Attaching creditor, 1106
 - Authority of agent to receive, 1106
 - Delivery to agent to await new orders from buyer, 1104
 - Assignee of buyer, 1107
 - Mortgagee of buyer, 1107
 - Pledgee of buyer, 1107
 - Warehouseman or wharfinger, 1106
 - Agreement to receive as buyer's agent, 1107
 - When delivery final, 1107
 - When delivery not final, 1106
 - Destination of goods (see *infra*, DELIVERY), 1086
 - Destination reached where new orders from buyer required to move goods, 1088
 - Delivery short of destination, see *infra*, DESTINATION OF GOODS.
 - Goods purchased by agent, 1088
 - Illustrations, 1087-1089
 - Importance of question, 1086
 - Intention of buyer and seller, 1087
 - Reshipment, 1087
 - Right not terminated by goods at destination, 1091
 - Test, 1088
 - What is destination, 1087
- Effect of stoppage, 1117**
- Deficiency judgment recoverable by seller, 1118
 - Disposition of goods, 1118
 - Generally, 1117
 - Goods may be sold by seller after notice to buyer, 1118
 - Illustrations, 1118
 - Lien of carrier, 1119
 - Part payments not recoverable, 1118
 - Sale not rescinded, 1117
 - Upon rights of carrier or middleman, 1119
 - Wrongful stoppage, 1119
- Equitable basis of right, 1081
- Equitable right, 1081
- Equity, 1079
- Evidence, see *infra*, BUYER MUST BE INSOLVENT.

STOPPAGE IN TRANSITU, cont'd.

- Executions, 1111, 1112
- Exercise of right, 1111**
 - Agent, 1114
 - Authority of agent, 1115
 - Illustrations, 1114
 - Notice, see *infra*, NOTICE.
 - Ratification, 1115
 - Resumption of possession, 1114
- Factors, 1083
- Goods must be in transit, 1086**
 - Beginning of transit, 1086
 - Constructive transit, 1086
 - Delivery to carrier, 1086
 - Delivery to middleman, 1086
 - Destination dependent upon intention of buyer and seller, 1087
 - Destination held not to be place of delivery to carrier, 1087
 - Destination held to be place of delivery to forwarding agent, 1087
 - Destination of goods (see *infra*, DESTINATION OF GOODS), 1086
 - Destination of goods purchased by agent, 1088
 - Destination reached where new orders from buyer required to move goods, 1088
 - Destination unaffected by reshipment, 1087
 - End of transit, 1089
 - General rule, 1086
 - Reshipment, 1087
- Goods must be paid for:**
 - Effect of credit, 1085
 - Extension of credit, 1085
 - General rule, 1084
 - Necessity for return of bill, 1085
 - Negotiation of bill or note, 1085
 - Part payment, 1085
 - Payment by bill or note, 1085
 - Payment by bill or note of third person, 1086
- Implied condition on contract of sale, 1082
- Laches, 1114
- Liability for wrongful stoppage, 1119
- Liens:**
 - Right not exerciseable by lienor, 1084
- Limitations of right, 1083
- Nature of right, 1079
- Notice, 1115**
 - As between seller and carrier, 1116
 - By whom given, 1116
 - Contents, 1117
 - Delivery after notice to a *bona fide* purchaser, 1116
 - Effect of notice, 1115
 - Form, 1117
 - Illustrations of sufficiency and insufficiency, 1116, 1117
 - In general, 1115
 - Notice to actual custodian of goods, 1116
 - Notice to buyer insufficient, 1117
 - Right exerciseable by notice, 1115
 - Sufficiency of notice, 1116
- Origin, 1080
- Partial delivery, see *infra*, CONSTRUCTIVE DELIVERY OR DELIVERY BY ATTORNMENT.**
- Persons having right of stoppage, 1083**
 - Agent, 1083
 - Factors, 1083
 - Lienors, 1084
 - Persons having partial interest in firm, 1083
 - Principal, 1083

STOPPAGE IN TRANSITU, cont'd.

- Persons having right of stoppage, cont'd.**
 - Privity of contract, 1083
 - Sureties for purchase price, 1084
 - The relation of buyer and seller is essential, 1083
- Present status of right, 1082
- Property subject to stoppage, 1084**
 - Bonds representing goods, 1084
 - General rule, 1084
 - Proceeds of attachment against buyer, 1084
 - Proceeds of subsale, 1084
- Proprietary rights, 1082
- Purchaser without notice, see *infra*, TRANSFER OF BILL OF LADING.*
- Reshipment, 1087
- Revocation of attornment, 1101
- Right of stoppage *in transitu*, 1079
- Right regarded with favor, 1082
- Seizure of goods under legal process against buyer, 1111**
 - Illustrations, 1112
 - Payment of freight by attaching creditor, 1112
 - Right not defeated, 1111
 - Rights and liabilities of parties, 1113
 - Time of attachment is immaterial, 1112
- Subpurchaser, 1108
- Subsale, 1108
- Sureties for purchase price, 1084
- Termination of right, 1091**
 - Assignment by buyer, 1111
 - Constructive delivery or delivery by attornment, see *infra*, CONSTRUCTIVE DELIVERY OR DELIVERY BY ATTORNMENT.*
 - Delivery, see *infra*, DELIVERY.*
 - Delivery of bill of lading, see *infra*, TRANSFER OF BILL OF LADING.*
 - Delivery to persons other than buyer, see *infra*, DELIVERY TO PERSONS OTHER THAN BUYER.*
 - Laches, 1114
 - Seizure of goods under legal process against buyer, see *infra*, SEIZURE OF GOODS UNDER LEGAL PROCESS AGAINST BUYER.*
 - Subsale, 1108
 - Waiver, see *infra*, WAIVER.*
- Transfer of bill of lading, 1108**
 - General rule, 1108
 - Indorsement of bill in payment of pre-existing debt, held to be transfer for value, 1110
 - Necessity of good faith, 1109
 - Necessity of indorsement, 1109
 - Pledge of bill of lading, 1109
 - Right of stoppage terminated, 1108
 - Right terminated by transfer of duplicate bill, 1111
 - Where bill is issued without delivery of goods to the carrier, 1109
- Who are transferees for value, 1110**
 - One to whom bill is pledged, 1111
 - One to whom the goods are sold, 1110
- Transit, see GOODS MUST BE IN TRANSIT.*
- Usages and customs:**
 - Customs of merchants, 1082
- Waiver, 1113**
 - Attachment by seller, 1113
 - Claiming under authority of buyer, 1113
 - Illustrations, 113, 1114
- Warehousemen, see *infra*, DELIVERY TO PERSONS OTHER THAN BUYERS.*

STOPPAGE IN TRANSITU, *cont'd.*

- Who are transferees without notice, 1111**
 - Notice of insolvency, 1111
 - Notice of nonpayment, 1111
 - Test, 1111
- Wrongful stoppage, 1119

STOPPING PLACE, 1119

STORAGE, 1119

STORAGE BATTERIES, 1120

STORAGE RECEIPTS, 1120

STORE, 1120

- Shop, 1121

STORE FIXTURES, 1122

STOREHOUSE, 1120

STOREKEEPER, 1122

STORE ORDER ACTS, 1123

- American acts, 1124
- Artificers, 1124
- Constitutional law :**
 - Acts held constitutional, 1125, 1126
 - Distinctions as to price unlawful, 1125
 - Such acts held unconstitutional, 1124
- Definition, 1123
- English acts, 1123**
 - Deductions allowed, 1123
 - Domestic acts, 1124
 - Generally, 1123
 - Illustrations, 1123, 1124
 - No option allowed, 1123
 - Who are artificers, 1124

STORM, 1126

STORM TIDE MARK, 1126

STORY, 1126

STOVE, 1126

STOWAGE, 1126

STOWAWAY, 1126

STRADDLE, 1126

STRAND, 1126

STRANDING, 1127

STRANGER, 1127

STRATEGEM, 1127

STRATEGY, 1127

STRAW, 1127

STREETS AND SIDEWALKS, see STATE AND PUBLIC LANDS.

SUBSCRIPTION, see STOCK AND STOCKHOLDERS.

SUCCESSION (see STATE AND PUBLIC LANDS):

- Stare decisis*, 181

SUNDAY, see STATUTES.

SURVEYS, see STATE AND PUBLIC LANDS

SWAMP LANDS, see STATE AND PUBLIC LANDS.

TAXATION, see STATUTES.

TENDER, see SPECIFIC PERFORMANCE.

TERRITORIES, see STATES.

THEFT:

- Steal, 769

TITLE, see SPECIFIC PERFORMANCE.

TRAVERSE:

- Special traverse, 2

TREATIES, see STATE AND PUBLIC LANDS.

TRUCK ACTS, see STORE ORDER ACTS.

TRUSTS AND TRUSTEES (see SPENDTHRIFTS AND SPENDTHRIFT TRUST):

- Special trusts, 3

ULTRA VIRES :

- Specific performance, 24

"UNAPPROPRIATED: "

- State and public lands, 213

UNCONSCIONABLE BARGAIN:

- Specific performance, 68

UNDUE INFLUENCE, see SPECIFIC PERFORMANCE.

UNITED STATES, see STATES.

UNITED STATES COURTS:

***Stare decisis* :**

- Conflict between state and federal courts, 164

USAGES AND CUSTOMS (see STOCKBROKERS; STOPPAGE IN TRANSITU):

- Stare decisis*, 183

"VACANT: "

- State and public lands, 212

VENDOR AND PURCHASER, see SPECIFIC PERFORMANCE.

VERDICT:

- Special verdict, 4

WILLS (see SPECIFIC PERFORMANCE; SPENDTHRIFTS AND SPENDTHRIFT TRUSTS):

- Stare decisis*, 182

WOMAN, 637

